Reasonableness, Gender Difference, and Self-Defense Law

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I. STANDARDS OF REASONABLENESS IN SELF-DEFENSE

THE DOCTRINE OF SELF-DEFENSE permits individuals who are unlawfully attacked, and have no opportunity to secure the law's protection, to take *reasonable* steps to defend themselves.[1] Statutory interpretations of what counts as reasonable self-defense differ by country and jurisdiction. Canadian criminal law stipulates that a person is justified in defending herself against unlawful force if (*i*) she uses no more force than is necessary to repel her assailant; (*ii*) she reasonably apprehends death or grievous bodily harm from an assailant; and (*iii*) she believes on reasonable grounds that she cannot otherwise preserve herself from harm except by using force.[2]

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1 This doctrine is premised on the belief that greater social harm will result if an unlawful aggressor is permitted to kill an innocent victim than if the victim is allowed to use force to defend herself against the aggressor. The law of self-defense is designed to protect the right of all individuals to self-help and bodily integrity. The aggressor, by exercising unlawful force against an innocent victim, in effect forfeits protection of his right to bodily integrity. For a discussion of the doctrine of self-defense, see J.R. Castel, "Discerning Justice for Battered Women Who Kill" (1990) 48 U.T. Fac. L. Rev. 229 at 235 and 236; J. Acker & H. Toch, "Battered Women, Straw Men, and Expert Testimony: A Comment on *State* v. *Kelly*" (1985) 21 Criminal Law Bulletin 125 at 144; and P. Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Col. L. Rev. 199 at 214.

2 The law of self-defense (against an unprovoked assault) is outlined in s.34 of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, as follows:

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

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

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causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues

The requirement of reasonableness is an important feature of Canadian self-defense law. Courts have traditionally employed a standard of reasonableness modelled on the classic barroom brawl scenario, involving antagonists of equal size, strength, and skill.[3] In such a scenario, the reasonable man

> [S]tands and faces his adversary, meeting fists with fists. He isn't frightened or provoked to violence by mere threats; he doesn't use a weapon unless one is being used against him; he doesn't indulge himself in cowardly behaviour such as lying in ambush or sneaking up on an enemy unawares.[4]

Feminist legal theorists have challenged this standard of reasonableness on the ground that it is based on a male stereotype which is insensitive to the different experiences and perspectives of battered women.[5] To respond to these differences, feminists have sought to contextualize[6] and individualize[7] the standard of reasonableness in self-defense. To this end, they have asked the courts to consider the socio-political and economic context in which battered women find themselves, their personal history, and their individual circumstances, when determining whether an act of self-defense was reasonable. Expert testimony on the battered

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his purposes; and

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

For a discussion of American self-defense law, see W. LaFave & A. Scott, *Handbook on Criminal Law*, 2d ed. (St. Paul, MN: West Publishing Co., 1972) at 391–397.

3 See *Lavallee*, *infra* note 10 at 115.

4 C. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense and the Law* (Columbus: Ohio State University Press, 1989) at 99.

5 See E. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1986) 9 Women's Rts. L. Rep. 195 at fn. 4.

6 The 1993 Task Force on Gender Equality in the Legal Profession regards contextualization as an "examination of the social, political and economic conditions in which individuals and groups are currently living." See B. Wilson *et al.*, *Canadian Bar Association Task Force on Gender Equality in the Legal Profession—Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 13.

7 Schneider submits that to individualize is to give " 'a full consideration of individual differences and capacities' when determining whether a defendant should be held accountable for a particular crime." See her "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" (1980) 15 Harv. Civ. Rts.-Civ. Lib. L. Rev. 623 at 639 (quoting G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, c1978) at 512). See also P.L. Crocker, who recommends that the courts adopt a "sex-neutral, individualized" approach to reduce the impact of sex-bias, in "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 Harv. Women's L. J. 121 at 132 and 150.

woman syndrome, as developed by Lenore Walker,[8] has been regarded as crucial to this approach. Feminists contend that such testimony facilitates the Court's appreciation of the different circumstances and perspectives of battered women and how these factors might render their acts of self-defense reasonable and justified, despite the fact that these acts depart from the "reasonable man" standard.

Expert evidence on the battered woman syndrome has been proffered in support of the reasonableness of battered women's acts of self-defense in several recent cases with varying degrees of success.[9] *R. v. Lavallee*[10] is the first Canadian case in which such evidence was heard successfully. Many commentators have praised Madame Justice Bertha Wilson's judgment in this case for its acceptance of expert testimony on the battered woman syndrome.[11] This paper re-examines Wilson J.'s judgment in *R. v. Lavallee* and raises some concerns about the merits of appealing to the battered woman syndrome to support a defense of self-defense. In particular, I argue that evidence of the syndrome may actually undermine a battered woman's claim of self-defense insofar as the psychological symptoms associated with the syndrome describe a mental disorder that may lead to impaired judgment. It is not part of my view, however, that the battered woman syndrome should be completely exorcised from the courts. In cases like *R. v. Eyapaise*,[12] where the evidence suggests that the defendant's perception of reasonableness was distorted by a history of abuse, I am prepared to concede that the syndrome may be indispensable in helping the courts and juries understand why the defendant *mistakenly* feared grievous harm and believed that there was no option save for the use of deadly force. In such cases, however, I argue that evidence of the battered woman syndrome may be used either to support a defense of mental incapacitation

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8 Dr. Lenore Walker first elucidates this theory in her book, *The Battered Woman* (New York: Harper and Row, 1979) [hereinafter "*Battered Woman*"] at 55–70. See also Walker's recent books: *The Battered Woman Syndrome* (New York: Springer Pub. Co., 1984) [hereinafter "*Syndrome*"] and *Terrifying Love* (New York: Harper and Row, 1989).

9 See Schneider, *supra* note 5 at fn. 3.

10 *R. v. Lavallee*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 [hereinafter *Lavallee* cited to C.C.C.].

11 See M. Schaffer, "*R. v. Lavallee*: A Review Essay" (1990) 22 Ottawa L. Rev. 609; D. Martinson *et al.*, "A Forum on *Lavallee* v. R.: Women and Self-Defense" (1991) U.B.C.L. Rev. 21; C. Boyle, "The Battered Wife Syndrome and Self-Defense: *Lavallee* v. R. (1990) 9 Cdn. J. Fam. L. 171; K. Mahoney, "The Legal Treatment of Spousal Abuse: A Case of Sex Discrimination (1992) 41 U.N.B.L.J. 21; Castel, *supra* note 1; L. Stuesser, "The 'Defense' of 'Battered Woman Syndrome' in Canada" (1990) 19 Man. L.J. 195.

12 *R. v. Eyapaise* (1993), 20 C.R. (4th) 246 (Alta. Q.B.).

or to negative the proof of *mens rea* (where *mens rea* is understood descriptively to refer to the specific intent, knowledge, and recklessness required for the offence).[13]

II. R. v. LAVALLEE AND EXPERT EVIDENCE ON THE BATTERED WOMAN SYNDROME

THE DECISION OF THE Supreme Court of Canada in R. v. *Lavallee* has been hailed as a landmark decision insofar as the Court admitted expert testimony on the battered woman syndrome. The facts of the case were that the accused, Angelique Lyn Lavallee, had been regularly abused by her common law husband, Kevin Rust, over several years. Lavallee had received medical treatment several times for various fractures, contusions, and bruises caused by Rust. An altercation ensued after a party on 30 August 1986—"wait till everybody leaves," Rust informed Lavallee, "you'll get it then." Handing her a rifle, he told her that if she didn't kill him first, he would kill her. When Rust turned to leave the room, Lavallee shot him in the back of the head, killing him instantly. At trial, Lavallee pleaded self-defense and the jury acquitted her of second degree murder. The Manitoba Court of Appeal set aside the acquittal but it was subsequently restored by the Supreme Court of Canada. In its decision, the Supreme Court considered the question of whether expert testimony from a psychiatrist concerning the defendant's state of mind and the battered woman syndrome was admissible to support the defense of self-defense.

