Thrice Punished: Battered Women, Criminal Law and Disinheritance

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It is a paradox of our time that those with power are too comfortable to notice the pain of those who suffer, and those who suffer have no power.[1]

Introduction

The legal system deals harshly with an abused woman who kills her male partner. It metes out severe 'punishment' bearing scant relation to the 'crime' of choosing a violent man as a partner: this results in the woman being "thrice punished". Her first punishment is enduring hell in the relationship itself, without access to effective legal intervention or protection. Her second is in facing criminal charges at a time when she is likely to be suffering the effects of post-traumatic stress occasioned by violence in the relationship, in a context in which battered women face serious barriers to obtaining a fair trial on the merits. These barriers include limited access to feminist legal representation that is informed by knowledge about male violence against women and gender bias in the law, and the relative unawareness of the reality of domestic terrorism on the part of a judge and jury. Her third punishment occurs even if she manages to obtain a conviction for manslaughter rather than for murder: any inheritance through the deceased by will, intestacy, superannuation, pension right,

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1 Goleman D, *Vital Lies, Simple Truths: The Psychology of Self-Deception*, Bloomsbury, 1997, p 13.

joint tenancy, or family provision right can be forfeited according to the public policy rule that a killer cannot benefit from her/his own wrongs. An acquittal on a charge of murder or manslaughter does not forestall the operation of the public policy rule.[2]

Two pivotal cases in the past decade, one Australian, *Troja v Troja*[3] (*Troja*), and one Canadian, *Attorney General of Canada v St-Hilaire*[4] (*St-Hilaire*), tell this story compellingly. These cases are central in their jurisdictions. *Troja* is significant in Australia because a senior court adhered to a rigid formulation of the forfeiture rule despite more flexible previous interpretations of the rule, prompting the legislature to enact the *Forfeiture Act 1995* (NSW). *St-Hilaire* is important because it is a rare example of a reported decision disinheriting a woman convicted of homicide;[5] it seems to be the only such reported case involving a woman who was acknowledged to have been in a violent relationship.

The two cases have many similarities: both women were abused by their male partners although the abuse was different in character; both women were seemingly working class women; both were characterised by the evidence as aggressors themselves; both were found guilty of manslaughter after being charged with murder; and both were disqualified from inheritance by the public policy rule. In *St-Hilaire* the forfeiture of pension rights was occasioned by the *Civil Code of Québec* rather than by the common law rule, known in Australia and the United Kingdom as the "forfeiture rule," that was invoked in *Troja*.

Troja caused the New South Wales Parliament to pass legislation permitting the courts to modify the harshness of the public policy rule where killing has occurred in circumstances of low moral culpability. However, the argument here is that the court had the tools available to assist Jeanna Troja and legislative intervention should have been unnecessary. Constance St-Hilaire's case has received none of the same legal and media attention, such that legislative change in Canada is improbable. In both Australia and Canada the majority of women

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2 *Helton v Allen* (1940) 63 CLR 691.

3 *Troja v Troja* (1994) 33 NSWLR 269.

4 *St-Hilaire v Canada (Attorney General)* (CA) [2001] 4 FC 289.

5 For an earlier example see *Ontario Municipal Employee Retirement Board v Young* (1985) 49 OR (2d) 78 (HC) where a woman convicted of criminal negligence causing death was barred from her widow's pension.

plead guilty to manslaughter in these cases,[6] thus remaining outside the light of a public trial and adjudication. Women who are convicted of manslaughter in such circumstances will be denied their claims by insurance companies and through intestate and testamentary succession. The claims seem to be litigated rarely, as the women would have scant resources with which to contest decisions by companies and trustees to deny payment. Battered women who have killed violent men thus remain in the shadows of the law in more ways than one.

Hell in a relationship of hostage

There is a wealth of scholarship highlighting the dilemma of a woman in a seriously abusive relationship. The rates at which men violently assault their female partners and kill them pose a serious threat to women's mental health, liberty and physical security.[7] Widespread

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6 For Canadian sources see Sheehy E, "Battered Woman Syndrome: Developments in the Law After *R. v Lavallee*" in Stubbs J (ed), *Women, Male Violence and the Law*, Institute of Criminology, University of Sydney, 1994, p 174; Sheehy E, *What Would a Women's Law of Self-Defence Look Like?*, Status of Women Canada, 1995; Shaffer M, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R v Lavallee*" (1997) 47 *University of Toronto Law Journal* 1. The pattern is somewhat less marked in Australia: Stubbs J and Tolmie J, "Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on Battered Woman Syndrome" (1999) 23 *Melbourne University Law Review* 709, 743. Battered women's tendency to plead guilty to manslaughter rather than go on trial is also manifest in the US: Schneider E, *Battered Women and Feminist Lawmaking*, Yale University Press, 2000 p 146, n 116.

7 In Canada, the rate at which women are killed by male partners has increased recently by 33 per cent (52 women were killed by their partners in 2000 and 69 and were killed by their partners in 2001) even though there has been a decrease in wife killing since 1974. The incidence of spousal violence has also increased from 302 to 344 for every 100,000 women: Carey E, "Domestic abuse rates still rising" *Toronto Star*, 24 June 2003, p 3. In Australia, Jenny Morgan's review of the studies concludes that women are most likely to be killed by their male partners whereas men are most likely to be killed by strangers. In fact the context of sexual intimacy constitutes the largest category of homicides, and within this group 77% of homicides involved men killing women: Morgan J, *Who Kills Whom and Why: Looking Beyond Legal Categories*, Victorian Law Reform Commission, 2002, pp 10 and 23. See also Mouzos J and Rushforth C, "Family Homicide in Australia" paper presented to the *Steps forward for families: research, practice and policy Eighth Australian Institute of Family Studies Conference*, Melbourne, 2003,

<http://www.aic.gov.au/conferences/other/mouzos_jenny/2003-02-AIFS.html>, (accessed 23 January 2004). This paper was based on Australian Institute of Criminology, National Homicide Monitoring Program data 1989/90-2001/02.

denial and minimisation of wife battering, police inaction, and the legal system's response all support the batterer in his effort to convince his partner that his abuse is her fault, that she will not be believed, that nothing will be done to stop him, and that resistance is futile. Men's use of coercive control is designed to so demoralise and confuse their partners that some women cannot extricate themselves until death looks them in the face; at this point, the options for survival are few.

Women who stay in the relationship have little access to legal protection from violent male partners. Although many state and provincial laws have undergone legal change in response to feminist demands that the law protect women against wife battering, studies in Australia[8] and Canada[9] demonstrate that even "zero tolerance" laws and guidelines are not implemented by police, due to discriminatory beliefs that continue to shape police responses. In fact, police misuse these laws to counter-charge women who fight back even in petty and ineffectual ways.[10] Beyond the risks of police inaction and being

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The authors state that 75% of intimate partner homicides involved men killing their female intimate partners; only 20% of offenders of intimate homicides were female.

8 Douglas H and Godden L, *The decriminalisation of domestic violence*, Socio-Legal Research Centre, Griffith University, 2002, <http://www.gu.edu.au/centre/slrc/pdf/dvreport.pdf>, (accessed 10 February 2004); Douglas H and Godden L, "The decriminalisation of domestic violence: examining the interaction between the criminal law and domestic violence" (2003) 27 *Criminal Law Journal* 32; Holder R, "Domestic and family violence : criminal justice interventions" *Australian Domestic & Family Violence Clearinghouse Issues Paper*, No 3, 2001; Vrankovic A, "Police responses to domestic violence" (2002) 1 *Domestic Violence and Incest Resource Centre Newsletter* 6; "Trends in family incident reports 1996/97-1999/2000" Victoria Department of Justice, Criminal Justice Statistics and Research Unit, 2002.

9 See for example Rigakos G, "The Politics of Protection: Battered Women, Protection Orders, and Police Subculture" in Bonnycastle K and Rigakos G (eds), *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada*, Collective Press, 1998, p 82; Hannah-Moffat K, "To Charge or Not to Charge: Front Line Officers' Perceptions of Mandatory Charge Policies" in Valverde M and others (eds) *Wife Assault and the Canadian Criminal Justice System*, University of Toronto Press, 1995, p 35. For a more optimistic assessment of the impact of charging policies see Jaffe P and others, "Wife Assault as a Crime: The Perspectives of Victims and Police Officers on a Charging Policy in London, Ontario from 1980 to 1990" (1991) 12 *Canadian Woman Studies* 113.

