Major Research Paper: DCL 7066

# African-Canadian Women and the Battered Woman Syndrome

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September 2, 2005

# INTRODUCTION:

Legal feminists in Canada began to voice their concerns about the phallocentric nature of the definition of self-defence decades ago. Their concerns were validated in 1990, when the Supreme Court of Canada acknowledged the fact that the *Canadian Criminal Code's*[1] definition of self-defence was indeed gender biased. Historically, self-defence was narrowly construed. In order to successfully claim self-defence, the accused must have retaliated with proportionate force, their actions must have been necessary and reasonable, the accused must have attempted to retreat from the situation, and the prospective harm had to have been imminent.[2] All of these prerequisites were interpreted based upon an altercation between two men of equal size and strength. Accordingly, when Canadian courts interpreted self-defence they ignored the perspective of women. In fact, self-defence was interpreted based upon the standard of the "reasonable man".

In order to rectify this problem, the Supreme Court of Canada recognized the existence of the Battered Woman Syndrome in *R. v. Lavallee*[3] and expanded the conventional boundaries of self-defence. In that case, the Supreme Court of Canada upheld Angelique Lyn Lavallee's acquittal of second degree murder. Even though Lavallee shot her husband in the back of the head, her actions were justified in self-defence because she had been suffering from the Battered Woman Syndrome at the time of the shooting. In its judgment, the Supreme Court of Canada held that the purpose of admitting Battered Woman Syndrome evidence is to assist the trier of fact in

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[1] R.S.C. 1985, c. C-46, ss. 34, 35 [*Criminal Code*].
[2] *Ibid.*; Elizabeth Comack, *The CRIAW Papers: No 31 Feminist Engagement with the Law: the legal recognition of the Battered Woman Syndrome* (Ottawa: CRIAW, 1993) at 40.
[3] [1990] 1 S.C.R. 852 [*Lavallee*].

understanding the reasonableness of the battered woman's actions.[4] As a result, the traditional interpretation of self-defence has been expanded in order to take in to account the perspectives of women. Accordingly, self-defence must now be interpreted based upon the "reasonable man" standard and the "reasonable woman standard".

Even though self-defence was expanded as a result of the *Lavallee* decision, both advocates of the decision and feminist legal theorists became predominately focused on the Supreme Court of Canada's acceptance of the Battered Woman Syndrome. Advocates of the decision claimed that the Battered Woman Syndrome finally gave women the legal recognition that they deserved.[5] However, a number of legal feminists have examined the Battered Woman Syndrome from a feminist reader's perspective. As a result, the Battered Woman Syndrome has been examined in light of the following questions:

1. How does the syndrome represent women?;[6]
2. What does it say about gender relations?;[7]
3. How does the Battered Woman Syndrome define sexual difference?;[8] and
4. What message does the syndrome convey about "...what it means to be a woman or a man"?[9]

Unfortunately, feminist legal theorists have discovered that the Battered Woman Syndrome is not as beneficial to women as they initially thought. By and large, they have discovered that the syndrome has serious implications for battered women and women in

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[4] *Ibid.* at paras. 50, 60.
[5] Kathleen Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in T. Brettal Dawson, ed., *Women and Social Change: Core Readings and Current Issues*, 3rd ed. (Concord: Captus Press, 1998) 164 [Dawson, "3rd ed."].
[6] Catherine Besley & Jane Moore, eds., *The Feminist Reader* (Blackwell: Oxford, 1997) at 1.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

general.[10] In fact, the Battered Woman Syndrome is centered around traditional assumptions about women's "true nature". The syndrome constructs women as weak, passive and fearful.[11] These stereotypical notions of "normal" female behaviour are used to explain the battered woman's actions. Generally, the Battered Woman Syndrome constructs abused women as irrational and powerless individuals. As a result, the syndrome denies women any agency or control in their own lives.[12]

In light of the fact that there are no cases in which an African-Canadian woman has attempted to use the Battered Woman Syndrome, it is not surprising to discover that critics of the syndrome have predominately focused on how the syndrome discriminates against women generally. Nevertheless, this means that the inter-relatedness of sex, "race"[13] and class has been largely overlooked.[14] As a result, the Battered Woman Syndrome has been applied to women as though they are homogeneous group. This is problematic. Since a battered woman must prove that she is a "normal", weak, passive, and fearful woman, "race" may play a role in determining who can avail themselves of self-defence and the Battered Woman Syndrome. According to Allard, "[r]ace certainly plays a role in the cultural distinction between "good" and "bad" women. The passive, gentle [W]hite woman is automatically more like the "good" fairy princess stereotype

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[10] Comack, *supra* note 2 at 4.
[11] Sharon Angella Allard, "Rethinking Battered Woman Syndrome: A Black Feminist Perspective" (1991) 1 U.C.L.A. Women's L.J. 191 at 193-194.
[12] Donald Alexander Downs, *More than Victims: Battered Women, the Syndrome Society, and the Law* (Chicago: University of Chicago Press, 1996) at 158.
[13] The term "race" is a "...socially constructed label used to describe certain patterns of physical and genetic difference." Generally, the term is most often used to refer to lineage and to "biologically distinct groups of people". See Vic Satzewich, "Race, Racism and Racialization: Contested Concepts" in Vic Satzewich, ed., *Racism & Social Inequality in Canada: Concepts, Controversies & Strategies of Resistance* (Toronto: Thompson Educational Publishing, Inc., 1998) 25 at 27.
[14] bell hooks, "Black Women: Shaping Feminist Theory" in bell hooks, *Feminist Theory: From Margin to Center* (Cambridge: South End Press, 2000) 1 at 14.

than a Black woman, who as the "other" may be seen as the bad witch."[15] As a result, an abused Black[16] woman who kills her abusive partner in self-defence may have a difficult time exonerating herself.

Even though the majority of Canadian feminist literature has failed to address this issue, there is evidence to suggest that an African-Canadian woman would face a significant number of barriers if she were to use the Battered Woman Syndrome in order to substantiate her self-defence claim. Foremost, African-Canadian women must contend with anti-Black racism.[17] African-Canadian people generally experience racial discrimination in most Canadian institutions.[18] They are discriminated against in the education system, in the employment context and in the media.[19] At the same time, African-Canadians are also confronted with racial discrimination when they come in to contact with the criminal justice system.[20] In fact, numerous government reports have documented the existence of racial discrimination in the criminal justice system.[21] These reports have been substantiated by case law which illustrates the inability and unwillingness of Canadian courts to deal with racially charged cases.[22] The fact that Canadian courts have difficulty dealing with "race" issues is also exemplified by the

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[15] Allard, *supra* note 11 at 194.
[16] In this paper, I use the term "Black" and "African" interchangeably. Both terms refer to people of African ancestry. I have also capitalized the word "Black" in order to recognize Black people as a cultural group.
[17] See African Canadian Legal Clinic(ACLC), *Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (ACLC, 2002). This report is also available online at <http://www.aclc.net/antiba_table.html>.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] See *e.g.* Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) [*Report*].
[22] See *e.g. R. v. R.D.S.*, [1997] 3 S.C.R. 484 [*R.D.S.*].

courts' treatment of Aboriginal women. For example, in *Howard*,[23] *Catholique*[24] and *Eyapaise*[25] the Aboriginal women's aggressive behaviour was explained in terms of their "race".[26] In addition, there are a number of other cases in which Aboriginal women have pled guilty to manslaughter even though they could have raised self-defence.[27] All of these women shared a number of common characteristics in addition to their "race". All of the women had histories of abuse with the deceased and other men. In all four cases, the accused women and the deceased men were intoxicated when the homicides took place. Furthermore, all four women had criminal records, were poor and had very little education. Accordingly, when racialized women become involved with the criminal justice system they must contend with racism, sexism and classism.

Since African-Canadian women are marginalized by both racism and sexism in law,[28] they must contend with two sets of myths and stereotypes when they become involved with the criminal justice system - those based on "race" and those based on gender.[29] These myths and stereotypes are rooted in both racism and sexism, as Black women are often stereotyped as: strong Amazon women; tough/aggressive matriarchs; cow-like mammies; nagging shrews; passive slave girls; and sexual savages.[30]

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[23] (1992) 8 B.C.A.C. 241 (C.A.) [*Howard*].
[24] (1990), N.W.T.J. No. 164 (N.W.T.S.C.) [*Catholique*].
[25] (1993), 20 C.R. (4th) 246 (Alta. Q.B.) [*Eyapise*].
[26] See Elizabeth Sheehy, Developments in Canadian Law After *R. c. Lavallee* (1993) Unpublished Paper ["Sheehy, "Developments in Canadian"], cited in Sylvie Frigon, "A Gallery of Portraits: Women and the Embodiment of Difference, Deviance, and Resistance" in Thomas O'Reilly-Fleming, ed., *Post-Critical Criminology* (Scarborough: Prentice Hall Canada Inc., 1996) 78 at 97.
[27] See *R. v. M.F.*, [2002] O.J. No. 2848 (O.S.C.J.) [*M.F.*]; *R. v. W.L.Q.*, [2005] S.J. No. 13 (S.C.Q.B.) [*W.L.Q.*]; *R. v. R.F.*, [2004] O.J. No. 544 (O.S.C.J.) [*R.F.*]; *R. v. S.M.*, [2004] S.J. no. 572 (S.C.Q.B.) [*S.M.*].
[28] Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1993) 43 Stan. L. Rev. 1241 at 1242.
[29] Allard, *supra* note 11 at 200.
[30] Esmeralda Thornhill, "Focus on Black Women!" (1985-1986) 1 C.J.W.L. 153 at 154.

Consequently, due to racist stereotypes Black women continue to be perceived as rude, aggressive and angry, while, White[31] women are perceived as gentle, quiet and warm.[32]

In view of the fact that the Battered Woman Syndrome maintains stereotypes which indicate that a woman should and would react to battering in a particular way,[33] it is not surprising to discover that an African-Canadian woman's "race" affects her ability to avail herself of the Battered Woman Syndrome. Historical, economic and socio-cultural variables shape a woman's gender identity.[34] Therefore, the core assumption within the Battered Woman Syndrome that all abused women are the same[35] is incorrect.

At best, the Battered Woman Syndrome partially explains the actions of battered women.[36] In reality, its framework is both demeaning and exclusionary.[37] According to the syndrome, the actions of all abused women are governed by their psychological disabilities.[38] This image represents women as frail and dependent.[39] Instead of empowering women, the Battered Woman Syndrome is oppressive to all women,[40] particularly African-Canadian women. In fact, the gender essentialism espoused by the Battered Woman Syndrome ignores Black women's fight against racism.[41] Therefore, the Battered Woman Syndrome should be abandoned and other legal defence theories, such as self-defence must be re-examined and further developed in order to assist all women.

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[31] I have capitalized the word "White" in order to recognize White people as a cultural group.
[32] Jacinth Herbert, "'Otherness" and the Black Woman" (1989-1990) 3 C.J.W.L. 269 at 274.
[33] Allard, *supra* note 11 at 193.
[34] Karen Dugger, "Social Location and Gender-Role Attitudes: A Comparison of Black and White Women" (1988) 2:4 Gender and Society 425 at 425-426.
[35] Shelby A.D. Moore, "Battered Woman Syndrome: Selling the Shadow to Support the Substance" (1995) 38 How. L. J. 297 at 341.
[36] Allard, *supra* note 11 at 195.
[37] Moore, *supra* note 35 at 303.
[38] *Ibid.* at 341.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.* at 343.

# PART I: THE HISTORICAL DEFINITION OF SELF-DEFENCE AND THE ORIGINS OF THE BATTERED WOMAN SYNDROME

In order to be found guilty of a criminal offence, the accused must possess criminal intent. A person may be justified in committing an illegal act if the act was not a result of free will. There are a number of legal justifications available to persons accused of a crime. These defences may mitigate or absolve the accused's liability. Since the Battered Woman Syndrome is a social-psychological theory it must be used in tandem with a recognized legal defence.

## i) Definition of Self-Defence pre-*Lavallee*: A Historical Perspective

The Battered Woman Syndrome was first applied in a self-defence case. Self-defence is a justification defence that can be used by a defendant charged with homicide. Unfortunately, self-defence was historically phallocentric in nature. It evolved from a thirteenth century plea called *se-defenendo,* which meant

> [h]omicide, ...which takes place upon a sudden encounter, where two persons upon a sudden quarrel, without premeditation or malice, fight upon equal terms, and one, before a mortal stroke has been given, declines any further combat, and retreats as far as he can with safety, and kills his adversary, through necessity, to avoid immediate death.[42]

As a result, the common law produced a definition of self-defence which spoke to men's needs as a result of men assaulting one another for decades.[43] Today self-defence is defined as "[d]efence of one's person or property directly against another exerting

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[42] The 'Lectric Law Library's Lexicon, online: The 'Lectric Law Lexicon's Lyceum <http://www.lectlaw.com/def2/s131.htm> (last modified: February 2002).

[43] Sunny Graff, "Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law" (1988) 10 Loy. L.A. Int'l & Comp. L.J. 1 at 10.

unlawful force."[44] Initially this definition appears gender neutral. However, the prerequisites that were required in order to prove self-defence prior to *Lavallee* discriminated against women. In order to successfully use self-defence, the accused must have used proportionate force in retaliation, the act must have been necessary and reasonable, and the accused must have made an attempt to retreat from the situation.[45]

All three elements that were required to prove self-defence caused problems for women. First, the concept of proportionate force was "...predicated on the assumption of two male adversaries of equal size, strength, and physical training."[46] Women who on average are smaller in size than men and less likely to have had any self-defence training were expected to use proportionate force in fending off their attackers. The problem arose when the assailant was a 200 pound man and the victim was a 120 pound woman. What was considered proportionate force when the two people involved in the situation were not of equal size, strength, and physical training? Was the woman in this case entitled to use a gun in order to protect herself? Second, it was hard to conceptualize whether an act was necessary and reasonable if you could not place yourself in the accused's shoes. A woman's perception of danger may be very different from a man's perception of danger due to her socialization, size, and physical training. For example, due to a woman's gendered socialization, she may be unable or unwilling to fight back.[47]

Third, the duty to retreat posed specific difficulties for women who were victims of domestic violence because a battered woman's ability to retreat from the situation was

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[44] Daphne A. Dukelow & Betty Nuse, *Pocket Dictionary of Canadian Law*, 2nd ed. (Scarborough: Thomson Canada Limited, 1995).
[45] *Criminal Code*, *supra* note 1.
[46] A. Browne, *When Battered Women Kill* (New York: The Free Press, 1987) 173, cited in Wendy Chan, *Women, Murder, and Justice* (Houndmills: Palgrave, 2001) at 139 [Chan, *Women, Murder*].
[47] Comack, *supra* note 2 at 39.

often very limited.[48] A person's home is supposed to be a safe haven. In *R. v. Seymane*[49] the court established the idea that a man's home is his castle "...and his fortress as well as for his defence against injury and violence for his repose."[50] Prior to *Lavallee*, it was difficult for an abused woman to claim this same privilege, as she was required to leave her home in order to prove self-defence.