From the perspective of the hypothetical reasonable man, Lavallee's perception of imminent harm and the need for deadly force do not appear to rest on reasonable and probable grounds. Lavallee shot an unarmed man in the back of the head as he was leaving the room—hardly a situation the courts would normally characterize as justified self-defense. Nevertheless, Madame Justice Bertha Wilson, writing for the majority, argued that the Court could not appreciate Lavallee's perspective without attending to expert evidence on the battered woman syndrome. Wilson J. noted that the battering relationship was subject to many myths and stereotypes and was, therefore, beyond the comprehension of the average juror. She argued that expert evidence of the psychological effect of battering was relevant and necessary in this case to assist the court in determining the mental state of the defendant and ascertaining whether her belief in imminent harm and the need for lethal defensive force was reasonable. In her words, "the definition of what is reasonable must be

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[13] Although Canadian law currently recognizes only two forms of the insanity defense, namely the articles relating to fitness and section 16, the courts have been groping towards a kind of compromise defense whereby evidence, usually psychiatric, will be admitted not to establish a full-blown insanity defense but to negative the proof of *mens rea*. For a discussion of relevant cases see D. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell Company Ltd, 1982) at 337–42 and *infra* note 69 and accompanying text.

adapted to circumstances which are, by and large, foreign to the world inhabited by the 'reasonable man.' "[14]

Specifically, Wilson J. held that expert evidence on the battered woman syndrome was needed to assist the court in applying two specific elements of the law of self-defense in the Canadian *Criminal Code*: the *imminence* requirement (section 34(2)(a)) and the *necessity* requirement (section 34(2)(b)).[15] To satisfy these two requirements, Lavallee must demonstrate that she reasonably believed she was in imminent danger of grievous bodily harm at the time she shot Rust, and that she reasonably believed that lethal force was necessary to avoid this harm.[16] The requirement of reasonableness imposes an *objective* standard of reasonableness on Lavallee's *subjective* apprehension of danger and the need for deadly force; it places at issue Lavallee's state of mind at the time she acted in self-defense and asks whether her perceptions were based on *reasonable and probable grounds*.[17]

The rationale behind the *imminence* requirement is that defensive force can only be justified if the defendant faces an uplifted knife or pointed gun, making it reasonable for her to suppose that there is no time to escape or to summon assistance.[18] On this reading of the law, Lavallee's defensive act seems unjustified—since Rust had turned his back to her it would appear that his threat to kill her was not imminent. However, Wilson J. found that the expert evidence of Dr. Shane, a psychiatrist, cast doubt on this conclusion by providing an explanation for why Lavallee reasonably feared imminent danger from Rust in her situation. Dr. Shane testified that the abuse in Lavallee's relationship conformed to the "Walker Cycle Theory of Violence."[19] This theory—named for the clinical psychologist Dr. Lenore Walker—identifies a cycle of violence common to battering relationships which is characterized by three distinct phases: (*i*) the tension building stage; (*ii*) the acute

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[14] *Lavallee*, *supra* note 10 at 114.

[15] The Supreme Court did not address the question of whether Lavallee's actions satisfied the "equal force" requirement as stated in s.34(1) of the *Criminal Code* (reproduced in note 2, *supra*).

[16] *Lavallee*, *supra* note 10 at 113.

[17] On this point the Court quoted the judgment in *Reilly* v. *The Queen* (1984), 15 C.C.C. (3d) 1 at 7–8, which considered the interactions between the subjective and objective components of the law of self-defense in s.34(2) of the Canadian *Criminal Code* (reproduced in note 2, *supra*).

[18] See *Reilly* v. *The Queen*, *ibid.*; *R.* v. *Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.); and *R.* v. *Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.).

[19] Dr. Shane acknowledged his debt to Dr. Lenore Walker in the course of establishing his credentials as an expert witness at the trial.

battering incident; and (*iii*) loving contrition.[20] Wilson J. maintained that the cyclical aspect of battering relationships begets a degree of predictability to the violence that is absent in an isolated encounter between two strangers.[21] This predictability of the battering cycle purportedly confers a special power of "heightened sensitivity"[22] on battered women which imparts the unique ability to detect subtle changes in her batterer's usual pattern of violence that may signal increased danger.[23] According to Wilson J., a woman who has developed this "heightened sensitivity" to her batterer's behaviour need not wait until an attack is in progress to defend herself.[24] This would require her to take an unreasonable and potentially deadly risk since she may be incapable of defending herself at the time of the attack. As her Ladyship explained,

> [D]ue to their size, strength, socialization and lack of training women are typically no match for men in hand-to-hand combat ... [thus, stipulating] ... that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would ... be tantamount to sentencing her to "murder by installment."[25]

Similarly, Wilson J. held that expert evidence on the syndrome can show how Lavallee meets the necessity requirement in self-defense law. To satisfy this requirement, Lavallee must show that she reasonably believed that shooting Rust was the only possible way of preserving herself from death or grievous bodily harm. Though the "necessity" requirement is concerned only with the defendant's options at the actual time of the attack—whether she could retreat or call for help to avoid being harmed—some courts have questioned why a battered women who was aware of

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20 Dr. Walker summarizes the Cycle Theory of Violence in *Syndrome*, *supra* note 8 at 95–96. According to Walker, a battered woman is defined as a woman who has experienced this cycle of violence at least twice (see Walker, *Battered Woman*, *supra* note 8 at xv).

21 Wilson J. drew on the work of Julie Blackman. See J. Blackman, "Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill" (1986) 9 Women's Rts. L. Rep. 227.

22 *Ibid.* at 120.

23 Julie Blackman argues that the battered woman's knowledge of her partner's violence is so heightened that she is able to anticipate the nature and extent (though not the onset) of the violence before the attack is precipitated. In particular, she notes that "a battered woman, because of her extensive experience with her abuser's violence, can detect changes or signs of novelty in the pattern of normal violence that connote increased danger": *ibid.* at 236 and 229.

24 Here Wilson is addressing the complaint, lodged by some critics, that a battered woman's "heightened sensitivity" to impending danger from her batterer should *not* be enough to justify preemptive force; battered women should have to wait until an attack is in progress to defend themselves. See *Lavallee*, *supra* note 10 at 120.

25 *Ibid.* Wilson J. is quoting from *State* v. *Gallegos*, 719 P. 2d 1268 (1986) at 1271 (N.M.).

her partner's potential for violence did not leave him long before her life was in danger. Thus, Lavallee's failure to leave Rust earlier in the relationship, when she became aware of his violent behaviour, may seem to undermine the credibility of her claim that at the time of the incident her act of self-defense was really necessary. If Lavallee had the opportunity to leave Rust before the incident, then perhaps (or so the argument runs) she could have left at the critical moment, rendering her use of deadly force unnecessary.

To help the court understand why Lavallee stayed with Rust, Dr. Shane testified that repeated exposure to abuse had induced a psychological condition which caused her to believe that she was powerless to escape. In Dr. Shane's words, "[a]lthough there were obviously no steel fences keeping her in [Lavallee felt] there were steel fences in her mind which created for her an incredible barrier psychologically that prevented her from moving out."[26] On his view, Lavallee suffered from a form of "learned helplessness"[27] which caused her to "[lose] the motivation to react and [become] helpless and ... powerless ... paralysed with fear."[28] This evidence suggested to Wilson J. that Lavallee's experience of repeated abuse had made her a kind of psychological hostage to Rust. When Rust threatened to kill her on the night in question, her situation was not unlike that of a hostage who had just been informed by her captor that he would kill her in three days. Wilson J. concluded that it would be reasonable for persons who found themselves in such a situation to seize the first opportunity to kill their captor, rather than wait until he makes his attempt.[29]

Regardless of why Lavallee did not leave Rust *prior* to the incident in question, the necessity requirement poses the question of why she did not retreat or call for help instead of exercising deadly force on the night in question. Addressing this

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[26] *Ibid.* at 124.

