

Not a Defender of Herself, but a Defenceless Victim without a Self:
The Need for Sociological Expertise in Battered Women's Self-Defence Trials

By Erin Wheal, B.A. (Hons)

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Abstract

When a battered woman kills her abuser in self-defence, she is thrust into a complex legal situation where her behaviour is frequently characterized by expert testimony as the result of a medical, psychological syndrome. In battered women's self-defence trials, expert psychologists are often called by the defence to explain how the accused battered woman's behaviour fits into the syndrome. Used alone, the individual psychological perspective embedded in battered woman syndrome propagates stereotypes about battered woman and acts as a barrier to their equitable treatment in the law. In this project, I argue that battered woman syndrome testimony should be abandoned in favour of more general psychological testimony on the effects of battering on women. I also argue for the addition of expert sociological testimony to help combat these stereotypes and to explain the importance of race, class, gender and unequal power relations in women's lives.

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Chapter 1: Introduction

When a battered woman kills her abuser in self-defence, she is thrust into a complex legal situation where her behaviour is frequently characterized by expert testimony as the result of a medical, psychological syndrome. Battered woman syndrome was devised in the 1970's by American psychologist Lenore Walker and focuses on the theories of learned helplessness and the cycle of violence.¹ In battered women's self-defence trials, expert psychologists are often called by the defence to explain how the accused battered woman's behaviour fits into the syndrome.

As an undergraduate studying sociology, I recall thinking that the legal response to this situation did not make sense. The law had failed to protect a woman who had experienced abuse but also sought to punish her for taking action to protect herself or to portray her as sick for doing so. There is a sense of tragedy when an abusive man kills his partner, yet violence against women remains a widespread and serious social problem. When a battered woman kills her partner in self-defence, there is less apparent understanding and compassion for her decision to take the action necessary to defend herself.

In many battered women's self-defence trials, battered woman syndrome and self-defence have become conflated as one. In these trials, expert psychologists testify about battered woman syndrome from a very individualized standpoint. Their testimony generally does not acknowledge the social factors of race, class and gender. Since these social characteristics

¹ Battered woman syndrome will be discussed in detail in chapter two.

constitute the significant ways in which women's lives are regulated and experienced, it is essential that they are added to the expert testimony used in a battered woman's self-defence trial in order for the triers of fact to more fully understand a battered woman's actions.

By attaching a medical, syndromatic label to their behaviour, psychological testimony classifies battered women as "abnormal." This label does not take into account that it is not "abnormal" behaviour to defend oneself from harm. When faced with imminent danger, most people would take action to defend themselves. This is the essence of the defence of self-defence. The legal dilemma is that most battered women kill in situations where their abusers seem to pose no immediate threat to their safety. In this context, expert testimony is needed to resolve the dilemma by explaining why the danger can be understood as imminent and a battered woman's response as reasonable.

Although an individual perspective is important to understanding the psychological effects domestic violence has on women, the court's exclusive reliance on these explanations results in a very one-dimensional understanding about battered women's behaviour, their perception of danger and the reasonableness of their actions. Used alone, the individual psychological perspective propagates stereotypes about battered woman and acts as a barrier to their equitable treatment in the law.

There is a large body of literature that critiques battered woman syndrome. Generally, these critiques focus on the negative implications of using battered woman syndrome testimony to explain the accused's actions. These critiques will be explained in detail in chapter three.

Some scholars² argue that employing a social context approach in battered women's self-defence trials would help to combat these negative implications and social stereotypes. The problem is that this suggestion has been made without any specification of *how* a social context approach might be introduced to a system of law that is heavily weighted towards individualized scientific evidence. I argue that the path to implementing this suggestion in battered women's self-defence trials would be to admit expert sociological testimony. This type of testimony would "fill the gaps" left by the individual focus of psychology by explaining the importance of race, class, gender and patriarchy in women's lives and could explain how women's experience is shaped by unequal, gendered power relations. Domestic violence is not solely an individual problem; it is also a serious social issue. The addition of sociological testimony would result in a strengthened understanding of battered women's experience of domestic violence, the reasons why they might stay with an abuser, and why they might have to act in self-defence.

Research Focus

My research questions the extent to which sociological testimony might aid in the determination of the reasonableness of the accused's actions, as required by the law of self-defence and as outlined in the Supreme Court of Canada in *R. v. Lavallee*.³ My secondary focus is to examine the extent to which the testimony of an expert sociologist could combat the stereotypes that continue to haunt battered women and are perpetuated by battered woman syndrome.

² See article by K.Tang, "Battered Woman Syndrome Testimony in Canada: Its Development and Lingering Issues" (2003) 47 *International Journal of Offender Therapy and Comparative Criminology* and Supreme Court Justice L'Heureux-Dube in *R. v. Malott*, [1998] 1 S.C.R. 123.

³ *R. v. Lavallee*, [1990] 1. S.C.R. 852. [*Lavallee*]

My discussion of these issues forms the basis of my argument that battered woman syndrome testimony should be abandoned for more general testimony about the psychological effects of battering which should be augmented by the addition of expert sociological testimony. In conjunction with psychological testimony, sociology could be used to explain a battered woman's behaviour and mindset from both an individual and social group perspective. The *Lavallee* principles and the criteria for the admission of expert testimony outlined in the Supreme Court case, *R. v. Mohan*⁴ allow for sociological testimony but, for whatever reason, the possibility does not seem to have been explored.

Methodology

In December 2007, I conducted a search on *Quicklaw* for Canadian battered women's self-defence cases using the search term "battered woman syndrome." I initially tried other keyword searches such as "*Lavallee* and battered woman syndrome and self-defence" but the results were too limited and included only post-*Lavallee* battered women's self-defence cases and decisions that mentioned *Lavallee*. By using the term "battered woman syndrome," I hoped to capture the highest number of cases. The downside to such a broad search term was that many of the cases mentioned battered woman syndrome but were not battered women's self-defence cases. Seventy-two cases came up using this search term, with some duplication in French. Of these, only twenty-four involved battered women arguing self-defence.⁵ Some examples of other cases that included the term "battered woman syndrome" were children's aid custody cases, self-defence involving men and welfare fraud. The battered women's self-defence cases

⁴*R. v. Mohan*, [1994] 2 S.C.R. 9. [*Mohan*]. The *Mohan* principles are explained at the end of chapter two.

⁵ See appendix A for a list of battered women's self-defence cases.

began with the 1987 Northwest Territories Supreme Court case, *R. v. Chivers*⁶ and ended with the 2006 Saskatchewan Provincial Court case, *R. v. Kahypeasewat*.⁷ Interestingly, *Chivers* was a pre-*Lavallee* decision, yet expert testimony about battered woman syndrome was included in the trial.

When I conducted the search, I expected there to be more battered women's self-defence cases. However, *Quicklaw* does not include cases that have been plead out. The low number of cases makes it appear as though a battered woman killing her abusive partner in self-defence is a rare occurrence, when according to Elizabeth Sheehy, the majority of cases are plead out.⁸ Sheehy explains that in many battered women's self-defence cases, the Crown solicits guilty pleas to manslaughter, which would explain the limited number of battered women's self-defence cases in legal databases. As a result, the severity of the problem is misrepresented (both the issue of domestic violence generally and the application of self-defence) and the legal inequalities battered women face are perpetuated. Women are choosing the sentencing flexibility of a manslaughter conviction over the possibility of a failed self-defence claim and the mandatory life sentence of a murder conviction.

I noticed that a common theme in the twenty-four battered women's self-defence cases was that many of the accused were Aboriginal women. Based on a perusal of the cases, ten were identifiable as involving Aboriginal defendants and are noted in the appendix. I wanted to examine a post-*Lavallee*, post-*Malott* decision in detail to analyze the way in which battered woman syndrome testimony was used and to assess the extent to which the battered woman's

⁶ *R. v. Chivers*, [1987] N.W.T.J. No. 118. [*Chivers*]

⁷ *R. v. Kahypeasewat*, [2006] S.J. No. 587 (QL)

⁸ E. Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L.J. 529 at 533.

social context was taken into account. I also wanted to choose a case that had not been widely analyzed by other scholars. As Aboriginal status was a recurring theme, I also narrowed my analysis to a case involving an Aboriginal woman. Since I am arguing for a specific sociological approach, I decided to analyze one case in detail, rather than to survey all of the cases and pick out common sociological themes. This approach provides more direct, concrete evidence; however, a wider case analysis of the need for sociological testimony could be conducted in a large-scale research project. I chose to analyze the case, *R. v. Bear*⁹ because it was immediately post-*Malott* and provided enough background details about the defendant and the case itself. I summarize my focus in *Bear* in the next section.

Since I am arguing for a new approach to expert testimony in battered women's self-defence trials, it is necessary to first review and assess the existing knowledge and case law. The literature I review provides a strong background and framework to analyze the concerns with battered woman syndrome and expert testimony. As a means to prove that my argument is both theoretically and legally possible, I first describe how expert testimony is currently used in battered women's self-defence trials. To do this, I review the Supreme Court of Canada cases, *R. v. Lavallee*,¹⁰ *R. v. Mohan*¹¹ and *R. v. Malott*¹² and use literature that critiques battered woman syndrome, positivism and psychology to ground my argument that an exclusive reliance on psychology is too narrow and undermines battered women's personhood.

⁹ *R. v. Bear*, [1999] S.J. No. 262. [*Bear*]

¹⁰ *Lavallee*, supra note 5.

¹¹ *Mohan*, supra note 4.

¹² *R. v. Malott*, [1998] 1 S.C.R. 123 [*Malott*]

This is not a thesis which bases its analysis in abstract grand theories that describe the fundamental power relations inherent in the law or those underpinning the theoretical constructs of expert knowledge. I examine the issues from a practical standpoint. I am not so interested in the broad theoretical implications of my research but rather, I focus my thesis on the description and feminist analysis of what is happening in battered women's self-defence cases, analyze the implications of battered woman syndrome testimony and offer a solution to the problem.

Outline of chapters

The second chapter provides an overview of Lenore Walker's "battered woman syndrome" and explains the parts that are the most cited in literature and self-defence trials. I then explain in detail the 1994 Supreme Court of Canada decision, *R. v. Lavallee*.¹³ Though the *Lavallee* decision pointed to expert testimony about battered woman syndrome as a means to understand a battered woman's unique perception of danger and the reasonableness of her actions, the principles the Supreme Court laid out are not specific to battered woman syndrome. I argue that these principles leave open the possibility of expert sociological testimony and I return to them in the concluding chapter of the thesis. At the end of the chapter, I briefly outline the 1994 Supreme Court decision, *R. v. Mohan*¹⁴ and summarize the four criteria that the Supreme Court ruled must guide the admissibility of expert testimony. The four *Mohan* criteria are broad enough that sociological evidence could satisfy them. However, as the subsequent chapters illustrate, sociological testimony has yet to be admitted in a battered woman's self-defence trial.

¹³ *Lavallee*, supra note 3.

¹⁴ *Mohan*, supra note 4.

The third chapter builds on the *Lavallee* decision and critically examines the structure and function of expert testimony in the trial process. From there, my discussion moves more specifically into battered woman syndrome. I argue that there are two broad critiques of battered woman syndrome testimony: the medicalization and syndromization of battered women's experiences and the stereotypes about women that battered woman syndrome perpetuates. These critiques demonstrate that battered woman syndrome testimony can cause more harm than good, and make clear that there are serious limitations to seeking its "explanations" in a battered woman's self-defence trial.

The fourth chapter outlines what sociological expert testimony could achieve in battered women's self-defence trials by providing information about the social context constraints that affect a battered woman's actions. I begin by summarizing some feminist critiques about positivism and psychology. With these critiques in mind, I analyze Supreme Court Justice L'Heureux-Dubé's remarks in the *R. v. Malott*¹⁵ about the limitations of battered woman syndrome testimony and the importance of understanding social context in battered women's self-defence cases. L'Heureux-Dubé's remarks open the possibility for sociological testimony, but do not specifically point to it as a "solution" to remedying the stereotypes perpetuated by battered woman syndrome testimony. I conclude the chapter by explaining what sociology is as a discipline and how it could be applied in battered women's self-defence trials.

As a conclusion to the thesis, I apply the critiques and observations I have made in an analysis of the case *R. v. Bear*.¹⁶ Janice Bear is an Aboriginal woman who was charged with the

¹⁵ *Malott*, supra note 12.

¹⁶ *Bear*, supra note 9.

assault of her abusive boyfriend. In the case analysis, I examine how battered woman syndrome testimony was used, the extent to which the *Lavallee* principles were followed and the stereotypes that were upheld about Bear's behaviour as a woman and as an Aboriginal woman. I then engage with the broader themes of race, class and gender from the *Bear* case to explain how a sociologist's testimony would provide valuable insight in similar trials. I conclude the thesis by demonstrating how sociological expertise is consistent with the *Lavallee* principles and with the *Mohan* criteria for the admissibility of expert testimony. There is no legal impediment to using sociological evidence to assist the triers of fact in understanding the actions of a battered woman and in assessing the reasonableness of her actions as an act of self-defence. Such evidence would promote women's equality by providing information on the raced, classed and gendered social context in which the individual woman acted.

Chapter 2: Battered Woman Syndrome, *R. v. Lavallee* and Expert Testimony

In trials of battered women who have killed (or seriously injured) their abusers, the defence will often seek to introduce the testimony of a psychologist or psychiatrist to explain battered woman syndrome and a woman's psychological state of mind (as a battered woman) to the jury in order to provide the basis for the defence of self-defence. Experts typically outline the tenets of battered woman syndrome to the judge/jury and apply them to the battered woman's situation. The purpose of their testimony is to dispel harmful or negative stereotypes about battered women. The rationale (as set out in *R. v. Lavallee*¹⁷ later in the chapter) is that without expert testimony to explain a battered woman's psychological state of mind, the jury might wrongly convict her because they do not see her actions as falling within the legal definition of self-defence.

I begin this chapter with a brief summary of "battered woman syndrome,"¹⁸ which was developed by American psychologist, Dr. Lenore Walker in the late 1970's. I will focus on Walker's theories of learned helplessness and the cycle of violence to contextualize how experts use battered woman syndrome in battered women's self-defence cases. I then move to a discussion of the precedent-setting Supreme Court of Canada case, *R. v. Lavallee*,¹⁹ which acknowledged the utility of expert evidence about battered woman syndrome in assisting the jury to assess the reasonableness of a battered woman's perceptions and actions in the context of the law of self-defence. Finally, I briefly outline the legal standards for the admissibility of expert

¹⁷ *Lavallee*, supra note 3.

¹⁸ See L. Walker, The Battered Woman Syndrome (New York: Springer Publishing Company, 1984).

¹⁹ *Lavallee*, supra note 3.

testimony in Canada using the criteria set out by the Supreme Court of Canada in *R. v. Mohan*.²⁰ These discussions provide a base from which to explore the feminist critiques of battered woman syndrome in the next chapter and lay the groundwork for my argument that expert sociological testimony is necessary in battered women's self-defence trials in order to provide the social context within which a battered woman's actions can be seen as reasonable.

Battered Woman Syndrome

From 1978-1981, psychologist Dr. Lenore Walker interviewed 400 battered women in order to try to understand the psychological effects that domestic violence had on them.²¹ Walker's original study, reported in her book *The Battered Woman*,²² focused on understanding a battered woman's perspective of her violent relationship. The purpose of the study was to include the standpoint of battered women in the developing discourse on domestic violence.²³ Walker challenged the prevalent social assumption that battered women *should* be able to leave an abusive relationship with relative ease, and if they failed to do so, they must "want" the violence that is inflicted upon them. She provided an explanation that outlined the psychological barriers that *prevent* battered women from leaving their abusers. Walker termed the set of these psychological barriers "battered woman syndrome." In a later study, reported in her book, *The*

²⁰ *Mohan*, *supra* note 4.

²¹ Walker, *supra* note 18 at 1.

²² L. Walker, *The Battered Woman* (New York: Harper and Row, 1979).

