What The Law Owes
An Examination of Legal Defences Available for Victims of Domestic Abuse Violence

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Introduction to the topic and thesis

"Domestic Violence violates the principles at the heart of the moral vision (of human rights): the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of men and women"[1]

Despite being a fundamental part of human rights, domestic violence cases across the globe have been all-time high. Canada alone reports approximately 400,000 victims in 2019[2]. Additionally, 1 in 4 women and 1 in 9 men in the United States of American have experienced domestic abuse violence[3]. From these statistics alone, the severity of the problem is clear. The problem of domestic abuse itself is extremely multi-faceted, with attributed causes to mental health, culture, economic income, etc.. As such, the solution to eliminating the problem can be difficult. Perhaps in part because of its complexities, domestic abuse violence also has a significant economic impact[4] - although there is no doubt that domestic abuse violence has always been a moral issue at heart.

Under the Criminal Code of Canada, family violence can lead to prosecution in terms of physical sexual, or psychological abuse, as well as administration of justice through court-mandated orders[5]. While the intention of these laws is to deter overall violence and harassment, these laws are not specifically targeted towards criminalising domestic abuse cases. As such, an identifiable gap between family violence and justice can be found.

As such, the objective of this paper is to study how Canada's legal system is involved in the fight against domestic abuse. Additionally, a section of this paper will be devoted to studying how the Canadian perspective may differ on an international scale, specifically in comparison to the legal perspectives of the United States.

Typically, the research paper would encompass a broad perspective on how the multi-facets of criminal justice work towards breaking the cycle of domestic abuse. However, due to the 6-week span of the project and the significance of defence in the role of victim acquittal, this paper will solely focus on the implications of how various defences were applied and discussed by the Canadian and American courts. Moreover, the statistical significance of female victims has provided reasons for this paper to narrows its focus specifically on women-victim cases. It should be stressed that domestic abuse can happen to both men,

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[1] Dorothy Q. Thomas and Michele E. Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Quarterly* 15, no. 1 (1993): pp. 36-62, https://doi.org/10.2307/762650.
[2] "Family Violence in Canada: A Statistical Profile, 2019," Statistics Canada (Government of Canada, March 2, 2021), https://www150.statcan.gc.ca/n1/daily-quotidien/210302/dq210302d-eng.htm.
[3] "NCADV: National Coalition Against Domestic Violence," The Nation's Leading Grassroots Voice on Domestic Violence, https://ncadv.org/STATISTICS.
[4] Ibid.
[5] "Family Violence Laws," Government of Canada, Department of Justice, Electronic Communications, July 7, 2021, https://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html.

children, and persons of all gender and that this research paper has chosen its focus with these acknowledgements in mind.

The research paper, as such, asks the question: how does the Canadian Criminal Justice System address types of victim defence when domestic abuse victims are prosecuted, and how do the perspectives from the courts of the United States of America differ from that of Canada's?

Throughout this research, it was found that in Canada, self-defence was a more well-rounded defence for battered women than provocation. In the United States, though self-defence is not as effective as it were in Canada, the mass legislation among states and federal criminalisation of specific domestic abuse crimes show a more extensive codification than Canada. On the other hand, Canada relies mostly upon the consequences of domestic abuse without directly criminalising domestic violence.

This paper will first contextualise the issues of domestic abuse within the legal system by explaining the key concepts of Battered Woman Syndrome. Then, this paper will examine the decisions and reasoning of Canada's courts in the usage of such syndrome as part of a complete defence. Next, the United State's decisions and legislation on domestic violence will be analysed and compared to Canada's, thus revealing key differences in two common-law jurisdictions.

Contextualising the issues of domestic abuse in the legal system

Throughout this research, a noted observation is that many courts have utilised the term "battered woman syndrome" to provide a defence for women who kill their abusers.

