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Conjugal Homicide and Legal Violence: A Comparative Analysis

Alison Young

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Abstract

This article examines the defences in English and Canadian criminal law available to battered women who kill their abusers. The article sets out in detail the formation and evolution of the doctrinal interpretation, in English law, of the defences of provocation, diminished responsibility, and self-defence. Current case law is examined, including the recent cases of Thornton and Ahluwalia. The objective of the essay is to provide a critical context, namely the legal construction of the phenomenon of conjugal violence, in which we can see the current elaboration of these defences. The Canadian position is investigated, by means of a thorough reading of Laval/e, in order to provide a comparative critique of the inadequacies of the English criminal defences. In conclusion, the article proposes several possible sources of reform, through which the defences in English law might be brought closer to the Canadian position.

Keywords

Abused wives--Legal status, laws, etc.; Marital violence--Law and legislation; Homicide--Law and legislation; England; Canada

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CONJUGAL HOMICIDE AND LEGAL VIOLENCE: A COMPARATIVE ANALYSIS[©]

BY ALISON YOUNG*

This article examines the defences in English and Canadian criminal law available to battered women who kill their abusers. The article sets out in detail the formation and evolution of the doctrinal interpretation, in English law, of the defences of provocation, diminished responsibility, and self-defence. Current case law is examined, including the recent cases of *Thornton* and *Ahluwalia*. The objective of the essay is to provide a critical context, namely the legal construction of the phenomenon of conjugal violence, in which we can see the current elaboration of these defences. The Canadian position is investigated, by means of a thorough reading of *Lavallée*, in order to provide a comparative critique of the inadequacies of the English criminal defences. In conclusion, the article proposes several possible sources of reform, through which the defences in English law might be brought closer to the Canadian position.

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I. INTRODUCTION

This article investigates the current law relating to the defences available to battered women who kill their abusers, in England and in Canada. Its aim is to argue the urgent need for reform of the law in England and to examine the various possibilities for bringing about reform, based on an elaboration of current doctrinal and judicial interpretation. As a result of a recent decision in their Supreme Court, the current law in Canada will be set out as illustrative of a direction that could be taken by reformers in England. While, as a feminist critic, I remain sceptical about the wholesale benefits of legal reform as a response to an issue such as the widespread battering of women in

intimate relationships,¹ there remain several reasons why it is worthwhile to argue the need for legal reform.

First, arguments for reform are being put forward by various groups and individuals.² Few have examined developments in Canadian law as a source for reformist inspiration; yet the changes achieved in that jurisdiction seem to offer some of the most hopeful possibilities for the defence of battered women. Second, criminal law continues to be taught to English law students in a traditional doctrinal manner with little reference to comparative material. The result is a blinkered approach to law and a tendency to overlook the specificity of the situation of the battered woman by incorporating her into the notion of the "reasonable man." It seems important to generate research that will enable law teachers to demonstrate to students that the English approach is neither the only nor necessarily the best approach. Finally, current legal interpretation of defences in criminal law has a very real effect on the women who attempt to excuse or justify their actions in killing their abusers. At the time of writing, Sara Thornton³ is serving a life sentence for murder. Kiranjit Ahluwalia,⁴ who had been found guilty of murder in July 1992, had that verdict set aside. A new trial took place in September 1992, in which she pleaded guilty to manslaughter. However satisfying it is to see the murder conviction set aside and Ahluwalia able to leave prison, the new trial was based firmly on the proposition that new evidence is available to support a defence of diminished responsibility, rather than on a recognition that judicial interpretation of her case was narrow and afflicted with masculine stereotyping. Legal reform of a far-reaching kind, for all the limitations of the reformist stance, has an urgency and necessity.

The article will demonstrate the general legal position of the battered woman, including the non-lethal options that are available.

¹ Similar scepticism is evinced by Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989), and E. Comack, "Legal Recognition of the 'Battered Wife Syndrome': A Victory for Women?" (Address to the American Society of Criminology Meetings, November 1991) [unpublished] [hereinafter "Legal Recognition"].

² For example, the campaigns of Justice for Women, Rights of Women, and Southall Black Sisters. See also the Private Members' Bill introduced by Jack Ashley, MP, which called for a redefinition of the law of provocation. Harry Cohen, MP, introduced another bill to demand the reform of provocation laws, advised by J. Horder, author of a study of provocation entitled *Provocation in the Criminal Law* (Oxford: Oxford University Press, 1992). There have been many calls for reform since the decision in the re-trial of Kiranjit Ahluwalia in September 1992 (unreported). No Bill has succeeded, and no reform has been enacted.

³ *R. v. Thornton*, [1992] 1 All E.R. 306 [hereinafter *Thornton*].

⁴ *R. v. Ahluwalia*, [1992] 4 All E.R. 889.

The next section discusses current understanding of the defences that may be pleaded by the battered woman who kills. In contrast, the position of the battered woman in Canada is examined. The recent evolutions in Canadian criminal law, relating to the interpretation of the law of self-defence are appraised for their relevance to the position in English law. Lastly, a number of proposals are made for the reform of the defences available in English law.

II. BATTERED WOMEN AND THE LAW IN ENGLAND

Before undertaking a discussion of the defences available to the battered woman who kills her abuser, it is necessary to set out some of the criminal legal context in which the homicide takes place. Much has been written on the inadequacy of legal responses to conjugal violence;⁵ for example, Edwards writes:

What is the basis of the prevailing view that spousal violence is a family affair, a private matter rarely if ever to be regulated or interfered with by the law, the police or the public? Can law-makers and enforcers and the police in particular justify their traditional complacency, or is this apparent resignation evidence of institutionalized misogyny, since it is undeniably the case that the victims of domestic violence are most often women—cohabitees, girlfriends, wives, daughters and mothers—and the aggressors are men—boyfriends, husbands, fathers and sons. Given this sex divide between aggressors and victims, it would not be illogical to interpret the treatment of both offenders and victims by the criminal justice system as misogynist, too, if too simplistic.⁶

This criticism of the legal system's responses to conjugal violence is well founded. First, it is clear from both official statistics and research studies that women (cohabitees, wives, girlfriends and so on) constitute the vast majority of victims of violence within the home.⁷ When men are

⁵ G. Fraser, "Taking Spousal Assault Seriously: A Philosophical View of Legal Contradiction" (1985) 5 Windsor Y.B. Access Just. 368.

⁶ S. Edwards, *Policing "Domestic" Violence* (London: Sage, 1989) at 1.

⁷ See the statistics released by the Home Office on 17 October 1991 on Domestic Homicide, relating to those homicides committed between 1982 and 1989; also considered by L. Smith for the Home Office, *Domestic Violence: An Overview of the Literature, Home Office Research Study no. 107* (London: Her Majesty's Stationery Office, 1989). See also E. Stanko, *Everyday Violence* (London: Pandora, 1990); L.K. Weisman, *Discrimination by Design: A Feminist Critique of the Man-made Environment* (Chicago: University of Illinois Press, 1992); R.J. Gelles & J.R. Conte, "Domestic Violence and Sexual Abuse of Children: A Review of Research in the Eighties" (1990) 52 J. Marriage & Fam. 1045; A. Côté, *La rage au coeur: Rapport de recherche sur le traitement judiciaire de l'homicide conjugal au Québec* (Baie-Comeau: Regroupement des femmes de la Côte-Nord, 1991); D. Finkelhor et al., *The Dark Side of Families* (Beverly Hills: Sage, 1983); J.E. Stets, "Verbal and Physical Aggression in Marriage" (1990) 52 J. Marriage & Fam. 501; and M.A. Straus & G.T. Hotaling, eds., *The Social Causes of Husband-Wife Violence* (Minneapolis: University of Minnesota

victims of violence, they have often acted as primary aggressor, by initiating the violence to which the woman responds.⁸

Furthermore, it is clear from an examination of the options available to the battered woman that the legal system does not appear to have as a priority the provision of effective solutions to her problems. Historical analyses support the argument that this is a long-standing phenomenon in legal practice.⁹ In England, women who experience conjugal violence have several options available to them: calling the police during an attack; asking for an injunction such as a non-molestation order (under the *Domestic Violence Matrimonial Proceedings Act*¹⁰ or the *Domestic Proceedings Magistrates' Courts Act*¹¹); leaving the relationship, perhaps initiating proceedings for divorce or judicial separation; and going to a women's shelter or refuge for assistance.

The poor quality of most of these options is by now well known: for example, the police may respond more slowly to a call for assistance from a woman in her own home than they would to a street fight between strangers, or they may not respond at all.¹² The police may refuse to arrest the aggressor, claiming that the woman is likely to refuse to press charges, or that their role is to cool down the argument rather

Press, 1980).

⁸ Weisman maps the territories of violence and victimization in the home: women are most often victimized in the bedroom; when they retaliate, it is most often in the kitchen, *ibid.* at 100-01.

⁹ See N. Tomes, "A 'Torrent of Abuse': Crimes of Violence Between Working-Class Men and Women in London, 1840-1875" (1977) *J. of Social History* 328; L. Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960* (New York: Viking, 1988); C. Backhouse, "Pure Patriarchy: Nineteenth-Century Canadian Marriage" (1986) 31 *McGill L.J.* 264; A. Clark, "Humanity or justice? Wifebeating and the law in the eighteenth and nineteenth centuries" in C. Smart, ed., *Regulating womanhood: Historical essays on marriage, motherhood and sexuality* (London: Routledge, 1992) 187 [hereinafter *Regulating Womanhood*]; E. Ross, "Fierce Questions and Taunts: Married Life in Working Class London, 1870-1914" (1982) 8 *Feminist Stud.* 575; E. Pleck, "Feminist Responses to 'Crimes Against Women', 1868-1896" (1983) 8 *Signs* 451 [hereinafter "Feminist Responses"]; E. Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York: Oxford University Press, 1987) at 182-225; and M.E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia, South Carolina: University of South Carolina Press, 1993).

¹⁰ [1976] c. 50.

¹¹ [1978] c. 22.

¹² The inadequacies of police performance are documented in A. Bourlet, *Police Intervention in Marital Violence* (Milton Keynes: Open University Press, 1990); M.D.A. Freeman, *Violence in the Home* (London: Croom Helm, 1979) [hereinafter *Violence*]; M.D.A. Freeman, "Legal Ideologies, Patriarchal Precedents and Domestic Violence" in M.D.A. Freeman, ed., *State, Law and the Family* (London: Macmillan, 1984) [hereinafter *State*]; Edwards, *supra* note 6; R.E. Dobash & R.P. Dobash, *Women, Violence and Social Change* (New York: Routledge, 1992); and J. Hanmer & M. Maynard, eds., *Women, Violence and Social Control* (London: Macmillan, 1987).

than remove the aggressor from the home.¹³ It has also been shown that a woman who calls the police during an attack risks severe violence: her partner may escalate the violence against her if he discovers her call to the police.¹⁴ Similarly, a woman who attempts to obtain an injunction risks increased violence. Injunctions are notoriously difficult to enforce. If a man wants to injure his partner, an injunction is unlikely to stop him.¹⁵ Leaving the abusive man can be enormously difficult: the problems faced by a battered woman who leaves an abusive relationship may include housing difficulties,¹⁶ financial troubles,¹⁷ the need to provide care for children, and—not least—the difficulty of accepting that a loved one is violent and will not reform his behaviour.¹⁸ Finally, going to a women's refuge may be impossible or difficult depending on its location. Even if a shelter does exist in her area, there may not be a vacancy; shelters are under-funded and under-resourced, and many have to turn women away.¹⁹

It should be clear that there are very few effective remedies that can be sought by a battered woman. For her, all avenues of response are dangerous, difficult or uncertain. The legal system appears to manifest

¹³ See Bourlet, *ibid.*; Freeman, *Violence, ibid.*; and Edwards, *supra* note 6 at 100ff.

¹⁴ See Tomes, *supra* note 9; L. Kelly, *Surviving Sexual Violence* (Cambridge: Polity, 1988); Bourlet, *supra* note 12; and *R. v. Donachie* (1982), 4 Cr. App. R. 378 [hereinafter *Donachie*].

¹⁵ As in *Donachie, supra*. Donachie's wife, in fear for her life, obtained an injunction against him. Donachie had been in prison when she wrote to him, telling him that she had begun an affair with a sixteen-year-old youth. The day after his release, despite the injunction against him, Donachie went to the matrimonial home, threw the youth out, and threatened him with a knife. The next day, he returned and found his wife and her lover in bed together. Both left the home. Donachie tracked them down. The spouses were left alone together; they argued; his wife said that she wanted nothing to do with him and spat in his face. He stabbed her twenty-nine times. Donachie was convicted of manslaughter on the grounds of provocation by his deceased wife. See also K. McCann, "Battered Women and the Law: The Limits of the Legislation" in C. Smart & J. Brophy, eds., *Women-in-law* (London: Routledge, 1985), and Edwards, *supra* note 6.

¹⁶ Edwards, *supra* note 6 at 154-55.

¹⁷ J. Pahl, ed., *Private Violence and Public Policy* (London: Routledge and Kegan Paul, 1985). D.S. Kalmuss & M.A. Straus, in their article "Wife's Marital Dependency and Wife Abuse" (1982) 44 J. Marriage & Fam. 277, state that it is economic, not psychological, dependency which keeps women in abusive relationships.