²³ Walker, *supra* note 18 at 3.

Battered Woman Syndrome,²⁴ Walker studied 41 battered women who killed their abusive partners and also included nine women who had taken part in her original study.²⁵

In her study on battered women who kill their abusers, Walker applied the theory of learned helplessness (first devised by psychologist Dr. Martin Seligman) to battered women by examining Seligman's well-known laboratory experiment on dogs.²⁶ Seligman administered periodic electric shocks to dogs in cages. Eventually, the dogs did not resist or try to escape from their cages even when Seligman had stopped administering shocks. The dogs "became unable to escape from a painful situation, even when escape was quite possible and readily apparent to animals that had not undergone learned helplessness training."²⁷ Walker noted that Seligman thought learned helplessness and depression were similar: "The inability to predict the success of one's actions was considered responsible for the resulting perceptual distortions."²⁸ Walker applied Seligman's findings about learned helplessness to her study of the psychology of battered women. She argued that his theory of learned helplessness could aid in proffering an explanation for "why women who could develop such intricate and life-saving coping strategies, found it so difficult to escape a battering relationship."²⁹ Learned helplessness theory was framed as an explanation about why some battered women remain in abusive relationships. Applying Seligman's theory to battered women was an approach to understanding why a battered woman who is subjected to abuse becomes both psychologically and physically unable

²⁴ Walker, *supra* note 18.

²⁵ *Ibid* at 40.

²⁶ Walker, *supra* note 18 at 2.

²⁷ L. Walker, *The Battered Woman Syndrome*, 2nd ed. (New York: Springer Publishing Company, 2000) at 117.

²⁸ Walker, *supra* note 18 at 86.

²⁹ *Ibid*.

to leave the relationship, just as the shocked laboratory dogs were unable to escape their open cages.

In the context of her study, Walker defined learned helplessness as “having lost the ability to predict that what you will do will make a particular outcome occur.”³⁰ Feminists took issue with Walker’s application of learned helplessness, arguing that it characterized battered women as passive and helpless. Walker responded to this criticism, stating that the behavior of learned helplessness does not equate to “*being* helpless.”³¹ The definition of learned helplessness suggests that it is a temporary state of mind influenced by a particular situation, whereas “being helpless” suggests a more permanent personality trait, as discussed further in chapter three. Despite her intention, the legal application of Walker’s interpretation of learned helplessness *has* tended to portray battered women *themselves* as helpless and passive, not just their behaviours and actions as such. Though Walker intended for the theory of learned helplessness to provide an *explanation* about some of the psychological barriers to leaving an abusive relationship, the medicalized language experts use in their testimony and the way in which they frame battered women’s psychological state (in relation to learned helplessness) actually *blames* the battered woman for “being helpless.”

The other popularized theory embedded within battered woman syndrome is the Walker cycle of violence. Walker identified three phases within a battering relationship, and argued that these phases occur in a cycle until the relationship is terminated. She labeled these as: tension building, acute battering incident and loving contrition. Walker theorized that a woman who had

³⁰ Walker, *supra* note 27 at 116.

³¹ *Ibid.*

been through this cycle twice should be labeled a battered woman.³² Walker defined “tension building” as an escalation in aggressive behaviours and incidents including emotional or physical abuse. The batterer conveys hostility to the woman “but not in an extreme or maximally explosive form.” In turn, the woman tries to control the situation by behaving in ways that she knows will “minimize” his harmful behavior.³³ Walker hypothesized that the tension continues to increase and the woman becomes less able to “control” the man’s abusive behaviour, eventually resulting in “the battering incident.” According to Walker, these incidents involve physical and psychological violence and injuries are frequent.³⁴ After the incident of abuse, the abuser apologizes to his partner, acts lovingly, shows remorse, gives gifts and promises never to be violent again. Known as “loving contrition,” Walker summarized that this phase “provides positive reinforcement for remaining in the relationship, for the woman. Many of the acts that he did when she fell in love with him during the courtship period occur again here ... Sometimes the perception of tension and danger remains very high and does not return to the baseline or loving-contrition level. This is a sign that the risk of a lethal incident is very high.”³⁵

Walker concluded that explaining the pattern as a cycle of violence helps a battered woman to recognize that domestic violence is “repetitive” and this knowledge “helps the woman to better assess her situation.”³⁶ The repetitiveness of the cycle of violence can help a battered woman assess the danger that her partner poses to her. A battered woman is attuned to acute behavioural changes in her partner. This knowledge informs her perception of danger and why she might believe that she is in serious danger, even if her partner is posing no “obvious” threat

³² Walker, *supra* note 27 at 126.

³³ *Ibid* at 126.

³⁴ *Ibid* at 126-7.

³⁵ *Ibid* at 127.

³⁶ *Ibid* at 137.

to her at the time she acts in self-defence. The cycle of violence could also be a factor influencing a battered woman's decision to stay with her abuser. Because abusive relationships have both violent and "honeymoon" periods, a battered woman might continue to hope that her relationship will improve and the abuse will end.

Though Walker's original study did not focus on learned helplessness and the cycle of violence exclusively, these two areas have been emphasized in trials by the type of testimony psychologists provide and the types of questions lawyers pose to these experts (as evidenced in *Lavallee* below). Though in her study, Walker assessed numerous psycho-social characteristics such as education levels, income and past relationships, her application and interpretation of learned helplessness and her cycle of violence theory are the most recognized and cited aspects of battered woman syndrome. Because of this emphasis, it is necessary to question whether experts testifying about battered woman syndrome on behalf of battered women misread or oversimplify Walker's theories.

Therefore, the issue with battered woman syndrome is the *manner* in which experts apply battered woman syndrome *to* battered women. However, Walker argues that the legal system and psychologists use the term "battered woman syndrome" differently. She notes that, "The courts combine the entire research project together under that title so the cycle theory and learned helplessness are combined under the dynamics of battering relationships along with the psychological syndromes that are often seen as the result of abuse."³⁷ Walker's observation raises a serious problem for battered women's self-defence cases. If psychologists and the courts conceptualize battered woman syndrome differently, then there is a risk that it is not being

³⁷ Walker, *supra* note 27 at 203.

applied in trials in ways that the testimony intends to convey, which results in misunderstandings about the effects of domestic violence on battered women. More alarming is that inconsistencies in understandings could translate to wrongful findings of guilt, further cementing legal inequalities for battered women.

Reliance on expert testimony about battered woman syndrome means that oversimplified aspects of a psychological syndrome coined in the early 1980's are being employed to provide the full explanation of battered women's behaviour. In many, if not most cases, battered woman syndrome provides an incomplete and inaccurate explanation for the actions of battered women who kill their abusers. The problem with this approach is that the issues have become blurred. There are many different layers to a battered woman's defence of self-defence. The courts and experts must recognize that battered woman syndrome and self-defence are not one in the same, nor are they mutually exclusive. The Supreme Court of Canada decision *R. v. Lavallee*³⁸ allowed battered woman syndrome testimony in the court. This set the focus on learned helplessness and the cycle of violence as a means to explain a battered woman's unique perception of danger, and how her knowledge of her partner's behaviour affects the reasonableness of her self-defensive actions. Defence lawyers have picked up on this "explanation" and used battered woman syndrome to promote self-defence claims.

³⁸ *Lavallee*, supra note 3.

R. v. Lavallee: Expert Testimony and Battered Woman Syndrome

The 1990 Supreme Court of Canada decision *R. v. Lavallee*³⁹ was a landmark case in Canadian law. For the first time, the Court recognized the complex situation of battered women who kill their abusers. At issue in the case was the admissibility of the expert testimony of psychiatrist Dr. Fred Shane. The *Lavallee* decision focused on the “relevance of expert testimony to the elements of self-defence.”⁴⁰ The Supreme Court held that the evidence was admissible, allowed Lavallee’s appeal and restored her original acquittal. The decision officially “opened the door” for the use of battered woman syndrome testimony to explain a battered woman’s psychological mindset, why she might stay in an abusive relationship, and why her violent response might in the circumstances be considered reasonable, thus laying the groundwork for a defence of self-defence for battered women who kill or injure their abusers.

Angelique Lyn Lavallee lived with her common law partner, Kevin Rust. His abuse of her had been a prominent feature of their relationship. On August 30, 1986, the couple had a party. Both Lavallee and Rust drank heavily and got into a heated argument in one of their bedrooms.⁴¹ According to Lavallee, Rust handed her a rifle and told her that once their guests left, he would kill her unless she killed him first. Lavallee told police that she believed that Rust would follow through with his threat. As he was leaving the bedroom, she shot him in the back of the head, killing him.⁴² When the police came to the residence, Lavallee expressed remorse, but was unaware that she had killed Rust.

³⁹ *Lavallee*, supra note 3.

⁴⁰ Ibid at 35.

⁴¹ Ibid at 7.

⁴² Ibid at 9.

Prior to her trial, Lavallee was examined by Dr. Fred Shane, a prominent psychiatrist with expertise in the treatment of battered women. Based on his interviews with Lavallee, and an examination of police and hospital reports, Dr. Shane concluded (and testified at the trial) that Lavallee had experienced domestic violence to the extent that she felt helpless, “trapped” and “worthless” and that these feelings prevented her from leaving the abusive relationship.⁴³ Dr. Shane testified about Walker’s battered woman syndrome – specifically the cycle of violence and learned helplessness. Dr. Shane testified that it was his opinion that Lavallee “felt . . . in the final tragic moment, that her life was on the line, and that unless she defended herself, unless she reacted in a violent way, that she would die.”⁴⁴ Dr. Shane’s testimony about battered woman syndrome was introduced by the defence in order to help the jury to understand Lavallee’s state of mind and why she believed she had no other alternative to save her life than to kill Rust.

At trial, the Crown moved to have Dr. Shane’s testimony dismissed, arguing that there was enough alternative evidence presented in the case such that the jury was capable of deciding Lavallee’s claim of self-defence without expert testimony.⁴⁵ The trial judge rejected the Crown’s application, stating that he would address the jury with instructions about how to interpret the expert evidence. Lavallee was acquitted by the jury. The Crown appealed the verdict to the Manitoba Court of Appeal⁴⁶ arguing that the trial judge did not provide adequate instructions to the jury about Dr. Shane’s testimony and the use of expert evidence. A majority of

⁴³*Ibid* at 10.

⁴⁴*Ibid* at 9.

⁴⁵*Ibid* at 10.

⁴⁶*R. v. Lavallee*, (1988) 52 Man R. (2d) 274 (C.A).

the Manitoba Court of Appeal⁴⁷ overturned Lavallee's acquittal and ordered a retrial. The case then went to the Supreme Court of Canada.

To determine the admissibility of the expert evidence, the Supreme Court examined the utility of psychiatric/psychological testimony in relation to the law of self-defence in the context of a battered woman who killed her abuser. The Supreme Court considered two aspects of the law of self-defence. The first part of the court's consideration was the "temporal connection," (more commonly known as the standard of imminence) that is, whether Lavallee had a "reasonable apprehension of danger or grievous bodily harm" as Rust left the room.⁴⁸ The second part of the Supreme Court's consideration was whether Lavallee believed on "reasonable grounds" that the only way she could protect herself from "death or grievous bodily harm" was to shoot Rust.⁴⁹ Although Rust had hit Lavallee before telling her that he would return later to kill her, given that he had his back to Lavallee when she shot him and was without a weapon, the perception of immediate harm was highly questionable.⁵⁰ The standards of imminence and reasonableness are connected to the perception of danger. The jury needs to understand a battered woman's perception of danger, and in these circumstances, why, in a battered woman's view, a man might pose a serious threat to their safety even though he is leaving the room. In *Lavallee*, Dr. Shane's expert testimony specifically referred to battered woman syndrome to explain why Lavallee believed Rust posed a serious threat to her safety.

⁴⁷ Ibid.

⁴⁸ *Lavallee*, supra note 3 at 36.

⁴⁹ Ibid at 36.

⁵⁰ Ibid.

In addition, to be successful with self-defence, one must have been defending oneself with appropriate force from an attack that is imminently occurring. However, Wilson J made a critical observation that the standard of imminent danger was *not* actually included in s. 34(2) of the *Criminal Code* (the self-defence provision of the Code).⁵¹ Case law and legal precedent had read imminence as a requirement⁵² and narrowly interpreted and applied the standard. The function of the imminence rule is simple: to “ensure that the use of defensive force is really necessary.”⁵³ If one is assaulted and does not act in a “reasonable” time frame, then it is presumed that the act was rooted more in revenge than self-defence. Wilson J re-interpreted the standard of imminence to apply to battered women who claim self-defence. She summarized the prevailing “assumptions” about the types of situations that lead to self-defensive action which had informed the standard of imminence. She wrote that most people equate the perception of imminent danger with a knife or gun being pointed at them. The law of self-defence was based on a male perception of danger, and presumed that the individuals involved were of comparative strength. These assumptions make it difficult for most people to understand why battered women often kill their abusers when he is posing no “obvious” threat to her. To most people unfamiliar with the dynamics of domestic violence, this act does not look like self-defence. Where battered women have killed their abusers, expert testimony is needed in order to challenge the assumptions that inform the standard of imminence by explaining “the context of a battered wife’s efforts to repel an assault.”⁵⁴ This testimony allows the jury to better understand and evaluate the woman’s violent response to a situation that on the surface, does not appear to be immediately threatening.

⁵¹ *Criminal Code*, R.S.C. 1985, c. C-46.

⁵² *Ibid.*

⁵³ *Lavallee*, *supra* note 3 at 41.

⁵⁴ *Ibid* at 43.

Wilson J quoted at length from Walker's book, *The Battered Woman Syndrome*⁵⁵ in order to contextualize Lavalley's perception of imminent danger. She referred to Dr. Shane's testimony about Walker's theory of learned helplessness and the cycle of violence and his explanation of how Lavalley and Rust's relationship fit into the cycle.⁵⁶ Wilson J recognized that the cycle of violence theory could help explain why a battered woman could "predict" the occurrence and severity of a battering incident based on certain behavioural cues of the batterer that could only be identified and understood by the battered woman herself. A battered woman's ability to "predict" violent incidents is much different than 'typical' self-defence cases involving an "isolated" violent encounter between strangers.⁵⁷ The difference is that because of her knowledge of the violent patterns in her relationship, a battered woman knows that the threat will be carried out and that she is in serious and immediate danger, even as he walks out of the room.

Further re-interpreting the imminence rule, Wilson J wrote that "the mental state of an accused at the moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality."⁵⁸ This is an important distinction because in *Lavalley*, the Court recognized that they should not examine only the moments leading up to when Lavalley shot Rust, but they also had to examine the *entire* history of Lavalley and Rust's relationship to understand why she acted in self-defence. In this case, "imminence," the perception of danger and reasonableness was influenced by the history of abuse Lavalley experienced. This means that Lavalley's reaction to the threat Rust posed to her was a response

⁵⁵ Note: the Supreme Court cited L. Walker, *The Battered Woman Syndrome* (New York: Springer Publishing Company, 1984).

⁵⁶ *Lavalley*, *supra* note 3 at 53.

⁵⁷ *Ibid* at 48.

⁵⁸ *Ibid* at 47.

to the entire history of their relationship and not only to the argument that immediately *preceded* the shooting.

Wilson J's re-interpretation of the imminence rule was a positive development in explaining the complex situation of battered women who plead self-defence. Wilson J did not throw out the standard of imminence; she simply noted that a battered woman's perception of danger and an attack was *different* than the 'traditional' conceptualization of imminence and reasonableness in the law of self-defence, and was to be interpreted in light of the fact that the "law does not require her fear to be correct, only reasonable."⁵⁹ Lavalley's knowledge of Rust's behaviour and his patterns of abuse informed her perception of the danger he posed, and accordingly, the reasonableness of her actions. Regardless of whether Rust would have followed through with his threat, based on her past experiences with him, Lavalley believed that he would. If she had waited until he attacked her to act, she may have been killed. Thus, it was *reasonable* for Lavalley to do what she believed would save her life; she acted in self-defence.