Battered woman syndrome is a diagnosed PTSD that is often a result of domestic abuse and can be defined as having been subjected to emotional or physical abuse[6]. A necessary condition according to experts would involve the woman has been through a battering cycle twice, as to infer that she may or may not have been forced to stay within the relationship[7]. This counterpoint to a logical step of leaving an abusive relationship could be caused by many factors, such as learned helplessness, financial dependence, or a real belief that threats may materialise and that their life may be in danger if they leave. Tragically, it is not uncommon for battered women to kill their abusers to escape a relationship of torment, and it only takes legal escalation for issues to come to light. This paper will focus on the reasoning and thus discuss certain trends observable derived from verdicts and decisions.

The syndrome itself was coined by Dr. Lenore Walker, and has been subject to discussion from law reviews and psychiatric reviews[8]. These will be used in the analysis below to discuss the differences in perspectives between the United States and Canada.

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[6] Lee Stuesser, "The 'Defence' of 'Battered Women Syndrome' in Canada," *Manitoba Law Journal* 19, no. 1 (1990), pp. 197.
[7] Ibid., pp. 197-198.
[8] Lenore E. Walker, "Who Are the Battered Women?," *Frontiers: A Journal of Women Studies* 2, no. 1 (1977): pp. 52-57, https://doi.org/10.2307/3346107.

Contexturalising Domestic Abuse within the Canada's Criminal Justice System and Domestic

Is domestic abuse criminalised in Canada? Criminal Code S. 265-268 details offences related to harm and injury that may occur as a result of domestic abuse, but there is no specific law that criminalises family violence. This is a major problem concerning the inability for Canada's justice system in combatting the real reason why battered women kill their abusers, which will be discussed later in this analysis. However, concerning domestic abuse violence cases, Canada's courts have shown extreme understanding and reasoning towards administering justice to these victims, and that Canadian literature has demonstrated a nuanced perspective towards legal implications of the battered women syndrome.

Through examining various leading cases in Canada, it was found that the key to victim acquittal in Canada often relies on the defence of provocation. The usual chain of reasoning involves the use of the "battered woman" syndrome clarifies the context of which the jury can understand the reasonableness of domestic abuse victims' actions.

To understand the development of Canada's usage of the battered woman syndrome, a vital case that represented an important step towards addressing domestic abuse would be the R. v. Lavallee case in 1990. At trial, Ms Lavallee was charged with the murder of her boyfriend after shooting him through the back of his head[9]. During the trial, her defence counsel not only introuced considerable evidence of an abusive relationship, but they also produced an expert to testify on the battered woman syndrome"[10]. The trial judge ruled that the expert evidence was admissible, which led to Lavallee's acquittal. Eventually, the case was escalated and the Supreme Court of Canada unanimously held that the expert's testimony was admissible, thus creating a powerful precedence on the admissibility of battered woman syndrome[11].

R. v. Lavallee's decision impacted the future of defence counsel for victims who may kill to escape their torment. Not only does it render a clearer picture on marginalized victims and their inability to escape an abusive relationship, it provides triers of truth a better assessment of the reasonableness of an accused's actions, bringing us a step closer towards administering justice for these victims[12].

We've seen clearly that acquittal for these women is possible, but under what circumstances? As mentioned above, the laws have evolved since R. v. Lavallee, and self-defence may not be the only defence available, or the proper defence strategy at all, that is accepted within the Canadian Criminal Justice System. To this end, this section will discuss Canadian's courts' reasoning behind using Provocation or Self-defence to defend women who kill their abusers.

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[9] *R. v. Lavellee* (SCC 1990).
[10] Ibid.
[11] Martha Shaffer, "R. v. Lavallee: A Review Essay," *Ottawa Law Review 607* 22, no. 3 (1990), pp. 2-3.
[12] Vanessa A Macdonnell, "The New Self-Defence Law: Progressive Development or Status Quo?," *Canadian Bar Review* 92, no. 2 (2014): pp. 301-326.