10 In Canada, many activists have commented on the trend to counter-charge women who call police for assistance: see, for example, Robillard N, *Take Back the Night* speech at the Vancouver Rape Relief and Women's Shelter, 16 September 2000 <http://www.rapereliefshelter.bc.ca/events/nicoler.html>, (accessed 27 January

charged themselves, women who consider calling police must concern themselves with what might happen to their mates at the hands of the police and the legal system, retaliation by the batterer, and being shunned by their families and communities.[11]

Some writers have likened the state in which the abused woman lives to that of a hostage in captivity,[12] and one has even suggested that in

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2004). One such example is provided by the case of *R v O'Leary* (unreported, Ontario Provincial Court (Criminal Div), 14 February 1989), where the woman was forced to sign a mutual peace bond for having seized her husband's keys and wallet and stepping on his hands when he tried to retrieve them. He, on the other hand, had pleaded guilty to many assaults against his wife.
Activists report that women are more likely to be charged than their male counterparts, even if it is the first time the woman has ever assaulted a man, because abusive husbands are quick to call police; women admit to the truth to police; women do not threaten or intimidate their partners to drop or deny the allegation; and police dislike "zero tolerance" directives and will therefore enforce them rigidly against women: Cross P, "Him or Her Domestic Assault: Are Prosecutions Fair?", Partner Abuse: Justice Issues, Ontario Women's Justice Network, Spring 2000, <www.owjn.org/issues/w-abuse/fair.htm>, (accessed 27 January 2004). Although some recent statistical work suggests that women and men are equally likely to be assaulted by their mates, (Fitzgerald R, *Family Violence in Canada: A Statistical Profile, 2000*, Statistics Canada, 2000) Yasmin Jiwani demonstrates that this data is misleading because it fails to examine the context of the assaults (retaliation or self-defence), their motivation (control or resistance), different forms of abuse, the severity of the abuse, and its consequences: Jiwani Y, "The 1999 General Social Survey on Spousal Violence: An Analysis", The FREDA Centre for Research on Violence against Women and Children, <http://www.harbour.sfu.ca/freda/reports/gss01.htm> (accessed 28 January 2004). Relying on the same Statistics Canada study she demonstrates that, although overall 7 per cent of men and 8 per cent of women reported violence by their partners, women were twice as likely to have been beaten, 5 times as likely to have been choked, twice as likely to have had a knife or gun used against them, and 6 times as likely to have been sexually assaulted. The meaning of such assaults is also different for women: while 1 of 10 men report being afraid for their lives, 4 of 10 women report this level of fear; 14 per cent of women are afraid for their children, as compared to 2 per cent of men; and 23 per cent of women experience lowered self-esteem, compared to 6 per cent of men. See also Morgan J, *Who Kills Whom and Why*, Victorian Law Reform Commission, 2002, n 108, for Australian references giving divergent interpretations of research on male and female violence.

11 Martin D and Mosher J, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8 *Canadian Journal of Women and the Law* 3; Koshan J, "Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women" in Boyd S (ed), *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, University of Toronto Press, 1997, p 87.

12 See Sheehy, "Battered Woman Syndrome: Developments in the Law After *R. v Lavallee*", note 6, p 187, referring to the work of Dr Judith Herman on trauma through captivity, *Trauma and Recovery*, Basic Books, 1992.

some abusive relationships a "reverse habeas corpus"[13] applies in favour of the husband. Here the great constitutional writ used to free those in wrongful incarceration takes on a different complexion: instead of operating to free an abused woman from imprisonment in an abusive marriage, law's failure to respond forces her return to an abusive husband or partner. It needs no court for enforcement, fear is enough: fear for her own, her children's or her family's lives; fear of injury; fear of loss of custody; and fear for her ability to survive with meagre resources in every sense.

The anxiety generated by lack of finances and loss of custody was made vivid in a story about the impact of separation on former Australian swimming star Tracey Wickham: "I am very, very bitter about that. I would have loved to fight him in court [over custody], but I had no money. In the end, I agreed to take a reduced financial settlement in exchange for more time with the children."[14] Her desperation at the loss of custody is evident: "I didn't think I could live without my children. So, yes, I thought about suicide."

At the same time, women who contemplate separation face serious obstacles. It is almost impossible to leave the "place of torment" permanently, and legally just about impossible to eject the tormenter, because of a multitude of factors. These include the erosion of self-confidence that a man's coercive control over a woman produces; women's limited financial resources to survive, particularly when they have dependent children; and the very real danger that the man will escalate his violence against her, the children, or other loved ones.[15]

Those who do step out into the 'abyss' frequently find that increased physical danger and the need to rely on a legal system that is capricious in its protection threaten their lives "beyond as within".[16] The law expects the woman to leave to earn its full support, despite the fact that she will face greater danger upon separation and need to replace one form of dependency with dependency on legal rights:

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13 Scutt J, *The Incredible Woman: Power and Sexual Politics*, Artemis, 1997, vol 2, p 134.

14 *Courier Mail*, 27 September 1997, Weekend Section, p 1.

15 A particularly good account of these factors is found in Bacon W and Lansdowne R, "Women who kill husbands: the battered wife on trial" in O'Donnell C and Craney J (eds), *Family Violence in Australia*, Longman Cheshire, 1982.

16 The inadequacy of the law is vividly recounted in Stratman P, "Domestic Violence: The Legal Responses" in O'Donnell & Craney, note 15.

> She is offered, instead of subordination to patriarchal authority in a violent relationship, the promise of legal liberalism: a self, protected by legal rights, able to make autonomous decisions, as long as she is willing to sever the relationship with the man, or at the least, risk making him very angry by filing charges against him or testifying against him. Not only is this a difficult decision but it is also a dangerous one. Men are most likely to be violent to women after they have left them.[17]

Chilling cases that are testament to the fear and the very real danger with which many separated abused women must live appear in the media. One Australian man took his three children for a holiday while on an access visit. At the end of the period he pulled up outside the home where his wife, the children and her parents resided, killed the children in the car and then proceeded to kill his wife, her parents and himself.[18] Another de facto spouse in Australia had taken out a domestic violence restraining order in the morning, saying at the time, "When he finds out about this, I'm dead." He killed her that very afternoon.[19]

2. Hell in the criminal justice system

The available statistics in both Australia[20] and Canada[21] suggest that women in relationships have a far greater chance of being killed by their male partners than killing them; that 51 per cent of femicides are preceded by escalating control and violence by the male partner; and 68 per cent of women who killed male partners had likewise

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17 Merry SE, "Wife Battering and the Ambiguities of Rights" referred to in Schneider, note 6, p 51 n 55.

18 *Courier Mail*, 26 January 1996, p 1.

19 *Courier Mail*, 7 August 1997, p 6.

20 Mouzos & Rushforth, note 7. See also Mouzos J, *Femicide: the Killing of Women in Australia 1989-1998*, Australian Institute of Criminology, 1999, <http://www.aic.gov.au/publications/rpp/18/index.html>, (accessed 23 January 2004); Easteal P, *Killing the beloved: Homicide between adult sexual intimates*, Australian Institute of Criminology, 1993, <http://www.aic.gov.au/publications/lcj/beloved/index.html>, (accessed 23 January 2004).

21 Locke D, "Family Homicide" in *Family Violence in Canada: A Statistical Profile, 2000*, Statistics Canada, 2000 p 39: 3.4 wives are killed for every husband killed.

previously experienced violence at the hands of their mates.[22] Furthermore, most wife battering remains hidden from public view, and even from the view of family members, doctors, and friends. On average, women are assaulted 35 times before their first police contact.[23] This context should caution against second-guessing a woman's assessment of the danger she faces or the options she can rely on to save her life. While this does not mean every time a woman kills her partner we should presume her life was threatened, or she should be acquitted on the basis of self-defence, it does counsel an approach to legal representation and adjudication that is attentive to the deadly reality of male violence against wives broadly, that inquires into the private reality of the particular marriage, and that generates a public policy response aimed at preventing femicide and providing women with escape routes that will not cost them their lives.

When it is understood that the correct analogy for the battered woman who strikes out and kills her partner is not the jealous and possessive, scorned woman,[24] or the mentally incompetent wife, but a hostage striking out to free herself from her captor,[25] it should be possible to characterise her actions as amounting to self-defence, based on a rational fear, to preserve her own life. However, unless lawyers have been well trained in the dynamics of domestic violence, they are unlikely to see a battered woman's actions as self-defence.[26]

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22 Wilson M and Daly M, "Spousal Homicide" (1994) 14(8) *Juristat* 7.

23 This figure has been cited in UK reports: Ward D, "When all you can do is run for your life", The Guardian, 13 December 2003, <http://www.guardian.co.uk/uk_news/story/0,3604,1106182,00.html>, (accessed 28 January 2004); and Canadian reports: Jaffe P and others, *Children of Battered Women*, Sage, 1990. In Australia, the ABS reported in its 1996 survey that 18.6% of women who had experienced physical assault by a man and 14.9% of women who had experienced sexual assault by a man, in the previous 12 months period, reported the last incident to the police. Women who experienced violence by a current partner were least likely to have reported the incident to the police: Australian Bureau of Statistics, *Women's Safety Australia*, Catalogue No 4128.0 (1996) pp 28-29, Tables 4.5–4.10.