However, because this conception of reasonableness is different from the male norm and is specific to the situation of battered women, Wilson J wrote that, "the definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical reasonable man."⁶⁰ To better understand these gendered "circumstances," Wilson J allowed the admission of expert testimony to aid in the determination of the *reasonableness* of a battered woman's actions. Expert testimony provided by psychologists/psychiatrists could help explain why a battered woman might not leave an abusive

⁵⁹ *Ibid* at 42.

⁶⁰ *Ibid* at 38.

relationship and thus could “assist the jury in determining whether the accused has a ‘reasonable’ apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner’s needs.”⁶¹

Wilson J summarized the function of expert testimony in self-defence cases involving battered women:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.”⁶²

Wilson J held that expert evidence on the psychological effects of battering was relevant and necessary in *Lavallee*. Interestingly, she did not specifically mention battered woman syndrome until later when she wrote that it could be used to understand why a battered woman remains in an abusive relationship. However, since *Lavallee*, when battered women are accused of murdering their abusers, self-defence and battered woman syndrome have become conflated as one. As the *Lavallee* principles outline below, this is not necessary or a requirement to arguing self-defence.

⁶¹ *Ibid* at 50.

⁶² *Ibid* at 31.

In *Lavallee*, the Supreme Court laid out six principles to guide the admissibility of expert evidence in similar cases. These principles were essentially a summary of the issues explored by Wilson J and her colleagues in the case:⁶³

1. Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.
2. It is difficult for the lay person to comprehend the battered woman syndrome. It is commonly thought that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochist strain in them. Each of these stereotypes may adversely affect consideration of a battered woman's claim to have acted in self-defence in killing her mate.
3. Expert evidence can assist the jury in dispelling these myths.
4. Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she "reasonably apprehended" death or grievous bodily harm on a particular occasion.
5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.
6. By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

Although battered woman syndrome is specifically mentioned only once in these principles, it informed much of the analysis in the Supreme Court's consideration of *Lavallee's* claim of self-defence. Understanding battered woman syndrome through principle two is tied to rejecting the misconceptions about why battered women might respond to the abuse in the way that they do. While the rest of the principles relate to battered woman syndrome, the principles are broad

⁶³ *Ibid* at 60.

enough that other forms of knowledge could satisfy them. These principles do not state that expert evidence about a battered woman's relationship or that the perception of reasonableness can *only* be provided by a psychologist/psychiatrist or that the expert testimony must be based in battered woman syndrome. The *Lavallee* principles left the door open for other types of expert evidence in these cases, but this possibility has yet to be explored.

Although in the course of this thesis, I repeatedly question and challenge the legal system's use of expert testimony and experts' interpretation about battered woman syndrome, it is clear that the testimony provided by Dr. Shane on battered woman syndrome was critical to *Lavallee's* acquittal. Dr. Shane outlined some of the psychological effects that domestic violence has on battered women. Battered woman syndrome provides an explanation of why some battered women stay in abusive relationships, and why some might perceive the danger to be such that they have no other option than to kill their abusers. Without Dr. Shane's testimony about how *Lavallee* fit into battered woman syndrome and how this syndrome explained her finely-tuned perception of danger, she likely would have been convicted. However, this poses a dilemma for the accused and their defence lawyers because reliance on battered woman syndrome pathologizes and stereotypes battered woman. But, despite its limitations and flaws, battered woman syndrome offers the potential for a successful defence of self-defence for *some* battered women.⁶⁴ My thesis explores a potential remedy to this dilemma by moving away from battered woman syndrome testimony through the introduction of other ways of understanding the reasons for a battered woman's actions. Other disciplines could provide different perspectives

⁶⁴ The distinction of who can use the battered woman syndrome will be made clear in chapters three and four.

on a battered woman's self-defensive actions. This type of testimony would be similarly admissible under the rules set down by the Supreme Court of Canada in *R. v. Mohan*.⁶⁵

R. v. Mohan: The Canadian Criteria for Admissible Expert Evidence

The six principles set out by the Supreme Court in *Lavallee* outlined the criteria for admissibility and the purpose of expert testimony in cases of battered women's claims of self-defence. The Court did not explicitly state what *type* of expert is acceptable, that is, *who* qualifies to provide this information. My purpose for including the *Mohan* criteria here is to enable me to address this question in the context of self-defence for battered women.

To provide guidance to the Canadian courts, in their 1994 decision *R. v. Mohan*,⁶⁶ the Supreme Court set out the criteria for admitting expert testimony. Sopinka J identified four criteria that must be applied when deciding on the admissibility of expert evidence: relevance, necessity in assisting the trier of fact, absence of an exclusionary rule and a properly qualified expert. I briefly outline the *Mohan* criteria below, but my focus will be on the fourth requirement. I will return to this fourth requirement in my last chapter to contextualize my discussion of the type of evidence provided by psychologists/psychiatrists with reference to battered woman syndrome and to explore the admissibility of other types of expert testimony.

According to the first requirement, the evidence offered by an expert must be directly relevant to the case. The determination of relevance must be made by the judge "as a question of

⁶⁵ *Mohan*, *supra* note 6.

⁶⁶ *Ibid.*

law.” The assessment of the relevance of expert evidence is to be conducted under a “cost-benefit analysis.”⁶⁷ A judge must consider whether expert testimony would be beneficial to help the jury to understand a particular element of a case, and at the same time, the judge must also examine the “cost” of allowing expert testimony and the possible negative effects it could have on a trial. To do this, the judge might consider if the evidence has the potential to confuse the jury rather than enhance its understanding about a particular issue.⁶⁸ Sopinka J warns that,

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up as scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves.⁶⁹

According to Sopinka J, it is essential that the jury not assign more weight to expert testimony simply because the theories they advance “seem” scientifically based. However, this “caution” is precisely what has happened with the application of battered woman syndrome testimony. The legal system tends to seek scientific experts who provide a particular type of evidence informed by scientific, positivist methodology.⁷⁰ The expertise of psychologists has been given priority over the knowledge of other experts who could provide valuable and relevant information in a battered woman’s defence. I will return to this issue in the fourth chapter of my thesis about the critiques of positivism and the individualized focus of psychology.

Directly related to the determination of relevance is the consideration of the necessity of expert evidence. Sopinka J noted that the evidence must be “necessary” such that it provide

⁶⁷ *Ibid* at 18.

⁶⁸ *Ibid* at 18.

⁶⁹ *Ibid* at 19.

⁷⁰ This discussion takes place in more detail in chapter four.

some sort of information that is outside the expertise and understanding of the judge/jury.⁷¹ At the same time, Sopinka J warned that expert evidence cannot “distort the fact finding process.” The potential for confusion resulting from expert testimony can be avoided so long as the trial judge properly instructs the jury about their role in assessing the expert testimony.⁷² Sopinka J cited *Lavallee* as a then-recent example of the judicial determination of the necessity of expert evidence. Given jurors’ limited understanding of the dynamics of domestic violence, expert testimony was necessary for the jury to be able to assess the reasonableness of Lavallee’s claim of self-defence.

The problem with the concept of necessity is that lawyers from either side could make the argument that expert testimony is necessary to explain their case. Acknowledging this potential, Sopinka J warned that “too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as a referee in deciding which expert to accept.”⁷³ At the same time, too restrictive an approach could run the risk that some expert testimony (despite offering knowledge outside that of the jury) would be deemed inadmissible. Courts need to seek balance in their assessment of the need for expert testimony.

The third criterion, the absence of an exclusionary rule, is the most straightforward requirement and is essentially a safeguard to prevent different aspects of the laws of evidence from contradicting each other. Simply put, even if the proposed expert evidence meets the other three criteria, it is not admissible if it violates an exclusionary rule of evidence.⁷⁴ For example,

⁷¹ *Mohan*, supra note 4 at 21.

⁷² Ibid at 23.

⁷³ Ibid at 20.

⁷⁴ Ibid at 21.

if the prejudicial effect of the evidence exceeds its probative value, it would not be admissible. Just because expert testimony would be admissible under the *Mohan* criteria, it can not be introduced if it would otherwise be excluded under a different rule.

The fourth criterion of a properly qualified expert is the most pertinent in terms of this thesis. The description of the criterion about who can be an expert is not very detailed. All that is provided is that, “the expert testimony must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect to the matters on which he or she undertakes to testify.”⁷⁵ The requirement here is academic or experiential knowledge related to the subject matter. This means that in battered women’s self-defence cases, there could be other types of expert testimony admitted, instead of relying only on the testimony of psychologist/psychiatrists who testify about battered woman syndrome.

The four *Mohan* criteria do not provide specific details about the types of experts whose testimony is admissible. Legal precedent shapes which expert testimony is admitted and, by implication, that which is not considered. In battered women’s self-defence cases, expert testimony has largely been limited to psychologists/psychiatrists and to the explanations provided by battered woman syndrome. The *Mohan* criteria allow for the possibility of *other* types of expert evidence that could complement expert testimony from psychologists without relying on the explanations provided by battered woman syndrome.

⁷⁵ *Ibid* at 27.

Chapter 3: Critiquing Battered Woman Syndrome

In *Lavallee*, Dr. Shane's testimony about battered woman syndrome focused on Walker's learned helplessness and the cycle of violence. Following the lead of Dr. Shane, Wilson J wrote in detail about battered woman syndrome and the positive contribution it makes in helping to understand a battered woman's state of mind when she acts in self-defence. Since battered woman syndrome has become central to the defence of self-defence for battered women who kill or seriously injure their abusers, expert testimony provided by a psychologist/psychiatrist has become a key component of these cases. Though the function of expert testimony in battered women's self-defence cases is to allegedly dispel 'myths' about battered women, battered woman syndrome testimony has created a whole new set of harmful social stereotypes about battered women.

Expert evidence pertaining to battered woman syndrome is introduced in order to help the jury understand the psychological barriers that prevent battered women from leaving an abusive relationship and thus, to help the jury to assess the reasonableness of a battered woman's self-defensive actions. There is a wide body of academic literature that critiques the concept of battered woman syndrome and the related implications of characterizing a battered woman's self-defensive actions as the result of "learned helplessness." In this chapter, I engage with some of these critiques and question the extent to which battered woman syndrome testimony is helpful in understanding the reasonableness a battered woman's perception of danger if its language simultaneously characterizes her behaviour as the result of temporary mental instability. The critiques about battered woman syndrome presented in this chapter are two-fold. The first critique about the syndromization of battered women's experiences shows how experts'

focus on the theories of learned helplessness and the cycle of violence actually characterize battered women as psychologically unstable and (therefore) unreasonable. The second critique focuses on the stereotypes battered woman syndrome perpetuates about battered women and is related to, but distinct from, the syndromization critique. Expert testimony is supposed to dispel harmful stereotypes about battered women, but the manner in which this testimony frames battered women who “suffer” from battered woman syndrome instead creates new psychological stereotypes about battered women that are both limiting and damaging.

I begin the chapter by examining the way in which experts translate the voice of battered women in their testimony. I argue that when experts translate battered women’s experiences into battered woman syndrome, the meaning of those experiences is obscured. Building on this discussion, I move to an examination of the problems associated with framing self-defence in the language of a medical syndrome. In brief, the problems I will examine in this section are: the pathologization of battered women by labeling their experiences as a result of a medical syndrome, the stereotypes that stem from this label and the narrow construction of battered women’s experience through the lens of battered woman syndrome. The stereotypes associated with battered woman syndrome cannot be remedied, but psychology as a discipline still has important insights to offer a self-defence trial. As such, I argue that expert testimony about battered woman syndrome is deeply problematic, and battered woman syndrome should be abandoned in favour of testimony on the psychological effects of battering without terming it as the result of a medical syndrome. Sociological testimony will provide protection against psychology slipping back into medicalized terminology to “translate” battered women’s behaviours and mindsets into an illness. To support my argument that battered woman syndrome

testimony should be abandoned, I focus on the implications of typecasting battered women's behaviours and mindsets through expert testimony. This critique provides the foundation for my argument for the addition of sociological expertise as a means to broaden the legal understanding of the self-defensive actions of battered women. As required by the defence of self-defence and the rules pertaining to expert evidence, the purpose of expert testimony in these cases is to provide information relevant to the issues of reasonableness and her perception of danger.

Expert Evidence: Translating Battered Women's Experience

The *Lavallee* decision responded to the need dispel sexist stereotypes that inform the public's response to battered women and to ensure that a battered woman who acts in self-defence receives equitable consideration from the court. Lawyers and judges have turned to psychology/psychiatry and to battered woman syndrome to fill this need to explain a battered woman's mindset and her reasons for seriously injuring or killing her abuser. In this section, I discuss some of the problems with the need to have experts explain women's behaviour as a prelude to the next section where I explain in detail the specific problems with battered woman syndrome expert testimony.

Feminist legal scholar Elizabeth Schneider argues that the rationale for seeking expert testimony in battered women's self-defence cases was the presumption that "battered women's voices either would not be understood or were not strong enough to be heard in the courtroom."⁷⁶ Likewise, Lenore Walker argues that the reason experts are needed in a battered woman's self-defence trial is because the ways in which battered women describe their

⁷⁶ E. Schneider, *Battered Women and Feminist Lawmaking* (London: Yale University Press, 2000) at 90.

experiences *differs* from the fact-finding process required by the court. She notes that battered women tend to “see events as occurring in patterns rather than discrete incidents” and use their prior experiences “to assign meaning to an event.”⁷⁷ That is, battered women tend to explain their experiences cumulatively, whereas the law tends to examine individual actions in isolation from other experiences. Expert testimony about battered woman syndrome interprets a battered woman’s situation into the kind of “factual” information required by the legal process. The purpose of expert testimony is to contextualize a battered woman’s individual actions and behaviours in relation to her history of abuse. When testifying about battered woman syndrome, the expert “translates” a battered woman’s experiences to help the judge/jury understand her experiences with domestic violence in a way that is consistent with courtroom expectations and norms.

In battered women’s self-defence trials, expert psychologists replace a battered woman’s “voice” with medicalized, scientific language. The problem is that translating a battered woman’s “voice” into medical terminology “re-interprets” battered women’s experience.⁷⁸ Isabel Grant contends that by seeking expert testimony in self-defence trials, “we implicitly send the message, that without this evidence, the woman’s perception of reality would not be trusted as reasonable.”⁷⁹ Thus, expert testimony is used to legally “validate” a battered woman’s perception of danger. Without a credentialed expert to “explain” a battered woman’s mindset in medicalized language, a battered woman’s claim of self-defence would be subjected to heightened suspicion and would be unlikely to succeed.

⁷⁷ Walker, *supra* note 27 at 256.

⁷⁸ Macrimmion, M. “A Forum on Lavalley v. R.: Women and Self-Defence” with Isabel Grant, Donna Martinson and Christine Boyle (1991), 25. U.B.C. Law Review 23 at para 76. (QL) Note: Quicklaw used numbered paragraphs for this article.

⁷⁹ *Ibid* at para 88 and 91.

However, expert testimony about battered woman syndrome does not “fix” the gendered inequality inherent in the structure of the law for some battered women. While providing an explanation, it also re-inscribes gender inequalities and masks the sexism women encounter when they come into contact with the law (as victims and/or defendants). The problem lies not only in the type of expert testimony relied upon, but also in the structure of the law’s fact-finding process. Both of these areas pose problems for battered women making a claim of self-defence.

This presents a two-tiered problem: it is problematic to have an expert translate battered women’s experience, but there is also a problem with the nature of the translation the expert provides. Until the law’s process changes to be more adaptable to women’s experiences and women no longer face sexism when they access or encounter the law, expert testimony will continue to be necessary to explain battered women’s realities. Sociological testimony could help to overcome the one-dimensionality of the expert testimony currently adduced, but ideally, this would be a temporary solution. Both Walker⁸⁰ and MacCrimmon⁸¹ argue that eventually, a battered woman should be able to relay her own experience to the court, *without* the explanation or translation of an expert.

