THE LEGAL TREATMENT OF SPOUSAL ABUSE: A CASE OF SEX DISCRIMINATION

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1. Introduction

In a recent public address, Justice Beverly McLachlin asked the question, "How has the criminal law treated women?" She then answered in part:

> ... in the past, and to some extent in the present, our criminal law has failed to accord equality to women. It has often placed the burden of social problems on the backs of women through the so called "feminine crimes" related to reproduction and sexuality. It has, at least until recently, failed to recognize the situation in which many women, such as battered women, find themselves, and the way that situation impacts on the traditional criminal law defences. And it has, through the misapplication of invalid stereotypes, often treated female offenders as less than fully responsible and female victims with cruel insensitivity.[1]

The problem of wife abuse is not new, nor is the unfairness in law and legal decisions which have been brought to bear upon it.

For centuries, our society and others have consistently condoned and legitimized male battery of women. This has been done directly through laws and policies which expressly allowed for it; and indirectly, through custom, procedures and discretionary decisions which ignored, trivialized or blamed victims for this use of violence to secure subordination.

When women are battered, they are choked, kicked, bitten, punched, sexually assaulted, threatened and hurt by weapons. In a study[2] of 100 battered women, all had been bruised, but 44 had also received lacerations of which 17 were due to attack with a sharp instrument such as a bottle, knife or razor. Twenty-six had their noses, teeth or ribs fractured and 8 had fractures of other bones, ranging from fingers and arms to jaw and skull. Two had their jaws dislocated and two others had similar shoulder injuries. Retinal damage was done to two women and one was rendered an epileptic as a result of head and brain injuries. In 19 cases, there were allegations of strangulation attempts. Burns and scalds occurred in eleven cases, bites in seven. All of the 100 women in the study had been attacked with clenched fists, but 39 reported that they were regularly kicked as well. In 42 cases, a weapon was used on them, usually the first available object, but in 15

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[1]Hon. B.M. McLachlin, "*Crime and Women – Feminine Equality and the Criminal Law*," (Address to the Elizabeth Fry Society, 17 April 1991) [unpublished].

[2]J.J. Gayford, "Battered Wives" in J.P. Martin, ed., *Violence and the Family* (New York: John Wiley and Sons, 1978) at 21-22.

cases this was the same object each time. In 8 cases the weapon was a belt with a buckle.

Battering is usually a regular and persistent practice. Thirty-one percent of women in shelters report being beaten weekly or daily.[3] In 1987, 157,000 wife assaults were reported in Canada. In 1989, 76 women were killed by their husbands or intimate partners.[4] This comprised sixty-two percent of all the female murder victims that year. Shootings and physical beatings were the most common cause of death in spousal homicides.[5]

In order to contextualize and make understandable the current deeply-embedded societal and legal problems of wife battery, one must understand how the past is intertwined with the present. Therefore, the first section of my paper will provide a brief historical overview of the legal treatment of wife abuse. The second section of the paper will explain how wife battery is a form of sex discrimination and why it must be viewed as a social crime in its broader, institutionalized context rather than as a personal, isolated, aberrant form of behaviour. In the third section, the sex equality dimensions of the problem are discussed, and some of the myths that have been used to perpetuate domestic assault are addressed. Some cases are examined in order to illuminate the legal principles underlying self-defence, provocation, sentencing and contempt charges against victims who fail to testify, showing where gender bias works against women. It is argued that in order to achieve gender-neutral results in these areas, a feminist perspective is required which takes into account the historical, economic and physical realities of women. This approach often requires the Courts to move beyond formal equality and to treat women differently in order to achieve equality of result.

2. History

Wife beating has been condoned throughout history in every part of the world. Amongst the earliest known laws is one dating from 2500 B.C., which provided that the name of any woman who verbally abused her husband was to be engraved on a brick which was then to be used to bash out her teeth.[6]

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[3]L. MacLeod, *Wife Battering in Canada: The Vicious Circle* (Ottawa: Canadian Advisory Council on the Status of Women, 1980) at 9.

[4]"Homicides in Canada" (1989) 10:14 Juristat 9.

[5]"Violence in Canadian Society" (1987) 7:2 Juristat 1; "Conjugal Violence Against Women" (1990) 10:7 Juristat 1; "Violent Crime in Canada" (1990) 10:15 Juristat 1. See also *supra*, note 3.

[6]M. Metzger, "A Social History of Battered Women" at 59. Copies distributed at consultation for Feminist Services Training Programme, November 28-30, 1979. Cited in *supra*, note 3 at 27.

During the Middle Ages, women were burned at the stake for scolding, nagging, miscarrying or talking back to their husbands.[7] Christian, Jewish and Muslim religions in all European countries openly encouraged wife beating. Wives were expected to obey their husbands absolutely. If they did not, they could be beaten with impunity. If a wife committed adultery, the law permitted her husband to kill her.

The 18th and 19th centuries brought no relief to women. Wives had little choice but to accept whatever punishment or abuse their husbands meted out. No laws protected them from their husband's "discipline."[8] On the contrary, until the 19th century, British law expressly permitted a husband to beat his wife with the condition that it not be done in a "cruel or violent manner."[9] The familiar phrase, "rule of thumb" comes from this era when the common law permitted a man to beat his wife with a whipping weapon as long as it was no thicker than his thumb. This replaced a law which allowed beating "with any reasonable instrument."[10]

Obviously, domestic violence against women by men was accepted both legally and socially. At the same time, a double standard applied if the wife aggressed against her husband. Between the years 1351 to 1858, for example, English law provided that if a woman killed her husband, she was liable to be convicted of the aggravated offence of "petit treason" (a form of treachery), the sentence for which was public execution by burning at the stake.[11] If a husband killed his wife, he was only liable to be convicted of murder and hanged. The reason was "the obedience which in relation of law is due from the wife to the husband."[12]

When attempts were made to protect battered women through legal means, they were blocked for fear that men's interests would suffer. For example, when John Stuart Mill attempted to champion battered women's rights in the 1850s and '60s through advancing policies which would increase women's economic

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[7]*Ibid.*

[8]T. Davidson, *Conjugal Crime: Understanding and Changing the Wife Beating Pattern* (New York: Hawthorn Books, 1978) at 104.