¹⁸ T.B. Herbert *et al.*, "Coping with an Abusive Relationship: How and Why do Women Stay?" (1991) 53 J. Marriage & Fam. 311; S.L. Miller & S.S. Simpson, "Courtship Violence and Social Control: Does Gender Matter?" (1991) 25 L.&S. Rev. 355; and E. Pizzey & J. Shapiro, "Choosing a Violent Relationship" (1981) 56/962 *New Society* 133. Pizzey's argument that some women are masochistically motivated to remain has been fiercely contested: see Edwards, *supra* note 6 at 166.

¹⁹ Weisman recounts the history of the building of a shelter in St. Paul, Minnesota, *supra* note 7 at 102-05.

disdain for the battered woman's situation. Women who do receive some kind of assistance often seem to fit into the category of "good wife and mother."²⁰ While the crude opposition between "good" and "bad" women is one that feminist criticism seeks to go beyond, legal practices often appear to follow exactly such an opposition. It is not my intention to argue for a simplistic analysis of legal discourse and practice; rather, my contention is that the opposition between "good" and "bad" women does operate within the juridical system. Its complex operation is bound up with the legal construction of other elements, such as the opposition between reason and unreason, justice and vengeance, victim and aggressor.

In contrast to Edwards who stated that violence between intimates is a matter "rarely if ever to be regulated or interfered with by the law,"²¹ it is my argument that the law has created its own culture of violence, in which the form and nature of violence is regulated and structured by legal practice. The following section will deal with the defences that could be raised against a charge of murder, when a battered woman has killed her abuser. In considering the defences available, it should be borne in mind that the options available to the woman before the point at which lethal force is used (that is, the possibility of leaving the relationship, calling the police, getting an injunction and so on) are of limited effectiveness. To forget this, as many commentators do,²² is to augment the problems faced by battered women.

²⁰ The case of Ruth Brown Snyder as an archetypal "bad" woman is examined by A. Jones in *Women who Kill* (New York: Fawcett Colombine, 1981) at 260-66. Ruth Brown Snyder, born in Manhattan in 1895, married a violent man. She began an affair with another man; soon after, her husband was murdered, apparently in a burglary (staged by her lover). She was convicted of murder and executed. The press coverage of the case made much of her adultery and vilified her as a betrayal of womanhood. Gordon discusses this dichotomy in its historical form in *supra* note 9 at 253, 267. Smart analyzes the legal construction of the "bad" mother in "Disruptive bodies and unruly sex: The regulation of reproduction and sexuality in the nineteenth century" in *Regulating womanhood*, *supra* note 9 at 7. In A.M. Smith, "A Symptomology of an Authoritarian Discourse" (1990) 10 *New Formations* 41, the author demonstrates the evolution of such a dichotomy as symptomatic of fundamental ruptures in the apparently smooth surface of discursive practices.

²¹ Edwards, *supra* note 6 at 1.

²² See Pizzev & Shapiro, *supra* note 18; and N. Shainess, "Vulnerability to Violence: Masochism as Process" (1979) 33 *Am. J. of Psychotherapy* 174.

III. DEFENCES IN ENGLISH CRIMINAL LAW FOR BATTERED WOMEN WHO KILL THEIR ABUSERS

A. *Provocation*

Provocation is pleaded fairly often by battered women as a defence to a murder charge. I will discuss this defence in some detail, since in many ways it represents the most likely area for reform.²³ Provocation as a defence to a charge of murder reduces it to a conviction for manslaughter. At common law, the so-called "classic direction" comes from the judgment of Devlin J. in *R. v. Duffy*,²⁴ in which he stated:

Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his [or her] mind.²⁵

The rule represented by this statement was modified by section 3 of the *Homicide Act 1957*,²⁶ which emphasized that the provocative act might be physical or verbal, and that the issue of whether or not "a reasonable man" would have been provoked by such an act be left to the jury. It leaves untouched Devlin J.'s use of the wording "sudden and temporary." As such, the section assumes that the test for provocation, as determined by the jury, has two parts: first, whether the defendant was provoked to lose her or his self-control; and secondly, whether a reasonable man would have been provoked to act as the defendant did. Smith and Hogan describe the first part as subjective and the second as objective.²⁷

²³ For example, G. Williams, "Domestic Provocation and the Ivory Tower" (1992) N.L.J. 381, and the *Ashley Bill*, which did not pass into legislation.

²⁴ [1949] 1 All E.R. 932 [hereinafter *Duffy*].

²⁵ *Ibid.* at 932.

²⁶ (U.K.), 5 & 6 Eliz. 2, c. 11.

²⁷ J. Smith & B. Hogan, *Criminal Law*, 7th ed. (London: Butterworths, 1992) at 351-52. I will refer to Smith and Hogan's text with some frequency in the discussion that follows; I am taking it as exemplifying the doctrinal text that sees criminal law as a collection of rules and more or less correct interpretations.

1. The subjective element

The first part of the defence of provocation, determining whether the defendant was provoked to lose self-control, is seen as a question of fact. Smith and Hogan state that the jury should be able to consider

all the relevant circumstances; the nature of the provocative act and all the relevant conditions in which it took place, the sensitivity or otherwise of [the defendant] and the time, if any, which elapsed between the provocation and the act which caused death.²⁸

At first reading, it might appear that the law of provocation should be able to encapsulate the specific position of the battered woman within the stated concern and to consider all relevant conditions and circumstances and the nature of the provocative act. However, it will be demonstrated that the apparently all-encompassing nature of the subjective element of provocation actually operates to exclude the battered woman from utilizing the defence. I will consider four separate aspects of the subjective element, using the terms employed by Smith and Hogan: a) "the nature of the provocative act," b) "all the relevant circumstances of the act," c) "the sensitivity or otherwise of the accused" at the time of the act, and d) "the time, if any, which elapsed between the provocation and the act which caused death."²⁹

a) *The nature of the provocative act*

Battered women often resort to lethal force after prolonged victimization by their partners.³⁰ For some women, this means suffering abuse over several years. Feminist critics have expressed concern about whether judicial understanding of the nature of the provocative act includes all of these very long periods of abuse, or arbitrarily divides

²⁸ *Ibid.* at 354.

²⁹ *Ibid.*

³⁰ The pattern of the commission of lethal violence by battered women is set out by K. O'Donovan in "Defences for Battered Women who Kill" (1991) 18 J.L. & Soc'y 219 [hereinafter "Defences"], and Edwards, *supra* note 6 at 128.

them into shorter periods, examining only the most recent battering.³¹ In their discussion of *Thornton*, Smith and Hogan state:

The fact that provocative behaviour has continued over a long period does not rule out the defence, provided it has culminated in a sudden explosion. The prolonged nature of the provocation may explain why an incident, trivial when considered in isolation, caused a loss of self-control.³²

There are three criticisms that can be made of this statement. First, Smith and Hogan's confident assertion that long-term battering is included within the definition of "provocative act" would seem to have no foundation in the case-law.³³ Indeed, in *Thornton*, it is strikingly apparent that the Court of Appeal showed no willingness to include Thornton's experiences over many months. The Court concentrated almost exclusively on the events of the night that Thornton resorted to lethal force. Her experiences of violence from the deceased are mentioned as part of the historical build-up to that night, but not as having anything to do with what provoked her to stab her husband.³⁴ The statement in *R. v. Davies*,³⁵ that it would be too generous to take account of the deceased's course of conduct throughout the whole year preceding the homicide, was cited with approval in *Thornton*.³⁶

The second criticism that can be made of Smith and Hogan's statement relates to the characterization of some incidents as "trivial when considered in isolation." This shows a very great disregard for the actual situation of the woman who is being battered. Accounts given by these women show that no incident can be considered trivial; each event is potentially life-threatening.³⁷ Research supports these accounts. In

³¹ See M. Fox, "Provocation and the Criminal Law" (Address to the Critical Legal Conference on Representation, September 1991)[unpublished]; A. Young, "Femininity as Marginalia" in S. McVeigh, P. Rush & A. Young, eds., *Criminal Legal Practices* (Oxford: Oxford University Press, forthcoming); Edwards, *supra* note 6; and O'Donovan, "Defences," *supra* note 30.

³² Smith & Hogan, *supra* note 27 at 355.

³³ See Duffy, *supra* note 24 and *Thornton*, *supra* note 3.

³⁴ *Thornton*, *supra* note 3 at 312 and at 314.

³⁵ [1975], 1 All E.R. 890.

³⁶ *Supra* note 3 at 314.

³⁷ See the accounts given by S. Thornton, "Why I Killed my Husband" (April 1992) *Women's Journal* 100, and of Jane Stafford in B. Vallee, *Life with Billy* (Toronto: Seal Books, 1986). Jane Hurshman married Billy Stafford and suffered many years of extreme violence at his hands. He also abused their children. He was well known as a violent alcoholic among his family and the local community. Jane Stafford shot him with a rifle at close range while he was unconscious from alcohol in his van. He had ordered her not to move until he woke up. Charged with first-degree murder (under her father-in-law's name of Whynot), she was acquitted on grounds of self-defence,

Edwards' study, after alcohol, which was attributed to 33 per cent of cases of spousal violence, "anything" was cited as the most frequent cause of a violent incident.³⁸ When "anything" can produce a violent response in the woman's partner, no incident should be considered trivial. Although the authors insert a disclaimer that their perspective can help to understand why an apparently trivial incident has greater seriousness, its characterization as trivial in any way shows a lack of sensitivity towards the battered woman.³⁹

The final criticism relates to the insistence on the need for a "sudden explosion" as culmination of the provocation. This perfectly exemplifies the masculine model of emotion that characterizes juridical debate about provocation. As Edwards notes: "Defences to homicide are founded on particular versions of typical people and typical situations. These ... are very much predicated on violent behaviour which men consider reasonable, and exclude women's definitions of motive."⁴⁰

The "particular versions" are masculine ones, with emphasis on masculine metaphors of temperature, speed, and pressure.⁴¹ Another expression used is "the heat of the moment" which is always counterposed, explicitly or implicitly, to murder "in cold blood." Anger is said to "build up." The effect is to establish that the loss of control was out of the individual's control. Provocation, in this conceptualization, lights a fuse which can ignite violence. Just as the lighting of fuses and the exploding bomb are tropes which feature in male action movies which exclude the perspectives of women, this characterization of anger does not include the emotions experienced by many battered women.

When a battered woman kills her abuser, it is likely that her act will conform in most respects to the following pattern: she will use a weapon of some kind (fuel, a knife, an axe), and she will wait until he is

even though no assault was under way or imminent when she killed Stafford. The Crown appealed the decision, and a new trial was ordered (*R. v. Whynott*(1983), 9 C.C.C. (3d) 449 (N.S.C.A.)). Jane Stafford pleaded guilty to manslaughter and was sentenced to six months' imprisonment and two years' probation.

³⁸ Edwards, *supra* note 6 at 171.

³⁹ The authors also imply that the incident in the case of *Thornton* (a discussion of which frames the authors' comments here) was a trivial one. The incident in question involved the deceased, who had battered his wife severely over several months, telling her that she was a whore and threatening to kill her at a later point. Such an incident should not be characterized as trivial.

⁴⁰ Edwards, *supra* note 6 at 181.

⁴¹ For example, Smith and Hogan write of the loss of self-control as a "sudden explosion," employing metaphors of speed and pressure. Interestingly, the male orgasm is often characterized as involving a similar "sudden explosion."

asleep or drunk, perhaps many hours after the last provocative act, as it is understood by legal doctrine.⁴² This pattern is perfectly logical: women are generally smaller than men, and the law's notion of an equal fight between unarmed combatants could not easily apply to a man and a woman. It is extremely difficult for women to resort to violence: women are socialized against the use of force, in contrast to most men's experience of the legitimized use of force at some point in their life. It is particularly difficult for women to resort to force when they are forced to act violently against their chosen romantic partner. If the woman has previously been assaulted by her partner, she will know too well what injuries he can inflict upon her. Waiting until the man is asleep or intoxicated may be the only way of using force against him without risking death or serious injury. Studies show that, when women did use force against their violent partners, the result was usually an escalation of violence against the women.⁴³

The law appears to characterize violent acts resulting from a sudden loss of self-control as naturally more acceptable than violence which arises when self-control is lost in any other way. Although acts in the former category also have to be considered under other aspects of the doctrine of provocation, a defendant who can claim that the violence occurred when self-control was lost in an instant will have an advantage over anyone who has to admit to a less than immediate loss of control. I would argue that the former category is more likely to include male defendants than female. The insistence of the courts and doctrinal commentators upon the masculine model of emotion outlined above will contribute to the successful use of the defence by a majority of male defendants. The judicial and doctrinal interpretation of "the nature of the provocative act" ensures that battered women, in most situations, are excluded from pleading provocation as a defence to a murder charge.

b) *All the relevant circumstances of the act*

This expression appears to manifest openness in legal doctrine, a willingness to consider different aspects of the situation and to include, rather than to exclude. However, it is my argument that exclusion is achieved by the deployment of the term "relevant." Legal discourse, whether expressed by the judiciary or in a doctrinal text, is remarkable for its use of a self-proclaimed neutral language which is far from neutral

⁴² The homicides by both Thornton and Ahluwalia conformed to this pattern.