Expert Testimony: The Syndromization of Women’s Experience

As explained in *Lavallee*, the purpose of seeking battered woman syndrome testimony in battered women’s self-defence cases is to explain a battered woman’s perception of imminent danger. However, the explanations provided by this type of expert testimony have much deeper

⁸⁰ Walker, *supra* note 27 at 15.

⁸¹ MacCrimmon, *supra* note 78 at para 76.

implications than simply clarifying imminent danger. The central feminist criticism of battered woman syndrome focuses on the implications of naming a particular set of behaviours as the result of a psychological/medical “syndrome.” These critiques point to the way in which the language of battered woman syndrome makes battered women appear “sick” and “abnormal.” Grant raises important points about the risks associated with labeling battered women’s experience with domestic violence in terms of a medical, psychiatric “syndrome.” She argues that syndromes identify a specific psychiatric problem, its causes, symptoms and treatment. The result of this type of labeling is that “boundaries” are drawn around the behaviours associated with the syndrome and the “anticipated responses” to situations associated with the syndrome are “regularized” by the medical community.⁸²

Syndromes are created by medicalized dichotomies that prescribe “normal” and “abnormal” behaviours. A syndrome provides an explanation for a specific set of behaviours thereby classified as “abnormal.” Battered woman syndrome is medical terminology that classifies battered women’s self-protective behaviours or experiences as “abnormal.” Zeedyk and Raitt make clear that, “explaining a woman’s experience by using a diagnostic label characterizes that experience as disordered, abnormal and pathological.”⁸³ They argue that battered woman syndrome has not been successful in achieving its goal of highlighting the “circumstances” that lead to battered women killing their abusers in self-defence because its medicalized roots have “emphasized . . . [battered women’s] disordered psychological state.”⁸⁴ Instead of explaining the mindset of a woman acting reasonably and proactively in a crisis

⁸² Macrimmon, *supra* note 78 at para 94.

⁸³ M.S. Zeedyk and F.E. Raitt, The Implicit Relation of Law and Psychology: Women and Syndrome Evidence (London: Routledge, 2000) at 12.

⁸⁴ *Ibid* at 75.

situation, battered woman syndrome portrays a psychologically damaged woman acting out of learned helplessness.

“Traditional” social stereotypes about gender roles dictate that women who act violently must, in some way, be “abnormal” because “normal” women would not kill their partners. Grant posits that women’s violent crimes contradict the social characterization of women as “gentle, maternal and feminine” and accordingly, psychological explanations are sought to “make sense of what is otherwise nonsensical,” that is, women’s violence.⁸⁵ This is precisely the gendered, normative stereotype perpetuated by battered woman syndrome.⁸⁶ Because women’s use of violence is presumed to be a rare and aberrant occurrence, the law looks to psychology to understand the supposedly “abnormal” motivations behind battered women’s self-defensive actions. Psychology classifies those motivations into a syndrome thereby cementing the understanding of a battered woman and her action to protect herself as pathological.

Walker makes the important distinction that there is little psychological difference between battered women who act in self-defence and those who do not. She argues that, “the difference [between battered women who kill and those who do not] lies, perhaps, in the extremely life-threatening nature of violence to which they are subjected and from which some of them can escape alive only by ending their abuser’s lives.”⁸⁷ Walker termed the behaviour of battered women who act in self-defence as a “syndrome,” but her description is not consistent with the language of a syndrome. When she was beginning her work, if she had framed the

⁸⁵ Macrimmon, *supra* note 78 at para 104.

⁸⁶ *Ibid* at 104 and J. Parfett, “Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases” (2001) 12 Windsor Review of Legal and Social Issues 55 at 71.

⁸⁷ Walker, *supra* note 27 at 7.

actions of battered women as she did above, many of the negative implications of terming battered women's behaviours as a "syndrome" might have been avoided. Walker characterized and labeled her findings in a way that invited medicalization and pathologization. The syndrome label, in conjunction with the theory of learned helplessness, is the root of the problem with current psychological testimony in battered women's self-defence trials.

Syndromes pathologize *problematic* aspects of particular behaviours. In the case of battered women, these problematic behaviours are "explained" by the theory of learned helplessness. Instead of framing these behaviours as a *realistic and reasonable* response to the abuse experienced and the impending threat, battered woman syndrome makes the behaviours understandable by characterizing them as pathological. In battered women's self-defence cases, expert testimony is allegedly introduced to "normalize" the responses of battered women in an effort to understand the reasonableness of their perception of the danger they face and the alternatives available to them. However, experts' focus on learned helplessness and the cycle of violence constructs battered women who stay in abusive relationships and kill their abusers as "abnormal." The "abnormality" is rendered understandable by the medical model. What is less clear in this psychological construction is whether the behaviour of battered women is constructed as "abnormal" because they stayed with their abuser or because they killed him. This conceptual distinction has not been explained by battered woman syndrome testimony; staying with an abuser and killing him are very different responses to violent situations. Learned helplessness is a "passive" state of mind; killing an abusive partner is an "active" choice. This contradiction should undermine battered woman syndrome testimony in relation to the defence of self-defence. However, crown attorneys do not seem to have picked up on it and courts seem

willing to accept stereotypical female helplessness as the explanation for aberrant female behaviour. This contradiction persists unchallenged.

To illustrate the point that battered woman syndrome characterizes battered women's behaviour as "abnormal," consider the manner in which Dr. Shane framed Lavallee's state of mind with reference to Walker's theory of learned helplessness. The descriptive language he used clearly portrays Lavallee as a helpless, severely damaged woman who has no self-esteem or personhood left. Dr. Shane spoke extensively of Lavallee's mental state; his testimony did little to characterize her as a rational (read "normal") actor. Dr. Shane's testimony made Lavallee seem psychologically damaged:

There was no out for her, this learned helplessness, if you will, the fact that she felt paralyzed, she felt tyrannized. She felt, although there were obviously no steel fences around, keeping her in, there were steel fences in her mind which created for her an incredible barrier psychologically that prevented her from moving out. Although she had attempted on occasion, she came back in a magnetic sort of a way. And she felt also that she couldn't expect anything more. Not only this learned helplessness about being beaten, where her motivation is taken away, but her whole sense of herself. She felt this victim mentality, this concentration camp mentality if you will, where she could not see herself be in any other situation except being tyrannized, punished and crucified physically and psychologically."⁸⁸

Dr. Shane's testimony focused on the psychological barriers Lavallee supposedly felt as a result of the violence she experienced. He used the theory of learned helplessness to explain why Lavallee did not (or could not) leave Rust. In doing so, he made Lavallee seem psychologically weak and unstable, "magnetically" drawn to her abusive partner. Kimberly White-Mair succinctly summarizes the problem with Dr. Shane's testimony: "The casting of Lyn Lavallee as emotionally unstable and innately susceptible to abuse successfully displaced the old common sense idea that women who kill are calculating and malicious, but it re(affirmed) and was

⁸⁸ *Lavallee*, *supra* note 3 at 56.

articulated through another common sense idea that women are passive and helpless.”⁸⁹ Dr. Shane’s testimony was effective to explain why Lavallee’s actions were understandable as defensive rather than “cold and calculating,” and this helped to secure her acquittal. At the same time, he characterized Lavallee as passive, helpless and unstable rather than rational and autonomous. With this characterization, Lavallee became not a defender of herself but a defenceless victim *without* a self. These dichotomous characterizations reflect the dilemma with seeking expert testimony in battered women’s self-defence cases; neither of the above characterizations allows us to see battered women as reasonable, rational and autonomous actors. However, expert testimony about battered woman syndrome has been beneficial to help secure acquittals for some women. In many of these cases, women “allow” themselves to be portrayed as suffering from battered woman syndrome because the alternative would likely be a conviction for murder. Battered women who kill their abusers have two characterizations available to them: either they are “cold and calculating” (and guilty) or passive, unstable and responding in self-defence.

Some feminists argue that the implications of labeling battered women’s behaviour as the result of battered woman syndrome creates the presumption that battered women are unable to act in a “rational” or “reasonable manner.”⁹⁰ Since the determination of the battered woman’s response to danger as reasonable is essential to a successful claim of self-defence, syndrome language which constructs battered women’s behaviour as “abnormal” actually undermines the defence. Expert testimony on battered woman syndrome is paradoxical because it characterizes a

⁸⁹ K. White-Mair, “Experts and Ordinary Men: Locating *R. v. Lavallee*, Battered Woman Syndrome and the “New” Psychiatric Expertise on Women in Canadian Legal History” (2000) 12 Canadian Journal of Women and the Law 406 at 436-7.

⁹⁰ Shaffer, supra note 88 at 8-9 and White-Mair, supra note 93 at 432.

battered woman as mentally unbalanced *and* at the same time, attempts to explain her perception of danger and her actions as reasonable. Despite this contradiction, the defence is often successful. The reason battered woman syndrome testimony has been successful in helping to secure acquittals for *some* battered women is not because the jury understands their actions as reasonable but because they come to see them as pathetic, helpless victims. The strategy to address and combat myths and stereotypes about battered women has collapsed into a pre-existing stereotype and we are left with exceedingly narrow and damaging female stereotypes as the means to an acquittal for battered women who kill their abusers.

Not only does battered woman syndrome testimony perpetuate stereotypes about battered women, it also creates restrictions about the “reasonable” perception of danger. Grant argues that the implication of using battered woman syndrome in self-defence cases is that the syndrome is *not* used to explain the psychological effects of a woman’s experience with domestic violence and instead “define[s] when it is reasonable for a woman to defend herself against an abusive partner.”⁹¹ The purpose of battered woman syndrome testimony has shifted from contextualizing a battered woman’s state of mind to setting parameters around “acceptable” situations in which to use self-defence. Battered woman syndrome has become a requirement to arguing self-defence. This perceptual shift is *not* consistent with the purpose of expert testimony as set out in *Lavallee*. Battered woman syndrome testimony is supposed to help the jury to understand a woman’s *perception* of danger; it is *not* meant to define *when* it is reasonable for her to act in self-defence. This is a very important conceptual distinction. If battered woman syndrome *defines* battered women’s perception of reasonable danger, then this means that women who do not fit into the “contours” of battered woman syndrome and will likely have their

⁹¹ Macrimmon, *supra* note 78 at 94.

claims of self-defence denied.⁹² However, because expert testimony in self-defence cases has so far been limited to battered woman syndrome, the syndrome has come to define the characteristics and experiences that lead to “reasonable” perceptions of danger for battered women. These definitional boundaries exclude some battered women from making a claim of self-defence.

Battered woman syndrome provides a *particular* answer for the situation of a *particular* battered woman. Women whose behaviour does not fit into the psychological construction of the archetypal battered woman might find that their claims of self-defence are undermined or denied. The characterization of women’s behaviour in battered woman syndrome is linked to “traditional” conceptions of femininity and “appropriate” behaviour. Kathleen Ferraro suggests that battered woman syndrome’s connotations of helplessness are rooted in Eurocentric ideals about femininity. Within this construct, women who work outside the home, lesbians and non-white women are viewed as “less feminine” than white, middle/upper class women. Because both “traditional” concepts of femininity and battered woman syndrome emphasize helplessness and passive behaviours, the explanations provided by battered woman syndrome are less accessible for women who do not fit or who resist the stereotype.⁹³ The more a battered woman’s behaviour deviates from the “ideal” standard of womanhood, the less likely their claims of domestic violence and self-defence will be taken seriously by the legal system.⁹⁴ Battered woman syndrome does not engage with the social categories of race, class, sexuality, employment status or patriarchal power/gender relations. While battered woman syndrome was

⁹² Ibid.

⁹³ K. Ferraro, “The Persistence of Battered Woman Syndrome in Criminal Cases involving Battered Women” (2003) 9 *Violence Against Women* 110 at 113-14.

⁹⁴ Shaffer, supra note 90 at 13.

an attempt to challenge patriarchal social stereotypes, it cannot effectively do so because its language and application actually reproduce harmful stereotypes about women.

Thus, the “kind” of woman conceptualized by battered woman syndrome is one-dimensional; expert testimony characterizes her almost entirely by her experience as a victim of domestic violence and by her self-defensive action against her abuser. It is important for the court to acknowledge that battered women experience different *types* of social inequalities (such as race, class, age, sexual orientation and (dis)ability) and come to the court from different social locations. These different social locations and experiences of inequality will inform a battered woman’s decision to stay with her abuser as well as her perception of the danger her abuser poses. These concerns will be addressed in the next chapter when I discuss what sociological expertise could offer a battered women’s self-defence trial. In chapter five, I analyze the *R. v. Bear*⁹⁵ case, which involves an Aboriginal woman. There, I discuss in detail how battered woman syndrome testimony does not adequately account for the complexities of race and Aboriginal status.

If battered woman syndrome does not (or cannot) provide an adequate explanation of the reasonableness of a battered woman’s perception of danger, then it is clear that we still need to examine *how* reasonableness (in terms of battered women’s self-defence) should be conceptualized. Although *Lavallee* represented a move toward a better understanding of the gendered standard of reasonableness, the critiques discussed in this section have made clear that the understanding a battered woman’s perception of danger presented through battered woman

⁹⁵ *Bear*, *supra* note 9.

syndrome has numerous, serious limitations. Grant argues that the court's consideration of the "reasonable woman" is not manifestly present in *Lavallee*. She argues that expert testimony pertaining to battered woman syndrome transforms an otherwise "irrational response into a reasonable one for a 'battered woman.' She must be either reasonable 'like a man' or reasonable 'like a battered woman.' Trapped in this dichotomy, the 'reasonable' woman may disappear."⁹⁶ Building on Grant's argument it is clear that it is not just a matter of the "reasonable woman" disappearing through battered woman syndrome testimony, but rather that the "reasonable woman" was never present in law in the first place. In *Lavallee*, the understanding of a woman's perception of reasonableness was predicated on the opinions expressed by an expert psychologist. Thus, there was *no* reasonable woman present, only a *reasonable* battered woman who "suffered" from battered woman syndrome. The action of a battered woman made reasonable through the medical labels attached to battered woman syndrome is, by that same explanation, rendered unreasonable. Reasonableness remains a highly gendered concept. Sociological testimony could help to de-gender the conception of reasonableness to include social factors in conjunction with the individualized focus of psychology.

⁹⁶ Macrimmon, *supra* note 78 at 88.

Chapter 4: Sociological Expert Testimony

In battered women's self-defence cases, the justice system needs to understand how domestic violence affects a woman's psyche. However, in these cases, expert testimony provided by psychologists should not be relied upon as the "only" explanation for women's experiences with domestic violence. The problem in battered women's self-defence trials has been that expert evidence is limited to psychologists and/or psychiatrists testifying exclusively about battered woman syndrome. Relying solely on a psychologist's expert testimony about battered woman syndrome *limits* (rather than enhances) the legal system's understanding of battered women's experience with domestic violence. The previous chapter made clear that there are serious limitations with battered woman syndrome testimony. For this reason, battered woman syndrome testimony provided by a psychologist/psychiatrist should be abandoned for general testimony about the psychological effects of battering without attaching a medical label to battered women's behaviours. At the same time, expert testimony in battered women's self-defence trials should not continue to be limited to psychologists/psychiatrists. Women's experiences and responses to gender inequality, their social and economic backgrounds, race and culture cannot be completely understood through the individualized, positivist explanations psychology tends to provide.

In battered women's self-defence cases, the judge/jury should be given access to expert sociological testimony *in conjunction* with individualized, psychological expert testimony. Sociology could be used to explain women's roles in a larger social context informed by patriarchy where women exist in a lower social space than men. Sociology's explanation of unequal patriarchal relationships and relevant social factors related to race, class, gender and age

can help the judge/jury understand the *social* dynamics of domestic violence. The outcome of a “teamed” psychological/sociological approach to expert testimony would be a more complete understanding of the difficulties battered women face in abusive relationships and would help the jury to better understand the accused’s unique perceptions of the danger as presented by her abuser.