[9]M. May, "Violence in the Family: An Historical Perspective" cited in *supra*, note 2.

[10]D.G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* (Boston: Allyn and Bacon, 1988) at 11.

[11]S.A.M. Gavigan, "Petit Treason in Eighteenth Century England: Women's Inequality Before the Law" (1989-90) 3 C.J.W.L. 335; R. Campbell, "Sentence of Death by Burning for Women" (1984) 5 Journal of Legal History 44. The sentence was dropped after 1790 and replaced with hanging – the same punishment to which men were subjected. Gavigan describes this as "one nail in the coffin of the old 'patriarchy' " in the sense that formal equality with men had been achieved in the 'right' to be hanged and later, the 'right' to be charged with murder.

[12]Sir Edward Hyde East, "A Treatise of the Pleas of the Crown" cited in Gavigan, *ibid.*

independence, he was met with opposition arguing the place of women was in the home. If women were encouraged to work outside the home, his opponents said, the economy of Britain would be endangered with the increase of "underpaid, superfluous women" in the marketplace.[13] What these opponents of women's rights were effectively saying was that if a choice had to be made between protecting the physical liberty and security of women and the economic benefit of men, women's interests were secondary.

Canada's legal history is similar to that of the systems upon which it is based. For example, spousal immunity for rape existed until 1983, and for more than sixty years before it was amended, the *Criminal Code* treated wife abuse more leniently than the assault of a stranger.[14]

In summary, the roots of wife battering are found in and nourished by historically embedded discriminatory values and laws. For centuries male-centred, sexist norms comprised the rules of acceptable conduct. These values see women as nothing more than the property of men – as the objects of their pleasure, anger and contempt. They require women to relinquish their independence upon marriage and obey their husbands without question; insist that husbands hold unquestionable authority over their wives; dictate that a woman's place in society is in the home, economically and reproductively dependant, serving her husband and caring for children; and maintain that the public realm is a man's world and his home, his castle.[15] These values informed and underpinned the laws dealing with marriage, divorce and wife battery. Few women rebelled[16] because the historical, legal, economic, cultural and religious context of wife battering conditioned women to be dependant and subservient towards their husbands and to expect little, if any, recourse from the judicial system. In addition, we have lost a great deal of the history of the women who did rebel. Against this backdrop it should not be surprising that wife battery was seldom spoken of, rarely reported,

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[13]*Supra*, note 3 at 28.

[14]From 1909 to 1965, the *Criminal Code* contained a specific section dealing with the beating of a wife or a woman. If actual bodily harm was caused, the offender could receive a maximum sentence of two years plus a whipping. The general maximum penalty for assault causing bodily harm was three years. See also J.G. Snell, "The White Life for Two: The Defence of Marriage and Sexual Morality in Canada 1890-1914" (1983) 16:31 Histoire Sociale/Social History 124.

[15]*Semayne's Case* (1605), 77 E.R. 194 at 195 (K.B.) may have been the source of the public/private dichotomy when the court described a man's home as his castle and fortress, as well as for his defence against injury and violence, as for his repose ...

[16]See, for example, E. Stewart, *Memories of the Crusade* (New York: Arno, 1972); L.P. Hume, *The National Union of Women's Suffrage Societies, 1897-1914* (New York: Garland, 1982); N.L. McClung, *Clearing in the West: My Own Story* (Toronto: Thomas Allen, 1964).

prosecuted or punished.[17]

3. Wife Battery is Sex Discrimination[18]

Since the Supreme Court of Canada's decision in *Andrews* v. *Law Society of British Columbia*,[19] courts in Canada have begun to create a new and unique equality jurisprudence. In *Andrews*, the Court concluded that the purpose of the constitutional guarantee of equality is the accommodation of differences and the remedying of disadvantage in order that individuals may benefit equally from the social and political advantages society has to offer.

In its decision the Court rejected the "similarly situated" test of equality which mandated that those who are alike should be treated the same, while those who are different may be treated differently. The Court, instead, adopted a purposive approach which does not require the same process of comparison in order to prove discrimination. The rejection of the similarly situated test now allows courts to consider issues such as spousal violence against women, pregnancy discrimination, abortion laws and other conditions affecting women but not comparable to men, to be addressed as sex equality issues.

The equality approach in the *Andrews* case makes it possible to argue that the equality rights of women are implicated in the social practice of wife battery. This is because wife battery exists in a societal environment where men assert dominance over women – an environment which includes sexual assault, sexual harassment, pornography and other forms of sex discrimination. Just as women are sexually harassed, sexually assaulted or sexually abused in pornography because of their sex,[20] women are abused by their male partners because of their sex. The act of beating a wife to "discipline" her or exert power over her is used by the batterer to "underscore women's difference from, and by implication, inferiority to the dominant male group" and to remind women of their inferior ascribed status.[21] When one considers the prevalence of wife abuse,[22] and the fear it

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[17]This was pointed out by the Supreme Court in *R.* v. *Lavallee*, [1990] 1 S.C.R. 852, (1990), 108 N.R. 321 at 343-44 [hereafter cited to N.R.].

