

THE NEW SELF-DEFENCE LAW: PROGRESSIVE DEVELOPMENT OR STATUS QUO?

Vanessa A MacDonnell*

*For more than three decades, feminist law reformers have argued that the law must better account for the different ways that men and women act in self-defence. In *R v Lavallee*, the Supreme Court agreed. Perhaps it should come as no surprise, then, that when the Conservative government introduced changes to the self-defence provisions in 2011 the amendments would reflect this evolution. In this paper I assess whether the law of self-defence is stronger now that feminist demands for change have been translated into law. In particular, I ask whether the new provision is likely to produce better results for groups whose self-defence claims have not always been dealt with satisfactorily.*

*Les organismes féministes de réforme du droit soutiennent, depuis plus de trois décennies, que le droit doit tenir compte davantage des comportements différents que peuvent adoptés les hommes et les femmes en état de légitime défense. Dans l'arrêt *R c Lavallee*, la Cour suprême a souscrit à cette perspective. Nous ne devrions donc pas être surpris, qu'en 2011, le gouvernement conservateur ait apporté des modifications aux dispositions relatives à la légitime défense qui reflètent cette évolution. Dans le présent texte, j'examine si le droit en matière de légitime défense est plus solide maintenant que les revendications féministes ont été intégrées dans la loi. Je me pose plus particulièrement la question de savoir si la nouvelle disposition est susceptible de donner de meilleurs résultats pour les groupes dont les allégations de légitime défense n'ont pas toujours été accueillies de manière satisfaisante.*

1. Introduction

For more than three decades, feminist law reformers have argued that the law must better account for the different ways that men and women act in self-defence.¹ In *R v Lavallee*,² the Supreme Court agreed, concluding that

* University of Ottawa Faculty of Law (Common Law Section). Thank you to Jena McGill, Elizabeth Sheehy, Benjamin Berger, Justice Matthew Webber, Howard Krongold and Leonardo Russomanno for useful conversations, comments and suggestions. Thank you to Eleonora Izmaylov and Bayly Guslits for research assistance. This paper was first presented at the 2013 Criminal Lawyers' Association Fall Conference.

¹ See Part 3 below.

² [1990] 1 SCR 852 [*Lavallee*].

“the perspectives of women, which have historically been ignored, must now equally inform the ‘objective’ standard of the reasonable person in relation to self-defence.”³ Perhaps it should come as no surprise, then, that when the Conservative government introduced changes to the self-defence provisions in 2011⁴ to “bring[] clarity and simplicity to the law,”⁵ the amendments would reflect this evolution in thinking.

The extent of the feminist imprimatur on the new law is nonetheless unexpected. In this paper I assess whether the law of self-defence is stronger now that feminist demands for change have been translated into law. In particular, I ask whether the new provision is likely to produce better results for groups whose self-defence claims have not always been dealt with satisfactorily. Defence counsel are now on stronger footing in arguing that triers of fact must take a broad, contextual approach to evaluating self-defence claims.⁶ This may assist marginalized and vulnerable accused, whose self-defence claims can be negatively impacted by de-contextualized assumptions about how the “reasonable person” would or should act in a dangerous situation.⁷ At the same time, the success of these claims depends upon counsel and triers of fact situating the self-defence inquiry in its proper context,⁸ and the new provision provides only partial guidance on what this might be in any given case. A more open-ended provision does not guarantee a more progressive law of self-defence.

In Part 2 of this paper I briefly describe the recent changes to the law of self-defence. In Part 3 I survey the law reform proposals on self-defence

³ *R v Mallot*, [1998] 1 SCR 123 at para 38 [*Mallot*], summarizing *Lavallee*, *ibid*. See also Martha Shaffer, “The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R. v. Lavallee*” (1997) 47 UTLJ 1 at 1; Donna Martinson *et al*, “Introduction: A Forum on *Lavallee v. R.*: Women and Self-Defence” (1991) 25 UBC L Rev 23 at 23; Donna Martinson, “Implications of *Lavallee v. R.* for Other Criminal Law Doctrines” (1991) 25 UBC L Rev 25 at 25.

⁴ Bill C-26, *An Act to Amend the Criminal Code (citizen’s arrest and the defences of property and persons)*, 1st Sess, 41st Parl, 2011; Bill C-60, *An Act to Amend the Criminal Code (citizen’s arrest and the defences of property and persons)*, 3rd Sess, 40th Parl, 2011.