[27] "Learned helplessness" is a term Lenore Walker borrowed from Dr. Charles Seligman, who performed a gruesome series of electro-shock experiments on dogs to determine the effects of prolonged stress on animal behaviour. He compared the behaviour of two groups of dogs. Group A was placed in cages from which there was no escape; group B was placed in cages which allowed the dogs to jump over a barrier. The floors of the cages of both groups were repeatedly charged with an electric current. After time, Seligman noted that the group A dogs—who could not escape the electric shock— would stop barking and jumping and would endure the shock quietly. This passive behaviour persisted such that, even when the dogs were moved to the cage from which there was easy escape from the shocks, the group A dogs did not even *attempt* to escape. Based on Seligman's research, Walker hypothesized that women subjected to inescapable trauma, such as abuse at the hands of a batterer, would exhibit similar passive behaviour, and would not attempt to escape their batterers even when the opportunity presented itself. See Walker, *Battered Woman*, *supra* note 8 at 67.

[28] *Lavallee*, *supra* note 10 at 121.

[29] *Ibid.* at 125.

question, Wilson J. drew attention to several environmental factors which may constrain a battered woman's ability to leave her batterer. For instance, she noted that battered women may lack the job skills or resources to support themselves; they may have dependent children or parents; there may not be able to obtain police protection or the support of social services; or they may fear retaliation from their batterer. Wilson J. did not, however, investigate the impact of these factors in Lavallee's case.

III. CONCEPTIONS OF REASONABLENESS AND THE BATTERED WOMAN SYNDROME

MADAME JUSTICE WILSON'S JUDGMENT relies extensively upon expert evidence on the battered woman syndrome to support the reasonableness of Lavallee's behaviour and to justify her act of self-defense. While I agree that Lavallee was indeed justified in her act of self-defense, I do not believe that an appeal to the battered woman syndrome supports this conclusion. In part A of this section, I show how the battered woman syndrome actually undermines rather than supports Lavallee's claim of justified self-defense. I begin by briefly exploring the concepts of *justified self-defense* and *reasonable belief*. This exploration indicates that the clinical diagnosis of battered woman syndrome is at odds with the requirement of reasonable belief in self-defense law. In part B of this section, I re-examine the facts in *Lavallee* to show how Lavallee's act of self-defense is justified on its own merits. On my view, Lavallee's personal history, individual characteristics, and socio-economic circumstances support her claim of self-defense. Attention to these contextual and individual factors renders an appeal to the battered woman syndrome unnecessary. Finally, in part C of this section, I suggest a way in which the evidence of the battered woman syndrome may still play a meaningful role in self-defense law.

A. Tension Between Conceptions of Reasonableness and the Battered Woman Syndrome

Canadian self-defense law posits a requirement of *reasonable belief*: an act of self-defense is justified[30] only if it is based on a *reasonable belief* in both the threat of

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[30] Some theorists draw a line between justification and excuse as follows: a justified act is one that the law regards as correct and appropriate under the circumstances, whereas an agent may be excused from committing a wrongful act if, through no fault of her own, she was incapable of meeting the standard required by law due to mental or physical incapacitation. Some regard this distinction as antiquated, relating to "an ancient era preceding the middle ages when justifications absolved, while excuses were merely a matter for mitigation of punishment": see Stuart, *supra* note 13 at 379. Whether or not one draws a distinction between justification and excuse, in contemporary law the legal effect of both appears to be the same.

danger and the need for defensive force. This requirement poses a problem for battered women defendants insofar as the courts have tended to treat battered women's behaviour as deviant and pathological whenever it departs from the behaviour expected of the hypothetical reasonable man. Evidence on the battered woman syndrome was designed to challenge this judicial interpretation of battered women's acts of self-defense by showing how battered women's behaviour is reasonable, and therefore justified, by the context of the situation. Such evidence was originally intended to function in a purely *descriptive* capacity—as an aid to explaining the psycho-social factors that shape battered woman's perceptions, making it possible for the courts to see past common myths and misconceptions about the battering relationship. As Crocker explains, the purpose of expert testimony on the syndrome "is to make the jury see that the woman's actions are reasonable rather than hysterical, inappropriate, or insane, and that the differences between men's and women's perceptions are a legitimate basis for differentiation." Thus, evidence on the syndrome would ensure that "[a] battered woman would no longer have to be judged under a standard that did not include her experience."[31]

Despite its intended application, the syndrome has often been read by the courts as evidence of mental incapacitation or insanity. Feminist legal theorists have rallied against this interpretation, maintaining that the syndrome does not refer to a pathological condition. Arguing against this received view, I will show that the Court's reading of the syndrome as evidence of a pathological condition is not without some justification. I maintain that a close examination of the symptoms associated with the syndrome reveals that features of the syndrome may fail to support the reasonableness of battered women's acts of self-defense, and ultimately, undermine their claims of justified self-defense. Specifically, I find that the psychological symptoms associated with the syndrome are inconsistent with an account of what it means to act reasonably. Indeed, insofar as these psychological symptoms refer to a pattern of cognitive impairment, I will show that evidence that a women is suffering from such symptoms may justifiably be interpreted by the courts as an indication that her reasoning may be impaired.

Consider the way in which the syndrome is usually characterized. The battered woman syndrome consists of both *inter*personal and *intra*personal components. The

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For a discussion of the precise boundaries between justification and excuse, see K. Greenawalt, "The Perplexing Borders of Justification and Excuse," in M.L. Corrado, ed., *Justification and Excuse in the Criminal Law: A Collection of Essays*, (New York: Garland Publishing, 1994). For an alternative account of how justification and excuse apply to self-defense, see Fletcher, *supra* note 7 at 274, 855, and 857; and P. Robinson, "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability," in Corrado, *supra*, 289 at 292.

31 Crocker, *supra* note 7 at 130.

interpersonal component refers to the cycle of violence which is said to be common to all cases of repetitive battering.[32] The intrapersonal component refers to a set of psychological responses alleged to occur in women who have been battered. According to Walker, these responses may include depression, anxiety, low self-esteem, heightened sensitivity, and learned helplessness. In her view, there is a direct relationship between battering and the development of these psychological symptoms:

> Repeated batterings, like electrical shocks [in Dr. Seligman's experiments on caged dogs], diminish the [battered] woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome, whether or not it might. Next, having generalized her helplessness, the battered woman does not believe anything she does will alter any outcome. She says, "no matter what I do, I have no influence." She cannot think of alternatives. She says, "I am incapable or too stupid to learn how to change things." Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.[33]

If battered women do develop the psychological symptoms described by Walker, it is difficult to see how we can rely on their perceptions of reasonableness in a court of law. These symptoms do not appear to increase either the reliability of a battered woman's beliefs or the accuracy of her predictions. Consider the specific ways in which some of these symptoms affect the perception and cognitive abilities of battered women. "Learned helplessness" describes a person whose ability to accurately perceive, evaluate, and adaptively act on her situation is impaired. Thus, a woman suffering from learned helplessness might not be able to perceive or avail herself of alternatives to the use of deadly force even if such options were readily available. The notion of heightened sensitivity suggests a person who is so sensitized to her partner's behaviour that she may well overreact and view things out of perspective. It is possible that a battered woman's heightened sensitivity may make her hypersensitive to her batterer's behaviour, causing her to fear grave danger at the slightest change in this behaviour. It does not follow, however, that the particular behavioural change that triggers her defensive action actually corresponds to a real and present danger.

These considerations suggest that the psychological symptoms of learned helplessness and heightened sensitivity may interfere with a battered woman's ability to accurately perceive and respond to her situation in a reasonable manner. Syndrome advocates argue against this conclusion, maintaining that the symptoms associated with the syndrome do not undermine the reasonableness of a battered

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[32] See note 20, *supra*.