Both pre-*Lavallee* and post-*Lavalle* battered women experience difficulty retreating from abusive situations for the following reasons. First, a battered woman may be unable to remove herself from the situation because she lacks control over monetary resources and transportation.[51] This means that she may have be unable to find safe and affordable housing.[52] Second, cultural, religious and social pressures prevent women from leaving abusive relationships, as the pressure to keep their families intact is often tremendous.[53] These pressures may be particularly poignant for immigrant women who may come from more stringent patriarchal[54] cultures.[55] Third, the safety of the woman, her children and other family members is more at risk if she does leave as the police are often unable to ensure their protection.[56] Accordingly, a battered woman may believe that she is protecting her children and other family members by remaining in an abusive relationship. Finally, these concerns are often compounded for immigrant women

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[48] Chan, *Women, Murder*, s*upra* note 46 at 142.
[49] [1605] 77 E.R. 194 (K.B.) [*Seymane*].
[50] *Ibid.* [*Seymane*]
[51] Chan, *Women, Murder*, *supra* note 46 at 142.
[52] Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" (1997) 47 U.T.L.J. 1 at 11.
[53] *Ibid.*
[54] White feminists have come to the consensus that patriarchy privileges men over women. See Katerina Deliovsky, "The More Things Change...Rethinking Mainstream Feminism" in Njoki Nathani Wane, Katerina Deliovsky & Erica Lawson, eds., *Back to the Drawing Board: African-Canadian Feminisms* (Toronto: Sumach Press, 2002) 54 at 69.
[55] See Zohra Husaini, *Cultural Dilemma and a Plea for Justice: Voices of Canadian Ethnic Women* (Intercultural Action Committee for the Advancement of Women, Funded by Status of Women Canada, 1998-1999) online: <http://www.acjnet.org/docs/culto4.pdf>.
[56] Shaffer, *supra* note 52.

because of language barriers. For example, women who do not speak English are often unable to access available services.[57] If they are able to access available services these services are often restricted.[58]

Even though there were only three statutory elements required to prove self-defence, the case law read in an "imminence" rule. This rule also caused problems for women who wished to use self-defence as justification for their actions. In order to ensure that the use of force was not motivated by revenge, the paradigmatic case of the one-time bar room brawl between two men was most often used to illustrate the "imminence" rule.[59] What this meant, was that a person had to wait until the physical assault was underway before they could use physical force to protect themselves.[60] Consequently, this standard sentenced women to murder by installment as women are typically no match for men in hand-to-hand combat due to their size, strength, socialization and lack of training.[61]

**ii) The Battered Woman Syndrome: An Addendum for Women**

The Battered Woman Syndrome was created in order to address the gendered nature of self-defence.[62] It is a psychological theory which was first promoted by Dr. Lenore E. Walker. Canadian courts first relied upon Walker's research in *Lavellee* in order to supplement self-defence as it existed and still exists in the *Criminal Code.* In her book, Walker describes the origins of the Battered Woman Syndrome and how it revolves around two related theories: the "Cycle of Violence" and

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[57] *Ibid.*
[58] *Ibid.*
[59] Comack, *supra* note 2.
[60] *R. v. Whynot*, [1996] N.S.J. No. 12 [N.S.C.A.], cited in Comack, *supra* note 23 at 29.
[61] *Lavallee*, *supra* note 3 at para. 52. See *State v. Gallegos*, 719 P.2d 1268 (N.M. 1986), at p. 1271.
[62] Comack, *supra* note 2 at 38.

"Learned Helplessness". According to Dr. Walker there are three stages in the "Cycle of Violence":

> 1. The Tension Building stage involves minor battering incidents and verbal abuse in which the woman is abused by her partner. The woman usually attempts to rationalize the incidents. The tension builds up during this stage and eventually culminates into stage two.[63]
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> 2. The Acute Battering stage is illustrated by the uncontrolled nature of the battering and the woman experiences severe psychological stress. The battered woman's reactions normally include apathy, depression and feelings of helplessness.[64]
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> 3. The Honeymoon phase occurs when the batterer realizes he has gone too far. He apologizes and he attempts to show kindness and remorse. Hoping that this behaviour will become the norm, the battered woman remains in the relationship and she accepts her situation.[65]

According to Walker, "Learned Helplessness" begins when the "Cycle of Violence" starts to repeat itself. During the "Learned Helplessness" stage the battered woman begins to think that she has no options. Feeling powerless, a battered woman becomes passive, submissive, and helpless.[66] The battered woman believes that she has

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[63] *Ibid.* at 18; Lenore E.A. Walker, *The Battered Woman Syndrome*, 2nd ed. (U.S.A.: Springer Publishing Company, 2000) at 126, 127-132 [Walker, *Battered Woman*, 2nd ed.].
[64] Comack, *supra* note 2 at 18; Lenore Walker, *The Battered Woman Syndrome* (New York: Springer 1979) at 61 [Walker, *Battered Woman*]; Walker, *Battered Woman*, 2nd ed., *ibid.* at 126, 127-132.
[65] Comack, *ibid.* at 19; Walker, *Battered Woman*, *ibid.* at 65; Walker, *Battered Woman*, 2nd ed., *ibid.* at 127.
[66] Comack, *ibid.*; Walker, *Battered Woman*, *ibid.* at 47.

no control or influence over what happens to her.[67] In the end, the battered woman expects the battering to occur and she thinks that she cannot influence its occurrence.[68]

Overall, the Battered Woman Syndrome attempts to substantiate self-defence as it exists in the *Criminal Code.* The syndrome confirms that a woman who has been abused on a regular basis is often "...familiar with signals of imminent violence from her batterer."[69] In addition, the theory illustrates the reasonableness of a battered woman's fears and how the psychological consequences of the relationship may prevent her from retreating from the situation.[70]

## PART II: EVALUATION OF THE BATTERED WOMAN SYNDROME AS A FEMINIST LEGAL STRATEGY

***R. v. Lavallee* [1990]:**

The Battered Woman Syndrome was first recognized as a legitimate theory, in 1990 in the *Lavallee* case. Since Lavallee was an abused woman who had killed her abuser, she was allowed to substantiate her self-defence claim by arguing that she had been suffering from the Battered Woman Syndrome at the time of the shooting. In that case, Ms. Lavallee was charged with second degree murder of her common law partner. Their four year relationship consisted of frequent arguments and violence. Ms. Lavallee shot her partner in the back of the head and killed him as he exited their bedroom.

After applying the Battered Woman Syndrome to the facts of the case, the Supreme Court of Canada upheld Lavallee's acquittal of second degree murder. In doing

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[67] Comack, *ibid.*; Walker, *Battered Woman*, *ibid.* at 48.
[68] Comack, *ibid.*; Walker, *Battered Woman*, *ibid.* at 43.
[69] Comack, *ibid.* at 20.
[70] Comack, *ibid.*

so, the court acknowledged the gender biases that existed in the *Criminal Code's* definition of self-defence. The decision received mixed reviews. Some unequivocally supported the decision, while others were more critical of the decision.[71]

**i) Potential Benefits:**

**a) Implications for Other Defences**

Battered Woman Syndrome advocates contend that the *Lavallee* decision benefits women in two important ways. First, the Supreme Court of Canada has recognized that "reasonableness" can be affected by gender and that the "reasonable man" standard must be expanded in order to take in to account the life experiences and perspective of the "reasonable woman".[72] Second, the Supreme Court of Canada also held that in order for self-defence to succeed as a defence, an imminent attack is not necessary.[73]

As demonstrated in *Lavallee*, these two developments have assisted women in self-defence cases.[74] However, they have also benefited women when they attempt to use other defences that have a "reasonableness" requirement and an imminence requirement.[75] For example, the defence of provocation, the defence of duress and the defence of necessity have all been reformulated in order to redress the disadvantage

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[71] Lahey, *supra* note 5; Comack, *supra* note 2 at 4. Note: Justice Bertha Wilson, the first woman appointed to the Supreme Court of Canada, wrote the decision for the majority.
[72] See *Lavallee*, *supra* note 3 at paras. 38-39.
[73] *Ibid.* at paras 41-43, 52.
[74] This expanded understanding of self-defence was reaffirmed in *R. v. McConnell*, [1996] 1 S.C.R. 1075. In that case, Justice La Forest of the Supreme Court of Canada confirmed that Conrad J.A.'s dissenting judgment at the Alberta Court of Appeal (*R. v. McConnell*, [1995] A.J. No. 651) was the correct interpretation and application of self-defence. In Conrad J.A.'s dissenting opinion he held that "...reasonableness must be assessed in light of the special circumstances of the accused". He also confirmed *Lavallee's* rejection of the rule that the apprehended danger must be imminent.
[75] See Donna Martinson, "Implications of Lavallee v. R. For Other Criminal Law Doctrines" [Martinson, "Implications"] in Donna Martinson, *et al.*, "A Forum on Lavallee v. R.: Women and Self-Defence" (1991) 25 U. Brit. Colum. L. Rev. 23 at 25 [Martinson, "A Forum"].

women previously faced when using these defences.[76] Since the approach taken towards "reasonableness" and imminence in *Lavallee* has been applied to these three defences, the defences themselves have become more flexible as the trier of fact is now required to consider the situation in its context.[77] In addition, other important factors now have to be considered when determining whether the accused can avail themselves of the respective defence. These important factors include the age, "race", culture, sex, class, religion and sexual orientation of the accused.[78] Accordingly, *Lavallee* has assisted women when they use other defences that have been written from a male's perspective and interpreted based on men's experiences.[79]

**b) *Self Defence Review***

Another potential benefit of the *Lavalle* decision was the creation of the *Self Defence Review*.[80] The Chair of the *SDR* was Judge Lynn Ratushny. Her mandate was as follows:

> 1. to review the cases of women under sentence in federal and provincial institutions who apply for a remedy and who are serving a sentence for homicide in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death;
> 2. to make recommendations in appropriate cases to the Government of Canada for individual women whose circumstances merit consideration for the granting of royal prerogative mercy;

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[76] Martinson, "Implications", *ibid.*
[77] *Ibid.* at 34.
[78] *Ibid.* at 27.
[79] For example, in *R. v. Ruzic*, [2001] 1 S.C.R. 687 the Supreme Court of Canada upheld Ms. Ruzic's acquittal. Her acquittal was upheld because she had committed the crime under the common law definition of duress. In that case a twenty-one year old Yugoslav woman was charged with importing narcotics into Canada. She claimed she had done so because she was under duress. According to Ms. Ruzic she had attempted to import the narcotics at Mr. Mirkovic's request because he had threatened to harm her mother. Ms. Ruzic followed his orders. In upholding her acquittal, the Supreme Court of Canada held that the common law defence of duress in Canada is no longer restricted by the constraints of immediacy and presence [para. 56].
[80] *Self Defence Review: Final Report* (Submitted to the Minister of Justice and to the Solicitor General of Canada, 11 July 1997) [*SDR*].

3. to clarify the availability and the scope of the defences available to women accused of homicide in the circumstances set out above; and
4. to make recommendations as considered appropriate with respect to possible law reform initiatives stemming from the review.[81]

Generally, the main purpose of the *SDR*, was to review cases in which women could have benefited from the new developments relating to the law of self-defence and battered women.[82] In total, Judge Ratushny received ninety-eight applications for review. Of the ninety-eight cases, only fourteen women were interviewed by Judge Ratushny. The majority of the applications were rejected because they did not meet the standard of review she had adopted, or because the criteria for self-defence had not been met.[83] Judge Ratushny made recommendations in seven of the fourteen cases.[84] Five of the seven women were granted some form of relief by the Federal Government.[85]

Even though the majority of the women who applied to have their cases reviewed were denied relief, a number of progressive recommendations and law reforms were suggested by the *SDR*.[86] Accordingly, the work done by the *SDR* can be viewed as meaningful. What is unfortunate is the fact that the Federal government has failed to implement the law reforms recommended.[87] There are also a number of other problems with the *SDR* report that have been identified. Generally, the *SDR* failed to address the

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[81] *Ibid.* at 11.
[82] *Ibid.*
[83] Elizabeth Sheehy, "Review of the Self-Defence Review" (2000) 12 C.J.W.L. 197 at 198 [Sheehy, "Review of the Self-Defence"]. See *SDR*, *ibid.* at 128-129.
[84] *SDR*, *ibid.* at 121-127.
[85] See "Sheehy, "Review of the Self-Defence", *supra* note 83 at 205: The Federal Government "...granted two conditional pardons, instead of the three unconditional pardons that had been recommended, to two women who has already completed their sentences; it granted remission of sentence to two women who had already been released into community on parole; and the minister of justice used her section 690 powers to refer one case to the Court of Appeal on the question of whether the killing was 'planned and deliberate.' The other two women were denied any form of relief."
[86] *Ibid.* at 199.
[87] *Ibid.* at 205.

systemic features of male violence.[88] At the same time, the *SDR* results reinforced the status quo; because very few women were granted relief, the myth that the criminal justice system in Canada is fair and unassailable was reinforced.[89] Finally, the *SDR* report failed to disclose the racial identities of the applicants.[90] Thus, the fact that the motives, actions and credibility of racialized women (who are charged with killing their abusive partners) are filtered through racist stereotypes and cultural assumptions was overlooked.[91] As a result, the intersecting oppressions of racism and gender were ignored.[92]

**ii) Initial Negative Implications of the Battered Woman Syndrome:**

Critics of the Battered Woman Syndrome have identified three main problems. First, the cornerstone of the syndrome, "Learned Helplessness", is based upon studies by animal behaviourists. Second, the theory "medicalizes" and "syndromizes" women's experiences. Finally, the Battered Woman Syndrome creates a new standard; the "reasonable man" standard is replaced by the standard of the "reasonable battered woman".[93]

**a) "Learned Helplessness":**

The cornerstone of the Battered Woman Syndrome is "Learned Helplessness".

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[88] *Ibid.* at 229.
[89] *Ibid.* at 232. For example, Sheehy has identified a number of newspaper articles in which the SDR results were discussed and the women were identified as "killers". See Stephen Bindman, "Judge: Free Four Female Killers" *Ottawa Citizen* (3 March 1997) A1; Janice Tibbetts, "Ottawa Won't Free Female Killers Yet" *Globe and Mail* (3 March 1997) A6; See especially Editorial, "Why Four Killers Should Go Free" *Ottawa Citizen* (4 March 1997) A12, "if anything, her work [Judge Ratushny's] demonstrates that the justice system works exactly the way it should in the vast majority of cases". See "Sheehy, "Review of the Self-Defence", *ibid.* at footnote 128.
[90] "Sheehy, "Review of the Self-Defence", *ibid.* at 229.
[91] *Ibid.* at 214.
[92] *Ibid.* at 214-215.
[93] Chan, *Women, Murder, supra* note 46 at 153.

"Learned Helplessness" was found in dogs that were repeatedly and arbitrarily shocked. The dogs became so demoralized by the electric shocks that they lost their will to escape from their cages. Dr. Leonore Walker was the first person to apply "Learned Helplessness" to battered women. She has testified at numerous murder trials throughout the United States. During her testimony Dr. Walker has repeatedly compared women to dogs. She claims that the unpredictability of when the abuse will occur again renders women helpless and passive.[94] As a result, the woman's motivation and response is diminished by the repeated beatings.[95]

According to the people that originally identified "Learned Helplessness", domestic violence is not an appropriate example of the condition.[96] Instead, someone who has been completely deprived of control over their own life is more likely to develop "Learned Helplessness". For example, someone who is unable to go to the bathroom alone, or put on their own clothes loses all power of self determination. A person who has lost all power of self determination would not have the will to kill.[97] Accordingly, this makes it hard to understand how the definition of "Learned Helplessness" can apply to a battered woman who kills her spouse in a vigorous action of self-defence.

