

Battered Women and Mandatory Minimum Sentences

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Abstract

The author argues for the repeal of mandatory minimum sentences based upon their role in the distortion of defences available to battered women on trial for the homicide of their violent mates. After reviewing other legal strategies aimed at eliminating the discriminatory biases facing women who attempt to plead self-defence, and illustrating the ways in which defences to murder are distorted, she turns to the examination of the transcript of a recent murder trial for a woman who argued self-defence. The author uses the transcript to provide concrete illustrations of three ways in which self-defence is distorted by the mandatory life sentence for murder. She considers prosecutorial guidelines as another possible legal strategy, but concludes that nothing short of repeal of the mandatory life sentence can redress the power imbalance between prosecutor and accused and provide battered women with an opportunity to proceed to trial and have their actions recognized as justified by way of self-defence

BATTERED WOMEN AND MANDATORY MINIMUM SENTENCES[©]

BY ELIZABETH SHEEHY*

The author argues for the repeal of mandatory minimum sentences based upon their role in the distortion of defences available to battered women on trial for the homicide of their violent mates. After reviewing other legal strategies aimed at eliminating the discriminatory biases facing women who attempt to plead self-defence, and illustrating the ways in which defences to murder are distorted, she turns to the examination of the transcript of a recent murder trial for a woman who argued self-defence. The author uses the transcript to provide concrete illustrations of three ways in which self-defence is distorted by the mandatory life sentence for murder. She considers prosecutorial guidelines as another possible legal strategy, but concludes that nothing short of repeal of the mandatory life sentence can redress the power imbalance between prosecutor and accused and provide battered women with an opportunity to proceed to trial and have their actions recognized as justified by way of self-defence.

L'auteur favorise l'abrogation des peines minimales obligatoires en raison de la distorsion qu'elles peuvent causer aux défenses disponibles pour les femmes battues accusées d'avoir tué leur partenaire violent. Après avoir examiné à la fois comment les défenses face au meurtre sont biaisées et les stratégies juridiques qui visent l'élimination de la discrimination dont font face les femmes qui plaident le moyen de défense de légitime défense, l'auteur examine une transcription d'un procès récent où une femme a plaidé la légitime défense. L'auteur utilise cette transcription en guise d'illustration concrète de trois façons dont le moyen de défense de légitime défense est biaisé par l'imposition de la peine obligatoire à l'accusée déclarée coupable de meurtre. L'auteur considère que des lignes directrices pour procureurs pourraient servir de stratégie juridique possible, mais conclut que seulement l'abrogation des peines à perpétuité obligatoires peut redresser le manque d'équilibre du pouvoir entre le procureur et l'accusé. De plus, l'auteur souligne que les femmes battues doivent avoir une opportunité de faire reconnaître leurs actes comme étant justifiés par la légitime défense lors d'un procès.

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I. INTRODUCTION

In this article I argue in favour of abolishing mandatory minimum sentences as part of a long-term strategy to secure justice on behalf of battered women who kill violent mates. I propose this strategy after several years of research, writing, and advocacy on the subject of the law of self-defence, including work for the Canadian Association of Elizabeth Fry Societies and the Self-Defence Review, which has enriched and challenged my thinking on criminal law reform.

I argue that mandatory minimum sentences introduce distortions into murder defences, and that these distortions significantly contribute to the injustice that battered women face in the criminal trial process. In large part, the mandatory life sentence of imprisonment for murder contributes to this distortion by adding further leverage to the position of the Crown prosecutor to exact a guilty plea to manslaughter, which carries a discretionary sentence, from someone who cannot bear the risk of getting the life sentence should she fail at trial. Defence and Crown collaborate in this distortion by abandoning the complete defence of self-defence and instead reframing the woman's defence—as either provocation or no intent to kill—in order to justify a manslaughter plea. Further, the prospect of conviction and a subsequent life sentence exert tremendous pressure on defence lawyers to distort self-defence, in order to secure acquittal, in ways that accord with “psychiatrized” and familial understandings of women's homicidal acts.

I base the characterization of defences as distorted upon a judgment that defences are applied or denied in a manner that is *both* a departure from doctrinal origins *and* at conflict with other accepted legal values, principles, or rights. In fact, in many of the distortion examples (discussed in Part III, below), the deployment of defences is fundamentally at odds with the equality rights and interests of relatively subjugated groups in our society.

Serious scholars in the United States,¹ the United Kingdom,² Australia,³ New Zealand,⁴ and Canada⁵ have concluded that battered women on trial for murder of their violent mates face discriminatory racial and sexual barriers when they allege that they killed in self-defence. Much has been written about the ways in which defences fail to conform to women's realities,⁶ and many strategies to redress this discrimination have been endorsed and attempted. Yet, none can be credited with achieving any marked increase in acquittals for battered women on trial. While it is true that the repeal of mandatory penalties is not a sufficient condition for the elimination of distortion in defences and systemic sex discrimination experienced by battered women on trial, it is a *necessary* condition: no other criminal law reforms or criminal justice policies can shift the power balance so effectively as to ensure a fair opportunity to women to have their legitimate claims to self-defence adjudicated.

In this article, I will first briefly discuss the various reforms that have been pursued, as well as their limitations, with respect to facilitating

¹ E.M. Schneider, *Battered Women and Feminist Law-making* (New Haven: Yale University Press, 2000) 146 at n. 116 and H. Maguigan, "Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals" (1991) 140 U. Pa. L. Rev. 379.

² C. Wells, "Battered Women and Defences to Homicide: Where Now?" (1994) 14 *Leg. Stud.* 266 and A. Young, "Conjugal Homicide and Legal Violence: A Comparative Analysis" (1993) 31 *Osgoode Hall L.J.* 761.

³ J. Stubbs & J. Tolmie, "Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?" in J. Stubbs, ed., *Women, Male Violence & the Law* (Sydney: Institute of Criminology, 1994) 192 [hereinafter "Battered Woman Syndrome in Australia"] and R. Bradfield, "Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?" (1993) 5 *Psychiatry, Psychology & Law* 71.

⁴ N. Seuffert, "Battered Women and Self-Defence" (1997) 17 *N.Z. L. Rev.* 292.

⁵ S. Noonan, "Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (Or (Re)Inscribing the Familiar?)" in A. Bottomley, ed., *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Press, 1996) 191 and A.M. Boisvert, "Légitime défense et le 'syndrome de la femme battue': R. c. Lavalée" (1991) 36 *McGill L.J.* 191.

⁶ For mistake of fact see A. Acorn, *The Defence of Mistake of Fact and the Proposed Repeal of the General Part of the Criminal Code: A Feminist Critique and Proposals for Reform* (Edmonton: Alberta Women & Seniors Secretariat, 1994). For self-defence see C. Boyle, "A Feminist Approach to Criminal Defences" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991) 273. For duress see I. Grant, "Exigent Circumstances: The Relevance of Repeated Abuse to the Defence of Duress" (1997) 2 *Can. Crim. L.R.* 331. For provocation see J. St. Lewis & S. Galloway, *Reform of the Defence of Provocation* (Toronto: Ontario Women's Directorate, 1995). For extreme intoxication see E. Sheehy, *The Intoxication Defence in Canada: Why Women Should Care* (Ottawa: Canadian Advisory Council on the Status of Women, 1995). For PMS see K. Kendall, "Masking Violence Against Women: The Case of Premenstrual Syndrome" (1991) *Can. Woman Stud.* 17.

acquittals for battered women on trial. I will outline my distortion argument by reference to examples from the defences of necessity, provocation, and in more detail, self-defence. I will then demonstrate the self-defence points by using the transcript from the recent prosecution of a woman for first-degree murder of her husband. Finally, I will consider the implications of this case for controlling prosecutorial use of the mandatory sentence and for other battered women on trial. I conclude that nothing short of the repeal of the mandatory life sentence can redress the power imbalance between prosecutor and accused, and provide battered women with an opportunity to proceed to trial and have their actions recognized as justified by way of self-defence.