[33] Walker, *Battered Woman*, *supra* note 8 at 49–50.

woman's beliefs or the accuracy of her perceptions.[34] According to syndrome advocates, battered women are neither crazy nor mentally deranged; rather, they are normal persons faced with abnormal and potentially deadly circumstances.[35] In Walker's words, the battered woman syndrome serves merely to identify a "terrified human being's normal response to an abnormal and life-threatening situation."[36] It follows, on this view, that testimony indicating that a battered woman exhibits symptoms of the syndrome should not to be used to discredit her testimony or to invalidate the reasonableness of her act of self-defense. On the contrary, Elizabeth Schneider asserts that such evidence should be used to give "commonality to an individual woman's experience ... [and] make it seem less aberrational and more reasonable."[37] Insofar as the battered woman's syndrome describes a *normal and common response to a traumatic experience*, advocates feel warranted in concluding that the actions of women suffering from the syndrome constitute a *reasonable*, and therefore a *justifiable*, response to their circumstances.[38] On this view, a battered woman's different perceptions of imminent harm and the need for deadly force are reasonable simply because they are what we would expect from someone in her situation. In Lenore Walker's words, it is not the physical reality but "*the psychological reality of these women that justifies their actions*."[39]

If this is true, and the battered woman syndrome is not a mental disorder that impairs the reasonableness of its victims, then why is it that courts have frequently interpreted it in this manner? Feminist legal theorists attribute this unwelcome reading of the syndrome to persistent sexism in the courts. On their view, evidence

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[34] Schneider discusses the tendency of the courts to wrongly interpret the battered woman syndrome as evidence substantiating an excuse: *supra* note 5 at 215. See also the American case of *State* v. *Kelly*, 97 N. J. 178 (1984) at 197.

[35] This belief in the normalcy of battered women's behaviour has led many feminist legal theorists to resist the inclusion of the battered woman syndrome in the third edition of the principal diagnostic manual of psychiatry in North America, the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-III-R*). For instance, Walker claims that the battered woman syndrome has been officially recognized as a sub-category of Post-Traumatic Stress Disorder by psychologists and experts in the field, but she remains concerned about the implications of including the syndrome in the *DSM* (see Walker, *Terrifying Love*, *supra* note 8 at 48–49). For a discussion of other feminists' concerns regarding the syndromization of women labeled as suffering from the battered woman syndrome, see Schneider, *supra* notes 5 and 7; Crocker, *supra* note 7; and Schaffer, *supra* note 11.

[36] Walker, *Terrifying Love*, *supra* note 8 at 180.

[37] Schneider, *supra* note 5 at 216.

[38] Schaffer explains how the battered woman syndrome is intended merely to alert the courts to the "normal" behaviour of women, *supra* note 11 at 620–21.

[39] Walker, *supra* note 8 at 267 (Walker's emphasis).

on the syndrome has been used to sustain the many myths and stereotypes of women in law and society. Elizabeth Schneider identifies the problem as follows:

> Regardless of its more complex meaning, the term "battered woman syndrome" has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this prevents them from acting "normally." ... This is undoubtedly not merely the problem of the term itself—which again, intends to be simply descriptive—but of the stereotypes it triggers for lawyers and judges. Courts are more likely to hear and respond to a perception of women as damaged than as reasonable, so presentation of testimony on battered woman syndrome responds more to and plays on patriarchal attitudes which courts have exhibited toward women and women defendants generally.[40]

Martha Schaffer interprets the tendency to characterize battered women as helpless victims of an incapacitating disorder as more evidence that the courts are unwilling to regard the different experiences of battered women as valid on their own terms. In Schaffer's words,

> The concept that battered women are victims of a syndrome reinforces the notion that battered women's experiences will not be viewed as valid so long as the legal system adopts values based on men's experiences as its norm. The concept that battered women are the victims of a "syndrome" reinforces the notion that common experiences of women which differ from common experiences of men are not legitimate on their own terms. Unless these experiences can be cast as a form of deviance (from an implicit male norm), the legal system is not capable of accommodating them.[41]

While there is no doubt that persistent sexism has skewed the standard of reasonableness in self-defense in favour of the ideal male combatant, I maintain that there is good reason to question the assertion that it is persistent sexism, by itself, that is to blame for the fact that testimony on the battered woman syndrome is read by the courts as evidence of a psychological disorder. The fact is that the psychological symptoms associated with the syndrome do appear to seriously impair the cognitive abilities of battered women. Indeed, syndrome advocates themselves are the first to assert that the syndrome profoundly affects the thoughts and perceptions of battered women. The contention that the syndrome alters cognitive processes and perceptions is pivotal to the claim that battered woman have a *different* conception of reasonableness. While it may be true that the symptoms associated with the syndrome are a "normal" or "common" response to the trauma of repeated battering, it does not follow from this fact that persons suffering from these symptoms are "reasonable." Delusions and hallucinations, for instance, may

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40 Schneider, *supra* note 5 at 207 and 216.

41 Schaffer, *supra* note 11 at 620.

be a normal or common response to certain toxic substances, but we would still want to insist that these symptoms seriously impair psychological processes.[42]

The claim that the battered woman syndrome is a *normal* response to a traumatic situation might be interpreted to mean three different things: (*i*) that the symptoms associated with the syndrome are *statistically normal*, in the sense that they are commonly manifested by victims of battering; (*ii*) that the symptoms of the syndrome are *understandable*, in the sense that we can understand how someone subjected to abusive treatment might develop these symptoms; or (*iii*) that the symptoms are normal in the sense that an individual who manifests these symptoms is *free of functional impairment*.[43] As Schopp *et al.* point out, the first two interpretations of what syndrome advocates might mean by the term "normal" are compatible with viewing the syndrome as a psychological disorder which impairs reasoning. The third interpretation, which interprets "normal" as meaning "free from functional impairment," is incompatible with the view that the syndrome refers to a psychological disorder.[44] Since syndrome advocates argue against interpreting the battered woman syndrome as evidence of a psychological disorder, they seem to be committed to the view that victims of the syndrome are free from psychological impairment. But such a position is hard to square with accounts of how the syndrome affects the battered woman's ability to accurately perceive, evaluate, and adaptively act upon her own situation. Whether you regard women suffering from learned helplessness as incapable of recognizing more adaptive alternatives to continued participation in an abusive relationship, or you see them as suffering from a dysfunction that renders them incapable of acting on these alternatives, learned helplessness constitutes a form of psychological impairment. If it is true that battered women commonly manifest the symptoms of psychological impairment identified with the syndrome—and some recent studies have cast doubt on this claim[45]—then we must conclude that the battered woman syndrome constitutes a psychological disorder, and therefore, a type of mental illness.

Despite the opposition of feminist legal theorists to the idea that the battered woman syndrome refers to a psychological disorder, it is interesting to note that Lenore Walker has herself referred to the syndrome in this context. Commenting on the expert testimony she prepared for a trial in which a battered woman was being tried for shooting her abusive husband, Walker noted that several defenses were available to her client: insanity, diminished capacity, and self-defense. Walker

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[42] R. Schopp, B. Sturgis & M. Sullivan, "Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse" (1994) U. Illinois L. Rev. 45 at 96.

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.* at 53–64.

stated that the question of which defense or excuse was most appropriate to her client's defense rested on a determination of how reasonable her client's perception of danger had been: "[i]f her perception had been based on reality, then she'd shot [her husband] in self-defense; if her perception had been tainted by mental illness, she would have to plead either insanity or diminished capacity ... ."[46] Walker explained that battered women's helplessness is not necessarily a reflection of their physical reality but may instead derive from their "negative cognitive set, or their perceptions of what they could or could not do, not by what actually existed."[47] Thus, in cases where the battered woman's learned helplessness does not reflect her reality, Walker concedes that the courts should respond by treating the learned helplessness as evidence of mental disorder.[48]

What follows from the claim that the battered woman syndrome refers to a psychological disorder? First, it is important to note that the fact that a person is suffering from a mental illness does not mean that all of her perceptions are unreasonable. The claim that symptoms associated with the syndrome are consistent with a mental disorder does not by itself settle the matter of whether victims of the syndrome can form reasonable beliefs about imminent danger and the need for defensive force. An answer to this question depends upon whether women suffering symptoms consistent with the syndrome can satisfy the conditions necessary for the formation of a reasonable belief. But what are the conditions necessary for reasonable belief? In ordinary language, we might say that a belief is reasonable if it is formed and held according to reason or for sound reasons. In tort law, a reasonable person has been described as one who possesses "normal acuteness of perception and soundness of judgment."[49] Thus, it appears that a reasonable belief in both ordinary and legal usage is one which is grounded in good reasons and sound judgment. Schopp *et al.* confirm this reading, stating that "a reasonable belief is formed and held on the basis of ordinarily reliable evidence as acquired by unimpaired perception and evaluated through normally sound reasoning and judgment."[50] These considerations suggest that a diagnosis of battered woman syndrome is inconsistent with both ordinary and legal accounts of reasonable belief—symptoms of the syndrome may interfere with a battered woman's ability to exercise sound judgment and form reasonable beliefs.