[18]Many of the arguments in this section of the paper have been developed by the Women's Legal Education and Action Fund (LEAF) in its *amicus curiae* brief of law filed in the Court of Queen's Bench, Saskatchewan, in the case of *A.L.* v. *The Crimes Compensation Board (Sask.)*, *infra*, note 37.

[19][1989] 1 S.C.R. 143.

[20]*Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252 at 1290.

[21]*Ibid.* at 1285. The Supreme Court, here, was quoting with approval a scholar's argument about the role of sexual harassment in society. The author is extending this to wife battering.

[22]D.E.H. Russell & N. Van de Ven, eds, *Crimes Against Women: Proceeding of the International Tribunal* (Millbray, Ca.: Les Femmes, 1976).

causes, the battering operates as a form of control over women. This in turn maintains the historically embedded idea that women are second-class citizens. Wife battering operates as both the symbol reinforcing women's inequality and a means of controlling women and keeping them subordinate to men.[23]

When the overwhelming majority of victims of domestic violence are women and the overwhelming majority of perpetrators are men,[24] the discriminatory nature of the behaviour is underscored. Statistics which indicate that as many as one in ten women are battered by their spouse or intimate partner[25] (other studies indicate the numbers could be much higher)[26] require that the behaviour must be seen as a social practice rather than as isolated violent incidents.

When viewed as a sex equality issue, the interpretation and application of laws dealing with wife abuse must meet the requirements of s. 15 of the *Canadian Charter of Rights and Freedoms*[27] which guarantees women equality before and under the law and the right to equal benefit and protection of the law. The Supreme Court has directed that the equality provision must be interpreted "in the light of the interests it was meant to protect," which include "equality in the formulation and application of the law" and also entail "the promotion of a society in which all are secure in the knowledge that they are recognized at law as equals."[28]

Justice Wilson in *R.* v. *Turpin*[29] recognized the importance of promoting equality for disadvantaged groups. She states, "section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society."[30] In assessing whether a group is discriminated against within the meaning of s. 15, she went on to say that inquiry must be directed into "the larger social, political and legal context" and enumerated "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice."[31] In order to achieve equality in the context of wife battery, such realities as disparities

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[23]*Ibid.* at 2-3.

[24]*Supra*, note 3.

[25]*Supra*, note 3 at 7; E. Lupri, "Male Violence in the Home" (1989) Canadian Social Trends at 19-20.

[26]M.D. Smith, *Woman Abuse in Toronto: Incidence, Prevalence and Demographic Risk Markers* (North York: York University, 1988).

[27]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[28]*R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344; *Andrews*, *supra*, note 19 at 171.

[29][1989] 1 S.C.R. 1296 at 1333.

[30]*Ibid.*

[31]*Ibid.* at 1333.

of power, access to economic opportunity, poverty and vulnerability to assault must be considered when deciding whether a law, policy or practice violates s. 15 equality rights. In other words, a contextualized approach as opposed to a sameness of treatment approach, is essential.

4. Sex Equality Dimensions in Case Examples

In *R.* v. *Lavallee*,[32] the Supreme Court of Canada recognized the inequities perpetuated by the "same treatment" model of equality when applied to self-defence in the context of wife abuse. The facts of the case were that the accused, Angelique Lyn Lavallee, was regularly abused by her common law husband Kevin Rust, and had been over a three to four year period. She had required medical treatment several times for various fractures, contusions and bruises caused by him. After a party on August 30, 1986, there was an altercation between Ms. Lavallee and Mr. Rust wherein he told her to "wait till everybody leaves, you'll get it then." He handed her a gun and told her if she didn't kill him first, he would kill her. After the argument, she shot him in the back of the head with a .303 rifle as he was leaving the room. At trial, Ms. Lavallee was acquitted of second degree murder by a jury on the basis of self-defence. The Manitoba Court of Appeal set aside her acquittal but it was subsequently restored by the Supreme Court of Canada where the substantive meaning of self-defence was examined in a contextualized way.

In its decision, the Court concluded that battered women who kill their partners do not fit into the law's traditional concept of self-defence. The Court said the defence evolved out of a bar-room brawl model which envisioned combatants of relatively equal size and strength.[33] When applied to battered women, the model does not work, based as it is on assumptions about how reasonable men behave in a fair fight:

> He stands and faces his adversary, meeting fists with fists. He isn't frightened or provoked to violence by mere threats; he doesn't use a weapon unless one is being used against him; and he doesn't indulge himself in cowardly behaviour such as lying in ambush or sneaking upon on an enemy unawares.[34]

The requirement of imminent danger – that the attack on the accused must be underway in order to prove a reasonable belief of apprehension of death or grievous bodily harm – comprehends only a male concept of reasonableness. It ignores the female perspective of reasonableness which in circumstances of wife battery may be quite different. Justice Wilson speaking for the unanimous Court

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[32]*Supra*, note 17 at 343-44 per Wilson J. speaking for the majority.

[33]*Ibid.* at 347.

[34]C.K. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense and the Law* (Columbus: Ohio State University Press, 1989) c. 4.

states at p.345:

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

In other words, the Court found that gender was germane to the question of reasonableness and decided that in order to be fair to women, it was necessary to reconsider the defence.

Although s. 15 of the *Charter* was not argued in the case,[35] it seems clear after *Lavallee* that if the female perspective is not considered when a woman invokes the defence, she will be denied equal protection and equal benefit of the law. *Lavallee* is a landmark case because it recognizes that a male-centred defence and doctrine which relies on concepts such as "the reasonable man" may not meet the needs of women. Changing the configuration of the self-defence doctrine to prevent gender bias is a milestone in the history of equality jurisprudence. By making gender relevant, the Court opened the door to the reconstruction of many other legal doctrines which discriminate against women.

