# DEFENDING BATTERED WOMEN ON TRIAL

## LESSONS FROM THE TRANSCRIPTS

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**Law and Society Series**
*W. Wesley Pue, General Editor*

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

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# Introduction

### In the Beginning: Angelique Lyn Lavallee

In September 1986 in Winnipeg, Manitoba, Angelique Lyn Lavallee killed her common law partner Kevin "Rooster" Rust in a situation not recognized by Canadian law as allowing self-defence. Rather than killing in an ongoing physical confrontation, she fired a gun as he turned and walked from the room after assaulting her and swearing that he would "get" her later. Lavallee's counsel, Greg Brodsky, made legal history by asking the Supreme Court of Canada to affirm the admissibility of expert evidence on "Battered Woman Syndrome" to reinterpret self-defence in light of the experience of battered women like Lavallee.[1]

Brodsky's argument was a bold one, for the criminal justice system – its procedures, assumptions, and rules – was never designed for women, especially those who kill their husbands or partners. In fact, the law historically authorized husbands to exercise violent authority over their wives and made it very difficult for women to escape from brutal husbands. The phrase "rule of thumb" is inherited from the notion that men were entitled to beat their wives with sticks as long as they were no thicker than a man's thumb.[2] The precedent-setting decision of *Hawley v Ham,* delivered in Kingston, Ontario, in 1826, set out the common law position in Canada. According to Chief Justice William Campbell, a man had "a right to chastise his wife moderately." To warrant leaving her husband, "the chastisement must be such as to put her life in jeopardy."[3] Campbell's ruling endorsed as permissible the behaviour of a husband who flourished a riding whip over his wife's head, with threats of flogging.[4]

Wife killing, through an excess of "chastisement," was often not condemned as murder but as "chance medley" – accidental homicide or what we today would call manslaughter. Husband killing, however, was worse than murder: it was treachery, a form of treason. The offence of petit treason – the killing of one's lord and master – garnered a special punishment of public burning at the stake until it was abolished in 1790.[5]

Criminal prosecution of wife beating was possible at least by the 1830s,[6] due to reforms to property, family, and criminal law and to public campaigns aimed at "redefining abusive spousal behaviour as criminal."[7] These reforms, spearheaded by early feminists and the temperance movement, began to untie the knots of patriarchal power by allowing abused women to keep their own property when fleeing violent husbands,[8] apply for maintenance,[9] retain custody of their children,[10] and press criminal charges.[11] There were isolated prosecutions for wife assault throughout history,[12] but it was not until the 1960s that large-scale and persistent second wave feminist demands returned to focus on this issue.[13] In the 1980s, the Canadian legal system began to respond with policies aimed at prosecuting wife battering more rigorously.[14] Yet the ideas and privileges protected by the law's established approval of wife beating survived beyond legal change on the surface.[15] And, when women like Lavallee kill their male partners, police and prosecutors bring the full force of the law to bear against the woman, sometimes acknowledging the deceased's past violence but characterizing it as legally irrelevant to her right to use lethal self-defence.[16]

## Before the Beginning: Jane Hurshman

Canadian jurors given liberal access to the woman's story – frequently constrained by the rules governing the admissibility of evidence in criminal trials – are often quite fair with battered women, arguably displaying the "common sense" for which the jury system is praised. The trial of Jane Hurshman,[17] who killed her common law husband, Billy Stafford, in 1982 in Bangs Falls, Nova Scotia, provides a powerful example.

Hurshman experienced "captivity" in her life with Stafford, a descriptor drawn from Dr Judith Lewis Herman's book *Trauma and Recovery.*[18] Dr Herman demonstrates that the psychological trauma of war and its aftermath of Post-Traumatic Stress Disorder (PTSD) are mirrored in the lives of women entrapped in domestic relationships with abusive men. "Traumatic events," she writes, "are extraordinary, not because they occur rarely, but rather because they overwhelm the ordinary human adaptations to life … They confront human beings with the extremities of helplessness and terror, and evoke the responses of catastrophe."[19] These events can include being subjected to or exposed to violence, where "action is of no avail." Traumatic experience overwhelms and disorganizes the psyche, producing "profound and lasting changes in physiological arousal, emotion, cognition and memory."[20] The symptoms of PTSD – hyperarousal, when the body and mind go into high alert; intrusion, when the event is relived repeatedly

through dreams and flashbacks; and constriction, when the mind escapes through altered states of consciousness or disassociation – persist long after the traumatic event.

Dr Herman explains that, while singular traumatic events can occur anytime and can arise from natural disasters, the experience of repeated trauma occurs only in captivity, such as that experienced by prisoners of war, members of cults, persons in institutions, and women in "domestic captivity." She says that "[t]he worst fear of any traumatized person is that the moment of horror will recur, and this fear is realized in victims of chronic abuse."[21] She describes the mechanics whereby men can accomplish and maintain the captivity of women and children who, to the external world, appear "free" to attend school, work, and live their lives.