The elements of the Defence of Provocation, under s. 232(1) of the Criminal Code, is outlined in R v Cairney (2013). It requires a subjective element on whether the accused views themselves as having lost their self-control as a result of other's acts, and requires an objective element on whether the provoking act was capable of depriving a reasonable person of self-control[13]. As common law developed, the objective element was added to restrain the situations in which the defence would be available[14]. Additionally, the common law precluded that this defence wouldn't be available if the accused had intentionally sought a provocative act to create pretense for killing[15].

The elements of Self Defence in s. 34(2) of the Criminal Code, that death or grevious body harm is justified only if two conditions are met: if they caused it because they reasonably believed that they would be harmed, and that if they reasonably believed that they cannot otherwise preserve themselves from death or grievous bodily harm[16].

Inherently, both defences differ in their effects, and subsequently how it may affect the charges brought upon domestic abuse victims. While provocation is an excuse, self-defence is a justification. This classification impacts the sentencing and charges; with provocation as a defence, first-degree or second-degree murder may be reduced to manslaughter, but with self-defence, victims may potentially be acquitted. Because the defence counsel is often looking out in the best interests of the defendant, a self-defence plea would be the preferred option - that is, if the defence is even available at all given the circumstances of the trial. Additionally, as reasoned by Fish and Abella JJ. in R. v. Cairney (2013), provocation "in no way absolves the accused" of any charges, which explains why instead of a full acquittal, the conviction of manslaughter still involves prison sentencing.

Applying domestic abuse cases to these defences, judges provided different routes of reasoning for both defences.

In R. v. Young (2008), it was shown that self-defence may be available if the accused believed words of threat in the context of the history of abuse and the reasonable perceptions of the accused. This case argues that self-defence is available despite the air of reality between the abuse and the accused's actions, and that "the accused need not reasonably believe that the assault is liable to happen imminently or at once, but must reasonably believe that an assault is impending, that is, that it is about to happen at some uncertain time near at hand"[17]. Regarding the role battered woman syndrome plays within the context of women who kill their abusers, expert evidence can help the jury understand the accused's state of mind at the relevant time, particularly how she perceived certain conduct by her abuser[18]. In these cases,

[13] *R. v. Cairney* (SCC 2013).
[14] *R. v. Tran* (SCC 2010).
[15] *R. v. Cairney* (SCC 2013)
[16] "Consolidated Federal Laws of Canada, Criminal Code," Justice Laws Website (Government of Canada, September 29, 2021), https://lois-laws.justice.gc.ca/eng/acts/C-46/section-34.html.
[17] *R. v. Young* (SKQB 2008).
[18] *R. v. Craig* (ONCA 2011).

the reason for self-defence to be available is if the battered woman syndrome created reasonableness for the victim, which in this case, involves the killer having had to kill the escape their cycle of abuse.

Further application can be found in R. v. Malott (1998). The case itself was an appeal on a second-degree murder conviction of an abused victim[19]. The judges at the SCC outlined the way self-defence can be raised in light of the accused having brought in expert evidence for battered woman syndrome:

“Once the battered woman syndrome defence is raised, the jury should be informed of how that evidence may be of use in understanding why an abused woman might remain in an abusive relationship, the nature and extent of the violence that may exist in a battering relationship, the accused’s ability to perceive danger from her abuser, and whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.[20]”

In essence, the jury during the trial was already properly informed of the issues raised by a history of domestic abuse and how that impacted the accused’s ability to make their decisions. As such, self-defence can be applied using the battered woman syndrome, as the diagnostics leave the jury with a better understanding of what the “reasonableness” of the accused could mean under domestic abuse.

But what about provocation? In R. v. Cairney, the Supreme Court of Canada (SCC) determined a line of reasoning for provocation as a defence in the context of domestic abuse, in which the accused “C” kills “F”, who was an abusive spouse to C’s cousin “R”. The provocation defence was not available, with a majority of the SCC affirming the Court of Appeal’s decision to order a new trial after the defence helped acquit the accused of second-degree murder and lowered the charges to manslaughter. The reason for this decision is based on the idea that gun-point lectures are to be discouraged, and that this was a self-induced provocation - in which C pulled a gun on F, leading to F provoking C to shoot him. However, the dissenting judges argued that the history of domestic abuse on R was the original provocation, and so C did not induce the provocation himself. This route of reasoning shows that domestic abuse may be enough to provoke retaliation, and thus this defence may be available, but to a lessened extent.