II. LAW REFORM AND SELF-DEFENCE FOR BATTERED WOMEN

Initial reform efforts in most jurisdictions have centered on creating a precedent for the introduction by the defence of expert testimony on wife battering and the long-term effects of battering on women in order to persuade a jury that the woman in question was defending her life when she killed her mate. While the precise requirements of the elements of self-defence differ across jurisdictions, generally, the proposed evidence has been used to make out the specific elements of the defence—such as whether the woman actually and reasonably believed that she was in grave danger—and to refute widely accepted social beliefs that minimize the violence women experience from their mates and blame women for failing to find a non-violent resolution.

Elizabeth Schneider has documented this legal struggle in the United States where key precedents were secured as early as 1977 (in the *State v. Wanrow*⁷ decision before the Washington Supreme Court) and 1984 (in the *State v. Kelly*⁸ decision before the New Jersey Supreme Court). However, Holly Maguigan's comprehensive 1991 study of appellate review of the convictions of battered women on trial for murder suggests that the existence of a strong precedent does not prevent the wrongful conviction of such women.⁹ She found a 40 per cent reversal rate on appeal for this category of cases and attributed most error to judicial failure to appropriately apply existing law. Similarly, a 1996 study of 270 cases in the

⁷ 559 P. 2d 548 (1977) as discussed in Schneider, *supra* note 1 at ch. 8.

⁸ 478 A. 2d 364 (1984) as discussed in Schneider, *supra* note 1.

⁹ Maguigan, *supra* note 1.

United States concluded that "the defense's use of, or the court's awareness of, expert testimony on battering and its effects in no way equates to an acquittal on the criminal charges lodged against a battered woman defendant."¹⁰

In Canada, the 1990 *R. v. Lavallee*¹¹ decision accomplished the aspirations of feminist law reformers when Madame Justice Bertha Wilson authored a decision that secured the admissibility of expert evidence on battered woman syndrome. Her judgment did several things: it related this expert evidence to specific aspects of the defence of self-defence; it exposed and refuted many of the pernicious beliefs about women who are battered; and it identified our legal history of sex discrimination as implicated in shaping both our social beliefs about men's marital violence and a gendered law of self-defence.¹² Reformers in other jurisdictions, like Australia and the United Kingdom, are still waiting for such a comprehensive, precedent-setting decision on self-defence and battered women.

In spite of the strong case law provided by the Supreme Court of Canada, *Lavallee* has not produced a rash of acquittals but has, instead, facilitated guilty pleas to manslaughter and sentences that tend to range from approximately four-years incarceration to suspended sentences. While it is of critical importance that some women have been able to avoid the stigma of a murder conviction and the crushing life sentence that follows, it is disturbing that many of the women may have been acquitted outright of all charges, in light of the available self-defence evidence, had they gone to trial. This observation has been made by several feminist academics¹³ who have found that only a handful of women have been acquitted based on the precedent set by *Lavallee*.

¹⁰ U.S. Department of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* (Washington: Office of Justice Programs, 1996) at vi [hereinafter *Battering and Its Effects in Criminal Trials*].

¹¹ [1990] 1 S.C.R. 852 [hereinafter *Lavallee*].

¹² C. Boyle, "The Battered Wife Syndrome and Self-Defence: *Lavallee v. R.*" (1990) 9 Can. J. Fam. L. 171 and E. Sheehy, J. Stubbs & J. Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations" (1992) 16 Crim. L.R. 387.

¹³ E. Sheehy, "Battered Women Syndrome: Developments in Canadian Law After *R. v. Lavallee*," in J. Stubbs, ed., *Women, Male Violence & the Law* (Sydney: Institute of Criminology, 1994) 174 [hereinafter "Battered Woman Syndrome"]; E. Sheehy, *What Would a Women's Law of Self-Defence Look Like?* (Ottawa: Status of Women Canada, 1995); and M. Shaffer, "The Battered Women Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" (1997) 47 U.T.L.J. 1.

A second law reform strategy has been to lobby for substantive law reform. In the United States, at least twelve states have passed new statutory provisions governing the admissibility of evidence of a woman's experience of past battering and of expert testimony on "battered woman's syndrome."¹⁴ Maguigan's work suggests, however, that legal change is not the critical component: rather, most of the legal failures of the claims of battered women on trial can be attributed to the exercise of discretion by police, prosecutors, and judges who frame the case for the jury through evidence gathering, choice of charges, determinations of admissibility, and jury instructions.

Reform of the substantive law of self-defence has been pursued in Canada by various official reform bodies, but nearly all have done so without attention to the context of battered women who kill and without a commitment to equality as a guiding principle.¹⁵ Feminists have attempted to insert equality and women's interests into the law reform agenda on self-defence, and have argued for gender-specific understandings of a duty to retreat and the relevance of past experiences of violence. It seems, however, quite unlikely that any reform worth having—from the point of view of battered women—will be pursued by the federal government, even though its most recent consultation document raises, for the first time, battered women's issues.¹⁶ This document remains committed to gender-neutral law reform, and does not adopt substantive equality as a benchmark

¹⁴ *Battering and Its Effects in Criminal Trials*, *supra* note 10 at ix.

¹⁵ See *e.g.* Canada, Department of Justice, *Reforming the General Part of the Criminal Code* (Consultation Paper) (Ottawa: Department of Justice, 1994); Canada, Department of Justice, *Toward a New General Part of the Criminal Code: Details on Reform Options* (Ottawa: Department of Justice, 1994); Canada, Department of Justice, *Proposals to Amend the Criminal Code (General Principles)* (Ottawa: Minister of Justice, 1993); Canadian Bar Association, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code* (Ottawa: Canadian Bar Association, 1993); Subcommittee on the Recodification of the General Part of the *Criminal Code*, Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada* (Ottawa: Minister of Supply and Services, 1993); Law Reform Commission of Canada, *Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1986); and Law Reform Commission of Canada, *Criminal Law: The General Part—Liability and Defences* (Ottawa: Minister of Supply and Services, 1982).

¹⁶ Canada, Department of Justice, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Consultation Paper) (Ottawa: Department of Justice, 1998) at 27. For critical responses to these proposals see *Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2000) [hereinafter *Response to Reforming Criminal Code Defences*]; and A. Côté, D. Majury & E. Sheehy, *Stop Excusing Violence Against Women! NAWL's Position Paper on the Defence of Provocation* (Ottawa: National Association of Women & the Law, 2000).

for reform. Furthermore, substantive law reforms of this nature are subject to interpretive discretion by the police, prosecutors, and judges who must implement them. Thus, even a gender-specific, equality-based reform may not survive operational interpretations or constitutional challenge. Finally, given that most battered women in Canada do not undergo trial and given that access to the trial transcripts for those who do is subject to a formidable financial barrier, we do not in fact have a strong research base from which to assess the need for substantive reform of the law of self-defence. For all of these reasons, substantive reform is not a promising strategy at this point in time.