In contrast to *Lavallee*,[36] consider the case of *A.L.* v. *The Crimes Compensation Board* (Saskatchewan).[37] After a history of abuse during the marriage, A.L. was severely assaulted by her husband on April 1, 1987. The assault occurred after an argument during which the husband threatened to leave her and the children without financial support. The wife then said she would pack his suitcase and went to the bedroom to do so. He followed her there and assaulted her. She sustained serious physical injuries, including a broken back. She reported the assault to the police who advised her to refrain from laying criminal charges until she separated from her husband which she did two months later. The husband subsequently pleaded guilty to the assault. At the time of the event, the victim was 45 years of age, had been married for 25 years and had 9 children, 4 of whom were dependent on her.

Following her husband's conviction for the assault, she applied to the Crimes Compensation Board for compensation for her injuries because the back injury

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[35]The issue before the Court was whether the expert testimony of a psychiatrist was admissible to assist the jury in dispelling myths about battered women in deciding whether there was a "reasonable apprehension" of death or grievous bodily harm and in assessing the reasonableness of the accused's belief that killing her batterer was the only way to save her life.

[36]*Supra*, note 17.

[37](2 June 1988), No. 1901/88 (Crimes Compensation Board of Saskatchewan); (15 March 1990), No. 2511/90 (Crimes Compensation Board of Saskatchewan).

prevented her from continuing her employment. The Board denied her application on the grounds that she "knowingly put herself into circumstances that caused injury to herself." The Board said she was aware of her husband's tendency to violence yet continued to associate with him. This association the Board said, resulted in injuries to herself, a situation which was found to fall within an exemption under the *Criminal Injuries Compensation Act*.[38] Furthermore, the Board found that her actions in going to the bedroom to pack his suitcase amounted to provocation stating "the applicant should have been aware that her actions on the date in question would aggravate him and lead to his violent behaviour."[39]

After a series of appeals,[40] the Board reheard the case, yet still found that A.L. was "the author of her own misfortune," and that "a reasonably prudent person could have foreseen the consequences of her actions."

The position taken by the Board resurrects the myths and stereotypes the Supreme Court discredited and rejected in *Lavallee*. The Board's decision effectively gives credence to the stereotypes that women who are battered choose, provoke and deserve to be beaten and are partially or wholly responsible for the violence directed against them. It also raises the *Charter* equality issues as to whether equal benefit and protection of the *Criminal Injuries Compensation Act* was denied to A.L. on the basis of sex and whether A.L.'s s. 7 right to equal security in accordance with the principles of fundamental justice as protected by s. 28 of the *Charter* was breached. I will deal with the two issues of reasonable foreseeability and provocation in terms of their equality implications.

(a) Reasonable Foreseeability

Compensatory relief under the Saskatchewan *Criminal Injuries Compensation Act* depends upon whether the injury was a "reasonably foreseeable" consequence of the complainant's action. In the context of wife battery, the same issue of gender relevance arises here as it did in *Lavallee*. What is "reasonable" in situations of domestic or other violence against women may be quite different than what is reasonable where other crimes are concerned.

If the Board was correct in the way it applied the reasonableness standard in *A.L.*, a woman's mere presence in a place where violence is foreseeable could be seen as an acceptance of the risk of assault. Is the Board suggesting that if a woman goes to a bar alone or goes for a walk alone at night and is assaulted, she

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[38]R.S.S. 1978, c. C-47, s. 11(a).

[39](31 July 1990), No. 2511/90 (Crimes Compensation Board of Saskatchewan).

[40]*A.L.* v. *The Crimes Compensation Board* (Saskatchewan) (24 May 1991), No. 4721 (Q.B.).

is contributing to her own assault? What about hitchhiking alone or inviting a male to her apartment? In Canadian society, violence against women is a reality and it is foreseeable in such places, but should women be blamed for it? In addition to blaming victims, this approach penalizes women for doing things that men freely do without any penalty or restriction.

The Board's decision implies that the solution to the foreseeability problem for women is to leave the abusive setting in which they live if they wish to be compensated for their injuries. If this is correct, one could argue by analogy that victims of sexual harassment at their place of work or victims of crime in high crime neighbourhoods, must be partially to blame for their victimization unless they quit their employment or move away. The Board faltered in this case because when it assessed reasonableness, it failed to take into account the dynamics of wife abuse and the general context of inequality within which women live.

The Board's assumption that women like A.L. can leave their abusive husbands but unreasonably refuse to do so is gender biased because it makes the assessment from a dominant, male perspective. First hand accounts by many battered women demonstrate that they are often trapped in the relationships.A decision to stay with an abusive husband is perfectly reasonable if from the wife's point of view, there is no other place to go.Financial and emotional dependence on their husbands; concern for the welfare and their custody of the children; lack of emergency housing and day care; lack of support from law enforcement agencies; the fear of public exposure; inadequate social support networks; the fear of greater injury; and the tendency of society to blame women rather than their assailants are the reasons battered women cite for staying in violent relationships.[41] All are related to the unequal social position of women which the Board failed to take into account when interpreting the "reasonably prudent person" test. For example, battered women have stated:[42]

> I was in a trap I couldn't get out of – having no money.
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> I doubt there are very many women who have never been abused by a man in their lives. Our very economic dependence on them brings about many of these undesirable living conditions.

