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**MENS REA — *WOMEN'S REA?***

**TRANSLATING PERSONAL EXPERIENCE**

**INTO LEGAL LANGUAGE:**

**A CASE STUDY OF THE LEGAL DEFENCES FOR  
BATTERED WOMEN WHO KILL THEIR BATTERERS**

by

**Amy Mahan**

**B.A. McGill University 1985**

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF**

**MASTER OF ARTS**

in the

**School of Communication**

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## ABSTRACT

Everyone who comes into contact with the law must translate specific events and experiences into legal terminology. Because legal language has historically been written from a male perspective, men's experiences, especially in terms of being the victim of violent crime, translate more completely than do those of women. For women, elements that have bearing on a case are under-represented or distorted because there is no corresponding terminology to describe or understand them.

Women who kill their batterers have little recourse either as battered women or as defendants due to pervasive misunderstanding and stereotypical perceptions of the 'battered woman condition'. This thesis examines different discourses which have bearing for women who kill their abusers in self-defence, with a view to assessing the addition to the legal lexicon of the Battered Woman Syndrome defence (through expert testimony), as well as limitations of this solution and possible precluded alternatives.

While a communication disjuncture between personal experience and legal language is not *per se* a problem unique to feminism, it is indeed an issue with which feminist theory is familiar. To identify and discuss historically and culturally specific discourses (both dominant and alternative), this thesis applies Nancy Fraser's model which theorizes sociocultural means of interpretation and communication. This discourse theory and model are used to identify different and competing discourses and to enquire how needs issues are shaped by the discourses that surround them.

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## 1. INTRODUCTION

*Mens rea* refers to the criminal or guilty mind: the criminal intent to commit a crime. *Womens rea* (a female standard of criminal intent), I will argue, is the result of discourse and objectified organization<sup>1</sup> in which legal categories and language can be demonstrated to be ill-equipped to deal with, from a feminist perspective, specific women's experience. This communication disjuncture results in different standards for women before the law. *Womens rea* occurs when a woman's real situation does not neatly fit into the categories of a jurisprudence which has historically perceived women as adjunct to society (in the private sphere) and has thus been written from the perspective of men, for the kinds of situations men are apt to find themselves in.

Consider the example of someone (male or female) held against their will<sup>2</sup> and told they will be killed in three days. A plea of self-defence will mitigate the very rational intent to kill, should the hostage decide, search for opportunity and plot to kill the abductor before the three day deadline. A woman who is repeatedly battered, told on numerous occasions that she will be killed, confined against her will, and who comes to the same rational conclusion that she must

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<sup>1</sup>See Smith (1990) *Texts, Facts, and Femininity*.

<sup>2</sup>This hostage example is used throughout the literature on battered women who kill their abusers.

kill her batterer before her own demise will not be afforded the same self-defence plea. Or at least not until recently. The catch is that to have access to a self-defence plea, she must show that her actions were not rational, or more specifically, that her reasoning was premised upon the condition of being a battered woman.

This thesis traces the disjuncture of communication in law from a feminist perspective through discussion of discourses which describe and define the condition of battering. The object of analysis is the inability of a particular set of discourses to deal with a specific set of experiences.

There is an historical context for this communication disjuncture. In Medieval times, for example, a woman who killed her husband was guilty of treason.<sup>3</sup> Jurisprudence has, over time, evolved new standards of rights and responsibilities. And, the BWS defence provides a salient example of the process (and limitations) of legal evolution. In transition, the courts have become somewhat more lenient when sentencing some battered women who kill their abusers, and the acknowledgement of Battered Woman Syndrome as a murder or manslaughter defence departs from previous formal legal requirements of self-defence. However, the ideologies which have historically resulted in more harsh judgements, have not been exorcised from current jurisprudence. Women as

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<sup>3</sup>"The punishment for that was the same as if she had killed the king." Gillespie (1989), *Justifiable Homicide*, p.37.

chattel, as ruled by men, as less valuable than men, as less moral than men, as less rational than men, as primary care-givers, etc., all of the above still have some degree of currency in law – from equal pay issues to refugee status claims to rape trials to child custody disputes.

Beginning in the early 1980s, there has been an emergence of writing and thought on feminist legal theory, feminist legal strategies and feminist jurisprudence. These studies and experience reveal the degree to which law awkwardly and ineffectively represents and protects the interests and concerns of women despite the considerable amount of legislation apparently aimed at correcting gender imbalances. Moreover, a focus on legislating for change targets the manifestation rather than the intent of law. The proverbial 'letter of the law' has proven to be malleable at the levels of interpretation and enforcement. As Boyle notes, it would be inaccurate to claim, however, that legislative reform has merely resulted in the superimposition of gender-neutral law on a reality in which gender is significant.<sup>4</sup> Sites of 'successful' negotiation become precedents, and social change, in uneven and varying degrees, is reflected in the intent of law. However, given the interpretive aspect of applying law, it is imperative to critically examine the negotiations and solutions as they are achieved.

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<sup>4</sup>Boyle (1991), "Hate, Hierarchy and Homicide," *Walter Owen Lecture*, (transcript of speech).

## **Thesis Question**

Carol Smart has asserted that, "we cannot predict the outcome of any individual law reform"<sup>5</sup> in the sense that reform aimed at correcting power imbalances or aimed at protecting women can be also used for opposite ends. The 1990 Canadian Supreme Court case of *R. v. Lavallee*<sup>6</sup> provides an example of such reform for women in Canada, by allowing a Battered Woman Syndrome defence for cases of women who have killed their batterers in self-defence. This thesis considers the strategic potential of recourse to expert testimony on the Battered Woman Syndrome in self-defence pleas, as well as the constraints of the psychological formulation of battering that should also be understood in terms of being a social condition. By identifying different discourses surrounding BWS, using the Canadian criminal cases of *Lavallee* and *Whynot*; media reports on the cases and on battering generally; and the literature of feminist responses to battering, this thesis assesses the impact and implications of the BWS defense in correcting power imbalances and ensuring justice for women who kill their abusers in self-defense.

## **Methodological Approach**

The method of discourse analysis describes the social process of shaping and forming beliefs. "Discourse develops the ideological currency of society,

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<sup>5</sup>Smart (1989), *Feminism and the Power of Law*, p.164.

<sup>6</sup>*Lavallee v. R.* [1990] 55 C.C.C. (3d).

providing schemata and methods which transpose local actualities into standardized conceptual and categorical forms."<sup>7</sup> This thesis employs discourse analysis to examine the social construction of 'women who are battered'. Battered Woman Syndrome has been adopted as a means of explaining this condition by both the media and the courts, as evidenced in the *R. v. Lavallee*. Using BWS as a defence in court may help to describe an individual context for self-defence, but does not necessarily provide an accurate representation of the range of issues in a social context. BWS needs to be considered in conjunction with other socially constructed discourses about women who are battered, in order to push current limits of discourse towards more meaningful representation.

Discourses compete for meaning. Not only in a dichotomous sense (i.e., determining whether a defendant is guilty or not guilty), but in the social organization sense of how society is ordered, how law is structured, how events are invested with meaning.

If we accept that law ... makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences. Non-legal knowledge is therefore suspect and/or secondary.<sup>8</sup>

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<sup>7</sup>Smith (1990) p.214-215.

<sup>8</sup>Smart (1989) p.11.



Determining which discourse(s) will be accepted (dominant) involves other competing discourses becoming marginalized or subsumed, or results in their being/becoming aligned with the dominant version.

As a result of how events are interpreted to be true, discourse generates a mandated course of action: "organizational properties are built into linguistic practices [...] which depend as a condition of their meaning on organizational process."<sup>9</sup> For example, invoking the self-defence plea initiates a legal procedure which generates a specific set of questions and criteria to be examined. This determines the discourse in terms of what will become and/or remain relevant, and intersects with procedures which control discourse at the level of "...determining the condition of their application, of imposing a certain number of rules on the individuals who hold them, and thus of not permitting everyone to have access to them."<sup>10</sup>

Highly organized and institutional discourses embody a distinctive terminology. "Social organization or relations govern how we choose terms and the syntactic arrangements we create among them."<sup>11</sup> Legal language is a particularly indicative example of this. The defendant pleading self-defence (as

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<sup>9</sup>Smith (1990) p137.

<sup>10</sup>Foucault (1984), "The Order of Things," p.120.

<sup>11</sup>Smith (1990) p.166.

well as other witnesses) articulates local and experiential descriptions of events which become processed in terms of specific self-defence criteria, so that perceptions and observations are limited and framed in terms of imminence, reasonableness, and so forth.

The notion of 'fact', for example, indicates a recurrent orderliness of movement from locally ordered observations to the textually mediated discourse they intend, the intertextuality of the discourse and further locally historic usages.<sup>12</sup>

The objectified organization of legal discourse is used to organize people and events in categories which preclude the particular, local, and individuality of experience.

Through processes of exclusion (marginalization, a mandated course of action, and inaccurate transliteration of events and perspectives into objectified categories), it is easy to lose, not hear, and avoid a range of other discourses. It is, then, difficult to meaningfully assess the usefulness and validity of discourses that become current without taking into account the discourses which become lost: the paths not taken.

To identify and discuss both dominant and alternative discourses, this thesis draws upon Nancy Fraser's model (1989) which theorizes sociocultural means of interpretation and communication: "the historically and culturally specific ensemble of discursive resources available to members of a given

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<sup>12</sup>Smith (1990) p.215.

collectivity in pressing claims against one another."<sup>13</sup> Fraser employs this model in her own work to specifically consider needs discourses. Fraser's approach is attractive for this analysis in terms of the intersection of needs claims and rights issues that must be addressed for women who are battered.<sup>14</sup> Fraser's model enquires into how needs issues are shaped by the discourses that surround them. The focus of this thesis regards not only the issue of acceptance of expert testimony on BWS in the courts, but also the question of how the needs of women who kill their abusers in self-defense culminate in the right of recourse to this testimony.

Feminist theory addresses women's historical exclusion from public discourse and lack of input into the workings of society's dominant institutions. Smith extends this inquiry to sociological methodology,<sup>15</sup> which, like law, is problematic in that the language and institutions used to legitimize it reinforce the ability and tendency of sociologists to obscure the roles, relations, experience and oppression of women in society. Carol Smart asserts that "in order to have any impact on law one has to talk law's language, use legal methods, and accept legal procedures."<sup>16</sup> Given the agenda of foregrounding alternative discourses,

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<sup>13</sup> Fraser (1989), *Unruly Practices: Power Discourse and Gender in Contemporary Social Theory*, p.164.

<sup>14</sup>Fraser acknowledges the conflict between approaches to needs claims and rights claims. She states, "I align myself with those who favor translating justified needs claims into social rights." (p.183).

<sup>15</sup>Smith (1987), *The Everyday World as Problematic*.

<sup>16</sup>Smart (1989) p.160.

attention must be paid to the formulation of research problems and methods in feminist jurisprudence, as in the critique of law.

Changing or challenging legal discourse begins with working towards an equal representation in numbers, but as new voices are added, the creation of new discourses are required to not perpetuate other exclusions. For example, the *Canadian Charter of Rights and Freedoms* section 15(1) implies that women possess *de jure* equality:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As indicated by this passage, the problem of closing the large gap between *de jure* and *de facto* equality is not only a question of gender, nor is it unique to women. Moreover, the experience of inequality is not the tidy set of categories the Charter's language implies. Battered woman syndrome, for example, is only one element of a contradictory experience often compounded by other factors, such as race and age:

[a]lthough both women of color and white women sometimes experience the family as an institution of violence and oppression, for women of color, the family often functions as a source of support for its members against the immediate harassment of racism and provides a site of cultural and political resistance to white supremacy.<sup>17</sup>

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<sup>17</sup>Kline (1989), "Race, Racism, and Feminist Legal Theory," p.122.

The intersections of gender, class, race, and age are crucial to developing the tenets of a feminist jurisprudence, as well as to feminism generally. However, by proposing specific definitional categories, other possible sites of difference are excluded from the discourse. If feminist discourse presumes a 'generic woman'<sup>18</sup>, there is little theoretical ground to contest the pitfalls of the defining of, for example, the 'classic type of battered woman' and hence what standards or criteria a battered woman would have to meet to have recourse to BWS as a defence. The risk here is predefining what constitutes a 'battered woman,' or, what constitutes a legitimate feminist concern.

Any feminist standpoint will necessarily be partial. Each person who tries to think from the standpoint of women may illuminate some aspects of the social totality which have been previously suppressed with the dominant view. But none of us can speak for 'woman' because no such person exists except within a specific set of (already gendered) relations - to 'man' and to many concrete and different women.<sup>19</sup>

Within discourses about jurisprudence this issue is equally difficult. Indeed, "if we cannot talk about 'woman' or 'women in general', then no case can be made about the injustice done to women, no strategy devised for the liberation of women."<sup>20</sup> The solution, however, lies not in the creation of abstractions equally pervasive to those generated by the institution of law. Feminist discourses on jurisprudence cannot be effectively driven by single perspectives (class, race,

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<sup>18</sup>See especially Spelman (1988), "Women: The One and the Many", *Inessential Woman*.

<sup>19</sup>Harding (1986), *The Science Question in Feminism*, p.154.

<sup>20</sup>Spelman (1988) p.78.

age or gender). To do so, is to replicate structures of domination already existing in the categories of thought of those investigations. Smith confronts the problem of positioning within the framework of sociological method. Recognizing that the institutions of sociology operate as an obstacle in their tendency towards the study of phenomena, she underlines the need to approach the subject as an active agent on society, rather than as a product of society. "For actual subjects situated in the actualities of their everyday worlds, a sociology for women offers an understanding of how those worlds are organized and determined by social relations immanent in and extending beyond them."<sup>21</sup>

As feminisms begin to acknowledge (or indeed, challenge and question) the privileged position of specific classes of women in defining various agendas, it becomes more appropriate to speak of differences rather than one underlying difference. In this thesis, a focus on discourse, process and procedure is used as a strategy for getting beyond the question of whether we can talk about (if not for) women, or categories of women. Identifying a range of discourses, who has access to them, whether they are implicit or negotiable, etc., highlights classes of subjects whose participation in (dominant) discourse is marginalized.

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<sup>21</sup>Smith (1987) p.106.

## Mapping

Fraser provides a model<sup>22</sup> to negotiate the terrain of different and competing discourses.

[Late capitalist societies] are stratified, differentiated into social groups with unequal status, power, and access to resources, traversed by pervasive axes of inequality along lines of class, gender, race, ethnicity and age. The [means of interpretation and communication] in these societies are also stratified, organized in ways that are congruent with societal patterns of dominance and subordination.<sup>23</sup>

Organized around identifying and juxtaposing different discourses, Fraser's model has important implications for understanding and making explicit a range of discourses, their relation to one another, including authoritative positioning that endorses some representations and invalidates others. Fraser's "sociocultural means of interpretation and communication" outlines different levels of discourse which form the framework for this thesis:

1. The officially recognized idioms in which one can press claims; ...
2. The vocabularies available for instantiating claims in these recognized idioms; ... For example, therapeutic vocabularies, administrative vocabularies, religious vocabularies, feminist vocabularies, socialist vocabularies;
3. The paradigms of argumentation accepted as authoritative in adjudicating conflicting claims; ... How are conflicts over the interpretation of needs resolved? By appeals to scientific experts? By brokered compromises? ...
4. The narrative conventions available for constructing the individual and collective stories that are constitutive of people's social identities;

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<sup>22</sup>Fraser (1989) pp164-165.

<sup>23</sup>Ibid. p.165.

5. Modes of subjectification; the ways in which various discourses position the people to whom they are addressed as specific sorts of subjects endowed with specific sorts of capabilities for action.<sup>24</sup>

Chapter 2, *Definitions*, sketches the "vocabularies available for instantiating claims", which are, to a large extent, communicated by the media. These vocabularies define battering in psychological and legal terms, and in relation to society, including administrative language (how the state problematizes battered women), as well as feminist discourses and responses to battered women.

Chapter 3, which looks at legal language around battering, examines the "paradigms of argumentation accepted as authoritative in adjudicating conflicting claims." Legal reasoning and legal categories that are employed in *R. v. Lavallee* and *R. v. Whynot*, cases in which women killed their batterers and claimed self-defence, are identified to examine the process of how the conflict is resolved. Questions of validity of the reasonable man/person and recourse to expert testimony are paramount issues in this area in terms of how legal discourse is extended to actual events.

Chapter 4, *Finding Voices*, is an account of how women in law have altered discourse by offering new means of constructing identities and legal language. This chapter explores the "narrative conventions available for constructing the individual," focusing on the social identity of women in the legal

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<sup>24</sup>Fraser (1989), pp.164-165.



profession, and developments and strategies for change in this social microcosm. Chapter 4 considers feminist perspectives as strategies to create a heightened awareness of women's position in law. Teaching feminisms in law school, as well as the intricacies of being a feminist lawyer or judge in a fundamentally patriarchal institution involves difficult trade-offs and a range of strategies. Traditional institutions infiltrated by historically marginalized people become the sites for negotiating discourses.