As survivors of abusive relationships, battered women are not helpless when they engage in self-protective behaviour. Battered women are often desperate. "Learned Helplessness" is about helplessness not desperation.[98] By denying women the integrity and agency they wish to attain, learned helplessness reduces women to the status of dogs. Endorsing the analogy between women's behaviour and dogs, "Learned Helplessness"

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[94] Walker, *Battered Woman*, *supra* note 64 at 47-48.
[95] *Ibid.* at 47-53.
[96] Downs, *supra* note 12 at 154-155.
[97] *Ibid.*
[98] *Ibid.* at 155.

conveys the message that women are passive, lack agency, and human intelligence.[99] Implicit in this comparison there also lays the belief that women and dogs behave the same way under similar circumstances.[100]

**b) The "Syndrome":**

Historically, ideal feminism was reconciled with female criminality through the regulation of women's bodies and minds.[101] For example, throughout history women who have deviated from ideal femininity or who have become involved with the criminal justice system have been described as heretics, as mentally insane, as suffering from a "syndrome", or as women who are unable to control their hormones.[102] Even today, when women are characterized as criminal subjects their bodies are often the focus of this construction.[103] Theories and syndromes continue to exist in which women are constructed as criminal subjects based upon their bodies and minds. The Battered Woman Syndrome is such a syndrome, as a woman who wishes to use the syndrome must exhibit both psychological and emotional disabilities.[104]

Since only women can use the Battered Woman Syndrome, it is not surprising to discover that concerns have been raised about the "...syndromization of women's experiences."[105] The word "syndrome" is defined in *Webster's New Encyclopedic*

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[99] *Ibid.*
[100] *Ibid.* at 158. Furthermore, if the analogy is to present the woman like a dog, then it follows that the husband is "portrayed" as the master of the wife.
[101] Frigon, *supra* note 26 at 79; E. Shur, *Labelling Women Deviant: Gender, Stigma and Social Control* (New York: Random House, 1984) in Frigon, *ibid.* at 80. See M. Summers, *Malleus Maleficarum* (New York: Benjamin Books Inc., 1970); See C. Lombroso, *The Female Offender* (Selected Library of Modern Science: Westminister Edition, 1895); See *e.g.* Evan Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58 Albany L. Rev. 973.
[102] Frigon, *ibid.* at 85-103.
[103] *Ibid.* at 79.
[104] Moore, *supra* note 35 at 307.
[105] Christine Boyle, "The Battered Wife Syndrome and Self-Defence: Lavallee v. R", in "Dawson, "3rd ed.", *supra* note 5, 174 at 177.

*Dictionary* as "a group of signs and symptoms that occur together and characterize a particular abnormality."[106] Since the word "syndrome" represents an abnormality, the Battered Woman Syndrome claims that a normal woman would leave or end the relationship; if she does stay, she is abnormal and her deviance must be explained.[107] Accordingly, the source of the problem is not the batterer, rather it is the woman's psychological inability to take control of her own life and exercise the right choice to leave her partner.[108] Thus, women who use the Battered Women Syndrome are rendered less capable of rationality and judgment.[109] Furthermore, because the word syndrome has been associated with people who are mentally unstable,[110] the psychological professions must interpret the battered woman's experiences.[111] In the *Lavallee* case her voice was never heard; instead, a psychologist shared his interpretation of her experiences, her state of mind, and her perceptions:[112]

> [i]n the process, the woman is transformed into a passive victim of her own dysfunctional personality. Other factors – like the actions of the abusive male in the social relation or the structural constraints which limit the woman's choices – go unacknowledged.[113]

**c) The "Reasonable Battered Woman":**

Women who use the Battered Woman Syndrome are also expected to display passive characteristics which have been associated with victim-hood[114] and traditional

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[106] *Webster's New Encyclopedic Dictionary*, 1994, *s.v.* "syndrome" [*Webster's*].
[107] Comack, *supra* note 2 at 43.
[108] *Ibid.* at 43-44.
[109] Elizabeth Schneider, "Describing & Changing: Women's Self-Defense Work and the Problems of Expert Testimony on Battering" in Downs, *supra* note 12 at 147-148.
[110] Jane Doe, *The Story of Jane Doe* (Toronto: Random House Canada, 2003) at 175; See Stark, *supra* note 101.
[111] Comack, *supra* note 2 at 41.
[112] *Ibid.*
[113] *Ibid.* at 51.
[114] Downs, *supra* note 12 at 167.

"feminine" behaviour. Consequently, a new standard is created; the "reasonable man" standard is replaced by the standard of the "reasonable battered woman".[115] As a result, a woman who now tries to use self-defence as justification for her actions must prove she is a genuine battered woman instead of proving that she has acted in a reasonable and necessary way:[116]

> [w]hile battered woman syndrome furthers the interests of some battered women, the theory incorporates stereotypes of limited applicability concerning how a woman would and, indeed, should react to battering. To successfully defend herself, a battered woman needs to convince a jury that she is a "normal" woman – weak, passive, and fearful. If the battered woman deviates from these characteristics, the jury may not associate her situation with that of the stereotypical battered woman...[The] battered woman syndrome explains the behaviour of battered women within fairly strict categories, i.e., that a woman is fearful, weak, and submissive. Yet, the theory provides no means for assessing the reasonableness of the woman's act of killing unless she is given the 'excuse' of learned helplessness.[117]

**iii) Canadian Case Law Post *Lavallee*:**

In 1993 and 1997, Elizabeth Sheehy and Martha Shaffer examined some of the developing case law post *Lavallee*.[118] Both authors found that the Battered Woman Syndrome was being developed in self-defence cases in ways that many feminists would find troubling.[119] Generally, they found that the *Lavallee* case has not resulted in any dramatic increase in the successful self-defence claims of battered woman.[120] This has occurred for a number of reasons. First, the Battered Woman Syndrome has only been

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[115] Chan, *Women, Murder*, *supra* note 46 at 153.
[116] *Ibid.*
[117] Allard, *supra* note 11 at 193-194, 206.
[118] Elizabeth Sheehy, Developments in Canadian Law After *R. c. Lavallee* (1993) Unpublished Paper ["Sheehy, "Developments in Canadian"], cited in Frigon, *supra* note 26 at 97; Shaffer, *supra* note 52.
[119] Shaffer, *ibid.* at 2.
[120] *Ibid.* at 17.

used in a limited number of reported cases.[121] In fact, women charged with the homicide of their abusive partners have often pled guilty to manslaughter. [122] For example, in *R. v. Whitten*,[123] Ms. Whitten pled guilty to manslaughter, even though there was a possibility that she could have secured a full acquittal if she had pled self-defence. According to Shaffer, there are three factors that likely influenced her decision. These factors include: Whitten's psychiatric history; her history of violence, including the fact that she previously attacked the deceased with a knife; and her alcoholism.[124] Similarly, in *Bennett*,[125] Ms. Bennett could have benefited from the Battered Woman Syndrome but instead she chose to plead guilty to manslaughter. Her decision to plead guilty to manslaughter may have also been influenced by the fact that she departed from the image of a "victim". Bennett had an alcohol problem, she had instigated violence against the deceased and others in public on prior occasions, she was aggressive and she liked to use profane language.[126] The trial judge even described her as "...one tough woman by anyone's standards".[127] The fact that both Whitten and Bennett departed from the standard of "victim" more than likely influenced their decisions to plead guilty to manslaughter.

The fact that many women have pled guilty to manslaughter instead of arguing self-defence, is clearly related to the second development that has emerged in post *Lavallee* decisions. This development relates to the creation of a new stereotype, the

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[121] For example, in 16 cases occurring between 1990 and 1997, where the accused was an abused woman charged with the murder or manslaughter of her abusive partner, only three were acquitted. See Shaffer, *ibid.*
[122] *Ibid.* at 18.
[123] (1992), 110 N.S.R. (2d) 148 (N.S.S.C.) [*Whitten*].
[124] Shaffer, *supra* note 52 at 28.
[125] (1993) O.J. No. 1011. (O.C.J.) [*Bennett*].
[126] Shaffer, *supra* note 52 at 30; *Bennett*, *ibid.* at paras. 44, 64.
[127] *Bennett*, *ibid.* at 15.

stereotype of the "reasonable battered woman". For example, the majority of women who have attempted to use the Battered Woman Syndrome in post *Lavallee* decisions were unable to secure acquittals because they did not "fit" within the Battered Woman Syndrome criteria.[128] For example, *Howard*, *Catholique* and *Eyapaise* are three cases which support this proposition. In all three cases, the accused were aboriginal women. According to Sheehy, the violence of White women is characterized as unwomanly and is explained through the Battered Woman Syndrome, wherein the woman is characterized as helpless and paralyzed.[129] In contrast, she argues that the violent acts carried out by the Aboriginal women in these three cases were viewed through racist lenses, which are consistent with stereotypes of Aboriginal women.[130] Accordingly, the violence displayed by the Aboriginal women in these cases did not need to be explained through syndromization,[131] instead it was naturalized and it was explained in terms of Aboriginal women's innate nature.[132]

Since the Battered Woman Syndrome may detrimentally affect a woman's ability to argue self-defence if she does not fit the stereotype of the "reasonable battered woman", it is important to examine what has happened in homicide cases involving racialized women who have not claimed Battered Woman Syndrome status. Even though there are no cases involving African-Canadian women and the Battered Women Syndrome or African-Canadian women and self-defence, other cases involving racialized women may provide some insight as to how an African-Canadian woman would be

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[128] See *Howard*, *supra* note 23; *Catholique*, *supra* note 24; *Eyapise*, *supra* note 25; *R. v. Fournier*, [1991] N.W.T.R. 377 (N.W.T.S.C.); *R. v. Whitten* (1992), 110 N.S.R. (2d) 148 (N.S.S.C.); *Bennett*, *supra* note 114.

[129] "Sheehy, "Developments in Canadian", *supra* note 118.

[130] *Ibid.*

[131] *Ibid.*

[132] See also Julie Stubbs & Julia Tolmie, ""race", Gender, and the Battered Woman Syndrome: An Australia Case Study" (1995) 8 C.J.W.L. 122.

treated by the criminal justice system. For example, recently there have been a number of cases in which abused Aboriginal women have pled guilty to manslaughter even though they may have been able to benefit from self-defence generally without arguing Battered Woman Syndrome.

*M.F.*,[133] *W.L.Q.*,[134] *R.F.*,[135] and *S.M.*[136] are four cases which illustrate this point. In all four cases, the actions of each one of the Aboriginal women could have been described in terms of self-defence because it appears as though each woman was being assaulted when the homicide took place. Nevertheless these women pled guilty to manslaughter. Why did these women plead guilty? What factors played a role in their decisions to plead guilty? Did their lawyers tell them to plead guilty? Did they plead guilty because they were intoxicated when the homicides took place? Did their violent histories and prior criminal records influence their decisions? Unfortunately, it is impossible to answer these questions with any certainty by simply reading the cases. Nevertheless, some evidence exists in these cases which implies that racialized women may not receive the legal advice or justice they deserve when they come in to contact with the criminal justice system.

*M.F.*, *W.L.Q.*, *R.F.* and *S.M.* are cases which contain similar facts. First, as previously mentioned all four women were Aboriginal. Second, all of the women pled guilty to manslaughter even though there was some form of evidence which suggested that the women had acted in self-defence. Third, all of the women had been intoxicated at the time the homicide took place. Fourth, all of the women had prior criminal records,

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[133] *Supra* note 27.
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*

some more violent than others. Fifth, all of the women had been sexually or physically abused as children. In addition, these women continued to live in abusive situations as adults. Sixth, none of the women were highly educated. Finally, all of the women came from lower socio-economic backgrounds. When these findings are examined as a whole, they are disturbing. In fact, they illustrate the criminal justice system's inability to address the intersecting oppressions of gender, race and class.[137]

Unfortunately, the impact of "race" is one of the most difficult variables to identify in Battered Woman Syndrome cases or in self-defence cases because the woman's colour is often erased.[138] For example, it has been suggested that *Lavallee* was Aboriginal; yet, the recorded facts do not indicate her "race".[139] Even when a woman's "race" has been identified, its importance is often marginalized because the accused's gender and "race" cannot be isolated. Nevertheless, the courts' treatment of the Aboriginal women mentioned in the above cases can be used to surmise how African-Canadian women would be treated by the Criminal Justice System. In fact, it is more than likely that Black women would also be viewed through racist lenses when asserting a claim of self-defence whether it is supported by the Battered Woman Syndrome or not.

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[137] Even the Supreme Court of Canada has difficulty addressing the intersectionality of oppressions that occur in women's lives. For example, in *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*], *Gladue* was constructed as a violent Aboriginal woman. Even though the court considered the impact of her race they ignored her gender and overlooked the patriarchal violence she had endured. For a critique of *Gladue* see Jean Lash, "Case Comment: R. v. Gladue" (2000) 20:3 Canadian Women's Studies 85.

[138] Sheila Noonan, "Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (Or (Re)Inscribing the Familiar?)" in A Bottomley, ed., *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Press, 1996) 191 at 207.

[139] *Ibid.* See Stubbs & Tolmie, *supra* note 132 at 125.

**iv) *R. v. Malott* [1998]**

The Supreme Court of Canada last considered the Battered Woman Syndrome in *R. v. Malott*.[140] In that case, Margaret Ann Malott experienced physical, psychological, emotional and sexual abuse at the hands of her common law partner, Paul Malott. This abuse occurred throughout their nineteen year relationship. Ms. Malott shot and killed Paul Malott on March 23, 1991. The shooting occurred outside of a medical center, where Ms. Malott had planned on obtaining drugs for the deceased's illegal drug trade. According to *Malott*, the deceased physically assaulted her upon their arrival at the medical center and his behaviour indicated that he was going to assault her again when they discovered that the medical center was closed. Instead of waiting for the assault to begin *Malott* shot the deceased several times.[141]

At trial, *Malott* was convicted of second degree murder and the jury recommended that she receive the minimum sentence because of the history of violence she had endured at the hands of the deceased. Malott appealed. Both the appeal to the Ontario Court of Appeal[142] and the appeal to the Supreme Court of Canada focused on "...the adequacy of the trial judge's charge to the jury on the issue of battered woman syndrome as a defence to the charge of murder".[143] Both courts dismissed the appeal.[144]

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[140] [1998] 1 S.C.R. 123 [*Malott*].
[141] *Ibid.* at para. 24.
[142] (1996), 30 O.R. (3d) 609 (O.C.A.) [*Malott*, O.C.A.] .
[143] *Ibid.* at para. 1.
[144] This is unfortunate considering the fact that legitimate concerns were raised by Justice Abella in her dissent at the Court of Appeal. In her dissenting opinion, Abella J., held that the trial judge had inappropriately focused on specific evidence during his charge to the jury. Instead of providing the jury with a balanced overview of the facts, Zalev J. predominately focused on the morning of the shootings. According to Abella J., he should have reviewed the Battered Woman Syndrome evidence that had been provided by Dr. Jaffe in greater detail in order to ensure that the jury understood the relevance of the cumulative years of abuse on *Malott's* perceptions.

Although the appeals were denied, the Supreme Court of Canada case does stand for a number of important propositions. First, the Supreme Court of Canada reiterated the fact that the Battered Woman Syndrome is not a legal defence; it is a psychiatric explanation which attempts to assist the trier of fact in understanding a battered woman's state of mind.[145] Second, the utility of Battered Woman Syndrome evidence is not limited to cases where a battered woman has pled self-defence.[146] Finally, while the majority simply restated the findings of *Lavallee*,[147] some of the literature that has expressed concerns about the syndrome was identified and discussed by L'Heureux-Dube J. and McLachlin J. (as she then was) in their concurring minority judgment.