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[46] Walker, *Terrifying Love*, *supra* note 8 at 184–85.

[47] *Ibid.*

[48] Walker, *Battered Woman*, *supra* note 8 at 48.

[49] *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851) at 135. Note that the Supreme Court also applies a similar conception of reasonable belief as a belief which is based on sound reasons. See also *Restatement (Second) of Torts* §11 (1965) comment a.

[50] Schopp, Sturgis & Sullivan, *supra* note 45 at 92.

If women suffering from the syndrome are incapable of reasoning in a way that conforms to our ordinary conceptions of reasonableness, then it follows that attempting to characterize such women as reasonable invokes a different standard of reasonableness for battered women. Some feminists have embraced the idea of a separate standard of reasonableness for battered women as the only way of ensuring that battered women receive a fair trial.[51] To treat battered women fairly, they maintain that we must acknowledge the fact that battered women's perceptions have been distorted by an abusive situation and consider what sort of perceptions would be reasonable for such persons. This proposal is cause for concern. Can one advocate a special standard for women suffering from the battered woman syndrome and at the same time refrain from applying this (or even some other) standard to other persons whose perceptions of reasonableness may be different from our own? Such a proposal seems to commit us to elaborating special standards for the "reasonable mentally handicapped person" and the "reasonable psychotic." To avoid this slide, we need to find some way of explaining why reasonableness should be attached to one disorder but not to others. Alternatively, we would have to develop a coherent notion of reasonableness that can vary according to the presence of psychological disorders, whereby different disorders will be held to vary in the manner and degree to which they distort psychological processes.

Even if it were possible to devise a scheme that would tell us how to develop different standards of reasonableness corresponding to different disorders—a doubtful prospect—attempting to apply these differential standards threatens to undermine the principles which sustain self-defense law. The doctrine of self-defense is designed to protect the rights of all individuals to self-defense and bodily integrity. It is premised on the belief that individuals must show equal concern for the safety and security of other members of society. What counts as showing equal concern for persons in self-defense rests on a judgment about how much risk we think each of the parties in a confrontation should bear.[52] When two persons confront one another, each party assumes certain risks: the person who perceives a threat bears the risk of a potentially life-threatening attack if she does not respond in self-defense, and the person who allegedly poses this threat bears the risk that the victim wrongly perceives him to be a threat and will react with lethal defensive force. In order to ensure that both parties to a confrontation bear these risks equally we must ensure that: (*i*) the alleged victim is protected from unreasonable threats; and (*ii*) the alleged assailant is protected from unreasonable self-defense. Ensuring that the parties face equal risks requires that we impose an objective standard of

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[51] For a discussion of courts and commentators who have a endorsed a separate standard of reasonableness for battered women, see H. Maguigan, "Battered Women and Self-defense: Myths and Misconceptions in Current Reform Proposals" (1991) 140 U. Pa. L. Rev. 379.

[52] My thanks to Arthur Ripstein for bringing this issue to my attention.

reasonableness on a person claiming self-defense, one which requires her to demonstrate that her subjective perception of fear was grounded in facts about her situation that warranted her act of self-defense.[53] A claim of justified self-defense does not require that the defendant be correct in her perception of danger and the need for deadly force, since one can reasonably but mistakenly believe in the need for self-defense. As Lafave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief."[54] It is crucial, however, that the defendant show more than just an *honest* belief in the need for self-defense: "[o]ne who because of voluntary intoxication thinks that he is in danger of imminent attack, though a sober man would not have thought so, does not have the reasonable belief which the law requires."[55]

Thus, the claim by syndrome advocates that battered women's psychologically impaired perceptions should count as reasonable effectively asks the alleged assailant to bear the risk of the woman's perceived fear. This distributes the risks between the two parties unequally, making the battered woman's fear the measure of her alleged assailant's security and exposing the alleged assailant to unreasonable self-defense.[56] Such a result conflicts with the idea that society should ensure that its members are protected against harm that may be inflicted on them as a result of another person's unreasonable perceptions of fear and danger. In keeping with the idea that the parties to an altercation should bear the risk of harm equally, I maintain that a battered woman's "psychological reality" does not justify her belief

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[53] By "objective standard" I refer to a standard that would apply to anyone who found themselves in a similar situation. Thus, the concept of an objective standard is not necessarily opposed to individualization in the sense that there is room to consider certain individual characteristics of the defendant, such as her strength, handicaps, ability to defend herself, etc. Adopting an individualized approach need not entail the abandonment of objective standards: it only requires that we abandon those objective standards that are so abstract and general that they set aside the individual's circumstances and characteristics in their enthusiasm for applying the rule of the law. Legal standards will not be any less objective if they include a recognition of the fact that context may alter an individual's circumstances such that we may change our conception of what may reasonably be expected from that particular individual under those circumstances. Standards become subjective when the question of what is reasonable depends solely upon the perceptions of the accused. Contextualization and its subspecies, individualization, still require that the individual satisfy an external test of what is reasonable. The Courts must be convinced that the defendant's reasons for acting were justifiably motivated by their individual circumstances such that if someone else found themselves in a similar situation, it would be reasonable for them to act in the same manner.

[54] See Lafave & Scott, *supra* note 2 at 393.

[55] *Ibid.* at 393–94.

[56] The particular phrasing of this point is owed to Arthur Ripstein.

that she had to defend herself. Individuals should be required to have a reasonable belief in the imminence of danger to warrant the use of deadly force in self-defense.

If Lenore Walker is right, and women who have been battered more than once manifest the psychological symptoms associated with the battered woman syndrome, then it seems to follow from my argument that battered women should not be able to claim justified self-defense. However, we need not draw this unwelcome conclusion. On the contrary, there is good evidence to support the claim that many battered women do not suffer from the symptoms associated with the syndrome, despite their experience of repeated battering. Indeed, some theorists have gone so far as to question whether the syndrome actually exists, citing recent studies that call into question the findings of Lenore Walker.[57] Whether or not the syndrome actually exists and battered women exhibit symptoms of learned helplessness and heightened sensitivity, I maintain that battered women's perceptions of imminent harm and the need for deadly force can be shown to reflect good judgment and sound reasoning in many cases. The failure of the Court to appreciate this fact rests with their neglect of the context in which battered women act in self-defense, their personal history, and their individual characteristics. By attending to these contextual and individual factors, I maintain that many battered women's acts of self-defense are justified on their own merits, rendering a separate appeal to the battered woman syndrome both unnecessary and inappropriate.

B. R. v. *Lavallee* Revisited

By re-examining the facts of the *Lavallee* case, I will briefly illustrate how attention to individual and contextual factors shows that Lavallee's act of self-defense is justified on its own merits. Expert testimony still plays a crucial role in supporting Lavallee's claim of justified self-defense. However, this testimony must focus on the battering relationship and the socio-economic circumstances of battered women, and not the battered woman syndrome and its psychological effects. The justification for admitting this expert testimony remains the same: it is introduced to facilitate the court's appreciation of the special circumstances surrounding the battering relationship which are often beyond the ken of the average judge or juror due to the prevalence of cultural myths and sexist stereotypes.