Chapter 5, *Feminist Jurisprudence*, addresses "modes of subjectification; the ways in which various discourses position the people to whom they are addressed." Chapter 5 examines conceptualizations of difference in law, and considers responses to the dominant discourse of jurisprudence in the work of feminists who theorize about alternative modes of jurisprudence and possible approaches to reframing this discourse. Gilligan's (1982) cultural feminism draws a distinction between the ethic of justice and an ethic of care, which would effect a better basis for compassion in law; Eisenstein (1988) proposes a postmodern decentering of the phallus to engender plurality and diversity; and Mackinnon's (1989) radical feminist theory of the state calls for a *necessary* and complete inversion of law privileging men over women to correct current power imbalance between the sexes.

The Conclusions, Chapter 6, discusses strategies to move beyond BWS as a defence. This involves recapitulating how the legal system is at worst, in specific instances, hostile to women, and at best, a limited site of transition but only in conjunction with other areas of social change. Specifically, in terms of access to self-defence, we must move beyond discourses informed by stereotypes and misinformation about women who are battered.

### **Conclusions**

The discourses identified in this thesis cross a number of disciplines including women's studies, law, media studies, sociology and psychology. Each foregrounds different aspects of the 'battered woman', or 'women' and 'men who batter', depending on the political focus.

The problem of ideology has close links with theories of language. It touches on the relationship between language and experience, reason and conduct, individual and society. These are problems which are wider than, though they include the traditional 'problem of ideology'. Only by analyzing the relationship between these different dimensions of social reality is it likely to be possible to conceptualize the mutually sustaining yet dislocated relationship between social conditions and political interpretations and to understand the processes of social and political change.<sup>25</sup>

Historically, discourse has centred on a public/private sphere distinction, the pathology of the individual woman, rather than problematizing 'men who batter women' or 'patriarchal societies which do not protect women from violence'. Dominant discourses have been difficult to penetrate with the voices of women's

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<sup>25</sup>Joseph (1983), *Political Theory and Power*, p.87.

perspectives: specifically the right to live without the threat of violence. Attempting to resolve the rupture in experience in which the female other is left outside, or incorporated seamlessly so that acknowledgement is marginalized, is not the simple matter of adding '/she' and '/her experience.' "How people speak of the forms of life in which they are implicated is determined by those forms of life."<sup>26</sup> And, how meaningfully women are represented in and by law is determined and limited by the conceptual categories implicit in legal discourses.

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<sup>26</sup>Smith (1987) p.188.

## 2. DEFINITIONS

"We can't just occupy existing words ... We have to change the meanings of words before we take them over."<sup>27</sup>

"No means no."

### The Different Standard

In response to Lorena Bobbitt's recent acquittal, the founder of the American National Organization for Men commented, "It's a tragedy, but I'm afraid it's now open season on men."<sup>28</sup> (This hunting characterization has been previously used in reference to the acquittal of women who killed their batterers.<sup>29</sup>) Given data on the pervasiveness of assault on women by their partners or spouses in our society,<sup>30</sup> it is understandable that the possibility<sup>31</sup> of courts sanctioning

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<sup>27</sup>Rowbotham (1974), *Women's Consciousness, Man's World*, p.33.

<sup>28</sup>Sidney Siller, founder of the National Organization for Men, *The Vancouver Sun*, January 22, 1994, A2.

<sup>29</sup>Kathleen Begley, "Are Women Getting Away With Murder?" *Chicago Daily News*, 28 November 1977; John Switzer, "Self-Defence Decision Causing Double Standard: Women Get More Than Equal Rights After Killing Spouse," *Columbia Dispatch*, n.d. 1978, p.A1: Cited in Gillespie (1989), *Justifiable Homicide*, p.10.

<sup>30</sup>During 1990, an average of two women every week were killed by their partners (Ministry of Attorney General, 1993); at least one in ten women [in Canada] is sexually assaulted each year by a husband, ex-husband or live in partner (First Report of the Subcommittee on the Status of Women, 1991); The Attorney General, 1993, puts the figure at one in eight, and notes that as many as 35 violent episodes may occur before a woman seeks intervention; wife assault is responsible for 1/5 of Canadian homicides (Ministry of Attorney General, 1986); etc.

<sup>31</sup>The court acquitted Lorena Bobbitt on the grounds of temporary insanity, for which she was (temporarily) institutionalized. So, bobbiting was not, in fact, sanctioned in this case.

violent retaliation might cause fear for certain men. Thus, it is clearly in the interest of those who do feel threatened to frame cases such as Lorena Bobbitt's acquittal (by reason of temporary insanity) in terms of revenge, rather than to acknowledge her fear or intent to protect herself in light of the threat she felt to her person. At issue here is the inability to grasp that people (including women) react to fear of danger, and the condemnation of women who act on perceived fear of imminent harm. That a different standard is applied to women, which precludes the right to self-defence has been difficult to demonstrate in social and legal fora. This is largely due to a framing of the concept of justice which assumes that all people are to be judged equally (i.e., the same) before the law. From this framing ensues the perception that women might be getting away with murder (or bobbiting), if events (facts) are accounted for and understood differently. The perception of unequal justice is predictably difficult to dispel in cases of women who kill their batterers in physically nonconfrontational situations such as when the batterers are sleeping or unarmed.

This and the next chapter explore the language and definitions that apply to women who are confronted by the legal situation of defending themselves for killing their batterers, and which contribute to battered women who kill their batterers being often held accountable without the usual opportunity to demonstrate how their actions were justified (i.e., in self-defence). Bertha Wilson writing the Supreme Court decision on the admissibility of expert testimony on

Battered Woman Syndrome notes that not all battered women who kill their abusers do so in self-defence.<sup>32</sup> This chapter argues that such legal definitions are problematic in the social, psychological, and physical context of women who live in a battering relationship. The two Canadian criminal cases of *R. v. Lavallee* and *R. v. Whynot*, discussed below provide examples of this.

Discourse about battered women generally presumes individual pathology, behaviour which warrants battering (whatever that would look like), and disbelief (i.e., if it was that bad the woman would leave). In short, language about battering has been formulated in terms of the individual woman who is battered: not in terms of men who batter, and not in terms of a society which condones (or at least does not systematically punish) violence against women.

A focus on language has been a crucial means for feminists to examine the construction of reality and woman's historical and current exclusion from that process.<sup>33</sup> Through language we communicate boundaries and intentions. Expressing one's self involves translating sensations, experiences and emotions into words which have socially constructed value and meaning. Expression can be further refined or limited through fitting words into structural conventions

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<sup>32</sup>*Lavallee v. R.*(1990) p.126.

<sup>33</sup>See: Mary Daly (1978), *Gyn/Ecology*, Boston: Beacon Press; bell hooks, (1984) *Feminist Theory: From Margin to Center*, Boston: South End Press; Cheris Kramarae (1981), *Women and Men Speaking*, Massachusetts: Newbury House; Dale Spender (1980), *Man Made Language*, Boston: Routledge & Kegan Paul.

such as poetry or academic work. It is even more difficult to be accurate in a language that is not one's own; to be a foreigner to the process of social construction of meaning. As noted in Chapter 4, the conventions of where we go to find out about law, as well as individual experience of law, are rigid. Narrative, subjective or informal texts do not usually qualify to inform legal discourse, even though, these are sometimes the only existing, real, or for given actors, *valid*, accounts of particular experience.

Some general conventions of sexist language have been made obvious and targeted for change. Disclaimers announcing that a given text uses for convenience masculine pronouns (referring to all persons) have increasingly given way to texts which employ non-sexist language. The seemingly ludicrous reform of words with the suffix 'man' (and the exaggerated extension to prefixes used to belittle the request for inclusion: person-handling, mistress-copy) has given way to manuals and guides for non-sexist writing and non-sexist equivalents. As these transformations are made to our language it is increasingly easy to evoke both women and men when referring to different professions and life situations.

What is more difficult to undo are stereotypes, misconceptions, and more deeply, racism, sexism, homophobia – ways in which we organize our worlds and constitute ourselves through recognizing, asserting or presuming power over

others. Ideally, we might construct society in which individuals position themselves vis-à-vis each other nonhierarchically – realistically, we must identify and understand why we do not, hence theories of patriarchy, capitalism, etc. Law, in particular, is a complex of categorical simplifications and generalizations which are aimed at facilitating the resolution of conflicts.

### **Historical Discourse about Women in Law**

Whether as victims or criminals, women who have come into contact with the law have historically been perceived as abnormal. Cesare Lombroso, a 19th century Italian physician, who is commonly regarded as the first criminologist, outlines feminine deficiencies in the following passage:

We have seen that women have many traits in common with children; that their moral sense is deficient, that they are revengeful, jealous and inclined to vengeance of refined cruelty. In ordinary cases these defects are neutralized by piety, maternity, want of passion, sexual coldness, by neatness and an undeveloped intelligence. But when piety and maternal sentiments are wanting, all in their place are strong passions and intensely erotic tendencies, much muscular strength and a superior intelligence for the conception and execution of evil, it is clear that the innocuous semi-criminal present in the normal woman must be transformed into a born criminal more terrible than any man.<sup>34</sup>

Biological difference with inferiority inferred from that difference combined with capitalism and patriarchy were the conceptual tools with which law about women was written and acted upon. According to Boyle, rape laws, for example:

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<sup>34</sup>Lombroso cited in Gavigan (1984), "Women's Crime: New Perspectives and Old Theories" p.49. Original citation: Lombroso, Cesare and Ferrero, Enrico (1900), *The Female Offender*. New York: D. Appleton, p.151.



were never meant to protect all women from rape, or to provide women with any guaranteed right to sexual autonomy. Rape laws were designed to preserve valuable female sexual property for the exclusive ownership of those men who could afford to acquire and maintain it.<sup>35</sup>

Accordingly, it was not until the late nineteenth century that in cases of rape, battering, seduction, and so forth that women could bring action themselves, rather than relying on a male family member to represent their interests. Not surprisingly, the interests of women in such cases were addressed in such ways that we might currently recognize as inadequate. First and foremost was the property equation with regards to women and sexuality, integral to a property structure.<sup>36</sup> Women in abusive marriages, for example, were discouraged from leaving their husbands.

"It was true," began [Chief Justice] Campbell, "that a chastisement had taken place; but however ungallant such conduct might be considered, yet a man had a right to chastise his wife *moderately* - and to warrant her leaving her husband, the chastisement must be such as to put her life in jeopardy."<sup>37</sup>

Second were the social norms of what was expected of a woman in situations such as sexual assault in which she would be expected to defend her honour tooth and nail, no matter what kind of coercion or intimidation was being used. Of course rape cases were easier on the victim if she was deemed by her peers to be virtuous, with her honour well intact. In short, the law acted in such a way to

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<sup>35</sup>Boyle (1984), *Sexual Assault*, p.viii

<sup>36</sup>The definitive statement on this formulation of the relationship is from Sir William Blackstone: "The husband and wife are one and that one is the husband ... Even the disabilities that the wife lies under are for the most part intended for her protection and benefit."

<sup>37</sup>Backhouse (1991), *Petticoats and Prejudice*, p.174

protect the perceived social value of women. If a woman had, herself, compromised this value, through prostitution, not being deemed a good wife and mother, etc., or if the economic situation of the woman's family was poor, then there was little of value to protect.

Women as criminal defendants have historically been less clearly addressed by criminal law which was written in response to situations in which men might find themselves.

It cannot be emphasized too strongly that all of these judges were male, as were the jurors and most of the criminal defendants brought before them. Their cases involved the sorts of situations men were apt to get themselves into; and the excuses or defenses they offered were those that made sense - to themselves, their judges, and all-male juries - in terms of acceptable or understandable masculine behaviour.<sup>38</sup>

Situations in which society would expect women to find themselves, then, would be occurrences of the private sphere. A woman was defined by her marriage and her family. Criminal offenses were, in a definitional sense, things that could not be contained within the family realm. Prostitution (in its criminal sense) happened outside of the family; murder either happened outside of the family, or threatened the value of the family structure; concealing childbirth and infanticide was usually committed by young unmarried women (an unwed mother and bastard child did not a family make). On the other hand, prior to the nineteenth century, much of healing expertise was a female domain. So, for example, the

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<sup>38</sup>Gillespie (1989) p.35. See chapter entitled "A Law for Men" which traces the evolution of criminal law from Medieval England to present.

definition of what constituted an abortion, and what was merely a "bringing on the menses" was informed by women themselves. Backhouse notes that the latter was viewed by most women as well within their rights before the quickening of the foetus.<sup>39</sup> The following section illustrates the degree to which previous discourses have maintained their currency in current legal discourse.

### **Defining Battered Women**

Defining battered women and Battered Woman Syndrome (BWS) is necessary in a society which has not been compelled to define the elements of 'men who batter syndrome'. The prevailing definition of 'battered woman' is relatively straightforward: "a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights."<sup>40</sup> Being in a battering relationship, however, involves complex relationships of personalities and socialization, and the definitions ascribed to this condition, its causes, cures, effects, and origins are obscured by intersecting definitions and perceptions of women and the institution of the family.

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<sup>39</sup>Backhouse (1991) "'Quickening' described the first recognizable movement of the foetus in the womb, generally sometime within the fourth month after conception." p.146.

<sup>40</sup>Walker (1979) *The Battered Woman*, p.xv. 'Repeatedly' in this definition indicates that there is a relationship between the two people. 'In order to coerce her to do something' might be simply to be subservient to him.

*Why doesn't she just leave...?*

The fundamental way battering dynamics have been misunderstood is through not asking why many men batter their spouses. Instead, it is asked why so many women remain in a battering situation. Bunyak notes that assuming a woman should leave is ineffective punishment:

Once divorced, the man is free to remarry and beat his new wife. Society has not told him that his behaviour was wrong; it merely tells him that one woman (his ex-wife) was not willing to tolerate it. He simply needs to find someone else.<sup>41</sup>

*Why doesn't she just leave?* also implies that women are in some way responsible for the violence, and indicates that it will stop if they take proper measures. Studies have demonstrated that this is not true. Men who create violent relationships tend to escalate them when threatened with rejection or abandonment.<sup>42</sup> The most dangerous period of a violent relationship is often at separation and during the two following years.<sup>43</sup> Some studies indicate that men are more apt to kill the woman they batter after she has left and that the recurrence of violence six months or more after treatment for the batterer averages at about 35%.<sup>44</sup> *Why doesn't she just leave?* subtly relinquishes responsibility for women who are thwarted in their attempts to leave; for women

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<sup>41</sup>Bunyak (1986), "Battered Wives Who Kill: Civil Liability and the Admissibility of Battered Woman's Syndrome" p.608.

<sup>42</sup>Castel (1990), "Discerning Justice for Battered Women who Kill" (citing Bernard) p.232.

<sup>43</sup>Walker (1993), "Battered Women as Defendants" p.246.

<sup>44</sup>Saunders (1993), "Husbands Who Assault: Multiple Profiles" p.26. This number is drawn from a survey of studies; the figure rises to 52% for men who do not complete treatment.

who have no where to go; for women who experience violence in the home as safer than racist violence outside the home;<sup>45</sup> and so forth.<sup>46</sup> Once battered, a woman is often further disadvantaged through seeking aid from police or through confronting the judicial process.

If wife beating were considered criminal, the situation would be treated as other criminal actions. The criminal would be removed from the victim and potential victims (other members of society). No one would seriously suggest that vulnerable members of society be taken away and locked up so they cannot be victimized.<sup>47</sup>

Although there have been attempts at serious reform in Canada,<sup>48</sup> and although Canadian law does not mandate a "duty to retreat", the expectation remains that if a woman is in serious danger in a battering relationship, she should leave.

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<sup>45</sup>See Kline (1989) p.122.

<sup>46</sup>I have not dealt here with battering in lesbian relationships which involves both a different set of issues vis-à-vis the lesbian community, as well as a more intense version of the issues and misconceptions confronted by women in heterosexual battering relationships. Renzetti (1992) provides an excellent overview and discussion of particular problems of even less access to safe places for lesbians in battering relationships because the location of shelters are often common knowledge in the community; a tendency towards recommending couples counselling, even though this has been proven ineffective and even dangerous in heterosexual battering relationships; and insularity which works against going outside the community for help. Renzetti also addresses the stereotypes and homophobia battered lesbians are confronted with when they do go outside the lesbian community for protection.

<sup>47</sup>Or, in prison be further victimized. Bunyak (1986) p.610.

<sup>48</sup>For example, see Ministry of the Attorney General (1993), *Policy on the Criminal Justice System Response to Violence Against Women and Children*.

### *Battered Woman Syndrome (BWS)*

Analysis focused on the victims of spousal abuse (or even on individual batterers<sup>49</sup>) does not really help to explain why so many men are inclined to batter women they are in relationships with. Accordingly, there is controversy as to whether evidence of BWS is best described in terms of the actual assaults committed against women, or in terms of psychological responses that repeated assaults engender. Focus on the psychology of individual women who are battered has been a key and growing area of research. On the one hand, this is a logical path of feminist inquiry: to uncover experience which has been previously hidden, devalued and misunderstood. Nonetheless, on the other hand, this information can then be used in a legal context to pathologize rather than empower individual women.