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[41] *Women in Transition, a Canada Works Project* (Thunder Bay, Ontario: 1978) cited in *supra*, note 3 at 29. See also, R. E. Dobash and R. Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: Free Press, 1979); L. Chamers and P. Smith, "Wife Battering: Psychological, Social and Physical Isolation and Counteracting Strategies" in A.T. McLaren, ed., *Gender and Society* (Toronto: Copp Clark Pitman, 1988) at 221; L. Freedman, "Wife Assault" in C. Guberman & M. Wolf, eds, *No Safe Place: Violence Against Women and Children* (Toronto: The Women's Press, 1985) at 41; L.A. Hoff, *Battered Women as Survivors* (London: Rentledge, 1990).

[42] *Supra*, note 3.

> I put up with not only physical abuse but all kinds of mental abuse because I had six children to care for and needed a home and food for them which I couldn't provide myself.
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> I heard the policeman say to my husband – 'Look, I believe a man's home is his castle.'
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> Statements are often made from the bench that make light of these very serious cases, which can often lead to homicide. Our local papers are filled each week with stories of domestic fatalities often after [the victims] turning to the courts for help and assistance, and not having been believed when they described their abuse and their fear of death ... [c]ourt officers use terms such as "Punch and Judy" cases ...
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> I felt afraid to go outside the house – afraid that people would find out, afraid of what they would say – that I was a bad wife and deserved it.

Other cultural, ethnic, racial and social reasons may exacerbate the inability of women to leave battering relationships. For example, native women may risk the loss of social benefits as well as their cultural identity if they leave their reserves; immigrant women who leave may be repudiated by their own cultural community, face insurmountable communication barriers or fear deportation if they leave the person who sponsored them for landed status; disabled and rural women may be unable to access day care, temporary housing or social support networks.[43]

A battered woman's decision to remain in her own home should not be used against her. If it is, not only is the responsibility for the abuse improperly diverted from the abuser to the victim, the social and psychological context of unequal power in which wife battering generally occurs is ignored.

The Board's failure to adapt "reasonableness" to women's circumstances not only renders its decision gender-biased, it penalizes victims of wife abuse in a way which victims of other multiple crimes are not penalized. The example of multiple property crimes makes the point. When mere possession of property is an insufficient basis for holding property owners responsible for repeated thefts or burglaries,[44] staying in one's own home, albeit a violent one, should similarly be an insufficient basis for holding battered wives responsible for repeated beatings.

A second questionable assumption underlying the Board's finding that it was unreasonable for A.L. to stay in the matrimonial home, is that there are safer places for battered women to go. Studies indicate that separation does not guarantee that the battering will end. Violence often escalates after a woman has

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[43]Chamers & Smith, *supra*, note 41.

[44]LEAF, *supra*, note 18 at 20.

separated from her abusive partner because the abuser is angered at losing control over her. Numerous research reports indicate that batterers often threaten to come after a battered woman, find her, and seriously injure, maim or kill her if she leaves.[45] Littleton points out that the statistical incidence of "recapture" – husbands finding wives (or partners) and beating them again – makes a mockery of the "duty to retreat" concept in self-defence.[46] It has also been found that the fear engendered by such threats is usually well founded and protective remedies such as restraining orders, injunctions and bail conditions are often ineffectual protective remedies for battered women and their children.[47]

Finally, the Board failed to consider the "battered woman syndrome" in its decision notwithstanding the fact that expert evidence was called to describe why battered women stay with their batterers.

The Supreme Court of Canada in *Lavallee*, in admitting expert evidence on the battered woman syndrome, recognized that many myths and stereotypes surround the question of why women stay and that triers of fact are as susceptible to being mislead by them as the general public. The Court stated at page 344:

> The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome." We need help to understand it and help is available from trained professionals.

And then at 345:

> A woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that

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[45]C.P. Ewing, *Battered Women Who Kill. Psychological Self-Defense as Legal Justification* (Lexington: D.C. Heath & Company, 1987) at 13.

[46]C. Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women" (1989) University of Chicago Legal Forum 23 at 36.

[47]For example, the study by the Manitoba Association of Women and the Law, (MAWL) *Gender Equality in the Courts: Criminal Law* (1991) at 3-50 points to the example of the Winnipeg woman murdered by her former boyfriend who had been arrested on three occasions within the few weeks preceding her death and released each time on bail, apparently with the consent of the Crown in each case. See also D. Martin, "Marital Conflict Mediation and Post-Separation Wife Abuse" (1990) 8 Law and Inequality 317.

severely, she must have stayed out of some masochistic enjoyment of it.[48]

Instead of reflecting and reinforcing these damaging stereotypes, the Supreme Court questioned them. The Court was of the view that the average person or jury member does not necessarily understand why a woman would put up with battering on a continual basis and that expert evidence was necessary to dispel the deeply held myths and stereotypes and restore the battered victim's credibility. Testimony regarding the "cycle of violence" and "learned helplessness" is required to help judges and juries understand the psychological barriers which prevent or hinder an abused wife from escaping her situation. Had the Board in *A.L.* seriously considered the battered women's syndrome in their analysis, continuing residence with an abusive spouse would likely not have been considered unreasonable. Furthermore, the Supreme Court in *Lavallee* acknowledged that there is no duty for a battered woman to retreat from her home within the context of self-defence. It follows that a woman should not be penalized under criminal injuries compensation legislation for staying in her home.

(b) Provocation

As an additional ground for denying compensation, the Board in the *A.L.* case found that the wife contributed to her injuries by packing her husband's suitcase after he announced he would leave. The Board saw this conduct as a provocative act which precipitated the husband's act of violence rather than as a protective and prudent act on the part of the wife calculated to preserve her own safety.