First, the question of whether Lavallee faced *imminent danger* at the time of the incident can be addressed simply by examining the contextual and individual factors which shaped Lavallee's perception of reasonableness. Lavallee's claim that Rust was capable of causing her grievous bodily harm is supported by independent testimony—friends, neighbors, police officers, and emergency room physicians had witnessed or overheard several fights and observed evidence of injuries Rust had

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[57] Several of these studies are discussed in Schopp, Sturgis & Sullivan, *supra* note 42 at 53–64.

inflicted on Lavallee.[58] In addition, Lavallee's familiarity with Rust's pattern of violence gave her the knowledge and experience to predict signs of impending danger not perceptible to others. Relying on this experience, Lavallee was able to discern a change in Rust's behaviour on the night in question which suggested to her that Rust would follow through with his threat to kill her. The evidence Lavallee provided (communicated through Dr. Shane's testimony) for this heightened danger included the fact that, unlike previous death threats, this time Rust actually loaded a weapon and handed it to Lavallee. This change in his behaviour signaled to Lavallee that the impending attack, unlike previous attacks, would be life-threatening.

These considerations, in themselves, are sufficient to demonstrate the reasonableness of Lavallee's belief that she faced imminent danger from Rust. We need not invoke the battered woman syndrome and attribute some psychologically altered state of awareness such as "heightened sensitivity" to justify Lavallee's belief that she feared imminent danger from Rust. By observing the facts of the situation from Lavallee's perspective, that is, from the perspective of a person who is intimately acquainted with Rust's pattern of violence, Lavallee's belief that she faced imminent danger from Rust appears reasonable and justified.

Second, the question of whether Lavallee reasonably perceived that deadly force was necessary to preserve her from harm may also be addressed without appealing to the battered woman syndrome. The determination of necessity rests on an assessment of the options available to Lavallee at the time of the incident, such as whether she could have summoned the assistance of others, or retreated to safety. The court heard evidence of Lavallee's history and, in particular, her previous efforts to obtain assistance from friends, neighbors, doctors, and police. Police had been called to her house on numerous occasions, not once laying charges against Rust. Lavallee had taken several trips to the hospital for injuries sustained at the hands of Rust. Although the doctors who attended to her past injuries suspected she had been beaten, they made no effort to report this to police or social workers.[59] On the night in question, Lavallee's appeals to friends for assistance were ignored. Norman Kolish testified that he witnessed Lavallee pleading with Rust to leave her alone and that she had sought protection by trying to hide behind Kolish. Lavallee also solicited the help of a friend named Herb. She told Herb that Rust was going to beat her and Herb responded by saying, "[y]eah, I know," and adding that if Lavallee was "his old lady things would be different."[60] Neither Herb nor Kolish came to her aid at any time.

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[58] *Lavallee, supra* note 10 at 102.

[59] *Ibid.*

[60] *Ibid.* at 101.

Lavallee's history of failed attempts to obtain assistance are sufficient to support her claim that she reasonably believed that self-help was the only viable option. Testimony that Lavallee was suffering from "learned helplessness," and due to this psychological condition could not be expected to seek assistance, undermines Lavallee's claim. It denies the very real efforts on Lavallee's part to seek assistance. It also suggests that her failure to secure the help of others was a reflection of Lavallee's mental condition and not the reality of her situation.

Second, the question of whether retreat was a possible option for Lavallee may be addressed with reference both to the location of the incident and Lavallee's socio-economic circumstances. It should be noted that while there is no statutory requirement to retreat before resorting to violence in self-defense, case law has tended to favor such a requirement in the interest of preserving life over the protection of property or honor.[61] However, as Madame Justice Wilson notes in her judgment, the law has also tended to treat the victim's home as her last line of defense, permitting her to remain and defend herself rather than flee.[62] But even if the law is interpreted so as not to require retreat from one's home, there remains the question of whether Lavallee could have avoided the need for deadly force entirely by ending her relationship with Rust at some earlier date. The fact that Lavallee did not leave in the days or weeks prior to the incident may seem to suggest that she was not really in danger at the time of the incident. On this reading of the evidence, it might appear that Lavallee killed Rust out of malice or for revenge. Expert testimony can rule out this possibility by explaining the particular socio-economic circumstances of many battered women. For instance, an expert could explain how battered women often do not have the resources or skills to make it on their own, they may have dependent children, and social assistance may be limited—many communities do not have shelters, and the ones that do often have long waiting lists and permit only short stays. In addition, the expert could relate statistics that indicate escape from a batterer carries grave risks: batterers have been known to retaliate by hunting down their partners and, upon finding them, beating them more severely or even killing them. The police offer little protection and the enforcement of restraining orders is often lax.

These considerations suggest that Lavallee's failure to leave prior to the incident may have been motivated by the reasonable judgment that leaving was not a viable option. We need not suppose that Lavallee's failure to leave is attributable to learned helplessness when her socio-economic circumstances provide ample evidence that retreat to safety was not a real alternative.

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[61] See Stuart, *supra* note 13 at 397–98; *R. v. Deegan* (1980), 49 C.C.C. (2d) 417 (Alta. C.A.).

[62] *Lavallee*, *supra* note 10 at 124. Wilson J. refers specifically to the case of *R. v. Antley*, [1964] 2 C.C.C. 142 (Ont. C.A.). See also *Brown v. United States of America*, 256 U.S. 335 (1920).

Finally, to address the *equal force* or *proportionality* requirement—the requirement that the force used by the defendant be no more than is necessary to avert the threatened harm—we may again refer to the facts of the situation and to the particular characteristics of the defendant. The proportionality requirement entitles one to use defensive force so long as it is proportional to the unlawful force used against you. Thus, it is permissible to use deadly force to defend oneself against deadly force. Given that Rust threatened to shoot Lavallee, it would appear that she was justified in using lethal force against him. However, the fact that Rust was not actually in possession of a weapon at the time that Lavallee shot him complicates the matter. By attending to Lavallee's history, however, her decision to shoot Rust when he was unarmed seems reasonable. The evidence clearly indicates that Lavallee had gotten the worst of every beating. Clearly, she could not defend herself against Rust without a weapon and, if there had been a struggle, she would more than likely have lost her hold on the weapon only to have it used against her.

Considerations about Lavallee's personal history and individual circumstances suggest that Lavallee was reasonable in using the weapon against her unarmed batterer. Appealing to the battered woman syndrome does not help to explain why Lavallee was justified in using deadly force against Rust. Indeed, the explanation which the syndrome provides for Lavallee's victimized condition, namely, the symptom of learned helplessness, seems inconsistent with Lavallee's defensive action. If the syndrome is correct and a battered woman may be "beaten so badly ... that ... she loses the motivation to react and becomes helpless and ... powerless,"[63] it is difficult to imagine how a woman in this condition might be able to summon the will to act in her own defense.

This review of the facts in *R. v. Lavallee* indicates that a strong case can be made for the reasonableness of Lavallee's act of self-defense by attending solely to contextual and individual factors. Attention to these factors reveals that Lavallee's perception of imminent harm and the need for deadly force was reasonable and justifiable given her personal history, socio-economic circumstances, and individual characteristics. We need not appeal to the battered woman syndrome and invoke symptoms of psychological impairment to make this point. Indeed, if anything, suggesting that Lavallee's perceptions of imminent harm and the need for deadly force were conditioned by a psychological disorder induced by trauma tends to undermine the reasonableness of her defensive actions.

This is not to suggest, however, that expert testimony does not have a role to play in the *Lavallee* case. On the contrary, expert testimony on the battering relationship and the socio-economic circumstances of battered women remains crucial to Lavallee's defense. Such testimony serves to debunk the myths and

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[63] *Lavallee, supra* note 10 at 121.

stereotypes which surround the battering relationship, thereby facilitating the court's appreciation of Lavallee's particular circumstances. Evidence on the battered woman syndrome is not required to make this point. Expert testimony on the contextual and individual factors relating to the battering experience, including evidence on the cycle of violence, can be successfully dissociated from testimony on the battered woman syndrome.