⁴³ Edwards, *supra* note 6.

(just as no discourse could ever be).⁴⁴ “Relevant” circumstances are those deemed so by the court. This may mean that the battered woman is not allowed to express her fears about her possible death at the victim’s hands, because the incidents did not fit the canonical definition instituted by Devlin J. in *Duffy*. It can also mean that the judge will describe the circumstances of the act in such a way as to structure its interpretation. In *Thornton*, the trial judge stated:

Members of the jury, ... even if Mrs Thornton had lost her self-control, you would still have to ask whether a reasonable woman in her position would have done what she did and, if you think (and this is for you to say) that she went out and found a knife and went back into the room and as a result of something said to her stabbed her husband as he lay defenceless on that settee deep into his stomach, it may be very difficult to come to the conclusion that that was, and I use the shorthand, a reasonable reaction.⁴⁵

To describe the deceased as defenceless requires that the perspective of the battered woman be completely suppressed. Since Sara Thornton had experienced her husband’s violence many times, she knew that he was capable of injuring or killing her, especially when drunk, as he was that night. The jury has, therefore, been presented with a highly coded scenario: the defenceless husband and the wife as primary aggressor. Even when framed within a hypothesis, as in the judge’s summing-up, such a scenario would have had a considerable effect on the jury’s reading of the events described to them. In these ways, legal discourse operates to exclude the battered woman’s perspective and to ensure that “relevance” is defined in a manner contrary to her interests.

c) *The sensitivity of the accused*

The courts in England have so far shown little or no willingness to hear evidence as to the effect that the experience of being battered can have upon a woman. In January 1992, the barrister Helena Kennedy attempted to adduce evidence that the defendant, Sally Emery, was suffering from “battered woman syndrome” (BWS). Emery was charged with failing to prevent her child from being killed by her husband, a man who had been battering both child and wife for a period of years. The jury did not accept that BWS had any relevance to the case and found the

⁴⁴ P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martin’s Press, 1987) at 206.

⁴⁵ *Thornton*, *supra* note 3 at 312, quoted on appeal by Beldam L.J.

woman guilty. She was sentenced to four years' imprisonment.⁴⁶ On appeal, Emery's sentence was reduced to thirty months' imprisonment, on the grounds that the trial judge had not given enough weight to the expert evidence relating to the trauma suffered by Emery as an abused woman.⁴⁷ The re-trial of Ahluwalia for manslaughter on grounds of diminished responsibility is seen by many as opening the judicial door to the admission of evidence about BWS in future cases.⁴⁸

BWS originated in the United States in the 1970s. In 1979, the categories "battered spouse" and "battered woman" were added to the International Classification of Diseases: Clinical Modification Scheme.⁴⁹ BWS is most closely associated with Dr. L. Walker, a psychologist who has acted as expert witness on BWS in many American cases and who works as a therapist with battered women. For Walker, battered women exhibit a series of behaviours that have been categorized as part of "learned helplessness," a concept developed by M. Seligman in experiments with dogs. The dogs were subjected to electric shocks; their initial attempts to avoid pain being fruitless, the animals developed passive and helpless behaviour.⁵⁰ According to Walker, battered women develop passive and helpless behaviour in ways similar to Seligman's dogs.⁵¹

The appeal of BWS in North America undoubtedly has to do with its purporting to answer many of the popular hard questions that are asked about battered women. It can explain why women do not leave their abusers (once helplessness is learned, leaving seems impossible); it

⁴⁶ This case and its appeal are unreported. It is discussed by defence counsel H. Kennedy in her book *Eve was Framed: Women and British Justice* (London: Chatto & Windus, 1992) at 96. See also A. Phillips, "The abuse that paralyses" *The Guardian* (28 January 1992) 16.

⁴⁷ Judgment was given by Lord Taylor, C.J., who, four months earlier, had heard Ahluwalia's appeal against the murder conviction. See D. Pallister, "Battered woman has jail term cut" *The Guardian* (4 November 1992) 8; and H. Mills, "Guilty of staying silent" *The Independent on Sunday* (6 December 1992) 20.

⁴⁸ C. Dyer, "Battered wife ruling a landmark, say lawyers" *The Guardian* (26 September 1992) 3.

⁴⁹ See "'Battered Syndrome' now official" (1979) 3 Response 3; and Dobash & Dobash, *supra* note 12 at 213ff.

⁵⁰ M. Seligman, "Alleviation of Learned Helplessness in the Dog" (1965) *J. of Abnormal Psychology* 256. Seligman also notes that the dogs developed pain reduction techniques, such as rolling in their faeces in order to lessen the conduction of the electricity.

⁵¹ L. Walker, *The Battered Woman* (New York: Harper and Row, 1979); L. Walker, "The Psychological Impact of the Criminalization of Domestic Violence on Victims" (1985) 10 *Victimology* 281; and L. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: Harper and Row, 1987) [hereinafter *Terrifying Love*].

can explain why a battered woman may stay with her abuser for years (violence occurs in a cycle, alternating with blissful "honeymoon" periods in which the abuser swears to reform, brings gifts to the woman, and acts like a "model husband"); it makes sense of some baffling aspects of the cases, such as many women's refusal to believe that their abusers were dead after the homicide (the man has by then taken on an aura of omnipotence).⁵²

BWS has many critics,⁵³ and its popularity in North America⁵⁴ should not be taken as underwriting its value. Its acceptance could easily fit into the pathologizing of women's experiences that has already occurred in relation to "premenstrual syndrome (PMS)."⁵⁵ (I will discuss in detail the dangers of accepting BWS in section VI, B and C.) However, the refusal on the part of the courts in England to admit evidence about BWS or any other theory about battered women's experiences and likely state of mind manifests a lack of interest which is tantamount to another form of violence against battered women. Far from inquiring into the "sensitivity or otherwise" of battered women as defendants in provocation cases, as Smith and Hogan claim, the courts refuse to accept that there is any uniqueness or specificity in battered women's experience and treat battered women under the same generic standards as the man in a street fight or an isolated argument between strangers. It should be clear, and it should be accepted by the courts, that the battered woman is indeed in a unique position (approximated only by the victims of rape by an intimate or victims of child abuse): her trust in another individual has been violated; her belief in promises to reform

⁵² Stafford's experiences, as recounted by Vallee, *supra* note 37, support this. See also the stories in Walker, *Terrifying Love*, *supra* note 51.

⁵³ See, for example, E. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battery" (1986) 9 Women's Rts. L. Rep. 195; Dobash & Dobash, *supra* note 12; A.-M. Boisvert, "Légitime défense et le 'syndrome de la femme battue': R. c. Lavallée" (1991) 36 McGill L.J. 191; Comack, "Legal Recognition," *supra* note 1; E. Comack, "Women Defendants and the 'Battered Wife Syndrome': A Plea for the Sociological Imagination" (1987) 5 Crown Coun. Rev. 6 [hereinafter "Women Defendants"]; and A. Young, "Crime and the Body: A Postmodern Reading" (Address to the Law and Society Association Meeting, May 1992) [unpublished].

⁵⁴ For example, its use in *State v. Kelly*, 478 A.2d. 364 (N.J. 1984), 97 N.J. 178 (1984) [hereinafter *Kelly*].

⁵⁵ The major proponent of the existence of PMS is K. Dalton: "Menstruation and Crime" (1961) 1 British Med. J. 326, and *The Premenstrual Syndrome and Progesterone Therapy* (London: Heinemann, 1977) [hereinafter *The Premenstrual Syndrome*]. For a critical assessment of the discursive formulation relating to PMS, see H. Allen, "At the Mercy of Her Hormones: Premenstrual Tension and the Law" in P. Adams & E. Cowie, eds., *The Woman in Question: MIF* (Cambridge, Mass.: MIT Press, 1990) [hereinafter "At the Mercy of Her Hormones"].

has been shattered again and again; her family life is falling apart; she may have to accept that her children's father is violent and dangerous; and she may have no practical solutions to the problems of finance, housing, and unemployment.

It is my contention that these factors should be considered automatically in any case where a battered woman has committed homicide. If this were done, it would go some way toward examining "the sensitivity or otherwise of the defendant." At the moment, judges appear to be moving in the opposite direction, showing no understanding or interest in examining the problems faced by battered women and acting instead to compound them. The trial judge in *Thornton*, in his direction to the jury, stated:

There are ... many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs.⁵⁶

Until the judiciary accept the need to respond more sympathetically to the situation of battered women, this kind of comment will appear again and again.

d) *Lapse of time between the provocation and the homicidal act*

At this point in the elaboration of the doctrine of provocation, it becomes essential that the loss of self-control experienced by the defendant occur immediately or very soon after the deceased's provocative act. Any delay creates what has become known as the "cooling-off period," in which the defendant is presumed to be able to reflect on what has happened and, if a reasonable man, to decide against taking action. If, after reflection in this cooling-off period, the defendant proceeds with the lethal act, it is presumed that any homicide which results is due to an intention to kill or cause serious harm. Provocation cannot be pleaded; there was no sudden loss of self-control.

The case of *Ibrams*⁵⁷ is important here. The defendant had been regularly abused by the deceased. She arranged an attack with the help of others. Almost a week had passed since the last act of abuse by the deceased, when he was attacked and killed. *Ibrams* pleaded provocation. The court held that, however terrible her experiences, a

⁵⁶ *Thornton*, *supra* note 3 at 312, Beldam L.J. quoting the trial judge's charge to the jury.

⁵⁷ [1982] 74 Cr. App. R. 154.

five-day cooling-off period, during which the attack had been planned with care, vitiated any possible defence of provocation. The planning and the lapse of time implied an intention to kill. Smith and Hogan cite *Thornton* as an example of "a generous interpretation of this element of the defence."⁵⁸ The authors seem surprised that the judge allowed provocation even to be considered by the jury, given what they see as the relevant facts: that Thornton had earlier declared her intention to kill her husband; that, after his provocative statements and threats, she had gone into the kitchen, sharpened a knife, returned to the room, and stabbed him.

The considerable weight given to Thornton's declared "intention of killing her husband" by Smith and Hogan and by the Court of Appeal is dubious and reveals an inadequate understanding of the battered woman's position. Walker, in her profile of battered women who kill, writes:

Few state later that they ever intended to kill; all say that they simply wanted to stop him from ever hurting them like that again. Almost every battered woman tells of wishing, at some point, that the batterer were dead, maybe even of fantasizing how he might die. These wishes and fantasies are normal, considering the extraordinary injustice these women suffer at their men's hands.⁵⁹

Whether or not we accept such a statement outright, it would seem right that the appalling conditions inflicted upon battered women require profound reflection on the meaning of any statements appearing to express homicidal intent. Thornton's statement to a friend, that she thought she would have to kill her husband in order to end the violence she suffered, can be read as recognizing the inadequacy of so-called "reasonable alternatives," such as divorce or leaving the batterer (the statement was made in the middle of a conversation about the difficulty of obtaining a divorce). It may have indicated the development of a homicidal plan; it is equally possible, however, that it indicated her despair at the options available to a battered woman. It should certainly not remove from a battered woman the possibility of pleading a defence such as provocation.

Smith and Hogan characterize Thornton's killing of her husband as marked by a lapse of time, during which she fetched and sharpened the knife, between the provocative incident and her stabbing him. This would also characterize the way that the incident was presented to the jury. It is, however, possible to read the facts differently. Thornton

⁵⁸ *Supra* note 27 at 356.

⁵⁹ Walker, *Terrifying Love*, *supra* note 51 at 106.

claimed that she spoke to her husband in order to persuade him to come to bed. He was lying on the sofa in a drunken state. He called her a whore, accused her of selling her body, and told her that he would give her no more money and that he would kill her as she had been out with other men. She was upset by these insults. She remembered being advised by Alcoholics Anonymous to stay calm and to make sure she was protected if he attacked her. In this spirit, she went to the kitchen, got the knife, sharpened it, and returned to the sofa. She repeated her request that he come to bed with her; he repeated the insults and said that he would kill her while she slept. She asked him once more to come to bed. He made no move; she raised the knife and stabbed him.

I would argue that the focus could have been considerably narrowed by the court, to examine the statements of the deceased and the actions of the accused after she returned with the knife. Any assumption that getting the knife indicated formation of homicidal intent should be questioned in the light of her previous experiences which led to severe injury and the advice given that she should protect herself against his attacks. If the frame is thus narrowed, the jury would have to consider whether the deceased's insults, threat to kill her, and silence in the face of her entreaty could have constituted provocation. Her fetching the knife should be interpreted in the light of his having already having said that he would kill her for, as he thought, having gone out with other men. The supposed lapse of time becomes insignificant. In commenting on the conviction of Ahluwalia for manslaughter due to diminished responsibility in her recent re-trial, Horder states that, in relation to provocation, now "it doesn't matter if you don't act in haste, but you still have to act in hot blood."⁶⁰ This seems an over-optimistic reading of the effect of Ahluwalia's re-trial, since the judgment given, in her appeal against conviction for murder, by the Lord Chief Justice in July 1992 is at pains to emphasize that the main ground for allowing her appeal related to the medical evidence as to her diminished responsibility which, though available at the time of the trial, had not been seen by the defence counsel. It would seem to be too soon to celebrate the complete reinterpretation of this aspect of the law on provocation.