This finding embodies all the old stereotypes that have been so damaging for women in the past. It contravenes A.L.'s equality rights under s. 15 and s. 28 of the *Charter* and denies her security rights under s. 7. The Board's interpretation of s. 11(a) of the *Criminal Injuries Compensation Act* implies that a battered woman must adopt a submissive and subordinate role in relation to the batterer in order to remain eligible for full compensation under the Act. The decision effectively says a battered wife cannot protest her husband's actions or do anything that may cause him to become angry and beat her again, such as challenging his authority or control over her. It also suggests that the victim of domestic violence has control over her victimization. If she would stop provoking her assailant, she would not get hit.

The defence of provocation in criminal law has a "reasonableness" requirement. In order to exculpate the accused from responsibility for the offence or reduce his culpability, the provocation must be such that it deprives an ordinary person of self-control. In the case of *A.L.*, the act which the Board found to amount to provocation was the wife packing the husband's suitcase in response to

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[48]*Supra*, note 17 at 344.

his threat to leave. If the criminal standard was used, the Board must have concluded that his rage in response to such an act was "reasonable" and that breaking his wife's back was an act which should be forgiven. Legitimizing these sexist, discriminatory attitudes and reactions is clearly in violation of s. 15 and s. 28 of the *Charter* insofar as the guarantee of equal protection of the law is concerned. To accommodate by law the violent enforcement of male dominance and female subordination is untenable in a country which has gender equality as an entrenched constitutional guarantee. The practical result is to permit more powerful members of society to prey with impunity upon more vulnerable members. Section 28 which states, "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons" requires equality in relation to other *Charter* rights. The Board clearly breached this section by diminishing women's bodily security rights in comparison with those of men in the context of a gender specific offence. Moreover, this interpretation and application of s. 11(a) harms women by reducing the compensation they would otherwise be awarded. In a contextualized analysis, it perpetuates women's disadvantage, justifies male dominance and denies her equal benefit of the law under s. 15 of the *Charter*. Even if the woman's conduct is not exemplary in the Judge's eyes, it is not legal justification for her to be assaulted and battered – "the author of her own misfortune."

(c) Sentencing and the Protection of Victims

The sentencing of wife abusers is a crucially important step in the legal process. Punishment for wrongs plays an important role in shaping societal attitudes and behaviours. If violence in the home is unacceptable behaviour in Canada, the judiciary must react in such a way that abusers and society understand that wife abuse is a crime, and that its victims are as entitled to the protection of the law as are victims of other crimes. Yet history and practice show that the judicial system generally views wife assault as a domestic dispute, a matter of civil rather than criminal law. This has trivialized the seriousness of the offence which in turn has often resulted in inappropriate sentencing decisions.

Trivializing wife assault by viewing it as a domestic matter rather than as a serious criminal offence causes discrimination against women in terms of their right to equal protection of the law and equal right to life, liberty and security of the person as protected in s. 28, s. 15 and s. 7 of the *Charter*. Studies and case analysis show that when judges fail to take domestic assault seriously, they tend to give less credence to the victims' fears, injuries and experiences; take inappropriate mitigating factors into account; and give far lighter sentences to abusers than they would for similar assaults against strangers.

As an example, the Maryland Special Joint Committee on Gender Bias in the Courts, found substantial evidence that the judiciary failed to give victims the

credibility they deserved. One witness spoke of her attempts to get help after her husband threatened to kill her with a gun:

> The thing that has never left my mind from that point to now is what the judge said to me. He took a few minutes to decide on the matter and he looked at me and he said, "I don't believe anything that you're saying." He said, "The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you."[49]

An advocate for battered women told the Committee about a judge who wanted to know whether counselling programs for families involved with violence are able to "flush out all these women who are lying." Another judge denied an application for a protective order because he did not believe that the husband would behave in the manner the victim described because he was a doctor. Yet another judge did not believe the victim had been beaten because she did not have any bruises. In one case the judge called the victim "one hell of an actress," despite clear and consistent testimony by the victim and a witness that her husband had beaten her frequently. One woman was beaten by her husband over the weekend between two court hearings, and she appeared at the second hearing wearing a neck brace because of the injuries he inflicted. The judge's response was, "anyone could put on a neck brace just to make him think something had happened."[50]

In other cases, judges take certain mitigating factors into account which, if they viewed the crime more seriously, wouldn't be considered in the sentencing assessment. For example, judges sometimes decide not to imprison an individual for serious abuse because they think that to leave a dependant spouse and children without any means of support doubly victimizes them. The competing argument, that the wife and children may be re-victimized if the offender is free to return to the home to continue the abuse, is often not given enough weight.

The marital relationship and emotions between the parties is another factor sometimes used to inappropriately mitigate sentence.[51] Judges infer that it is the "relationship" that has led to the criminal activity and somehow that makes it more understandable. An example of this is the disposition in *R.* v. *Fern Wayne Kreton*.[52] The accused first attempted to run down his wife's son with his vehicle. Within a month, he breached an order prohibiting him from having any contact

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[49]Maryland Special Joint Committee, *Gender Bias in the Courts* (May 1989) at 3.

[50]*Ibid.* at 4.

[51]*R.* v. *Fern Wayne Kreton* (6 February 1990), (Man. Prov. Ct) at 26 [unreported].