24 See Easteal P, "Til death do us part" in Greenwood K (ed), *The Thing She Loves: Why Women Kill*, Allen and Unwin, 1996 p 2.

25 Easteal, note 24, pp 14-15.

26 A well-known Australian instance is *R v Kina* (unreported, CA (Qld), 29 November, 1993). A final appeal resulting from media exposure quashed her conviction for murder on the grounds of inadequate legal representation and miscarriage of justice due to evidence of self-defence and provocation not being presented at the original trial.

Many academic writers have presented analyses of cases where, inexplicably, lawyers failed to raise self-defence for women clients charged with murder although the facts obviously demanded they do so.[27] In Australia, lawyers are more likely to raise diminished responsibility[28] or provocation,[29] both of which result in a manslaughter verdict rather than a complete acquittal. In Canada, although some lawyers have successfully argued self-defence, most women's cases are plea-bargained as manslaughter, even when the agreed facts clearly suggest self-defence.[30] Typically, regardless of the context in which they kill, women are not exonerated. Instead, as illustrated by the work of Rebecca Bradfield, they are excused, on an individual basis, for their psychological frailties.[31]

There are many explanations for lawyers' failure to advance self-defence for abused women, the most common one being that self-defence has been traditionally constructed within a male paradigm as a response to an immediate physical threat: the "bar-room brawl" scenario. However, battered women do kill in physical confrontations with their mates. Indeed, most acquittals on the grounds of self-defence have occurred where the woman killed seconds after being assaulted, and counsel has decided to argue self-defence.[32] However, for women to strike in response to an immediate physical threat would be tantamount to committing suicide, and yet this is what the law of self-defence has required until quite recently.

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27 Sheehy, "Battered Woman Syndrome: Developments in the Law After *R. v Lavallee*", note 6 and Shaffer, note 6; see also Judge Ratushny L, *The Self Defence Review: Final Report*, Ottawa, Minister of Justice, 1997.

28 See Currie S, "Justice for women who kill in self-defence?" (1995) 14 *Social Alternatives* 31, p 32 drawing on Kennedy H, *Eve Was Framed: Women and British Justice*, Chatto & Windus, 1992.

29 See Tolmie J, "Provocation or Self-Defence for Battered Women Who Kill?" in Yeo S (ed), *Partial Excuses to Murder*, Federation Press, 1991.

30 Sheehy, note 6; Shaffer, note 6; Ratushny, note 27.

31 See for example Bradfield R, "Women who kill: Lack of intent and diminished responsibility as the other 'Defences' to Spousal Homicide" (2001) 13 *Current Issues in Criminal Justice* 143, pp 148-9; "Is Near Enough Good Enough? Why isn't Self-Defence appropriate for the Battered Woman?" (1998) 5 *Psychiatry, Psychology and Law* 71, p 80.

32 Easteal P, *Less than Equal: Women and the Australian Legal System*, Butterworths, 2001, p 46.

Landmark cases such as *R v Lavallee*[33] in Canada now permit women to use expert evidence regarding the effects of male battering to inform self-defence such that, at least according to formal legal interpretation, women can invoke pre-emptive violence. For example, years of living with a violent person condition the woman to an acute perception of danger and the need for self-protective responses such that she may perceive danger where others might not. Further, her only opportunity to defend herself violently may come when her partner is sleeping or "passed out" or when she has access to a weapon like a knife or gun. *Lavallee* changed Canadian law by ruling that such a woman need not wait until an assault upon her is in progress to defend herself.

Recent Australian cases have also overcome the immediacy requirement. Notably, a majority of the Northern Territory Court of Appeal in *R v Secretary*[34] held that the accused should have been permitted to advance a plea of self-defence despite a lack of immediacy, in circumstances where the accused shot her abuser de facto spouse while he was sleeping. Helen Secretary was then acquitted after a retrial. Martin CJ in dissent asserted the traditional view, referring to the need to establish "a contemporaneous connection between the assault and the act of self defence" and stating "the remedy, if there is to be one, lies with the amendment of the Code which is a matter for the Parliament."[35]

The dissent in *Secretary* underscores the 'lottery' nature of a fair outcome. For example, US author Holly Maguigan's extensive study of the case law found that the problem for battered women on trial is not the law itself, since many significant precedents have opened self-defence for women. Rather, the problem is that the law is interpreted and applied in a discriminatory manner by judges in their evidentiary rulings, their commentaries on the evidence, and their instructions to the jury.[36]

A further appalling reality inevitably confronts those willing to fight their criminal charges: women's lack of finances is a formidable barrier to adequate representation. Tracey Wickham's story, which

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33 *R v Lavallee* [1990] 1 SCR 852.

34 *R v Secretary* (1996) 107 NTR 1.

35 *R v Secretary*, note 34, at 2.

36 Maguigan H, "Battered Women and Self-Defense: Myths and Misconception in Current Reform Proposals" (1991) 140 *University of Pennsylvania Law Review* 379.

describes a woman wanting to fight for custody of her children, but who is financially unable, must be mirrored many times in the annals of those driven to kill their partners. Given that she would have had more 'resources' than many, one wonders what the real statistics are on women's access to justice. Elizabeth Schneider describes an empirical study conducted in New Haven, Connecticut, which underscored the dichotomy between "rights in theory" and "rights in practice".[37] The study made it clear that many battered women cannot afford a lawyer when seeking the protection of criminal and civil laws against their mates. While it is true that impecunious women charged with murder will have access to legal representation, the state resources available may be extremely limited.

Even if generously financed, it is clear that adequate representation remains an enormous hurdle. Many battered women with access to a lawyer are represented by lawyers who are unwilling or unable to mount a vigorous defence based on battered women's experience of male violence.[38]

A related difficulty is that the overwhelming majority of cases involving battered women remain unreported in both Australia[39] in Canada.[40] The lack of access to these decisions is a factor preventing women's stories from becoming 'visible' through academic work. It also means that lawyers representing battered women, and judges presiding over such cases, do not have ready access to legal materials concerning the successful use of self-defence by battered women who kill.[41]

One wonders how Robyn Kina from Queensland found the strength, as she did, to continue challenging the system. Despite a guilty verdict at trial and dismissal of her subsequent appeal, she participated in a television program that drew attention to the injustice she had suffered. This resulted in the Attorney General referring the matter to the Court of Appeal, which quashed the conviction due to inadequate legal

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37 Schneider E, *Battered Women and Feminist Lawmaking*, Yale University Press, 2000 at p 95.

38 Schneider, note 37.

39 Easteal, note 32, p 43. Easteal notes that this failure has also been discussed in Tolmie J, "Case and Comment" (1996) 20 *Criminal Law Journal* 223.

40 Sheehy E, "Battered Women and Minimum Mandatory Sentences" (2001) 39 *Osgoode Hall Law Journal* 529, p 535.

41 Sheehy, note 40. See also Easteal, note 32.

representation and counsel's failure to advance provocation and/or self-defence at the original trial.[42] Zoe Rathus points out that much of the information Kina provided to her lawyers about the violence with which she lived was never presented in court, and no efforts were made to draw her out about the circumstances leading to the final attack.[43]

Many feminists have also identified the extreme danger of raising "battered woman syndrome" because it 'psychologises' the accused as a mentally diminished victim, who (wrongly) 'perceived' her only choice was to kill her attacker.[44] This defence strategy may preclude her act of killing from being seen as a rational choice for self-preservation. As Nanette Rogers says: "Why say 'battered women *believe* there is nowhere they can go', when in fact there *is* nowhere they can go? Who wouldn't be 'depressed, frightened and anxious' in this woman's position?"[45]

Reliance on this evidence also may prevent any woman who presents other than as a cowed victim from having the reality of her story understood by the triers of fact.[46] Helena Kennedy QC says of the British legal system: "Women who conform to the conventional image of the cowed victim fare better than those who come to trial angry that they are being blamed for what ultimately took place."[47] Where evidence of battered women's syndrome may be most helpful is in introducing evidence of the battered woman's captivity to

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42 R v Kina, note 26.

43 Rathus Z, *Rougher Than Usual Handling: Women and the Criminal Justice System*, 2nd ed, Women's Legal Service, Queensland, 1994, p 120.

44 For example, Rogers N, "To save her life: Gender, justice and battered women who kill" in Greenwood, note 24, pp 78-81; also Bradfield, note 31. Interestingly, the ABS survey of women's safety found: "When violence over the whole relationship is considered, women were much more likely to have experienced violence from a partner they no longer live with than from a current partner. 42% of women (1.1 million) who had been in a previous relationship reported an incident of violence by a previous partner compared to 8.0% of women who reported violence from a current partner during the relationship. … for 74,700 women, violence occurred only after the relationship had ended.": Australian Bureau of Statistics, *Women's Safety Australia*, Catalogue No 4128.0 (1996) 8, pp 51-52.