⁶⁰ Quoted in Dyer, *supra* note 48.

2. The objective element

The second part of the defence of provocation is viewed as involving an objective question: would a reasonable man/person have done as the defendant did? Let us return here to the comment made by the trial judge in *Thornton* about whether it was more reasonable for the defendant to fatally stab her husband or to go upstairs (“why do they stay? they could always leave if they didn’t like/deserve it”). In the summing-up for the jury, the trial judge thus used mistaken but commonplace notions about battered women to suggest to the jury that Thornton’s action may not have been reasonable. Given a direction such as this, it comes as no surprise that the jury found provocation did not exist in Thornton’s case.

The objective question in provocation was formulated in terms of whether “the reasonable man” would have done as the defendant did. The *Camplin*⁶¹ case is accepted as having had a liberalizing influence upon this doctrine. Lord Simon suggested that the reasonable man is to be construed as having the age, sex, and characteristics of the accused. Lord Simon stated: “A ‘reasonable woman’ with her sex eliminated is altogether too abstract a notion for my comprehension or, I am confident, for that of any jury.”⁶² Allen notes that here Lord Simon is confronting the unthinkable—the rationality of woman:

Having first stated that the term ‘a reasonable man’ is to include in principle ‘a reasonable woman’, the law lord continues by explaining that even though the two are thus covered by the same term, they must necessarily remain conceptually distinct, since the lack of that conceptual division is literally unthinkable ... a reasonable human subject not identified by sex.⁶³

The judiciary and various commentators have since then made certain pronouncements about how the notion “reasonable man” naturally includes within it the concept of “the reasonable woman.”⁶⁴

It is clear that the assumed correctness of this statement, and others like it, is extremely problematic. As I have argued above, women’s experiences are being assessed according to a model more suited to a fight in the street between two men at pub-closing time (or other such situations). Women’s experiences of being battered by their

⁶¹ *D.P.P. v. Camplin* [1978], 2 All E.R. 168.

⁶² *Ibid.* at 180.

⁶³ H. Allen, *Justice Unbalanced: Gender Psychiatry and Judicial Decisions* (Philadelphia: Open University Press, 1987) at 31 [hereinafter *Justice Unbalanced*].

⁶⁴ For example, J. Smith, “Commentary on *R. v. Thornton*” (1992) *Crim. L. Rev.* 54 at 55.

lovers and husbands are not addressed by or contained within the notion of "the reasonable man." Indeed, it could be said that judicial and doctrinal interpretation of the concept "reasonable man" has legitimated the battering of women.⁶⁵ Many feminist critics have argued that the history of criminal law is one of indifference to the claims of women who have been victimized by men (whether through rape or other forms of violence).⁶⁶ It is disingenuous to suggest that a notion such as the "reasonable man" could have any meaning for women who have killed their abusers.

Women who plead provocation as a defence to a murder charge face the enormous obstacle of the legal construction of reason within marriage. While men have been allowed to assault and sometimes (far more frequently than women do) kill their partners, women are always constructed as already victimized within the relationship. Victimization, within legal discourse, is woman's destiny.⁶⁷ The battered woman who kills is explicitly rejecting that destiny and is perceived as attempting to usurp the position of dominance which is reserved for men in marriage. We can see this discourse at work in the following instances. First, in Thornton, the trial judge describes the deceased as "defenceless." He also refers to miserable marriages as being "a fact of life." This accords to the violent marriage the immutable nature of, for example, the daily facts of dawn and dusk. While some battered women are forced to believe that killing their abuser is the only possible way out of their situation, the judge implies that almost anything else would have been more reasonable. Secondly, in the trial of Valerie Flood for manslaughter,⁶⁸ the judge said: "there are many other courses open to

⁶⁵ Such as the cases *McGrail* and *Singh*; *McGrail* is unreported, but discussed in Kennedy, *supra* note 46 at 205. *Singh* was covered in news reports: "Nagging provoked businessman to strangle wife, court told" *The Guardian* (28 January 1992); and "Wife killer given suspended sentence" *The Independent* (30 January 1992) 3.

⁶⁶ Edwards, *supra* note 6; Smart, *supra* note 1; and R.E. Dobash & R.P. Dobash, "Wives: the 'Appropriate' Victims of Marital Violence" (1977-78) 2 *Victimology* 426.

⁶⁷ Young, *supra* note 53, and A. Young & P. Rush, "The Law of Victimage in Urbane Realism: Thinking Through Inscriptions of Violence" in D. Nelken, ed., *The Future of Criminology* (Beverly Hills: Sage, 1994) [forthcoming].

⁶⁸ Valerie Flood was married to a man who frequently burned her and beat her with a hammer, and who tried to strangle and stab her. She stabbed him seventeen times and was convicted of manslaughter. This case is unreported, but is discussed in Edwards, *supra* note 6 at 180.

[battered wives] ... they can leave, separate, take divorce proceedings or seek legal help."⁶⁹

Violence within marriages is thus normalized by the judiciary, as long as the violence is being done by the man to the woman. To this extent, it would appear that the marriage licence is indeed a "hitting licence."⁷⁰ The "reasonable man" is quite likely to beat his wife. It is not, within the construction of the law, generally reasonable for a woman to respond to that violence with lethal force. These, then, are the difficulties that will face a battered woman who attempts to plead that she was provoked into killing her abusive partner. The next section will deal with the difficulties, if not impossibility, of pleading self-defence in such a situation.

B. *Self-Defence*

There 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. This seems counter-intuitive, since most of these homicides occur during a beating by the abuser. Self-defence, therefore, initially appears to constitute a likely explanation for the homicide. However, judicial understanding of self-defence does not appear to allow it as an option for battered women.

At common law, one is entitled to defend oneself against attack. The general principle is that the law allows such force to be used as is reasonable in the circumstances of the particular case; when an offence requires *mens rea*, what is reasonable is to be judged in the light of the circumstances as the accused believed them to be, whether reasonably or not. It is not relevant that the defendant was mistaken.⁷¹ The defence is proved, therefore, by asking whether the force that was used was

⁶⁹ Cited in Edwards, *supra* note 6 at 179-80. It is ironic that such a statement appears in a case that is considered to show a more lenient approach to a battered woman, in allowing a manslaughter charge and resulting in a lower sentence: see "Heart of the Matter" (transcript of a television programme on battered women who kill, 1991).

⁷⁰ M.A. Straus, "The Marriage License as a Hitting License: Evidence from Popular Culture, Law, and Social Science" in M.A. Straus & G.T. Hotaling, eds., *The Social Causes of Husband-Wife Violence* (Minneapolis: University of Minnesota Press, 1980) 39. Straus is associated with the proposition that "the marriage license is a hitting license;" however, since his claim was that it licensed both men and women within marriage, his argument has met with much criticism. R.A. Berk *et al.*, "Mutual Combat and Other Family Violence Myths" in Finkelhor *et al.*, *supra* note 7 at 207.

⁷¹ Smith & Hogan, *supra* note 27 at 252.

reasonable in the circumstances as the defendant supposed them to be. Note that the defendant is not required to

weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence.⁷²

The case of *Gladstone Williams*⁷³ is authority for the principle that the accused is to be judged on the facts as he or she believed them to be. This would seem to imply that if a battered woman kills her abuser and pleads self-defence, the jury must examine what she believed to be the circumstances at the time of her act. Battered women who kill state that, at the time of the homicide, insofar as they had any clear thought, it was often that they would be killed by the abuser (such was the severity of the attacks they had just undergone or were still experiencing).⁷⁴ As a general proposition, it would seem that battered women, because of the nature of their experiences as battered women, should be able to raise this defence. However, the lack of success requires a deeper investigation into the legal construction of self-defence.

1. Reasonable force

Section 3 of the *Criminal Law Act 1967*⁷⁵ requires that force used in the prevention of a crime be reasonable. Defence of oneself against attack will almost always be able to be construed as preventing a crime (the initial attack to which the self-defender responds). Thus, the court is investigating, (1) the nature of the circumstances as the accused believed them to be, and (2) the reasonableness of the force used in those circumstances. According to Smith and Hogan, the question of proportionality in that reasonableness is "somewhat speculative."⁷⁶ They cite the case of a butcher who repelled a robber with a butcher's

⁷² Lord Morris in *Palmer v. R.*, [1971] 1 All E.R. 1077 at 1088.

⁷³ (1984), Cr. App. Rep. 376, aff'd by the Privy Council in *Beckford v. R.*, [1987] 3 All E.R. 425.

⁷⁴ Flood reports this: see her story in "Heart of the Matter," *supra* note 69.

⁷⁵ (U.K.), 1967, c. 58.

⁷⁶ *Supra* note 27 at 254.

knife: the man's defensive action (in preventing the robbery of his takings) was described with approval by the coroner.⁷⁷ However, the examples cited above, in relation to the judicial reception of the reasonableness of the battered woman's lethal act in provocation cases, do not suggest that lethal force will be seen as an acceptable response to the beating she is receiving or has just received. While the judiciary remain convinced that force is not a reasonable option, it is not likely that lethal force will be construed as reasonable in the circumstances (even if the battered woman asserts her belief that her own death was likely if she did not act). The judicial presumption of the unreasonableness of lethal force used by women is one of the main reasons why self-defence has not been successfully pleaded by a battered woman in English criminal law.

2. The question of retreat

Smith and Hogan state that, instead of being a duty, retreat is now simply a factor to be taken into account in deciding whether it was necessary to use force and whether the force was reasonable.⁷⁸ They surmise that "[i]f the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he [*sic*] can."⁷⁹ It seems clear that, although the battered woman should not be disqualified from the defence by virtue of this aspect, judicial (lack of) understanding of her situation will require retreat instead of the use of force.

In *Thornton*, the trial judge asked the jury to consider whether, in the context of provocation, it was reasonable for the defendant to stab her husband instead of leaving the room or going upstairs. No mention was made of Thornton's previous unsuccessful attempts to retreat or otherwise counter her husband's violence or threats of violence. In the preceding ten months, she had contacted Alcoholics Anonymous for information on how to deal with her husband's drunken violent rages, she had called the police for assistance, and she had asked neighbours for advice. Despite these efforts, she had been badly beaten many times. Thornton claimed that, on the night that she stabbed her husband, she

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 255-56.

⁷⁹ *Ibid.* at 256.

genuinely believed his threat to kill her. From her experience of the ineffectiveness of the alternatives (calling the police, asking neighbours for help), retreat seemed impossible. If Thornton had pleaded self-defence, it seems unlikely that the courts would have accepted it.

3. Imminence of the attack

Within doctrinal interpretation of the law of self-defence, there is a perceived need for the attack to be imminent before the self-defensive response can legitimately occur. If a gun is pointed or a knife raised to stab, the imminence of the attack seems obvious. Valerie Flood, who, after stabbing him seventeen times, was convicted of the manslaughter of her violent and alcoholic husband, describes the event as follows:

So as he was coming at me with the knife, I got both my hands round his arm, and I was squeezing, so that he'd let go of the knife, so that I could get rid of it, and um he wouldn't use it on me. But as it happens, I snapped, because I said this to the police, I do remember stabbing him once, because I remember saying that's it, I can't take more, I've had enough and I stabbed him.⁸⁰

A case such as this, which involves the wresting of a knife away from the attacker and then using it to defend oneself against further attack (Flood's husband had also tried to strangle her that night), could easily accommodate the requirement that the attack be imminent. More difficult are cases where there is a threat of later violence (as there would be in a case similar to Thornton's situation) or where the claimed self-defence occurs some time after the attack (as in a case like that of Ahluwalia: after her husband had burned her with an iron, she waited until he was asleep and set his feet on fire; the fire spread and he later died). It is then more difficult to prove to the court's satisfaction that self-defence and not primary aggression was occurring. Under the present interpretive standards employed by the courts, these two latter types of situation would not be considered to fall within the category of self-defence.⁸¹ Again, it can be argued that judicial attention to the specificity of the battered woman's position could overcome these difficulties and open up the defence for use in such situations. I will return to this point in my later discussion of the Canadian interpretation of self-defence when a battered woman kills her abuser.

⁸⁰ "Heart of the Matter", *supra* note 69.

⁸¹ O'Donovan summarizes the historical evolution of judicial reluctance to include these cases as self-defence in "Defences", *supra* note 30 at 221-23.

I have used the cases of women such as Thornton and Ahluwalia in illustrating my argument, although they did not plead self-defence, no doubt on the justified advice of their counsel that it would be unlikely to succeed. However, I would argue that their situations, and those of many other battered women, should be able to be interpreted as falling under the heading of self-defence. Many of the reforms that have occurred in other jurisdictions, notably the United States and Canada, have involved accepting that the battered woman who kills should be acquitted due to self-defence. I will now turn to the defence of diminished responsibility.