[52]*Ibid.*

with his wife, attacked her in her apartment building, choked her, attempted to throw her over a third floor railing, dragged her out of the building, smashed her head on the sidewalk, repeatedly kicked her in the head and threatened her with a knife. The woman suffered injuries including a fractured nose, a fractured arm, numerous bruises and abrasions to all parts of her body and severe lacerations to her hands resulting in permanent damage to her tendons. While incarcerated prior to the trial, the accused wrote a letter to the victim stating, "I will not nicely go away and leave you until I am dead." The result of the case was a jail sentence of six months with eighteen months probation. The judge was clearly influenced by the existence of the "relationship." In his sentencing comments, he says:

> These cases, as counsel has alluded to, are unique in that people that otherwise wouldn't engage in criminal conduct, due to matrimonial affairs, unfortunately often lead to criminal conduct. People who wouldn't ever come into a courtroom in a criminal context get themselves into situations because of emotions, because of lack of perception, will be unable to deal with the problem or see it properly and therefore do things that, if other facts had been different, would never have appeared before the court.[53]

In a similar case in the same jurisdiction but one involving strangers, the Court imposed a four-year sentence.[54] This approach is difficult to justify. "Relationship" is not taken into account as a mitigating factor in circumstances other than sexual or domestic assaults.[55] Arguably the existence of relationship should not diminish the sentence. Perhaps it should result in a harsher sentence for a person convicted of a battering offence because of the breach of trust between parties in a relationship of unequal power. The crime if viewed as a crime, would seem to be more serious and reprehensible in this context than where the parties are strangers or where the exchange is between equals.[56]

A related issue is the sentencing range in domestic assault cases. Compared to cases of stranger assault, the sentencing range appears to be significantly lower. For example, in *R.* v. *Eugene Vincent Gaywish*,[57] the batterer assaulted his common-law wife with a stick or club. At trial, he received a suspended sentence plus supervised probation. The Court of Appeal added 100 hours of community service but declined to impose a prison sentence. It is doubtful that the same

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[53]*Ibid.* at 41-42. The Manitoba Court of Appeal increased the six-month sentence to eighteen months for aggravated assault. In light of the fourteen-year maximum for this offence, even the Court of Appeal's disposition is extremely light.

[54]*R.* v. *Peter Dennis Rose*, [1989] Man. D. 7112-04.

[55]For example, the MAWL Report, *supra*, note 47, at 3-17 asks, "Would the judge have similarly commented and sentenced if an 'emotional' employee viciously assaulted his former employer ... after the termination of the employer/employee relationship?"

[56]*R.* v. *Inwood*, [1989] 69 C.R. (3d) 181 at 188.

[57][1989] Man. D. 7110-01.

offence between strangers or those in a non-intimate relationship would have had the same result.

In another case, a batterer assaulted his common-law wife with a garden spade, breaking the handle in the process. A history of repeated assaults was reported yet the disposition was a two-year suspended sentence.[58] At about the same time, in the same jurisdiction, a man who mistreated his pet kitten was sentenced to a three-month jail term.[59]

An even more extreme example is *R.* v. *Chaisson*[60] where a husband who tied his wife to a chair, taped her mouth, manually abused her and burned her breasts, received a mere twelve-month suspended sentence and an eighteen-month probation order. The reasoning of the court was that its primary objective should be to facilitate and not to impede the reconciliation of the spouses.[61]

What judges in cases like these do not seem to appreciate is that treating violence as a marital dispute does not make it end. Rather than punish and deter, light sentences indirectly support the use of violence against women because they discourage victims from reporting incidents of abuse and send the message to perpetrators and society generally, that this form of violence is not serious.

(d) Contempt Proceedings

When victims of domestic violence fail to testify against their abusers, the decision as to whether or not to find them in contempt and punish them, raises difficult issues for a judge. On the one hand, failure to testify frustrates the legal process and results in wasted time and expense in bringing accused batterers before the Court. On the other hand, the Court may participate in the on-going victimization of the battered woman if it finds her in contempt and fines or incarcerates her.

If a judge fails to keep the dynamics of the battering relationship in mind and assumes the victim is flaunting a court order or showing disrespect for the legal process, the decision to punish may be gender biased and violate the woman's equality rights. The laying of a contempt charge against a victim of abuse may engage s. 15 equality rights if it has a differential impact based on sex compared to the laying of contempt charges in other circumstances. It must be borne in mind that women as a group are physically more vulnerable to threats. It is also

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[58]*Winnipeg Free Press* (24 February 24 1989) 10, cited in MAWL Report, *supra*, note 47 at 3-26.

[59]*Ibid.* at 3-26, 3-27.

[60](1975), 11 N.S.R. (2d) 170 at 173 (S.C.A.D.).

[61]*Ibid.*

true that abusive husbands or partners are able to intimidate their wives or partners from testifying through coercive means. If a woman has been threatened with violent retaliation by the abusive spouse and at the same time there is inadequate state protection for her physical well-being, it is hardly legitimate for a judge to punish her for taking the rational step of refusing to testify in order to protect herself.[62] The question the Court should ask is, who should bear the risk? It could be argued that unless the state can satisfy the court that realistic protection for the witness is available, the woman should not be convicted of contempt.[63] In their *Feminist Review of Criminal Law*, Boyle *et al.*, address this point:

> The law of contempt might work more harshly against women than against men because women may be physically more vulnerable to threats. Adequate resources may not be devoted to their protection. Guilty persons may be acquitted because women are treated as being less credible and so will be in a position to carry out their threats. . . Persons should therefore not be convicted of contempt for refusing to testify unless the State can satisfy the court that realistic protection is available for the witness.[64]

5. Conclusion

One could summarize this paper by saying two things: first, that wife battering must be understood broadly – by looking at the family as a societal institution with roles, functions and traditional relationships with other institutions such as law, employment and religion; and second, that consideration of wife battering must be sensitive to the feminist perspective. It is a mistake, in my view, to perceive wife battering as a series of isolated aberrations from the norm and to treat the family as a particular and personal group of individuals. If incidents of wife battery are viewed in isolation from their historical and economic context, their systemic aspects are hidden and the role of the police, crown prosecutors, judges and other actors in the process is obscured. If wife battery is viewed solely from the dominant male perspective, we virtually deny the existential reality of women and the case they have made about the justice system as we know it.