The battered woman syndrome, as it is currently understood, suggests that there is a causal relationship between the cycle of violence and the development of psychological symptoms, such as learned helplessness, depression, and low self-esteem. However, we need not accept this characterization. Recent studies have cast doubt on the alleged causal relationship between the cycle of violence and the development of these psychological symptoms, suggesting that battered women do not exhibit a higher incidence of depression and low self-esteem than other members of society.[64] In addition, there is some debate as to whether Seligman's research on animals, which purportedly identified the phenomenon of learned helplessness, can be appropriately applied to humans.[65] These considerations make it reasonable to suppose that experience with the cycle of violence does not necessarily lead to the development of such symptoms. And, given my argument above to the effect that the psychological symptoms associated with the syndrome may undermine the conditions necessary for reasonable belief, it seems wise to avoid invoking these symptoms to explain defensive behaviour when attention to contextual and individual factors will suffice.

C. R. v. *Eyapaise*: A Continued Role for the Battered Woman Syndrome

While there is a strong argument for resisting an appeal to the battered woman syndrome in cases like *Lavallee*, where the defendant's actions are justified by her circumstances, the battered woman syndrome still has a role to play in the courts. For instance, an appeal to the syndrome seems appropriate in the case of *R. v. Eyapaise*[66] since it helps us understand why the defendant felt the need to defend herself with lethal force in a situation where she did not face grievous bodily harm. In this instance, evidence on the syndrome may be used to support a mitigated sentence or even an acquittal on the grounds that *mens rea* was negatived because the accused lacked the specific knowledge and intent to commit the offence.[67]

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[64] See the research cited by Schopp *et al.*, *supra* note 42.

[65] *Ibid.*

[66] *Supra* note 12.

[67] See Stuart, *supra* note 13.

In this case, the defendant Nellie Eyapaise was charged with assault with a deadly weapon. On the night the assault occurred, Eyapaise accompanied her cousin and a stranger, Kenneth Boutin, to her cousin's house to continue an evening of drinking. At the house, Boutin proceeded to grab Eyapaise about the breasts and thighs. Eyapaise pushed Boutin away repeatedly. When she tried to get up, Boutin grabbed her and pulled her towards him. Eyapaise broke free apparently without a struggle, grabbed a knife, and stabbed Boutin in the neck causing him serious injury. In her defense, Eyapaise claimed that she suffered from the battered woman syndrome due to a history of battering relationships, and that it was her affliction with the syndrome that caused her to fear grievous harm from Boutin. While acknowledging that Eyapaise's history may have contributed to her fear, the court convicted her on the grounds that there were other means of assistance available to her. The judge, McMahon J., maintained that "[h]er cousin was present and could have intervened, his wife was in an adjacent room and apparently sober. She could have left, a telephone was close, and [Boutin] had stopped his objectionable conduct for a while."[68]

Was the Court right in convicting Eyapaise? The facts of the case seem to indicate that, unlike Lavallee, Eyapaise did not have reasonable and probable grounds for believing that she faced imminent danger necessitating the use of lethal force. Even if we examine the broader context of the situation and take into account Eyapaise's history of abusive relationships, this history does not warrant Eyapaise's defensive behaviour. The fact that Eyapaise was battered by men in the past helps us to understand why she might have been afraid of Boutin on the night in question, but it does not render her perception of danger reasonable. Unlike Lavallee, Eyapaise did not have a prior relationship with Boutin, so she was not in any position to judge whether Boutin's advances would escalate to violence. Moreover, Eyapaise's use of a lethal weapon to fend off Boutin's advances seems out of proportion to the force used against her, especially in light of the fact that Boutin readily released Eyapaise when she pushed him away. Finally, there does not seem to be any reasonable explanation for why Eyapaise did not pursue alternatives to the use of self-help, such as soliciting the help of her cousin's sleeping wife or calling the police. Moreover, the fact that the incident did not occur in her own home, coupled with the fact that Eyapaise had no reason to suppose she would be prevented from leaving or pursued if she fled, supports a presumption in favor of retreat over the use of lethal force.

Arguably, expert evidence relating Eyapaise's experiences might cast doubt on the viability of these options. It is possible that her experience with past battering relationships had taught her that social agencies, friends, and even relatives,

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[68] *Eyapaise, supra* note 12 at 246.

could be counted on for assistance. Perhaps, she had attempted to retreat from an abuser in the past, only to be pursued and attacked. If so, then her belief that she had no other option but defensive force would appear to be a reasonable inference from past experience. Nevertheless, there remains no way to justify Eyapaise's personal belief that Boutin, in particular, posed a danger to her. Eyapaise did not have sufficient knowledge of Boutin's past behaviour to predict whether his unwanted touching would lead to violence. Indeed, the fact that he immediately withdrew when rebuked by Eyapaise would seem to suggest that he posed no threat. Given these facts, lethal force in response to Boutin's unwelcome advances constitutes an unwarranted use of force under the circumstances.

Though the evidence strongly suggests that Eyapaise was not justified in acting in self-defense, we might still question whether she should be held responsible for her actions. There remains the issue of whether Eyapaise was capable of appreciating the nature and quality of her criminal behaviour. The evidence suggests that Eyapaise honestly believed that Boutin intended to cause her grievous bodily harm. There is no evidence of malice on Eyapaise's part, and her fear appears to be a response conditioned by years of abuse. Evidence on the battered woman syndrome can help to explain how Eyapaise's perceptions of imminent harm and the need for deadly force were distorted by the trauma of battering. These distorted perceptions explain why she inaccurately assessed the danger Boutin posed to her, and why she failed to pursue alternatives to the use of lethal force. But these distorted perceptions also suggest that she may have been incapable of appreciating the nature and quality of her actions, and of recognizing the fact that her use of lethal force against Boutin was unjust and unlawful under the circumstances.

While a defense of mental incapacitation may seem appropriate in Eyapaise's case, there are a number of concerns raised by such a defense. Chief among these concerns is the fear that we will be encouraging the courts to view all battered women's defensive acts as unbalanced. But we might also be concerned that insanity inaccurately describes Eyapaise's mental condition. Eyapaise's perceptions and judgments are not the perceptions and judgments of someone who is insane. On the contrary, Eyapaise's unreasonable fear of Boutin is similar to the unreasonable fears expressed by people who suffer from phobias. Eyapaise is no more insane that a person suffering from claustrophobia. Like a phobic, however, her ability to reason soundly in circumstances relating to her traumatic experience is seriously impaired. This suggests that instead of treating her as insane, the law should regard evidence on the battered woman syndrome as evidence which negatives *mens rea*. Thus, a women who has a personal history of battering may honestly, but mistakenly, believe that she faces grave danger necessitating the use of defensive force. Though her false belief may cause her to harm an innocent person, she lacks the criminal intent requisite for conviction.

When an accused is charged with an offence requiring proof of specific intent, there is much authority in Canadian law allowing evidence that the accused was suffering from a disease, although falling short of mental disorder, to be used to negative the specific intent required for the offence.[69] This doctrine is distinct from the specialized diminished capacity defense to murder in English law which provides that a person suffering from "abnormality of the mind" which impaired his legal responsibility should be "liable instead to be convicted on manslaughter."[70] The Canadian approach relies instead on an interpretation of a substantive *mens rea* requirement and involves a determination of whether the defendant had the mental state required to prove the offence. Canadian law does not posit a special category of murder under extenuating circumstances. Several decisions of various provincial courts of appeal have allowed psychiatric evidence which is insufficient to establish the defense of insanity to, nevertheless, be admitted to negative the proof of *mens rea*.