Abusive men achieve domination by subjecting women to repeated psychological trauma, through threats to kill or wound them or those whom they love; surveillance of and control over women's movements, bodies, and bodily functions; sexual violence and degradation; sleep deprivation; interrogation; enforcement of petty rules; and destruction of their attachments to family photographs, loved ones, and cherished values. Batterers can use minor violence or resort to violence infrequently to reinforce their control by keeping women in a state of dread or to secure their compliance. But simple compliance is often not enough, according to Dr Herman. An abusive man requires gratitude, admiration, and love: "His ultimate goal is the creation of a willing victim."[22]

Batterers deploy additional methods when women attempt to separate: promises to change, apologies, and declarations of love; efforts to further isolate women from familial and social supports; and escalating threats to kill them should they leave. These men seek total surrender, which they achieve by forcing women to violate their own boundaries and moral codes, participate in their own humiliation, or sacrifice others – children, family, friends. Thus "broken," a woman is at risk of losing the will to live.

Release from captivity required that Hurshman kill Stafford. No one else was going to save her. Her story is told in a best-selling work of non-fiction by Brian Vallée, *Life with Billy.*[23] The CBC's current affairs program, *The Fifth Estate,* interviewed Hurshman after her initial acquittal and documented her struggle with the effects of trauma.[24] The recording technician stopped because he thought that something was wrong with his equipment: as Hurshman relayed Stafford's brutal attacks, the lapel microphone picked up the sound not only of her voice but also of her relived terror, betrayed by the sound of her wildly pounding heart.[25]

From 1977, when Stafford first attacked Hurshman, through to 1982, when she killed him, he kept up a relentless campaign of material deprivation, control, intimidation, extreme violence, and degradation against Hurshman; Allen, her son from her first marriage; and Darren, the child whom she conceived with Stafford. Her co-workers described Hurshman as constantly bruised and black-eyed. Stafford fired bullets in her direction, knocked her unconscious, sexually degraded her in horrifying ways, and assaulted and punished her children with deliberate cruelty. He was notorious as a violent bully who boasted having killed a man by throwing him overboard at sea. He so terrified other sailors that all refused to testify with respect to this death. He had raged at authorities and openly defied police and court orders.

It is perhaps not surprising that Hurshman had never once reported any of his hundreds of assaults against her and her boys.[26] She knew that his two prior wives had fled the province to escape. Should she try to leave, Stafford threatened, he would not be a "three time loser": he would kill her family members one by one until she returned. She contemplated killing Stafford in bed, once putting a loaded gun to his head while he slept, but she worried about Darren seeing the aftermath. She considered suicide but could not bring herself to leave Darren alone with his father. She thought about killing Darren and then herself but could not kill her son. Hurshman even tried unsuccessfully to hire a man to kill Stafford.[27]

One night in March 1982, Stafford announced that he would set fire to a trailer next door with neighbour Margaret Joudrey and her husband inside and "deal with" Allen, vowing that he would clean them all up at the same time. Hurshman killed Stafford with his shotgun after he passed out drunk in his truck outside their home. She drove the truck away with his body in it and left it to be found on a country road.

She was brought in for questioning by the police the next day. Within twelve hours, she confessed. The police seemed sympathetic, but Staff Sergeant Peter Williamson recorded her confession and left out all the abuse that she recounted. Yet he said to another officer, within her hearing, that "[s]he deserves a medal. She probably saved a couple of our officers' lives. He always had loaded guns. I'm sure we would have gone out there one day and he would have shot one of us."[28] Two weeks before the killing, her lawyer learned, Hurshman had attended the station to beg the police to cancel a summons against Stafford for shooting deer out of season. They ignored her bruises and black eyes.

The provincial Attorney General's (AG) office insisted on pursuing first-degree murder charges against Hurshman, repudiating her lawyer's offer of a guilty plea to manslaughter. Because she had shot Stafford while he was unconscious, the AG believed that her actions displayed "planning and deliberation" deserving of the most serious sentence available for murder: life imprisonment without parole eligibility for twenty-five years.[29] As the prosecutor, Blaine Allaby, told the jury at her trial, "[w]e may sympathize with Jane [Hurshman] in her situation, but the law is the law."[30]

Defence lawyer Alan Ferrier painted a picture for the jury of Stafford's brutality. One woman testified that Stafford tried to run her down while she crossed a street with her baby in a stroller. When she reported him to the police, a bullet was fired through the window of her home. Another woman was threatened by Stafford after she complained to the police that he had shot her dog. A man was punched, chased, and shot at by Stafford; another man committed perjury in a deer-jacking charge against Stafford because he was so terrified of retaliation; another man ran barefoot from the Stafford house in the snow with his wife and son after Stafford suddenly became a raging madman and hit him for no reason. Stafford's two ex-wives described how they fled Nova Scotia with their children and went into hiding. Three doctors also testified for the defence: one of them was a forensic and child psychiatrist who evaluated Darren as an abused child and who gave evidence on "battered women" and "the syndrome."[31]