In this chapter, I begin by briefly outlining some critiques of positivism to explain psychology’s methodological roots. I then explore some feminist criticisms about the individualized focus of psychology to demonstrate the need for a broader understanding of domestic violence. Although I use battered woman syndrome as an *example* of the problems with the individualized focus of psychology, I do not conflate psychology with battered woman syndrome. To further support my argument for the addition of an expert sociologist in battered women’s self-defence trials, I draw on Madam Justice L’Heureux-Dubé’s remarks in the Supreme Court of Canada case, *R. v. Malott*.⁹⁷ Finally, I conclude the chapter by outlining what sociological testimony could achieve in a battered women’s self-defence trial. This discussion will help to frame my case analysis in the next chapter.

⁹⁷ *Malott*, supra note 12.

Positivism

Psychology's methodological base is positivism and so to understand the critiques of psychology, it is necessary to outline some of the broad critiques of positivism. Understanding the positivist approach upon which psychology is largely premised also helps to understand why psychology has been preferred over sociology in the trial process.

Psychology is regarded as a scientific discipline and like other scientific disciplines, it is underpinned by the theory of positivism.⁹⁸ Janis Bohan defines positivism as knowledge which is produced through "scientific observation," and because of its adherence to 'unbiased' scientific method, the knowledge can be confirmed with "absolute certainty."⁹⁹ Unger expands Bohan's definition by adding that positivism "restricts analysis to a few clearly observable units of behaviour in order to avoid imposing one's own beliefs upon the organisms studied."¹⁰⁰ Scientists employ positivist research methods with the assumption that the results will be rooted in objective knowledge free from outside social influence or bias. Within most research paradigms (whether they be positivist or not) a standard of objectivity is the focal point of the methodologies employed.

Like science, law also has roots in the positivist tradition. Law is viewed as "capable of producing truth, accompanied through the application of logic and objective facts to legal

⁹⁸ J. Bohan, "Prologue: Reviewing Psychology, Re-Placing Women: An End Searching for a Means" Seldom Seen, Rarely Heard, Women's Place in Psychology Janis Bohan ed. (Boulder: Westview Press, 1992) at 12.

⁹⁹ Ibid.

¹⁰⁰ R. Kesler, "Through the Looking Glass: No Wonderland Yet (The Reciprocal Relationship between Methodology and Models of Reality)" Seldom Seen, Rarely Heard, Women's Place in Psychology Janis Bohan ed. (Boulder: Westview Press, 1992) at 148.

rules.”¹⁰¹ Law views objectivity as paramount and so science’s principles of objectivity and neutrality mesh well with the law’s quest for evidence-based facts.¹⁰² Due to their linked positivist frameworks, it is not surprising that both the scientific community and the law accord more credence to research conducted in “scientific laboratories” than those based in fieldwork (for example). In the eyes of the scientist, laboratory “experiments” remove the researcher from the study and accordingly, “guarantee” objectivity.

Some feminist scholars take issue with the presumption that positivist research methods ultimately result in the objective “discovery” of knowledge. Caroline Ramazanoglu and Janet Holland argue that, “positivist approaches to methodology bring a particular conception of scientific method to bear on the study of social life, with the claim that reality is directly accessible given the correct methods.”¹⁰³ If positivist research methods ultimately result in a discovery of “reality,” one must question *whose* “reality” is discovered. It is inevitable that the scientist’s interpretation of the discovered “reality” will affect their “unbiased” interpretation of the information that is “revealed” to them by the subject.

Perhaps even more troubling is Carolyn Wood Sherif’s argument that scientists’ ability to decide which independent variables will be studied means that in studies of human behaviour, “much of what goes on is simply ignored.”¹⁰⁴ Scientists presume that relationships, behaviours and events can easily be translated into analogous numerical codes for statistical analysis.

¹⁰¹ Zeedyk and Raitt, *supra* note 83 at 42.

¹⁰² *Ibid* at 15.

¹⁰³ C. Ramazanoglu and J. Holland, *Feminist Methodologies: Challenges and Choices* (London: Sage Publications, 2002) at 45.

¹⁰⁴ C. Wood Sherif, “Bias in Psychology” *Seldom Seen, Rarely Heard, Women’s Place in Psychology* Janis Bohan, ed. (Boulder: Westview Press, 1992) at 116.

Kathleen Ferraro cautions against using the scientific method to define human behaviour and experience, arguing that doing so makes experiences “codeable” and runs the risks of analytical categories taking on a “life of their own.”¹⁰⁵ Using codes to categorize and define human experience obscures the meaning of those experiences by dismissing social, subjective experiences that cannot be expressed in statistical form. Despite numerical data that might suggest otherwise, Ramazanoglu and Holland caution that, “there is no guarantee that one woman’s experience will be comprehensible to another, or that any one human being can ever fully understand themselves or others.”¹⁰⁶

The scientific method removes the individual from their subjective experiences by focusing on a specific trait, behaviour or characteristic. Bem and de Jong argue that, “in a nutshell, science is systematic in the sense that it tries to formulate laws that apply everywhere, not just in traditionally established [behavioural] habits, and is exploratory in the sense that it tries to answer ‘why’ questions, providing an answer to the question of why the phenomena are observed.”¹⁰⁷ However, the attempt to “formulate laws that apply everywhere” is not compatible with the complex realities of social life. It seems self-evident to acknowledge that people’s relationships and experiences are the result of their many different social roles and identities. Questioning and researching the “why” without answering (or at the very least, exploring) the “how” provides, at best, a partial explanation of human behaviour and social life. Explaining the motivations behind individual action without understanding *how* social roles constitute the individual provides at best, a partial analysis of human experience. As a discipline that regards

¹⁰⁵ K. Ferraro, Neither Angels nor Victims: Women, Crime and Victimization (Boston: Northeastern University Press, 2006) at 18.

¹⁰⁶ Ramazanoglu and Holland, supra note 103 at 123.

¹⁰⁷ S. Bem and H. De Jong, Theoretical Issues in Psychology: An Introduction (London: Sage Publications, 1997) at 6.

positivist scientific method as the most reliable source of knowledge, psychology is vulnerable to these critiques of positivism.

Psychology and Critiques of its Individual Approach

As the scientific study of human behaviour, psychology's unit of analysis is the individual. Zeedyk and Raitt define psychology as "the study of the behaviour of individuals and what happens *inside* them."¹⁰⁸ Wood Sheriff defines the individual as "a bundle of abilities, capabilities, skills and personal traits." Psychology's positivist background creates the presumption that it is possible to "develop a test of these traits either through a set of tasks to be performed or a set of questions to be answered."¹⁰⁹ However, psychology's "positivist agenda" has "dictated" its range of 'acceptable' subject matter. According to Bohan, the positivist framework has defined "the scope and definition of acceptable questions, the range of its methodology, and the nature of interpretations and applications generated by psychological theory and research."¹¹⁰ The result of this limited scope is a type of "tunnel vision" in studies of individual behaviour. Important factors outside the individual are dismissed as irrelevant.

Psychology theorizes that the "meaning" and motivations of human behaviour can be understood by studying the individual. Psychologists study the individual in an effort to "discover general laws that govern their behaviour."¹¹¹ The problem with such an individualized focus is that it deconstructs individual behaviour simplistically. Though there are commonalities

¹⁰⁸ Zeedyk and Raitt, *supra* note 83 at 53.

¹⁰⁹ Wood Sheriff, *supra* note 104 at 129.

¹¹⁰ Bohan, *supra* note 98 at 13.

¹¹¹ Zeedyk and Raitt, *supra* note 83 at 54.

to human behaviours, motivations and experiences, psychological experimental “tests” cannot account for the social basis of individual behaviours. From this perspective, battered women’s actions are narrowly defined as a syndrome, as an individualized problem experienced by individual women.

By focusing on individual qualities, psychology tends to implicitly blame the individual for their problems and behaviours. Bohan suggests that psychology’s individual, scientific focus has resulted in an “unquestioning acceptance” of the practice of assigning blame *to* the individual for their conduct.¹¹² For example, this criticism is evident in battered woman syndrome. Though not its original intention, battered woman syndrome blames a battered woman for remaining in an abusive relationship. As I outlined in the previous chapter, there is an underlying presumption that “normal” women are able to leave an abusive relationship. Battered woman syndrome sets battered women apart from “normal” women because it is an explanation for women with supposedly “abnormal” psychologies, that is, as a syndrome.

Zeedyk and Raitt propose that the solution to this problem of assigning blame to battered women is that analyses of human behaviour *must* extend their scope beyond the individual. They argue that consideration of the “social-historical-personal context” is necessary to understand the “meaning” behind individual action and behaviour.¹¹³ Similarly, Naomi Weisstein argues that the first step in conducting a study in human behaviour is to study “the social contexts within which people move, the expectations as to how they will behave, and the authority which tells

¹¹² Bohan, *supra* note 98 at 13.

¹¹³ Zeedyk and Raitt, *supra* note 83 at 8.

them who they are and what they are supposed to do.”¹¹⁴ Zeedyk and Raitt’s and Weisstein’s suggestions concretely expose the problem with psychology’s individualized approach: there is little space for a consideration of social context and how an individual’s social roles and experiences both construct *and* influence their behaviour. Women’s gender roles and the crime of domestic violence are both the products of a social system characterized by patriarchy, gender and other inequalities. A study of the individual effects of domestic violence is incomplete without an understanding of women’s unequal place in society.

It is no surprise to Weisstein that psychology (as a discipline) has failed to acknowledge the significance of social context in women’s lives. She argues that, “one must understand the social conditions under which women live if one is going to attempt to explain the behaviour of women. And to understand the social conditions under which women live, one must be cognizant of the social expectations about women.”¹¹⁵ These “social expectations about women” relate to gender roles and include expectations of subservience to men, weakness, passivity and being a “good wife” and “good mother.” These same feminine “social expectations” are embedded in battered woman syndrome and the gender inequalities they reflect are perpetuated. Though battered woman syndrome was designed as a feminist theory to combat sexist attitudes about battered women, as I made clear in the previous chapter, its characterization of battered women as psychologically weak, unstable, helpless and reliant on men, reproduces harmful “social expectations” about women’s behaviour.

¹¹⁴ N. Weisstein, “Psychology Constructs the Female, or, the Fantasy Life of the Male Psychologist” Seldom Seen, Rarely Heard, Women’s Place in Psychology Janis Bohan, ed. (Boulder: Westview Press, 1992) at 70.

¹¹⁵ Ibid at 75.

Weisstein concludes that both psychology *and* western culture depict women as inferior and indecisive. She argues that in psychology, women are constructed as “emotionally unstable, lacking in a strong conscience or superego, weaker, ‘nurturant,’ rather than productive, ‘intuitive’ rather than intelligent and if they are at all ‘normal,’ suited to the home and family.”¹¹⁶ Psychology frames women (as a social group) in an inferior manner. This negativity is magnified for battered women who stay in abusive relationships who are portrayed through battered woman syndrome as abnormal extremes of these female stereotypes. By explaining battered women’s behaviour through battered woman syndrome, expert psychologists reproduce a harmful and damaging psychological script about women’s personhood, autonomy and abilities.

Zeedyk and Raitt raise important points about the near-exclusive use of psychological expertise in court cases. They note that an assumption of using psychology in a legal setting is that “the interaction between the two independent fields should help to counteract biases held by the other.” Of course, this is not the case because psychology and law base their analysis in the positivist framework and their “knowledge and perspectives actually reinforce each other’s existing biases.”¹¹⁷ If both psychology and law reinforce each other’s inherent biases, adding the harmful stereotypes perpetuated by battered woman syndrome to the mix makes for a situation that seriously disadvantages battered women making a claim of self-defence. This provides further evidence of the necessity of adding an alternative sociological disciplinary expertise to battered women’s self-defence cases.

¹¹⁶ Ibid.

¹¹⁷ Zeedyk and Raitt, supra note 83 at 62.

Both science and law carry with them a high level of prestige. By assigning their disciplines prestige and stringently defining what they consider to be “their knowledge,” law and science attempt to safeguard their disciplines from outside scrutiny.¹¹⁸ The positivist link between science and law explains why scientists are the “preferred” experts in court cases. Zeedyk and Raitt question the courts’ presumption that psychologists are “the best qualified” to provide answers to issues because of the “approach they employ.”¹¹⁹ Instead, Zeedyk and Raitt suggest that “the utility of information [would] be best evaluated by reference to the question it seeks to answer, rather than simply by a reference to the tool with which it was acquired.”¹²⁰ In battered women’s self-defence cases, the question the court considers is: did a battered woman have a reasonable perception of danger when she acted in her defence? It is important to recognize that there is nothing in this question which denotes that a psychologist is the only or even the best person to provide “the” explanation for a battered woman’s behaviour. Just because psychology has ‘traditionally’ provided the expert explanation of human behaviour does not mean that we should not explore the possibilities that other established disciplines could offer in terms of expert evidence. Because domestic violence is an individual psychological issue *and* a social issue, employing knowledge derived exclusively from experimental, quantitative research methodologies to explain the actions of battered women actually limits rather than enhances the understanding of violence against women and the reasonableness of battered women’s perceptions of danger. Aspects of women’s identities such as social experiences, inequality and culture are not generally captured through positive, quantitative research

¹¹⁸ *Ibid* at 34.

¹¹⁹ M.S. Zeedyk and F.E. Raitt , “Psychological Evidence in the Courtroom: Critical Reflections on the General Acceptance Standard” 8 *Journal of Community and Applied Psychology* (1998) 23 at 30.

¹²⁰ *Ibid* at 30.

methodologies. In *R. v. Malott*,¹²¹ Madam Justice L’Heureux-Dubé shares the concerns of these feminist scholars discussed about the absence of social context in battered woman syndrome.

R. v. Malott: The Importance of Social Context

One of the conceptual problems with battered woman syndrome testimony is that *all* battered women do not “fit” into its tenets. This is precisely the caution extended by Madam Justice L’Heureux-Dubé in the 1998 Supreme Court of Canada decision, *R. v. Malott*.¹²² She wrote that it is necessary for the judge/jury to consider social context in battered women’s self-defence cases to offset the medicalized and social stereotypes battered woman syndrome testimony has created about battered women. Though she did not specifically state that sociological expertise *should* be admitted in the courtroom, the limitations about battered woman syndrome testimony identified by L’Heureux-Dubé J in *Malott* open the way for considering alternative disciplinary perspectives.

At the end of the *Malott* decision, L’Heureux-Dubé J (writing on behalf of herself and McLachlin J) added some comments as obiter dicta about the implications of expert testimony on battered woman syndrome. L’Heureux-Dubé J concurred with the majority decision delivered by Major J to dismiss Malott’s appeal, but noted that the Supreme Court had not discussed the “value” of expert evidence about battered woman syndrome since *R. v. Lavallee*.¹²³ L’Heureux-Dubé J wrote that because the “discourse” of battered woman syndrome had been “evolving” in the legal arena, both she and McLachlin J thought it was necessary to make a few remarks about

¹²¹ *Malott*, supra note 12.

¹²² *Malott*, supra note 12.

¹²³ *Lavallee*, supra note 3.

the significance of expert testimony in battered women's self-defence cases.¹²⁴ The fact that L'Heureux-Dubé J chose to make remarks about the implications and limitations of battered woman syndrome testimony beyond the actual *Malott* decision indicates that she had serious concerns about its use in battered women's self-defence cases.

L'Heureux-Dubé J began by briefly summarizing the Supreme Court's decision in *Lavallee* and its ruling on the need for expert evidence to combat stereotypical thinking about battered women by the judge and/or jury.¹²⁵ She continued that in *Lavallee*, the majority of the Supreme Court accepted that "a woman's perception of what is reasonable is influenced by her gender as well as by her individual experience, and both are relevant to the legal inquiry. This legal development was significant because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events."¹²⁶ However, in this summary, L'Heureux-Dubé J failed to acknowledge that the Supreme Court did *not* actually look at the "whole context" of *Lavallee's* experience. The Supreme Court's understanding of *Lavallee's* actions in terms of her gender and her individual experience as a battered woman was filtered through the perspective of a psychologist, whose testimony focused on individual, psychological responses to abuse, which perpetuated gender stereotypes. L'Heureux-Dubé J walked the fine line of endorsing the precedent of *Lavallee* while at the same time offering an implicit critique of the limitations of the approach adopted in *Lavallee*. She attributed more to the decision than was actually present in the judgment, sowing the seeds for future courts to employ a social context analysis. The negative implications about battered woman syndrome testimony were present in *Lavallee*, but were less apparent because this was

¹²⁴ *Malott*, *supra* note 12 at 35.