45 Rogers, note 44, p 80.

46 Stubbs J and Tolmie J, "Battered woman syndrome: a challenge to gender bias in the law?" in Stubbs J (ed) *Women, Male Violence and the Law*, Institute of Criminology, University of Sydney, 1994, p 211.

47 Kennedy, note 28, p 215.

challenge the perception that there were other alternatives available, including leaving.

The ultimate reality of the system is that most battered women charged with murder do not have their day in court at all. In most cases they plead guilty to manslaughter,[48] rather than suffer the further trauma of fighting in a system where the odds seem stacked against them. Helena Kennedy QC points this out:

> What happens most in domestic homicide cases is that the woman has available to her a number of different defences, but if one of the avenues affords a manslaughter plea which is acceptable to the Crown, whatever the basis, she is likely to enter that plea rather than fight for a total acquittal and risk conviction.[49]

She further elaborates on the trauma for women in taking on the system:

> Who can blame them, when it avoids the horrors of a full trial, with all the attendant scrutiny of your life and possibly a less favourable outcome? For similar reasons, women are less inclined to choose trial by jury, in cases where there is a choice, because the delay and terror of a trial is even more intimidating and disruptive of their lives than it is for men. They often do not have the same will to take on the system.[50]

Patricia Easteal[51] provides a direct example of this by relating the story of 'Judy'. The extreme violence she had suffered was excluded from the sentence hearing as irrelevant. Judy said poignantly:

> When I came to trial I chose to plead guilty. I was only twenty years old, pregnant, and I had been beaten down. I felt I could not cope with the trauma of a trial. ... I had to stand there while [the judge] denigrated me for twenty minutes. Amongst other

48 Rogers, note 44, p 77.

49 Kennedy, note 28, p 209.

50 Kennedy, note 28, p 207.

51 Easteal, note 32, pp 36-37.

> things he said, 'Women leave their husbands, they don't kill them.'[52]

Finally, it must be said that even those women who do go to trial and who succeed with self-defence pay a very high price for justice. The mandatory life sentence for murder in place in jurisdictions such as Canada creates pressure to distort defences.[53] Should they proceed to trial, women's entire lives will be under scrutiny; their most humiliating and terrifying experiences must be aired in a court room; they must re-live and recount events that they have never told others; they will face hostile prosecutors whose questions will put them back into self-blame and self-loathing; and their children and loved ones may be forced to testify for them, or even worse, against them.[54]

3. And then disinherited - by operation of law

A third chapter in this sorry saga is the application of the public policy rule to these women, in furtherance of the aim, laudable at face value, "[that] a killer should not profit from his/her own wrongs." The traditional rule dates to 1892. In *Cleaver v Mutual Reserve Fund Life Association*,[55] a woman who poisoned her husband was convicted of wilful murder and sentenced to death. Her sentence was commuted to life imprisonment, but she assigned her rights under her husband's life insurance policy to another, who attempted to collect. The Court of Queen's Bench held that the law did not allow the enforcement of "rights directly resulting to the person enforcing them from the crime of that person."[56] The result is that a 'killer' loses rights of inheritance by virtue of a will, joint tenancy, intestacy, and even a family provision right.

The public policy rule developed in the United Kingdom, and was applied as a strict rule of law according to the following test articulated in *Gray v Barr*:[57]

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52 Easteal P, "Domestic Violence: A Life Sentence" (1995) 14 *Social Alternatives* 10.

53 Sheehy, note 40, p 551.

54 Sheehy, note 40, p 549.

55 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1QB 147.

56 *Cleaver v Mutual Reserve Fund Life Association*, note 55, at 156-157 per Fry LJ.

57 *Gray v Barr* [1970] 2 QB 626 at 640 per Geoffrey Lane J.

> [T]he logical test ... is whether the person seeking [the benefit] was guilty of deliberate, intentional and unlawful violence ... and death resulted therefrom, then, ... the Court should not allow [the person to take the benefit].

Cleaver was followed soon after in Canada in another case involving a man who killed his wife and was convicted of manslaughter.[58] A person found guilty of manslaughter or who pleads guilty to manslaughter, regardless of the circumstances or sentence (and even if only probation is imposed), may thus fall foul of this rule. There is even authority to the effect that it applies to a person who kills negligently.[59]

An acquittal does not necessarily take an accused outside the ambit of the rule. In 1940, the High Court of Australia held in *Helton v Allen*[60] that the rule was operative where, before a civil court, the killing was proved on the balance of probabilities. Helton had been charged with murder and acquitted.

It can be seen that if the test in *Gray v Barr* is applied strictly, any battered woman convicted of murder will be within its scope, as will those whose manslaughter verdict is based on provocation. Even battered women whose manslaughter verdict depends on a lack of intention to kill may be disinherited, as their actions can be cast as deliberate and intentional, not as justifiable acts of self-preservation. This test is most likely to benefit those who plead insanity or are unable to form the *mens rea* to kill, but it has not been applied to those who successfully plead diminished responsibility, such as Jeanna Troja (discussed below).

Judicial reluctance to remodel these outdated principles, and judicial insistence that reform is the legislature's role, was displayed in the 1981 decision in *R v National Insurance Commissioner*.[61] In that case, the court applied the rule in *Cleaver* to a woman convicted of manslaughter for stabbing her husband during what was described as a "domestic quarrel", barring her from receiving her widow's

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58 *Lundy v Lundy* (1895) 24 SCR 650.

59 *Ontario Municipal Employee Retirement Board v Young* (1985) 49 OR (2d) 78 (HC).

60 *Helton v Allen,* note 2.

61 *R v National Insurance Commissioner* [1981] 1 All ER 769 (QB).

pension. The decision was criticised in the academic literature[62] and was followed by legislative reform in 1982, when the *Forfeiture Act 1982* (UK) expressly conferred judicial discretion in the application of the forfeiture rule. That legislation was followed by identical legislation enacted in the Australian Capital Territory in 1991, and by a broadly similar statute passed by the New South Wales legislature in 1995.

In other jurisdictions, however, judges have either completely ignored the legislative change in the United Kingdom, citing only the pre-reform case law, or they have used legislative intervention in the United Kingdom to distinguish their jurisdictions. For example, in *Bain v Morabito*,[63] (decided before the *Forfeiture Act 1995* (NSW)) there was strong evidence that the female killer had been subjected to brutal domestic violence.[64] Nonetheless, Powell J felt constrained by the traditional forfeiture principle, stating that there would have been no need for the *Forfeiture Act 1982* (UK) if courts had the necessary common law power. He went on to suggest that the legislature might see fit to confer the necessary power on his court.

A rare example of judicial flexibility was provided by the 1985 case of *Public Trustee v Evans*[65], where the Public Trustee argued that the court should act on the High Court decision in *Helton v Allen.* Evans had been acquitted at her criminal trial after the trial judge discharged the jury from giving a verdict because of the evidence of horrific domestic violence inflicted on the accused. The discharge operated as an acquittal under the *Crimes Act 1900* (NSW), yet the forfeiture rule was advanced by the Public Trustee in an application before the court. Fortunately, on this occasion, Young J applied the rule to the benefit of Evans, taking into account the mitigating circumstances of domestic violence. The judge viewed the rule as a judge-made rule that he could limit as appropriate to the particular age.

The two more recent cases of *St-Hilaire* and *Troja* are particularly disturbing, given that they were decided several years after *Public*

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62 Robilard St J, "Public Policy and the Widow" (1981) 44 *Modern Law Review* 718.

63 *Bain v Morabito* (unreported, SC (NSW), Powell J, 14 August 1992). See also *Kemperle v Public Trustee* (unreported, SC (NSW), Powell J, 20 November 1985).

64 Rogers, note 44, pp 83-84.

65 *Public Trustee v Evans* (1988) 2 NSWLR 188; see also *Public Trustee v Fraser* (1987) 9 NSWLR 443 and *Re Keitley* [1992] VR 583 discussed below.

Trustee v Evans, and after feminists successfully challenged the male paradigm in self-defence.

Troja

Jeanna Troja experienced extensive psychological abuse at the hands of her husband.[66] She was clearly subjected to "an on-going barrage of degrading comments and baffling mind-games."[67] She killed to free herself from this mental abuse. The following account is drawn from the original criminal sentencing judgment and appeal, and from the facts recited in her civil litigation. He left her for another woman and "was accustomed to making unfavourable comparisons of the femininity, attractiveness and joie de vivre of the two women." In the course of an argument not long before the killing, she said he invited her to "blow her brains out." Around this time her friend feared that she was becoming suicidal. On the day of the killing, she said the deceased made it clear he wanted a divorce and to have control of the house and business, in which she also had been involved, and that he had engaged solicitors to effect these plans. He called her his "baby bull", said that she was "hopeless", and again invited her to take her own life. The last thing she recalled him saying was: "Stiff shit Jeanna baby, you lose."