C. Diminished Responsibility

The *Homicide Act 1957*⁸² introduced a new defence to murder, known as diminished responsibility. If successfully pleaded, the accused is entitled to a conviction for manslaughter rather than a complete acquittal (as would be the case with an insanity plea where the accused would be found not guilty by reason of insanity). Section 2 of the *Homicide Act* provides that a person shall not be convicted of murder if he or she was suffering from an abnormality of mind that substantially impaired mental responsibility for the homicidal act. The abnormality of mind may arise from arrested or retarded development, inherent causes, or any induced disease or injury. "Abnormality of mind" has been interpreted to mean something different from "defect of reason" in the M'Naghten Rules on insanity. It means rather "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal."⁸³

Provocation and self-defence, therefore, require the defendant to establish that she shares the characteristics of the reasonable man; diminished responsibility demands that she prove herself to be so far in state of mind from that of the reasonable man that it should be considered abnormal. As Allen points out, a kind of inverted "reasonable man" test is invoked here, where the defendant is to be excused because no reasonable man could have acted that way.⁸⁴ The distinction between the employment of "reasonable" contained within provocation and self-defence on one hand, and that within diminished

⁸² *Supra* note 26.

⁸³ *R. v. Byrne*, [1960] 2 Q.B. 396 at 403, Lord Parker C.J.

⁸⁴ Allen, *Justice Unbalanced*, *supra* note 63 at 26.

responsibility on the other, is of great importance when examining the defences available to battered women who kill, since diminished responsibility could be said to be the defence which is the most easily accessible. The case of *Robinson*⁸⁵ involved a woman who had been attacked several times by her violent husband, ending up in hospital for emergency treatment. Eventually, she attacked him with a hammer and strangled him. Her plea of diminished responsibility was successful; she was put on probation for two years.

This case and others like it demonstrate the success that a battered woman who kills may have when pleading diminished responsibility.⁸⁶ It may seem a tempting option as a defence, if the facts can be thus presented. However, there are considerable problems inherent in the use of this defence. First, the woman must claim to suffer from an abnormality of the mind. The attention of the court will be on her abnormal state of mind at the time of the homicide; her act must be shown to be the result of a mental state so far from the ordinary person's that a reasonable man would call her responsibility thus diminished. Since, as I have shown above, many judicial pronouncements reveal a presumption that a battered woman need not resort to lethal force, it is easy to see why judges are content with the notion that such a homicide was, by definition, unreasonable and, in fact, the product of a mental abnormality.

The second problem relates to a shift of focus away from the actions of the batterer. The focus of the trial will be on the abnormality of the woman's mind, not on the appalling violence she has suffered. In merely excusing her homicide, the law exculpates the violent man. Related to this is a third difficulty in pleading diminished responsibility: the fact that the woman cannot claim her act was justified and reasonable, as she could if self-defence were accepted; or that her act was reasonable, as she could if provocation were allowed. While all three defences may lead to a non-custodial outcome, the symbolic value of declaring justification and reasonableness is highly important. A fourth issue relates to the fact that a plea of diminished responsibility still results in a conviction, unlike a plea of self-defence. Finally, if evidence as to battered woman syndrome is accepted in future by the court, it is likely that it would result in more pleas of diminished responsibility, since it aims to establish that the woman suffered a

⁸⁵ *Independent Law Reports* (7 July 1990).

⁸⁶ In his article, "Punishment and Self-Defense" (1989) 8 *Law & Phil.* 201, G. Fletcher emphasizes that self-defence will not be available when it appears to judicial interpretation that the defendant has attempted to dispense "private vengeance" or "individual justice."

particular mental disorder as a result of persistent battering.⁸⁷ For all these reasons, it is my contention that diminished responsibility as a defence for battered women who kill is highly unsatisfactory and should be avoided where possible.

Even where psychiatrists agree that a mental disorder exists, the court may not accept that it has any relevance to the defendant's state of mind at the time of the homicide. In *Thornton*, it appeared that the court was unable to accept that Thornton was the victim of this situation, rather than the deceased: to the court, her actions seemed to be more consistent with aggression and private vengeance than with victimization.⁸⁸ Diminished responsibility, then, although apparently a promising choice of defence, should be avoided as risky, exculpatory for the man, excusing rather than justifying the woman's actions, and establishing her abnormality rather than her reasonableness. The next section will examine, in contrast to the above, the position in Canada relating to the legal position of battered women in general, and the specific position of battered women who kill.

IV. THE BATTERED WOMAN IN CANADIAN LAW

The battered woman's movement began its struggles in Canada in the 1970s.⁸⁹ McGillivray details how, by the early 1980s, the movement had won governmental support.⁹⁰ The process of gaining such support, however, was neither easy nor straightforward. As MacLeod writes:

Just a few years ago, wife battering was still a laughing matter for some of Canada's political leaders. On May 12, 1982, when the problem of wife battering was raised in the

⁸⁷ See below.

⁸⁸ M. Kelman, "Reasonable Evidence of Reasonableness" (1991) 17 *Critical Inquiry* 798. Kelman compares the self-defence of a battered woman who kills her abuser and the vigilante who kills a would-be attacker (with specific resonance to the case of Bernard Goetz). G.P. Fletcher also writes on Goetz in *A Crime of Self-Defense* (New York: Free Press, 1988).

⁸⁹ N.Z. Hilton, "One in Ten: The Struggle and Disempowerment of the Battered Women's Movement" (1988) 7 *Can. J. Fam. L.* 313; G.A. Walker, *Family Violence and the Women's Movement: The Conceptual Politics of Struggle* (Toronto: University of Toronto Press, 1990) [hereinafter *Family Violence*]; and L. MacLeod, *Battered but not Beaten ... Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) [hereinafter *Battered but not Beaten*].

⁹⁰ A. McGillivray, "Battered Women: Definition, Models and Prosecutorial Policy" (1987) 6 *Can. J. Fam. L.* 15.

House of Commons as a serious and widespread reality suffered by one out of ten Canadian women, laughter echoed through the House.⁹¹

The incident was reported in Hansard as follows:

Mrs. Margaret Mitchell: ... It states that one in ten husbands beat their wives regularly.
 Some Hon. members: Oh, oh!
 Mrs. Mitchell: These women -
 Some Hon. members: Oh, oh!
 Mrs. Mitchell: I do not think it is very much of a laughing matter, Madam Speaker.
 An Hon. member: I don't beat my wife.⁹²

The public outcry that followed the reporting of this incident was such that it appeared to require governmental action to demonstrate how seriously wife battering was taken in Canada.⁹³

In the 1970s, the women's movement had established shelters for battered women, as a response to the documentation of wife beating as a social problem.⁹⁴ Hilton chides the tendency to treat this as a "discovery," thus effacing the history of women's attempts to end battering over the centuries.⁹⁵ To this extent, there are considerable parallels with activism going on around the same time in Britain and the United States.⁹⁶ Hilton⁹⁷ and Beaudry⁹⁸ have described how the success of the Quebec movement, in alerting the provincial government to the

⁹¹ MacLeod, *Battered but not Beaten*, *supra* note 89 at 3.

⁹² In the Parliamentary Debates, 32nd Parliament, First Session at 17334; also cited by Hilton, *supra* note 89 at 329, note 89.

⁹³ MacLeod, *Battered but not Beaten*, *supra* note 89 at 3.

⁹⁴ See, for example, J. Barnsley, *Battered and Blamed: A Report on Wife Assault from the Perspective of Battered Women* (Vancouver: Vancouver Women's Research Centre and Vancouver Transition House, 1980); and J. Downey & J. Howell, *Wife Battering: A Review and Preliminary Enquiry into Local Incidence, Needs and Resources* (Vancouver: United Way of Vancouver, 1976).

⁹⁵ Hilton, *supra* note 89 at 322-23. For an analysis of some of these attempts, see C. Bauer & L. Ritt, "A Husband is a Beating Animal: Frances Power Cobb Confronts the Wife Abuse Problem in Victorian England" (1983) 6 *Int'l J. of Women's Stud.* 99; C. Bauer & L. Ritt, "Wife Abuse, Late Victorian English Feminists and the Legacy of Frances Power Cobb" (1983) 6 *Int'l J. of Women's Stud.* 195; and Pleck, "Feminist Responses", *supra* note 9.

⁹⁶ See especially E. Pizzey, *Scream Quietly or the Neighbours will Hear* (Harmondsworth: Penguin, 1974); and K.J. Tierney, "The Battered Woman Movement and the Creation of the Wife Beating Problem" (1982) 29 *Social Problems* 201. In the United States, now, the National Organization of Women which was founded by Betty Friedan, initiated a Task Force on Battered Wives in 1974. In London, the First Women's Aid Centre was founded at Chiswick. In Quebec, the first referral centres opened in the early 1970s: see M. Beaudry, *Battered Women*, trans. L. Huston & M. Heap (Montreal: Black Rose Books, 1985).

⁹⁷ *Supra* note 89.

⁹⁸ *Supra* note 96.

problem of wife battering, may be perceived as leading to a co-opting of the movement's aims and a depoliticization of the radical claims about the roots of wife battering in patriarchal society.⁹⁹ Hilton writes: "members of the Quebec movement realized too late that their collaboration with the government had led to their loss of ownership of the battered women issue."¹⁰⁰

Whatever losses were sustained in the process, the battered women's movement did succeed in establishing the need for governmental support of responses to wife battering.¹⁰¹ After the laughter in the House of Commons had died down, and the resulting public outcry gathered momentum, it became apparent that the governmental response was to be a matter of statistics:¹⁰² as MacLeod writes, "A concern with incidence became central to our understanding of the problem with which we were dealing. Knowing how many women and what types of women were battered seemed crucial in identifying adequate and appropriate responses to the problem."¹⁰³ The resulting crisis mentality produced a sense of urgency. Many procedures were instituted to support battered women, to aid prosecution of batterers, and to ameliorate a life-or-death problem.¹⁰⁴ For example, the Report of the Standing Committee on Health, Welfare, and Social Affairs recommended two main lines of response: the establishment of shelters

⁹⁹ See also P. Morgan, "From Battered Wife to Program Client: The State's Shaping of Social Problems" (1981) 9 *Kapitalistate* 17.

¹⁰⁰ *Supra* note 89 at 325.

¹⁰¹ L. MacLeod, *Wife Battering in Canada: The Vicious Circle* (Quebec: Supply & Services Canada, 1980) at 21, states the statistic of one in ten. In 1981, the Hon. J. Robert Howie asked the House of Commons to have the Standing Committee on Health, Welfare and Social Affairs investigate the prevalence, identification and treatment of family violence, especially wife battering. This motion was passed without question. See also, Legislature of Ontario Standing Committee on Social Development: First Report on Family Violence: Wife Battering (Toronto: Queen's Park, 1982).

¹⁰² S.E. Small, *Wife Assault: An Overview of the Problem in Canada* (Toronto: Support Services for Assaulted Women, 1980) represents one of the first attempts at documenting the extent of the problem.

¹⁰³ MacLeod, *Battered but not Beaten*, *supra* note 89 at 3. MacLeod has written several reports for the Canadian Advisory Council on the Status of Women (CACSW); see also *Wife Battering is Everywomen's Issue: A Summary Report of the CACSW Consultation on Wife Battering* (Ottawa: CACSW, 1980); and *Preventing Wife Battering: Towards a New Understanding* (Ottawa: CACSW, 1989).

¹⁰⁴ See G. Larouche & L. Gagné, "Où en est la situation de la violence envers les femmes dans le milieu familial, dix ans après les colloques sur la violence?" (1990) 8 *Criminologie* 23.

and the reform of police charging practices.¹⁰⁵ On 8 July 1982, Parliament unanimously passed a motion to encourage police prosecution in all cases of wife beating.¹⁰⁶ The Final Report of the Federal, Provincial and Territorial Group on Wife Battering stated, "The charges should serve two goals: to convey to abusive men that it is just as unacceptable to assault their own wives as it is to assault anybody else; and secondly, to convey to assaulted women that help is available through the legal system."¹⁰⁷

Although admirable in the speed of its reformist response and commendable in comparison with the lethargic responses of successive governments to the demands of the battered women's movement in Britain, problems can still be identified in the Canadian attempt to create a legal framework which might effectively answer the needs of battered women.¹⁰⁸ First, although much was said about the need to develop a wide-ranging network of shelters and although they had been in the forefront of highlighting the problem,¹⁰⁹ shelters and transition houses were and remain desperately under-resourced. Despite an increase in the number of shelters,¹¹⁰ there are still too few places for women who are attempting to leave their violent partners. One house in Toronto reported in 1986 that they turned away ten women for every one they were able to house.¹¹¹

The second defect in the new responses related to the inadequacy of the criminal justice system to provide reinforcement to any increased police prosecutorial policies. Any messages of deterrence to men and of support to women embodied in police charging practices were undermined by the reluctance of the courts to convict and their

¹⁰⁵ House of Commons Standing Committee on Health, Welfare and Social Affairs, *Inquiry into violence in the family* (Ottawa: Queen's Printer, 1982). Hilton documents the practices of the London City Police Force in Ontario, unusual in its commitment to prosecution several years ahead of other forces, *supra* note 89 at 328-29.

¹⁰⁶ Canada, Parliamentary Debate, *House of Commons Debates* (8 July 1982) at 19119-20.

¹⁰⁷ Status of Women Canada, *Implementation Report of the 1984 Federal/Provincial/Territorial Report on Wife Battering, Federal Section* (Ottawa: 1986) at 28.

¹⁰⁸ J. Barnsley, *Feminist Action, Institutional Reaction: Responses to Wife Assault* (Vancouver: Women's Research Centre, 1985).