¹²⁵ *Ibid* at 36.

¹²⁶ *Ibid* at 38.

the first instance of its endorsement in a Canadian court and the restrictions had not yet solidified.

L'Heureux-Dubé J acknowledged feminist concerns that expert testimony about battered woman syndrome had created a "new stereotype of the battered woman." She cautioned against adopting a "rigid" and "restrictive" approach to expert testimony in battered women's self-defence cases.¹²⁷ She wrote that social factors should also be considered to ensure a more reflexive approach to assessing the reasonableness of a battered woman's actions rather than perpetuating damaging stereotypes,

It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman.¹²⁸

The social factors of race and class identified by L'Heureux-Dubé J are anchored more in a sociological perspective and require one to move away from the individualized focus of psychology (and battered woman syndrome). Sociological testimony would more fully and effectively explore these social inequalities and their impact on battered women's lives.

L'Heureux-Dubé J wrote that expert testimony which "emphasizes" Walker's theory of learned helplessness shifts the legal debate "from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women."

¹²⁷ *Ibid* at 39.

¹²⁸ *Ibid* at 40.

She continued that this type of testimony must be “avoided” so as not to “undermine” the “legal achievements” from the *Lavallee* decision.¹²⁹ This is an implicit argument against the use of battered woman syndrome testimony in the defence of battered women who kill their abusers and is consistent with the argument I have been making throughout this thesis.

L’Heureux-Dubé J suggested that there are “other elements of a woman’s social context” that would explain the difficulties she faces in leaving her abuser that are outside the “traditional” explanation of learned helplessness offered by battered woman syndrome and do not comport with the stereotypes created by battered woman syndrome testimony. She highlighted “a woman’s need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women. . .” as factors that would “inform” a battered woman’s perception of reasonable danger.¹³⁰ L’Heureux-Dubé J described these factors as part of a woman’s “social context.” Her comments about the importance of considering both individual factors and social context in battered women’s self-defence cases again suggest the need for both expert sociologists and psychologists.

Although L’Heureux-Dubé J wrote that expert testimony which perpetuates social stereotypes about battered women *should* be avoided, she did not specify *how* it could be avoided. I suggest that the way to avoid this problem is two-fold: first, eliminate the use of battered woman syndrome and employ less rigid, less medicalized psychological evidence and second, add sociological expert testimony. Sociological expertise would not focus on the

¹²⁹ *Ibid* at 41.

¹³⁰ *Ibid* at 42.

“personal inadequacies” that prevent a battered woman from leaving her abuser and instead would contextualize domestic violence from a wider social perspective that theorizes domestic violence as a serious social issue underpinned by a system of inequality. In this context, the reasonableness of the accused’s perception of danger would be assessed in light of the gender and other inequalities that affect her life and actions.

Whereas in *Lavallee*, Wilson J relied upon Walker’s theories of the cycle of violence, learned helplessness and battered woman syndrome, L’Heureux-Dubé J was cautious about the negative implications of battered woman syndrome testimony while still keeping within the *Lavallee* principles. Wilson J’s focus in *Lavallee* was on how battered woman syndrome through expert testimony could help the jury to understand a battered woman’s perception of danger as reasonable. While L’Heureux-Dubé J flagged social context as an important element to consider in battered women’s self-defence trials, she stopped short of saying that battered woman syndrome testimony should be abandoned or even that different types of expert testimony that attend to social context should be introduced. Though it was a positive development to acknowledge the limitations of expert testimony on battered woman syndrome, if L’Heureux-Dubé J’s remarks had resulted in opening up the court to admitting different types of expert testimony, the *Malott* decision would have been ground-breaking for battered women who act in self-defence. L’Heureux-Dubé J’s remarks about the importance of considering battered women’s social context in self-defence trials hold great promise, but it is not clear that judges in future cases have picked up on this suggestion. It is even less clear that judges less familiar with these feminist critiques would even know how to respond to the concerns raised by L’Heureux-Dubé J.

Sociology

Before I outline what sociological expertise could achieve in battered women's self-defence trials, it is first necessary to acknowledge that sociology *was* a discipline born out of positivist traditions. In the early 19th century, when Auguste Comte was developing sociology, he intended for it to be a discipline based in positivist methodologies. The 19th century was characterized by vast development in the natural sciences and positivism was the preferred framework of study. At the time, it made sense that Comte would base this new discipline seeking credibility in positivism.¹³¹

Sijuwade notes that there has been great debate in sociology about positivism but the trend in recent years has been to frame sociological analysis in a more reflexive approach.¹³² Much like the criticisms I outlined about the individual focus of psychology, "the methods employed in the natural sciences [and of positivism] have little or no applicability to sociology, since the facts of sociology are mostly qualitative and defy quantification."¹³³

Burawoy argues that reflexive sociology fills the gaps left by positivist sociology: "Reflexive sociology connects what positive sociology compartmentalizes: participant and observer, situation and knowledge, life world and system, ideology and theory."¹³⁴ It is this reflexive, interpretive sociology that I refer to throughout this thesis and in this section to frame how sociological factors need to be considered in a battered woman's self-defence case. As the

¹³¹ P. Sijuwade, "Recent Trends in the Philosophy of Science: Lessons for Sociology" (2007) 14 *Journal of Social Science* 53 at 53.

¹³² *Ibid* at 54.

¹³³ *Ibid* at 63.

¹³⁴ M. Burawoy, "Critical Sociology: A Dialogue between Two Sciences" (1998) 27 *Contemporary Sociology* 12 at 15.

feminist critiques made clear earlier in this chapter, positivism's focus on quantification cannot adequately explain important social factors of race, gender, class and inequality. This criticism also applies to positivist sociology. Although sociology has its roots in positivism, a more reflexive and interpretive sociological approach has gained prominence over the "traditional" positivist school of thought.

Sociology could provide much-needed expertise in a battered woman's self-defence trial. While there is no general definition of sociology, as a discipline, there is a generally accepted understanding of what sociology entails. Sociology critically studies "the institutions, the social processes, and the organization of work, family and gender relations that exist in the social world."¹³⁵ According to Brym, "one of the sociologist's main tasks is to identify and explain the connection between people's personal troubles and the social structures in which people are embedded."¹³⁶

The disciplinary focus of sociology is very applicable to battered women's self-defence cases. Patriarchal gender relations are a social process relayed through our social institutions; violence against women is embedded in our culture. Linda Mckie summarizes the ways in which violence against women is entrenched in our social practices and institutions:

Violence arises from a complex interaction of political, social, cultural and economic factors. Within those factors there is the interplay of individual and social relationships, and the ways in which people and relationships are embedded in communities through, for example, neighbourhoods, schools, shops, health centres and places of employment.¹³⁷

¹³⁵ G. Macdonald, ed. Social Context and Social Location in the Sociology of Law (Peterborough: Broadview Press, 2002) at 13.

¹³⁶ R. Brym New Society (Toronto: Thomson Nelson, 2008) at 8.

¹³⁷ L. Mckie, Families, Violence and Social Change (Maidenhead: Open University Press, 2002) at 142.

Though domestic violence was historically conceptualized as a “private” family problem, Mckie’s summation describes how violence against women is, in some form, intertwined in nearly all aspects of society. Her emphasis on the “interplay of individual and social relationships” supports my argument for a collaborative psychological/sociological approach to expert testimony. Isolating domestic violence to the private domain individualizes the problem and masks the patriarchal social dimensions of the issue. Reliance on psychology as the explanatory model of violence has perpetuated the individualized, decontextualized understanding of a social problem and in doing so, has made the battered woman complicit in the problem. Sociology can provide the critical link that demonstrates that these “individual,” “private” problems have a gendered social base. Expert sociological testimony is needed for a fuller understanding of the problem with respect to both the individual and society and thus, of the individual’s actions in their social, political and economic context.

In a battered woman’s self-defence trial, sociology could act as the disciplinal “bridge” between the psychological analyses of the individual and the society in which they live. Though sociologists generally study social groups and relationships, Taylor asserts that sociologists do not completely “reject” analyses of human behaviour as part of the analyses of social groups. Instead, he notes that “. . . thinking sociologically involves seeing the relationship between individuals as a two-way street rather than a one-way street.”¹³⁸ Sociology provides a reflexive approach to understanding how the individual engages in social behaviour and experiences social life through encounters with social institutions and social groups. An expert psychologist could explain the individual effects of domestic violence on a battered woman’s psyche, while a

¹³⁸ S. Taylor, ed., Sociology: Issues and Debates (New York: Palgrave, 1999) at 4.

sociologist could explain how her roles and experiences with social institutions could dictate the options she has in seeking help and why she might decide to stay in an abusive relationship. The testimony of both these experts could explain a battered woman's perception of danger and would thus be consistent with the *Lavallee* principles. The individual, psychological perspective could explain how a battered woman's experience as a victim of abuse can affect her perception of danger. Sociological testimony could be used to explain the social barriers to leaving an abusive relationship (outlined in more detail below) and in doing so, why a battered woman might believe that she has no other option than to act in self-defence. Sociological testimony would also be able to take male violence out of an individualized focus on the deceased and into the larger social domain when the accused's response might well be seen as a reasonable defence.

MacDonald argues that as a discipline, sociology can help make sense of the social relationships embedded in the law. Because law has been shaped by dominant social groups, MacDonald argues that when sociology enters the legal arena, more "standpoints" are included and the law becomes "more inclusive of all groups within society."¹³⁹ As discussed in chapter three, expert testimony by psychologists provides a limited, sometimes distorted, description of the experiences of battered women. Sociology is needed to provide additional perspectives on those experiences and to broaden and ground the court's understanding of domestic violence and its effects on battered women.

However, sociological expert testimony has not typically had a place in the courtroom. As the study of social groups, organizations and inequality, sociology has tended to be viewed by

¹³⁹ Macdonald, *supra* note 135 at 14.

the law as an “unscientific” discipline.¹⁴⁰ The law prefers psychology because psychology’s experimental, positivist methodology is presumed to be more objective and more analogous to the legal process. Zeedyk and Raitt argue that the law has been resistant to sociology’s “complex, systemic explanations of human behaviour” because legal actors are unsure of how to make sense of them. Traditionally, the law has limited its analysis to “individualistic models” of inquiry. Due to their methodological similarities, psychology has assumed a privileged place in working with the law.¹⁴¹

When a battered woman kills her abuser in self-defence, the law requires an assessment of the reasonableness of her perception of the danger she faced. While the *Lavallee* decision ruled that it is necessary to understand how a history of domestic violence affects this perception, the practice has been to focus on the incidents directly leading to the point where a battered woman acts in self-defence against her abuser. By focusing on the events directly leading to a battered woman using self-defence, the law misses the importance of understanding the context of a battered woman’s actions (as in *Lavallee*). The problem is that law analyzes behaviour separately from the context underlying individual action. In Zeedyk and Raitt’s view, this disconnect means that social problems cannot be “effectively addressed” by the law.¹⁴² Our behaviour and experiences are shaped by our social roles and location. According to Comack, these social roles and locations are influenced by race, class and gender and she notes that these social factors constitute the “primary bases” where inequalities are produced and reproduced.¹⁴³

¹⁴⁰ Zeedyk and Raitt, *supra* note 83 at 55.

¹⁴¹ *Ibid* at 58.

¹⁴² *Ibid* at 59.

¹⁴³ E. Comack, ed., *Locating Law: Race, Class, Gender, Sexuality Connections* (Winnipeg: Fernwood Publishing, 2006) at 11.

Like L'Heureux-Dubé J in *Malott*, Zeedyk and Raitt note the need to consider “economic and social circumstances” in order to understand why battered women stay in abusive relationships.¹⁴⁴ The individual focus of the psychology of battered women does not attend to “social circumstances” and the law’s focus on individual action rather than social context means that unequal social relations are not adequately considered by the court in determining reasonableness. A woman’s unequal social standing can limit her access to support services and this means that some women stay in abusive relationships because they have no other practical or realistic options. For example, a woman with children who is financially dependent on her abusive partner may not leave because doing so would place her and her children in poverty. Or, she may not leave because, as an economic dependant, she fears losing custody of her children. In *Lavallee*, there was no mention of how race, class and gender affect the determination of reasonableness or how these three areas (among others) can prevent battered women from leaving abusive relationships.

Sociological testimony could explain how domestic violence is a crime entrenched in the unequal social and gender relations of patriarchy, and how patriarchy translates to a devaluation of women in our culture. This testimony could also explain how a woman’s race, social class, age and (dis)ability affect her experiences of social inequality. Sociology could be used to explain social factors that can inhibit battered women from leaving her abuser such as whether she was employed, the strength of her family supports and the adequacy of social supports for battered women. Allowing sociological expert testimony in battered women’s self-defence trials would facilitate the connection between an individual experience of violence and the social dimensions of violence and would provide the social context that would shift the understanding

¹⁴⁴ Zeedyk and Raitt, *supra* note 83 at 59.

of the woman's actions from pathological to reasonable. Because individual action cannot be divorced from social roles, the combined approach of sociology and psychology is necessary. This approach would strengthen judicial/legal understandings of battered women's perception of reasonableness and would provide a fuller and clearer understanding of a battered woman's decision to act in self-defence.

Chapter 5: R. v. Bear Case Analysis

As a conclusion to my thesis, I analyze the case *R. v. Bear*,¹⁴⁵ and look at how expert testimony is employed in a case in which an Aboriginal woman is charged with assaulting her abusive partner. I chose this case because it demonstrates important contextual information that could be addressed by sociological testimony. Without this additional information, racist and sexist stereotypes remain unchallenged and are thereby further entrenched into the law. The *Bear* case came shortly after the *Malott* decision. It is clear that the concerns raised by L'Heureux-Dubé J in *Malott* have not been considered in the case.

Janice Bear is an Aboriginal woman. She lived in poverty, had little education and suffered from substance abuse problems. Her experience as a battered Aboriginal woman was complicated by these social factors. Given the numerous socioeconomic inequalities faced by Aboriginal women in Canada, and because there are deeply complicated social issues stemming from Bear's cultural background, the *Bear* case provides an excellent example of the problems associated with expert psychological testimony and the damage perpetuated by the concept of battered woman syndrome.

In this chapter, I rely on feminist legal scholars to frame my argument because they themselves rely on sociological evidence as the basis of their analysis of the law. In doing so, they provide a strong example of the kind of knowledge that needs to be brought into the courtroom. The arguments and observations I make in this chapter about the potential benefits of expert sociological testimony are applicable to any battered women's self-defence case.

¹⁴⁵ *Bear*, supra note 9.

Although battered woman syndrome testimony *was* successful in helping to win Bear's acquittal, there are elements in the case that warrant further examination. Keeping the previous chapters' critiques in mind, I analyze the manner in which battered woman syndrome and more generally, the individualized focus of psychology were used to explain Bear's behaviour and actions. Throughout the chapter, I briefly return to the *Lavallee* principles and assess the extent to which they have been applied and how they have been interpreted in the *Bear* case. Although Justice Whelan followed the precedent set by *Lavallee*, in doing so, he perpetuated the stereotypes embedded within battered woman syndrome. Bear's Aboriginal background was largely ignored in this case, but at the same time, both the expert testimony and the tone of Whelan J's remarks embody negative stereotypical attitudes about Aboriginal people. Ideally, in battered women's self-defence cases, no expert testimony would be required because the fact finders would be able to understand battered women's experiences without translation by an expert. However, given that expert testimony will likely continue to be needed in battered women's self-defence cases, sociological testimony would provide essential contextual information. This type of testimony could combat negative attitudes about Aboriginal people by explaining issues of poverty, race and racism and could also explain why, for example, Bear's decision to stay with her abuser was reasonable given that she had limited options in seeking help from the police and social service agencies.