Just by comparison of these cases, self-defence feels more appropriate in the eyes of Canada’s justice system. Danielle Tyson argues that provocation does not typically fit the circumstances of women who kill an intimate partner, because these women typically “aren’t responding to a specific triggering incident that is legally required before a successful defence of provocation

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[19] *R. v. Malott* (SCC 1998).
[20] Ibid., pp. 124.

can be made out”[21]. Similar to the R. v. Cairney scenario, C’s action of killing F was heavily influenced by F’s history of abuse towards R. Therefore, C was not acting purely on his self-induced provocation, but on a history of abuse.

The implication that provocation conditions are more difficult to meet is short-sightedness on part of the Canadian justice system. Just as the dissenting judges Fish and Abella JJ. have outlined, the jury should have been able to infer that domestic abuse played a factor into C’s mens rea.

‘While F’s dismissive *attitude* towards C might have been predictable, a jury could infer from the full context of this case that an ordinary person would not predict F’s response that he would keep beating R if he felt like it. The objective element of the defence of provocation should be informed by contemporary norms, including *Charter* values. These do *not* include aggressively proprietary attitudes about a spouse. It is therefore troubling to conclude, as the majority does, that it was “predictable” for F to react to C’s warning by confirming his intention to continue inflicting domestic violence. It is difficult to accept that an expressed intention to continue assaulting a spouse could ever be considered “predictable”.[22]’

From examining the Canadian trend on available defences for battered women, an improvement to the use of provocation or self-defence legal strategies can come from a broader and better understanding of the battered woman syndrome. It is argued by scholar Wendy Chan that the application of the defences of provocation and self-defence are “discriminatory because women who do not respond immediately to a violent attack by their spouses cannot successfully make a plea of provocation or self-defence”[23], and thus the definitions governing the criteria of provocation and self-defence ought to be broadened to include the experiences of battered women who do not kill immediately. Furthermore, Grant and Parkes argue a similar point, in that there is a sexist trend in the use of provocation, as it favours male defendants and their violence against women[24]. For example, some trial judges still take the view that a woman communicating that she is leaving an abusive relationship constitutes sufficient provocation to put the defence to the jury. Or in other cases like R. v. Evans, the Court suggested that a man being mocked for his sexual performance is enough to satisfy as a provocation and thus killing a woman[25].

A counterpoint to this would be the difficulty in determining the extent of the definition “who do not kill immediately” - will any battered woman be entitled to the defence? Of course,

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[21] Isabel Grant and Debra Parkes, “Equality and the Defence of Provocation: Irreconcilable Differences,” *Dalhousie Law Journal* 40, no. 2 (2017): pp. 469.
[22] *R. v. Cairney* (SCC 2013), pp. 423.
[23] Wendy Chan, “Access to Provocation and Self Defence,” *Women, Murder and Justice*, 2001, pp. 108-149, https://doi.org/10.1057/9780230596665_6.
[24] Grant and Parkes, “Equality and the Defence of Provocation: Irreconcilable Differences”, 2017.
[25] Grant and Parkes, “Equality and the Defence of Provocation: Irreconcilable Differences”, 2017,, pp. 473.

this is dependent on the circumstances of each case, but this is perhaps out of my paygrade to discuss. In any case, I agree with Chan's recommendation on the basis that abused victims may not immediately have the courage to act or escape their situation, thus leading them to inevitable situations of having to kill.

Overall, an observable trait of the current Canadian system is that self-defence is a more well-rounded defence than provocation, although there are clearly certain criteria in which the definition of provocation can be improved to aid these victims towards an acquittal.