Ferrier asked the jury to consider self-defence and defence of others, which would result in acquittal if successful, but his main focus was on persuading them to return a manslaughter verdict on the basis that either Hurshman was provoked or she had no intent to kill.[32] The presiding judge, Mr Justice D Burchell, meticulously reviewed the testimony of the forty-six witnesses who testified over nineteen days. He spent seven and a half hours charging the jury. After eighteen hours of deliberation, with two nights in sequestration, the jury returned an acquittal for Hurshman. The courtroom exploded with the jubilation of spectators.[33]

Public reaction to Hurshman's acquittal was positive – but not that of the legal profession. Ferrier was shocked by the acquittal, for he thought that a manslaughter conviction was the appropriate verdict.[34] Dalhousie University law professor Wayne McKay criticized the result, saying that Hurshman's circumstances and lack of options should not have been considered with respect to her guilt or innocence. Instead, he said, these were matters for sentencing: "[I]n its quest for justice in the individual case, a jury should not be permitted to distort principles."[35]

The AG's office filed its appeal within three weeks. Hurshman was told by the RCMP officer who served the appeal notice that "I'm really sorry to have to give this to you. I can't see what they hope to gain. Every officer across the country has followed this case, and it should have ended when they acquitted you."[36]

The Nova Scotia Court of Appeal agreed with the Crown appeal and ordered a new trial.[37] The judge should not have allowed the jury to consider either self-defence or defence of others because no one faced "imminent harm" while Stafford slept. Furthermore, all evidence of Stanford's rampant violence should have been ruled inadmissible because it was not relevant to a viable defence. Hurshman offered to plead guilty to manslaughter to avoid a second trial. This time the Crown accepted readily.

At the sentencing hearing, Allaby asked Mr Justice Merlin Nunn to impose a jail sentence as a deterrent to others. Justice Nunn commented that Hurshman had endured a hard life but warned that "[w]ives don't have the right to take the lives of their husbands."[38] He sentenced her to six months of imprisonment, denouncing her for playing "judge, jury and executioner."[39]

An editorial in the *Liverpool Advance* by Jock Inglis expressed the community's outrage at the AG's conduct:

> The Crown got its pound of flesh through the incarceration of Ms. Stafford, but at what cost to our judicial system? … There are those of us who felt that the jury was the pillar of our judicial system, that once we were found to be innocent by a group of our fellow citizens we were free to go about our business. We know now that this is not so. We also wonder how, in the future, the Crown can expect we citizens to do our duty as jurors, to sit hour after hour, day after day, studying the testimony and finally to be told, once our verdict has been rendered, that no, our opinion was not really wanted after all, only that of the lawyers. What did the Crown really accomplish through this exercise? Did they prove to the citizens of Queen's County, beyond a reasonable doubt that Ms. Stafford committed a crime against our society? Did they show society that she deserved to be punished? Will the sentence stop others from protecting themselves from physical or emotional violence perpetrated by their mates? Did our society derive meaningful benefit from the second trial? We think not.[40]

Hurshman became a public figure in Nova Scotia, where she spoke out against wife battering and supported other women's efforts to escape from violent men. Nova Scotia's AG Henry How insisted on speaking with

Hurshman at a hotel just before she was to address a women's conference in Lunenburg, Nova Scotia, in February 1985. According to Vallée, "he apologized for granting appeal in her case, but said he had no choice."[41] How explained that she did not kill in response to "sudden provocation," since Stafford was asleep, and the law did not recognize "slow burn" or cumulative provocation; he also said that self-defence covered only an immediate confrontation. Then, How said, "[n]ow Jane – off the record – I want to say, that cocksucker should have been shot a long time ago."[42]

How was later appointed the Chief Judge of Nova Scotia's Provincial Court, where he served until his retirement in 1988. Hurshman did not fare so well. She died in February 1992, likely by her own hand.[43] Although she escaped from Stafford, she never recovered from his effort to break her body and spirit, and her terrible legal ordeal took its toll.

Hurshman was condemned by prosecutors and judges for not choosing the appropriate route to deal with Stafford's reign of terror. But no one specified what that route was. She was credited with "choice" and therefore responsibility for how she secured her and her children's safety, while AG How, arguably one of the most powerful men in the province, claimed that he had no choice and therefore bore no responsibility for the legal injustice committed against her. The state justified its response by reference to "the law" and its principles, when a jury of her peers understood all too clearly that "the law" had nothing to offer Hurshman.