R. v. Bear: Analysis of Race, Class and Gender

Janice Rose Bear is an Aboriginal woman from Saskatchewan charged with aggravated assault against her abusive boyfriend, Rolf Elvik. Bear and Elvik's relationship had a long, violent history. During a heated argument, Elvik choked Bear and tried to stab her to prevent her from leaving their apartment. Bear defended herself by stabbing Elvik numerous times. The question considered by Provincial Court Justice Whelan was whether Bear acted in self-defence and whether to accept the defence's evidence and expert testimony about battered woman syndrome. At trial, expert testimony was provided by Deborah Farden, who had extensive experience working with battered women. Farden defined battered woman syndrome and testified that it was her opinion that Bear "suffered" from it. Justice Whelan agreed and found Bear not guilty of aggravated assault.

It is clear that Bear feared for her life on numerous occasions. While she was being interviewed by the police, Bear was hesitant to tell them about the abuse Elvik had inflicted upon her for fear that he would kill her,¹⁴⁶ a fear based on her knowledge of his actions and the history of their relationship. Before becoming involved with Bear, Elvik had been in a relationship with Bear's sister, Gloria Cook. Elvik and Bear became involved two months after Cook went into a coma. Bear told the police that Cook had told her that Elvik physically abused her and Bear believed that Elvik was the cause of Cook's coma. When Elvik abused Bear, he often threatened to do the same to her as he had done to Cook.¹⁴⁷ Farden also testified that in the past, when

¹⁴⁶ *Ibid* at 2 and 16.

¹⁴⁷ *Ibid* at 20.

Elvik had threatened Bear with a knife, he had always used it. She testified that Bear's fear of death was reasonable "given the history of the relationship . . ." ¹⁴⁸

When Bear stabbed Elvik, she was defending herself against an attack that was in progress. The fourth principle outlined by Wilson J in *Lavallee* was that expert testimony was to be used to help the jury appreciate a battered woman's unique perception of danger based on her knowledge and the history of abuse in the relationship. ¹⁴⁹ This principle was designed to help address the requirement of imminence that had been read into case law as part of the law of self-defence. In some cases, expert testimony is needed to enable the trier of fact to see why the accused may have reasonably understood herself to be in imminent danger even though her abuser was leaving the room or was asleep. In *Bear*, there was no question of imminent danger: she was under attack; therefore the danger was unquestionably imminent. This was not a case of a battered woman shooting her partner as he left the room and expert testimony was not needed in order to understand imminent danger from the perspective of a battered woman.

Presumably, the evidence of battered woman syndrome was introduced in *Bear* in order to address the issue of excessive force: that is, the requirement in self-defence cases that the defendant use only the force needed to repel an attack. Some people may have thought that because Bear stabbed Elvik repeatedly, she used excessive force. In this thinking, Bear could have defended herself by stabbing Elvik once and then have fled the apartment. Defence expert Deborah Farden explained Bear's use of force as the result of battered woman syndrome. ¹⁵⁰ Using expert testimony and battered woman syndrome to explain the level of force employed by

¹⁴⁸ *Ibid* at 51.

¹⁴⁹ *Lavallee*, *supra* note 3 at 60.

¹⁵⁰ *Bear*, *supra* note 9 at 38.

the battered woman was a shift from using them to address imminence as in *Lavallee*. This shift was not explicitly discussed, or even acknowledged by Whelan J in the *Bear* case. While the level of force may require explanation to fact finders familiar with the male self-defence paradigm, the question of whether such testimony was needed should at least have been canvassed. Instead, Whelan J accepted battered woman syndrome testimony without commenting on the shift from *Lavallee*. In labeling Bear's excessive force as the result of battered woman syndrome, the same harmful, medical stereotypes were perpetuated.

Whelan J's summary of Farden's testimony fell into the trap of constructing Bear's actions as the result of battered woman syndrome. Like Dr. Shane in *Lavallee*, both Farden and Whelan J characterized Bear's response as a result of mental instability and portrayed her as unable to gauge the "lethality" of her actions. In delivering his judgment, Whelan J wrote,

Despite all of the abuse and fear of him [Elvik] she was resigned to their being together. **The restrictions on her freedom are in her mind and appear to transcend these proceedings or any altercation between them.** It is no surprise, in this context that her response would be without measure or regard to the outcome. Ms. Farden said that women in her situation are in a heightened state of alert to danger but at the same time become **blunted by the violence and have difficulty measuring the potential lethality of the violence** used against them, hence they **adopt coping mechanisms, rather than leave**; they also experience, she said, **difficulty in measuring the lethality of their own actions** [emphasis added]. I believe that this helps to explain why Ms. Bear's actions appeared so out of proportion to the attack.¹⁵¹ [emphasis added]

Bear's actions were an obvious self-defensive response to a violent attack that was in progress. Her self-defensive action was *not* necessarily the result of battered woman syndrome or learned helplessness. Despite this being an "obvious" case of self-defence, the explanation of Bear's mindset was made to fit into battered woman syndrome. Whelan J's comments about the "restrictions of freedom" being in Bear's mind echo the "steel fences" in *Lavallee*'s mind that

¹⁵¹ *Ibid* at 75.

Dr. Shane spoke of in his testimony. This related to Bear's decision to continue in the relationship but had no apparent connection to the issue of excessive force. Whelan J suggested that Bear had "difficulty measuring the potential lethality" of her actions which did directly address the issue of excessive force. This suggestion implies that Bear was psychologically unstable. A different (preferable) reading of her action is that it was simply a response to what she reasonably believed was an imminent threat to her life, which, following the law of self-defence, would *not* make the force she used excessive.

The nuance of Whelan J's summary of battered woman syndrome corresponds to the myth that a psychologically healthy woman would be able to leave her abuser. Whelan J summarized Farden's testimony and explained that women who "suffer" from battered woman syndrome develop learned helplessness to the extent that they are unable to recognize their "options," which explains why some battered women do not view leaving the abuser as a possibility.¹⁵² Whelan J's summation of battered woman syndrome suggests that he thinks there are *viable* options for battered women to leave abusive relationships, and specifically that there were options that Janice Bear was psychologically incapable of exercising. As discussed previously, sociology could put these "options" in their social, political and economic contexts so that they would be recognized as largely unavailable to a woman in Bear's situation.

Some of Farden's testimony ventured beyond the confines of battered woman syndrome and the theory of learned helplessness and shifted into racial stereotypes about Aboriginal people. Bear's alcohol addiction was a factor in Farden's assessment of Bear's experiences as a battered woman. Farden testified that Bear's addiction affected her "perception of her history

¹⁵²Ibid at 41-2.

and her recollection of the incident.” Whelan J summarized that Farden “agreed that the addiction to alcohol played a roll [sic] in her assessment of Ms. Bear as a battered woman, but added that Ms. Bear’s description was very consistent with the criteria for the syndrome.”¹⁵³ Whelan J’s remark suggests that a woman who abuses alcohol may not fit into the contours of battered woman syndrome. He ultimately reassures us that even though Bear was an alcoholic, in this particular case, she *still* suffered from battered woman syndrome and therefore could argue self-defence. This reference, however, raises the point discussed previously that a battered woman whose actions significantly deviate from gendered “ideal” standards of feminine behaviours is less likely to be able to access the explanations provided by battered woman syndrome. The “reassurance” is more disturbing than reassuring. By mentioning Bear’s alcoholism in this manner, both Farden and Whelan J made Bear appear even more helpless and “damaged.” Their remarks tend to invoke pity for Bear: not only was she an alcoholic, she was *also* a battered woman unable to leave her abuser. This exacerbates the stereotype of the weak, helpless battered woman embodied in battered woman syndrome. Here, race and sex stereotypes combine to even further pathologize the defendant within the battered woman syndrome.

Racial and cultural stereotypes are also evident in Whelan J’s remarks about Bear’s testimony. Whelan J did not understand why Bear did not want to describe the abuse she faced from Elvik. He wrote that in Bear’s testimony, she “was not an articulate witness” and “at times she didn’t appear to be following the line of questioning or appreciate what was being asked of her.”¹⁵⁴ He continued,

As much as it would have been in her interest to provide great detail about his abuse of her, she did not appear to want to do so . . . Further, when cross examined and asked to

¹⁵³ *Bear*, supra note 9 at 55.

¹⁵⁴ Ibid at 68.

repeat what she said she could recall of the events leading up to the assault, she was really very consistent and I remarked upon this to myself especially given her inability or refusal to provide detail about the subject stabbing and other incidents of assault between her and Mr. Elvik. She said she blacked out about the stabbing of Mr. Elvik. I was rather of the impression that she could not bring herself to remember it or discuss it and that this was consistent with Ms. Farden's testimony regarding avoidance."¹⁵⁵

Continuing with the medicalized stereotypes of battered woman syndrome, Whelan J's remarks refer to Bear as incapable or unwilling to describe her experiences with domestic violence to the court. In this, he implicitly characterizes Bear not only as passive and helpless but also as unintelligent. Whelan J's comments make it seem that Bear was "being difficult" as a witness when there may have been legitimate reasons why she did not want to testify about her history of abuse. Elizabeth Sheehy explains that burying the memory of painful experiences is a survival technique for battered women: "in order to survive trauma, many women must "forget" and minimize ongoing violence and threat, and some women have survived years and many incidents. Therefore, their accounts rarely immediately emerge fully, in chronological order, or in meticulous detail."¹⁵⁶ Alternatively or additionally, Bear may have been reluctant to detail the abuse in front of a non-Aboriginal judge in a "white" courtroom.

Returning to a point made by Lenore Walker, the way in which battered women describe their experiences in court often differs from the fact-process required by the court.¹⁵⁷ This could be a reason why Bear did not wish to describe her experiences to the court. Bear may have been unsure of how to describe her experiences in a legal forum that asked isolated questions rather than allowing her to tell her story as *she* understood it. In addition, there could have been cultural reasons why Bear did not wish to outline her experiences of abuse to the police and the

¹⁵⁵ *Ibid* at 69.

¹⁵⁶ Sheehy, *supra* note 8 at 20.

¹⁵⁷ Walker, *supra* note 27 at 256.

court. The legal process of the Canadian justice system and Aboriginal notions of justice are quite different. Differing conceptions of justice can lead to a “misunderstanding of the actions and reactions of Aboriginal people in the courtroom.”¹⁵⁸ The Elizabeth Fry Society notes that judges and juries do not often possess cultural knowledge about Aboriginal people, and this ignorance translates to misunderstandings about “demeanor and body language,” which in turn, affect the determination of guilt and sentencing.¹⁵⁹

Whelan J did not demonstrate any understanding of how Bear’s Aboriginal background might have affected the manner in which she made sense of, and relayed, her experiences to what she may have well perceived as a hostile court. Such contextualization could be provided by sociological testimony which could explain Aboriginal cultural practices to an audience that is largely ignorant of the complex lives of Aboriginal people. Although this point about cultural difference is specific to Aboriginal women, the broader implication is that an interpretation and understanding of cultural behaviours are necessary in battered women’s self-defence trials involving a racialized defendant.

Analysis of Sociological Themes and Issues Emerging from *Bear*

Race, class, gender and inequality are principal sociological themes that emerge from the *Bear* case. In this section, I engage with these themes on a broader scale to highlight the gaps that could be filled by sociological testimony, both with reference to *Bear* and in a self-defence trial more generally. Introducing sociological expert testimony would be a step to remedying

¹⁵⁸ Canadian Association of Elizabeth Fry Societies, “Aboriginal Women Fact Sheet” (<http://www.elizabethfry.ca/eweek08/pdf/aborig.pdf>) 2008 at 2.

¹⁵⁹ *Ibid* at 2.

some of the inequalities battered women face in the justice system and part of a larger solution of changing the law's structure and process to make it more amenable to understanding women's experiences.

In Canada, many Aboriginal women face extreme levels of social and legal inequalities. There are a disproportionate number of Aboriginal women incarcerated in Canada.¹⁶⁰ Studies indicate that this over-incarceration is due in large part to racism and social conditions of inequality.¹⁶¹ The social and legal inequalities experienced by Aboriginal people are the result of Canada's history of colonialism; its harmful effects and attitudes are still experienced by Aboriginal people. Patricia Monture, a Mohawk law professor, provides a simple, straightforward definition of colonialism: "It is the belief in the superiority of certain ways and beliefs *over* ways, values and beliefs of other peoples . . . Colonialism is the theory of power, while oppression is the result of the lived experience of colonialism."¹⁶² The history of colonialism is present in the structure of our laws. Our legal system was developed by white, European men and our laws still reflect their negative attitudes towards racialized people and women. Canada's laws were (and still are) a way in which to exert power over Aboriginal people. Our legal system is an institution where oppression is magnified for Aboriginal peoples, as evidenced by the large number of incarcerated Aboriginal people.

¹⁶⁰ Citing a report by the Ministry of Public Works and Government Services Canada, the Elizabeth Fry Society notes that Aboriginal women represent 3 per cent of the female Canadian population, but also constitute 32 per cent of the women in federal prisons. In a ten-year period between 1997 and 2007, the rate of federally sentenced Aboriginal women rose by 117 per cent. See *supra* note 158.

¹⁶¹ *Ibid.*

¹⁶² P. Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender" *Locating Law: Race, Class, Gender, Sexuality Connections* E. Comack, ed. (Winnipeg: Fernwood Publishing, 2006) at 80.

Marlee Kline pushes this point about the relationship between colonialism and law further and argues that “law provides one of the discourses in which racism is constructed, reproduced and reinforced.”¹⁶³ The implication of law reproducing racist discourses is that there are serious barriers to accessing justice for those who are not from a European, Caucasian background. For an Aboriginal woman making a claim of self-defence, there is an elevated risk that her claim may be denied for reasons related to her racial and cultural background. Or, as in the *Bear* case, there is a risk that stereotypes of Aboriginal women will be used to further pathologize rather than to understand the behaviour of an Aboriginal woman. The social issues and inequalities stemming from race and culture are within the disciplinary focus of sociology. Sociological testimony could help to overcome negative stereotypes about racial backgrounds and cultural practices that differ from the Eurocentric “norm” embedded in Canadian institutions, including law, medicine and psychiatry. Sociological testimony could also explain how the history of colonialism has resulted in deeply held prejudicial attitudes about Aboriginal people, how the long-term effects of the reserve and residential school systems have resulted in widespread and deeply entrenched poverty for Aboriginal people, and could make the link about how poverty and oppression often result in violence and substance abuse. By outlining these factors, sociological testimony would be able to conceptualize a battered Aboriginal woman’s culturally specific perception of reasonable danger and, in doing so, provide a social understanding of the accused.

As one of the most disenfranchised ethnic groups in Canada, accessing social and legal support is especially difficult for Aboriginal women. Harper suggests that all levels of the justice system discriminate against Aboriginal women. She explains that when an Aboriginal woman

¹⁶³ M. Kline, “The Colour of Law: Ideological Representations of First Nations in Legal Discourse” (1994) 3 *Social and Legal Studies* 451 at 452.

makes a complaint of sexual assault or domestic violence, “court personnel often fail to either recognize or acknowledge the unique forms of injury that Aboriginal women suffer.”¹⁶⁴ These forms of injury are a specific type of “cyclical” violence. Monture points out that, “both the forms of violence (physical, sexual, spiritual, emotional and verbal) and how violence is inflicted on Aboriginal women are multifaceted. Violence is not generally experienced as a single incident. The violence is cyclical. All too often, violence describes most of our lives . . . The violence becomes a fact of life and it is inescapable.”¹⁶⁵ Though Monture terms the violence experienced by Aboriginal women as “inescapable,” this is the inescapability of systemic racism, not of learned helplessness. Monture does not “blame” women for their “inability” to leave the abusive relationship; instead she outlines the types and nature of the ongoing violence Aboriginal women experience and explains its social and historical roots, implicitly rejecting the individual pathological explanations promoted by psychology. Aboriginal women in these situations face numerous levels of inequality. They face gendered inequality when they are abused by their partners and they face racial, gender, economic and legal inequalities when, as an Aboriginal person, they attempt to access social services or the justice system. This is the social context that sociological evidence would depict and explain.