Feminists in several jurisdictions have also identified inadequately trained lawyers as part of the dynamic that produces unjust convictions for battered women on trial for murder. As a result, they have embarked upon a third strategy, which consists of working with and educating defence lawyers. In this context, Schneider discusses the U.S. case law on ineffective assistance of counsel claims. She notes that battered women on trial for murder make up a substantial portion of these claimants in cases both where it is alleged that they pleaded guilty based on inadequate legal advice and where the trial was poorly run because they were not urged to take the stand to testify in their own defence, expert evidence was not introduced, or evidence of past violence by the deceased was not offered at trial.¹⁷ Sue Osthoff, director for the National Clearinghouse for the Defense of Battered Women, reports that based on calls received from defence lawyers and the significantly higher rate at which battered women's homicide convictions are overturned on appeal, "many attorneys still do not understand the relevance of such testimony and fail to offer an expert on behalf of their clients."¹⁸ Julie Stubbs and Julia Tolmie have worked with defence teams and expert witnesses in Australia and New Zealand and have written about the difficulties of this endeavour and their own frustrations with the ultimate trial strategy.¹⁹ Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, has also attempted to secure an audience with defence lawyers representing battered women on trial, and has encountered a great deal of resistance from wary defence

¹⁷ Schneider, *supra* note 1 at 144-46.

¹⁸ S. Osthoff, "Preface" in J. Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases* (Philadelphia: National Clearinghouse for the Defense of Battered Women, 1994) at v.

¹⁹ J. Stubbs & J. Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 C.J.W.L. 122 [hereinafter "Race, Gender and the Battered Woman Syndrome"].

lawyers who see no real role for feminist activists in their legal work. While innovations in legal education²⁰ and the creation of an information clearinghouse for lawyers may help systematize what is otherwise a random and fortuitous process of educating lawyers, this strategy is far from being fully implemented.

Post-conviction review strategies have been invoked in several states in the United States, where governors have pardoned women after undertaking large scale conviction reviews of these kinds of cases.²¹ In Queensland, Australia, Robyn Kina was granted a new trial after a judicial review of her conviction revealed that the poor communication established with her counsel had precluded the development of a relationship of trust, which in turn had submerged her account of the facts giving rise to the homicide and prevented her from testifying at her own trial.²² Unfortunately, while these kinds of review processes may be successful strategies for the individual women, they have not generated law reform that will serve to benefit other battered women on trial, particularly when they are executive processes that are conducted rarely and in relative secrecy, and without public disclosure of the criteria used to evaluate the claims.

In Canada, the Self-Defence Review offered the possibility of both individual relief and law reform when Madame Justice Lynn Ratushny was charged with reviewing the cases of ninety-eight convicted women who alleged that they acted in self-defence when they killed their mates. Due to the role of the executive, the criteria for review, and the women's privacy concerns, this process did not secure the release of any women, nor has it provided a clear basis for reform of the law of self-defence that will benefit other battered women on trial.²³

The two most significant reform possibilities advanced by Madame Justice Ratushny in her *Final Report for the Self-Defence Review*²⁴ have yet to be responded to by the federal government of Canada. Madame Justice

²⁰ See Schneider's description of her course offering "Battered Women and the Law," *supra* note 1 at 212-27.

²¹ A. Madden, "Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum" (1993) 4 *Hastings Women's L.J.* 1.

²² *In Re: Robyn Bella Kina*, Reference by the Attorney General under s. 672A of the *Criminal Code* to the Supreme Court of Queensland, 1993.

²³ E. Sheehy, "Review of the Self-Defence Review" (2000) 12 *C.J.W.L.* 197.

²⁴ Justice L. Ratushny, *Self-Defence Review (Final Report)* (Ottawa: Minister of Justice, 1997) [hereinafter *Self-Defence Review*].

Ratushny, after discussing the systemic features that seem to routinely produce guilty pleas for battered women on trial, had submitted a law reform proposal that would permit a jury to recommend a sentence of less than life imprisonment for such women if they are convicted of murder. She also suggested a second reform geared at creating Crown guidelines to inform and constrain the exercise of discretion in these cases. In particular, she recommended that prosecutors only proceed to trial with manslaughter rather than murder charges where the Crown would be prepared to accept a guilty plea to manslaughter, and where the plea is "equivocal" due to a possible defence of self-defence.²⁵ While the first reform is a very positive step forward that has received support from significant branches of the legal community,²⁶ it does not go far enough to apply to women who are at risk of being convicted of first-degree murder, and it would not guarantee a woman charged with murder that she will be out of the mandatory life regime should she fail at trial in her bid for self-defence.²⁷ The second reform is much more likely to enable women to proceed to trial and argue self-defence. In the conclusion, I will return to discuss the potential in this reform in light of my analysis of the distortion of defences and their impact on the prosecution of Kim Kondejewski.

III. THE DISTORTION EXAMPLES

There are some obvious examples of the phenomenon of distortion that have been discussed at length in the legal literature and in public debates. However, the distortion is called something else, like sex discrimination or homophobia,²⁸ and it is not often attributed to the mandatory sentence.²⁹ It is true that examples of defence distortions that are not connected to mandatory minimum sentences can be found in jurisdictions that have no legislated minimum sentence for murder,³⁰ and

²⁵ *Ibid.* at 174-80.

²⁶ S. Bindman, "Call for leniency gets wide support" *The Ottawa Citizen* (25 July 1997) A3.

²⁷ See Sheehy, *supra* note 23 at 227.

²⁸ See e.g. K. Thomas, "Beyond the Privacy Principle" (1992) 92 *Colum. L. Rev.* 1431

²⁹ The exception to this generalization is the brief to the Department of Justice submitted by the Canadian Association of Elizabeth Fry Societies, *Response to Reforming Criminal Code Defences*, *supra* note 16 at 14.

³⁰ Tasmania, New South Wales, and Victoria have no mandatory life sentence (see I. Grant, "Rethinking the Sentencing Regime for Murder" in (2001) 39 *Osgoode Hall L.J.* PAGE NUMBER), but these jurisdictions still experience defence "distortion."

in Canadian law with respect to some offences for which there is no mandatory minimum.³¹ However, as the stakes get higher with minimum sentencing regimes, it becomes even more pressing to resort to defences in order to achieve whatever result mitigation of sentence might otherwise accomplish. For example, the form in which necessity was argued by Robert Latimer³² when he was on trial for the murder of his daughter is, I would suggest, a distortion of a defence usually used to defend the preservation of life. The law has required that to establish the defence the harm avoided be greater than that inflicted.³³ Latimer's necessity defence was that it was necessary, from the perspective of his daughter Tracy's interests, that he end her life. Not only does this application of the defence strain the doctrine; it also requires that the harm avoided be assessed from the point of view of a dependent child with multiple and serious disabilities. The problem is that these serious disabilities deprived the child of a voice to articulate her experience of harm. Thus, the proposed application of the defence tends to reinforce Tracy's subjugation.³⁴

The provocation defence is another defence that provides many examples where its application strays from its doctrinal origins. Legal doctrine has required for the defence either provocative acts, such as assault (as opposed to mere words), or actual, sudden confrontation by a husband of his wife in the act of adultery.³⁵ As has been documented by several scholars, the provocation defence has been extended far beyond its boundaries to include allegedly provocative words, men who hear about or even suspect adultery,³⁶ and alleged "homosexual advances." For example, provocation (in both formal and informal guises) is routinely available to defend intimate femicide of female partners who are attempting to leave their husbands and boyfriends,³⁷ and to the killing of gay men based on so-

³¹ For example, necessity defences have been successful in a few wife assault cases. See *R. v. Morris* (1981), 31 A.R. 189 (Q.B.) and *R. v. Manning* (1994), 31 C.R. (4th) 54 (B.C. Prov. Ct.).