## A New Paradigm for Self-Defence?

*Lavallee* changed the law of self-defence in 1990, thereby resolving the unfairness that had confronted battered women on trial for murder. Or did it? True enough, expert evidence on Battered Woman Syndrome, a subset of PTSD, was ruled admissible to support self-defence. *Lavallee* also put to rest the common law "imminence" requirement deployed against Hurshman: women do not need to wait for the "uplifted knife" to act in self-defence.[44]

Legal researchers looking for *Lavallee*'s impact were disappointed. Early assessments in 1994 and 1995 detected only two cases in which prosecutors declined to prosecute women when evidence of serious violence by the deceased against their female partners emerged.[45] Beyond these prosecutorial stays, few women were known to have been acquitted based on *Lavallee.*[46]

In 1995, Judge Lynn Ratushny, as she then was, was appointed by the federal government to conduct an *en bloc* review of the homicide convictions of women who alleged that they had killed male partners in self-defence, on the basis that they arguably had not received the benefit of the

*Lavallee* ruling. This review was the product of initial research and lobbying by the Canadian Association of Elizabeth Fry Societies.[47] The Terms of Reference asked Judge Ratushny to review the applications for review of eligible women to ascertain whether their cases warranted a recommendation to the government for granting the royal prerogative of mercy and to identify appropriate law reforms stemming from the review.

Judge Ratushny's *Self-Defence Review* (*SDR*) received ninety-eight applications from women convicted before and after *Lavallee.* Judge Ratushny developed legal standards for review of the women's cases, and, after compiling and analyzing the applications in light of those standards, she rejected all but fourteen women's claims. She interviewed those fourteen women, but in the end she made recommendations for seven;[48] the federal government granted some relief to only five of the women; and no woman was released from prison as a result of the *SDR.*[49] Judge Ratushny also made a number of law reform recommendations that have languished without federal response in the fifteen ensuing years. I discuss these recommendations in the chapters that follow where relevant.

The results of the *SDR* were extremely disappointing to the women and their advocates, but they should not be read as confirmation that the justice system works fairly for battered women on trial. I have explained elsewhere how the legal standards for review, the burden of proof that falls on those who challenge their convictions, the unfairness of some of the legal requirements for self-defence for battered women, the lack of a systemic analysis of male violence against women, the restricted availability of counsel for the women, and Judge Ratushny's experience of resistance and interference by government officials[50] together blunted access to justice for the women involved.[51] Battered women advised by counsel to plead guilty rather than go to trial, those who went to trial but did not raise self-defence, and those whose lawyers raised self-defence but nonetheless made strategic decisions about the evidence and the arguments were out of luck for a remedy unless there was new evidence or evidence whose significance was unappreciated at the time. In the absence of clear incompetence, counsel's strategic decisions, especially in light of the complex law of self-defence, the rarity of its interpretation in cases of battered women, and the high stakes presented by a murder conviction, could not be reviewed by the *SDR,* potentially leaving deserving women without a remedy.

The *SDR* recognized, consistent with the work of feminist scholars,[52] that one salient effect of *Lavallee* was to facilitate plea bargains for manslaughter and compassionate sentences for battered women, in circumstances in

which they might have achieved acquittal based on self-defence had they gone to trial. Inherent in such plea bargains is the notion that the crime was committed while the woman was in a provoked or intoxicated state, in which she did not have the intent to kill required for murder because her mind was affected by Battered Woman Syndrome. In some of these cases, judges have mitigated women's manslaughter sentences in light of the battering that the women endured, imposing suspended sentences, conditional imprisonment (house arrest), and sentences of less than two years of imprisonment.

Thus, instead of the legal system recognizing that the woman's act was justified by the complete defence of self-defence, her act is "excused" by the prosecutor's acceptance of a manslaughter verdict based on compassionate considerations. This looks like mercy, not justice, according to Rebecca Bradfield: "The classification of the sentence as 'merciful' … renders the battered woman's case as exceptional and outside the legitimate mitigatory framework. The use of the concept of mercy perpetuates the judicial system's willingness to express sympathy and compassion for these women, while not recognising the legitimacy of their actions."[53]

Are these results just? Are Canadian women receiving equal access to a fair trial when they kill violent male partners? To adopt the definition proposed by Holly Maguigan,[54] do women have access to a trial in which they can put to the jury the full contexts of their acts and receive the benefit of judicial instruction that relates the contexts in which they killed to the law? Would our legal system respond today to a woman in Hurshman's situation as it did in the 1980s?

## Searching for Justice

Using trial records of women's homicide trials that were previously not transcribed, a clearer picture emerges of how the Canadian justice system deals with these difficult cases. I searched electronic legal and news databases[55] to identify 141 cases in which women were charged with killing their male partners from 1990 to 2005; I then secured transcripts when they were available and within my research budget.