¹⁰⁹ J. Ridington, "The Transition Process: A Feminist Environment as Reconstitutive Milieu" (1977-78) 2 *Victimology* 563.

¹¹⁰ For example, the number of shelters increased from 85 in 1982 to 264 in 1987, MacLeod, *Battered but not Beaten*, *supra* note 89 at 3.

¹¹¹ *Ibid* at 7. See also T. Don, *An Introduction to the Ontario Association of Interval and Transition Houses* (Toronto: OAITH, 1985).

predisposition in favour of passing nominal sentences.¹¹² Not only, therefore, were there still complaints that police enforcement was haphazard and unenthusiastic,¹¹³ but the lax enforcement of the law by the courts, in cases that did result in prosecution, could convey the impression that woman battering is acceptable and criminal sanctions inappropriate.¹¹⁴ Attempts by women to pursue private legal action were frequently unsuccessful (the court appears to treat such cases even less seriously than if the police had been involved) and often resulted in greater danger for the woman.¹¹⁵

Finally, the new system of responses to woman battering failed battered women themselves: Hilton describes this as the "disempowerment of battered women"¹¹⁶ and MacLeod writes of its failing "the test of battered women's realities."¹¹⁷ By this, she is referring to the inability of the system to predict and take account of the needs and demands of battered women: for example, in resisting the assumption that the relationship with the batterer should end (asking instead that he be given the means by which to reform, through psychosocial counselling, education, therapy, *etc.*); and in resisting the

¹¹² My interest here is not in arguing whether such a policy of criminalization is the correct or only response to battering. Instead, firstly, I am following the arguments made about empowerment through prosecution as a desire of many battered women, as found in Jaffe *et al.*, "The Impact of Police Charges in Incidents of Wife Abuse" (1986) 1 J. Fam. Violence 37; P. Jaffe & C.A. Burris, "Wife Abuse as a Crime: The Impact of Police Laying Charges" (1983) 25 Can. J. Crim. 309; and D.A. Ford, "Prosecution as a Victim Power Response: A Note on Empowering Women in Violent Conjugal Relationships" (1991) 25 L. & S. Rev. 313. Secondly, it is necessary to examine whether such a policy was indeed instituted, deployed, and sustained, given that this was the stated intention of the Canadian legislatures. On treatment-oriented responses to battering, see, for example, D. Adams & A.J. McCormick, "Men Unlearning Violence: A Group Approach Based on the Collective Model" in M. Roy, ed., *The Abusive Partner: An Analysis of Domestic Battering* (Toronto: Van Nostrand Reinhold, 1982) 170; and D.J. Sonkin, *et al.*, *The Male Batterer: A Treatment Approach* (New York: Springer, 1985).

¹¹³ See A. Bissett-Johnson, "Domestic Violence: A Plethora of Problems and Precious Few Solutions" (1986) 5 Can. J. Fam. L. 253; and J. Meade-Ramrattan, *et al.*, "Physically-abused Women: Satisfaction with Sources of Help" (1980) 48 Social Worker 162. Note how the weight of history can constitute an inertia against change; see Berk *et al.*, *supra* note 70 on the reluctance of police to alter their practices. The police tend to cite fear of injury as one of the major reasons for non-intervention. However, studies show that this fear is over-estimated in cases of conjugal violence: D. Ellis, "Policing Wife Abuse: The Contributions Made by 'Domestic Disturbances' to Deaths and Injuries among Police Officers" (1987) J. Fam. Violence 319.

¹¹⁴ Hilton, *supra* note 89 at 331.

¹¹⁵ M. Baril *et al.*, "Quand les femmes sont victimes ... quand les hommes appliquent la loi" (1983) 16 Criminologie 89.

¹¹⁶ Hilton, *supra* note 89 at 332.

¹¹⁷ MacLeod, *Battered but not Beaten*, *supra* note 89 at 4.

notion that they were distinct from "ordinary" women and thus a social problem that could be counted and measured.¹¹⁸ Hilton's point is that "governmental and professional involvement has repossessed the battered women problem and quelled the penetrating examination of our society for which the battered women's movement had fought."¹¹⁹

It is clear that the general legal context relating to battered women in Canada is simultaneously different and similar to the legal system in Britain. On one hand, it is clear that the Canadian jurisdictions appear to have paid much more attention to the issue and have at least attempted to institute some procedures that might be effective, in comparison to Britain's reluctance, at the official level, to create any substantial reforms in the last fifteen years. On the other hand, the consensus appears to be that the Canadian procedures fail in ways very similar to how the British system fails: a lack of consistent application, a judiciary which has been reluctant to convict men of crimes of violence against their partners, and a continuing under-funding of women's shelters and organizations. It is within this context of similar differences that I will now proceed to examine the specific responses of the Canadian legal system to battered women who kill their abusers.

V. BATTERED WOMEN WHO KILL THEIR ABUSERS: *LAVALLÉE*

Studies of the incidence of battering in Canada have produced a vast amount of statistics. According to the General Social Survey (GSS) conducted by Statistics Canada in 1988, an estimated 7 women per 1,000 were assaulted one or more times during 1987 by a spouse or former spouse. Fifty per cent of these were assaulted more than once. According to the Canadian Urban Victimization Survey (CUVS) in 1982 and the GSS, women account for 80 to 90 per cent of victims of inter-spousal violence. Seventy-five per cent of the incidents in both surveys

¹¹⁸ For examples of the many studies aimed at creating taxonomies of battered women, see D.G. Dutton, "An Ecologically Nested Theory of Male Violence toward Intimates" (1985) 8 *Int'l J. of Women's Stud.* 404; J.B. Fleming, *Stopping Wife Abuse: A Guide to the Emotional, Psychological and Legal Implications for the Abused Woman and Those Helping Her* (Garden City, New York: Anchor/Doubleday, 1979); J.J. Gayford, "Battered Wives" (1975) 15 *Med. Sci. & L.* 237; I. Gillman, "An Object-Relations Approach to the Phenomenon and Treatment of Battered Wives" (1980) 42 *Psychiatry* 346; E. Hilberman & K. Munson, "Sixty Battered Women" (1977-78) 3-4 *Victimology* 460; M.D. Pagelow, *Woman-Battering: Victims and their Experiences* (Beverly Hills: Sage, 1981); and B. Star, "Comparing Battered and Non-Battered Women" (1978) 3 *Victimology* 32.

¹¹⁹ Hilton, *supra* note 89 at 332-33.

involved physical or sexual attack. Twenty per cent of attacks involved the use of a weapon, usually bottles or blunt objects. Less than half (44 per cent) of the incidents in the CUVs were reported to the police. In 1989, 76 women died at the hands of their spouses.¹²⁰ Côté writes that, in Quebec, between 1974 and 1989, 37 women killed their partners. That figure represents 14 per cent of the total number of conjugal homicides. On average, this means that three or four women each year in Quebec will kill their partners.¹²¹

As an antidote to the aridity of the preceding statistics, Dworkin's comments may be useful:

We are very close to death. All women are. And we are very close to rape and we are very close to beating ... We use statistics not to try to quantify the injuries, but to convince the world that those injuries even exist. Those statistics are not abstractions ... Those statistics are not abstract to me. Every three minutes a woman is being raped. Every eighteen seconds a woman is being beaten. There is nothing abstract about it.¹²²

The "true incidence" does not really matter. The main point is that women experience battering and, as I have tried to show above, while there may be slightly better options and greater awareness of the issue in Canada than in Britain, the fact remains that a considerable number of women are killed by their partners. A smaller group of women, in response to violence against them, resort to deadly force.

One of these women is Angelique Lyn Lavallée. She had lived with her partner, Kevin Rust, for about four years. It was a violent relationship. She had been seriously injured by him several times. On one occasion, attending hospital for medical help, she told the doctors that she had fallen off a horse.¹²³ One night in 1989, Lavallée and Rust had a party. Towards 1 A.M., he began to beat her; she took refuge in a closet in their bedroom. Rust found her and shouted at her that she belonged to him and must do as he told her. He struck her on the face and head. Placing a gun in her hand, he told her that, when all their guests had left, either he would kill her or she would have to kill him. As he turned his back to leave the room, Lavallée shot him dead with one

¹²⁰ The source of these statistics is the material produced by Statistics Canada on *Wife Assault*, included in the documentation for the National Symposium of Women, Law and the Administration of Justice in Vancouver, 10-12 June 1991. I am indebted to Margaret Shaw for making these and other materials available to me.

¹²¹ Côté, *supra* note 7 at 115.

¹²² A. Dworkin, "I Want a Twenty-four Hour Truce during which There is no Rape" in *Letters from a War Zone: Writings, 1976-1987* (New York: Secker & Warburg, 1988) at 163.

¹²³ S. Bindman, "Top court upholds acquittal, 'Battered wife syndrome' defence in man's slaying" *The Vancouver Sun* (3 May 1990) 1.

bullet in the back of the head.¹²⁴ She was charged with murder in the second degree (which carries a sentence of ten years before parole can be allowed). At her trial, she pleaded self-defence and was acquitted. The Crown appealed and a new trial was ordered by the Court of Appeal. The case was then heard by the Supreme Court of Canada, which reinstated the acquittal.

The case has since been hailed as a feminist victory, since the judgment, written by Madame Justice Bertha Wilson, states that the law must accommodate the perspectives of women in general and those of the battered woman in particular. Boyle writes:

Thus the Court has indicated that the factor of gender is germane to what is reasonable ... The case is important methodologically as the situation examined was not simply the killing itself. Rather, the Court was signaling a willingness to examine social context in which gender is significant—the research on battered women, the history of sex discrimination, and the fact that the imminent attack doctrine might in effect be a sentence of death.¹²⁵

Boisvert sees the decision as indicating the increasing recognition, by the courts and by the law, of the needs and demands of women.¹²⁶ Côté writes: “not only does [this judgment] propose a redefinition of ‘reason’ and ‘objectivity’ in terms of women’s perspectives, it also constitutes a break with a tradition which has for too long sanctioned violence against women.”¹²⁷

Madam Justice Bertha Wilson, who gave the judgment in *Lavallée*, described the significance of the case as follows:

The law of self-defence was critically examined to expose its elements as reflecting and embodying male experience with violence and hence male evaluations of appropriate responses to violence. Expert evidence of the experience of battered women put a new complexion on self-defence from the perspective of a battered woman. Angelique Lavalée was acquitted when the social reality of wife battering and its documented effects on women victims was not only taken into account but was incorporated into the legal concept of self-defence.¹²⁸

¹²⁴ These are the facts as recounted in Côté, *supra* note 7 at 132-33. See also the case report *R. v. Lavallée* [1990], 1 S.C.R. 852 [hereinafter *Lavallée*].

¹²⁵ C. Boyle, “Gender and the Substantive Law” (Address to the National Symposium on Women, Law and the Administration of Justice, 10-12 June 1991) [unpublished] at 4.

¹²⁶ Boisvert, *supra* note 53 at 194.

¹²⁷ My translation of Côté, *supra* note 7 at 135.

¹²⁸ Hon. B. Wilson, “Women, the Family and the Constitutional Protection of Privacy” (Third Muriel V. Roscoe Lecture presented at the McGill Centre for Research and Teaching on Women, McGill University, 14 November 1991) [unpublished], also presented at the Hong Kong Bill of Rights Conference in June 1991, published in (1992) 17 *Queen’s L. J.* 5 at 20.

The judgment of the Supreme Court elaborates how this was accomplished. Self-defence in Canadian law, codified in section 34 of the *Criminal Code*,¹²⁹ allows a person to be justified in defending himself or herself and in repelling an illegitimate attack. The force used must be that which is sufficient to avert the danger. Retreat, or other licit means of averting attack, must be impossible.¹³⁰ According to paragraph 34(2), and as pleaded by Lavallée at trial, a defendant may intentionally cause the death of an attacker who is mounting an unprovoked assault on the defendant, if certain conditions are met. First, the defendant must reasonably believe that she is likely to sustain death or serious injury if she does not act in self-defence. Second, she must reasonably believe that there exists no other way of averting the danger.

In relation to the first requirement, the jury must examine the reasonableness of the defendant's belief in the imminence and severity of the danger; this belief has to be measured according to the standard of the "reasonable man." The jury must be satisfied that a reasonable man in the defendant's position would have believed in the likelihood of death or serious injury. As Boisvert points out, recourse to the reasonable man allows self-defence its justificatory nature: "intentional homicide committed in self-defence is not a crime because such an act conforms to the norm."¹³¹

A. Reason and Femininity

The adherence to the standard of the reasonable man has been much criticized throughout North American jurisdictions. Schneider writes:

Female traits have been viewed as the antithesis of reasonableness; women were considered incapable of meeting the standard required of a reasonable man. Rationality has been considered a male characteristic; women have been viewed as 'disabled' by their lack of logic. This sex stereotype and the atypical self-defense settings in which women act have made it difficult for them to appear reasonable and demonstrate the reasonableness of their acts.¹³²

¹²⁹ R.S.C., 1985, c. C-46.

¹³⁰ W. Lafave & A. Scott, *A Handbook on Criminal Law* (St. Paul, Minn.: West Publishing, 1972) at 391.

¹³¹ My translation of Boisvert, *supra* note 53 at 198.