Immediately after the shooting she confessed what she had done to her friend and called the police. Dr Strum, a psychiatrist who examined her, unequivocally expressed the opinion that she was suffering from a severe reactive depression at the time of the shooting. The symptoms included: "sleeping disturbance, muddled thinking, agitation, aggressiveness, irritability, inappropriate outbursts, temper tantrums and suicidal thoughts." In addition, Dr Strum considered that her cold and composed demeanour after the shooting was consistent with the typical emotional shutdown suffered by those who have experienced severe anxiety and a sudden discharge of energy.

Troja was charged with murder and convicted at trial of manslaughter. It was accepted in the sentencing hearing that the verdict was reliant

66 For a description of the abuse to which she was subjected, see Easteal, note 24, p 2.

67 These terms were used by Jacqueline Keller to describe psychological abuse; see: "A rebuttal to Lee Bowker's Article on the Battered Woman's Syndrome Index" (1997) 2 *Domestic Violence Report* 84.

upon the partial defence of diminished responsibility. She received a minimum prison sentence of eight years.[68] An application for leave to appeal the sentence was dismissed.[69] The matter then came before the court in civil proceedings, Waddell CJ holding that she was disbarred from any inheritance from the deceased's estate as a result of the forfeiture rule.[70] He saw the only remedy for problems raised by the forfeiture rule as lying with the legislature.

The decision of Waddell CJ was affirmed on appeal,[71] with a notable dissent from Kirby P, who held that the forfeiture rule should be applied flexibly to take account of the demands of conscience. In Kirby P's view, this meant that Jeanna Troja would not be entitled to the entire estate, but rather that the matter should be returned to the court for examination of Troja's contribution to the estate, and the issue of unjust enrichment of the deceased's mother (the beneficiary if Troja was disentitled).

One of the majority, Mahoney JA, suggested she could pursue her rights in a family provision application (whereby a will or intestacy can be contested on grounds of need and lack of proper provision), or by virtue of a constructive trust by reason of her contribution to the accumulation of common property. Jeanna Troja then took further civil proceedings for family provision along the lines suggested by Mahoney JA, but Master McLaughlin held it would be inconsistent with the policy of the forfeiture rule to allow her to avail herself of the *Family Provision Act 1982* (NSW).[72] One wonders why her lawyer did not raise the constructive trust argument at the same time. All in all she went to court on five separate occasions over a five-year period and on every occasion was unsuccessful!

A lack of sensitivity to Jeanna Troja as a victim of domestic violence, and to the underlying dynamics of domestic violence, was markedly displayed by Meagher JA and Mahoney JA, the majority in the Court of Appeal, who strictly applied the forfeiture rule to disinherit Jeanna Troja. The following comments leave no doubt as to the outcome:

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68 Patricia Easteal's study of 22 husband killings in NSW and Victoria found her sentence to be one of the harshest dealt out to a woman who killed her husband. See Easteal, note 32, p 50.

69 *R v Troja* (unreported, CCA (NSW), Kirby P, Grove and Newman JJ, 16 July 1991).

70 *Troja v Troja* (unreported, SC (NSW), Waddell CJ, 15 February 1993).

71 *Troja v Troja* (1994), note 3.

72 *Troja v Troja* (1994) 35 NSWLR 182.

"there is something *a trifle comic* in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles" (emphasis added);[73] "an unhappy marriage and an ongoing depression, while they may explain, do not excuse the planned and deliberate killing of a human being";[74] and "the court must act according to the law and ... it must not depart from the law because of emotion, for the wife who feels wronged or for the husband she killed."[75]

It is illustrative to note the difference in the way Kirby P quoted Troja's vital evidence, compared to Meagher JA. Whereas Meagher JA quoted: "[I] pointed the rifle at him and fired. I recocked, I reloaded and shot the bastard again to make sure he fuckin' stayed dead",[76] Kirby P continued the quote to include the telling next words: "[A]ll I could think of was if I got 20 years in gaol, I couldn't be no more lonely than what I'd been. I was free, just no more abuse and I didn't cry."[77] Given the way Meagher JA quoted the evidence, it is not surprising that he found it *comic* to be asked to assess the moral culpability of the killing. It is equally unsurprising that Kirby P managed to find a way to remodel the rule as a proper instrument of public policy.

It should be noted first that although Jeanna Troja did not argue self-defence, there was evidence that supported this interpretation of the events even though it would require the law to recognise that emotional and psychological abuse poses such a threat to a woman's survival that she is entitled to defend her self with force. When asked whether she intended to kill the deceased, she replied: "Yes, I just wanted the abuse to stop."[78] Although this statement was used to justify Troja's exclusion from inheritance as an intentional killer, it is in fact deeply ambiguous. Her statement takes responsibility for her act while at the same time identifying self-preservation as her impetus.

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73 *Troja v Troja*, note 3, at 299.

74 *Troja v Troja*, note 3, at 298.

75 *Troja v Troja*, note 3, at 289. For an earlier UK decision in which a woman found guilty of manslaughter on the basis of diminished responsibility was barred from inheritance see *In Re Giles* [1972] Ch 544.

76 *Troja v Troja*, note 3, at 299.

77 *Troja v Troja*, note 3, at 272.

78 *Troja v Troja*, note 3, at 292.

Intimidation, degradation, coercive control, mind games and other such forms of psychological destruction used by abusive men are as harmful, and sometimes more harmful to women than physical assault.[79] The erosion of self-confidence, one's sense of reality, and the boundaries of acceptable and deserved abuse put the self in grave danger, as evidenced by Troja's suicidal thoughts as well as the deceased's taunts that she should end her life. Her symptoms at the time of the homicide as noted by Dr Strum suggest a woman suffering from post-traumatic stress syndrome, as described in Judith Herman's ground-breaking work.[80]

Further, the fact that Troja was convicted of manslaughter and not intentional murder should matter in terms of a strict application of the forfeiture rule. While Easteal states that of all the cases she has studied Jeanna Troja is the only woman who even remotely conformed to the jealous and possessive image of husband killers portrayed by the media,[81] it is clear that Troja was in fact emotionally and mentally abused by her husband.

The majority justified their decision by calling on the notion that judges must be neutral and detached in administering the law. However, the ability to empathise with the parties to a case is just as much a part of maintaining confidence in the system as detachment and neutrality. As the Honourable Richard McGarvie has said, quoting Professor Kathleen Mahoney:

> One of the requirements of judicial decision-making is an ability to empathise with parties before the Court. Detachment must be the posture from which judges render their final decisions, but it should only be assumed after the judge has exercised his/her ability to empathise with the parties to a law-suit.[82]

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79 Stark E, "A Failure to Protect: Unravelling 'The Battered Mother's Dilemma'" (2000) *Western State University Law Review* 29, p 50.

80 Herman J, *Trauma and Recovery*, Basic Books, 1992 pp 35-36.

81 Easteal, note 24, p 2.

82 McGarvie RE, "Equality, Justice and Confidence" (1996) 5 *Journal of Judicial Administration* 141, p 144.

St-Hilaire

Constance St-Hilaire killed her husband Gérard Morin on 3 February 1995. She pleaded guilty to manslaughter and, after a lengthy sentencing hearing over four days, she was sentenced to two years less a day in prison and three years probation.[83] Thereafter, the Treasury Board of Canada denied her the benefits to which she would have otherwise been entitled from her husband's superannuation fund, citing the public policy rule that a killer may not benefit from her/his crime. She applied to the Superior Court of Québec for a declaration of entitlement to these benefits, and Blais J held that a manslaughter conviction did not bar her entitlement as an unworthy heir, although he refused to order the Treasury Board to pay interest.[84]

The Attorney General of Canada and the Treasury Board appealed the decision. In March 2001, six years after the killing, the Federal Court of Appeal overturned Blais J's decision, denying St-Hilaire access to the benefits of the superannuation fund. The only concession to her "circumstances", and this was not a consequence of explicitly recognising that she was subjected to domestic violence, was that no order for costs was made against her.

Justice Trotier of the Superior Court of Québec summarised the evidence at the sentencing hearing for St-Hilaire's manslaughter conviction. The marriage was one of approximately 14 years duration. The judgment records escalating violence and at least 25 police interventions in the years leading up to the killing. However, Trotier J stated that the aggression was "reciprocal" and noted one occasion when St-Hilaire had hit Morin in the wrist with a knife. No further detail was provided as to the physical and health consequences of the 25 interventions, nor of their legal consequences. One suspects that hospital and legal records would show that St-Hilaire was by far the more endangered by this "reciprocal" violence, as occurs in the overwhelming majority of cases studied.