Over the past several years, in first the United States and then in Canada, a great deal of effort has been expended on demonstrating that many areas of the law as written, interpreted and applied are gender-biased or sexist.[65] There are many reasons for this state of affairs, not the least of which is the fact that no

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[62]*A Feminist Review of Criminal Law* by C. Boyle *et al.* (Ottawa: Minister of Supply and Services Canada, 1985) at 32.

[63]*Ibid.*

[64]*Ibid.*

[65]I define gender-biased or sexist approaches as those informed and shaped by a male viewpoint resulting in a distorted picture of social reality.

woman had a voice in the design of legal institutions or methodologies that rule the social order under which women as well as men, live.[66] Further, the condition of women or their interests were not taken into account or represented by the men who created the social order. There are huge amounts of historical evidence which support this,[67] so I do not think it is an arguable point.

There is also now an impressive array of literature that demonstrates that gender bias and sexism exist in law -- many of these works are cited in the MAWL Report.[68] Hundreds of others exist. There seems to be some dawning awareness on the part of judges, government and legal educators that women have been unjustifiably excluded from consideration and that there is some need to integrate their concerns into law. This is manifested in national conferences such as "The Socialization of Judges to Equality Issues" held in 1986, The Canadian Association of Law Teacher's conference on Gender Issues in Legal Education held this year, the Justice Minister's National Symposium on Women and the Administration of Justice held in June 1991 and the various judicial education seminars that have been held in Vancouver, Lake Louise, Yellowknife and Charlottetown.

New textbooks such as *Canadian Perspectives on Legal Theory*,[69] *Equality and Judicial Neutrality*[70] and *Equality Rights and the Canadian Charter of Rights and Freedoms*[71] include a number of articles or chapters on women or discuss some aspect of gender and sex roles. University law faculties have courses on feminist legal theory, and are now incorporating feminist critique into mainstream courses such as Torts, Remedies, Contract, Criminal Law, Family Law, Constitutional Law, Legal History, Jurisprudence and so on. There are also a growing number of special publications which specifically publish feminist work such as *Signs*, *Canadian Journal of Women and the Law* and the *Harvard Women's Law Journal*. There are chairs for women's studies at universities, special scholarships for feminist research and institutes focused on women and their changing role in society. In other words, there is tangible evidence that women now constitute a legitimate area of legal interest. This is in contrast to earlier times when many of the same criticisms and suggestions being made now, were unable to penetrate

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[66]C.A. MacKinnon, "Reflections on Sex Equality Under Law" (1991) 100 Yale Law Jo. 1281 at 1281.

[67]See, for example, MAWL Report, *supra*, note 47; C. MacKinnon, *Toward a Feminist Theory of State* (Cambridge, Ma.: Harvard University Press, 1989); L.L. Crites & W.L Hepperle, *Women, the Courts and Equality* (Beverly Hills, Ca.: Sage, 1987); M. McTeer, "The Time For Change is Now" in S.C. Martin & K.E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

[68]*Supra*, note 47.

[69]R. Devlin, ed., (Toronto: Edmond Montgomery, 1991).

[70]K. Mahoney & S. Martin, eds, (Toronto: Carswell, 1987).

[71]A. Bayefsky & M. Eberts, eds, (Toronto: Carswell, 1985).

institutional structures sufficiently to make it into official agendas.[72]

Margrit Eichler has written about sexism in social science and possible responses to it.[73] I think her approach is transferrable to the issue of sexism in law. She makes the point that certain paradigms guide knowledge and inquiry. At their most general level, the paradigms can be identified as "normality." Paradigms of this sort are based upon a set of rules and assumptions which many do not even realize exist because there is such widespread agreement on them. The existence of such paradigms determine the choice of problems, issues and solutions to be studied within their framework. Paradigms do not change unless there is some feeling of crisis – evoked by an anomaly which is so important and weighty that it calls the entire paradigm into question. People begin to search for alternative solutions. This is a lengthy process, one which it is impossible to time exactly or to attribute with precision to one individual only. It is a collective process rather than an individual shift in thinking. Is sexism or gender bias in the way in which the law deals with wife abuse serious enough to require a paradigm shift in thinking? Is the problem fundamental enough? Pierre Trudeau's famous comment that, "the state has no place in the bedrooms of the nation" is significant in its stunning inappropriateness to wife abuse. The criminal law has traditionally avoided the private sphere, based on the notion that "a man's home is his castle" and concentrated on maintaining order and peace in the public realm. However, the truth of the matter is that women in increasing numbers are beaten, tortured and killed in the bedrooms of the nation.

What we have today, and what needs to be addressed, is a covert system which allows violence as a private matter between husband and wife. The family is by and large placed outside the rules and laws of society. A blind eye is turned to the use of violence by a husband against a wife in the name of the sanctity of marriage. The result is that when a woman who is battered looks for help outside her family, she discovers that her plea for safety and sometimes survival elicits platitudes about the privacy of the home and the proper role for women. The battering issue must be seen and understood within a new paradigm, which questions the vast network of official and non-official procedures and attitudes which are institutionalized and biased against women. Until we attack it at that level, nothing of substance will change.

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[72]M. Eichler, "The Relationship Between Sexist, Non-Sexist, Woman-Centered and Feminist Research" in *Studies in Communication*, vol. 3 (Toronto; JAI Press, 1986) 37 at 42; R. Herschberger, *Adam's Rib* (New York: Harper and Row, 1970); D. Spender, *Man Made Language* (London: Routledge and Kegan Paul, 1983); A. Rossi, ed., *The Feminist Papers: From Admas to de Beauvoir* (New York: Bantam Books, 1973).

[73]Eichler, *ibid.*