For instance, the Quebec Court of Appeal in *R. v. Meloche* held that the suicidal tendencies of the accused, though insufficient to establish insanity, might nevertheless indicate a "state of mental weakness such that his will to commit the three homicides was seriously affected."[71] The same Court expressed a similar point in *Lechasser* v. *R.* and held that evidence not establishing insanity may nevertheless be "sufficiently strong to create a reasonable doubt as to the capacity of the accused to formulate the specific intent that the law requires."[72] The Ontario Court of Appeal has expressed similar sentiments in both *R. v. Browning*[73] and *R. v. Hilton*.[74] In *Browning* the Court spoke of the "specific intent" required for murder,[75] and in *Hilton* the Court referred to the necessity of instructing the jury to consider such evidence "along with all the other evidence in determining whether the accused had the intent requisite for murder."[76] The Supreme Court of Canada in *Cooper v. R.* did not object to the attempt at trial to avoid the defense of insanity by

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[69] See Stuart, *supra* note 13, and P. Knoll, *Criminal Law Defenses*, 2d ed. (Toronto: Carswell, 1994) at 104.

[70] See *The Homicide Act*, 1957 (5 & 6 Eliz. 2), c. 11.

[71] *R. v. Meloche* (1977), 34 C.C.C. (2d) 184 (Que. C.A.) at 193.

[72] *Lechasser v. R.* (1978), C.R. (3d) 190 (Que. C.A.) at 192.

[73] (1977) 34 C.C.C. (2d) 200 (Ont. C.A.).

[74] (1977) 34 C.C.C. (2d) 206 (Ont. C.A.).

[75] *Browning*, *supra* note 73 at 202.

[76] *Hilton*, *supra* note 74 at 208.

adducing medical evidence to deny proof of *mens rea*.[77] And, in R. v. *Rabey*, the majority of the Supreme Court approved the judgment of the Appeal Court that if the defense of insanity was rejected, there could be consideration of the psychiatric evidence in respect of the specific intent element of the offence charged, namely, causing bodily harm with the intent to wound.[78]

Evidence negativing *mens rea* might lead either to an acquittal or mitigation of sentencing. The *Criminal Code* (section 672.54) states that a person who is found not criminally responsible due to mental disorder must come before the Review Board which may make one of several dispositions, including discharge, discharge with conditions, or detention. Whether the accused is discharged or remanded to a psychiatric hospital depends upon the nature of the mental disorder and the degree of threat the accused poses to society. However, in cases where psychiatric evidence is used to negative *mens rea* but not to prove mental incapacitation, it is less clear how the Courts should respond. If the Court treats these cases in the same manner as cases of mental incapacitation, then the question of whether Eyapaise should be discharged or held for treatment depends upon whether she poses a threat to society. Arguably, if Eyapaise reacts with excessive violence to certain situations, she may well pose a threat to innocent bystanders. This concern might lead us to suggest that Eyapaise should be detained for treatment. However, the Court should also take into account the fact that society is partly to blame for producing Eyapaise's unreasonable fears by repeatedly failing to protect her from violence in the past. Perhaps we ought to consider the possibility that it is society, and not Eyapaise, that needs treatment. A society that provided sufficient police and court protection for women like Eyapaise would go along way to ensuring that women did not feel the need to exercise deadly force in their own defense.

IV. Conclusion

Prior to the introduction of evidence on the battered woman syndrome, insanity was the only defense the courts would countenance for women who had killed their batterers. Expert evidence on the syndrome has been instrumental in helping the Courts appreciate the reasonableness of battered women's acts of self-defense. By speaking to the circumstances and perspectives of battered women, this evidence has helped to eradicate the many myths and stereotypes that surround the battering relationship and has shown how the defensive behaviour of battered women satisfies the requirements of self-defense. Despite this progress, there are a number of difficulties engendered by expert evidence on the battered woman

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[77] *Cooper* v. *R.* (1980), 51 C.C.C. (2d) 129 (S.C.C.).

[78] R. v. *Rabey* (1977), 79 D.L.R. (3d) 414 (Ont. C.A.), affirmed (1980), 15 C.R. (3d) 225 (S.C.C.).

syndrome. Feminist legal theorists have found that expert evidence has painted a portrait of battered women as syndromized, emphasizing battered women's victimization at the expense of their agency. Instead of facilitating a claim of justified self-defense, evidence on the syndrome has fed into existing stereotypes of battered women as helpless victims leading some courts to regard a battered woman's act of self-help as evidence that she was not really a battered woman.

It is more than persistent sexism that is to blame for this unwelcome interpretation of the syndrome. As I have argued, evidence on the syndrome appears to undermine a battered woman's claim of self-defense insofar as the psychological symptoms associated with the syndrome conflict with both legal and commonsense conceptions of what it means to formulate a reasonable belief. Learned helplessness, for instance, suggests a person who is incapable of accurately perceiving and responding adaptively to her situation. Unless we invoke a special standard of reasonableness for battered women, an approach which risks stigmatizing battered women and undermining legal universality, the perceptions of someone suffering from learned helplessness do not appear to satisfy even a gender-neutral standard of reasonableness.

How do these considerations impact on the use of expert evidence on the battered woman syndrome to support a claim of justified self-defense? It is my view that evidence on the syndrome should *not* be invoked in cases where the battered woman's perception of imminent danger and the need for defensive force can be characterized as reasonable given due attention to contextual and individual factors. A battered woman's judgment that defensive force was necessary to preserve her from harm is often a sound inference based on past experience. It is not necessary to appeal to the battered woman syndrome and the symptoms of heightened sensitivity and learned helplessness to make this point. Indeed, as I have argued, characterizing a battered woman's perceptions as the result of an abuse-induced mental state ultimately undermines the reasonableness of battered women's acts of self-preservation. Wilson J.'s judgment in *Lavallee*, while deserving of praise for its sensitivity to the contextual and individual factors affecting Lavallee's perception of reasonableness, can nevertheless be criticized for needlessly invoking the battered woman syndrome and thereby jeopardizing Lavallee's claim of justified self-defense.

This does not mean, however, that expert evidence has no part to play in self-defense trials. Quite the contrary; such evidence is crucial to ensuring that the courts appreciate the reasonableness of battered women's acts of self-defense. An expert on the battering relationship (who need not be a clinical psychologist) can direct the Court's attention to the contextual and individual factors which may have conditioned the battered woman's perceptions. Without invoking the syndrome, this expert can speak to the knowledge acquired by battered women who have experienced the cycle of violence (which is not the same as ascribing a

symptom of heightened sensitivity). She can explain the socio-economic circumstances faced by many battered women—e.g., inadequate police protection, nonexistent or overcrowded shelters, and the lack of other forms of social support—and explain how these circumstances may have shaped the defendant's belief that she had no alternative to self-help. Finally, an expert can focus attention on the particular characteristics of an individual battered women—e.g. skills, resources, talents, and physical attributes—which may impact both on the woman's ability to defend herself against her batterer and her belief that she could not escape. The use of this expert evidence is justified on the grounds that the situation of battered women is beyond the ken of the average judge or jury whose perspective may be clouded by sexist stereotypes and cultural myths. Thus, an expert's knowledge may still be necessary to ensure that the requirements of self-defense law are applied in a manner that is sensitive to the different experiences and perspectives of battered women.

Evidence of the battered woman syndrome, particularly its psychological aspects, will not support a defense of justified self-defense and is inappropriate in cases where attention to contextual and individual factors indicates justified self-defense. However, in cases where the battered woman's perceptions of imminent harm and the need for deadly force are not substantiated by the context of the situation, evidence on the psychological effects of the syndrome may be useful to explain why the defendant nevertheless felt the need to exercise lethal force in self-defense. In such cases, however, evidence on the battered woman syndrome may serve either to prove mental incapacitation or to negative *mens rea*, that is, the specific intent to commit the offense. A finding of not criminally responsible due to mental incapacitation will be appropriate in extreme cases where the defendant's ability to reason has been severely compromised by her traumatic experience. However, in cases where the defendant exhibits a mental disorder which falls short of mental incapacitation, a mitigated sentence or even an acquittal may be appropriate if the mental disorder was sufficient to negative *mens rea*.