An English language translation of much of Trotier J's decision is reproduced in the judgment of the Court of Appeal of Décary J. It illustrates the persistence of many of the myths in judicial and societal

83 *R. v St-Hilaire* [1996] AQ No 597 (CSup).

84 *St-Hilaire v Canada (Attorney General)* (TD) [1999] 4 FC 23.

understandings of domestic violence that have been exposed by the rich literature surrounding battered women.

First, it is clear that self-defence would have been a live issue had the case gone to trial. The judge accepted that a physical and verbal confrontation took place, in front of a witness, and that the deceased had pushed the accused against a wall in the kitchen just before she reached into a drawer for the knife with which she fatally stabbed him. The argument had been fuelled in part by drugs and alcohol consumed by both, but also by the deceased's jealous demands for information about the accused's affairs. Moments before the physical confrontation, the deceased had threatened to have the accused followed by Hell's Angels members in order to identify her dealer, which was in fact a very serious threat particularly in light of the biker wars in Québec at that time.

However, the sentencing judge focused on the accused's statement to the police; "I was the one who stuck it to him, the bastard!" and the fact that a year earlier she had said to the same police officer; "Some day I am going to stick it to him, the bastard!" Justice Trotier concluded:

> The context of constant and excessive family violence in which your husband and you lived pointed to this outcome unless you were to separate. You were both used to it, even in front of other people, and again, I do not think the theory of self-repression and self-denial is at the basis of this fatal event. This was not an ultimate desperate act of a woman who sincerely believed that her life was endangered. ... the offence committed was prompted by anger, not fear, and this precludes any claim that it was an accident.[85]

Justice Trotier clearly recognised that the marriage was destined to end in the death of one of the marital partners. Statistically, it was far more likely to have been St-Hilaire than her mate Morin who would die. Yet Trotier J underplayed that very real danger by suggesting she was "used to it", and that her actions were motivated by anger alone, as if fear and anger can be cleanly separated in the midst of a physical confrontation.

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85 As translated and reproduced in *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [25] per Décary J.

The testimony of the eyewitness in fact supported the gist of her story, but it too was used to minimise the danger posed by Morin's threats and behaviour. Instead of acknowledging that as a result of enduring repeated beatings, the battered woman has a heightened perception of when her life is truly in danger and that this perception may elude others, even a witness to violence within the marriage, Trotier J preferred the witness's assessment: "The witness Gilles Gasse tells us that your husband's threats about the Hell's Angels did not seem to affect you particularly, that the atmosphere of tension was palpable that night, but not so different from that observed during his previous visits."[86]

Second, one of the most fundamental myths, namely, that a battered woman has other alternatives, also appears in Trotier J's decision. He concluded his remarks rejecting her apprehended fear by stating: "Moreover, that night you had other alternatives or outlets that were often used such as locking yourself in your room, leaving the premises and going to bars, or calling the police."[87] This statement not only ignores the fact that 25 police interventions had failed to stop the violence, it also ignores the law. The legal duty to retreat prior to responding with lethal force to which Trotier J appears to have been referring, was explicitly rejected by the Supreme Court of Canada in *Lavallee* when Wilson J held that a woman in her own home is not obligated to retreat before striking out in self-defence.

Third, St-Hilaire was clearly disadvantaged by her inability to give a consistent and coherent narrative about the events even though it is well understood that accounts of trauma, and particularly long-term, repeated trauma, often emerge slowly, out of chronological order, and with more detail and more extreme levels of violence being disclosed later rather than sooner.[88] Elizabeth Schneider points out: "as [battered] women speak out, they frequently revise their stories."[89] Schneider refers to the work of Dr Judith Herman, who sees the

86 *St-Hilaire v Canada (Attorney General)* (CA), note 4.

87 *St-Hilaire v Canada (Attorney General)* (CA), note 4.

88 Fern Martin's experience running a shelter is that women attempt to protect others from the details and that it also takes time to trust that one's words will be believed: *A Narrow Doorway*, General Store Publ, 1996, pp 16, 141, 163.

89 Schneider, note 37, p 107.

process of revision of stories as a sign of a battered woman's recovery from abuse.[90]

At St-Hilaire's sentencing hearing, Trotier J gave her no credit for her immediate and frank confession to police. He instead focused on the inconsistencies in the four different statements that she gave over time:

> When it comes to remembering the events of a year ago, Madam, you no longer have a very clear idea of them. Time has eroded your memories and you have enriched them, embellished them in your favour. Between what actually happened and what you have described for the first time in Court, there is a world of difference.[91]

Fourth, Trotier J clearly preferred the evidence of the witness not only to the evidence of St-Hilaire, but also to the evidence of the defence expert. It seems from the extract that he had scant regard (despite outward politeness) for the expert, who appears to have given evidence that would have supported a self-defence plea in the case:

> With respect for this expert, it was not in a context of collapse of your defence mechanisms that the unfortunate act was committed, but through a lack of control inspired by "anger accentuated by substance abuse". You wanted to respond to the assault against you through intimidation, which implies the use of your own defences.[92]

The expert appears to have construed what occurred as self-defence, and St-Hilaire herself appears to have told a story of acting "out of fear":

> You testified with sincerity, of course, but sincerity is not necessarily the truth. Of course, you did not want to kill your husband that night, but you acted "in the heat of anger" and not "out of fear" for the purpose of avoiding danger.[93]

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90 Herman, note 80.

91 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [25].

92 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [25].

93 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [25].

The judge's account shows no understanding of commonly known facts about the legacy and dynamics created by a man's use of violence against a woman within a relationship. Thus, Constance St-Hilaire can certainly claim that not only was her story not believed, it was not even 'heard'. To use Regina Graycar's analogy,[94] the judge has seen the world through a mirror reflecting his own experiences, and not looked through clear glass into the world inhabited by women who have experienced violence at the hands of a mate in a relationship.

The way the sentencing judge presented the facts led to further punishment for St-Hilaire in the civil proceedings. Ultimately, the Court of Appeal denied her any inheritance or widow's pension, and subsequently the Supreme Court dismissed her appeal without giving reasons.[95] All the judgments examined in various degrees of detail the textual 'black-letter' issues, namely, what was the applicable law and how did it apply, without attending to the context in which St-Hilaire's actions should have been be considered.

The question of what law was applicable was far from simple and in this respect the judgments are meticulously detailed. There were two issues: first, whether the *Civil Code of Québec* or the common law forfeiture rule constituted the relevant law for the purposes of her claim; and second, whether her conviction for manslaughter, as distinct from murder, was outside the applicable rule.

At the initial hearing, Blais J held the *Civil Code of Québec* governed the claim since the federal law under which the benefit arose in no way restricted the application of the general law of the province in which the claim originated. Justice Blais ruled that Article 620, which states: "The following persons are unworthy of inheriting by operation of law: (1) a person convicted of making an attempt on the life of the deceased", did not apply to manslaughter. He examined the previous version of the article, Article 610, which had used much broader language so as to disentitle anyone who was convicted of killing or attempting to kill another from inheriting from the deceased's estate. The new language, he concluded, indicated that only those possessing homicidal intent should be denied their claims, and since manslaughter did not require proof of intent to kill, a manslaughter conviction did not invoke Article 620.

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94 Graycar R, "The Gender of Judgements: An Introduction" in Thornton M *Public and Private: Feminist Legal Debates*, Oxford University Press, 1995, p 262.

95 [2001] CSCR 296.

In a 2:1 decision, the judgment of Blais J was overturned on appeal to the Federal Court of Appeal. Justice Décary, who dissented in part, carefully examined the applicable law and also concluded that the governing law was the *Civil Code of Québec*. The other judges accepted this analysis and conclusion. However, the judgments parted company on the reach of Article 620; Létourneau JA and Desjardins JA accepted that manslaughter was a possible cause of unworthiness, while Décary JA posited that a more objective and certain application of Article 620 would result if it were confined to convictions for murder. The latter interpretation was supported by several academic works, and by the interpretation given by courts in France to an identical provision in France's *Civil Code*.

Justice Décary then separated the entitlements as heir and as surviving spouse (Létourneau JA and Desjardins JA agreed on this point), and held that Article 2243[96] governs the entitlements of a surviving spouse. This section is wider in scope than Article 620 since it applies to all those who make an attempt on the life of the deceased as opposed to only those who are convicted. Thus, Décary JA found that St-Hilaire's entitlements as heir to a supplementary death benefit and the minimum amount payable for succession were not forfeited by her conviction for manslaughter, but her entitlement to a pension as surviving spouse was forfeited because her actions fell within the language of Article 2243.