³² *R. v. Latimer*, [2001] 1 S.C.R. 3.

³³ *R. v. Perka*, [1984] 2 S.C.R. 232.

³⁴ This reinforcement of inequality stands in sharp contrast to Sue Rodriguez's claim to a right to assisted suicide, as she was a capable adult who made that decision and articulated it herself: *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519.

³⁵ *D.P.P. v. Camplin*, [1978] 2 All E.R. 168 (H.L.).

³⁶ V. Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defence" (1997) 106 Yale L.J. 1331 and 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 Côté Nord, 1991).

³⁷ Côté, *ibid.*

called “homosexual advances” or “homosexual panic,”³⁸ thus reducing what would otherwise be murder to manslaughter. These applications of the defence conflict with our current legal stance on women’s right to exit dead relationships,³⁹ and on the rights of gay men and lesbians to be free from private violence that is tolerated by the state.⁴⁰

Most importantly, for the purposes of this article, the defence of self-defence for battered women provides another significant context wherein the mandatory life sentence creates distortion. This distortion occurs in three specific ways. First, and perhaps most commonly from what can be gathered from the reported decisions, self-defence is abandoned as a trial strategy and battering is instead pleaded in mitigation in a sentence bargain, in all likelihood because of the enormity of the penalty attached to conviction and to the emotional price exacted from battered women on trial. While this pattern of guilty pleas by battered women to avoid trial has been noted in the United States⁴¹ (and to a lesser extent in Australia),⁴² it stands out more dramatically in the Canadian context: the leading decisions of *Lavallee* and *R. v. Malott*⁴³ are viewed as far more progressive for women than the precedents in other jurisdictions,⁴⁴ and these decisions were reasonably expected to produce more acquittals for battered women charged with murder. Academics have examined reported sentencing decisions⁴⁵ and Madame Justice Ratushny has viewed entire files where there were legitimate, triable issues of self-defence that were never litigated because of the systemic barriers that battered women would have to cross to get to trial. Ratushny identifies hurdles such as the impact of having the responsibility to care for young children, the effect of long-term abuse on

³⁸ S. Banks, “The ‘Homosexual Panic Defence in Canadian Criminal Law’ (1997) 1 C R (5th) 371.

³⁹ Nourse, *supra* note 36.

⁴⁰ Thomas, *supra* note 28.

⁴¹ Schneider, *supra* note 1 at 146, n. 116.

⁴² J. Stubbs & J. Tolmie, “Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome” (1999) 23 *Melb. U. L. Rev.* 709 at 743 [hereinafter “Falling Short”], discussing the deal offered to and rejected by Eileen Waugh

⁴³ [1998] 1 S.C.R. 123 [hereinafter *Malott*].

⁴⁴ See e.g. “Falling Short,” *supra* note 42 at 717-19, 721 and Schneider, *supra* note 1 at 140-42.

⁴⁵ See Sheehy, *supra* note 13; and Shaffer, *supra* note 13

women's willingness and ability to testify in public, and women's remorse, expressed in the belief that they deserve punishment.⁴⁶

Second, when battered women go to trial and argue self-defence, their defence is frequently presented as a psychological syndrome rather than a rational reaction to life-threatening violence. Several feminists have made the significant point that although *Lavallee* opened a door in terms of providing opportunities to rely on expert evidence of "battered women syndrome" to both expand and concretize the legal requirements of self-defence, self-defence has been thereby recast, if not distorted, by its conceptualization as a "syndrome" when invoked by a battered woman rather than an objectively tested defence of justification.⁴⁷ For example, the few Canadian cases that discuss the evidence presented on behalf of battered women on trial or at sentencing tend to emphasize women's helplessness, paralysis, dependency, and emotional turmoil as part of the "syndrome" explaining their "overreaction," rather than emphasizing the deceased's record of brutality.⁴⁸ As Kimberley White-Mair comments in this context: "the possibility of incorporating alternative narratives of women's criminality continues to be blocked in part by the perpetual psychiatrization of female behaviour and the continued reliance on psychiatric and psychological theory that reaffirms common beliefs about women's experiences."⁴⁹

This trend by defence to present, and judges to instruct on, women's self-defence claims in syndrome terms has been documented not only in Canada, but also in the United States⁵⁰ and Australia.⁵¹ In light of this pattern, it is clear that systemic sexism is deeply implicated in this particular distortion: men's violence against women is denied, trivialized, explained, and forgotten over and over again by individuals in the criminal justice system, as well as by legal doctrines, no matter how recent or staggering the data on this violence is. Instead of focusing on men's violence, the focus is on women's subjective and psychiatric states to explain what is presumed to be their irrational behaviour. Further, battered

⁴⁶ *Self-Defence Review*, *supra* note 24 at 159-64.

⁴⁷ Schneider, *supra* note 1 at 135-37.

⁴⁸ Sheehy, "Battered Woman Syndrome," *supra* note 13 at 176-83 and Shaffer, *supra* note 13.

⁴⁹ K. White-Mair, "Experts and Ordinary Men: Locating *R. v. Lavallee*, Battered Woman Syndrome, and the 'New' Psychiatric Expertise on Women within Canadian Legal History" (2000) 12 C.J.W.L. 406 at 435.

⁵⁰ Schneider, *supra* note 1 at 123-32.

⁵¹ "Battered Woman Syndrome in Australia," *supra* note 3.

women cooperate with our disbelief in men's violence by withholding information that they know we cannot bear, will not believe, or will use against them.⁵² In addition, in order to survive trauma, many women must "forget" and minimize ongoing violence and threat, and some women have survived years and many incidents. Therefore, their accounts rarely immediately emerge fully, in chronological order, or in meticulous detail.⁵³ As a consequence, in every prosecution of a woman who alleges that she killed her partner in self-defence, women's credibility is at issue when they disclose the violence of their partners. In these cases, the value of women's lives is on trial.⁵⁴

The vulnerability of women accused of murder, together with the possibility of life imprisonment, call for desperate measures, and the defence's use of battered women's syndrome evidence to argue self-defence is fraught with legal risk. It is also laden with self-abnegation for women since it requires identification with victim status⁵⁵ and with many negative stereotypes of womanhood, such as passivity and dependency. Not infrequently, it also triggers resistance among legal professionals, and, in the public, backlash against individual battered women.⁵⁶

Stubbs and Tolmie have examined trial transcripts of battered women on trial for murder and have argued that reliance on syndrome evidence puts the woman's self-defence claim at risk: it tends to focus on her syndrome and her subjective perceptions, rather than on the deceased's

⁵² See F. Martin, *A Narrow Doorway: Women's Stories of Escape From Abuse* (Burnstone, Ont.: General Store, 1996) at 16, 141, 163.