**a) Concurring Minority Judgment**

In the concurring minority judgment, L'Heureux-Dube J. and McLachlin J. discussed the problems that have been raised by a number of academics in recent years.[148] They caution trial judges about the dangers in using Battered Woman Syndrome evidence.[149] In particular, they discuss the fact that concerns have been raised about the presence of a new stereotype that battered women must overcome. As previously mentioned, this new stereotype has been identified as the stereotype of the "reasonable battered woman".

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[145] *Malott*, *supra* note 140 at para. 37, headnote.
[146] For example, Battered Woman Syndrome evidence can be used in cases where provocation, duress, or necessity is argued. *Ibid.* at para. 36.
[147] Isabel Grant, "R. v. Malott" [Grant, "R. v. Malott"] in T. Brettal Dawson, ed., *Women and Social Change: Core Readings and Current Issues*, 4th ed. (Concord: Captus Press, 2002) 212 at 214 [Dawson, "4th ed."].
[148] See Isabel Grant, "The 'Syndromization' of Women's Experience" in Martinson, "A Forum", in Martinson, *supra* note 75 at 51; Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Mich. L. Rev. 1; Sheila Noonan, "Strategies of Survival: Moving Beyond the Battered Woman Syndrome" in Ellen Adelberg and Claudia Currie, eds., *In Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang Publishers, 1993) 247; Shaffer, *supra* note 43.
[149] "Grant, "R. v. Malott", *supra* note 147.

Generally, the concurring minority justices discuss how certain prerequisites of the Battered Woman Syndrome, such as "Learned Helplessness", dependence, victimization and low self-esteem cause problems for battered women.[150] According to L'Heureux-Dube and McLachlin J.J., these prerequisites too readily conform to stereotypes that society already holds about women.[151] Accordingly, the fact that women who cannot fit themselves within the stereotype of a "victim" who is passive, helpless and dependent, may be judged unfairly was acknowledged.[152] The different types of women who may not be able to fit within this "victim" stereotype were also identified. These women include those who show initiative and strength, professional women, women of colour and women who have reciprocated the violence they experienced.[153]

If most of the prerequisites of the Battered Woman Syndrome conform to pre-existing stereotypes about women, is its usefulness not questionable to begin with? Accordingly, an argument can be made that due to its current definition, the Battered Woman Syndrome cannot benefit women in the long run. In fact, the Battered Woman Syndrome poses particular difficulties for women of colour. Justice L'Heureux-Dube explicitly stated so herself.[154] If a Supreme Court of Canada judge expressly states that the syndrome poses problems for particular groups of women why has the syndrome not been reformulated or abandoned?

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[150] *Malott*, *supra* note 140 at para. 41.
[151] *Ibid.*
[152] *Ibid.* at para. 40.
[153] *Ibid.* See Stubbs & Tolmie, *supra* note 132. See *Bennett*, *supra* note 125, where Judge Ratushny recognized the fact that a woman is not only a "victim" and that a woman may have been violent herself. She went on to hold that these facts do not preclude a woman from proving that she suffered violence at the hands of her partner and that these facts are relevant to her self-defence claim.
[154] See *Malott*, *supra* note 140 at para. 40.

# PART III: CANADIAN LITERATURE

## Black Feminist Criticism:

The fact that "race" may affect a Black woman's ability to use the Battered Woman Syndrome was explicitly recognized in *Malott*. Nevertheless, very few Canadian legal feminists have critically examined how the Battered Woman Syndrome affects African-Canadian women. This has occurred for a number of reasons. First, there are no cases in Canada in which an African-Canadian woman has attempted to use the Battered Woman Syndrome. Second, White feminism has historically excluded the experiences of racialized women. Finally, African-Canadian feminism has had difficulty establishing itself as a discourse because it has relied too heavily upon African-American feminism to speak on its behalf.

### i) White Feminism: A Barrier for African-Canadian Women

Feminism has been predominately concerned with the plight of White women. Accordingly, this helps explain why there has been very little written about African-Canadian women and the Battered Woman Syndrome. Until recently White feminists were unaware of how their perspectives were racist and biased.[155] As a result, White women's reality has been presented as representative of the lived experiences of all women.[156]

Generally, modern feminist thought has claimed that "all women are oppressed".[157] This premise is intellectually reasoned;[158] however, the idea that all women suffer a "common oppression" is problematic. First, the lived and varied

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[155] hooks, *supra* note 14 at 3.
[156] *Ibid.*
[157] *Ibid.* at 5.
[158] Moore, *supra* note 35 at 336.

experiences of women disprove this proposition.[159] Second, women are divided by a number of prejudices, including: racism, sexism and class privilege.[160] Finally, the idea that women suffer a "common oppression" ignores the impact of "race" and other factors like class and sexual preference which individual women must face.[161] In fact, "[t]here is much evidence substantiating the reality that "race" and class identity creates differences in quality of life, social status, and lifestyle that take precedence over the common experience women share - differences that are rarely transcended."[162] Thus, sexism does not determine the fate of all women.[163]

It is true that White feminism in Canada has begun to recognize the importance of "race" in women's lives, during the past fifteen years. However, this recognition has been predominately superficial.[164] The superficial recognition of "race" has occurred for a number of reasons. First, Canada was colonized on the basis of "race" not sex.[165] As a result, racial alliances were formed. Consequently, racism has restricted bonding between Black women and White women.[166] This means that because of racial imperialism,[167] White feminists may generally refuse to examine how they participate in the oppression of others.[168]

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[159] hooks, *supra* note 14 at 44.
[160] *Ibid.*
[161] *Ibid.* at 5
[162] *Ibid.* at 4.
[163] *Ibid.* at 5.
[164] Deliovsky, *supra* note 54 at 59. However, more Canadian authors are beginning to write about racism and their analyses have not been superficial. See for example works written by Himani Bannerji, Makeda Slivera, Dionne Brand, Sherene Razack, George J. Sefa Dai, Joanne St. Lewis, Camille A. Nelson, Abigail Bakan, Gilllian Cresse, Marlee Kline, Ronnie Leah, Daiva Stasiulis etcetera.
[165] Thornhill, *supra* note 30.
[166] *Ibid.*
[167] *Ibid.*
[168] Deliovsky, *supra* note 54 at 61.

Second, White feminists may be unwilling to relinquish the power and control which they have gained from the feminist movement.[169] They know that the fight against sexism is the most effective means to advance their status in society.[170] On the other hand, any advancement in the fight against racism would jeopardize the power and privileges they possess.[171] In addition, White feminists have argued that any focus on "race" and class will destabilize the women's movement's basic structure, and thus detract from the "gender" analysis and the movement's authenticity.[172]

Finally, White feminist scholarship has revolved around the concepts of patriarchy and gender. Since these concepts are too narrow to fully encompass women's oppression, any inclusion of "race", class, ethnicity and sexuality under these concepts is superficial.[173] The concept of "women" as an essential category versus "male domination" as an essential category ignores other sites of oppression.[174] Because many feminists continue to base their analyses on these two terms, women continue to be analyzed as a homogeneous group.[175]

**a) Gender and Patriarchy: Exclusive Terms**

Even though White feminism has recently acknowledged that "race" is a variable in women's lives, this recognition has occurred at a superficial level due to feminism's

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[169] *Ibid.*; See Patricia Monture, Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Ya-Gah (The Way Flint Women Do)" (1986) 2 C.J.W.L. 159 at 168.
[170] Nkiru Nzegwu, "Confronting Racism: Towards the Formation of a Female-Identified Alliance" (1994) 7 C.J.W.L. 15 at 23.
[171] *Ibid.* In contrast, some White feminists think that it is inconceivable that they participate and benefit from racial hierarchies. See Deliovsky, *supra* note 54 at 61.
[172] Ronalda Murphy, "Unstable Categories: Comparing the Politics of 'Gender' in the Early 1990s in Canada and South Africa" (2002) 14 C.J.W.L. 300 at 312, 314.
[173] Deliovsky, *supra* note 54 at 62.
[174] Murphy, *supra* note 172 at 310.
[175] Deliovsky, *supra* note 54 at 64.

focus on gender and patriarchy as common sites of oppression.[176] White feminism is premised on the notion that women suffer from a common oppression because they are women.[177] However, gender identity is also influenced by many more experiences such as "race", class, ethnicity and sexuality. This fact has been largely overlooked.[178] Within this gender analysis there is also a presumption that gender can be isolated from other sites of oppression such as "race".[179] This method of analysis perpetuates the belief that White women are not "race"d.[180] As a result, the power and privileges White women possess are often concealed.[181]

Patriarchy is also a fundamental concept which is central to White feminist analysis.[182] Even though there is no single definition of patriarchy White feminists have come to the consensus that patriarchy privileges men over women.[183] This definition of patriarchy assumes that women are dominated by men on a global level.[184] As a result, this concept ignores other hierarchies that exist such as "race"/ethnicity, class and sexuality.[185] For example, White men had unrestricted access to Black women due to slavery, colonialism and imperialism, while the reverse was not true for Black men.[186] During this same time period, both White men and White women participated in the lynching of Black men in the United States and in Canada.[187] More recently, White

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[176] *Ibid.* at 65.
[177] *Ibid.* at 64; Thornhill, *supra* note 30 at 157.
[178] Marxist and socialist feminism are the exception. Nonetheless, they have also ignored "race", ethnicity and sexuality. See Deliovsky, *supra* note 54 at 64. See generally Thornhill, *supra* note 30.
[179] Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988) at 165, cited in Deliovsky, *supra* note 54 at 64.
[180] Deliovsky, *ibid.* at 66.
[181] *Ibid.* at 67.
[182] *Ibid.* at 69.
[183] *Ibid.*
[184] *Ibid.* at 70.
[185] *Ibid.*
[186] *Ibid.* at 73.
[187] *Ibid.*

women racialized their quest to gain the vote by discriminating against non-White men during the suffrage movement.[188] They asked, "Why should the ballot be given to these aliens who own not a tithe of the property owned by Canadian women who are without the ballot?"[189] Accordingly, the way in which patriarchy has been conceptualized is incorrect.[190] Patriarchy is not a universal expression of masculine co-operation.[191] Patriarchal power and power in general is often determined by "race".[192]

The fact that the terms "gender" and "patriarchy" are of limited use to Black women can be further understood by comparing and contrasting the issues that are important to Black women with the issues that are important to White women. For example, White feminists' preoccupation with the post-Industrial Revolution family, which consisted of the male breadwinner and female homemaker, was not the major source of oppression for Black women.[193] It is true that many racialized women are burdened by gender oppression in the family, however, immigration and labour policies have had a greater affect on their families than gender relations. This is predominately due to the fact that unlike White women, racialized women were not exclusively confined to the domestic sphere.[194] In fact, women of colour were often indentured slaves.[195] They

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[188] Tamari Kitossa, "Criticism, Reconstruction and African-Centred Feminist Historiography" in Wane, Deliovsky & Lawson, *supra* note 54, 85 at 108.
[189] Marianna Valverde, "'When the Mother of the "race" is Free': "race", Reproduction and Sexuality in First Wave Feminism" in Franca Iacovetta and Mariana Valverde, eds., *Gender Conflicts: New Essays in Women's History* (Toronto: University of Toronto Press, 1992) 3 at 19.
[190] Delivsoky, *supra* note 54 at 74.
[191] *Ibid.*
[192] *Ibid.*
[193] Radha Jhappan, "Post-Modern "race" and Gender Essentialism or a Post-Mortem of Scholarship" in "Dawson, "4th ed.", *supra* note 147, 392 at 396.
[194] *Ibid.*
[195] *Ibid.*

also participated in the paid labour force more frequently and at much higher rates than White middle class women.[196]

Similarly, other issues that have been raised by White feminists, such as abortion and sexuality, do not carry as much resonance for racialized women.[197] This is due to the fact that racialized women are more preoccupied with their physical survival and economic well-being.[198] For example, they are more concerned about physical abuse, social security, and starvation.[199] Finally, the goal of White feminists to attain equality with White males is not a goal that racialized women aspire to achieve.[200] Since White men have achieved their positions of power and privilege because of racism and sexism, White women's ability to obtain the same position would mean that racial hierarchies would remain in place.[201]

Due to White feminism's preoccupation with gender and patriarchy, it is clear that the impact "race" may have on a woman's ability to use the Battered Woman Syndrome has been largely overlooked. In order to ensure that feminism is inclusive of all women it is important to identify where improvements can be made. Canadian feminists must analyze legal strategies from many different perspectives. Accordingly, legal feminists must saturate the concepts of gender and patriarchy with "race", ethnicity, class and sexuality when examining legal strategies such as the Battered Woman Syndrome. If they fail to do so, they not only allow the oppression of other groups of women to continue, they also participate in maintaining racism.

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[196] *Ibid.*
[197] *Ibid.*
[198] Archana Parashar, in Jhappan, *ibid.*
[199] *Ibid.*
[200] *Ibid.* at 397.
[201] *Ibid.*

**ii) African-Canadian Feminism**

Since White feminism has predominately ignored the experiences and interests of Black women, Black women have created their own feminisms. African-Canadian feminism is a multilayered feminism, which has incorporated ideologies from African feminism, White feminism and African-American feminism.[202] In Canada, the Black community consists of a number of groups, including: Black Canadians, African Caribbean, continental Africans and Afro-Latinas.[203] Consequently, the term "Black Canadian" is a heterogeneous identity which reflects the multiplicity of Black feminism.[204] This means that people who have different locations with regards to ethnicity, language, class and sexuality have come together to create Black feminisms in Canada.[205] This has also meant that there is no consensus about the meaning of African-Canadian feminism.[206]

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[202] Njoki Nathani Wane, "Black-Canadian Feminist Thought: Drawing on the Experiences of My Sisters" in Wane, Deliovsky & Lawson, *supra* note 54, 29 at 32.
[203] Wane, Deliovsky & Lawson, *ibid.* at 14-15.
[204] *Ibid.*; See also Agnes Calliste and George J. Sefa Dei, *Anti-Racist Feminism: Critical "race" and Gender Studies* (Halfiax: Fernwood Publishing, 2000).
[205] Wane, Deliovsky & Lawson, *supra* note 54 at 15.
[206] Wane, *supra* note 202 at 33. In 1999-2000, Njoki Nathani Wane taught a course at the Ontario Institute for Studies in Education at the University of Toronto called "Black Feminist Thought: Sociological Research in Education". Following a number of group discussions, the class agreed upon the following definition of Black-Canadian feminist thought: "Black feminist thought is a theoretical tool meant to elucidate and analyze the historical, social, cultural and economic relationships of women of African descent as the basis for development of a liberatory praxis. It is a paradigm that is grounded in the historical as well as the contemporary experiences of Black women as mothers, activists, academics and community leaders. It is both an oral and a written epistemology that theorizes our experiences as mothers, activists, academics and community leaders. It can be applied to situate Black women's past and present experiences that are grounded in their multiple oppressions." This definition is what I am referring to when I use the term African-Canadian feminism. Note: Since I am White, I am not suggesting that a White woman cannot examine how race may impact a woman of colour. What I am expressing is an interest in under-interrogated areas of Canadian feminist thought. Accordingly, African-Canadian feminism needs to be

Even though African-Canadian feminism is a multilayered feminism, there is a limited amount of literature that has been written by Black-Canadian Feminists.[207] This has occurred for two reasons. First, racialized groups of women are situated on the margins of Canadian society.[208] Often, these women struggle to survive on a daily basis because they are economically deprived and disadvantaged socially.[209] Their economic deprivation and social disadvantage include: racial prejudice, cultural prejudice, religious prejudice, illiteracy, lack of accessible and trustworthy day-care facilities, and low wages.[210] Generally, poverty has prevented racialized groups of women from organizing a large political alliance.[211]

Second, Black-Canadian feminism has been shaped by African-American feminists, theorists, and activists.[212] When "race" and class critiques began to emerge in Canada in the 1980s, they were predominately written by American feminists. This is problematic. Even though both Canada and the United states have participated in "...systemic social and state-sponsored racism", the history of "race" relations and the demographics of "race" are vastly different in each country.[213] Accordingly, African-Canadian feminists must focus on Black-Canadian women.[214] They must create their own definitive space in feminist theory by writing about their own theories, experiences and perspectives.[215] Similarly feminists generally must begin to grapple with the different

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theoretically interrogated in much greater detail. Unfortunately, this paper is not conducive to such an examination.