Of course, not all 141 women killed in circumstances that raised the issue of self-defence: some were found unfit to stand trial or not criminally responsible on the basis of mental disorder; others alleged an alternative defence or mitigating circumstance. I excluded from further study those women who, from the available information, made no claim to have experienced abuse. I also excluded a number of women who may have fit my criteria,

but the available information was incomplete. The remaining ninety-one women's cases are shown in the Appendix of this book. For these women, self-defence was at least arguable. All experienced prior abuse, the majority being described in news accounts and judgments as having been "battered." These results (65 percent) are generally consistent with earlier work by Statistics Canada, which reported that 68 percent of husband killings involved a history of domestic violence.[56]

Seventy-two of the ninety-one women whose cases are recorded in the Appendix were killed in the course of an ongoing altercation that involved some form of physical conflict or threat. Nine of the remaining nineteen were women who killed sleeping male partners, and two women conspired to kill with the aid of others. However, this group also included women who killed upon discovering that the deceased had sexually assaulted them or their children, women who killed in anticipation of physical conflict, and women who killed during a lull in a physical confrontation. These results, which suggest that only 20 percent of the ninety-two women did not kill during physical conflict, parallel those found by US author Maguigan in her study.[57]

In cases in which there was some evidence of prior abuse, I attempted to gather basic information about the relationship, the circumstances surrounding the homicide, the charges laid, the arguments advanced, the legal resolution of the charges, and the sentence, if the woman was convicted. Charges were declined, dropped, or stayed by the prosecutor, or the accused was discharged by the judge after a preliminary inquiry, in seven of these cases. Guilty pleas to manslaughter (and two to conspiracy to commit murder) were entered by forty-nine women (54 percent of total, or 58 percent of those against whom the prosecution proceeded); one other woman pled guilty to second-degree murder after multiple trials. Of the thirty-four women who went on to trial, two were convicted of first-degree murder, one of second-degree murder, and nine of manslaughter, totalling twelve convictions (13 percent of total, or 14 percent of those against whom the Crown proceeded). The remaining twenty-two women were acquitted of all charges (24 percent of total, or 26 percent of those against whom the prosecution proceeded), including one woman acquitted by the court of appeal and another acquitted after a new trial. In the end, out of ninety-one women, sixty-two were convicted of some form of homicide (68 percent of total): fifty-six of manslaughter; two of conspiracy to commit murder; two of second-degree murder; and two of first-degree murder. Another twenty-nine women (32 percent of total) were either spared a trial or were acquitted.

More recent work tracking battered women's homicide cases from 2000 to 2010 shows similar patterns: thirty-six women were charged; twenty pled guilty, nineteen to manslaughter and one to murder (56 percent); one charge was stayed; and, among the fifteen who went to trial, eleven were acquitted (30.5 percent).[58]

From my research base, I ordered thirty-six transcripts[59] of preliminary inquiries, trials, and sentencing hearings. I chose to analyze eleven of these women's cases, selected to show the range of issues that arises in battered women's trials, the different outcomes, and the strategies and arguments advanced by their lawyers. I also chose these cases taking into consideration the length of the transcript, the availability of additional secondary materials such as reported decisions in the matter and newspaper coverage, and, in the case of Aboriginal women, the prevalence of their cases among my sample.

This study presented methodological challenges, to be sure. These databases allowed me to retrieve a number of sentencing reasons where women pled guilty or were found guilty of manslaughter[60] and appeal decisions on jury instructions or sentence. Jury acquittals and convictions are not reported in legal databases unless they raise a legal issue, such as parole eligibility, or are appealed; guilty pleas, where the reasons for sentence are brief, are rarely reported in legal databases. Newspaper databases revealed many more cases, probably because husband killing remains relatively infrequent and therefore more "newsworthy," but the details provided are often sketchy. In some cases, further media reports on the progress of the case could not be found. Thus, neither search method yields a complete picture of women who kill male partners in Canada. Statistics Canada reports that approximately 273 women killed male partners in my study period,[61] so my research has captured approximately half of the known cases.

Although my research base does not perfectly match the statistics, it allows a snapshot of the results of battered women's homicide charges post-*Lavallee,* revealing charging patterns, the predominant outcome of guilty pleas to manslaughter, and a surprising number of acquittals based on self-defence. This study also provides a context within which to make sense of the eleven cases that I analyze in depth, using a case study approach. For each case, I explain legal aspects for the general reader; situate it within my larger study of ninety-one cases; and show its relationship to the broader social and legal contexts in which it occurred to highlight the systemic forces that shaped the homicides and the legal resolution of the charges. The case study approach to criminal trial transcripts does not lend itself to definitive

conclusions about guilt or innocence or the "right" or "wrong" trial strategy, but it nonetheless offers valuable insights into the barriers and challenges facing battered women on trial.