⁵³ *Ibid.*

⁵⁴ This point about the low value placed upon women's lives and security was recognized in a rare legal decision regarding sex discriminatory investigative techniques used to apprehend the "balcony rapist" used by Toronto police in *Jane Doe v. Metropolitan Toronto Police* (1993), 39 O.R. (3d) 457 (Gen. Div.).

⁵⁵ For the negative implications of assuming "victim" status see K. Bumiller, "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection" (1987) 12 Signs 421.

⁵⁶ Karla Homolka's plea bargain for twelve years for manslaughter with respect to the murders of Kristen French and Leslie Mahaffy, which was in large part based upon ample evidence of systematic and brutal violence perpetrated by her co-accused Paul Bernardo against her, was accepted not only by senior Crown lawyers but also by Mr. Justice Patrick Galligan, as discussed in his investigative report, *Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka* (Toronto: Queen's Printer for Ontario, 1996). However, the public uproar over Homolka's sentence has been extraordinary and has resulted in death threats and public interference with the service of her sentence. P. Ray, "Approaching dates in Internet death pools for Homolka worry her lawyer" (CP, 6 February 2001). Most recently, see M. Wentz, "How to get away with murder (for women only)" *The Globe and Mail* (10 March 2001) A15. On the more general point of resistance by legal professionals see Schneider, *supra* note 1 at 147.

violence and the reasonableness of her reaction in light of her assessment of the threat.⁵⁷ She may therefore fail on the objective branch of the test for self-defence by failing to conform to the stereotypes associated with the syndrome of passivity and learned helplessness.⁵⁸ Further, if she is pathologized too much, her evidence may be viewed as inherently unreliable. Regina Schuller's research, using simulated juries and a literature review, indicates that there are few differences in trial outcomes emanating from jurors hearing self-defence argued in "syndrome" terms as opposed to those who hear self-defence argued in social context terms, whereby evidence of past battering and the woman's social reality is presented. She notes, however, a significantly greater juror propensity to view the woman's thinking as distorted, and her capacity for rational choice as diminished, when self-defence is argued in "syndrome" terms.⁵⁹

Defence lawyers choose the syndrome path to defending battered women for many reasons, but the mandatory life sentence may mean that they cannot afford to leave it out of their strategy. While Stubbs and Tolmie document several successful self-defence efforts that were pursued without resort to syndrome evidence (two of which were tried in a jurisdiction that has a mandatory life sentence), extensive pre-trial preparation of the social context evidence seems to have been critical.⁶⁰ Schneider makes the point, based on the rate at which battered women file "ineffective assistance of counsel" claims and succeed in clemency applications post-conviction, that few defence lawyers either understand or are equipped to engage in defence work that does not rely heavily on simplified and stereotyped renditions of women's motivations and actions.⁶¹

In *Malott*, Madame Justices L'Heureux-Dubé and McLachlin rejected the syndrome version of self-defence for battered women. They emphasized that a shift in the objective test itself is required (rather than an accommodation for the fractured "perceptions" of women who have been battered), and placed the legal issues for resolution in the wider context of women's collective experience of battering and the legal

⁵⁷ "Race, Gender and the Battered Woman Syndrome," *supra* note 19.

⁵⁸ See the studies discussed in "Falling Short," *supra* note 42 at 737.

⁵⁹ R. Schuller, "Battered Woman's Syndrome Evidence: Its Impact on Juror's Decisions" in K. Bonnycastle & G. Rigakos, eds., *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 112 at 115.

⁶⁰ E. Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58 Albany L. Rev. 973.

⁶¹ Schneider, *supra* note 1 at 122, 144-46.

response to it. Their judgment in *Malott* made four specific points. First, battered woman syndrome is not a defence in itself; rather, it is relevant to the elements of self-defence. Second, *Lavallee* must not be read as modifying the objective test to include the subjective perspectives of battered women. Rather, it redefines the objective standard altogether.⁶² Third, it must not be read as a script for stereotypes of passivity that battered women must conform to in order to entitle them to rely on self-defence.⁶³ Lastly, to avoid the syndromization trap, self-defence must be informed by the woman's own individual experiences—her “need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women, and no guarantee that the violence would cease simply because she left”⁶⁴—as well as those experiences shared “with other women, within a context of a society and a legal system which has historically undervalued women's experiences.”⁶⁵

While the two female Justices of the Supreme Court of Canada specifically rejected the distortion attributable to syndrome evidence led on behalf of battered women on trial for murder, they stood alone on these points in *Malott*. Further, the current legal position of the majority of the Court as set out in *R v. Petel*,⁶⁶ may undercut the fine-tuning that these justices urged. *Petel* seems to conceptualize past experience of violence as affecting the accused's *subjective* perception of danger as opposed to the *objective* reasonableness of those perceptions. In *Petel*, the Court emphasized that the accused's state of mind is the critical issue in self-defence and not the acts of the deceased, stating that any requirement that an anticipated assault be imminent is a common sense presumption of fact that can be rebutted by evidence, such as that supplied by experts. The Court went on to apply *Lavallee*'s analysis to a woman who did not allege past battering by focusing on her subjective experience of the potential violence emanating from her daughter's boyfriend rather than on any expert or social context evidence. This application endorses an understanding of self-defence that is individual, apolitical, and potentially de-gendered.

⁶² *Malott*, *supra* note 43 at 141.

⁶³ *Ibid.* at 141–43.

⁶⁴ *Ibid.* at 143–44.

⁶⁵ *Ibid.* at 144.

⁶⁶ [1994] 1 S.C.R. 3 [hereinafter *Petel*].

Third, and finally, self-defence, when presented to a jury, may also need to be retold or reshaped to make it more compelling for a jury, in light of the low value society places on women's lives and on women's credibility. For example, much is made by prosecutors of whether there is corroborating evidence of past violence by the deceased;⁶⁷ this is in sharp contrast to the operative assumptions when an accused argues that a gay man approached him in a sexually aggressive manner. Women may need to prove that the deceased was violent to many people, not just privately to her.

Battered women on trial for murder may be compelled to emphasize the danger or threat to others, such as their children, in order to succeed with their own self-defence claims. In this context it is clear that children cannot be immunized from threats to their mothers, especially when made by their own fathers, and that many children suffer psychological and physical harms as a consequence of wife battering. It would, therefore, be quite reasonable to argue that every threat to a mother's life is at some level a threat to the safety and well-being of her children. However, the legal arguments are not framed in this way, nor have we seen any clear legal support for the proposition that a mother is entitled to kill a father to protect the children from him. Instead, children provide the factual backdrop to the mother's self-defence claim and women's experience of their mate's brutality provides the context within which claims to defence of others are argued.