[207] *Ibid.* at 33, 36.
[208] Nzewgu, *supra* note 170 at 17.
[209] *Ibid.*
[210] *Ibid.* at 19.
[211] *Ibid.* at 17.
[212] Wane, *supra* note 202 at 33, 36.
[213] Murphy, *supra* note 172 at 309.
[214] Wane, *supra* note 202.
[215] *Ibid.* at 36-37.

lived realities of sub-groups of women. Only then will Canada see an increase in Canadian literature written about Black women.

## PART IV: ANTI-BLACK RACISM, STEREOTYPES AND CANADIAN CASE LAW

### Barriers Faced by African-Canadian Women:

Since there is a limited amount of Canadian literature which discusses the Battered Woman Syndrome and African-Canadian women, other resources must be examined in order to determine whether an African-Canadian woman's "race" may affect her ability to avail herself of the Battered Woman Syndrome. The history of anti-Black racism in Canada, the criminalization of African-Canadians in the media and the criminal justice system, and the stereotyping that Black women are faced with all indicate that "race" does affect an African-Canadian woman's ability to avail herself of the Battered Woman Syndrome. This proposition is further supported by Canadian case law and government reports which document the existence of anti-Black racism in Canada, and more specifically, the existence of anti-Black racism in the criminal justice system.

### Anti-Black Racism in Canada:

#### i) Historical Perspectives

Canada proudly describes itself as a nation of immigrants; yet, people of African descent were forced to come to Canada through enslavement.[216] The presence of African Canadian communities in Canada dates back to the late sixteenth century, when the first

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[216] Michael Ornstein, *Ethno-Racial Inequality in the City of Toronto: An Analysis of the 1996 Census* (Toronto: 2000), cited in ACLC, *supra* note 17 at 15-16.

slave was brought to Canada.[217] Due to the presence of African slavery from the late sixteenth century until 1834, when slavery was abolished, the experiences of peoples of African descent are unique and distinct from the experiences of other racialized groups.[218] Peoples of African descent were not only dehumanized by slavery, their communities, languages, cultures, history and spiritual belief systems were also destroyed.[219] No other racialized group in Canada, besides Aboriginal peoples, has had to contend with comparable treatment.[220]

**ii) Present Day Barriers**

In 1996, 570,000 people in Canada identified themselves as "being from African descent".[221] Consequently, people of African descent constitute the third largest community of all racialized[222] groups in Canada.[223] Nonetheless, they experience pervasive racial discrimination in most institutions, including: the education system, employment and the media.

**a) Education**

Anti-Black racism is a predominate feature of Canada's public education system.[224] Structured inequality based on "race" is both preserved and perpetuated by

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[217] *Ibid.*
[218] ACLC, *ibid.* at 16.
[219] *Ibid.*
[220] *Ibid.* Furthermore, even though Aboriginal peoples were colonized and their cultures were destroyed, Aboriginal people were never enslaved the way African people were.
[221] *Ibid.* at 15.
[222] Even though White people are also "raced", I use the term racialized to refer to non-White people.
[223] *Ibid.*
[224] *Ibid.* at 35.

educational institutions.[225] When White students and racial minority students enter the school system they have similar occupational aspirations; yet, the careers and professions attained by racial minority students and White students are manifestly different.[226] This occurs for a number of reasons. First, African-Canadian histories and cultures are excluded from the curriculum.[227] Second, certain teaching styles discourage African-Canadian students from learning.[228] Third, Black youth must contend with stereotypes that characterize them as underachievers and as criminals.[229]

**b) Employment**

In addition to experiencing discrimination in education, African-Canadians also continue to experience discrimination in the labour market, even though Canada has implemented legislation prohibiting racial discrimination in employment.[230] A number of studies have been conducted which have established the racist discrimination that people of colour must contend with in the employment context.[231] The following statistics reveal that employment is becoming increasingly racialized and that African-Canadians face the following barriers in employment:

1. African-Canadians are less frequently employed in managerial or professional occupations;[232]

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[225] Frances Henry, Carol Tator, *et al.*, "Racism in Canadian Education" in *The Colour of Democracy* (Canada: Harcourt B"race", 2000) at 232; ACLC, *supra* note 17 at 35. See also C.C. Smith, *et al.*, *At the Foot of the Walls of Jericho* (Law Society of Upper Canada, 2001) at 21-24.
[226] Henry & Tator, *ibid*; ACLC, *ibid.*
[227] ACLC, *ibid.* at 35, 43-44.
[228] *Ibid.* at 35.
[229] *Ibid.* at 38, 42. For example, the fact that insidious biases exist against African Canadian youth, which view them as prone to criminality, has been acknowledged be the Supreme Court of Canada.
[230] *Ibid.* at 56-57.
[231] *Ibid.*
[232] *Ibid.* at 61; Grace-Galabuzi Edwards, *Canada's Creeping Economic Apartheid: The Economic Segregation and Social Marginalisation of Racialized Groups* (Canadian Social Justice Foundation, May 2001) at 37, 39, cited in ACLC, *supra* note 17 at 58.

2. African-Canadians earn less money than the rest of the Canadian population;[233]
3. African-Canadians are more likely than other Canadians to live below the poverty line [31.5% verses 15.7%];[234] and
4. Approximately forty percent of all "race"-based employment complaints heard by Canadian Human Rights Tribunals are initiated by African-Canadians.[235] This is due to the fact that African Canadians often must endure racial and sexual harassment in the workplace.[236] For example, "Blacks are lazy and stupid" and "Black women are horny".[237]

**c) Media**

The media plays a part in shaping public opinion. As a result, it influences how African-Canadians are perceived.[238] It also reflects and reinforces racist attitudes by perpetuating stereotypes. Television, video, radio and print are all powerful media venues that influence opinions about people, particularly oppressed groups.[239] Unfortunately, the media has been used by White people to subordinate peoples of African descent.[240]

Since White people are the norm against which racialized people are compared,[241] the media preserves White people's positions of power[242] by constructing racialized

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[233] ACLC, *ibid.* at 62; Edwards, *ibid.*
[234] Statistics Canada, 1995, in ACLC, *supra* note 17 at 60, 62.
[235] See Frances Henry and Carol Tator, *Racist Discourse in Canada's English Print Media* (Canadian "race" Relations Foundation, 2000) at 69-87, 123-160, 89-103, cited in ACLC, *ibid.* at 62.
[236] Nzegwu, *supra* note 170 at 17.
[237] *Ibid.*
[238] ACLC, *supra* note 17 at 67.
[239] Erica Lawson, "Images in Black: Black Women, Media and the Mythology of an Orderly Society" in Wane, Deliovsky & Lawson, *supra* note 54, 199 at 200.
[240] ACLC, *supra* note 17 at 67.
[241] Lawson, *supra* note 239.
[242] ACLC, *supra* note 17 at 67.

people as deviants.[243] For example, African Canadians are often stereotyped through the racialization of crime.[244] This means that different media outlets tend to focus on the "race", colour or ethnicity of the suspect when a crime has been committed. Consequently, both the police and the general population think that Black people are more likely to commit crimes.[245]

The media's racialized coverage of a robbery that occurred in Annex, Toronto, in 1994, helps exemplify this point. Three Black men robbed a café. During the robbery a young White woman was shot. The injuries she sustained from the gunshot were fatal. The media coverage focused on the "race" of the men. In a *Globe and Mail* article, journalist Michael Valpy stated that:

> The Barbarians are inside the gate…if you live in any metropolitan city…you thought about the way you conduct your life, about the safety of familiar surroundings, about the mythology of Canada as an orderly society. Maybe in reality, maybe only in perception our little country passed some sort of benchmark these last few days. We have been brought face to face with an alien slaughter, something that is not supposed to happen here. Getting robbed in Annex is alien enough…But who expects a murder in exchange for an act hitherto normal Canadian behaviour: telling the robbers no, you can't have my money? You expect maybe to get pushed around, maybe punched, but killed?[246]

This excerpt from the *Globe and Mail* illustrates how Black people are often perceived as barbarians.[247] It also alludes to the notion that Canada is a peaceful country that is under constant threat from uncivilized non-White outsiders. As a result, the story of White

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[243] Lawson, *supra* note 239.
[244] Henry and Tator, *supra* note 235 at 89-103, cited in ACLC, *supra* note 17 at 70.
[245] See ACLC, *supra* note 17 at Part III: Anti-Black Racism in Canada's Criminal Justice System, 21-35.
[246] Michael Valpy, "Face to Face With New violence" *The Globe and Mail* (7 April, 1994), cited in Lawson, *supra* note 239 at 202.
[247] Lawson, *ibid.* at 201.

innocence is formed, promoted and accepted,[248] while racialized groups are constructed as uncivilized.[249] This criminalization of Black people effectively leads the public to believe that Black people are more likely to commit crimes, even though empirical evidence does not support this sentiment.[250]

**iii) Black Women in the Canadian Media**

Too often crimes are racialized by the media. As a result, Black men are perceived as being prone to violence.[251] What about Black women? How are they perceived by Canadians? How are they portrayed by the media?

In Canada, Black women are largely invisible in the media.[252] Their absence is symbolic for a number of reasons. First, their absence represents Canada's collective amnesia regarding genocide and slavery.[253] Second, it also symbolizes how racialized people are erased from the Canadian landscape.[254]

When Black women are included in the media, they are often denigrated like their male counterparts. For example, in 1993, Audrey Smith, a Black Jamaican woman who was visiting Toronto was stripped searched in public by a female police officer. She was asked to pull down her panties and bend over. The police officer claimed that she was

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[248] Sherene H. Razack, *Dark Threats & White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* (Toronto: University of Toronto Press, 2004).
[249] Lawson, *supra* note 239 at 203: Racism in the media is also manifested in the following ways. First, subordinate racialized groups are predominately invisible in most forms of media, including: print, radio and television. Second, racialized groups are under-represented in most levels of media organizations. Third, Eurocentric values and images are perpetually promoted while issues concerning African Canadians are largely ignored or misrepresented. See ACLC, *supra* note 17 at Part VII: Anti-Black Racism in Cultural Institutions and the Media, 67-72.
[250] Wendy Chan, "Criminological Research on "race" in Canada" in Camille A. Nelson & Charmaine A. Nelson, eds., *Racism Eh? An Inter-Disciplinary Anthology of "race" and Racism in Canada* (Concord: Captus Press, 2004) 103 at 106 [Chan, "Criminological Research"].
[251] Lawson, *supra* note 239 at 203.
[252] *Ibid.* at 204.
[253] *Ibid.*
[254] *Ibid.*

searching for drugs. No drugs were ever found. The strip search supposedly occurred as a result of a tip.[255] According to the police, Smith fit the description of the suspect described. The police officer's lawyer and two female journalists commented upon the incident. Their comments help illustrate how Black women are constructed in the media in Canada.

The police officer's lawyer claimed that Smith was an exhibitionist. He also stated that it was typical behaviour for a Jamaican woman to disrespect authority figures by flashing their behinds at them.[256] Similarly, two White female journalists focused on Smith's body; a body that was gendered, "race"d, sexualized and classed.[257] While Christine Blatchford insinuated that Smith was childlike, cunning and untrustworthy,[258] Rosie Mimanno described Smith as a bovine woman.[259] Generally, both Blatchford and Dimanno agreed that Smith was unintelligent and unsophisticated.[260]

The reasons Smith was strip searched to begin with were never critically interrogated by either journalist.[261] Neither Blatchford nor DiManno used their positions of power to challenge what happened. Their descriptions of Smith reinforced images that depict Black women as unintelligent, promiscuous and prone to criminality.[262]

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[255] The strip searched occurred in the West end of Toronto, in Parkdale. This area is known for prostitution and drugs. See Lawson, *ibid.* at 214.
[256] Roger McTair, "Common Practice and Common Slander" *The Toronto Star* (29 September, 1995) A23, cited in Lawson, *ibid.* at 215.
[257] Lawson, *ibid.* at 217.
[258] Christine Blatchford, "Search for the Truth" *The Toronto Sun* (27 April, 1994) 5, cited in *ibid.* at 219.
[259] Rosie Dimanno, "Smith's Simple Testimony Blunted Lawyer's Barbs" *The Toronto Star* (22 September, 1995) A6, cited in Lawson, *ibid.* at 218.
[260] Lawson, *ibid.* at 218-219.
[261] *Ibid.*
[262] *Ibid.* at 217.

**iv) Invisibility of African-Canadian Women**

In "Images in Black: Black Women, Media and the Mythology of an Orderly Society", Lawson interviewed five African-Canadian women.[263] During the interviews, she asked them to discuss images of Black women on television, in videos, in newspapers and in magazines. Their responses can be described as follows. First, most of their responses focused on images of Black women in American culture, highlighting the invisibility of Black Canadian women. Second, the women found that Black women are generally constructed in a limited number of ways. According to the interviewees, Black women are constructed in the following ways: as angry Black women, as women in positions of servitude, as hyper-sexualized women, as sex objects, or as a welfare mothers.[264] Generally, all of the women were very concerned about the exploitation of Black women's sexuality.[265]

What is important to note about this study, is the fact that all of the women interviewed focused on the negative representations of Black women in American popular culture.[266] Accordingly, the stereotypes that are perpetuated and promoted in the United States do have an impact on Canadians. Thus, the importance of examining some of the stereotypes African-American women face cannot be underestimated.

**Racial Stereotypes: American**

African-American feminists have been prolific in writing about Black women and the stereotypes they face. They have also written about the specific stereotypes that Black women face when they attempt to use the Battered Woman Syndrome. Linda L.

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[263] See generally Lawson, *supra* note 239.
[264] *Ibid.* 205-206, 209.
[265] *Ibid.* at 206.
[266] *Ibid.*

Ammons, Shelby A.D. Moore and Sharon Angella Allard are three American feminists who have written about the Battered Woman Syndrome and African-American women in depth.[267]

According to Ammons, Moore and Allard, America's national psyche is deeply embedded with racial stereotypes.[268] This means that Black women's lives are impacted daily by stereotypes.[269] A stereotype is "a standardized mental picture that is held in common by members of a group that represents an oversimplified opinion, emotional attitude, or uncritical judgment."[270] Stereotypes are prejudicial.[271]

A lot of research has been conducted on stereotyping and African-Americans.[272] Research has revealed that African-Americans "...consistently receive the most unfavorable attributions."[273] For example, upon contact, with Africans for the first time, Europeans described them as humanly and culturally deficient.[274] This xenophobia was used to justify slavery.[275] During slavery, African-American females "...were denied the status of women".[276] Since African-American women were objectified as sexual beings

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[267] Linda A. Ammons, "Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome" (1995) Wis. L. Rev. 1003; Moore, *supra* note 35; Allard, *supra* note 11.