### Defining My Terms

For the purposes of this book, I use the term "battering" to describe the systemic use of threats and acts of violence, whether minor or serious, by male partners to get their way – to enforce their authority, to isolate, intimidate, and silence their female partners, and to control them.[62] Also called "intimate terrorism" in the literature, battering is overwhelmingly committed by men against women, is motivated by the desire to dominate and achieve control over another, and tends to escalate over time.[63] Battering draws on structural inequalities experienced by women – women's unequal access to social, political, and economic resources. Societies more rigidly stratified by gender have higher rates of battering.[64]

Battering is used to enforce women's traditional roles – to force women to serve their male partners by cooking and cleaning, bearing and raising children, and being sexually available; to restrict or supervise what women wear, whether they pursue educational or employment opportunities, and whom they associate with;[65] and to reflect men "at twice their natural size."[66] Melanie Randall sums up battering as "simultaneously express[ing] and reproduc[ing] sexual inequality on both individual and societal levels; it is both a cause and effect of sex inequality."[67]

Battering is distinguished from "situational couple violence," which denotes common couple violence in which women as well as men might on occasion use violence outside a larger pattern of control or coercion in order to get their way in a particular situation.[68] Relationships are described as battering ones when there is evidence of threatening behaviour, sexual or physical abuse by the man, coupled with his effort to control and dominate the woman. In such cases, the implication is clear to both partners: if he needs to use more serious violence to achieve his goal, he will. Lisa A Goodman and Deborah Epstein elaborate: "Even nonviolent control tactics take on a violent meaning through their implicit connection with potential physical harm."[69]

The term "battered women" is used throughout this book, even though it implicitly suggests a category of women whose experiences are universal and who are somehow set apart from "other" women.[70] In the context of criminal trials, in which nuance is abandoned by Crown and defence lawyers who present competing narratives about women on trial as either violent,

manipulative frauds or wholly innocent, deserving wives and mothers, claiming the experience of battering carries particular risks. Women who fail in any way to meet the preconceptions of battered women can have their credibility destroyed and their chances of acquittal undercut. For example, in one case in my study of ninety-one women, the prosecutor argued at sentencing that the woman was "often drunk, profane, verbally abusive, physically aggressive, prone to lying and exaggeration, that she was not in fact the submissive, passive, vulnerable woman who lived in the state of learned helplessness."[71] Some Canadian judges have attempted to disrupt this binary, insisting that, although a woman might use violence or coarse language or in other ways present as less than perfect, this does not mean that she has not experienced battering.[72] Yet Crown attorneys and defence lawyers continue this battle for the hearts and minds of jurors by presenting contrasting and stark portraits of the woman's (and the deceased man's) goodness or evil.

To further complicate matters, many women, US author Martha R Mahoney explains, avoid calling themselves "battered." She identifies "the gap between my self-perceived competence and strength and my own image of battered women, the inevitable attendant loss of my own denial of painful experience, and the certainty that the listener cannot hear such a claim without filtering it through a variety of derogatory stereotypes."[73] Even women convicted of killing their batterers might reject the label because they have grown up with male violence as a constant, internalized it as their fault, thought that the violence they experienced was not severe enough, or believed that if they fought back they could not be a battered woman.[74] Thus, the practices of batterers and the consequences for women whose lives have been affected by them remain relatively invisible in our society and legal system[75] and continue to be distorted by misconceptions.

### A Word about Transcripts

Trial transcripts in Canada are very difficult for researchers to obtain. The preparation and release of transcripts are subject to different rules in each province. They also require lengthy waits and are extremely expensive to acquire, if the tapes have indeed been preserved. For example, until recently, Nova Scotia destroyed tapes and transcripts after two years.[76] Although new practices using digital records will allow much longer retention in the future, on average jurisdictions retain tape recordings for between five and ten years. In some jurisdictions, the tapes follow the court reporter, requiring the researcher to locate the court reporter, who then has to find her tapes.

Even then, the court reporter might not have the time – or the researcher the money – to type the record, at an average cost of $3.50 per page.

Worse are jurisdictions such as British Columbia and the Yukon, which have privatized the enterprise, enabling court reporter services to charge fifteen dollars per page to produce the transcript and high fees even for photocopies of trial records that have already been transcribed, and claim copyright in public records. British Columbia has further revised its policy as of February 2011 to require a court order before transcripts of criminal proceedings can be released to a member of the public.[77] These barriers to transcript-based research mean that the Canadian public loses knowledge and history as a consequence.