Lenore Walker has done much of the ground-breaking work in the area of defining and explicating the collection of symptoms which together characterise BWS. In addition to her academic studies, she has served as an expert witness to explicate the syndrome. Bertha Wilson in writing the Supreme Court Judgement of *R. v. Lavallee* (see Chapter 3) relied heavily on Walker's work to justify the decision to allow testimony of an expert witness, which hinged on the recognition

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<sup>49</sup>There is a growing literature which attempts to 1) profile men who might be inclined to batter; and 2) strategize treatment for men who batter. This literature is committed to interventions at the levels of identifying batterers and breaking individual cycles of violence. The bulk of research and theorizing in the area of why so many men do batter women (and hence why attempts at determining typologies of batterers have been largely unsuccessful) has been the result of profeminist work.



of BWS. Walker subscribes to two key theories in this area: learned dependency and a cycle theory of violence.

Learned dependency or learned helplessness occurs as a response to repeated abuse as one begins to feel/realise a lack of control over the situation and an inability to change it.

Learned helplessness was first tested in laboratory experiments in which dogs were taught that their behaviour did not make a difference to whether or not they received electric shocks. Similarly, the lack of control over one's environment was found to cause disturbances in human motivation and behaviour.<sup>50</sup>

The dogs in the study ceased to attempt to escape, and in fact, had to be retrained to leave their cages though repeatedly dragging them through the opened door. On a human level, learned helplessness affects a variety of coping strategies of which escape is just one.

Stairs and Pope juxtapose Amnesty International's *Report on Torture*<sup>51</sup> and literature on wife abuse to illustrate the "remarkable similarity" between the two conditions. 'Techniques' used (in addition to battering) which contribute to the 'inevitability' of a battering relationship include: isolation; monopolization of

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<sup>50</sup>Brodsky (1987) "Educating Juries: The Battered Woman Defence in Canada" p.462, citation omitted.

<sup>51</sup>Amnesty International (1975), *Report on Torture*, cited in Stairs and Pope (1990), "No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds" pp.175-176.

perception; induced debility and exhaustion; threats; demonstrating "omnipotence"; enforcing trivial demands; and occasional indulgences.

In Walker's analysis, learned helplessness works in tandem with a 'cycle of violence'. The first stage is escalation:

The batterer expresses dissatisfaction and hostility but not in an extreme or maximally explosive form. The woman attempts to placate the batterer, doing what she thinks might please him, calm him down, or at least, what will not further aggravate him. She tries not to respond to his hostile actions and uses general anger reduction techniques.<sup>52</sup>

The second stage is the actual, escalated physical attack. And, the third stage involves indulgences, acts of contrition, pleas for forgiveness and promises of change.

The woman wants to believe the batterer and, early in the relationship at least, may renew her hope in his ability to change. This third phase provides the positive reinforcement for remaining in the relationship, for the woman.<sup>53</sup>

The cumulative repetition of the cycle contributes to the conditioning of learned helplessness: the woman lives the belief that there is nothing she can do change her situation. All of the literature in this area indicates that over time, the cycle of battering increases both in frequency and intensity. 'Occasional indulgences' in the Amnesty International Report, are described as small kind acts used to provide positive motivation for compliance. In the Walker Cycle of

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<sup>52</sup>Walker (1984) p.95.

<sup>53</sup>Ibid. p.96.



Violence Theory, 'occasional indulgences' is suggested in the third stage of the repetitive Cycle, acts of contrition.

Criticisms of Walker's work suggest that the 'learned helplessness' model is not entirely appropriate in describing battered women who employ a range of different coping strategies, only some of which might be very passive (such as forgetting, minimizing the battering, or fantasizing).<sup>54</sup> "The emphasis on victimization and 'learned helplessness', rather than on a woman's actions in surviving, has also caused concern."<sup>55</sup>

Further, as illustrated by the laboratory experiments using dogs, and psychology literature on Post Traumatic Stress Disorder (PTSD) of which Battered Woman Syndrome is a subcategory, neither learned helplessness or PTSD are sex specific. The genderedness of BWS unnecessarily invokes a different category for women and forces a discourse which focuses on difference. It is indicated that males (and dogs) tend to respond in the same manner when faced with conditions similar to those which cause women to learn helplessness. If gender specific terminology is to be used productively, it should express an actual difference. The choice between using the term BWS or PTSD to describe a psychological reaction does not highlight a meaningful difference, and, it might

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<sup>54</sup>Barnett and LaViolette (1993), *It Could Happen to Anyone*, pp.105-106.

<sup>55</sup>Boyle (1990), "The Battered Wife Syndrome and Self-defence: *Lavallee v. R.*, p.177.

be more strategic to show how men and women are alike in their response to repeated violence which they cannot control.

Walker's work, and the emerging literature in this area, have provided expertise in an area which previously did not exist – a crucial development in terms of admissibility of expert witness testimony for battered woman syndrome. A criterion for introducing expert testimony is that the state of knowledge in that area be sufficiently developed in order to give an expert opinion (see further discussion of expert testimony in Chapter 3). Walker's studies in this area also work towards refuting stereotypes of masochistic female pleasure, and/or other means of women benefiting from battering relationships. Ultimately, the question of why women do not leave battering relationships is rendered, in Walker's analysis, a non-question: repeated battering and abuse results in learned helplessness and a psychological inability to believe that one can take control of one's circumstances. Arguably, we must not lose sight of why women do not leave battering relationships. Not all women who are battered are incapacitated by BWS, but are restrained from leaving. Replacing 'why *doesn't* she leave' with 'why *can't* she leave' helps to situate these reasons in a social context rather than on an individual level.

## *Social Context of Battered Women*

Discussing the problem of men who batter women from the perspective of explicating battered woman syndrome contributes to the trend which has been instrumental in framing this as a 'woman's issue.' This formulation displaces discourse around issues of the social costs of wife battering. Police, child welfare, medical, legal, and social services are direct costs. Inability to work, sick leave, costs incurred by drug and alcohol abuse and special needs for affected children are some of the hidden costs.<sup>56</sup> Because all aspects of wife battering are so poorly documented, it is difficult to determine the financial cost to Canadian society in addressing the effects of wife battering. Estimates propose numbers of the magnitude of \$40 million in 1985 to operate the 230 transition houses and shelters across Canada and \$32 million in 1980 for police intervention and related support and administrative services.<sup>57</sup> Because funding in this area is inadequate<sup>58</sup> and dedicated to treating symptoms, these costs increase over time.

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<sup>56</sup>It is not always clear who should be responsible for these costs. In response to a proposal for a battered women's shelter, the Social Credit candidate for Okanagan-Boundary Chuck Stone, stated: "politicians are fed up with hearing about programs for women and children; men's needs should now be addressed." Monk, "Socreds' comments anger women proposing shelter," *Vancouver Sun*, 17 August 1991, p.A7.

<sup>57</sup>MacLeod (1987), *Battered But Not Beaten*, p.35.

<sup>58</sup>In Quebec, one woman out of two is turned away from shelters because of lack of space; in Alberta approximately 1.5 or two women are turned away for every one who is accepted; in Saskatchewan, some women travel 500 miles to access services; in British Columbia, for every family taken in, two are turned away. *The War Against Women*, June 1991, p.32.

The term 'wife battering' has only existed for about twenty years. During that time, it has shifted from referring to a domestic, private and even joking matter 'have you stopped beating your wife?',<sup>59</sup> to a political issue of gender domination, to a focus "on individual pathology, the 'illness' of the batterer and the psychological profile of the victim."<sup>60</sup> This shift is indicative of the level of state intervention, and the power to define the issue through the allocation and structure of resources provided. Morgan discusses the state's role in managing the 'image' of social problems; "that is, an image of social problems which supports the state's legitimacy and guards against definitions which may threaten social order."<sup>61</sup>

Early feminist responses to wife battering were to create safe places for women and to educate women and the general public about gender domination, especially as manifested by violence against women. The practice of consciousness-raising enabled women in these feminist community organizations to counter knowing their social beings only as constructed and distorted within the realm of male dominance. "In their discourse, battered women were not addressed as individualized victims but as potential feminist activists, members

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<sup>59</sup>Fraser (1989) p.175.

<sup>60</sup>Morgan (1985), "Constructing the Images of Deviance", p.66.

<sup>61</sup>Ibid. p.61.

of a politically constituted collectivity.<sup>62</sup> Redefining personal battering situations within the larger context of oppression against women engendered the possibility of politicized action and potential for change rather than individual resignation to the break-down of a marriage and self-blame.

The growth of the feminist movement and requests for the funding of shelters provided an entry point for state intervention. Funding served to legitimize the severity of the issue of wife battering. However, the subsequent professionalization of shelters has worked to undermine the feminist collective and political approach which a patriarchal state might find threatening.

[W]hen social movements succeed in politicizing previously depoliticized needs, they enter the terrain of the social, where two other kinds of struggles await them. First, they have to contest powerful organized interests bent on shaping hegemonic need interpretations to their own ends. Second, the encounter expert needs discourses in and around the social state.<sup>63</sup>

Refuges which had previously been run by women from a community who had often experienced battering themselves, were replaced by larger centres providing a range of services.<sup>64</sup> With bureaucratization, the focus on teaching women to be self-sufficient (within a supportive community) shifted to treating disorders and providing services for women as individuals. The educational, fundraising and

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<sup>62</sup>Fraser (1989) p.176.

<sup>63</sup>Ibid. p.175.

<sup>64</sup>Morgan (1985) p.66

social change functions that were previously addressed as part and parcel of helping battered women are successfully replaced with this strategy.

The growth of the medical approach, and professionalized treatment organized through public and mental health services, has not only provided an environment supportive of the individualization of wife-battery, but has essentially guaranteed that battery be subsumed under this rubric.<sup>65</sup>

Morgan suggests that this kind of government response is a self-protective framing of the issue that "eliminates the need for inquiries into the condition of women in contemporary society."<sup>66</sup> If the condition of wife-battering is defined as an individual condition, rather than as a social problem, then it can be effectively treated within existing institutions, and more importantly, without requiring these institutions to change.

That poor women are more likely to be in contact with social services, and are more likely to have nowhere else to go than to a shelter, contributes to the perception that battered women are only those who are already down and out. "[I]t is comforting for Canadians to think they are different from such low-class unfortunates, to think people in this predicament are not normal, not the couple next door."<sup>67</sup> Increasing awareness of the issue has, in some instances, been coupled with the preference that battered women not be visible. Preventing the

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<sup>65</sup>Ibid. p.73.

<sup>66</sup>Ibid. p.73.

<sup>67</sup>Greaves, "Reality of battered women harsher than study shows," *Globe and Mail*, 10 September 1987, p.A7.

establishment of a battered women's shelter in Winnipeg, residents were quoted as saying:

I've lived here for 35 years and don't want to see the street swarming with husbands looking for their wives. ... It's peaceful here. Couldn't they find somewhere else?

I don't want them [speaker's children] exposed to the violent nature of that sort of thing with police cars, and husbands coming around.<sup>68</sup>

I feel there will be a potential for violence in our neighbourhood that doesn't exist now.<sup>69</sup>

The perception expressed in these accounts is that battered women are "others", i.e., "this does not happen here". Individualization of a social condition contributes to battered women themselves being perceived as repugnant and threatening. The inequality, isolation and oppression of their situation is not easily recognized.

Increased media attention on battered woman syndrome (and on assault of women in general) is not coincidentally related to better awareness and understanding in the courts. However, as witnessed in the recent Bobbitt case, the media will still tend towards sensationalism at the expense of accurate reportage. Stereotypes and misconceptions have been factors in retarding the acceptance of the battered woman self-defence plea. Misinformed attitudes and

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<sup>68</sup>Simon, "Shelter for battered women riles residents in north end" *Winnipeg Free Press*, 29 November 1987, p.A3.

<sup>69</sup>Speirs, "Neighbours quash shelter for abused native women," *Winnipeg Free Press*, 29 January 1988, p.A3.



general ignorance have, as well, shaped police response to domestic disputes and influenced the allocation of funding for the support of battered women.

That wife-beating was historically a legitimate function of marriage<sup>70</sup> is underlined by the lack of media attention during the 1960s and 1970s when feminists were attempting to target battering as a social issue. "Battered women" as a subject category appeared in the *Canadian Newspaper Index* only in 1980 and directed researchers to the category of "Family violence". It was not until 1984 that "Battered women" was a category of its own with a listing of 107 articles for that year. And finally, in 1989, researchers were directed to also "see Men who batter women".

Pervasive societal acceptance of wife abuse resulted in inaccurate perceptions of the gravity of the condition as well as common sense solutions to the problem. The frequently asked question: "why doesn't she just leave?" as well as the misnomer of "the problem of wife battering" continue to function to situate the onus of resolution on the victim rather than the abuser.

Because wife-abuse has traditionally been such a private and unreported phenomenon, the media have had tremendous influence in perpetuating earlier

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<sup>70</sup>"Rule of thumb" refers to the law which permitted a man to beat his wife with a stick no wider than his thumb. The possibility of a rape charge against one's husband was only created in 1983. Boyle (1984) p.8.



stereotypes. Recently there have been trends towards increased coverage and more comprehensive explication of BWS, including a Government of Canada advertising campaign which depicted women who actually looked battered. Nonetheless, these trends are undermined by stereotypical depictions of women in other areas of the media, particularly in terms of revenue accrued through advertising which continually defines how women can best be pleasing to men. An example of this was the recent CBC airing of one of the most realistic media depictions of a battered woman to date, *Living with Billy*, which was interrupted by advertising primarily aimed at women selling consumer strategies for being more appealing.

### **Lady Killers and the Media**

"Females whose offence is more consistent with sex role expectations seem to experience less harsh outcomes than females whose offence is less traditional."<sup>71</sup> The media contribute to the construction of this perception that it is anomalous for a woman to seriously defend herself. In the *Winnipeg Free Press* reporting on the *Lavallee* acquittal, directly above the article which claimed that: "[l]egal organizations and wife-abuse associations say the case will change public attitudes about wife abuse"<sup>72</sup> ran the photo of Miss Winnipeg and the runner-up

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<sup>71</sup>Nagel cited in Edwards (1985), *Gender Sex & the Law* p.134.

<sup>72</sup>McFarland, "Lavallee tragedy sparks aid, awareness in wife abuse fight," *Winnipeg Free Press*, 27 September 1987, p.A3.

to Miss Winnipeg.<sup>73</sup> Stereotypical attitudes about women and women's societal role to be visually pleasing are underlined in such instances, as the headlines poignantly reflect the juxtaposition of women's roles.

Newspaper coverage of Lavallee further demonstrated a difficulty in reporting on battered women who kill or commit crimes that are not consistent with gender stereotyping. "Lavallee, who Brodsky [her lawyer] refers to as a 'bubbly girl, not a woman,' never thought the jury would acquit her."<sup>74</sup> Lavallee, at 22-years of age (most definitely a woman), in the same article was also described as petite, unable to grasp the condition of 'battered-wife syndrome', and as having colour-coordinated her plants to make it easier for her mother to water them in the event that she should go to prison. *The Vancouver Sun* quoted Brodsky as saying: "This lady was a battered woman"<sup>75</sup> implying different standards for nice ladies and bad women. While Brodsky may well have been misquoted, what is significant is the paper's selection of and focus on factors of being "ladylike". Similarly, Chantale Soumis, imprisoned for planning and committing the murder of her husband, in an article published around the same

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<sup>73</sup> A journalistic attempt to keep all of the "Women's News" on the same page?

<sup>74</sup> Sinclair, "Abuse victim continues to carry guilt despite verdict," *Winnipeg Free Press*, 26 September 1987, p.A1.

<sup>75</sup> Canadian Press, "Battered wife acquitted in slaying of husband," *The Vancouver Sun*, 23 September 1987, p.A2.

time of the Lavallee case, is described as "a small, almost doll-like woman, with blue eyes and a sculptured face."<sup>76</sup>

The *Lavallee* decision focused on the admissibility of expert testimony on BWS, and the media covered this by outlining specific conditions which contribute to battered woman syndrome: psychological abuse and emotional entrapment, threats, repeated assaults, not being able to flee because of lack of resources or not wanting to leave children behind. However, these elements are simplified in presenting women as unlikely candidates for being able to kill, either because of their physical frailty or naivety. The risk of building on the concept of a "classic type" of abused women<sup>77</sup> is that once defined, it will be used as a standard of measurement. Such a standard has already begun to emerge.

The stereotype portrays all battered women as passive, helpless and emotionally disturbed. A defendant who does not conform to the court's narrow definition of how all battered women supposedly behave may not be regarded as battered. For instance, if the defendant attempted to leave or to resist in the past, the court will accept this as evidence that rebuts her status as a battered woman irrespective of prior physical abuse.<sup>78</sup>

It is important to emphasize that the merits of the Lavallee Supreme Court decision lie not only in the recognition of battered woman syndrome per se, but

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<sup>76</sup>Bagnall, "I killed him just to finish: afraid to testify, battered women are the despair of police and prosecutor," *The Gazette* (Montreal), 23 May 1987, p.B1.