Extending outside of the type of defences battered woman syndrome can help prove, the concept of battered woman syndrome used in law has also been reviewed in Canadian literature. In a review essay on R. v. Lavallee, Martha Shaffer argued that the battered woman syndrome, while has helped explain some of the assumptions that a woman's actions may be reasonable under domestic abuse, has reinforced prevailing assumptions that these women are "weak", that they are "sick, helpless victims", ultimately stereotyping diagnosed women as passive and thus dismissing their strength within these abusive relationships[26]. This point will become a relevant comparison when compared to the cases in the United States.

[26] Shaffer, "R. v. Lavallee: A Review Essay", 1990.

A Comparative Study between United States of America and Canada's Judicial Decisions on Battered Women Cases

The United States of America (the US; America) has an extensive history of legislation towards domestic violence law. Since the year 2011, thirty-two state governments within the US have passed resolutions to declare freedom from domestic violence a fundamental human right[27]. Perhaps the single most important development within the history of domestic violence concerning female victims would be the three Violence Against Women Acts signed in 1994, 2000, and 2005[28]. Overall, it was signed to improve criminal justice responses to domestic violence and increase the availability of services to those victims, with the 2000 and 2005 acts authorising funding and improving access to help to underserved populations.

However, similar to Canada, there is no explicit federal law in America that criminalises domestic violence. Title 18 of the US Code addresses crimes and criminal procedures comparable to Canada's Criminal Code, and similarly only punishes domestic abusers through assault charges[29].

It is interesting to point out the differences in either country's extent in administering justice in the field of family violence. Canadian provincial laws are not explicit in domestic abuse laws. Even though six provinces and three territories have legislated policies revolving around domestic abuse, most of them focus on intervening and protecting families rather than prosecuting and criminalising the abusers' behaviour[30]. American states have criminalised domestic abuse within their own legislature. For example, Title 16 of the South Carolina Code of Law explicitly outlines the forms of domestic abuse and prosecution charges of domestic abuse[31]. The existence of these state laws may explain why there is an absence of federal laws criminalising domestic violence. Because of the many passed resolutions and legislation of domestic abuse within state laws, federal laws need not criminalise these laws, especially when these cases are rarely escalated to the U.S. Supreme Court. Because the states themselves have laws in place to directly protect domestic abuse victims, it is fathomable that the need to escalate has rarely occurred, and has mostly reached the state court of appeal, and not to a federal level[32].

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[27] "Recognizing Freedom From Domestic Violence and Violence Against Women as a Fundamental Human Right," Columbia Law School Human Rights Institute (Miami Law Human Rights Clinic, 2014), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/combined.pdf.
[28] "History of the Violence Against Women Act," Legal Momentum, 2021, https://www.legalmomentum.org/history-vawa.
[29] "United States Code: Title 18 - Crimes and Criminal Procedures," OLRC Home (Office of the Law Revision Counsel, 2021), http://uscode.house.gov/browse/prelim@title18/part1&edition=prelim.
[30] "Family Violence Laws," Government of Canada, Department of Justice, Electronic Communications, July 7, 2021, https://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html.
[31] "South Carolina Code of Laws Unannotated: Title 16 - Crimes, Chapter 25: Domestic Violence," South Carolina Legislature, 2016, https://www.scstatehouse.gov/code/t16c025.php.
[32] *Hawthorne v. State of Florida* (District Court of Appeal of Florida 1985).

It is interesting to note as well that while general domestic violence is not criminalised in the U.S. Code, it does criminalise stalking and interstate domestic violence. Canada does not have federal laws in place against interstate domestic violence, and there is no researchable literature within my scope to discuss why that is. It is highly recommended that additional studies could be added to enrich the purpose behind such niche legislation but not general legislation on domestic violence as a whole.

Above are the fundamental introductions to structural dissimilarities and comparisons between Canadian law and American law on domestic abuse. Below paragraphs will discuss American literature outlook on the Battered Woman Syndrome and the discussion on whether self-defence or provocation is a more effective defence strategy.