In the Federal Court of Appeal, the judges relied on Trotier J's summary of the facts at St-Hilaire's sentencing. All the judgments on appeal failed to interrogate Trotier J's conclusion that St-Hilaire did not act "out of fear". The majority concluded that manslaughter falls within the scope of Article 620 if the person had the intention to kill but was excused on account of provocation, or if "a person clearly places himself in a situation in which there is reason to apprehend that he could cause death. A person clearly places himself in such a situation if, knowingly and deliberately, he stabs his victim to death."[97] Justice Létourneau concluded (Desjardins JA concurring on

96 Art 2243: "An attempt on the life of the insured by the policyholder entails, by operation of law, cancellation of the insurance and payment of the surrender value."

97 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [155].

this point[98]) that certainly this manslaughter was within Article 620 because of the evidence of St-Hilaire's intent:

> There is no doubt that in the case at bar Ms St-Hilaire wanted, if not to kill her husband, to at least cause serious bodily harm to him likely to cause his death. She had even announced her intentions during a previous quarrel, saying: "Some day I'm going to stick it to him, the bastard." She consciously and deliberately made an attempt on the life of the deceased within the meaning of Article 620(1) of the *Civil Code of Québec*.[99]

Justice Décary would have permitted St-Hilaire to claim her benefits as heir because she was only convicted of manslaughter, and he would have confined the application of Article 620 to those convicted of murder. However, with respect to her pension claim as surviving spouse and the application of Article 2243, he would have found that she had made an attempt on the life of the deceased because the evidence revealed that she expressed a "settled intention to take advantage of the opportunity that was presented to 'stick it to' the victim once and for all."[100]

The majority and minority judgments inappropriately used St-Hilaire's prior statements as evidence of a firm intent to seriously injure the deceased. These statements were taken out of the deeply gendered context of a situation involving escalating and admittedly deadly violence. For example, Susan Edwards has argued that while judges easily find intent to kill evidenced by women who wield knives and guns against their violent male partners, it seems to be much more difficult for judges to infer murderous intent when men beat, strangle or kick their wives to death.[101] St-Hilaire's statements were also taken out of the context of the sentencing judgment wherein many more ambiguous statements were made about her intentions, as discussed above. Clearly this is an unsympathetic view of the circumstances and Létourneau JA trivialised the violence in the

98 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [13].

99 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [162].

100 *St-Hilaire v Canada (Attorney General)* (CA), note 4, at [116].

101 Edwards S, "Ascribing Intention – The Neglected Role of Modus Operandi – Implications for Gender" [1999/2000] *Contemporary Issues in Law* 235.

relationship, referring to it as a "previous quarrel", a common indicator of insensitivity to domestic violence.[102]

The reliance by civil courts on criminal court judgments magnifies the confusion and contradiction inherent in many sentencing decisions involving battered women who kill. While on the one hand Trotier J was prepared to accept a manslaughter plea, and it seems clear that the backdrop of severe and longstanding marital violence must have been critical to the prosecutor's and the judge's acceptance of the plea, the legal basis for a manslaughter plea is unclear. All parties to the plea-bargain must downplay self-defence, because a judge cannot in good conscience accept a plea of guilty from an accused who insists that he/she killed in self-defence. Thus, the basis for manslaughter here was either that St-Hilaire had no intent to kill because she was intoxicated by drugs and alcohol, or that she was provoked. The difficulty with the provocation analysis is that it is not framed this way by the judge, nor is there a clear factual basis for provocation in the evidence. Although the "no *mens rea*/intoxication" theory is more plausible legally and factually, the Court of Appeal ignored it in favour of importing intent to seriously injure from a statement made a year earlier.

What is missing in this analysis is an examination of the context that should influence the interpretation given to a public policy rule, whether it is of civil or common law origin. This examination of context was not evident even in the judgments that found for St-Hilaire: Blais J at trial, and Décary JA on appeal. One would have thought that the disproportionate consequences for St-Hilaire would have led the judges to adopt the most beneficial interpretation for her (and ultimately other battered women), given that such an interpretation was possible and involved no distortion of the law. The issue had not been decided under Québec law by the appeal court, and the academic authorities referred to in the judgments suggested as much support for excluding manslaughter from Article 620 (Faribault, Briere, and Mayrand) as for the contrary position (Mignault, Langelier, and Baudouin). Similarly, when the court discussed the possible application of the common law public policy rule rather than the *Civil Code of Québec*, it was clear that the court would have applied the public policy rule in the strict UK sense (ie pre-*Forfeiture Act*) or as applied by the majority of the NSW Court of Appeal in *Troja.*

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102 See Easteal P and Currie C, "Battered women on trial: Revictimisation by the Courts" (1998) 3 *Sister in Law* 56, pp 58-60.

4. Legislative Reform?

The legislatures of the United Kingdom, the Australian Capital Territory, and New South Wales moved, in 1982, 1991 and 1995 respectively, to give a court the discretion not to apply the forfeiture rule, taking into account all the circumstances of the case. In December 2003, the Tasmanian Law Reform Institute published an issues paper supporting the enactment of a Forfeiture Act, calling for comment and discussing options for the form and detail of an Act.

However, the path of legislative change is neither predictable nor necessarily positive for women. In fact, the process of legislative change is sometimes almost accidental. Cretney[103] tells the interesting story of the passage of the *Forfeiture Act 1982* (UK). Some parliamentarians with an interest in law reform and considerable political skill managed to manipulate the parliamentary process to have the Act passed as a Private Member's Bill. There was almost no debate or parliamentary awareness of its controversial nature. The Bill's sponsors never expected its enactment and raised it merely to highlight the issue. As befits its accidental history, the Act is simple in form. Section 2 gives the court power to modify the forfeiture rule, as follows:

> (1) Where a court determines that the forfeiture rule has precluded a person (... the "offender") who has unlawfully killed another from acquiring any interest in property ... the court may make an order modifying the effect of that rule.
>
> (2) The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.

The Act has been criticised as being a far from comprehensive piece of legislation.[104] It fails to set out any principles to assist the court in

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103 Cretney SM, "*The Forfeiture Act 1982*: The Private Member's Bill as an Instrument of Law Reform" (1990) 10 *Oxford Journal of Legal Studies* 289.

104 Peart N, "Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia" (2002) 31 *Common Law World Law Review* 1, p 24.

determining the "justice of the case" and the consequences of modification of the rule have been left to the courts. Further, it is clear that the Act does not preclude the courts from re-fashioning the common law forfeiture rule itself.

However, the Act has been used to benefit a wife who killed her husband accidentally in the course of attempting to deter his brutal attack on her.[105] She had been subjected to violent attacks for most of her 18 years of marriage. She pleaded guilty to manslaughter although it appears that she could have raised self-defence. Even though the killing was accidental, the court ruled that the forfeiture rule applied because she intended to use the gun to instil fear in her husband in order to ward off an attack. But for the Act, she would have forfeited her inheritance, almost half a million pounds.

The *Forfeiture Act 1991* (ACT) is in substance identical to the UK Act.[106] No cases have been found that have applied the ACT Act.

The *Forfeiture Act 1995* (NSW) also follows the same model as the UK Act in granting judicial discretion to modify the rule. It is a more comprehensive piece of legislation, particularly because it allows applications by "any interested person". Section 5 gives some brief guidance to the court in determining whether justice requires the modification of the rule, by directing the court to consider: (a) the conduct of the offender, (b) the conduct of the deceased person, (c) the effect of the application of the rule on the offender or any other person, and (d) such other matters as appear to the court to be material.

From the reported decisions, the NSW Act does not appear to have been utilised to date by a battered spouse. However, *Lenaghan-Britton v Taylor*[107] suggests that it would be helpful where a manslaughter

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105 *Re K (deceased)* [1985] Ch 85 (Vinelot J); [1986] Ch 180, CA.

106 Section 3, the pivotal section, states:
(1) Where a person (… the "offender") has unlawfully killed another and is thereby precluded by the forfeiture rule from obtaining an interest in any property, application may be made to the Supreme Court for an order modifying the effect of the rule.
(2) On an application under subsection (1), the Supreme Court may make an order modifying the effect of the forfeiture rule if satisfied that, having regard to the conduct of the offender and of the deceased and to any other circumstances that appear to the court to be material, the justice of the case requires the effect of the rule to be modified. Section 3 (5) provides that an application must be made within 3 months of conviction. Section 4 precludes persons convicted of murder.

107 *Leneghan-Britton v Taylor* (unreported, SC (NSW), 28 May 1998). The Act was also successfully applied in *R v R* (unreported, SC (NSW), 14 November 1997. In

verdict is reached following a plea of diminished responsibility. In that case a woman who killed her grandmother pleaded guilty to manslaughter on the basis of diminished responsibility. Despite her attempt to cover up for four months what had occurred by leading the police to believe that her grandmother had been killed by an intruder, modification of the forfeiture rule was ordered to allow her to take the full benefit from her grandmother's will. This result is to be contrasted with the harshness of the penalty meted out to Jeanna Troja, who had been involved in a significant way in building up the assets of the deceased, took full responsibility immediately for the killing of her husband, and also pleaded diminished responsibility at her criminal trial.