<sup>77</sup>Darroch "Battered wife jailed for killing husband" *Toronto Star*, 10 January 1987, p.B11. Sinclair, 26 September 1987.

<sup>78</sup>Castel (1990) p.255 (footnote omitted).

that the decision also acknowledged the possibility of a different perception of imminent harm, a perspective that the courts have heretofore been reluctant to recognize. Women's increased participation in the public sphere has demanded and facilitated an awareness of different perspectives than previous dominant discourses permitted. This has been especially evident in media studies and opposition to sexist depictions of women in the media and popular culture.

### **A 'Men's Issue'?**

The sudden emergence of 'battered husband syndrome', based in large part on the research of Suzanne Steinmetz, in the late 1970s commanded extensive media coverage. Yet when examined more closely, the research is a classic example of overgeneralization and misrepresentation of statistics.<sup>79</sup> Mildred Pagelow attempting to unravel the process of Steinmetz's findings outlines the following. Based on a sample of fifty-seven couples, within a county of 94,000 couples, Steinmetz found four battered women. This was converted to 7,016 battered women per 100,000 population and compared to police data for the same area which reported twenty-six cases of spouse assault (twenty-four women and two men). Concluding that only one out of 270 women report being battered, Steinmetz suggests that if the same degree of underreporting was present for

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<sup>79</sup>Steinmetz's study has been referred to as suffering from "battered data syndrome". Saunders (1988) p.95.

husbands, an estimated number of 250,000 husbands were the victims of assault in the United States during 1975.<sup>80</sup>

Despite the obvious fallacies of this reasoning and a lack of additional studies to confirm Steinmetz's results, the media immediately jumped in to corroborate this horrible social injustice. Pagelow cites the following headlines:

- 'The battered husbands' *Time Magazine*
- 'Not only wives: study shows husbands battered too'  
*San Gabriel Valley Tribune*
- 'Who struck Jane ... or John?' *Los Angeles Times*
- 'Husband is more battered spouse' *Chicago Daily News*
- 'Some statistics in the battle of the sexes'  
*Chicago Sun Times*
- 'Claim of 12 million battered husbands takes a beating'  
*Miami Herald*<sup>81</sup>

Perturbation was not confined to the print media.

Fascinated reporters and national television talk-show hosts latched onto the topic and telecast interviews from coast to coast, and eventually the claim of 250,000 battered husbands exploded into 12 million battered husbands and spread internationally.<sup>82</sup>

The overwhelming response although short lived, demonstrates (in reverse) the difficulty of getting accurate depictions of the incidence of wife assault in the media. Despite increasing awareness of the degree to which battering of women is underreported, rather than acceptance that there is a pervasive problem (as immediately conceded in the case of men based on Steinmetz's data), the

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<sup>80</sup>This is paraphrased from Pagelow (1985), "The 'battered husband syndrome'" pp.174-175.

<sup>81</sup>Ibid. p.173.

<sup>82</sup>Ibid. p.173 (footnote omitted).



incidence of battered women is continually disbelieved, or challenged on issues such as whether or not psychological battering can be included in the definition. Battered Man Syndrome and the Bobbitt case are examples of reduction through equivalence:<sup>83</sup> they are shown to be victims of women, just as women are victims of men, thus presenting the situations as reciprocal and similar. Inaccurately indicating that men are similarly situated to women with regards to incidence of violence undermines arguments for change and contributes to misperceptions and misinformation.

### **Conclusions**

The media fascination with the battered men study was recently replicated in reporting on the Bobbitt cases. The reason for the case being given any media attention at all had to do, of course, with one man's unfortunate separation (and subsequent happy reunion) with his penis. Ironically, if Lorena Bobbitt had killed her husband, this story would probably not have been judged newsworthy.

Stereotypes about women in battering relationships and disbelief of the severity or the battering, both in terms of the actual level of abuse and the number of women affected, mitigate the degree to which battering will be taken seriously as a social issue. Because the incidence of battering (and assault on women generally) is not a fully prioritized social issue, there is an inevitableness

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<sup>83</sup>I am indebted to Lynne Hissey for this term.

to discourses in this area which focus on battered women, per se. It is much easier to study and redress the pathology of individual women. This approach is more consistent with beliefs that in Canada there are some violent homes, and does not challenge us to believe unbelievable statistics that suggest we live in a violent society.

### 3. LEGAL LANGUAGE AND DEFENCES FOR WOMEN WHO KILL THEIR BATTERERS

"I never beat my wife. I responded physically to her."

"Not injured. She bruises easily."

"It was over sex, and it happened I guess because I was trying to motivate her. And she didn't seem too motivated."<sup>84</sup>

Building on the definitions outlined in Chapter 2, this chapter examines the relevant legal language used and the implications of the framing of the discourse related to women who kill their batterers. The role of the court is to ascertain whether or not an individual is guilty (and if so, to determine how punishable the crime is). To decide, the court must determine the actual chain of events, the state of mind of the defendant, and whether or not actions embodied in those events were justified. There are two primary levels of discourse at play: substantive law and evidentiary issues. The first is the legal framework and terminology embodied in the criminal code and legal reasoning generally. The second, evidentiary issues, involves what will be allowed as evidence to help the defendant demonstrate the reasonableness or justification for her actions.

Everyone who comes into contact with the law must translate specific events and experiences into legal terminology. For example, anyone who is not a witness

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<sup>84</sup>Ptacek (1988), "Why do Men Batter Their Wives?" pp146-147.



or an officer of the court, one must assume the position of either complainant or defendant, which necessarily mediates the explication of events. Men's experiences, especially in terms of being the victim of violent crime, translate more completely than do those of women. For the latter, certain elements that have bearing on a case are underrepresented or distorted because there either is no corresponding terminology to describe them, or because the existing infrastructure prohibits their expression. The inadequacy of legal language extends, in certain instances, to outright exclusion.<sup>85</sup>

Recourse to expert testimony on BWS provides an example of legal evolution: from recognizing that existing categories are insufficient to an attempt to define new methods which are more workable. The acknowledgement of battered woman syndrome helps the defendant depart from previous formal legal requirements of qualifying for a self-defence plea. Most importantly, the impact of this defence raises the strategic 'power to define' as a communicational object of analysis.

### **Women and Legal Ideology**

"The power of legal ideology is so great that it often becomes hard to differentiate between legal principles and social customs."<sup>86</sup> What the law implicitly articulates about women reflects a collection of social norms and expectations about woman's

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<sup>85</sup>I have yet to come across an explanation as to why legal language is still a bastion of masculine personal pronouns, especially considering efforts to move to gender neutral concepts in law.

<sup>86</sup>Rifkin, Janet, (1980), "Toward a Theory of Law and Patriarchy" 3 *Harvard Women's Law Journal*, p.85.

'natural' role in society. Cotterrell writes of ideologies as: "systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security, the basis of beliefs and guides for conduct."<sup>87</sup> The separation of public and private spheres in law, for example, has historically engendered a hands-off approach to legal intervention in what is perceived as a man's right (or historically, duty) to "discipline" his spouse, and generally keep his family in order. Formal changes in law have had little impact on any substantial social change in this area.<sup>88</sup> Legal practices reflect the same cultural ideology which informs whether domestic dispute calls are responded to by the police, and the action that is taken in those cases; what kind of coverage the media will accord specific cases and the problem of men who batter, generally; how the area of wife assault will be taught in law school; and so forth.

Social perceptions written into legal language exemplify the perception of crime in general as something that happens outside of the home. Stanko notes: "as a criminologist, I have no academic language or analysis to account for 'fear of crime' in association with the home being an unsafe, fear-producing

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<sup>87</sup>Cotterrell, (1984) *The Sociology of Law*, p.121.

<sup>88</sup>Specifically, see: First Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, (1991), *A Study of Protection for Battered Women; The War Against Women*.

environment."<sup>89</sup> In places where the 'castle doctrine' is used, for example, 'home' will carry a different meaning for women than men. Wife abuse has only recently been categorized as a crime, and legal terminology in this area is difficult to reform because of its close ties with the right to privacy as well as property values.

The 'castle doctrine', based on the premise that no one should be expected to retreat from assault in one's home, and that the home is the safest place one could be, assumes that an attack in one's home would be committed by a stranger or an intruder. The only demand for retreat in this doctrine is when the assailant lives on the premises, or has a right to be there.<sup>90</sup> In the context of legal 'chastisement' of one's wife, the castle doctrine denotes that the home is *his* castle, and further a "domain into which the king's writ does not seek to run"<sup>91</sup>.

The routine awarding of custody of children and the family home to women in divorce cases implying the social convention of women as the primary parent, is an extension of ascribing appropriate roles in the private sphere. Conversely, the legal terminology of 'surrogate mother' rather than 'birth mother' or 'gestational mother' – motherhood which occurs outside of the traditional conception of 'home'

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<sup>89</sup>Elizabeth A. Stanko, "Fear of Crime and the Myth of the Safe Home," *Feminist Perspectives on Wife Abuse*, 1988, 76.

<sup>90</sup>For a discussion of the castle doctrine and US case law see: Gillespie, 1989, *Justifiable Homicide*, pp.82-87. In Canada, women do not have a duty to retreat from the home.

<sup>91</sup>*Balfour v. Balfour*, L.R., 2K. B.571 (C.A. 1919), cited in Rhode, D.L. (1986) p.154.

or 'family' - "expresses and entrenches a preference for viewing that situation contractually."<sup>92</sup> 'Domestic' abuse, 'spousal' assault, and 'family' violence, all qualify the special context of violence which thus makes it seem something less than criminal violence, and implicitly distinguishes it from 'normal' violence.

The example of refugee claims made by women seeking asylum in Canada who are fleeing abuse in the home in their native countries further illustrates the debilitating extension of public/private ideologies. In order to be admitted to Canada as refugees, applicants must: "show a well-founded fear of persecution for reasons of race, nationality, religion, political opinion or membership in a social group, and that they are unable or unwilling to avail themselves of the protection of the State."<sup>93</sup> An omission in these criteria is the lack of protection for persons persecuted because of their sex. Women must be able to demonstrate a political dimension of their abuse within the rubric of criteria which recognise political acts as ones against a state, in a public context. Women's lack of power; women's acts of resistance not being recognizably (and definitionally) political because they generally occur in the private sphere (directed at family, not the state, *per se*); lack of recourse in oppressive regimes, some in which wife assault is not a crime; lack of recognition of different kinds of sex specific persecution, such as wife assault, or forced abortions; and so forth, all contribute to legal sex-based discrimination.

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<sup>92</sup>Finley, Lucinda (1989) "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" 64 *Notre Dame Law Review*, p.888.

<sup>93</sup>Canadian *Immigration Act*, cited in Stairs, F. and Pope L. (1990) p.150.

A final example is that of the attempt to establish rape as a crime about violence rather than sex and the subsequent 1983 legal classification of sexual assault was a response to the pervasive equation of sexual passion with rape. The definitional problem was not in law, in which rape is considered to be a serious crime, but procedurally in establishing that specific rapes had occurred. In a society which defines rape as merely overzealous seduction, or which posits that a marriage license includes sexual rights, it will be very difficult to convict someone on misinterpreting the fuzzy line of consent, especially if consent is not believed to be necessary in certain situations.

Societal perspectives and biases are mediated through legal language, and in the process reflect an understanding and organization of social relationships, simultaneously legitimising those perceptions. The next sections discuss legal language used in criminal cases of women who have killed their batterers.

### *Lavallee and Whynot*

The Canadian criminal cases of *R. v. Lavallee*<sup>94</sup> and *R. v. Whynot*<sup>95</sup> have many similarities. After a three year period of abuse which was frequently sufficiently severe to require medical treatment, Angelique Lyn Lavallee shot and killed her common law spouse. Jane Stafford (Whynot) killed her common law husband after

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<sup>94</sup>*Lavallee v. R.* [1990] 55 C.C.C. (3d).

<sup>95</sup>*R. v. Whynot* [1984] 9 C.C.C. (3d) 449.

a similar five year period of abuse. When killed, neither of the men was about to physically attack: Kevin Rust was leaving the room and had his back to Lavallee when she shot and killed him; Billy Stafford was asleep in a drunken stupor when shot by Whynot. Both men, prior to their own deaths, had issued death threats against others: Rust had handed Lavallee the gun and told her something to the effect of "either you kill me or I'll get you"<sup>96</sup>; Stafford throughout the evening prior to his death had spoken of his intent to kill a neighbour and Whynot's 16 year old son. Both women procured expert witnesses on Battered Woman Syndrome to testify at their trials. Lavallee and Whynot were both initially acquitted of unlawfully killing their partners and subsequently, both cases were appealed.

The crucial difference between the two cases is the Supreme Court of Canada's eventual recognition, in the *Lavallee* decision, of the validity of the 'battered woman defence' which informed the admissibility of expert witness testimony and the restoration of her acquittal. Seven years earlier, the Nova Scotia Supreme Court Appeal Division allowed the Crown's appeal in *Whynot* and a new trial was ordered on the grounds that the jury had been misdirected in being allowed to consider a self-defence plea. Whynot however pleaded guilty to first degree manslaughter and so the case never went back to trial. She was sentenced to six months imprisonment and probation, a relatively light sentence that suggests the court was uncomfortable in its ability to deal with this case. Upholding the permissibility of expert testimony,

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<sup>96</sup>*Lavallee v. R.*, p.101.



in *Lavallee*, to explain battered woman syndrome to the jury, and acknowledging the differences in context and perception of self-defence between men and women, resulted in the difference between acquittal and conviction. These two cases are typical in terms of the problematic issues raised when women kill their abusers.

### **Defences & Communicating in Court**

The narrative of a woman who kills her batterer begins long before she enters her plea, and it is by definition the narrative of a lawless existence. This narrative is crucial in explaining the state of mind, and perception of fear that would lead a woman to protect herself by killing her batterer. Access to the subjective perception of the defendant would help to mitigate the charges being understood in terms of existing stereotypes: Was the individual woman's mental state sufficiently diminished to excuse her (provocation, temporary insanity, diminished capacity)? Was her act motivated by revenge? The resulting conclusions of whether she was capable of acting otherwise are drawn through objective reasoning, using standards of how our society expects 'reasonable' people to act in given situations.

What women who kill their abusers (in self-defence) need to be able to communicate to the court is the subjective reality of living with her batterer: specifically, how she *knew* that the relationship had changed from one of battering to one of kill or be killed; how she perceived that she had no other alternatives. "There are times, after all, when language is answered by gunfire; the meaning of

an utterance may only be clear when set against the background of direct physical force."<sup>97</sup> Batterers communicate through violence: a language that may only be intelligible to the woman who lives it.

Before a word is said in her defence, the charged woman must appear to the jury in a manner that is consistent with her plea. For example:

The jury may require a woman who asserts an impaired mental state defense to sound truly insane. A woman who sounds too angry or too calm may not fulfil the jurors' role expectations. The jury may then feel punitive toward her for not conforming to the stereotype.<sup>98</sup>

Women who are afraid or upset can lose credibility through appearing to be overly emotional (not rational). Women who have been repeatedly battered and told how ugly and stupid they are, are not necessarily attractive; making an effort to appear so may undermine claims of severity in terms of what a jury might expect a truly battered woman to look like.<sup>99</sup>

### **Self-Defence for Women who Kill their Batterers**

Women on trial for killing their abusers have tended to plead to a diminished capacity or insanity, thus reflecting social perceptions that women who commit violent acts are an anomaly. "[T]o many, the notion that a woman would ever have to kill her spouse to save her own life or the life of a child is simply

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<sup>97</sup>Hirschkop (1986), "Bakhtin, Discourse and Democracy,"160 *New Left Review*, p.110.

<sup>98</sup>Schneider cited in Ewing (1987), *Battered Women Who Kill*, p.46.

<sup>99</sup>McGregor & Hopkins (1991), *Working for Change*, p.100.



incomprehensible. Women making such claims are often automatically labelled as hysterical or insane."<sup>100</sup>

**Self-defence** permits the use of force against someone who is threatening imminent and unlawful bodily harm, when the threatened person has no means of acting lawfully or obtaining the law for protection to defend themselves. The defendant in a successful self-defence case would be considered "innocent" at the time of the act: as protecting an innocent victim (herself). This is the most advantageous plea because it results in a complete acquittal, unlike for example, provocation which is only a partial defense to homicide (and which is considered within the context of mitigating circumstances and informs the sentencing and the degree of the charge against the defendant).

Perhaps the most common form of the self-defence plea requires that the threatened person has a **reasonable** apprehension of **imminent** bodily harm or death.<sup>101</sup> Women have traditionally been disallowed or discouraged from using the

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<sup>100</sup>Castel (1990) p.231.