In terms of the admissibility of "battered woman syndrome", the syndrome is also commonly used to support the characterisation of a victim's reasonability and state of mind during the conflict. In Dyas v. United States (1977), Battered Woman Syndrome testimony requires a three-prong test for admissibility: The provided testimony had to be beyond layman facts; the testimony has to be from a professional; the testimony will not be admissible if a reasonable opinion cannot be asserted from an expert[33]. Additionally, prior to admitting this evidence, the party seeking to establish the testimony needs to also establish the victim is a battered woman and the jury's perceptions of the accused's behaviour would be aided by the testimony[34]. This was amended in 2000 when Congress amended Federal Rule of Evidence 702 to include three tests for trial courts to determine expert testimony's reliability: the testimony must be based upon sufficient facts or data; the testimony must derive from reliable principles and methods; the expert must apply those principles and methods reliability to the facts of the case[35].

Self-defence is also historically unfavourable for the battered women defendants in domestic abuse cases. In Hawthorne v. State of Florida (1985), the court could not admit expert testimony to the trial, but expert testimony was not precluded from a new trial that was ordered by the Court of Appeal. Previously this research paper has set out to discuss the literature regarding self-defence using battered woman syndrome from an american perspective, and as such, I turn to "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" from David Faigman. Faigman's main argument on the failure of battered woman syndrome as an evidence itself is that the focus on determining reasonableness purely based on syndromising women is damaging to the original intention of Dr. Walker's work[36]. As such, he has suggested that, because battering does not give rise to a single pattern, the agents of the

[33] *John Dyas v. United States* (District of Columbia Court of Appeals 1977).
[34] *Ibn-Tamas v. United States* (District of Columbia Court of Appeals 1978).
[35] Noel Rivers-Schutte, "History of the Battered Woman Syndrome- a Fallen Attempt to Redefine the Reasonable Person Standard in Domestic Violence Cases.," Seton Hall Law, 2013, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1618&context=student_scholarship.
[36] David L. Faigman, "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent," *Virginia Law Review* 72, no. 3 (1986): pp. 619-647, https://doi.org/10.2307/1072974.

court must rely on the environmental evidence brought before the court rather than the psyche evidence to understand the victim's motivation and actions. Furthermore, he argues that rather than establishing PTSD, it is perhaps more important to establish the victim's inability to leave an abusive relationship. Through this approach, the defendant can claim self-defence more effectively in the eyes of the court.

This argument is in line with Wendy Chan's perspective, in that the unsuccessfulness of the self-defence plea comes from a misfocus on proving a syndrome. Rather, the focus should be designated towards admitting evidence on the victim's environment and history with the abuser.

Conclusions

The question proposed at the beginning of this paper was: how does the Canadian Criminal Justice System address types of victim defence when domestic abuse victims are prosecuted, and how do the perspectives from the courts of the United States of America differ from that of Canada's? The answers to this question derived from the research above indicates a leniancy on the Canada's court towards battered women who kill, in which, when ompared to provocation, self-defence was a stronger defence. It is interesting to note that there is a lower chance of acquittal based on defences informed by the battered women syndrome in the United States than in Canada. In terms of the evaluation of the Battered Woman Syndrome's admissibility in court, literature from both the United States and Canada have critiqued the use of the syndrome as evidence in court as an oversimplified outlook towards the victim's circumstances and context. Most literature pointed out that admissibility should be on the basis that the defendant could use this to establish their inability to leave a broken relationship. As an extension of this point, perhaps the focus of utilising the syndrome as evidence in court should go beyond merely proving PTSD, but to establish a humane approach towards the victim's circumstances and context caused by her PTSD.

Much of this research has been focused on examining the critique surrounding the Criminal Justice System's approach on domestic violence, and though it is clear we've already made steps to consider justice for domestic abuse victims, there is much to be done. Throughout my research, I've also noticed the lack of statistical analysis on the subject of domestic abuse cases, such as the conviction rate of these women or the average incarceration period. Perhaps this field of research is one that remains relatively niche despite its relevance in society, and certainly warrants further research by others in the future.

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