¹³² E.M. Schneider, "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" (1980) 15 Harv. Civ. Rts.-Civ. Liberties L. Rev. 623 at 636.

Boisvert asserts that, rather than there being no notion of a "reasonable woman," the problem is that the collective vision of the reasonable woman does not correspond to the notion of reasonableness which lies at the heart of legal norms.¹³³ Crocker claims that "as a fictional, hypothetical individual, the reasonable man does not reflect the social reality of anyone."¹³⁴ Fiora-Gormally charges clinicians and therapists with the preservation of preconceptions about rationality and gender, arguing that it is their assumptions of what makes a "healthy adult" into a Catch-22 for women: to be a healthy adult they must lose their femininity (and, therefore, become an unhealthy woman), while to be a normal "feminine woman" she must display traits which do not conform to notions of a healthy adult.¹³⁵

Criticism, therefore, takes one or more of various forms: an alleged failure to take account of the lived realities and experiences of individuals in general or of battered women in particular (a phenomenological criticism); a saturation with sex bias which favours male defendants over women (a liberal sociological criticism); and an inaccurate or misjudged understanding of what it means to be an individual thanks to a reliance on psychologistic notions of reason (an anti-psychology criticism).

In *Lavallée*, Madam Justice Wilson stated clearly the argument that the judicial notion of the reasonable man or reasonable person ignores the lived realities of women. The definition of what is reasonable must be adapted to the circumstances occupied by the battered woman, which are entirely foreign to the hypothetical "reasonable man."¹³⁶ It is apparent that the Court is founding its criticisms of the notion of the reasonable man upon phenomenological and sociological grounds. As will become clear later, the Court certainly does not take an anti-psychiatry stand.

To enable the jury to understand the perspective of the battered woman, the Supreme Court endorsed the provision of expert testimony in the form of psychiatric evidence about whether the accused suffers from "battered woman syndrome" (BWS). One of the elements of the Crown's appeal against *Lavallée's* acquittal related to this testimony.

¹³³ Boisvert, *supra* note 53 at 199.

¹³⁴ P.L. Crocker, "The Meaning of Equality for Battered Women who Kill Men in Self-Defense" (1985) 8 *Harv. Women's L. Rev.* 121 at 125.

¹³⁵ N. Fiora-Gormally, "Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?" (1978) 2 *L. & Human Behavior* 133.

¹³⁶ *Lavallée*, *supra* note 124 at 874.

Lavallée did not give evidence at trial; instead, a psychiatrist, Dr. Fred Shane, testified at length about her experience of bws. The Court felt that it was important that the jury should hear this evidence in order to keep at bay the stereotypes that might otherwise affect their verdict. In terms of the requirement within the *Criminal Code* that the defendant must show apprehension of death or serious injury to be reasonable, the Court stated that psychiatric evidence about bws could demonstrate how Lavallée's relationship with Rust had deteriorated to the extent that she suffered terror in his presence.¹³⁷

A crucial aspect of the determination of the reasonableness of the accused's apprehensions of death or serious injury relates to the perceived imminence of the attack (although section 34(2) contains no express requirement of imminence, it has been so interpreted within the case-law).¹³⁸ It has been pointed out that the requirement of imminence relates most closely to a sudden fight between two men of equivalent strength;¹³⁹ this was recognized by the Court in *Lavallée*: Madam Justice Wilson stated that "imminent" implies a knife raised to stab or a gun loaded and aimed at another person.¹⁴⁰ Given that most battered women who resort to deadly force do so after a period of time has elapsed and their partner has turned his back or is asleep, it is easy to see how it could be difficult to plead self-defence. In the case of *Whynot (Stafford)*,¹⁴¹ Jane Stafford shot her appallingly violent husband while he was unconscious after drinking a large amount of alcohol. He had threatened to kill her son and to burn a neighbour out of her home. Stafford was originally acquitted on the grounds that she had acted in self-defence; however, the Nova Scotia Court of Appeal ordered a new trial (again for murder in the first degree, which carries a mandatory twenty-five year sentence). She pleaded guilty to manslaughter rather than face a second trial and was sentenced to six months in prison (she was released after two). The relatively short sentence should not distract from the fact that her original acquittal on the basis of self-defence was overturned. Had she been tried a second time, with the judge forbidden

¹³⁷ *Ibid.*

¹³⁸ See *Reilly v. R.*, [1984] 2 R.C.S. 396; and *R. v. Baxter* (1975), 33 C.R.N.S. (Ont C.A.).

¹³⁹ Boisvert, *supra* note 53 at 203.

¹⁴⁰ *Lavallée*, *supra* note 124 at 876.

¹⁴¹ *Supra* note 37.

to allow a plea of self-defence, she would probably have been convicted of murder.¹⁴²

The Court of Appeal in *Whynot (Stafford)* stated that self-defence could not be pleaded when the attack was anticipated, rather than imminent or in progress. In *Lavallée*, however, Madam Justice Wilson notes that while the “reasonable man” would not see any real danger of death in the conduct of Kevin Rust, the battered woman certainly would. Again, it was felt that expert evidence about the effects of BWS could help the jury to understand why a battered woman would see a lethal threat in such a situation. The effect of this development is to allow battered women to plead self-defence in situations where the requirement of imminence could not ordinarily be met. Perhaps anticipating criticisms that such a move gives women a licence to carry out acts of private vengeance, Madam Justice Wilson likens the battered woman’s position to that of a hostage who has been told that he will be killed in three days. Madam Justice Wilson stated, “The situation of the battered woman as described by Dr. Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day?”¹⁴³ This clever analogy could be adapted usefully into the law of self-defence in England.

B. *A Reasonable Belief that No Alternatives Exist*

Section 34(2) of the *Criminal Code* states that killing the aggressor must reasonably seem to be the only possible action. At this point, the prosecution might raise the popular questions asked of a battered woman: why did she stay in the relationship, why did she not ask for help, why did she not get a divorce? Madam Justice Wilson stated in *Lavallée* that these questions are not pertinent: the fact at issue is whether the battered woman could have reasonably believed that the use of lethal force was the only possible course of action open to her.¹⁴⁴ Once more, psychiatric evidence is seen as the means of aiding the jury to understand the woman’s position, offering answers to the questions of why she had not left the man when violence began and why she did not

¹⁴² Jane Hurshman’s (Stafford) killing of Billy Stafford was felt by many to be justified, including the local police who said that she deserved a medal; in *Vallee*, *supra* note 37.

¹⁴³ *Lavallée*, *supra* note 124 at 889.

¹⁴⁴ *Ibid.* at 884.

attempt to escape when she believed her life was in danger.¹⁴⁵ Madam Justice Wilson took pains to emphasize that these issues should be explained to the jury through expert evidence, but they were not germane to the reasonableness of her perception of the necessity of lethal force. She stated:

it is not for the jury to judge the fact that a battered woman has remained with the man who has beaten her ... A man's house may be his castle, but it is also a woman's home, even if it can seem to her more like a prison ...¹⁴⁶

This stands in considerable contrast to judicial pronouncements in English law, where it often appears that the woman's right to live unmolested in her home is secondary to the right of the man to do as he pleases there.¹⁴⁷

VI. IMPLICATIONS OF *LAVALLÉE*: A CRITICAL APPRAISAL

When making a straightforward comparison between, for example, *Thornton*, and the Canadian law as exemplified in *Lavallée*, it is tempting to see the latter as manifestly more progressive than the English law. For feminist legal scholars in England it would be a happy day indeed to have the House of Lords or Court of Appeal endorse the need to avoid masculinist stereotyping and to take account of women's perspectives. Within that frame, *Lavallée* seems to be a "better" decision. My interests at this point, however, are in the insights that English legal scholars, concerned to argue for reform of English criminal defences, might gain from an analysis of the Canadian approach. This is not to subtract from the value of *Lavallée* as a precedent which has enormous pragmatic value in legal defence work.¹⁴⁸ Rather it is to question the certainty with which *Lavallée* has been hailed as a departure from the "traditional" decisions and values which shape a case such as *Thornton*.

¹⁴⁵ *Ibid.* at 888.

¹⁴⁶ *Ibid.* at 888-89.

¹⁴⁷ See *Richards v. Richards*, [1983] 2 All E.R. 807; *Matrimonial Homes Act 1983*, (U.K.), 1983, c. 19; and McCann, *supra* note 15.

¹⁴⁸ G.G. Brodsky, "Battered Spouse Syndrome: A Defence Counsel's Perspective" (1987) 5 *Crown Coun. Rev.* 1.

A. *Subsequent Case-law*

It has been claimed that *Lavallée* has had a positive impact on later cases. Comack cites two examples. In February 1991, a court in British Columbia dropped charges of murder in the second degree against a woman who had shot her violent husband. The legal recognition of BWS in *Lavallée* was cited as the basis for the Court's decision. In August 1991, a woman received a three-year suspended sentence and three years' probation after shooting to death her abuser.¹⁴⁹ The latter case would be considered a success according to Walker's criterion (the low percentage of cases in which she has been involved as an expert witness resulting in the defendant having to serve a prison sentence).¹⁵⁰

Whereas the former case does appear to register a beneficial result for the defendant, the latter rather seems to follow a different course. The woman concerned has been convicted of a serious crime (manslaughter) and, although she does not have to spend any time in prison, she has gained a criminal record. Côté voices similar doubts in connection with a Montreal case,¹⁵¹ suggesting that—while the judge no doubt evinced compassion for the defendant in dispensing a non-custodial sentence—a more positive result would have been her acquittal. This is the case of Micheline Poulos. For fifteen years Poulos had been the lover of Frank Guzzo, a minor member of the Montreal Mafia. He cohabited with another woman (Olga Naperecka), but Poulos spent most nights on the floor beside their bed. Guzzo controlled her bank account, beat her, and terrorized her. When he became ill, the two women were ordered to spend their days looking after him, in a state of silence which he had commanded (Poulos having been ordered to give up her job). Guzzo believed that he had cancer, although the autopsy revealed malnutrition and gangrene; he would have survived for several years. However, he told Poulos to buy a gun (which she did) and to kill him, Naperecka, and then herself. Poulos shot him six times in the head and waited thirty minutes before calling

¹⁴⁹ Comack, "Legal Recognition", *supra* note 1 at 19. See K. MacQueen, "Court ruling recognized fear ended violent, abusive marriage, 'I can only say that, Mrs. Murray, you have suffered greatly'" *The Vancouver Sun* (1 March 1991) A1; and N. Balsara, "Killed abusive husband, Manitoba woman freed, Judge rules justice would not be served by jail sentence" *The [Toronto] Globe and Mail* (12 August 1991) A5.

¹⁵⁰ Walker, *Terrifying Love*, *supra* note 51.

¹⁵¹ See Côté, *supra* note 7 at 137.

for assistance (as he had ordered). She made no attempt to kill Naperecka or herself.

Poulos was charged with second-degree murder. The defence adduced expert evidence from a psychiatrist who asserted that Poulos suffered from "dependent personality disorder," which he likened to BWS. Her act, it was said, was not voluntary, since her will had been colonized by Guzzo. The jury found her guilty of manslaughter and she was sentenced to three years' imprisonment. The judge appeared sympathetic to Poulos, who was portrayed throughout the trial and in the press as inadequate and pathetic, but stated firmly that any sentence less than the one given would be to "slide into the abyss."¹⁵²

While generalizations cannot safely be made on the basis of a few cases, it is still possible to contrast the strong terms of Madam Justice Wilson's statements in *Lavallée* with the much less dramatic results in some of the cases that have followed. It would, therefore, appear that *Lavallée* cannot be assumed to herald a new era of judicial enlightenment. Rather, it is more likely that Canadian courts will proceed cautiously, producing many compromise judgments and sentences. This may keep the media and Crown prosecutors contented; it does less for battered women than *Lavallée* claimed was their due.

B. *Reliance on Pathologization of Women's Behaviour*

As noted above, while criticizing legal doctrine for its sex bias and its ignorance of women's experiences, the Supreme Court in *Lavallée* did not take a stance against the doctrinal and judicial tendency to interpret women's behaviour and attitudes through a psychiatric prism. The ability of expert evidence, almost always psychiatric, to portray the realities of battered women's lives for the jury is a constant trope in the judgment of the court. The testimony of the psychiatrist can explain why the woman does not leave, why she may claim to love the man she killed, and why she believes she had no options other than homicide. All this can be explained through the notion of battered woman syndrome. There is a special appeal in such testimony. The acceptance of expert testimony on BWS means that, as in *Lavallée's* case, an accredited expert can translate the perspectives of the battered woman into psychiatric terminology. The woman's experiences are

¹⁵² Y. Boisvert, "Micheline Poulos condamnée à trois ans de prison" *La Presse* (19 May 1990) A3; R. Laurent, "Woman gets 3-year prison term for 'mercy killing'" *The Montreal Gazette* (19 May 1990) A3.

deemed to be relevant only to the extent to which they conform to the contours of BWS. Further, the woman who uses evidence about BWS in establishing her defence, whether it is provocation, insanity, self-defence or diminished capacity,¹⁵³ is making a statement about her state of mind and her identity.