<sup>101</sup> Self-defence is covered in Sections 34 and 37 of Canada's *Criminal Code*:

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

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

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

(b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

self-defence plea because they do not generally meet any of the above requirements – from the objective perspective of law, as set out in the test of ‘reasonable apprehension of death’ (or grievous bodily harm, etc).

The next sections briefly outline the requirements of a self-defence plea. They are followed by a discussion of the need for expert testimony to help the jury (and judges) understand how the subjective experience of being a battered woman corresponds to these requirements.

**Imminence** – As noted by Justice Wilson in *Lavallee*, the requirement of imminence, that the attack is about to happen (if not already underway), is not formally written into Section 34 of the *Criminal Code*, but has been grounded in case law. The formalization is intended to ensure that use of defensive force was necessary: that no alternative measures could have been pursued (escaping or calling the police), and that an interval between the threat or original assault was not actually used to plan the attack in revenge.<sup>102</sup>

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37. (1) Every one is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.  
(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

<sup>102</sup>*Lavallee v. R.*, p.115.

In the case of a battered woman who has killed her batterer there will be, at least, residual assumptions that it was an act of retaliation. And, most battered women admit feelings, at some point in the relationship, of wanting their spouses dead. However, "self-defence pleas in homicide cases are not nullified when extreme terror mixes with extreme rage. It seems reasonable to expect victims of battery and sexual abuse who defend themselves from lethal or nonlethal attacks to combine anger with their fear."<sup>103</sup> This is underlined with, as in both *Lavallee* and *Whynot*, the fact that many women living in fear of their batterers tend to kill them in their sleep, or at a time when they will not be likely to fight back. There was found to be a lack of imminence, however, in *R. v. Whynot*: "There was no assault against her..."<sup>104</sup> at the time she killed her husband. Nor did Justice Hart find that the threat issued against her son (that he would be 'dealt with') warranted her defensive actions. "In the absence of imminence, the defendant's perception of harm will be held to be unreasonable for she or he, it is assumed, may later discover other means to escape the future harm or the threatened harm may never materialize."<sup>105</sup> The prerogative of reasonableness in this light burdens the victim with adhering to a predetermined and decontextualized version of reasonableness which imposes a duty of retreat not imposed upon other defenders.<sup>106</sup>

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<sup>103</sup>Saunders (1988) p.100 (citation omitted).

<sup>104</sup>*R. v. Whynot*, p.464.

<sup>105</sup>Castel (1990) p.236.

<sup>106</sup>Willoughby (1989), "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?" p.187.

Of the self-defence criteria, variations on perceptions of imminence have been the most difficult to demonstrate for women who kill their batterers, and is shown in *Lavallee* to be a thorny issue. Wilson, in her decision, takes issue with the imminence requirement imposed in *Whynot* stating, "that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in law would ... be tantamount to sentencing her to 'murder by instalment'."<sup>107</sup> Further, the Supreme Court appeal of *Lavallee* was based on two issues: the admissibility of expert evidence, and the issue of whether *Lavallee* faced an imminent attack. Boyle notes the "mysteriousness" that at both the trial and appeal levels, the case dealt with the former.<sup>108</sup> It is not clear if Boyle finds the choice itself to be the mystery, or that both levels of court chose not to engage the critical issue of imminence. Certainly it is easier to render a decision on admissibility of evidence, in which a clear set of requirements is delineated, than to negotiate discourse on the perception of imminence. As Boyle notes, *Whynot* would have been used as a precedent if the issue of imminence had been more salient. References to *Whynot* in *Lavallee* suggest that the Supreme Court did not want to replicate the 1984 decision. This could only be avoided by discussing imminence differently, through altering the category of imminence, and how it is used in determining meaning.

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<sup>107</sup>*Lavallee v. R.*, citation omitted.

<sup>108</sup>Boyle (1990): "My intuition is that a number of participants in the early framing of the *Lavallee* issues were sceptical about the applicability of self-defence and yet reluctant to insist that the full force of the imminent attack doctrine be brought to bear on the accused on the particular facts of the case." p.172.

**Reasonable apprehension** of imminent bodily harm, as well, is problematic as an objective standard for women who kill their abusers in self-defence. The doctrine of reasonableness is embodied by the 'reasonable man' (or recently, 'reasonable person'). This concept refers to the "legal, 'good-enough-subject'"<sup>109</sup> who is sufficiently capable, virtuous and prudent to function within the dictates of law.

The minimal levels of forethought, restraint and self-control which the law routinely requires of its subjects, are those of 'the Reasonable Man' ... From the opposite perspective, the construct of Reasonable Man marks the maximum level of human failings and frailties for which the law is normally willing to make allowances. The law acknowledges that human beings cannot always be expected to be perfect, and accordingly, it sometimes allows special exemptions to those who do wrong under circumstances where even a reasonable man might have done likewise.<sup>110</sup>

The reasonable man/person measure is then, judging not a person's ability to reason *per se*, but rather a person's reaction under the duress of specific circumstances. A salient aspect of this measure is that it is inextricably tied to social values. As is often noted in the literature: "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."<sup>111</sup> Further, men who do find themselves in relationship in which they are battered do not in addition, experience the hopelessness of a society which condones, or does not effectively prohibit that violence.

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<sup>109</sup>See Allen (1988), "One Law for All Reasonable Persons?" p.420.

<sup>110</sup>*Ibid.*, p.420

<sup>111</sup>*Lavallee v. R.*, p.114.

## Communicating through Expert Testimony

Lyn Lavalley did not testify at her own trial. Events about that specific evening were presented to the court through her statement to the police, the police report, testimony provided by witnesses who were at the Lavalley-Rust house when Rust was shot, and by an expert witness who interviewed both Lavalley and her mother and presented evidence on "the battered-wife syndrome."

The possibilities for the jury were to find Lavalley guilty of first or second degree murder, voluntary or involuntary manslaughter or to acquit her with regard to her plea of self-defence. First and second degree murder are distinguished by *mens rea*, or criminal intent. To convict on charges of first degree, the Crown must be able to show that the murder was planned and deliberate. Second degree murder is either wilful and intended without the malice of aforethought, or the result of a reckless state of mind. Because Lavalley was allowed recourse to expert testimony, information beyond accounts of the actual event were brought to bear on the case. This was necessary to establish the cumulative context of repeated violence on her 'state of mind' and 'reasonable apprehension of death'.

Expert testimony is used to provide to the jury (and the court) clarification of information which is not normally possessed by the average juror. To qualify as an expert witness:

1. The subject matter must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average laymen.

2. The witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinions or inferences will probably aid the trier of fact in their search for truth.
3. Expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.<sup>112</sup>

Walker's work in the areas of battered women, learned helplessness and Cycle Theory of Violence (discussed in Chapter 2) has been instrumental in establishing the requirements for the first criterion.

One can illustrate the importance of expert testimony through examining *Whynot*, where it was inadmissible. This case focuses predominantly on the issue of whether or not the imminence requirement for self-defence was met. Detailing evidence given at the trial beginning with: "The facts of the matter are not complicated and may be stated *simply* as follows"<sup>113</sup> provides the first indication that the subjective reality of living in terror and violence was not considered. Because Billy Stafford was not actually attacking Jane Stafford (Whynot) "the context of the accused's act becomes irrelevant and decision makers must reject evidence that she had been beaten periodically, had been refused help by the police, and had tried to escape from her partner and failed."<sup>114</sup>

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<sup>112</sup>Brodsky (1987) p.467, citations omitted.

<sup>113</sup>*R. v. Whynot*, p.451 (my emphasis).

<sup>114</sup>Boyle & Rowley p.319.

Although Stafford is described as "a very large and powerful man prone to violence, especially when drinking or under the influence of drugs"<sup>115</sup>, the possible long-term effects or implications are not used to mitigate the case. Evidence about the character of the deceased was "unnecessary and inadmissible" because it was not relevant to Whynot's defence, and "served only to create sympathy for the respondent and for this reason should have been excluded."<sup>116</sup> In fact, the term 'battered woman' is not used throughout the decision, and is only alluded to in the context "some psychiatric evidence ... which tended to show that Jane Stafford was at her wit's end when she committed the killing".<sup>117</sup> Because Jane Stafford killed her batterer while he was drunkenly passed out, the Supreme Court judged her anticipation of an assault unfounded. The reason for applying the imminence requirement is to make a distinction between self-defence and premeditated revenge. In *Whynot*, its rigorous application precluded recourse to expert testimony, which could have also helped to demonstrate that distinction.

Acker and Toch, in their analysis of expert testimony and BWS, discuss another fear: that expert testimony could cause undo sympathy for the defendant and that juries might find the killing of a batterer justified as a "fitting act of

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<sup>115</sup>R. v. *Whynot*, p.452.

<sup>116</sup>*Ibid.*, p.461.

<sup>117</sup>*Ibid.*, p.455. Wit's end, can be understood here to be a code word for BWS.



retribution directed at a member of a sadistic fraternity who had finally reaped his just deserts."<sup>118</sup>

As mentioned above, *Lavallee* is significant because of the admissibility of expert testimony, and indeed, because of the value it places on expert testimony in helping to arrive at a just verdict. The imminence requirement, rather than being used to exclude the possibility of expert testimony, is instead explained in terms of subjective fear and the context of BWS.

Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.<sup>119</sup>

## Conclusions

In considering the context of specific cases, such as *Lavallee* and *Whynot*, it is at times difficult to look beyond that which is necessary to achieve an acquittal. Expert testimony proved valuable in one case, and its exclusion was harmful in the second. Expert testimony is, however, a response to self-defence criteria being inadequate for a particular set of circumstances, which women rather than men will find themselves in. And, in this sense, expert testimony provides a legal device rather than

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<sup>118</sup>Acker & Toch (1985), "Battered Women, Straw Men and Expert Testimony: A Comment on *State v. Kelly*, p.147-148. In support of this they cite reputed criminal defence attorney, Percy Foreman: "The best defence in a murder case is the fact that the deceased should have been killed regardless of how it happened."

<sup>119</sup>*Lavallee v. R.*, p.118.

"acknowledging the equal potential of women and men to act in reasonable self-defence."<sup>120</sup>

Boyle et al., argue for a restructuring of law which foregrounds the subjective perspective of the accused, and propose two approaches to achieve this.<sup>121</sup> The first would be to adopt an entirely subjective test to ascertain whether the accused believed she was in imminent danger and used the force necessary to protect herself. The second approach inquires into the context of the battering relationship to determine objectively and subjectively whether the accused had other realistic means of protection or recourse, to understand the subjective perception of fear of imminent harm.<sup>122</sup>

Because expert testimony on BWS is now admissible in Canadian courts, in light of the need to relax imminence requirements, it would be interesting to apply Walker's model in such a manner to recognize that women having gone through the two cycles of violence required to qualify as having BWS, are for legal purposes considered to be in a perpetual state of assault. This would be useful for self-defence

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<sup>120</sup>Crocker (1985), "The Meaning of Equality for Battered Women Who Kill in Self-Defence" p.137.

<sup>121</sup>Boyle, et al (1985), *A Feminist Review of Criminal Law*, p.41.

<sup>122</sup>The proposed questions are: 1) Were there realistic alternative means which the accused could have used to protect herself or other persons? 2) (if relevant) With respect to 1), had the accused attempted alternatives in the past? 3) Was she afraid of retaliation if she attempted any alternative? 4) What was the accused's economic and psychological state? 5) How did the accused and the person she killed or assaulted compare in size and strength? 6) Was the accused's action reasonable given her socialization? (*Ibid*, p.41).

cases because it would clearly situate the defendant in a situation that is outside of the law in terms of legal protection. In terms of proactive measures, it would provide legal recourse outside of demonstrable assaults.

Expert testimony focusing on BWS was fought for in the hopes that it would provide a window on the subjective reality of individual women who live in battering relationships, but it does so in a highly mediated form. Although one of the intentions of admitting this evidence in the *Lavallee* decision is to dispel prevalent stereotypes,<sup>123</sup> in citing Lenore Walker's definition and criteria for BWS, its use risks the creation of a new legal standard rather than a new means of inquiry into the context of the assault. The narrative of the charged women rather than being heard, risks now being required to fit the new narrative of learned helplessness, and so forth (which has replaced the previous standards for self-defence).

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<sup>123</sup>Without this evidence the accused faces the prospect of being condemned by popular mythology about domestic violence..." *Lavallee v. R.*, p.98.

#### 4. FINDING VOICES

In order to challenge "socially authorized forms of public discourse"<sup>124</sup> and the representation of different and conflicting interests, we need to identify who is empowered with constructing and altering discourses. It is only one hundred years since Clara Brett Martin was permitted to be the first woman to practise law in the British Commonwealth.<sup>125</sup> Women's historical exclusion from the practice of law does not, of course, mean that women have not been subject to and come into contact with law. There are different means of excluding people from an institution. Not being permitted to contribute to the shaping of an institution is an ongoing fact of exclusion.

Increased participation of members of such groups traditionally excluded from the discourse of law as teachers, lawyers and judges has had bearing on the perspectives and interests represented. Suzanna Sherry notes that "the mere presence of women on the bench serves an educative function"<sup>126</sup> through shattering stereotypes and affirmatively demonstrating woman's role in society. A corollary to representation in legislative and judicial processes is having a voice to raise issues and articulate values.

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<sup>124</sup>Fraser (1989), p.164.

<sup>125</sup>For a detailed history of Clara Brett Martin's career see: Backhouse, (1991) *Petticoats & Prejudice: Women and Law in Nineteenth Century Canada*.

<sup>126</sup>Sherry (1986), "The Gender of Judges" p.160.

The exclusion of women from criminal law debates has enabled legislators to give priority to such values as private property and the security of the State and its officials at the expense of other issues, such as sexual equality, children's rights and the responsibilities of fathers toward their children.<sup>127</sup>

The other side of the coin is the incertitude of the significance and possible influence of women in the legal profession.<sup>128</sup> Resistance to 'feminism' in law schools<sup>129</sup> is echoed by marginalization of women in the legal profession. "Women are overrepresented in those segments of the profession that traditionally have enjoyed the lowest status and income."<sup>130</sup> These lower echelons tend to be areas involving the private sphere, for which of course, women are seen to have a natural proclivity: "women are 'pulled' into work for which they are thought to possess special talent (such as domestic relations) and 'pushed' (or more likely kept) out of high-status work (such as private commercial matters in capitalist regimes)."<sup>131</sup>

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<sup>127</sup>Boyle, et al. (1985) p.3.

<sup>128</sup>"Change in the law comes slowly and incrementally; that is its nature. It responds to changes in society; it seldom initiates them. And while I was prepared - and, indeed, as a woman judge anxious - to respond to these changes, I wondered to what extent I would be constrained in my attempts to do so by the very nature of the judicial office itself." Justice Bertha Wilson (1990), "The Fourth Annual Barbara Betcherman Memorial Lecture."

<sup>129</sup>See: Tobias (1989), "Respect for Diversity" *University of Cincinnati Law Review*; Menkel-Meadow (1987), "Excluded Voices" *University of Miami Law Review*; O'Brien and McIntyre (1986), "Patriarchal Hegemony and Legal Education" *Canadian Journal of Women and the Law*; Boyle (1986), "Teaching Law as if Women Really Mattered" *Canadian Journal of Women and the Law*.

<sup>130</sup>Menkel-Meadow (1989), "Feminization of the Legal Profession" *Lawyers in Society*, p.198.

<sup>131</sup>*Ibid.*, p.211. See also "Report of the Gender Bias Study of the Supreme Judicial Court", in XXIII *Suffolk University Law Review* (1989) pp.652-657, documenting women's representation in specific areas of law.

With regards to the communication problem of translating personal experience into legal language, this section addresses the relevance of having a voice to contribute to the discourse of law. Issues to be considered are first, that if the fact of women lawyers, judges and law teachers is a necessary component for transforming the institution of law into a more meaningful institution, then how do we go about enacting a legal structure which facilitates a fair and accurate representation of the range of different members in our society? Secondly, can necessary change be affected through participation in legal fora? The following chapter on feminist jurisprudence will address these issues in terms of possible alternatives to the prevailing jurisprudence.

### **Gaining Access to the Legal Profession**

The demands in the late 1800s and early 1900s that women be 'permitted' to vote, own property, have access to higher education and be allowed into the professions such as medicine and law appeared radical because they entailed a rupture of the traditional separate spheres.