Perhaps it should not be surprising that in the United States, one of the first legal breakthroughs in self-defence for battered women was a case in which the woman on trial was in fact defending her child. In *Wanrow*,⁶⁸ the accused's child and her caregiver's child had previously been assaulted by the deceased, without redress, and on the night in question he had broken into the accused's home and tried to enter her son's room.⁶⁹

⁶⁷ See e.g. the trial of Lilian Getkate, where the Crown made much of the fact that there was "no evidence" that she had been abused or was under threat for her life. A Crown witness attempted to suggest that the massive weapons collection in the home and the live explosive device set to blow in the basement could be attributable to the accused: P. Hum, "Slain man described as calm, gentle" *The Ottawa Citizen* (17 September 1998) D1.

⁶⁸ *Supra* note 7.

⁶⁹ I am grateful for an article by Kathleen Lahey that drew this to my attention, although her focus was on the racism that pervaded Yvonne Wanrow's case, and not the fact that she was actually defending her child: "On Silences, Screams, and Scholarship: An Introduction to Feminist Legal Theory" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 328.

Nowhere does the case discuss how, given the facts at issue, this is a self-defence case. Another significant Canadian case that broke ground prior to *Lavallee, R. v. Whynot (Stafford)*,⁷⁰ also involved a woman who was attempting to protect other people from her mate. Her defence was framed as defence of others, namely her son and her neighbour, with a backdrop of her mate's long-standing and notorious record of violence against her. Her acquittal by a Nova Scotia jury constituted a significant legal victory.⁷¹ The Court of Appeal sent Jean Whynot back to trial for error in the trial judge's instructions to the jury, holding that an assault had to be in progress before defence of others could be invoked. However, the Supreme Court of Canada made it clear in *Lavallee* that the court of appeal ruling was no longer good law.

IV. THE KONDEJEWSKI TRIAL

These arguments that distortion of self-defence is at least partly attributable to the mandatory life sentence may be made more vivid by reference to the trial transcript for the first-degree murder trial of Kim Kondejewski, which took place in Brandon, Manitoba in 1998.⁷² At the close of the trial, the judge withdrew first-degree murder as a possible verdict from the jury and charged the jurors on second-degree murder and manslaughter,⁷³ even though the judge had committed Kondejewski for trial after the preliminary inquiry on first-degree murder charges and had dismissed a motion to dismiss initiated by the defence at the close of the Crown case.⁷⁴

The only evidence that could possibly have supported a conviction for planned and deliberate murder pursuant to section 231(2) of the *Criminal Code*⁷⁵ was that the accused had been sitting in the bedroom holding a gun moments before her husband entered the room, and that she had written a note to her children stating "Please forgive me for what I've

⁷⁰ (1983), 37 C.R. (3d) 198 (N.S. C.A.) [hereinafter *Whynot(Stafford)*].

⁷¹ B. Vallée, *Life After Billy. Jane's Story: The Aftermath of Abuse* (Toronto: McClelland-Bantam, 1993).

⁷² Transcript of proceedings at trial before Mr. Justice Mykle in the City of Brandon, Province of Manitoba, 12 May 1998 [hereinafter "Transcript"].

⁷³ *Ibid.*, vol. 7 at 14.

⁷⁴ *Ibid.*, vol. 3 at 30.

⁷⁵ R.S.C. 1985, c.C-46.

done.”⁷⁶ Even though this note was written in the past tense, the Crown posited that it had been written before Kondejewski shot her husband, demonstrating a deliberated plan to kill him. In spite of the fact that Ms. Kondejewski endured a seven day trial, it took the jury only one hour to arrive at a verdict of not guilty. The nature of the Crown’s case, described below, explains why the case was so easy for the jury.

Having read the transcript several times, I can only conclude that the mandatory minimum for murder so exacerbates the unequal power between Crown and accused when a battered woman like Kim Kondejewski is on trial that the prosecutor simply has too much leverage. My reading of the evidence available at the preliminary inquiry and at trial is that the Crown prosecutor in this case had grounds to decline to prosecute Kondejewski. There was ample evidence of a complete defence of self-defence, as well as evidence that the deceased had caused grievous injury to his children. Thus, it is reasonable to conclude that it was not in the public interest to proceed to prosecution.⁷⁷

In this case, the Crown proceeded with first-degree murder charges even though much of the Crown’s own evidence demonstrated that the deceased was an extremely violent and dangerous man. For example, two of the Crown’s witnesses at the preliminary inquiry (the children of the marriage) both testified to rampant violence by the deceased: choking, slapping, punching, kicking, throwing objects such as an iron,⁷⁸ pointing a firearm at their mother and pulling the trigger,⁷⁹ threats to kill her,⁸⁰ and constant verbal abuse by the deceased. It was also a matter of public record that the son had been removed from the home for six weeks by child welfare authorities due to extreme violence committed against him by his father (burning the child’s hand when he was six years old to “teach him a lesson” about playing with matches, choking and punching him in the face, slapping him, and throwing him down the stairs and into walls) and one

⁷⁶ *Ibid.*, vol. 2 at 23.

⁷⁷ See e.g. K. MacQueen, “Justifiable Homicide” *The Globe and Mail* (3 May 1991) A1, as well as the argument advanced by S. Ross, “Battered Wife Syndrome and the Role of Lawyers” (1998) 72:11 *Law Institute J.* 39.

⁷⁸ “Transcript,” *supra* note 72, vol. 3 at 42.

⁷⁹ *Ibid.*, vol. 3 at 46.

⁸⁰ *Ibid.*, vol. 3 at 49.

incident where the boy ran out of an upstairs window when he heard his father get and load a gun and begin to come up the stairs after him.⁸¹

The Crown's evidence, provided by police witnesses, also substantially supported a portrait of a dangerous man who collected banned and illegal weapons. In fact, police testified that after the house was searched, the army had removed pistols, shotguns, assault weapons, bayonets, ammunition, re-loading machines, bows and arrows, rockets, grenades, and gunpowder set to explode from the house. They also testified that they had removed a weapons collection more extensive than anything ever seen by officers.⁸²

Other elements in the Crown's case further supported a defence of self-defence: both children stated at the preliminary inquiry, under cross-examination, that they had heard the deceased fighting with their mother some time before his death and ordering her to kill herself by driving into a semi (tractor-trailer) so that he could collect insurance to save the family from debt incurred by him.⁸³ This account was further substantiated by four insurance policies, amounting to approximately two hundred thousand dollars, that were found at the house. The policies had been purchased by the deceased only two weeks before his death.⁸⁴

The testimony of the other important Crown witness, the girlfriend of deceased, provided further support for the accused's defence. She testified that the deceased told her he was separated from his wife. He had managed to carry off this deception for three years because, although the girlfriend had visited his house twelve times, she had only once seen any possessions of the accused because the accused had so few.⁸⁵ She spoke about the rage that the deceased flew into when she had seen his wife's shoes in the hallway, ranting about how he had forbidden his "ex-wife" from entering "his" home. In several respects, the girlfriend's testimony regarding the night of the killing corroborated the accused's story about the deceased's plan for her death. According to her, he had proposed marriage to her that evening (ironically—or tragically—it was Mother's Day)⁸⁶ and had seemed edgy and jumpy throughout the evening.

⁸¹ *Ibid.*, vol. 3 at 45.

⁸² *Ibid.*, vol. 2 at 38–40, 95.

⁸³ *Ibid.*, vol. 1 at 56, 82.

⁸⁴ *Ibid.*, vol. 1 at 58, vol. 4 at 46.