BWS is understood as a disorder or abnormality,¹⁵⁴ which will clear up or improve after a period of time away from the abuse or with the appropriate psychiatric help. All the battered woman's actions are classified as abnormal, whether they relate to remaining in the relationship;¹⁵⁵ refraining from calling for assistance during an assault;¹⁵⁶ or killing the abuser.¹⁵⁷

The woman who suffers from BWS, according to Walker, has the characteristics of "poor self-image and low self-esteem;" she "behaves in stereotyped, traditional ways in order to please the batterer;" "she suffers great guilt" and "continual stress ... psychosomatic ailments and depression."¹⁵⁸ Lavallée was described by Dr. Fred Shane, the expert called to give evidence on BWS, as a typical battered woman: "losing the motivation to react [to beatings], becoming helpless and powerless ... has a very disturbed or damaged self-esteem."¹⁵⁹ A battered woman who kills is a special kind of battered woman (many battered women do not resort to lethal force), said to have different perceptions of the violence she endures. Browne found that the women in her study who killed their abusers, perceived them as using greater violence, more frequently and posing a greater threat to any children that existed. The batterers were more likely to be dependent on alcohol, use weapons, make more death threats, and to continue to abuse the woman even if she had taken up a weapon herself.¹⁶⁰

¹⁵³ Walker recounts instances of women adducing evidence about BWS in cases involving each of these defences: *Terrifying Love*, *supra* note 51 at 265-66.

¹⁵⁴ Walker describes the acceptance of BWS as a sub-category of post-traumatic stress disorder, *ibid.* at 48.

¹⁵⁵ "She convinces herself ... that [the battering] will never happen again; her lover can change, she tells herself." *Ibid.* at 45.

¹⁵⁶ "Although the battered woman sees it as unpredictable, she also feels that the acute battering incident is somehow inevitable." *Ibid.* at 43.

¹⁵⁷ "None of these women are ruthless killers. All are victims." *Ibid.* at 12.

¹⁵⁸ *Ibid.* at 102-03.

¹⁵⁹ Lavallée, *supra* note 124 at 884.

¹⁶⁰ A. Browne, *When Battered Women Kill* (New York: Free Press, 1987), especially c. 8.

As a psychological notion, BWS proposes that battered women kill because they are psychologically unable to terminate the relationship through other means. BWS cannot explain why the violence occurred in the first place, nor why some women do leave the relationship.¹⁶¹ As shown above, while able to describe some surface differences between the women who kill and those who do not, proponents of BWS cannot explain why a woman ends up in one category rather than the other. As such, the descriptions do nothing to challenge the notion that the women who kill are acting abnormally while the women who leave, call the police, divorce the man, *etc.*, are acting within the confines of normal and justifiable behaviour. The reasonableness of the woman deemed to have killed in self-defence because of her suffering from BWS is merely the reasonableness of the abnormal, of the individual who has a mental disorder. Thus, although Lavallée's action was held to be reasonable by the Supreme Court, it is not the reasonableness of Cartesian rationality (which accrues to men in self-defence cases, such as *Beckford* or *Gladstone Williams*).¹⁶²

Without resorting to the conventional findings of insanity or diminished capacity, the Court succeeded in finding that Lavallée was, through BWS, mentally abnormal. It is my argument that this reveals how women's experiences can only be translated into legal discourse through the medium of repression. It occurs in rape trials through masculinist notions of sexuality; it manifests itself in the recent introduction of premenstrual syndrome (PMS) as evidence for the defence in some criminal cases.¹⁶³ It has been present throughout the history of the legal construction of marriage.¹⁶⁴ The acceptance of BWS evinced in *Lavallée* exists in a frame that, although having feminist potential, produces implications for the legal interpretation of Woman as a category which are profoundly disturbing.

¹⁶¹ Comack, "Women Defendants", *supra* note 53.

¹⁶² *Supra* note 73.

¹⁶³ The story of "Anna" was recently featured in S. Husband, "Murderers Talking" (1992) Options 39. See also Dalton, "Menstruation and Crime", *supra* note 55; Dalton, *The Premenstrual Syndrome*, *supra* note 55; and Allen, "At the Mercy of Her Hormones", *supra* note 55.

¹⁶⁴ C. Smart, *The Ties that Bind* (London: Routledge and Kegan Paul, 1984); and K. O'Donovan, *Sexual Divisions in Law* (London: Weldenfeld and Nicolson, 1985).

C. *Psychiatric Victimization*

While researchers such as Walker define themselves as feminist and argue that there is a pragmatic necessity to their work as expert witnesses,¹⁶⁵ others feel uneasy about the effects of translating the woman's experience into psychiatric knowledge. Schneider argues that expert evidence about BWS allows the court to view the woman as mentally ill, blaming her pathological reactions rather than any underlying, causative social conditions.¹⁶⁶ Comack argues that "the woman is reduced to a 'case' and her experiences are made compatible with the behaviours of dogs in cages."¹⁶⁷ Loseke and Cahill see BWS as transforming the woman into a "true" victim, "more acted upon than acting."¹⁶⁸ Dobash and Dobash note that, despite describing the male role in the cycle of violence in great detail, no effort is made to explain it.¹⁶⁹ For the woman's victimization to be complete, the cycle of violence has to repeat itself continually. The stories cited by Walker and Browne, among others, do not include any batterers who did seek help or who did recognize that they had a problem (perhaps no such men exist; however, this is surely an issue that should be addressed).

The battered woman is portrayed by exponents of the syndrome as unique in her psychological experience (akin only to Seligman's dogs, perhaps). The assertion of uniqueness is crucial to the idea of a syndrome which is abnormal in its condition. Others, however, have asserted that the battered woman may not be so "sick" as is claimed. For example, Loseke and Cahill have analyzed the behaviours of couples who are separating ("uncoupling"). They write:

The lengthy "leaving and returning" cycle said to be characteristic of battered women is a typical feature of the uncoupling process. Further, the guilt, concern, regret, bitterness, disappointment, depression and lowered perception of self attributed to battered women are labels for emotions often reported by women and men in the process of uncoupling.¹⁷⁰

¹⁶⁵ Walker, *Terrifying Love*, *supra* note 51 at 10.

¹⁶⁶ E.M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1986) 9 *Women's Rts. L. Rep.* 195.

¹⁶⁷ "Legal Recognition", *supra* note 1 at 23.

¹⁶⁸ In Comack, *ibid.*

¹⁶⁹ *Women, Violence and Social Change*, *supra* note 12 at 225.

¹⁷⁰ Loseke & Cahill, quoted in Comack, *supra* note 1.

It may be, then, that the similar emotional reactions of battered women and separating couples reveal the significance—hardly acknowledged¹⁷¹—of the romantic relationship which is such a crucial component of most marriages and cohabitations in contemporary society.

Just as it is possible to argue that the legal construction of marriage permits a degree of violence to be perpetrated on the wife by the husband,¹⁷² so it can be said that contemporary elaboration of the nature of romantic love contains within it the potential for precisely the kind of reactions that lead to the battered woman being categorized as suffering from a psychiatric disorder. Estrich questions the necessity for any woman-specific notion in determining whether or not a defence is made out.¹⁷³ At the surface level of legal rules and legal reasoning there is no necessity. Need is apparent, however, in two very different locations. First, the battered woman who kills may desperately need a defence founded on BWS in order to avoid a life sentence. To advocate the value of BWS here is to make a pragmatic and short-term argument. The second source of need lies within legal discourse. To admit the reasonableness of the battered woman's lethal act would challenge the masculine order of rules embodied in the law of marriage and the laws prohibiting violence. Representing the battered woman as suffering from a psychiatric disorder contains any challenge within her act of resistance to the violence that the law of marriage otherwise endorses.

VII. IMPLICATIONS FOR THE REFORM OF ENGLISH LAW

The criticisms that I have made about the defences available in English criminal law to the battered woman who kills can be summarized in three main arguments. In each section I will set out the implications of the Canadian legal interpretation of conjugal homicide by battered women for the possible reform of English criminal law.

A. *Self-Defence*

Within the law relating to self-defence, there are patent constraints in its interpretation which prevent the battered woman from

¹⁷¹ Comack is one of the few to acknowledge the importance of the aspect: "Legal Recognition", *supra* note 1 at 24.

¹⁷² See Edwards, *supra* note 6; Dobash & Dobash, *supra* note 12; and Young, *supra* note 53.

¹⁷³ S. Estrich, "Defending Women" (1990) 88 Mich. L. Rev. 1430.

successfully pleading its applicability. Other jurisdictions have recognized the existence of such constraints and have, through judicial reinterpretation, taken steps to remove them.¹⁷⁴ Similar steps should be taken here to open up a defence which is currently a narrow and stereotyped understanding of the battered woman's position. The recent decision of *Lavallée* demonstrates how such an opening-up may be initiated.

B. *Provocation*

The battered woman who pleads provocation can only succeed when the relevant event fits into an extremely narrow frame structured around typically masculine modes of reaction, emotion, and understanding. To advocate the reform of the defence of provocation is not to argue for one law for women and another for men, since it is more the case that the current position is that of one law for men and none for women.¹⁷⁵ An examination of the case law reveals that women are currently expected to conform to these masculine modes of provocation and response. The effect is to exclude women such as Thornton from the doctrinal elaboration of the defence. Their exclusion and the narrow interpretation of provocation is the result of an inadequate understanding of the position of battered women in terms of (1) their reactions and responses to the fact of abuse and violence within an intimate relationship; and (2) the legal construction of marriage.

As far as (1) is concerned, steps must be taken to ensure that the judiciary gains a proper understanding of the battered woman's position. This could be done by establishing a committee of inquiry into violence in intimate relationships, perhaps along the lines of the many Canadian initiatives in the 1980s. Any such inquiry should take account of the considerable amount of research carried out by feminists in Britain as well as other jurisdictions at least since the 1970s. Steps must also be taken to ensure that the jury understand the position of the battered

¹⁷⁴ See *State v. Wanrow*, 559 P.2d. 548 (Wash. 1977); *Kelly*, *supra* note 54; *Lavallée*, *supra* note 124; and C. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense and the Law* (Columbus, Ohio: Ohio State University Press, 1989).

¹⁷⁵ The few attempts to claim that women beat their male partners in the same way as men batter women have been severely criticized: Jones, *supra* note 20 at 295-321; Pleck *et al.*, "The Battered Data Syndrome: A Comment on Steinmetz' Article" (1977-78) 2 *Victimology* 680; G. Walker, *Family Violence and the Women's Movement: The Conceptual Politics of Struggle* (Toronto: University of Toronto Press, 1990). S. Steinmetz was the major proponent of the "battered husband" position with "The Battered Husband Syndrome" (1977-78) 2 *Victimology* 499.

woman, a concern voiced in the strongest of terms by Madam Justice Wilson in *Lavallée*. This should be done by admitting evidence about violence in marriage, the lack of viable solutions for many battered women, and the incidence of serious injury after leaving the abuser or calling the police. The temptation to argue battered woman syndrome as a convenient shorthand should, I would urge, be avoided, since it replays many of the masculinist prejudices about Woman that already abound within the legal system. Its acceptance might lead to acquittals for some women; in the long term, it can only do further damage to the continually derided notion of femininity that operates within legal discourse.¹⁷⁶

Instead, recourse should be made to the work of researchers such as Schneider and Ewing on the “traumatic bonding” that can develop between battered woman and abuser or between hostage and kidnapper, or the National Clearinghouse for the Defense of Battered Women in the United States, which has investigated many lines of defence other than the dubious BWS. If we return to *Lavallée*, the image used by Madam Justice Wilson, that of the hostage, could provide a positive starting-point for defence lawyers seeking an easily understandable notion around which to structure a defence. The image of the hostage avoids the inherent pathology within the idea of the woman who suffers from BWS.

In terms of (2), the legal construction of marriage, there exists a legal culture of violence in which conjugal violence takes place. The law has allowed few remedies to be available to women who experience assaults at the hands of their partners. The law displays an extreme reluctance to intervene in any way that would provide useful options for such women; or indeed, going further, in any way that would show that violence by men against women is not a legitimated characteristic of conjugal relations. When homicide is committed by a woman, she is judged according to a simplistic dichotomy between true and false victims; a dichotomy symptomatic of the underlying legal construction of femininity. If she falls into the category of the false victim, she experiences punishments of a terrifying severity: life imprisonment, the death penalty.¹⁷⁷ If she falls into the category of the true victim, she has

¹⁷⁶ Note that many believe that the recent decision in the re-trial of Kiranjit Ahluwalia will open the door to judicial acceptance of BWS—an eventuality which, despite its pragmatic attraction for individual cases, can only worsen the general position of women in legal discourse.

¹⁷⁷ One of the activist statements from Justice for Women, who are campaigning for the release of Sara Thornton and for reform of the law of provocation, is “Sara Thornton escaped a life in hell for a life in jail.” See also E. Rapaport, “The Death Penalty and Gender Discrimination”

conformed to the narrow masculinist definition of legal doctrine; although she may receive a lesser sentence or an acquittal as a result, the effect is to perpetuate the legal repression of women in marital relationships. This dichotomy is the logical symptomatology of a legal culture of violence which sacrifices Woman to maintain an idealized representation of union and community in marriage.

(1991) 25 L. & S. Rev. 367 for gender discrimination which sentences more women than men to death for conjugal homicide.