Not all proposed legislation is likely to be beneficial to battered wives. Statutory reform is not an easy path, even when a compelling case for change exists, for politicians must satisfy many competing 'stakeholders' in the process, as well as other claims for legislative attention. For example, Nicola Peart[108] has drawn attention to a New Zealand *Draft Succession (Homicide) Act* proposed by the NZ Law Reform Commission in 1997. In contrast to the above Acts, this Draft Act does not give a court a discretion to modify the forfeiture rule, but rather specifically exempts certain killings from the definition of homicide for the purposes of the forfeiture rule. Killings that occur through negligence, infanticide or pursuant to a suicide pact or assisted suicide are exempted, but intentional killings are not. This proposal would create more rigidity in the application of the rule such that battered wives who kill would continue to be subjected to the forfeiture rule.

In spite of the potential unevenness of law reform, it seems clear that legislative intervention will be the most beneficial way to prevent battered women from being "thrice punished". It is noted that reform of the forfeiture rule is not on the agenda of the National Committee for Uniform Succession Laws.[109] Therefore specific state legislation

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R v R, a 13-year-old boy who killed his mother and sister when suffering from an abnormality of mind pleaded diminished responsibility, was found guilty of manslaughter and sentenced to 10 years imprisonment. He successfully utilised the Act to inherit under his mother's will. His mother's mother and brother supported his application.

108 Peart, note 104.

109 Tasmania Law Reform Institute, *The Forfeiture Rule* (December 2003) Issues Paper No 5, p 3.

is necessary. The experience of the UK, ACT, NSW and Tasmanian Law Reform Institute investigations should be drawn upon to draft an improved legislative model that is capable of responding to the reality of women's experience of marital abuse and violence, and of compelling judges to look behind women's manslaughter convictions for the possibility of their moral innocence in the face of grave danger to their selves and/or their children.

At the same time, the legislation should not invite judges to abandon the forfeiture rule for husbands who kill their wives and are convicted of manslaughter because of "provocation", unless comparably severe threats by the deceased were involved. *Re Soukup*,[110] decided in Victoria, which has not undergone legislative change, illustrates that the rule has its place in certain cases in the modern context. Here the court explicitly followed the majority approach in *Troja*, this time to bar a domineering and controlling man who had killed his wife. He was initially charged with murder; the charge was reduced to manslaughter and he pleaded guilty. The decision to apply the forfeiture rule was correct, there being no suggestion of culpability on the wife's part. The sentencing judge noted:

> It is … a very serious matter that an elderly woman who had lived a blameless life and who, as your partner, had made considerable sacrifices of her own interests in favour of your interests, has died as a result of your unlawful and dangerous assault upon her.[111]

Indeed, the court accepted that Soukup had made his wife's life so difficult that she had resolved a number of months prior to her death to leave her husband, but postponed this when Soukup was hospitalised for a prostrate condition. The sentencing judge noted: "It was a charitable decision which cost her life."[112] On the day before she died she announced in the presence of her family that Soukup's conduct had finally caused her to resolve to leave him. The circumstances of the marriage as recounted in the civil decision alone suggest Ms Soukup was subjected to psychological and emotional

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110 *In the Matter of the Estate of Soukup* (1997) A Crim R 103.

111 *In the Matter of the Estate of Soukup*, note 110, at 117 (as recounted by Gillard J in the civil proceedings).

112 *In the Matter of the Estate of Soukup*, note 110, at 115 (as recounted by Gillard J in the civil proceedings).

abuse by her husband, circumstances much like the facts that led Jeanna Troja, Constance St-Hilaire and other battered women to kill. It is the lack of culpability on the victim's part, indeed the probability that the victim was herself a battered wife, which distinguishes this case from others involving forfeiture when battered women kill their violent partners.

Despite the application of the forfeiture rule in *Soukup*, the case nevertheless illustrates lenient treatment in the sentencing process received by a man who strangled his wife. Soukup's lenient sentence (a five years good behaviour bond with mandated psychiatric treatment and counselling visits, following six months in custody after his arrest and pending bail), imposed on a man who killed a blameless wife contrasts with the long prison sentences meted out to Jeanna Troja (eight years minimum imprisonment) and Constance St-Hilaire (two years imprisonment and a three years good behaviour bond), who both clearly suffered at the hands of their victims. The Victorian Supreme Court accepted that Soukup's actions in strangling his wife were the product of "impaired emotional control" caused by a "serious medical and psychological condition."[113] A battered woman's actions are rarely viewed in such a charitable light, nor with an understanding that battering in its many forms frequently produces serious medical conditions, notably post-traumatic stress syndrome. On this point, it is particularly apt to recall psychiatrist Dr Strum's testimony that Jeanna Troja was suffering from a severe reactive depression at the time of shooting.

Conclusion

In the absence of legislative reform, it is the responsibility of the courts to re-fashion a rule reflective of public policy. The systemic barriers to justice presented by the criminal law make it essential that the judiciary in the civil law context does not abdicate its duty to rework and update legal principles in accordance with modern conceptions of justice and a more enlightened understanding of abused women. It is hardly fair to rely on the need for legislative change, when that route is frequently precarious, lags well behind community attitudes, and its results are

113 This finding appears to support the argument that judges more easily find intent to kill by women who wield knives and guns against their violent partners, than when men beat or strangle their wives to death: see Edwards, note 101.

patchy. Daniel Goleman's recognition that those who are comfortable may be unable to see the pain of those who are not is apposite.[114] This empathy needs to be explicitly reflected in judgments and in the development of the law. Otherwise, as this article has shown, the law as it relates to an abused spouse becomes an instrument of oppression itself, and engagement in the legal process will prolong her "life in hell".

In the absence of legislative intervention, some Australian judges have tried to remodel and apply the forfeiture rule in a modern, flexible, and humane way in the context of domestic violence. Justice Young in *Public Trustee v Evans*,[115] Kearney J in *Public Trustee v Fraser*,[116] Coldrey J in *Re Keitley*,[117] and Kirby P (dissenting) in *Troja*,[118] all tied a modern application of the rule to notions of unconscionability. All were cases where the deceased had subjected the female killer to domestic abuse, and all were cases where the judge fashioned relief to prevent the woman from being (totally) disinherited from the batterer's estate. In particular, Kirby P framed the issue as a matter of doing justice, and as a function of a judge's duty to the law:

> The knowledge of domestic violence allowed to judges, and of the circumstances in which conduct, although manslaughter, can sometimes be morally virtually blameless, requires of them, a rule of sufficient flexibility to permit a decision which accords with the justice of the case. Otherwise, the law becomes a vehicle for serious injustice. That must not be allowed to occur – especially by the slavish adherence to the non-binding authority of another country. The rule in question has been made by judges. It has already been developed, in part, by judges. It is still in the process of refinement. It is not a breach of this Court's duty to the law to clarify the stage which that refinement has reached ... Indeed, as I can see, that is one of the functions of this Court.[119]

114 Goleman, note 1.

115 *Public Trustee v Evans*, note 65.

116 *Public trustee v Fraser*, note 65.

117 *Re Keitley*, note 65.

118 *Troja v Troja*, note 3.

119 *Troja v Troja*, note 3, at 285.

Over a century ago in *Findlay v Chirney*,[120] the House of Lords distorted the law to turn an "action in contract" into an "action in tort" in order to hold that the plaintiff's claim for support was extinguished on the death of Mr Chirney. Ms Findlay was the housekeeper seduced by Mr Chirney, to whom she bore an illegitimate child, on a promise of marriage. As Jocelynne Scutt points out, the judges must have been aware that in denying any financial security to Findlay, the alternative for her and her child was the poorhouse. Scutt continues:

> Had the English House of Lords been possessed of compassion or, even better, taking into account all the issues in the case, a sense of justice; had they not been imbued with sexist attitudes dictating their behaviour; if only they had been able to put themselves in Ms Findlay's shoes. ... If the court had been comprised of women?
>
> Is there a moral to the story?
>
> Find the right judge. Find the right century. Be in the right place at the right time.[121]

That this story happened over a century ago we understand, but do not accept; that the same story seems to be repeated again and again in relation to women in the 21st century is appalling. When are women going to find (consistently) the right judge, be in the right century, and be in the right place at the right time? Even in the 21st century, women and all 'others' in the legal system are never going to be in the right century unless and until the members of the judiciary take seriously their duty to educate themselves about, and thus become aware of, the reality of the lives of 'others'.

120 *Findlay v Chirney* (1888) QBD 494.

121 Scutt, note 13.