Aboriginal women’s claims of violence are not always taken seriously by the police, which is another barrier to accessing justice. For example, although Bear did not call the police on the occasions when Elvik abused her, she had threatened to do so. Farden testified that in previous abusive relationships, when Bear had called police, by the time the police responded to the call, her partner had fled the scene. When the police left, her partner would return and Bear

¹⁶⁴ A. Harper, “Is Canada Safe for Aboriginal Women?” (2006) 25 Canadian Women’s Studies 33 at 35.

¹⁶⁵ Monture, supra note 162 at 81.

would have to again “deal with the violence.”¹⁶⁶ Calling the police to respond to a situation of domestic violence turns what has been traditionally viewed as a “private” problem into a public one. Many women choose not to call the police because they are concerned about what their families and neighbours will think of them. For racialized women, the decision to call the police (or not) is also complicated by the treatment they sometimes receive by the police. Kimberle Williams Crenshaw suggests that racialized women do not want to “subject their private lives to the scrutiny and control of a police force that is frequently hostile.”¹⁶⁷ Similarly, Harper makes the point that when Aboriginal women call the police and/or press charges against their abusers, they are often “ostracized by their families and reserves” and are “blamed for their situation.” This problem is magnified for women living on remote northern reserves because there are little counseling or support services available to women as they connect with the justice system.¹⁶⁸ Moreover, a woman may be hesitant to call the police because doing so would place her racialized partners in a space where he is likely to be treated more harshly than other offenders.

Thus, when Aboriginal women come into contact with the justice system (as victims or defendants), Kline argues that it is especially important to take into account their social backgrounds. She summarizes that, “the cycle of poverty, dispossession, drugs and violence that are part of the experiences of many First Nations women and the consequences of disproportionate contact with the criminal justice system must be essential parts of any analysis of women and the criminal justice system.”¹⁶⁹ These areas that Kline identifies as “essential” should inform the court’s consideration of an Aboriginal battered woman’s claim of self-defence.

¹⁶⁶ *Bear*, *supra* note 9 at 48.

¹⁶⁷ K. Williams Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour” (1991) 43 *Stanford L.R.* 1241 at 1257.

¹⁶⁸ Harper, *supra* note 164 at 35.

¹⁶⁹ M. Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 *Harvard Women’s L.J.* 115 at 128.

These are issues that are within the disciplinary purview of sociology. In *Bear* for example, sociological testimony could have explained how poverty and unemployment are linked to alcohol abuse. For Aboriginal people, alcohol abuse, unemployment and poverty are outcomes of a history of colonization and domination. A sociologist would be well-situated to clarify these causes and links, which in turn, would help to understand a battered Aboriginal woman's behaviour in a non-prejudicial, non-punitive manner.

Elizabeth Sheehy argues that many battered women's self-defence cases "do not expose either the widespread nature of violence against women and children or the systemic failures of the various systems to intervene or provide the support necessary to transform relations of dominance. The judges frequently do not describe or comment on women's efforts to seek help or the results of the attempts to bring police or courts into the "private" sphere."¹⁷⁰ The Elizabeth Fry Society assigns a high degree of blame to the justice system for the "creation of poor social conditions in Aboriginal communities . . ." The organization connects the justice system's oppression of Aboriginal peoples to the often devastating social conditions they face both on and off reserves. As a result, Aboriginal people experience "social disruption in the community and widespread poverty."¹⁷¹ An individual psychological focus would not be able to adequately address the complex social conditions such as poverty and oppression. An individual tends to isolate the individual from the social world in which they live and to ascribe their actions to individual circumstances and choices, divorced from their social context.

¹⁷⁰ E. Sheehy, "Battered Woman Syndrome: Developments in Canadian Law after *R. v. Lavallee*" J Stubbs, ed. *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) at 184.

¹⁷¹ Canadian Association of Elizabeth Fry Societies, supra note 158 at 4.

In her case analysis of Canadian post-*Lavallee* battered women's self-defence decisions, Sheehy argues that racial discrimination is often present in cases involving Aboriginal women and in the law itself.¹⁷² She argues that when white women defend themselves against their abusers, their actions are explained by the cycle of violence, learned helplessness and battered woman syndrome. However, when Aboriginal women act in the same manner, the legal system conceptualizes their actions as "consistent with stereotypes of Aboriginal women, and thus not requiring rationalisation through syndromisation."¹⁷³ According to Sheehy, an Aboriginal battered woman is less likely to be "diagnosed" with battered woman syndrome.¹⁷⁴ Since battered woman syndrome has been an important part of a battered woman's legal strategy in arguing self defence, it follows that Aboriginal women are less likely to be acquitted of the murder or assault of their abusive partners. Sheehy argues that,

. . . the extraordinary high rates of incarceration of Aboriginal women in Canada and the brutal treatment that federally sentenced Aboriginal women have experienced at the hands of various components of the justice system, suggest that those who participate in constructing offenders for sentencing, such as social workers, police, probation and parole officers, lawyers, prison guards, therapists and judges may not readily view Aboriginal women as fitting within battered woman syndrome.¹⁷⁵

This presents a very complex situation. Aboriginal women making a claim of self-defence are disadvantaged in three forms. First, if they are permitted to use battered woman syndrome, they have to allow their actions to be pathologized in order to fit its contours (as discussed in chapter three). Second, in order to have a chance at self-defence within the

¹⁷² Sheehy, *supra* note 170 at 174. In her article, Sheehy noted that racial discrimination was present in the *Howard*, *Catholique* and *Eyapaise* cases. See appendix for full citations.

¹⁷³ *Ibid* at 183.

¹⁷⁴ Kathleen Ferraro also makes the point about the hesitancy of the legal system to attach the label of battered woman syndrome to non-white women. Ferraro was an expert witness in numerous American battered women's self-defence cases and notes that in 19 years of providing expert testimony, she had been sought out by the defence to provide expert testimony in only two cases involving African American women. See Ferraro, *supra* note 93 at 114.

¹⁷⁵ Sheehy, *supra* note 170 at 184.

constraints of battered woman syndrome and to combat the stereotypes of Aboriginal women that make self-defence less available to them in the first place (as described by Sheehy), they have to “allow” themselves to be pathologized and stereotyped even more than non-Aboriginal women. Third, psychology’s individual focus (alone or as part of battered woman syndrome testimony) cannot account for the social complexities of a non-dominant race and culture.

Applying Sheehy’s argument, the use of expert testimony on battered woman syndrome in *Bear* presents a puzzling situation. An Aboriginal woman who “needs” expert testimony about battered woman syndrome is often denied it, but an Aboriginal woman who has an obvious case of self-defence (as in *Bear*) and therefore does not “need” expert testimony is “permitted” to seek an explanation of battered woman syndrome. Using battered woman syndrome testimony to explain excessive force is a shift away from the actions the syndrome has “traditionally” been used to contextualize. This shift has further negative implications for battered women. Bear had a valid claim of self-defence: based on her knowledge of Elvik’s behaviour, she was defending herself from what she believed was an imminent threat to her life. The immediate threat of death should have been sufficient to explain the level of force employed by Bear. It is possible that in the current environment, the only way that Bear’s actions could be understood was through battered woman syndrome. This means that until the types of admissible expert testimony changes, some women making “obvious” claims of self-defence might also need to have their behaviours pathologized by battered woman syndrome in order to avoid conviction.

In order to counteract the ways in which the justice system negatively frames Aboriginal culture and Aboriginal battered women, the testimony of a sociologist could be introduced in battered women's self-defence trials to explain Aboriginal culture, the history of inequality, the social conditions they face and the numerous types of violence to which they are often exposed. Ignorance of race and culture are forms of racism and this results in stereotypes about Aboriginal people are being ingrained in the legal system. A battered Aboriginal woman making a claim of self-defence faces serious barriers to accessing justice and being treated equitably by the legal system. Though *Bear* was acquitted of aggravated assault, her case demonstrates important concerns about battered woman syndrome testimony and psychological testimony more generally and illustrates how reliance on psychological testimony can reinforce stereotypical attitudes about Aboriginal peoples and Aboriginal women specifically. *Bear* demonstrates a need for sociological evidence not only to explain the reasonableness of the accused's perception of imminent danger or the use of force, but more generally to undermine the gendered and racialized myths and stereotypes that might wrongly lead to the conviction of a battered Aboriginal woman who wounds or kills her abuser.

Conclusion

The numerous limitations I have identified in this thesis about expert testimony on battered woman syndrome have made clear that both the structure and function of this type of testimony in battered women's self-defence cases is outdated and problematic. Rejecting battered woman syndrome as "the" explanation for the behaviour of battered women who kill their abusers and replacing it with a more general explanation of the psychological effects of battering on women would be a positive step in the legal response to battered women who kill

their abusers. General testimony about the psychological effects of battering on women is less harmful than the medical labels and pathologies battered woman syndrome testimony assigns to battered women. However, because its focus is so strongly positivist and individualized, psychological testimony is still limited and when used exclusively in the court, upholds stereotypes about battered women by “blaming” them for their situation. Allowing sociological testimony that would outline the impact of social factors such as race, class, gender, ability and sexual orientation would be a further significant improvement. Sociological testimony would challenge the damaging stereotypes perpetuated by the individualized focus of psychology and would facilitate the treatment of battered women with dignity, respect and equality.

As I conclude this thesis, I return to the *Lavallee* principles to support my argument that sociological expertise in battered women’s self-defence trials could help the judge/jury understand the reasonableness of a battered woman’s understanding of the danger presented by her abuser, or more generally, the reasonableness of her response to the violence to which she was being subjected.

In *Lavallee*, the first principle set out by the Supreme Court referred to the value of expert evidence in helping the fact-finder understand issues or behaviours that are beyond the knowledge of the average person. Sociological testimony would explain the social inequalities of race, class and gender and how women’s experiences with these inequalities shape their behaviour. A jury may not be attuned to the way in which these social factors are intertwined, and particularly for poor and/or racialized women. The second principle acknowledged the difficulty the average person would have in understanding battered woman syndrome and

referred to negative social stereotypes about battered women. Similarly, the third principle noted that expert evidence is a means by which to combat and overcome these stereotypes. Sociology is the best way to counteract those systematic stereotypes because it conceptualizes human experience from a wider framework than the individual focus of psychology. The pressing need for a social understanding is clearly demonstrated by the fact that battered woman syndrome has itself become a new, damaging stereotype.

The fourth principle stated that expert testimony that explained a battered woman perception of danger could explain the extent to which she “reasonably apprehended” serious injury or death. The fifth principle stated that expert testimony explaining why a battered woman stayed in an abusive relationship can be helpful to gauge the history of abuse. Finally, the sixth principle stated that expert testimony explaining why a battered woman did not “flee” when she felt her life was in danger can help determine the reasonableness of her belief that she had no choice but to kill her abuser. The fourth, fifth and six principles refer to the issue of providing an explanation as to why some battered women do not leave their abusers. As I have made clear in the previous chapters, the decision to remain in an abusive relationship is influenced by numerous, interrelated social factors and is far from an entirely individual decision. The determination of reasonableness involves understanding why a battered woman did not leave an abusive relationship when she felt her life was in danger, and in understanding why self-defence might reasonably be perceived as her only option. Sociological testimony would explain how social barriers inform and frame a battered woman’s perception of reasonable action and danger.

In theory, the *Lavallee* principles offer an effective means for the legal system to take account of a battered woman's precarious situation by acknowledging a battered woman's unique perception of danger. The problem is that lawyers have relied exclusively on battered woman syndrome to satisfy these principles. However, battered woman syndrome testimony pathologizes battered women and presents harmful stereotypes. The syndrome "works" for some women while excluding others. Women who rely upon battered woman syndrome testimony trade the possibility of an acquittal for medical labels and language that makes them appear psychologically damaged, sick and helpless. The *Lavallee* principles provide the basis for addressing the needs of battered women who defend themselves but the principles have been narrowly applied in a way that has very negative consequences. A viable solution is to reject battered woman syndrome testimony altogether and use both psychological and sociological expert testimony to understand a battered woman's perception of danger and the reasonableness of her actions without pathologizing her behaviour. This approach would still satisfy the *Lavallee* principles. Furthermore, the addition of sociological testimony is also consistent with the *Mohan* criteria for the admissibility of expert evidence. Sociological testimony would be relevant to the case, and would fit with the requirement that the testimony provide information outside the expertise of the judge and jury.

Though I argue that sociological expert testimony would help to remedy the social stereotypes and inequalities in a battered women's self-defence trial, it would not fix all of the problems I have outlined in this thesis. The law needs to change its processes and to view women as equal actors so that they do not face disadvantage on account of their race, class or gender and so that they have equal access to justice. Admitting sociological expert testimony into battered

women's self-defence cases would represent a small step in overhauling the legal process to making it more amenable to understanding women's experience. The ultimate goal in battered women's self-defence trials should be that no expert testimony is required and that the testimony of battered women is understood and accepted without the translation and contextualization of experts. There is potential for sociological testimony to help the law understand those not of its "image." This would move the courtroom beyond the maleness and whiteness inherent in the structure and process of the law and should ultimately eliminate the need for experts to "translate" battered women's experiences to the court. Sociological expert testimony will not fix the law's unequal gendered structure or the legal disadvantage faced by battered women making a claim of self-defence, but would constitute an important step in the direction of full legal equality for all women.

Appendix A: List of battered women’s self-defence cases using the search term “battered woman syndrome”

AB = Aboriginal Woman

- R. v. Chivers*, [1987] N.W.T.J. No. 118 (N.W.T. Supreme Court) (AB)
- R. v. Lavallee*, [1990] 1. S.C.R. 852 (AB)
- R. v. Catholique*, [1990] N.W.T.J. No. 164 (N.W.T. Supreme Court) (AB)
- R. v. Phillips*, [1992] O.J. No. 2716 (Ontario Gen. Div.)
- R. v. Bennett*, [1993] O.J. No. 1011 (Ontario Prov. Div.)
- R. v. Eyapaise*, [1993] A.J. No. 1080 (Alberta Q.B.) (AB)
- R. v. Raymond*, [1993] N.W.T.J. No. 86 (N.W.T. Territorial Court) (AB)
- R. v. G.A.M.*, [1996] N.S.J. No. 52 (Nova Scotia C.A.)
- R. v. M.A.M.*, [1996] O.J. No. 3511 (Ontario C.A.)
- R. v. Malott*, [1996] S.C.C.A. No. 546
- R. v. Ferguson*, [1997] O.J. No. 2488 (Ontario Gen. Div.)
- R. v. Malott*, [1998] 1 S.C.R. 123
- R. v. Trombley*, [1998] O.J. No. 2680 (Ontario C.A.)
- Reference re: *Gruenke* [1998] M.J. No. 549; [2000] S.C.J. No 32
- R. v. Getkate*, [1998] O.J. No. 6239 (Ontario Gen. Div.)
- R. v. Vaillancourt*, [1999] J.Q. No. 571 (Quebec C.A.)
- R. v. Bear*, [1999] S.J. No. 262. (Saskatchewan Prov. Ct.) (AB)
- R. v. Skanks*, [1999] A.J. No. 262 (Alberta Prov. Ct.)
- R. v. R.F.*, [2004] O.J. No. 544 (Ontario Sup. Ct.) (AB)
- R. v. S.M.*, [2004] S.J. No. 572 (Saskatchewan Q.B.) (AB)
- R. v. M.L.B.*, [2004] S.J. No 755 (Saskatchewan Prov. Ct.) (AB)
- R. v. Graveline*, [2005] Q.J. No 7186 (Quebec C.A.)
- R. v. Kahypeasewat*, [2006] S.J. No 587 (Saskatchewan Prov. Ct.) (AB)

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