[268] *Ibid.* See also Kimberle Crenshaw & Gary Peller, "Reel Time/Reel Justice" (1993) 70 Denv. U.L. Rev. 283; see also Cornel West, *"race" Matter* (Boston: Beacon Press, 1993).

[269] Ammons, *supra* note 263 at 1044. For example, one study revealed that employers perceive African American women to be aggressive, hostile, sly and untrustworthy. See Marilyn Yarbrough & Crystal Bennett, "Cassandra and the 'Sistahs': The Peculiar Treatment of African American Women in the Myth of Women as Liars" (2000) 3 J. Gender "race" & Just. 625 at 655. See *Glass Ceiling Comm'n, Good for Business: Making Full Use of the Nation's Human Capital*, online: <http://www.ilr.cornell.edu/library/e_archive/glassceiling/>.

[270] *Webster's*, *supra* note 106, *s.v.* "stereotype".

[271] Ammons, *supra* note 267 at 1045.

[272] Ammons, *ibid.* at 1048; see Paul F. Secord *et al.*, "The Negro Stereotype and Perceptual Accentuation" (1956) 53 Journal of Abnormal & Social Psychology 78.

[273] Ammons, *ibid.*

[274] *Ibid.* at 1032; see Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968) at 27-28.

[275] Winthrop, *ibid.* at 4, 97, cited in Ammons, *ibid.* at 1032.

[276] Margaret Washington, *Narrative of Sojourner Truth xxx-xxxi* (1st ed., 1993), cited in Moore, *supra* note 35 at 327.

and labourers, their worth was measured by their labour output and their ability to reproduce.[277] White women who stayed within their prescribed roles of piety, purity, submissiveness and domesticity were seen as "true women",[278] and placed on pedestals of nobility within the family. In contrast, Black women were described as animalistic[279] and they were literally held in cages.[280]

**i) Historical Stereotypes:**

**a) Mammy/Aunt Jemima**

Historically, African-American women were stereotyped as a Mammy/Aunt Jemima or as a Jezebel.[281] Mammy is defined in the dictionary "...as a black woman serving as a nurse to white children,[282] or as a servant to a white family".[283] Generally, mammy is characterized as an asexual woman who is maternal and deeply religious.[284] One of the best known mammies is Aunt Jemima.[285] Aunt Jemima was created for an Exposition in Chicago in 1893.[286] Today, her picture continues to appear on pancake boxes and pancake syrup containers. In fact, there is a brand of "Aunt Jemima" pancake mix and pancake syrup that is produced in Peterborough, Ontario. This example helps

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[277] As slaves African-American's were considered property. Therefore, when a woman slave gave birth she did not give birth to a child she gave birth to property. Hazel V. Carby, *Reconstructing Womanhood: The Emergence of the Afro-American Woman Novelist* (1987) 24-25, cited in Moore, *ibid.* at 327-328.
[278] Barbara Welter, "The Cult of True Womanhood: 1820-1860" (1966) 18 Am. Q. 151, cited in Moore, *ibid.* at 328.
[279] Ammons, *supra* note 267 at 1035.
[280] *Bradwell v. People of State of Illinois*, 83 U.S. 130 (1872) (Bradley, J., concurring) at 141, cited in *ibid.* at 1036.
[281] Ammons, *supra* note 267 at 1049-1050.
[282] *Webster's*, *supra* note 106, *s.v.* "mammy".
[283] *Random House College Dictionary*, 1988, *s.v.* "mammy", cited in Ammons, *supra* note 267 at footnote 170.
[284] Yarbrough & Bennett, *supra* note 269 at 637.
[285] Ammons, *supra* note 267 at footnote 171.
[286] *Ibid.*

illustrate how the stereotyping of Black women that occurs in the United States often reaches Canadians.

**b) Jezebel**

In contrast, a Jezebel is a woman who is shameless, immoral and sensuous. In *Webster's Ninth New Collegiate Dictionary* the word "Jezebel" is defined as "an impudent, shameless, or abandoned woman".[287] Since a Jezebel takes advantage of men and engages in lewd sexual acts,[288] the word "whore" is often used to describe a Jezebel.[289] In fact, in the Old Testament Jezebel was a prostitute.[290]

African women were characterized as Jezebels long before they arrived in the new colonies.[291] Today, Black women continue to be stereotyped as sexually permissive. One of the reasons this has occurred is because of the historical sexual exploitation Black women endured during slavery. For example, according to the law during the time of slavery, Black slave women could not be raped because they were immoral.[292] As a result, White men were able to justify the fact that they sexually exploited Black women.[293] The perception that Black women are whores continues to influence sexual assault cases to the detriment of Black women, in both Canada and the United States.[294]

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[287] *Webster's Ninth New Collegiate Dictionary*, 1983, *s.v.* "jezebel". The mammy figure can be attributed to slavery, when Black slave women performed domestic duties for their owners and their families. See K. Sue Jewell, *From Mammy to Miss America and Beyond: Cultural Images and the Shaping of the U.S. Social Policy* (United States: Routledge, 1992) at 38, cited in Yarbrough & Bennett, *supra* note 269 at 636.
[288] Yarbrough & Bennett, *ibid.* at 637.
[289] Ammons, *supra* note 267 at footnote 172.
[290] Yarbrough & Bennett, *supra* note 269 at 640.
[291] Ammons, *supra* note 267 at footnote 172.
[292] Allard, *supra* note 11 at 199.
[293] *Ibid.* See Jennifer Wriggins, *Rape, Racism and the Law* (1983) 6 Harv. Women's L. J. 103, 117-123.
[294] See Yarbrough & Bennett, *supra* note 269 at 643-658. See also Jane Doe, *supra* note 110.

**ii) Present Day Stereotypes:**

**a) Sapphire**

Today Black women are often stereotyped as Sapphires, as matriarchs, or as welfare queens.[295] bell hooks describes the Sapphire figure as a Black woman who represents everything the mammy figure is not.[296] A Sapphire is evil, treacherous, bitchy, stubborn and hateful.[297] A Sapphire is also iron-willed and contemptuous towards Black men.[298] A Sapphire shows her contempt for Black men by engaging in verbal duals, where she emasculates them by using verbal putdowns.[299]

**b) The Matriarch and the Welfare Queen**

Similarly, a matriarch emasculates men by being overly aggressive.[300] She is the failed mammy, who spends too much time outside of the home and away from her children.[301] In *Webster's New Encyclopedic Dictionary*, the word "matriarch" is defined as follows: "a woman who rules a group or state; *esp*: a mother who is the head of her family and descendants".[302] In contrast, the welfare mother's lack of aggressiveness causes her to avoid work and to pass poor values on to her children.[303]

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[295] Ammons, *supra* note 267 at 1050-1051.
[296] hooks, *supra* note 14 at 85.
[297] *Ibid.*
[298] Jean Carey Bond & Patricia Perry, "Is the Black Male Castrated?" in Toni Cade, ed., *Black Woman: An Anthology* (1970) 113 at 116, cited in Ammons, *supra* note 267 at footnote 173.
[299] K. Sue Jewell, *From Mammy to Miss America and Beyond: Cultural Images and the Shaping of the U.S. Social Policy* (1993) at 45, cited in Yarbrough & Bennett, *supra* note 269 at 638.
[300] Ammons, *supra* note 267 at footnote 174.
[301] *Ibid.*
[302] *Webster's*, *supra* note 106, *s.v.* "matriarch".
[303] Ammons, *supra* note 267 at footnote 174.

**c) Cassandra**

Even though the stereotypes mentioned above are the stereotypes most commonly associated with Black women, Marilyn Yarbrough and Crystal Bennett have identified another stereotype that Black women must contend with; the stereotype of Black women as liars.[304] According to Yarbrough and Bennett, women in general and Black women in particular, are susceptible to being disbelieved.[305] They have identified this stereotype by referring to the metaphor of "Cassandra". Cassandra was the daughter of a king who was granted the gift of vision by Apollo. Because Cassandra ignored Appollo's advances he cursed her. As a result of the curse nobody believed her visions and prophecies.

Cassandra symbolizes the reality that a male-dominated society often fails to hear or understand women.[306] When women are heard they are disbelieved.[307] This proposition can be supported by the fact that American customs and laws that endure today, are written as though women are childlike and frivolous; and that they are also prone to lie.[308]As a result of all of these negative stereotypes, the sight of a Black woman can cause the following responses: violence, disdain, fear or invisibility.[309]

**iii) Positive Stereotypes: Strength and Independence**

Black women are also often stereotyped by attributes that should be positive, yet they sometimes can have detrimental consequences. For example, Black women are also

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[304] Yarbrough and Bennett have identified this stereotype by referring to the metaphor of Cassandra. See generally Yarbrough & Bennett, *supra* note 269.
[305] *Ibid.* at 626.
[306] John Vagelatos, "Heeding Cassandra: The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies" (1995) 5 Colum. J. Gender & L. 127, cited in *ibid.* at 628.
[307] *Ibid.*
[308] Yarbrough & Bennet, *supra* note 269 at 628.
[309] Ammons, *supra* note 267 at 1052.

characterized as strong and independent.[310] These traits can be attributed to the historical treatment of Black women as slaves and their drive to survive.[311] This means that Black women are often trapped "...between sub and super-human imagery and expectations."[312] In fact, given that Black women are supposed to be physically stronger than White women, a Black woman's perception that she is in danger of serious bodily harm would probably be disbelieved.[313] Similarly, African-American families have been described as matriarchal as African-American women supposedly govern their families.[314] Within this perception therein lies the belief that African-American women are masculine and tough.[315] Therefore, there is a misperception that it would be unlikely that a Black woman would have to use deadly force against her abuser in order to repel an attack.

**iv) African-American Women and the Battered Woman Syndrome**

Since the stereotypes of Black women contradict those characteristics associated with a "reasonable battered woman", an African-American woman may have a difficult time convincing a court of law that she has acted in a reasonable way.[316] The stereotype that Black women are strong and domineering may cause judges and jurors to think that the woman somehow deserved or caused the violence she endured.[317] When Black women are viewed this way, judges and jurors may be prevented from believing that Black women are equally worthy of protection or respect.[318] In fact, African-American

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[310] *Ibid.* at 1054.
[311] *Ibid.*
[312] *Ibid.*
[313] Allard, *supra* note 11 at 204.
[314] Vernetta D. Young, "Gender Expectations and Their Impact on Black female Offenders and Victims" (1986) 3 Just. Q. at 307, cited in Moore, *supra* note 35 at 333.
[315] Vernetta, *ibid.* at 310, cited in Moore, *ibid.*
[316] Ammons, *supra* note 267 at 1034-1056.
[317] Moore, *supra* note 35 at 333.
[318] *Ibid.* at 334.

women are less likely to be believed by jurors when they claim self-defence and rely on the Battered Woman Syndrome to justify killing their abusers.[319] For example, Pamela Hill is a Black woman who killed her abusive boyfriend Roy Chaney during a struggle to gain control over a knife.[320] During the prosecutor's closing argument he made the following statement: "[A] lot of people would have you believe Pamela Hill is carrying the banner of Nicole Simpson."[321] When the prosecutor made this statement he wanted to ensure that the jurors knew what a real battered woman looks like. The prosecutor's statement raises overt images and stereotypes.[322] "Nicole Simpson was White, beautiful, rich, portrayed as a good mother and brutalized. Pamela Hill is Black, poor, an unwed mother, and considered violent."[323] Hill was convicted and sentenced to five to twenty-five years in prison.

Even Dr. Walker, the first person who identified and promoted the Battered Woman Syndrome, acknowledges the fact that Black women may have a particularly difficult time availing themselves of the syndrome because of stereotypes. In her book, *Terrifying Love: Why Battered Women Kill and How Society Responds*,[324] Walker identifies the stereotype of the "angry Black woman" as the main barrier Black women face when they attempt to explain their actions through the use of the Battered Woman Syndrome.[325] According to Walker, White people generally fear Black anger.[326] In addition, she suggests that normal cultural modalities often used in African-American

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[319] *Ibid.* at 303, 333.
[320] Ammons, *supra* note 267 at 1006.
[321] James Ewinger, "Woman Gets Prison in Boyfriend's Killing" *Cleveland Plain Dealer* (20 September 1994) 3B, cited in Ammons, *ibid.*
[322] *Ibid.*
[323] *Ibid.* at 1006-1007.
[324] Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: Harper & Row, 1989) [Walker, *Terrifying Love*].
[325] *Ibid.* at 206. According to Walker, this stereotype is often held by White people.
[326] *Ibid.*

culture, such as speech patterns and gestures, may be interpreted as signs of anger.[327] Walker maintains that these modalities may be perceived as personally threatening to White people.[328] For example, Walker states that:

> ...being racially different from the white majority may put a defendant at risk in an American court of law, whether or not she takes the witness stand in her own defense...The same liability is noted for impoverished women with no job skills...Racism and economic discrimination are inextricably linked to sexism in our culture creating an ugly nexus in our courts of law...when a woman appears...defensive or hostile in court --- especially when she is poor or Black – there is a great likelihood that she will be judged severely, and punished severely.[329]

Accordingly, when an African-American woman is perceived as angry at trial, it is unlikely that the judge or jury would believe that she is psychologically damaged as required by the syndrome.[330] In fact, it is more probable that the judge and jury would believe that her anger influenced or caused the death of her abuser on the night of the homicide.[331] Generally, it is difficult to reconcile the stereotypes perpetuated about African-American women with the image created by the Battered Woman Syndrome.[332] As a result, any attempt to demonstrate that a Black woman suffers from mental abnormalities as a result of abuse would probably be disbelieved as African-American women are perceived as strong and invincible.[333]

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[327] *Ibid.* See also, Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38:1 Buff. L. Rev. 1.
[328] *Ibid.*
[329] *Ibid.* at 210-218.
[330] Moore, *supra* note 35 at 335.
[331] *Ibid.*
[332] *Ibid.* at 336.
[333] *Ibid.*

**Canadian Case Law:**

There are a number of Canadian cases which indicate that African-Canadian women may also have to contend with similar stereotypes and anti-Black racism if they attempt to use the Battered Woman Syndrome. *R. v. Theberge*, *R. v. Parks*,[334] *R. v. Wilson*,[335] *R. v. Hamilton*[336] and *R. v. Spencer*[337] help illustrate the fact that African-Canadian women must contend with racism in all facets of their lives.[338] In fact, a report entitled *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*[339] helps substantiate the case law by documenting the systemic racism African-Canadian's face when they come in to contact with the criminal justice system.

**i) *R. v. Theberge* [1995]**

In *R. v. Theberge*, Tracey Theberge, an African-Canadian woman, was charged with the murder of her abusive partner. The jury found her guilty of second degree murder. Unfortunately, the ruling was written in French and the judgment has not been translated in to English. However, a number of the comments made by the trial judge were translated in to English because a public inquiry was held regarding the judge's conduct during the case.