The vote itself is a deeply radical demand in a male dominated society. Nonetheless, some commentators have insisted that the demand for the vote was completely compatible with traditional or "bourgeois" views of womanhood. If one does not recognize the central fact of male dominance and female dependence in patriarchy, it is indeed difficult to understand where all the opposition to feminist and nonfeminist demands for the vote did come from. It is also difficult to see the radicalism of women's proposals for vast social changes, made by feminists in the name of women and children as powerless and vulnerable groups with specific

needs and values and not simply in the name of women as self-sacrificing mothers.<sup>132</sup>

It is doubtful that demands for enfranchisement were premised on a sudden realization that women were not represented by abstract notions such as the foundation of western liberal jurisprudence that: "no distinctions ought to be made between men who are equal in all respects relevant to the kind of treatment in question, even though in other (irrelevant) respects they may be unequal."<sup>133</sup> It is more likely that, like today, women's concerns with legal strategies "all focused on the specific social practices that were the material conditions of women's inequality: alcohol abuse, exploitation of female and child labour, disenfranchisement and the legal imposition of civil disabilities in law."<sup>134</sup>

However, unlike today, complete exclusion from legal fora had created an expectation amongst women that once they had attained access to higher education, the vote, and so forth, they would achieve equality. A liberal strategy, which is based on rights of equal access, however, lacks a theory of oppression, and allows for exclusion to continue in its various pervasive forms. The values associated with equality were not extended to cover all women or all of

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<sup>132</sup>Miles (1985a), "Feminism, Equality and Liberation" p.49.

<sup>133</sup>Aristotle cited in *Encyclopaedia of Philosophy*, p.39.

<sup>134</sup>Lahey (1987), "Feminist Theories of (In)Equality" p.77.

society.<sup>135</sup> It cannot be said that no change occurred, although this is clearly true for some less well-off sectors of the population. To some degree, the split between public and private spheres was reaffirmed through the necessity that women<sup>136</sup> choose one or the other, a profession or marriage and family.<sup>137</sup> In her critique of liberalism, Mary Dietz notes:

Not only does the concept of rights reinforce the underlying liberal freedom and formal equality; it also sets up the distinction between "private" and "public" that informs so much of the liberal perspective on family and social institutions.<sup>138</sup>

Legal argumentation for excluding women from the bar had everything to do with maintaining the ideology that women belong in the private sphere. Even though it was the case that much of the female population worked outside of the home, the doctrine of law (reflecting dominant social values)<sup>139</sup> conceptualized women in the following fashion:

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper

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<sup>135</sup>A salient example is that one of the remaining pieces of Clara Brett Martin's correspondence is vehemently antisemitic. Backhouse (1991) p.324, and note 90.

<sup>136</sup>Mainly middle-class women had the luxury of choosing between a career or a family, poorer women already were in the work-force in large numbers.

<sup>137</sup>Mossman (1986b), "Portia's Progress: Women as Lawyers, Reflections on the Past and Future." Mossman notes that most women lawyers will be the first generation of women lawyers in their families because of earlier generations choosing between career or family. She posits the likelihood of a "third generation" woman lawyer "to have had a non-practising lawyer for a grandmother, and even perhaps a mother" (p.E-5 and note 29).

<sup>138</sup>Dietz (1987), "Context is All: Feminism and Theories of Citizenship" p.4.

<sup>139</sup>Rifkin (1980), "Toward a Theory of Law and Patriarchy" p.85.



timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>140</sup>

Conveniently, there was as well no precedent of women lawyers. Clara Brett Martin's petition for admission to the Law Society was initially denied on this ground. Indeed, at the time of her petition, the Law Society was debating as to whether women were to be included in the meaning of "persons".<sup>141</sup>

### Teaching Law from an Other's Perspective

It is only in the past fifteen years that there have been a significant number of practising female lawyers.<sup>142</sup> To a large extent, this has been an exercise in gaining access to a dominant institution, without being given access to the necessary tools to effect change. It can be posited that evidence of change will be more in prominence when the students of law professors using alternative means of teaching law begin to practice in significant numbers. The question here is not how we theorize about difference, *per se* (that will be addressed in the next

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<sup>140</sup>Mr. Justice Barker, 1873, cited in Mossman (1986a) *Australian Journal of Law and Society*, p.34. This quotation was not an anomaly, but rather the prevailing sentiment.

<sup>141</sup>Backhouse (1991) p.301. The 1930's 'Persons' case in Canada (Edwards v. A.G. [1930]) established women as 'qualified persons' in reference to s.24 of the *Constitution Act 1867*, and could thus be appointed to Senate. The federal franchise was granted to women in 1918 and by 1940 women were qualified to vote in all provinces. (See Adamson, et al. (1988), *Feminist Organizing for Change*; and Sachs & Wilson, *Sexism and the Law*, especially "Britain: Are Women 'Persons'?" and "United States: Are Women Citizens?").

<sup>142</sup>See Mossman (1986b) p.E-6.

chapter), but rather, what (some) women have contributed to the teaching of law.

Karen Selick, author of the column "Right Thinking" in *The Lawyers Weekly* wonders why Dalhousie Law School advertised specially for black and native lawyers to teach a "Native Justice" course: "Presumably that's different from everybody else's justice."<sup>143</sup> Arguably, it is. That is, different groups of persons experience the justice system differently. Rather than understanding affirmative action as a process to increase the balance of different viewpoints, Selick all but reduces the intention to the same level as apartheid.<sup>144</sup> Mari Matsuda addresses legal apartheid which for her "is evident in the books shelved, in the journals read, and in the sources considered in the process of legal scholarship."<sup>145</sup> The questions Matsuda raises are crucial in terms of understanding how the law is experienced by sectors of the population for whom it is not an obvious resource, but rather a constraint. The difference between Selick's and Matsuda's views on what constitutes legal apartheid provides an example of engendered discourse, and of course, an example that women will not necessarily have different interpretations of law than men. Selick is committed to the belief that law can, is

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<sup>143</sup>Selick, "Adding more women won't end bias in justice system," *Lawyers Weekly*, (35) p.7.

<sup>144</sup>Ibid. In a different article Selick equates affirmative action with the method that rapists use to select their victims. *Vancouver Sun*, 23 July 1991, p.A-11.

<sup>145</sup>Matsuda (1988), "Affirmative Action and Legal Knowledge: Planting seeds in Plowed-up Ground" p.2 and note 5. Matsuda is, of course, referring to the over-representation of white men in terms of authoring and editing the texts deemed necessary for legal scholarship.

and must be neutral. Her positioning in the legal community indicates that she benefits from this formulation of legal discourse. By this, it is not suggested that she does not question law's objectivity only because of vested interest, but because there is little perceived need to question that which so matches one's reality that it becomes natural, or common sense.

Matsuda's response to excluded voices in the legal profession is affirmative action scholarship, in which individuals are responsible for moving beyond mainstream texts. By way of example, she describes attempting to find aboriginal writing on law in Australia. After searching a range of bookstores including Black Books operated at an aboriginal college and only finding books written by "enlightened whites" she was directed to the poetry and fiction section.

These works contained what I was looking for: insight into the jurisprudence of aboriginal people – their ideas about land, about law, about government, about justice. Later, I realized, the best sources I have found for an indigenous voice are poems. ... Aboriginal writers, coming from a rich oral tradition and finding themselves excluded from academic writing, have become powerful poets and fiction-writers.<sup>146</sup>

Texts addressing feminism and law make a surprising number of references to 'literature and law' and, as well include poetry and selections from various works of fiction to provide examples, illustrations and different perspectives. Such works have been selected to illustrate experiences which are not represented or

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<sup>146</sup>Ibid., p.14.

reflected in dominant discourses, and when used in writing on law, effectively work to counterpoint legal objectivity.<sup>147</sup>

Angela Harris, in her article "Race and Essentialism in Legal Theory," identifies aspirations in legal theory (including feminist legal theory) to speak as "We the People" as "ultimately authoritarian and coercive in its attempt to speak for everyone."<sup>148</sup> This is especially poignant in her critique of feminist theory which characterizes being black (being a black woman) as an 'intensifier' rather than as a fundamentally different experience from being white.<sup>149</sup> Her own work draws on a range of literary and poetic sources to underline the lack of similarities between the experiences, histories and perspectives of black and white women. Harris asserts: "In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."<sup>150</sup>

To illustrate difference, Patricia Cain asks each of her students to write down three self-descriptive nouns or adjectives. Most women include 'woman' on their list; most white women do not mention race, women of colour do; straight

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<sup>147</sup>Harris (1990), "Race and Essentialism in Feminist Legal Theory" p.583.

<sup>148</sup>Ibid., p.583. "We the People" refers to the 'voice' of the United States Constitution.

<sup>149</sup>Ibid., p.596.

<sup>150</sup>Ibid., p.615.

women do not include the term heterosexual, but lesbians ("who are open") identify themselves.<sup>151</sup> Cain thus notes that we "perceive our differences differently". Difference is something that sets one apart from that which is obviously reflected in dominant discourse.

The above examples illustrate how easy it is for any curriculum to teach implicit values. Six ways in which teaching materials can be biased are: "invisibility, stereotyping, selectivity and imbalance, unreality, fragmentation and isolation, and linguistic bias."<sup>152</sup> Bias appears in teaching methods as well: "It may be unnecessary to *tell* a class that women do not matter when the message can be conveyed as effectively by a sexist joke or by habitually interrupting women students when they are speaking."<sup>153</sup> In this vein, Christine Boyle addresses the question of the 'hidden curriculum' of legal education which is implicit in the structures of law schools. Like Cain who asks her students to define themselves, Boyle inquires of law schools, amongst other questions: Who are invited as distinguished visitors? Who are awarded honorary degrees? Is legal education available on a part-time basis? What is regarded as amusing at the annual variety show? Is the "faculty" washroom male?

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<sup>151</sup>Cain (1989-90), "Feminist Jurisprudence: Grounding the Theories" p.208.

<sup>152</sup>Sadker and Sadker, *Sex Equity Handbook for Schools*, cited in Boyle (1986) p. 99-100, footnote omitted.

<sup>153</sup>Boyle (1986) p.98-99.

In the context of these questions, Boyle identifies sites of fear which work to limit alternative strategies and perspectives that she as a law professor might initiate. Fear of her own isolation; of making things worse; of her anger being identified as wrong or childish; of being labelled; and fears of her own career being limited.<sup>154</sup> Combining feminist methodologies with legal education also creates friction in practical terms. Heather Wishik considers the problem of "pressure upon me as a non-tenured member of a law faculty to produce published work that is 'clearly my own,' so that I, as an individual scholar, may be evaluated."<sup>155</sup> Collective processes such as consciousness-raising,<sup>156</sup> and inclusive methodologies such as 'action research' in which subjects actively design the research about themselves, are fundamental to feminist strategies. Definitionally however, Wishik's collective work with non-scholars is neither exclusively her own, nor 'scholarly', "unless of course I put only my name on it and don't tell them what my process was".<sup>157</sup>

The examples provided thus far, in the context of academia, involve risks more or less on the personal level: risk of venturing into areas where one must admit a lack of knowledge; risk of professional abnormality; risk of being

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<sup>154</sup>*Ibid.*, pp.109-112.

<sup>155</sup>Wishik (1986), "To Question Everything: The Inquiries of Feminist Jurisprudence" p.70.

<sup>156</sup>Consciousness-raising refers to a collective process through which "women [or any group] begin to perceive the dimensions of the dominant reality, the existence of the dominant group's definition of them, and the false nature of all those meanings." Spender (1980) p.130.

<sup>157</sup>Wishik (1986) p.70.

discredited. Students in law school, and law professors who teach alternative approaches to mainstream law are nonetheless supported (or surrounded) by the institution. In most law schools courses focusing on women and law, critical legal studies, native justice, and so forth, will be the exception rather than the rule. The rest of the curriculum will be premised on a conventional approach to law, with the objective of producing competent lawyers.

### **Practising Law**

Wishik's academic dilemma put in the context of feminists practising law situates problems in terms of legal discourse on a different level. In spite of visions of a better jurisprudence, or ideas which transcend the limitations of current law, like other professions, there is an ethic of responsibility/constraint in professional conduct. Doctors and engineers, for example, can not simply decide on their own that they have found a better way to cure people and put up buildings; journalists are required to take some degree of responsibility for the accuracy of facts, and so forth.

Kathleen Lahey sketches out the contradictions which arise in attempting to defend a woman in a given case by showing that (depending on the case) women are either more like men or less like men "than the legal system had seemed to acknowledge."<sup>158</sup> In a case of a battered woman who kills her

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<sup>158</sup>Lahey (1985), "... Until Women Themselves Have Told All That They Have To Tell" p.538.

batterer, it is strategically tempting to focus on how women are different from men, which would be contradicted in, for example, a case against protective labour legislation for which one would want to stress sameness between the sexes. Lahey's sketch illustrates the dilemma of women's life experiences becoming fragmented and inconsistent in legal discourse.

Carrie Menkel-Meadow describes her induction into "macho trial culture" and the problems of results-oriented lawyering in which: "paper victories' did not solve the underlying problem, as opposed to the legally constructed problem,"<sup>159</sup> and in which her attempts at negotiation, rather than winning were regarded as "too soft". The problem for Menkel-Meadow was not in learning to be a "tough cookie", but in subsequently teaching this kind of lawyering to her students. Effective lawyering (i.e., best serving one's client) requires focusing on outcomes of a case rather than indulging in feminist principles which might make a crucial point but not win the case and/or which might preclude avenues of subsequent reconciliation.

This disjuncture is manifested on more subtle levels as well. Lucie White<sup>160</sup> describes defending a woman on welfare with five children who had been misinformed by her case worker that a cash insurance settlement would not

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<sup>159</sup>Menkel-Meadow (1987), "Excluded Voices: New Voices in the Legal Profession" p.32.

<sup>160</sup>White (1991), "Subordination, Rhetorical Survival Skills, and Sunday Shoes".



be considered income (and thus calculated in to her welfare payments) and that she was therefore free to spend it as she wished. The ensuing case involved a subsequent claim from the welfare office of overpayment, asking Mrs G. to repay the amount of the insurance settlement. The dilemma for White was which line of defence to follow: an estoppel defence based on the wrong advice from the case worker, or a defence which demonstrated that Mrs. G. was a victim of poverty and had averted a crisis by spending the (extra) insurance money on necessities.

The estoppel story would feel good in the telling, but at the likely cost of losing the hearing, and provoking the county's ire. The hearing officer – though charged to be neutral – would surely identify with the county in this challenge to the government's power to evade the costs of its own mistakes. The necessities story would force Mrs. G. to grovel, but it would give both county and state what they wanted to hear – another "yes sir" welfare recipient.<sup>161</sup>

### **Feminist Judges**

During her tenure as a Canadian Supreme Court judge, Madam Justice Bertha Wilson addressed the question, "Will women judges really make a difference?"<sup>162</sup> Christine Boyle questions whether "persons with a commitment to feminist values might experience ethical difficulties in accepting such an appointment."<sup>163</sup> Arguably, the premise of judicial neutrality precludes the need for representation on the bench reflecting the diversity of members of society.

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<sup>161</sup>Ibid., p.43. See also Fraser (1989), chapter: "Women, Welfare and Politics" for a discussion of the gender subtext of the welfare system.

<sup>162</sup>Wilson, (1990) *The Fourth Annual Barbara Betcherman Memorial Lecture*.

<sup>163</sup>Boyle (1985), "Sexual Assault and the Feminist Judge" p.94.

However for this to be the case, judicial neutrality must actually be possible, must actually exist. Judicial neutrality is the framework within which the concept of equality is embedded. It is presumed that investing judges with the responsibility of impartial judging will ensure fair rulings in which individuals before the law are treated equally.

Bias is a manifestation of conflict of interests and is symptomatic of power relations inherent in "defining" paradigms. Four different classifications of judicial gender bias include:<sup>164</sup> **androcentricity** which foregrounds a male perspective and posits the male subject as the norm; **overgeneralization and underspecificity** which elicit inadequate distinctions between men and women; **gender insensitivity**, illustrated by equal treatment, instead of by treatment which would produce equal results; and **double standards** which arise through treating similarly situated (comparable) individuals differently, the mitigating difference between the two being gender.

Judicial gender bias occurs when judges assess a woman's role in relation to traditional sex-role stereotypes while ignoring her personal characteristics and woman's social role; when they fail to appreciate and act upon the real life experience of women; when they rely upon inaccurate, common, ingrained and socialized beliefs; and when they fail to recognize or scrutinize their use of sexist stereotypes and untested assumptions.<sup>165</sup>

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<sup>164</sup>These categories are from Eisler *Foundations of Bias: Sexist Language and Sexist Thought*.

<sup>165</sup>Martin (1987), "Persisting Equality Implications of the 'Bliss' Case" p.196.

Specific and well-known examples of bias include the following presumptions: that what a woman was wearing when sexually assaulted has bearing on that case; that women function as the primary parent; that woman is the more delicate sex, and so forth. As illustrated by the example of women's exclusion from the legal profession, judicial neutrality is not a passive stance, rather it is the translation of social values into law. Through the structure, doctrine and interpretation of law, judicial neutrality is an active force in upholding these social values.<sup>166</sup>

Another way at this issue is to inquire "who" is required to be neutral: if just legislators,<sup>167</sup> why is this trait especially incumbent on them rather than on society at large?<sup>168</sup> Further, a distinction must be made between the neutrality of intention, the motives and reasons that a legislator uses to justify rulings, and the neutrality of the effects of the legislator's decisions.<sup>169</sup> Boyle notes that to admit to bias is to presuppose that there can be unbiased decisionmakers – which

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<sup>166</sup>Sunstein in discussing the US Equal Protection Clause: "What does the Court treat as an illegitimate reason for treating one person differently from another? In brief, the Court requires differential treatment to be justified by reference to some public value." p.131.