Finally, if one gets the transcript, one can be surprised by the variability of what it includes or omits. Some transcripts exclude all oral argument by lawyers on points of law before the judge when the jury is absent; many exclude matters such as jury selection; and critical matters such as the final jury addresses are sometimes excluded, for no apparent reason. Video or audio recordings entered into evidence are rarely transcribed, so the researcher is acutely aware that she is not reading the whole story. Even when supplemented by in-court observation, a transcript provides a partial glimpse into what happened, as lawyers, witnesses, and judges deploy the rules of evidence to shape the evidence presented in the courtroom.[78]

## The Chapters

The chapters in this book are driven by the narrative of each transcript and are presented in an accessible form for the general reader.

Chapter 1 explores Angelique Lyn Lavallee's trial, made possible only because Greg Brodsky retained a copy of her transcript in his files and generously shared it. This chapter contextualizes Brodsky's advocacy in the *Lavallee* case by reference to the work of feminist activists and lawyers who prepared the groundwork and advanced the arguments in US courts on behalf of battered women who kill. Here I explain the theory of Battered Woman Syndrome, using Lenore Walker's work,[79] and review the critiques and problems associated with invoking this theory. The *Lavallee* case is lauded around the world as the most progressive decision among Western nations for battered women who kill: this chapter explains the role played by Justice Bertha Wilson in the decision and why the judgment held so much promise for battered women. It situates this case within the feminist movement's efforts to put wife battering on the public agenda and the backlash

against so-called violent women engendered by feminist demands for formal equality whereby women would be treated the same as men.

Chapter 2 steps back from women's murder trials to examine the other side of the coin: what of those battered women who do not kill? This chapter explores what we know about wife battering, police intervention, women's options for escape, and the risks of intimate femicide, for this is the dangerous sea in which most women who kill male partners must swim. I use Bonnie Mooney's civil lawsuit against the AG of British Columbia and the police for failing to protect her and her loved ones against the violent rage of her ex-partner to illustrate how the "social entrapment" of battered women narrows their options for escape from abusive men. James Ptacek argues that women are not only held captive by abusive men: "Individual women are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize, and control so many women draws on institutional collusion and gender inequality."[80] What exactly do we offer by way of safe passage for women seeking to escape from batterers?

Chapter 3 exposes a major barrier to women's access to a fair trial on the merits: the mandatory life sentence for murder. I tell Kim Kondejewski's story in this chapter to show how the mandatory life sentence makes the line between guilt and innocence arbitrary when a battered woman is charged with homicide, particularly first-degree murder. Although I use her transcript to tell "the facts," I also draw on the work of Emma Cunliffe[81] and Austin Sarat[82] to explore the limitations of trial transcripts. The Kondejewski case illustrates some of the risks of using Battered Woman Syndrome evidence and raises the question of whether self-defence is available for planned and deliberate murder and for defence of one's children. Finally, I invite the reader to consider the psychological price paid by battered women who undergo murder trials.

Chapter 4 explores what happens to Aboriginal women who kill, whose experiences might not easily be captured by Battered Woman Syndrome. Both Gladys Heavenfire and Doreen Sorenson killed non-Aboriginal male partners who were able to draw on systemic racism to further dominate them. Their domestic captivity was enabled by colonial practices of the state that heightened their vulnerability to male violence. This chapter argues that Aboriginal women's dilemmas must be understood within the context that these women are dramatically more likely to be the victims of intimate femicide than other women. Not surprisingly then, they appear disproportionately in my study, comprising 41 percent of my ninety-one files. I use the

work of Sherene H Razack[83] in this chapter to explore how the role of racism can be rendered invisible in Aboriginal women's homicide trials, at the risk of further shoring up racist stereotypes and white privilege. The Heavenfire and Sorenson transcripts raise delicate questions about how a defence lawyer can expose unconscious racism that might affect how the credibility of witness testimony, especially that of the client, is evaluated by the jury.

Chapter 5 uses a major study by Anne McGillivray and Brenda Comaskey[84] to show the role of colonization in Aboriginal women's experience of male violence. This chapter identifies the common features of Aboriginal women's homicides, focusing on those women who kill Aboriginal male partners. Aboriginal women almost invariably kill during an altercation and not when their partner is asleep or passed out, yet they are more likely than others to plead guilty and forgo their right to argue self-defence. The chapter examines the trials of two women who did not plead guilty: Donelda Ann Kay and Denise Robin Rain. Their cases illustrate the serious barriers to acquittal for Aboriginal women who are invariably portrayed as aggressors, not "real" battered women. In light of the escalation of the federal incarceration of Aboriginal women by 151 percent between 1997 and 2007,[85] making them the fastest-growing prison population in Canada, this chapter seeks to understand why so many Aboriginal women are convicted of killing violent male partners. These transcripts reveal strategies that might be used to challenge stereotypes about Aboriginal women and to position their actions within a self-defence paradigm. The chapter then turns to the well-known case of Jamie Tanis Gladue, whose guilty plea led to a sentencing decision that made legal history in 1999.[86] I ask whether she should have gone on to trial rather than pleading guilty in light of the exculpatory evidence available through her preliminary inquiry and sentencing hearing.