⁸⁵ *Ibid.*, vol. 3 at 14, 17.

⁸⁶ *Ibid.*, vol. 3 at 21.

It was also a matter of public record that the deceased had been charged and convicted of unlawful discharge of weapon when the accused had attempted to leave him some years before. He had locked himself into the bathroom in their apartment and fired the gun into the ceiling; consequently, he was banned from weapons possession for five years.⁸⁷ This evidence, readily available to the Crown, indicated a man willing to use both threat and violence to keep his wife under his control, and provided a measure of the reality of danger she faced were she to attempt to leave him.

Even with extensive Crown evidence (which was known at the time of the preliminary inquiry) that corroborated the reality of the daily violence and threat faced by this woman and her children, Kim Kondejewski initially contemplated pleading guilty to manslaughter and serving a twelve year sentence of incarceration. She later desperately attempted to get the Crown to accept a plea to manslaughter and five years imprisonment rather than undergo a trial.⁸⁸ Not only did Kondejewski face the possibility of life without eligibility for parole for twenty-five years, but the personal cost of this trial would be devastating.

Consider, for example, the price Kondejewski paid for her acquittal. She had to either testify herself or bear witness to the testimony of both of her own children testifying as Crown witnesses in her preliminary inquiry for first-degree murder. Her fifteen-year-old daughter then testified as a Crown witness at the trial and was cross-examined by her mother's counsel. The Crown refused to call her son at trial because his testimony at the preliminary inquiry was so damaging to the prosecution's case that he was instead called as a witness by the court to enable *both* counsel to cross-examine this fourteen-year-old boy.

A nineteen-year-old daughter of a neighbour testified that even with her windows shut and the television volume turned up she could still hear the deceased screaming at his family; that she witnessed the deceased assault his daughter with a broom on their deck; that she saw the deceased assault the accused in Wal-Mart where the accused worked, an event that prompted security intervention; and that she was prohibited by the deceased from even talking with the accused.⁸⁹ A co-worker of Kondejewski testified as to having seen her injuries, heard the verbal abuse by the

⁸⁷ *Ibid.*, vol. 4 at 5-6.

⁸⁸ Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, April, 2001.

⁸⁹ "Transcript," *supra* note 72, vol. 3 at 86-90.

deceased, and discussed with her why she could not leave.⁹⁰ Many witnesses testified as to the deceased's constant, demeaning, verbal denigration of Kondejewski. Throughout the trial, over and over again, the accused had to hear repeated the deceased's barrage of insults that she was fat, worthless, stupid, lazy, a loser, a bitch.

Kondejewski had to testify as to her three suicide attempts through pill overdose, and how the deceased used these attempts to persuade her that she would never get custody of the children if she left.⁹¹ Before the Court, and presumably in the presence of her children, she had to recount how she had been raped several times by the accused.⁹² She also described the sexual acts she performed with other couples, forced upon her by the deceased, as well as the pornographic videos and photos of her that he circulated and sold on the Internet, and kept at the house.⁹³ She had to testify about the deceased's girlfriends that she tolerated because she wasn't satisfying the deceased sexually, she was too fat and ugly, he could not be seen in public with her, and he had to have someone. She even welcomed these liaisons (she was actually quite kind, according to the girlfriend who testified as a Crown witness) because she and her children could have peaceful and pleasant evenings if he were otherwise occupied.⁹⁴ She admitted to lying, at his insistence, about their finances in order to secure loans from his family. She described her numerous efforts, under threat from the deceased, to kill herself by driving into a semi-truck and to electrocute herself by dropping radios and hair dryers into the bathtub.⁹⁵ Finally, she had to witness all of the other humiliating and soul-destroying testimony as a price for her acquittal. This testimony included her son's statement that he had not told his mother about all of his father's violence against him in order to protect her,⁹⁶ and her daughter's admission, upon cross-examination, that her father's dog was treated better than her mother by her father.⁹⁷

⁹⁰ *Ibid.*, vol. 3 at 73-76.

⁹¹ *Ibid.*, vol. 4 at 10-11.

⁹² *Ibid.*, vol. 4 at 22, 62.

⁹³ *Ibid.*, vol. 4 at 20-24, 38.

⁹⁴ *Ibid.*, vol. 4 at 32, 36.

⁹⁵ *Ibid.*, vol. 4 at 54-60.

⁹⁶ *Ibid.*, vol. 3 at 69.

⁹⁷ *Ibid.*, vol. 1 at 55.

My second distortion point is that self-defence continues to be framed, for battered women like Kim Kondejewski, in syndrome and in stereotype rather than in terms of the reality facing these women. The defence expert in Kondejewski's case was Dr. Frederick Shane, who is well known as an expert witness for counsel defending battered women on trial. He testified predominantly in syndrome terms, detailing the profile of "battered woman syndrome" (BWS) and describing the many ways in which the accused matched the profile in order to explain to the jury why this woman stayed in a violent marriage, and to interpret her understanding of the danger she faced that night. Many of his remarks typify the BWS discourse, making Kondejewski's psychology and perceptions the problem. The following is an example of how Dr. Shane depicted Kondejewski:

She was trapped, she couldn't leave and she couldn't stay. It's very disorganizing, frightening and there's a fence, a psychological steel wire fence around it. You don't see it but it's in her mind, and she's traumatized and she's a victim. She's a prisoner of war. She sees no hope. This is in her head, and that's the issue you look at battered women with this sort of history who have fallen into this trap of the helplessness and the hopelessness. It looks like they can escape ...⁹⁸

While it is also true that this witness at several points stated his view that Kondejewski's fears of the deceased's violence—his willingness to track her down if she left, and to kill in order to control her—were entirely reasonable and grounded in experience,⁹⁹ his expertise was focused on the psychological impact of the abuse rather than the reasonableness of her perceptions. In the closing address to the jury, the defence used Dr. Shane's testimony to present the accused as a victim whose sole loyalty was to her children:

All the evidence points to one thing and one thing only, that this woman was profoundly abused. She was a prisoner within their relationship. She couldn't escape, a typical and classical victim, as Dr. Shane described it to you. And the actions at the end were not to defend herself, but to defend her children.¹⁰⁰

My third distortion point, that women's self-defence claims may need to be presented as defence of others, is illustrated by the fact that a key element of the defence strategy in *Kondejewski* (both in her testimony and in Dr. Shane's evidence) was that she was willing to, and had attempted

⁹⁸ *Ibid.*, vol. 5 at 54.

⁹⁹ *Ibid.*, vol. 5 at 27-29.

¹⁰⁰ *Ibid.*, vol. 6 at 12.

on several prior occasions, to kill herself to appease her husband and to give her children “a better life.” What was portrayed as critical, through direct examination and in the defence’s closing address, was that the deceased had for the first time on that particular night threatened to kill the children if the accused failed to kill herself that same night, as he had “nothing left to lose.”¹⁰¹ This threat was highlighted for the jury as the pivotal threat and, in fact, Kondejewski claimed not to have feared for her own life but rather solely for the lives of her children.