<sup>167</sup>Justice Rothman added that it is not, however, going to be enough to sensitize judges to equality issues if lawyers are not sensitized to them as well!" Wilson (1990).

<sup>168</sup>Waldron p.69; See also Goodin & Reeve p.196: Judicial neutrality or the concept of a neutral state presupposes a distinction between the state and society. Liberal theory demands neutrality only of the first.

<sup>169</sup>Waldron p.66

hides the real point of judicial decision-making and power.<sup>170</sup> The question of whether increasing the number of women judges will make a positive difference presumes a deficiency in law and reflects the fact of societal inequality. To answer this question, we must move beyond strategies of equal representation and address feminist contributions to legal method on a substantive level.

## Conclusions

Feminism began with a theory of rights: a necessary starting point of demanding identical treatment as received by men both as subjects and as active participants within law. This built upon the individualistic modern paradigm of rights-based rather than a goals-based law which would provide equal results. This was an obvious point of entry into legal forays: an argument which law could accommodate, but not a solid basis for achieving goals which might not be articulable in this forum. As Menkel-Meadow notes, exclusion can take on many different forms beyond simply not admitting new members:

admitting but not listening to the new members, admitting but segregating or marginalizing, and finally, transmuting or translating the words of those excluded into the terms and definitions of the included. All of these strategies have been deployed to exclude women, and others from the legal profession.<sup>171</sup>

Attempting to initiate change through gaining access to the profession as lawyers, judges and law educators has been critiqued as a liberal approach to oppression

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<sup>170</sup>Boyle (1987) p.312, note 1.

<sup>171</sup>Menkel-Meadow (1987) p.35

which does little to dismantle the structural relations of oppression. "Litigation and other forms of legal relief [...] cannot lead to social changes, because in upholding and relying on the paradigm of law, the paradigm of patriarchy is upheld and reinforced."<sup>172</sup> Nonetheless, a great deal is owed to reforms which took the first steps to reordering patriarchal power relations, affording women access to higher education, to practice law, and to become directors of legal studies programs. As claims "become institutionalized and are no longer contested they come to be embedded in social roles and appear as part of the natural order."<sup>173</sup> Thus the process of rights claims is an ongoing process of shifting the line of demarcation between the realm of the natural and the realm of the constructed. That current law no longer formally allocates rights to men which it denies to women<sup>174</sup> is evidence of this legal shift in the perception of natural roles. However this shift has had little impact on the relations of power that engender oppression.

It has been, and continues to be imperative to gain access to the institutions which define and interpret social conditions and hierarchies, in order to be able to change and transform those institutions and productions of dominant discourses.

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<sup>172</sup>Rifkin (1980), "Toward a Theory of Law and Patriarchy" p.88. See also Smart (1989).

<sup>173</sup>Peattie and Rein (1983), *Women's Claims: A Study in Political Economy*, p.19

<sup>174</sup>Smart (1989) p.139

Recognizing the universal reality of female subordination, we have long known that legal reforms can alter the status of women only to the degree that they cause, or are accompanied by new ways of thinking about gender differentiation.<sup>175</sup>

Women in the legal profession "make a unique contribution to the legal system by their presence, their participation, and their perspective."<sup>176</sup> This last, 'perspective', is the most contentious, and where we must look to for possible avenues of structural change to the institution of law. The tradition of legal method has offered "little opportunity for fundamental questioning about the process of defining the issues, selecting relevant principles, and excluding irrelevant ideas."<sup>177</sup> Indeed, it is not only the 'language of law' which impedes the speaking of a feminist perspective, but the concepts and structures through which the law is ordered and invested with meaning. The power of definition is a paramount one. Although a difficult exercise of imagination, it is imperative to consider the foci and functioning of a jurisprudence born out of a society in which all of those ruled by law possess equal citizenship rights.

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<sup>175</sup>Ashe (1987), "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence" p.1171

<sup>176</sup>Sherry (1986), "The Gender of Judges" p.159 - Sherry here refers to women judges, but we can safely generalize her description to women in the profession.

<sup>177</sup>Mossman (1986a) "Feminism and Legal Method: The Difference it Makes" p.32.

## 5. FEMINIST JURISPRUDENCE

A significant aspect of women gaining access to the legal profession was (and is) that of becoming conversant with legal discourse. This knowledge, in and of itself, is a necessary but not sufficient form of power. Understanding what legal doctrine says and presumes of women, as distinct from the reconciliation of these values with the evidence in concrete cases provides an entry for feminist intervention. This chapter will outline approaches to feminist jurisprudence which attempt to bridge the gap between personal, contextualized experience and the legal interpretation of that experience. While the construction of a feminist jurisprudence is arguably not possible,<sup>178</sup> the premise of one is a useful entry point for examining both the logic of western jurisprudence itself, and the highly self-reflexive questions about feminist projects which arise in that context.

Do battered women who are accused of killing their batterers warrant special treatment before the law (for example, leniency, or specialized rules of evidence such as expert witnesses)? 'Special treatment' is an acknowledgment that women's experience is an anomaly in law; but it is also a means of avoiding attention to the structure and source of the imbalance, and it can, additionally, be used as a device for maintaining that imbalance. The issue is one of the distinction between justification of the act, as opposed to excusing the individual

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<sup>178</sup>See Smart (1989); and Fineman (1991), *The Illusion of Equality*.

because of the circumstances surrounding the act. The former acknowledges that the act did not deviate from accepted social norms; the latter allows for some form of diminished capacity which compelled the actor.

This chapter inquires: what characteristics would a jurisprudence possess in order not to require special treatment for women before the law? This question requires situating the discussion beyond the context of current law. It is asked in the context of, and as an alternative to the consequences of demanding 'special treatment' or specific practices of equal result strategies.

Critiques of the legal system generally, and particular attempts to define feminist jurisprudence, are typically formulated in response to specific inadequate laws, or processes which disadvantage women or marginalize their claim. This engenders the conceptual problem of always being in the position of a respondent for whom the structure and language of current law preconditions the intelligible responses that can be made.

A strong view of precedent in legal method, for example, protects the status quo over the interests of those seeking recognition of new rights. The method of distinguishing law from considerations of policy, likewise, reinforces existing power structures and masks exclusions or perspectives ignored by that law.<sup>179</sup>

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<sup>179</sup>Bartlett (1990), "Feminist Legal Methods" p.845, footnotes omitted.



Strategically, it is difficult to imagine confronting the monolith of law without an equally compelling and accepted conceptual framework.<sup>180</sup> But this 'totalizing' prescription runs counter to the kinds of approaches that are central to feminist thinking and method generally.

We need to consider whether implicit in this quest is the tendency to place law far too much into the centre of our thinking. Rather than marginalizing law, does the search for a feminist jurisprudence not simply confirm law's place in the hierarchy of knowledge?<sup>181</sup>

### Celebrating the Differences

In formulating a jurisprudence which does not have to make special treatment allowances for women, how we theorize about difference and differences is an important starting point. Although perhaps obvious, it seems worthwhile to emphasize that in a feminist jurisprudence, difference cannot be a site of liability or disadvantage.

There are different means of achieving this. This section considers the strategy of Cultural Feminism<sup>182</sup> in which women redefine themselves through reclaiming and valuing nurturing characteristics. The foundation of this theory is

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<sup>180</sup>Sometimes it seems that opposing the grandeur of "Jurisprudence" with anything else than another, perhaps differently gendered, "Jurisprudence" will be an exercise in futility – that proposing the demolition of a historic monument to make way for a variety of makeshift encampments is madness." Dalton (1988), "Where We Stand: Observations on the Situation of Feminist Legal Thought" p.7.

<sup>181</sup>Smart (1989) p.68.

<sup>182</sup>Also referred to as 'Maternal Feminism'.

the premise that because of bearing and raising children, women are differently connected to the world than are men, and that women place more emphasis (and are more reliant) on a sense of community than are men. This difference is born out of women's *natural* nurturing role which gets passed on to female children: "women (unlike men) do not need to separate from their mothers in order to grow up, they see the world in terms of relationship and caring rather than independence and abstractions."<sup>183</sup> Male children are differently affected by the discontinuity of the nurturing split with mother and are "more likely to have been pushed out of the preoedipal relationship and to have had to curtail their primary love and sense of empathic tie with their mother."<sup>184</sup>

What makes this view expressly feminist (rather than, say, traditionally conservative) is its claim that women's experience as mothers in the private realm endows them with a special capacity and a "moral imperative" for countering both the male liberal individualist world view and its masculinist notion of citizenship.<sup>185</sup>

Carol Gilligan applies this theory to jurisprudence positing that because of the nurturing difference, women have a unique perspective and reasoning process that engenders an ethic of care, which is the foundation for a feminist morality.

The strength of women's moral perceptions lies in the refusal of detachment and depersonalization, and insistence on making connections that can lead to seeing the person killed in war or living in poverty as

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<sup>183</sup>Menkel-Meadow (1989), "Feminization of the Legal Profession" p.230.

<sup>184</sup>Chodorow, cited in Gilligan (1987), "Moral Orientation and Moral Development" p.60.

<sup>185</sup>Dietz (1987) p.11.

someone's son or father or brother or sister, or mother, or daughter, or friend.<sup>186</sup>

Cultural feminism highlights the question of communication disjuncture between feminine experience in law through reclaiming a woman's voice which articulates different perspectives. "Integrative knowledge is not a confused and failed attempt to come to grips with the elementary rules of deductive logic; it is a way of knowledge and should be recognized as such."<sup>187</sup> Thus, in this strategy a feminist law would emphasize subjectivity, connection and responsibility rather than autonomy, objectivity and rights.<sup>188</sup>

Suzanna Sherry uses this paradigm to illustrate, not that a feminist law would be better, but rather, that there are non-hierarchical differences between women and men which become perverted in a jurisprudence whose foundations rest on a masculine perspective. That one-sided structure "reflects a distorted view of the tension between autonomy and connection between the individual and society."<sup>189</sup>

Cultural feminism in law (and generally) focuses on relational resolutions rather than dichotomized conflicts. The most cited exemplification of this is

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<sup>186</sup>Gilligan (1987) p.32.

<sup>187</sup>West (1988), "Jurisprudence and Gender" p.18.

<sup>188</sup>See Sherry (1986), "Civic Virtue and the Feminine Voice in Constitutional Adjudication" p.543.

<sup>189</sup>Ibid., p.582.

Gilligan's study of the responses of Jake and Amy to the dilemma of a man being unable to afford needed medication for his dying wife. Jake reasoned that a human life being at stake was sufficient justification for stealing the necessary medication. Amy was uncomfortable with the framing of the question: couldn't the husband explain the situation to the pharmacist, and perhaps make an arrangement to pay back the money later, and so forth.

Critiques of cultural feminism focus on the ethnocentrism and essentialism of this approach. Denoting specific masculine and feminine modes of thought and of moral judgment obscures the issue that caring is learned behaviour.<sup>190</sup>

We do not know if men and women have essentially different natures which make women more caring and nurturing and men more aggressive and competitive. The extent of variation in how our biological capacities have been socially valued, invested with meaning and mediated by the social organization of production, makes generalization premature."<sup>191</sup>

Situating the fundamental site of difference between women and men in the biological realm of motherhood asserts that women because of their sex are bound by specific physical characteristics. Foregrounding interdependence is only useful if one's role is not prescribed: "Women's sexual difference, her capacity to

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<sup>190</sup>MacKinnon (1987) *Feminism Unmodified*; MacKinnon (1989) *Towards a Feminist Theory of the State*; Ashe (1987) "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence"; Eisenstein (1988) *The Female Body and the Law*.

<sup>191</sup>Ramazanoglu (1989) *Feminism and the Contradictions of Oppression*, p.33. See also Epstein (1988) *Deceptive Distinctions*, pp.81-82 for a discussion of Gilligan's research results as overgeneralized, and not adequate support for her assertions.

On overgeneralization Dietz (1987) p.13, comments: "At the center of the mothering activity is not the distinctive political bond among equal citizens but the intimate bond between mother and child."

bear children, can only contribute to her individuality once she is not defined by it."<sup>192</sup> The ethic of care articulated in cultural feminism risks the implication that "women have a unique responsibility for bringing the humanistic principles derived from the experience of nurturing and caring in the private world of personal relationships and family to bear on the public sphere."<sup>193</sup>

Crucial issues are addressed by cultural feminism, especially that women's experience, perceptions and reasoning are devalued in law. But there is still the problem in cultural feminism of essentialist categories. Thus, we have yet to move beyond a structure in which 'special treatment' is warranted, indeed critical, for certain kinds experiences.

### **Difference, which Difference?**

Zillah Eisenstein (*The Female Body and the Law*, 1988) applies postmodernism to the difference debate in her work on women's inequality within the framework of androcentric law. Issues dealing with sexual or gender differentiation posit the male as the norm and the female perspective and condition as either like the male and therefore able to be considered and judged by the same criteria; or different and in a sense, an aberration:

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<sup>192</sup>Eisenstein (1984), *Feminism and Sexual Equality*, p.240.

<sup>193</sup>Stiltanen and Stanworth, 1984, "The Politics of Private Woman and Public Man" in Women and the Public Sphere, Hutchinson, London p.199 (cited in Thornton, 1986).

[W]oman is different from man, and this difference is seen as a deficiency because she is not man. This construction of difference homogenizes all women as different in the same way (not man). The way they are different from all men, and establishes the duality man/woman.<sup>194</sup>

Through recognition that there is no 'natural body', "only bodies that are constructed and gendered through social institutions,"<sup>195</sup> Eisenstein proposes to overcome this bias, and barrier to equality through situating the pregnant body as the standard, thus proffering plurality as the norm, and decentering phallogocentric discourse.

Eisenstein's premise works towards acknowledging sexual difference while proposing a way out of "endorsing the historical contingencies of its engendered form."<sup>196</sup> Which is to say that sex difference requires an engendered reinforcement (even what is thought of as raw biology is socially constructed and mediated). "Both the body as "fact" and the body as "interpretation" are real, even if we cannot clearly demarcate where one begins and the other ends."<sup>197</sup> The underlying strategy of this approach is to specifically differentiate the classifications of "woman" and "mother", to avoid the collapsing of the former into the latter.

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<sup>194</sup>Eisenstein (1988) p.8.

<sup>195</sup>Bernstein (1989-90), "Difference, Dominance, Differences: Feminist Theory, Equality and the Law" p.216.

<sup>196</sup>Eisenstein (1988) p.4.

<sup>197</sup>Ibid., p.80.

What if there are multiple differences of sex that are complexly related to differences of gender rather than a 'difference' of sex established in nature that differentiates all women from all men? The problem is that the meaning of 'real' cannot be established from inside the engendered meanings of 'classification by sex' within law.<sup>198</sup>

Eisenstein maintains that pregnancy is not a category of sex because nonpregnant persons are both men and women<sup>199</sup> and that when the standard of evaluation is the phallus, the nature of the law privileges nonpregnant persons. Although Eisenstein does not make an explicit connection, she approximates the reasoning in the 1974 case of *Geduldig v. Aiello*, which maintained that insurance companies could exclude pregnancy from their disability plan.<sup>200</sup> Eisenstein's claim also difficult in that women, in general, are not privileged in the same way as men who find their perspective reproduced in the perspective of law. Post-menopausal women, sterile women, female children and women who have a strong commitment to not getting pregnant cannot necessarily claim to be better represented within the law than pregnant women.

Positing the pregnant body as the standard has the primary advantage of alleviating the constraints of finding 'similarly situated individuals' for pregnant women. Equal treatment within legal discourse of the phallogocentric order, "is a

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<sup>198</sup>Ibid., p.57.

<sup>199</sup>Ibid. p.66.

<sup>200</sup>[T]he [insurance program] divides potential recipients into two groups - pregnant women and non-pregnant persons. While the first is exclusively female, the second includes members of both sexes." *Geduldig v. Aiello*. 417 US 484. (1974) at 497.

model which fits pregnancy into the category of temporary medical disability in order to make it comparable to a male experience."<sup>201</sup> This classification is inaccurate in the sense that pregnancy is not a disease and pregnant women are not disabled: if the reproduction of the species is worthwhile, they are in fact functioning superbly. Further, having a child is not a temporary condition and labelling it as such imposes the norm that a woman after having a child will be able to return to a previous level of productivity.

If diversity is posited as the new premise for judicial decisions, then there is no basis for gender specific legislation which presumes both a capacity and desire of all women to be pregnant at some time. However, in the vast majority of cases, legislation based on sexual differences is neither necessary or relevant; some notable examples of this are exemption from conscription, restrictions to certain kinds of working conditions and sexual segregation of sports at all levels. It is problematic that such labour legislation under the guise of protecting women for not being (biologically) like men, is in fact maintaining an ideological structure designed to exclude women (and others) in the first place.