Even though Justice Jean Bienvenue made comments about Theberge's skin colour and sexual orientation during the trial,[340] the main focus of the public inquiry was

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[334] (1993), 84 C.C.C. (3d) 353 (O.C.A.) [*Parks*].
[335] (1996), 29 O.R. (3d) 97 (O.C.A.) [*Wilson*].
[336] [2003] O.J. No. 532 [O.S.C.J.] [*Hamilton*].
[337] [2003] O.J. No. 1052 [O.S.C.J.] [*Spencer*].
[338] *Theberge* also illustrates how all women who come in to contact with the criminal justice system may also have to contend with sexism.
[339] *Report*, *supra* note 21.
[340] Christin Schmitz, "Comments about women, Holocaust victims sparked outrage Judicial inquiry recommends Que. judge's ouster" *The Lawyers Weekly* (19 July 1996) 16:11.

the following comments he made during sentencing. During sentencing, Bienvenue J. said the following to Ms. Theberge:

> It has always been said, and correctly so, that when women—whom I have always considered the noblest beings in creation and the noblest of the two sexes of the human "race"—it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this.
>
> And it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.
>
> *Alas you are indeed in the image of these women so famous in history: the Delilahs, the Salomes, Charlotte Corday, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women. You are one of them, and you the clearest living example of them that I have seen.*
>
> At the Auschwitz-Birkenau concentration camp in Poland, which I once visited horror-stricken, even the Nazis did not eliminate millions of Jews in a painful or bloody manner. *They died in the gas chambers, without suffering...*
>
> *Animals themselves—your cat, for example—never sink to such depths as you have. Animals kill for food in accordance with the secular rules of nature, but they never kill out of pure cruelty...*
>
> And in my view, as in the view of doctors, Veillette and Gagne, your earlier announcements of suicide, of false suicide, were a complete farce. You should know, if you are not aware of it, that those who really commit suicide do not announce what they are going to do but actually take action. *And when they do so, "they take no chances", if you'll pardon the expression. They use sharp blades and they actually press down, as you did successfully to the man you said you loved so much when you killed him like a coward* [emphasis added].[341]

Clearly these statements illustrate the contempt Bienvenue J. holds towards women generally. What is particularly disturbing is the hatred he feels towards Tracy Theberge. In fact, he stated that Theberge was worse than Delilah, Salome, Charlotte

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[341] *Report to the Canadian Judicial Council* by the Inquiry Committee Appointed under Subsection 63(1) of the *Judges Act* to Conduct a Public Inquiry into the Conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in *R. v. Theberge* –June 1996—Released July 4, 1996 in Berend Hovius, Michael Lynk & Robert Martin, *Constitutional Law: Cases and Materials Volume 1*, 19th ed. (London, Ontario: Faculty of Law, University of Western Ontario, 2001) 5-87 at 5-91.

Corday and Mata Hari. In order to understand the significance of this statement it is important to identify who these women were and the crimes they supposedly committed.

Delilah is a female character in the Old Testament who was the downfall of Samson, an Israelite judge and powerful warrior.[342] She stole Samson's strength by cutting seven locks of hair from his head.[343] As a result, the word "Delilah" has been equated with an enchantress, temptress, siren or femme fatale. Generally, Delilah is "a woman who is considered to be dangerously seductive".[344] Similarly, Salome was also a Biblical character. In order to obtain the head of John the Baptist, she seduced her stepfather/uncle, King Herod with a dance.[345]

In contrast, Charlotte Corday and Mata Hari are more recent examples of infamous women. Charlotte Corday assassinated Jean-Paul Marat, a leader of the Paris Commune, during the French Revolution in 1793.[346] She did so because she believed that Marat was a tyrant and that he was responsible for many of the executions and misfortunes that French citizens were undergoing.[347] Accordingly, Charlotte Corday is known as a murderer.

While Charlotte Corday has been described as a murderer, the name "Mata Hari" has become synonymous with sensuality, espionage, and intrigue.[348] Mata Hari was a

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[342] Answers.com, online: <http://www.answers.com/topic/samson> *s.v.* "samson".
[343]Definitions of Delilah on the Web, online: <http://www.google.ca/search?h1=en&2r=&oi+defmore&q=define:delilah> *s.v.* "Delilah".
[344] Word Reference.com, online: <http://www.wordreference.com/definition/delilah> *s.v.* "Delilah".
[345] Definitions of Salome on the Web, online: <http://www.google.ca/search?hl=en&lr=&oi=defmore&q=define:Salome> *s.v.* "Salome".
[346] See Charlotte Corday, online: <http://camembert-country.com/ccorday.htm>; See Marie Antoinette & Charlotte Corday: A Whore and A Murderer?, online: <http://www.geocities.com/Athens/Forum/5154>
[347] *Ibid.*
[348] Court T.V's Crime Library: Criminal Minds and Methods, "Mati Hari", online: <http://www.crimelibrary.com/spies/mata_hari/>

Dutch dancer who was executed for spying for the German Reich during World War I.[349] Mata Hari catered to male fantasies during her dancing which would be classified as "stripping" today.[350] Generally, Mata Hari's name conjures up images of "feminine decadence" and evil female temptresses.[351]

When Justice Bienvenue compared Tracy Theberge's actions with the actions of Delilah, Salome, Charlotte Corday, and Mata Hari, it is clear that he held biased views of women. Specifically, it is evident that he holds a particular disdain for women who transcend their feminine roles. What is unclear is whether Theberge's "race" played a role in his comments. Bienvenue J. did refer to Theberge as a "Negress" during the trial.[352] Today the word "Negress" is no longer used because it is widely regarded as offensive.[353] Since Justice Bienvenue was 67 years old during the trial, an argument could be made that his use of the word "Negress" was due to the fact that he was from a different generation and that it was an acceptable word to use during his "time". Nonetheless, the intersectionality of gender and "race" cannot be isolated. Bienvenue J.'s comments were predominately directed at women generally, however, it is unrealistic to think that Theberge's race had no impact on his comments, as he did make comments about her skin colour during the trial. Accordingly, this case demonstrates how difficult it is to isolate the different oppressions of gender and "race" that women are faced with.[354]

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[349] FemBio, "Fem-Biography Mata Hari", online: <http://www.fembio.org/women/mata-hari.shtml>.
[350] *Ibid.*
[351] *Ibid.*
[352] Schmitz, *supra* note 340.
[353] Farlex, *The Free Dictionary*, online: <http://www.thefreedictionary.com/Negress> *s.v.* "Negress"; Farlex, *The Free Dictionary*, online: <http://www.thefreedictionary.com/Jewess> *s.v.* "Jewess".
[354] Even though Beinvenue J. was reprimanded for his comments and removed from the bench, this case is not necessarily an anomaly as there are a number of other cases in which judges have made racist and sexist comments.

**ii) *R. v. Parks* [1993] & *R. v. Wilson* [1996]**

In both *Parks* and *Wilson* the Ontario Court of Appeal, on two separate occasions, took judicial notice of the fact that widespread anti-Black racism exists in Ontario.[355] In both cases, the Ontario Court of Appeal acknowledged the growing bodies of studies that have documented racist beliefs in Canada. These studies provide support for the proposition that anti-Black racism is widespread.[356] Even though the Ontario Court of Appeal recognized these reports, it conceded that the existence and extent of racial bias are not issues that can be established like other adjudicative facts.[357] It is true that some people expressly hold racist values and beliefs,[358] however, many people hold racist attitudes on a subconscious level.[359] As a result, the stereotypes and negative attitudes they hold towards Black people are often hidden. This is one of the main reasons why racism remains unnamed and unchallenged.

Since racism is part of the community's psyche,[360] society's institutions, including the criminal justice system, both reflect and perpetuate negative racial stereotypes.[361] This helps explain the empirical studies that have been conducted in the United States which prove that the "race" of an accused can negatively influence a juror's verdict,

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[355] In *Parks*, Justice Doherty held that anti-Black racism exists in Metropolitan Toronto and that a juror can be asked if they hold negative attitudes towards Blacks. Chief Justice McMurtry expanded Justice Doherty's reasoning in *Wilson*. He held that the ability to challenge a juror for cause because of racial discrimination should be expanded to all of Ontario. He stated that there is no evidence to suggest that anti-Black attitudes are less evident elsewhere in Ontario. In fact, C.J. McMurtry held that "[i]t is unrealistic and illogical to assume that anti-black attitudes stop at the borders of Metropolitan Toronto. In my view non-black persons who regularly interact with black citizens are probably less likely to harbour negative views. The possibility therefore of anti-black racism taking root in communities outside of Metropolitan Toronto, where there may be much less interaction with members of the black community, should be a matter of concern for the criminal justice system." *Parks*, *supra* note 334; *Wilson*, *supra* note 335. *See* also *R. v. Williams*, [1998] 1 S.C.R. 1128.
[356] *Parks*, *ibid.* at 366.
[357] *Ibid.*
[358] *Ibid.*
[359] *Ibid.*
[360] *Ibid.* at 369.
[361] *Ibid.*

particularly when the juror is from a different "race".[362] Even though there is no Canadian evidence attesting to the same findings, Canadian commentators maintain that jury verdicts in Canada are also impacted by racist attitudes when the accused is a racial minority.[363] In fact, the criminal trial environment can emphasize racial bias, particularly in cases involving Black people, crime and violence. For example, a juror's prior negative attitudes about Black people may be validated in the juror's mind simply because the accused is Black.[364] As a result, the juror may ignore the evidence and legal principles required to determine an accused's liability and instead they may manifest their racist beliefs.[365] Furthermore, because Black people experience racism in all other facets of their lives, including; employment, housing, education and public transit, it is unrealistic to think that racism is not present in jury deliberations[366] or in the criminal justice system generally. Frequently, peoples' anti-Black biases are a result of unspoken and uncontested assumptions they have learned over their lifetimes.[367] As a result, peoples' daily behaviour is unconsciously shaped by these assumptions.[368] This means that the unconscious psyches of both jurors and judges may be greatly affected by racial prejudice.

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[362] *Ibid.* at 354.
[363] *Ibid.* at 378.
[364] *Ibid.* at 372. See Kent Roach, "Challenges for Cause and Racial Discrimination" (1995) 37 Crim. L. Q. 410 at 421.
[365] S. L. Johnson, "Black Innocence and the White Jury" (1985) 83 Mich. L. R. 1611 at 1679, cited in *Parks*, *supra* note 334 at 371.
[366] C. Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill L. J. 147 at 177-178.
[367] Johnson, *supra* note 365.
[368] *Ibid.*

**ii) *R. v. Hamilton* [2003] & *R. v. Spencer* [2003]**

In two recent Ontario cases involving drug couriers, the Ontario Superior Court of Justice specifically acknowledged some of the systemic racism Black women face in Canada. In *Hamilton* and *Spencer*, Justice Hill and Justice Mossip recognized the over-representation of Black women in Canadian prisons for drug offences. During their deliberations, both justices considered the following evidence when deciding what sentences three Black female drug couriers should receive. First, even though Black females constituted only 2.3% of the Canadian population in 2001,[369] they represented 7.6% of all federally incarcerated women,[370] (which indicates that African-Canadian women are over-represented in the criminal justice system). Second, African-Canadian women are the single largest group of people being charged with cocaine importation.[371] Third, Ontario is similar to many parts of the United States, as the "war on drugs" has resulted in the increased imprisonment of Black people.[372] Finally, the Ontario Superior Court of Justice acknowledged the social and economic inequalities the accused women faced because of their "race" and their status as single mothers.[373] All of these factors were used by the respective judges to mitigate each woman's sentence. As a result, all three women received conditional sentences. Upon appeal, Justice Doherty upheld the trial judge's decision in the *Hamilton* case.[374] In contrast, he overturned the decision in *Spencer* and imposed a sentence of twenty months incarceration.[375]

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[369] 2001 Canadian Census data, cited in *Hamilton, supra* note 336 at para. 88.
[370] See Correctional Service of Canada, *"race" Profile Population Trends: Statistical Overview- Women Offenders* (2002); Correctional Service of Canada, *Population of Incarcerated Federal Offenders by Gender and "race"* (January, 2003).
[371] *Hamilton, supra* note 336 at para. 104.
[372] *Report, supra* note 21 at 82.
[373] *Hamilton, supra* note 336 at paras. 193, 196, 198.
[374] [2004] O.J. No. 3252 [*Hamilton*, O.C.A.].
[375] [2004] O.J. No. 3262 [*Spencer*, O.C.A.].

Even though both cases represent judging that recognizes the "...importance of perspective and social context in judicial decision-making...,"[376] it is difficult to determine if the reasoning in these cases would be of any benefit to an African-Canadian woman attempting to use the Battered Woman Syndrome or self-defence. Although the *Hamilton* case was upheld on appeal, the *Spencer* case did not receive the same treatment. Doherty J.A. wrote the judgments in both appeals, yet he held that systemic racial and gender bias had not played a role in Ms. Spencer's commission of the crime.[377] Doherty's reasoning in *Spencer* is particularly disconcerting given the fact that like Ms. Hamilton and Ms. Mason, Ms. Spencer was on government social assistance at the time she committed the crime. Doherty J.A.'s reasons for distinguishing Ms. Spencer's case from Ms. Hamilton and Ms. Mason's case is based upon the fact that Ms. Spencer was receiving extra government assistance for schooling. Doherty went on to state that

> While it is true that Ms. Spencer was on government assistance presumably above and beyond the student loans, when she committed the crime, I do not think that the receipt of government assistance means that she was impoverished, or more to the point, that her financial circumstances had anything to do with her race or gender.[378]

Even though *Spencer* was overturned, the contextual approach taken by the judge in *Hamilton* at the trial level could benefit a Black woman who wishes to use the Battered Woman Syndrome to justify her actions. For example, the portions of *Hamilton* that refer to the barriers faced by single Black women such as the feminization of poverty and the social and economic inequalities African-Canadian women experience could be further developed.[379] This could be accomplished by examining the discrimination African-

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[376] *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 28 [*R.D.S.*].
[377] *Spencer*, O.C.A., *supra* note 375 at paras. 25-26, 27.
[378] *Ibid.* at para. 28.
[379] *Hamilton*, *supra* note 336 at paras. 187, 189, 192, 193, 196, 198, 221.

Canadian women face in employment, education and the media. The discrimination African-Canadian women experience in these areas of their lives could then be used to explain why a battered Black woman may not fit within the standard of the "reasonable battered woman".

**iii) *R. v. R.D.S.* [1997]**

Unfortunately, the Supreme Court of Canada has not been as willing to accept the fact that anti-Black racism exists in Canada. The judgments written by the Supreme Court Justices in *R.D.S.* illustrate this point. The facts of *R.D.S.* are as follows. A fifteen year old Black male was charged with three criminal code infractions: unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. At trial, Justice Corrine Sparks, a Black woman, accepted the accused's version of the facts and as a result the accused was acquitted of all charges. During her decision Justice Sparks made the following statement:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day. At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.[380]

[380] *R.D.S.*, *supra* note 376 at para. 53.

The Crown appealed, claiming that Justice Sparks' comments gave rise to a reasonable apprehension of bias. In a six to three split, the Supreme Court of Canada held that Justice Sparks' comments did not give rise to a reasonable apprehension of bias.

Even though the Supreme Court of Canada upheld Judge Sparks' verdict, the Supreme Court of Canada's ruling is problematic for a number of reasons. First, the case had the potential to subject the decisions of all non-White male judges to challenges for bias.[381] Second, the issue of "race" was generally glossed over by the majority of the Supreme Court Justices.[382] Third, L'Heureux-Dube and McLachlin J.J. were the only two judges who did not analyze the case from a colour blind perspective.[383] This means that only two of the nine Justices situated the case within history, recognizing that Canada has a history of racism.[384]

**a) ""race"lessness" & Colour Blind**

For the most part, the majority of the Supreme Court of Canada Justices ignored the racial identity of the people involved in the case, even though racial identity was one of the main issues. Five of the nine Justices completely ignored the racial identities of the accused, the police officer and the trial judge. At the same time, three of the Justices argued that there was no evidence presented at the trial which proved that the police

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[381] Carol A. Aylward, "'Take the Long Way Home'" *R.D.S. v. R.*: The Journey" (1998) 47 U.N.B. L.J. 249 at 277. Implicit in this reasoning, is the assumption that White male judges are impartial while women and minority judges are not.