Chapter 6 asks whether self-defence is or should be available to those relatively rare women who kill their batterers in non-confrontational situations, such as when the man is asleep. Lilian Getkate's murder trial raises the question of whether Battered Woman Syndrome is appropriate when little evidence corroborates the woman's claim of abuse and when the woman does not match the stereotypes associated with battered women. An alternative defence theory might be "Coercive Control,"[87] which shifts the focus away from a man's discrete acts of violence and toward his pattern of psychological domination and pervasive threat "to secure privileges that involve the use of time, control over material resources, access to sex, and personal service."[88] This chapter also considers whether overzealous Crown prosecutors of battered women violate their ethical obligation to act in the

public interest to ensure that justice is done,[89] given that the same prosecutors must assure battered women that their accounts of battering will be believed and prosecuted according to the law. Is there an inherent ethical and moral conflict posed for Crown prosecutors in these cases?

Chapter 7 shows how, in order to survive battering, women use alcohol and drugs; they suppress their fear and anxiety; and they dissociate from reality. Some have experienced traumatic brain injuries from being hit on the head, strangled, and thrown into walls and down stairs. The transcripts of Margaret Ann Malott and Rita Graveline demonstrate these additional hurdles for battered women on trial, whereby their partial or wholly absent memory can compromise their ability to argue self-defence. I discuss here other defences advanced in these trials – intoxication, provocation, and automatism – and their limitations for battered women who kill. The chapter uses the work of Evan Stark and Anne Flitcraft[90] to examine the role of the medical profession in women's social entrapment by treating women for depression and prescribing anti-depressants and anti-anxiety medications. It also discusses psychological abuse by batterers as a form of torture that risks the destruction of the psychological self. Does or should the law of self-defence recognize psychological self-defence? Does our law of self-defence fairly capture women's survival dilemmas?

The Conclusion identifies changes that could be put in place to secure for battered women on trial for homicide their equal right to a fair trial on the merits: what can we do to alleviate the pressure to plead guilty and avoid a trial? I highlight successful defence strategies, especially relating to the choice of alternatives to Battered Woman Syndrome and of experts to testify to the theory. I also suggest changes to prosecutorial policies and practices, to the sentencing of murder, to legal aid, and to the law of self-defence that arise from my study of the transcripts.

In the Conclusion, I also outline the new law of self-defence, which passed in June 2012,[91] after I completed this book. The new provision replaces sections 34-37 of the *Criminal Code* and applies to all offences that a person might commit in self-defence, including non-violent offences.[92] This new defence addresses many of the uncertainties that I identify through my analysis. Still, my study remains relevant for lawyers, activists, and researchers because the new law uses the same principles as the old did[93] and because lawyers and judges will continue to draw from prior practice and precedent in its interpretation. I end by discussing the legal, economic, and social changes needed to secure for women in Canadian society their due: safety and freedom.

Elizabeth M Schneider names the work of the battered women's movement in the United States as "feminist lawmaking" that "seeks to transform social meaning."[94] She describes a dialectical process between the social movement and legal change whereby theory and practice talk back to each other: "[T]heory emerges from practice and practice then informs and reshapes theory."[95] In Canada, this dialectical process of revision has been stunted by the fact that neither the battered women's movement nor feminist litigators have been involved in crafting battered women's defence strategies. I hope that this book can contribute to dialogue and revision among feminist activists, legal researchers, and lawyers who defend battered women on trial.

### Dealing with a Dilemma

Criminal trials, especially murder trials, are matters of public record. All of the cases described in this book are documented in newspapers, legal reports, and transcripts. Press bans are ordered by judges to protect the identities of women and others who are sexually assaulted – unless they themselves are charged criminally. This means that, though battered women charged with killing their abusers have almost always been raped, and this information emerges from their trials, they are not granted the same anonymity granted to other women. Some legal reporter services mask the identities of women sentenced for spousal manslaughter by substituting initials for names in their reports, but the women's names are readily available in other reporters that do not employ the same practice and in newspaper accounts of the women's prosecutions.

I am acutely aware that the women whose trials I describe will experience suffering by having their cases once more discussed and debated. Each woman has already lost so many years to captivity and then to criminal justice adjudication. None should be asked to suffer further. I considered trying to mask their names somehow, but documenting my sources while concealing their names would have created intractable problems for presenting a credible record of these events. And anyone who wishes to discover their names can easily do so from any partially altered sources that I might have devised. I wish that I could do justice to these women's lives and struggles without subjecting them to renewed public scrutiny, but I could not find a way to do so that would have both protected them and furthered our knowledge of battered women on trial. I have endeavoured to treat each woman's story with integrity and respect.

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