Predominantly reliant upon law to correct power imbalances, Eisenstein does not really transcend the categories of her analysis. Lacking a plan of where

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<sup>201</sup>Eisenstein (1988) p.101.



to begin to implement radical pluralism we are left only with an intriguing theory.

A striking aspect of the literature in this area is the degree to which feminist projects that focus on or reclaim difference exclude discussions of violence against women. This is due, in part, to different discourses following different (perhaps parallel) trajectories: reasoning which responds to and builds upon previous discussion and debates. One might suspect, as well, that such an exclusion exists because of an incapacity to address the necessary issues. Both radical pluralism and cultural feminism, for example, argue for increased contextuality in legal reasoning however the question of why law is already objective and impersonal, and how this is maintained must equally be addressed.

In the following section, Catharine MacKinnon emphasises: "So long as men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it."<sup>202</sup> As illustrated so far, historically, difference has engendered dominance both within and outside of law. MacKinnon turns this around to: "Dominance reified becomes

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<sup>202</sup>MacKinnon (1989) p.293.

difference."<sup>203</sup> Thus, reclaiming 'difference' (and investing it with other meanings) continues to justify different treatment which ensues from domination.

### **The Dominance Approach**

Catharine MacKinnon proposes the subversion of current jurisprudence for one which foregrounds the female experience and perspective. Her reasoning is supported by the extensive violence against, discrimination and oppression of women, which have persisted through the attributes of a male defined positive law. She does not find it problematic that this jurisprudence would be fundamentally biased: "A feminist jurisprudence, stigmatized as particularized and protectionist in male eyes [...] is accountable to women's concrete conditions and to changing them."<sup>204</sup> A feminist theory of the state has barely been imagined and MacKinnon's preoccupation is in defining the necessary conditions for the ending of oppression of women. This includes a judicial system which both represents and protects the needs and concerns of women. However, such a judicial system is doomed to failure (both theoretically and in practice) if it is not reflected in other societal structures. As Smart points out, "...MacKinnon sees no division between law, the state and society ... these are virtually interchangeable concepts - they are all manifestations of male power."<sup>205</sup> In this vein, the

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<sup>203</sup>MacKinnon 1989, p.238.

<sup>204</sup> *Ibid.*, p.248.

<sup>205</sup>Smart (1989) p.81.

subtext to MacKinnon's work can be understood as her assertion that radical feminism is feminism,<sup>206</sup> and her work is both an explanation and legitimization of this claim.

MacKinnon's feminist theory of the state requires the restructuring of the relationship between law and society. In order not to replicate the current system of laws to which women have never consented, feminist theory must reconstruct what it means to be a woman in order to create a state built on that perspective. The method to achieve this restructuring is that of consciousness raising:

Feminism turns theory itself, the pursuit of a true analysis of social life, into the pursuit of consciousness, and turns an analysis of inequality into a critical embrace of its own determinants. The process is transformative as well as perceptive, since thought and thing are inextricable and reciprocally constitutive of women's oppression, just as the state as coercion and the state as legitimating ideology are indistinguishable, and for the same reasons. The pursuit of consciousness becomes a form of political practice.<sup>207</sup>

From a similar point of departure, Smith's level of inquiry begins with the subjective existence of women's reality: "in actual experience as embedded in the particular historical forms of social relations that determine that experience."<sup>208</sup> Consciousness raising works to counter women only knowing their social beings as constructed and distorted within the realm of male dominance.

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<sup>206</sup>MacKinnon (1989) p.117.

<sup>207</sup>Ibid., p.84.

<sup>208</sup>Smith (1987) p.49.

Problematic to this approach, as Smart cautions, is that once this "becomes a feminist Truth it becomes another mode of disqualifying women who do not conform to that version of events."<sup>209</sup> The strategic premise here is that consciousness raising is an empowered knowing which affirms the potential to act for social change. Consciousness-raising is MacKinnon's starting point for creating a feminist jurisprudence.<sup>210</sup> It is a reaction to a masculine state which veils adopting the standpoint of male power through the guise of objectivity.<sup>211</sup> There are two fundamental issues here. The first is gender as a "social system that divides power,"<sup>212</sup> the second is the concept of objectivity. Eisenstein critiques the 'neutral standard' of law as an inaccurate jurisprudential device which is used to assess gender issues. MacKinnon takes this a step further:

Objectivity is liberal legalism's conception of itself. It legitimates itself by reflecting its view of society, a society it helps make by so seeing it, and calling that view, and that relation, rationality.<sup>213</sup>

Male perspective and power is privileged by law precisely because law reflects and corresponds to power enforced by men over women in society. "So long as

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<sup>209</sup>Smart (1989) p.80.

<sup>210</sup>Harding (1987), *Feminism & Methodology*, ironically comments, "...it has been argued that she (MacKinnon) paints a picture of such unrelenting oppression and exploitation of women that it is hard to imagine how feminism ever got started" p.135.

<sup>211</sup>MacKinnon (1989) p.162-163.

<sup>212</sup>*Ibid.*, p.160.

<sup>213</sup>*Ibid.*, p.162.

men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it."<sup>214</sup>

MacKinnon's primary examples of this are rape, child abuse, abortion, pornography – issues that are either addressed by legislators in futility or legislated from the bias of masculine interests. *Roe v. Wade* (1973) illustrates the legalization of abortion on grounds of privacy rather than the 'right' to choose to terminate a pregnancy. Likewise, the more recent Canadian equivalent *R. v. Morgentaler* (1989) struck down the abortion law's approval procedure as an "unjustified violation of a woman's security ... as guaranteed by section 7 of the Canadian Charter."<sup>215</sup> Section 7 also upheld Chantal Daigle's legal right to an abortion. Neither case was decided under the Charter's equality provisions.

Rather than 'celebrating difference' another entry point for feminist critique then, is the focus on dominance of men over women. Tension between the concept of equality (which presupposes sameness) and the concept of sex (which presupposes difference) means that sex equality is fundamentally a contradiction in terms.<sup>216</sup> Gender neutrality is the male standard and special protection the

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<sup>214</sup>*Ibid.*, p.239.

<sup>215</sup>Smith (1991) p.6.

<sup>216</sup>MacKinnon (1987) p.33.

female standard.<sup>217</sup> The terminology is one that law anticipates and invites: equality can be dealt with within the framework of law without rupturing the liberal experience.

The difference approach misses the fact that hierarchy of power produces real as well as fantasised differences, differences that are also inequalities. (p.37) and "For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness. (p.39)

As long as issues are framed in terms of difference/equality demands for equality will always appear to be asking to have it both ways. As well, framing the questions in this way, will leave open the possibility for men to benefit from the reform and new legislation while women are left relatively resourceless and powerless.

MacKinnon's refutation of the equality/difference debate as an obfuscation of hierarchy is a logical corollary of the private/public debate.<sup>218</sup> The concept of equality when addressed by liberal jurisprudence is framed by the notion of similarly situated individuals. Despite any appearance of equality before the law or in the courtroom, women are not (yet) similarly situated to men within society, so they arrive in court from a position of disadvantage. "Unless the dialogue is

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<sup>217</sup>Ibid., p.34.

<sup>218</sup>"By placing the operation of law squarely in the public realm and, at least rhetorically, removing itself from the "private realm" of personal life and the family, the legal system created a distinction between a public realm of life, which is a proper arena for legal or social regulation, and another, fundamentally different, personal sphere, which is somehow outside the law's or society's authority to regulate. Thus, the legal system has functioned to legitimate that very distinction by asserting it as a natural, rather than socially imposed, ground for different treatment." Polan (1982), "Toward a Theory of Law and Patriarchy" p.298.

constructed in such a way that the individual asserts the sameness of economic and social practices for men and women the claim for a remedy for individual mistreatment cannot begin.<sup>219</sup> The alleged double standard is a product of the inevitable double-bind created through patriarchal law being passed off as special treatment, leniency and protective legislation.

### **Conclusions**

As discussed in Chapter 4, liberal discourses of equality through inclusion is a necessary but limited strategy for change. Conceptualizing approaches to feminist jurisprudences builds upon the necessarily constrained responses to specific legal situations. Strategically, these latter need to be addressed in terms of legal methods that can work within legal structures: how do we make, for example, the applicability of self-defence for women who kill their batterers intelligible using legal terms and processes? Through inquiry into entrenched concepts of difference, equality, neutrality, objectivity, etc., feminist jurisprudences work to broaden legal discourse and to provide new frameworks for social discourses.

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<sup>219</sup>Judith Grbich (1991) "The Body in Legal Theory" p.72.

## 6. CONCLUSIONS

A range of discourses inform justice for women who kill their batterers. Fraser's (1989) 'means of interpretation and communication' identifies different levels of discourse, which situate actors and social organizations in terms of their power to define, interpret and engage in discourse. This thesis has traced a path through the different discourses which surround the condition of battering with a view to critically examining the Battered Woman Syndrome defence as a strategy to secure justice for women who kill their batterers in self-defence. There have been important changes since the early 1970s in terms of *how* battering is described, defined and addressed. But, in spite of these shifts, two areas have not changed. First, a significant proportion of women in Canada are still battered by their male partners. Sometimes this results in women fearing for their safety to the degree that they attempt to defend themselves by whatever means possible. Second, in law there remains the problem of legitimate access to the self-defence plea.

This thesis has used the *Lavallee* decision to illustrate how legal discourse subsumes and contains other alternative discourses. Expert testimony on BWS was allowed to be introduced on grounds that criteria for self-defense discriminated against women: a woman living in a battering relationship could have a different perception of reasonableness than that expected of the reasonable man/person. However, through an analysis of the discourse surrounding the case, this thesis has



identified flaws in the profile of BWS. Two issues arise as a result of the BWS solution. First, like the many women who have killed their abusers and have not had full recourse to the self-defense plea, many women will not meet the psychological profile of learned helplessness implicit in BWS. Secondly, the institutionally sanctioned voice of the expert witness has been called to stand in for the subjective, personal voices of women who are battered. This thesis argues that the *Lavallee* decision does not guarantee justice for women who kill their batterers in self-defense but do not embody the profile of BWS. The need for a discourse which could address and describe a range of differences for women, and the subjective experience of those differences has instead been met with the creation of a new standard. The BWS self-defense solution provides recognition of alternative discourses while simultaneously dismissing them in favour of a rational, positivistic measure, which is more in accordance with the categories of law.

Institutionalized documentation such as medical, police and court records, and media reports and dramatizations, are the most dominant forms of texts used to inform, define and discern justice for women who kill their abusers. These texts are organized discourses, which by necessity employ objectified categories of subjective experience. "The orderliness of events, objects, etc., is thus pre-informed by the schema of discourse or formal organization."<sup>220</sup>

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<sup>220</sup>Smith (1990) p.217.

The least audible discourses are those generated by individual women. Unless we have personal experience of being a battered woman, or intimately know someone in that situation and are capable of identifying with her, societal referents are constructed largely by the popular media. Almost simultaneous with women discovering and asserting a politicized voice in response to this issue in the early 1970's, psychological/medical classifications emerged and recast the issue of men battering their spouses back into personalized pathological terms. Nonetheless, the condition of battering has become known: socially identified as an unacceptable practice and known to be a prevalent practice. In detailing the above however, battering has become known predominantly as a 'women's issue', on the feminist agenda, and thereby situated as a lesser discourse.

The popular media are important sites of negotiation of discourses. Made-for-television films, reportage on actual cases, and published studies in this area are all means of shaping awareness and understanding or perpetuating stereotypes and downplaying the issues. But, like law, media reflect dominant social values, and on occasion, their negotiation. An example of this last is the competing accounts of Lorena Bobbitt's acquittal published in *The Vancouver Sun* including: a news story covering the event and three editorial pieces, polarized to two different perspectives.<sup>221</sup> It is reductive to depict this divergence as being only along gender

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<sup>221</sup>"Bobbitt's acquittal gets mixed reviews" A1-A2; "Some less-than-penetrating observations about unkind cut" A3; "Babe feminism demeans grown-up gains of women" A13; "No tears for the Bobbitts - only for America" B1. *The Vancouver Sun*, 22 January 1994.

lines, although this is how the case has been reported. The effort to publish different perspectives illustrates a shifting of discourses, however the negotiation is contained within a debate around gender rather than social issues.

Throughout the Bobbitt trial, the fear of vigilante revenge by women who had been battered was well articulated in the media. However, despite anticipation of a crime wave against men predicted by the National Men's Organization, no mention was made of the need for men to fear an 'open season' on men in the courts. That is, there was no generalized fear articulated (or indication that there should be fear) that men might actually be held accountable and convicted en masse of assaulting their partners. The discourse of fear sensationalized in reporting on Bobbitt was that women will, en masse and in revenge, take the law into their own hands. Reduction through equivalence is a strategy that media are quite adept at employing: framing feminist issues in terms of how men are similarly situated; and framing resolution of these issues in terms of how they will impact on men.

Legal discourse, in the context of spousal assault, implicitly reflects an historical male perspective of rights, including where and how one might defend one's self (or property), and the right/need to rule the home. This premise has been difficult to undo, and subsequent revision of law has been difficult to enforce. In tandem with law that historically sanctioned the abuse of women, is legal language

which was not written to presume that women will (or should) physically defend themselves.

Battered Woman Syndrome which describes a woman's response to battering, not society's role in creating the context for that response, has become an institutional account of women who are battered. Written into Canadian law, in the Supreme Court *Lavallee* decision, the BWS defence provides another (somewhat improved) path through a legally mandated course of action. However, its function risks evolving to providing an alternative to revising the doctrine of self-defence: acknowledging and accommodating the double standard (through creating a new one), rather than the experience and subjective voice of the battered woman.

It would be dangerous to assert that the language of law is not worth fighting for. A focus on legal discourse can highlight specific terminology which needs to be reconsidered, such as redefining with a view to relaxing equal force and imminence standards, and reassessing the applicability of the reasonable man/person standard. Engaging and challenging the discourse of law at this level, however, is not a linear progression. Incremental attempts to secure areas of law, such as claiming self-defence for women who kill their batterers, risk becoming subsumed by reasoning which does not really support the idea of self-defence for women against the men they are married to, or against men generally. (Another example of this nonlinearity is the flip-flopping around the legality of abortion.) Expert testimony provides

recourse to some women seeking to relax imminence requirements. Generally, though, expert testimony must meet rigid criteria before it is admissible. So, while women who kill their batterers have recourse to an expanded definition of battered woman syndrome, "it might not be possible to produce evidence of say the 'desperately poor woman syndrome' in a welfare fraud case."<sup>222</sup>

Failed attempts to generalize the typical battered woman and the typical man who batters indicate that solutions which address this in terms of specific individuals will not be entirely productive. Walker's Cycle of Violence and learned dependency definitions are useful in helping to understand what living in constant violence can do to an individual, but, highlighting the different condition of 'battered women', obscures the right of all individual women, traumatized or not to protect themselves (and their children) from violent abuse.

Attention to discourses surrounding this issue is a first step toward recasting it. Moving beyond victim blaming can be achieved through asking about (and being concerned with) available (and adequate) resources, security and safety for women; and second, through asking about the social response to the batterer – his removal from the home, treatment, and perhaps *why doesn't he get arrested?* These are important and difficult questions and will keep us sufficiently engaged to not have time to meaninglessly ponder on *why doesn't she leave?* This refocusing helps to

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<sup>222</sup>Boyle (1990) p.174.

displace the discourse from '*battered women*' to one of '*women and men who batter*', or '*women and men who batter in a society which does not systematically punish violence against women*'. It is important to move beyond discourses which implicitly suggest that women are aberrant because of their being battered, to discourses which foreground the unacceptability of that condition and the societies that create or accept that condition.

An entry in a recent *Globe and Mail* contest to create anagrams of the names of famous persons included: Bertha Wilson – the law is born. This was the sentiment of many women when she was appointed to the Supreme Court of Canada, in anticipation of finally having a voice in that realm – a bilingual voice, fluent in both law and feminism. But as feminism is replaced by feminisms, reflecting a multiplicity of perspectives, agendas and strategies, it is unrealistic to expect individuals such as Wilson to be the unitary voice for the gamut of feminist politics. Representation in law schools and the courts does add more voices to discourse, but is not, in-and-of-itself a sufficient strategy for change. Judges administer justice: how feminist judges administer justice necessitates inquiry into different approaches to feminist jurisprudence.

It is through theorizing jurisprudences which can accommodate discourses about the possibility of an ethic of care and responsibility, the pervasiveness of violence against women, private/public sphere discontinuities, the condition of

maternity, and so forth, that we can begin to imagine what we might expect of current law.

In discourse as in all else, the contrast between democracy and oppression is a distinction between forms of social organization, not degrees of it. In this respect Habermas is entirely right to argue that the criterion of democracy applies to *procedures* rather than *specific ideas*.<sup>223</sup>

What is still to be achieved is the legitimization of feminist discourse in law: the engaging and inclusion of discourse of personal experience, in which voices of women who are battered are consulted rather than pathologized; and, more to the point, are warranted as important and credible.

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<sup>223</sup>Hirschkop, (1986) p.111 (my emphasis).

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