[382] Sherene Razack, "R.D.S. v. Her Majesty The Queen: A Case About Home" (1998) 9:3 Const. Forum 59; Christine Boyle, *et al.*, "*R. v. R.D.S.*: An Editor's Forum" (1998) 10 C.J.W.L. 159.

[383] Razack, *ibid.* at 60.

[384] Note: The two judges who recognized the importance of "race" were women. On the other hand, their male colleagues were much more reluctant to recognize its significance. See Razack, *ibid.*

officer involved in this case was motivated by racism.[385] Writing for the dissenting Justices, Major J. stated that,

> [i]t can be hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.[386]

What the dissenting Justices failed to recognize is the historical and present day power imbalances between disadvantaged groups, such as Black people, and those members of dominant groups, such as White police officers. In this case, the dissenting Justices seem to be advocating formal equality.[387] Accordingly, they can be described as colour blind.[388] They attempted to "…'erase' the issue of "race" by resorting to legal rhetoric".[389] Consequently, the social and historical disadvantage experienced by African-Canadians was overlooked, because the subject position of African-Canadians was willfully forgotten.[390]

The behaviour manifested by the dissenting Justices is a part of Canada's legal history. Generally, legal actors have often been reluctant to recognize the existence of racism and the racial identity of those involved in racially charged cases.[391] The Justices who failed to recognize the existence of racism and the importance of racial identity in the *R.D.S.* case minimized and overlooked the body of evidence that has proven that

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[385] *Ibid.* at 61.
[386] *R.D.S.*, *supra* note 376 at para. 18.
[387] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada held that the goal of s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*], is to ensure that substantive equality is achieved, not formal equality.
[388] Razack, *supra* note 382 at 62.
[389] Aylward, *supra* note 381 at 300.
[390] Razack, *supra* note 382 at 62.
[391] Constance Backhouse, "Bias in Canadian Law: A Lopsided Precipice" in Boyle, *supra* note 382, 170 at 171 [Backhouse, "Bias in Canadian Law"].

"race" matters.[392] In fact, references to racism are not welcome in most Canadian courts.[393]

Fortunately, the Justices who wrote the majority decision acknowledged the fact that "race" often matters and that this case was racially charged.[394] The two female Justices, also explicitly stated that judging should always be contextualized.[395] Accordingly, they held that it was appropriate for Judge Sparks to take judicial notice of anti-Black racism in this case. In fact, Judge Sparks' actions demonstrated her ability to judge in a multicultural society where power imbalances and discrimination continue to exist. The Judge's life experiences and the social reality of racism were openly considered and for once racism was named. She recognized that within Canada's social context, the existence of racism is a possibility and as a result, interactions between White people and Black people may be affected.[396]

**Criminal Justice System:**

The findings discussed in the case law above, can be substantiated by reports and inquiries that have been commissioned by both levels of government.[397] These reports and inquiries continue to document the extent of racism in Canada. For example, the

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[392] *Ibid.* at 174.
[393] Aylward, *supra* note 381 at 285.
[394] Razack, *supra* note 382 at 62; *R.D.S.*, *supra* note 376 at para. 57.
[395] Razack, *ibid.*
[396] Aylward, *supra* note 381 at 296-297.
[397] Furthermore, it has been proven that Canada's legal history is saturated in "race". "Backhouse, "Bias in Canadian Law", *supra* note 391 at 174. See Constance Backhouse, "Gretta Wong Grant: Canada's First Chinese-Canadian Female Lawyer" (1996) 15 Windsor Yearbook of Access to Justice 3; Constance Backhouse, "The White Women's Labor Laws: anti-Chinese Racism in Early Twentieth-Century Canada" (1996) 14 Law and History Review 315; Constance Backhouse, "White Female Help and Chinese-Canadian Employers; "race", Class, Gender and Law in the Case of Yee Lun, 1924" (1994) 26 Canadian Ethnic Studies 34; Constance Backhouse, "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia 1946" (1994) 17 Dalhousie Law Journal 299; James St. G. Walker, "'Race', Rights and the Law in the Supreme Court of Canada" (Toronto: Osgoode Society, 1997).

following reports expose the racial inequities that exist in Canada's legal system:[398] *Marshall Commission*,[399] the *Report of the Aboriginal Justice Inquiry of Manitoba*,[400] the *Report of the Royal Commission on Aboriginal Peoples*,[401] *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*,[402] the *Report of the Royal Commission on Systemic Racism in the Ontario Criminal Justice System*.[403]

The *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* is one of the most recent reports that has focused on anti-Black racism in Ontario. The Commission's mandate was "...to inquire into and make recommendations about the extent to which criminal justice practices, procedures and policies reflect systemic racism".[404] The focal point of the analysis was anti-Black racism in urban centers in Ontario.[405] In the *Report*, the Commission determined that a large proportion of the residents of Metropolitan Toronto believe that the justice system does not treat everyone equally.[406] A significant number of defence lawyers and judges who have been recently appointed also think that white accused and racial minority accused are not treated the same.[407] These findings indicate that a large number of people who live in

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[398] "Backhouse, "Bias in Canadian Law", *ibid.* at 177.
[399] Royal Commission on the Donald Marshall, Jr., Prosecution, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Royal Commission, 1989).
[400] *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991).
[401] *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996).
[402] *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: Task Force, 1991).
[403] *Report*, *supra* note 21.
[404] *Ibid.* at 1.
[405] *Ibid.*
[406] *Ibid.* at 12-17.
[407] *Ibid.* at 24-34. In contrast, the majority of Crown attorneys and judges appointed before 1989 think that "...concerns about racism or any other form of discrimination in Ontario's courts have no basis in fact". See *Report, ibid.* at 31, 19-24, 29-35.

Ontario think that there is a two-tiered criminal justice system in Ontario; one for people who have money and connections and the other for racialized people.[408]

The Commission not only determined that the criminal justice system is not perceived as upholding its commitment to equality, it also found evidence of racial inequality in practices.[409] First, when the police and crown attorneys decide to lay, screen or divert charges they often exercise their discretion in favour of White people more frequently than they do in cases involving racialized people.[410] Second, Black accused and other people of colour are particularly vulnerable to imprisonment before trial.[411] Finally, there is an over-representation of Black people among prison admissions.[412] In general, African-Canadians have had to contend with abuse of power by the police and "...prejudice, bias and discrimination in the administration of justice... by crown attorneys, judges and juries".[413] In fact, the *Report* and other evidence suggest that in both Canada and the United States racialized groups are being criminalized at much higher rates than White people.[414] At the same time, they are also receiving harsher treatment.[415] Since the "terrorist" attacks on the World Trade Centers in New York City, in 2001, and the subway bombings in Britain in 2005 this treatment has been "justified" as part of the "war on terrorism".[416] This may be a partial explanation. However, it is more than likely that this excuse has been used by racists to express overt racism.

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[408] *Ibid.* at 35.
[409] For example, since 1978, 16 Black people have been shot by on-duty police officers; ten of them died. Note: this number may have risen since the *Report* was written in 1995. See *Report*, *ibid* at Executive Summary x.
[410] *Ibid.* at ch. 6.
[411] *Ibid.* at ch. 5
[412] *Ibid.* at ch. 4
[413] ACLC, *supra* note 17 at 21-22.
[414] "Chan, "Criminological Research", *supra* note 250 at 104; *Report*, *supra* note 21.
[415] *Ibid.*
[416] See *e.g.* Reuters, "Brazilians outraged by police slaying" *The Ottawa Sun* (25 July 2005) 4.

# PART V: CONCLUSION

Researchers and academics have paid significant attention to Aboriginal people and their involvement with the criminal justice system, while less attention has been paid to African-Canadians.[417] It is true that both levels of government have commissioned reports on systemic racism. However, these reports rarely result in any material changes being made. In fact, it is unclear whether any of the recommendations made by the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* have been adopted or will be adopted in the near future.[418] Furthermore, the *Report* was not gender specific. Accordingly, more studies need to be conducted in order to determine how to alleviate the problems that are specific to African-Canadian women.

Even though there is an accumulated body of evidence which documents the prevalence of racial discrimination across Canada, White Canadians and the criminal justice system continue to dismiss its existence.[419] For example, in *R.D.S.* the privileging of White subjects was ignored and their innocence was promoted.[420] Generally, Canada's history of racism was overlooked. The *R.D.S.* case revolved around issues of "race", yet for the most part racism remained unnamed. What does this mean for cases involving accused African-Canadians? For example, what happens when "race" is a peripheral issue in a homicide case? Since the highest court in Canada has difficulty addressing issues of "race" and is very hesitant to do so, even when the main issue is racism, it is

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[417] Chan, "Criminological Research", *supra* note 250.
[418] *Ibid.* at 107.
[419] Aylward, *supra* note 381 at 299.
[420] Razack, *supra* note 382 at 65.

unlikely that other courts would recognize the significance of "race" in the life of a battered Black woman.[421]

The Anglo-American tradition has attempted to construct "true women" as pious, pure, submissive, and domestic.[422] The Battered Woman Syndrome characterizes women in a similar fashion. Women who use the Battered Woman Syndrome are expected to exhibit the following characteristics. They are supposed to be emotional, submissive, passive, dependent, and gentle.[423]

In North America, White women are expected to be "true women".[424] In contrast, Black women have been denied "true woman" status because the stereotype of Black women has been created by slavery.[425] As slaves, Black women were exploited in a number of ways. They were exploited in the fields, in the domestic household, as breeders, as sexual objects of White men, and as victim's of physical and psychological abuse at the hands of White men and White women.[426] Accordingly, Black women's attitudes towards gender roles have been affected by their experiences in the systems of production and reproduction.[427] For example, White women were viewed as too frail and dainty to undertake physical labour, while Black women were viewed as "beasts of burden" as they participated in hard labour next to Black men.[428] Consequently, Black women's experience of womanhood was very different from White women's experience

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[421] However, *Parks, Wilson* and *Hamilton* indicate that a number of judges are beginning to realize that "race" matters.
[422] Moore, *supra* note 35 at 323.
[423] Allard, *supra* note 11 at 196.
[424] Moore, *supra* note 35 at 324.
[425] *Ibid.*
[426] Thornhill, *supra* note 30 at 159.
[427] Dugger, *supra* note 34 at 427.
[428] *Ibid.*

of womanhood.[429] Black women's experience of womanhood included: self-reliance, hard work, perseverance, tenacity, resistance and sexual equality.[430] Consequently, racism and sexism have created "race"-specific gender effects in the lives of Black women.[431] These effects result in differences among women such that their identity and gender-role attitudes may be affected.[432] As a result, it is much easier for a White woman to benefit from "victim" status as outlined in the Battered Woman Syndrome than it is for a Black woman.[433]

In reality, the status of "victim" is not static.[434] Women involved in battering relationships are not always powerless victims.[435] A woman may become overpowered during the course of her relationship; however, this does not mean that she is a permanent "victim", or that she is inherently powerless.[436] In fact, women sometimes act from positions of power in order to save their own lives.[437]

Since the status of "victim", represents powerlessness or helplessness, a woman who claims this status must not demonstrate personal strength such as fighting back during a battering incident.[438] If she does, it is unlikely that she will be perceived as a "victim".[439] Generally, in order to be a successful Battered Woman Syndrome "victim" a

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[429] See Beth E. Richie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (New York: Routledge, 1996). Richie discusses the fact that many Black women are compelled to commit crimes because of their "race", gender and class.
[430] Dugger, *supra* note 34 at 427.
[431] *Ibid.* at 426.
[432] *Ibid.*; see also Allard, *supra* note 11 at 194.
[433] Moore, *supra* note 35 at 324.
[434] *Ibid.* at 325.
[435] *Ibid.*
[436] *Ibid.*
[437] *Ibid.* at 323.
[438] *Ibid.*
[439] *Ibid.*

woman must be both pitied and viewed condescendingly.[440] Many women cannot and do not fit this image.[441]

Racism and sexism intersect in the lives of racialized women, yet feminist or antiracist practices rarely articulate this reality.[442] For example, in *Howard*, *Catholique Eyapaise*, *M.F.*, *W.L.Q.*, *R.F.*, *S.M.* and *Gladue* the criminal justice system failed to recognize the intersectionality of gender and "race". When racism and sexism are presented as an either/or proposition, racialized women's voices are silenced.[443] This tends to happen in law because law is a discourse that is shaped to respond to either race or gender.[444]

As demonstrated by this paper, African-Canadian women face a significant number of barriers when they come in to contact with the criminal justice system. African-Canadian women must contend with anti-Black racism, sexism, classism, racist stereotypes and sexist stereotypes. Consequently, feminist analyses based on women as a homogeneous group are no longer appropriate. The distinctive experiences and perspectives of sub-groups of women must not be ignored.[445] In fact, in order to implement a more comprehensive political response, an intersectional analysis must be used to respond to the numerous ways in which women are oppressed.[446] This means that when legal strategies are being examined, it is imperative that women's multiple grounds

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[440] *Ibid.*
[441] *Ibid.* at 346.
[442] Crenshaw, *supra* note 28. See Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581.
[443] Crenshaw, *ibid.*
[444] *Ibid.* at 1244.
[445] Archana Parashar, "Essentialism or Pluralism: The Future of Legal Feminism" (1993) 6 C.J.W.L. 328 at 343.
[446] Crenshaw, *supra* note 28 at 1283.

of identity are analyzed.[447] Accordingly, the benefits that have occurred as a result of the Battered Woman Syndrome must not be forgotten. In fact, the Battered Woman Syndrome has arguably assisted the development of other defences. Nevertheless the syndrome in and of itself should be abandoned as a theory of self-defence. This has begun to happen as legal scholars and lawyers are starting to move away from the Battered Woman Syndrome. Instead, social framework evidence or contextual evidence is being used in order to further develop a self-defence for battered women.[448] Feminist legal scholars must ensure that as this continues to happen, the perspectives of all women, including African-Canadian woman, are taken in to consideration.

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[447] *Ibid.* at 1245.

[448] Robbin S. Ogle & Susan Jacobs, *Self-Defense and Battered Woman: A New Framework* (London: Praeger, 2002) at 6. See Downs, supra note 12; see H. Maguigan, "Review of More than victims: Battered women, the syndrome society, and the law, by Donald Alexander Downs", Book Review (1998) 17:1 Criminal Justice Ethics 50; Elizabeth Schneider, "Resistance to Equality" (1996) 57:3 U. Pitt. L. Rev. 477. According to Ogle and Jacobs, the best way to develop a self-defence defence for battered women is to view battering as an interaction process. This means that the last violent encounter would no longer be the focus of the self-defence claim. In its place, the battering relationship would be understood as a "long-term homicidal interaction process". Accordingly, the entire history and context of the battering relationship would be examined. This would ensure that the context of the battered woman's survival efforts are fairly portrayed. If self-defence cases involving battered women were viewed in this way, it is more likely that the battered woman's actions would be viewed as a reasonable response. See Ogle & Jacobs at 69-71.