Having led the evidence, shaped the testimony, and emphasized to the jury that his client was afraid for her children and was defending their lives, counsel withdrew his section 37 defence of others defence from his argument to the trial judge, and asked only for an instruction to the jury on section 34(2) self-defence.¹⁰² This withdrawal of the defence of others makes this distortion point even more clearly. While counsel told the judge that section 37 was “too complex” for the jury, he may have worried about the status of the *Whynot (Stafford)* ruling—whether syndrome evidence could be read into section 37—and about the specific requirement that the violence used not be “excessive.” At the same time, the defence lawyer clearly did not want the possibility of acquittal to rest solely on self-defence. In the end, the judge put both defences to the jury.¹⁰³

The fact that Kondejewski was acquitted when so many women are not¹⁰⁴ suggests that the threat to the children may have also been critical to the jury: that is, a woman defending her children is a more likely candidate for acquittal than a woman defending her own life. Kondejewski’s acquittal may very well have rested on the understanding that she was simply a good, selfless mother willing to sacrifice herself, but who drew the line at sacrificing her children to a violent mate.

V. CONCLUSION

One might ask why a Crown would proceed to trial in a case where the Crown’s evidence, let alone the defence’s, substantiates a complete

¹⁰¹ *Ibid.*, vol. 4 at 66.

¹⁰² *Ibid.*, vol. 7 at 1.

¹⁰³ *Ibid.*, vol. 7 at 22-23.

¹⁰⁴ See e.g. *R. v. Getkate*, [1998] O.J. No. 6329 (Gen. Div.), online: QL(OJ) [hereinafter *Getkate*]; *R. v. Ferguson*, [1997] O.J. No. 2488 (Gen. Div.), online: QL(OJ) [hereinafter *Ferguson*]; and *Malott*, *supra* note 43.

defence to murder. The only answer that I can come up with is because they *can*.

In light of the evidence available and the ultimate acquittal of Kondejewski, one might also wonder how the Crown's office could justify ignoring the spirit of Madame Justice Ratushny's recommendations even though the recommendations do not have the force of law. Where manslaughter is realistically the most favourable Crown outcome possible and the accused woman is willing to plead to this offence, then consistent with the spirit (although not the letter) of Madame Justice Ratushny's recommendations, the Crown should proceed with manslaughter, not murder, charges.

It is possible, given the resistance among government officials generated by the *Self-Defence Review*, that Madame Justice Ratushny's recommendation has been read as a caution against considering manslaughter pleas from battered women in order to avoid being put in the position of charging at the level of manslaughter.¹⁰⁵ This reading is also consistent with the stance of some Crown offices, which take the position that Madame Justice Ratushny's recommendation has no relevance if the Crown is *unwilling* to accept a manslaughter plea from a woman charged with the murder of an allegedly violent mate. It seems that some prosecutors are committed to "gender neutrality" with a vengeance, with the result that the context of wife battering and social inequality completely disappears from their decision-making about the laying of charges against women who kill their mates.

Cases like the Kondejewski prosecution suggest that even if Madame Justice Ratushny's prosecutorial guidelines were to be implemented at the provincial level, it is unlikely that they would shift practices to any significant degree. Why would a prosecutor voluntarily lay down such a potent weapon as a murder charge carrying a mandatory life sentence, particularly when the target is so easy? The most common version of these cases is that the women themselves call 911 to report the homicide and often make full confession immediately to police and others.¹⁰⁶ They are women who have been convinced that they deserved the violence and abuse they received and, in fact, in their recounting of their marriages, they frequently minimize the violence and leave out major pieces of that experience. Finally, battered women often hold themselves responsible for killing their mates, and, thus, they are remorseful and vulnerable, and may

¹⁰⁵ S. Bindman, "Bureaucrats 'Scorned' Judge's Probe" *The Ottawa Citizen* (25 July 1997) A1.

¹⁰⁶ See, in a related vein, *Getkate*, *supra* note 104.

recount that they saw homicide as the only way out. First-degree murder charges are almost irresistible to prosecutors in these cases.

With these dynamics in mind, it seems clear that no prosecutorial guidelines can possibly disarm the mandatory minimum for murder. It is true that some improvements to the law of self-defence might be pursued in the future,¹⁰⁷ but we know from the U.S. experience that the main problem in securing acquittals for battered women who have killed violent mates is the everyday exercise of discretion by police, prosecutors,¹⁰⁸ and trial judges.¹⁰⁹ Even the most positive reforms cannot alleviate the pressure to plead or the distortion of defences that is produced in a first-degree murder trial where the penalty is life imprisonment. The repeal of the mandatory sentence will not, of course, mean that battered women will always go to trial. Some will continue to plead to manslaughter to avoid the public spectacle of a trial in which they and their children are forced to testify.¹¹⁰ But at least these bargains would be struck in the absence of the coercive threat of a lifetime in prison.

Finally, it should be noted that we are about to witness the new toll that mandatory minimum sentences will bestow upon battered women, as a result of the recently enacted minimum sentence, under Bill C-68, for numerous offences committed with a firearm.¹¹¹ Women such as Lisa Ferguson,¹¹² Lilian Getkate,¹¹³ and Jocelyn Bennett¹¹⁴ will never again receive compassionate sentences such as suspended sentences or conditional imprisonment. Mandatory minimum four-year prison sentences must, as a consequence of the 1995 firearms legislation, be imposed for manslaughter committed with a firearm, regardless of any of the circumstances that created the lethal moment. It does not matter if it was

¹⁰⁷ For some recommendations see *Self-Defence Review*, *supra* note 24; and *Response to Reforming Criminal Code Defences*, *supra* note 16.

¹⁰⁸ E. Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 N.Y.U. L. Rev. 520 at n. 185.

¹⁰⁹ Maguigan, *supra* note 1 at 384.

¹¹⁰ It was reported that a prosecutor in Charlottetown agreed to a manslaughter plea and a ten-year sentence of imprisonment for a man charged with the murder of his wife in order to avoid the need for the deceased's seven-year-old son to testify against his father. See J. MacAndrew, *The Globe and Mail* (20 March 2001) A7.

¹¹¹ *Firearms Act*, Bill C-68, S.C. 1995, c. 39.

¹¹² *Ferguson*, *supra* note 104.

¹¹³ *Ibid.*

¹¹⁴ *R. v. Bennett*, [1993] O.J. No. 1011 (Prov. Ct.), online: QL (OJ).

the deceased's gun, or even that he had previously threatened her with the same gun. If the battered woman is convicted of manslaughter, she must serve a sentence of at least four years' imprisonment. It is significant in this context that the 1994 *Juristat* study of spousal homicide found that 27 per cent of male partners killed by women were shot.¹¹⁵ Consequently, more than one quarter of women will face a mandatory minimum of four years imprisonment even if the homicide is treated as a manslaughter through a plea bargain or at trial. The disappearance of the one concrete, yet inadequate, gain from *Lavallee* for battered women, without even a policy discussion of what the new law would mean for women, is heartbreaking.

Together, the implications of the *Self-Defence Review* and Bill C-68 suggest that the spectacle of the battered woman on trial for first-degree murder will become more common in the years to come. While it is true that many women will be acquitted when their self-defence claims are aired, it is important to recognize that women's credibility and a non-gender neutral understanding of violence are on trial each and every time, and that inevitably, some women will be convicted. And for those who are acquitted, the price paid for their freedom is unconscionable.

¹¹⁵ Canadian Centre for Justice Statistics, *Spousal Homicide* (Ottawa: Statistics Canada, 1994)