⁵ Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, No 19 (17 May 2012), online: <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/19ev-49551-e.htm?Language=E&Parl=41&Ses=1&comm_id=11> (Minister Rob Nicholson) [Nicholson testimony].

⁶ By “context” I mean those factors and characteristics of the accused that might be considered relevant to assessing her or his self-defence claim.

⁷ Elizabeth Sheehy, “Review of the Self-Defence Review” (2000) 12 CJWL 197 at 218 [Sheehy, “Review”].

⁸ Interview with Elizabeth Sheehy, 31 January 31 2014 [Sheehy Interview].

that have been advanced over the past three decades, and draw parallels between some of these proposals and the current law. In Part 4 I examine whether the new provision is likely to benefit marginalized and vulnerable self-defence claimants, before concluding in Part 5.

2. *The New Section 34*

In 2011, the Conservative government introduced Bill C-26, *An Act to Amend the Criminal Code (citizen's arrest and the defences of property and persons)*. The Bill proposed three changes to the *Criminal Code*: to expand the power of citizen's arrest, to re-structure the defence of property provisions of the Code, and to replace the existing self-defence regime with a single, comprehensive self-defence provision. C-26 became law in March 2013. The new self-defence provision, section 34, provides in full:

34. (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

The self-defence provision is structured in two parts. Subsection (1) sets out the constituent requirements of self-defence. The accused must believe on reasonable grounds that force is being used against him or her or against another, or that a threat of force of being made;⁹ the accused must have committed the offence for the subjective purpose of defending him or herself or another; and his or her actions must have been reasonable in the circumstances. Subsection (2) lists factors to consider in determining whether the accused's actions were reasonable. The list of factors is not "exhaustive."¹⁰

The new self-defence provision asks whether the accused's actions were reasonable.¹¹ Many of the factors that the trier of fact must consider in assessing reasonableness are familiar features of the law of self-defence, including imminence, proportionality, and whether the accused had other options available to him or her. The difference between the old and the new provisions is that these features are no longer absolute requirements or barriers to making out self-defence. They are "merely ... factor[s] that must be considered in determining whether any act of self-defence is reasonable in the circumstances."¹² The structure of the new provision thus gives the trier of fact some freedom to weigh these factors differently depending upon the circumstances of the case.

⁹ The new law makes self-defence potentially available where any offence is committed in self-defence. It is not limited to assault-based offences, as the predecessor provisions were; see Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16 Can Crim L Rev 275 at 279.

¹⁰ *Ibid* at 278.

¹¹ *Criminal Code*, RSC 1985, c C-46, s 34(1)(c); see also Roach, *ibid*.

¹² Roach, *ibid* at 277.

Other factors contained in section 34(2) also signal a commitment to a contextual approach to self-defence, such as “the size, age, gender and physical capabilities of the parties to the incident,”¹³ “the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat,”¹⁴ and “the history of interaction or communication between the parties to the incident.”¹⁵ Although these factors have been considered in cases involving battered women since the Supreme Court’s decision in *Lavallee*,¹⁶ the fact that they have been incorporated into the “general law of self-defence”¹⁷ means that they will now be considered in all self-defence cases, though again, the weight they are given will vary.

3. Reform Proposals

Advocates and law reformers have proposed numerous changes to the law of self-defence since the 1980s.¹⁸ Some of these proposals emerged from broad discussions about reforming the criminal law. Others stemmed from more focussed discussions about the law of self-defence, and in particular, about the difficulties battered women have faced in successfully invoking it.¹⁹ The discussion of self-defence found in large law reform projects is of limited assistance because these projects rarely explain in any depth why and how the law would be improved by adopting the formulation proposed. They do help to clarify the essential elements of self-defence, however, and in this respect reveal the continuity between the old and new provisions. By contrast, in the *Self-Defence Review*, Justice Ratushny provided a very detailed explanation of the deficiencies in the law on self-defence as it

¹³ *Criminal Code*, *supra* note 11, s 34(2)(e).

¹⁴ *Ibid*, s 34(2)(f).

¹⁵ *Ibid*, s 34(2)(f.1).

¹⁶ Roach, *supra* note 9 at 286; Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, No 19 (17 May 2012) online: <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/19ev-49551-e.htm?Language=E&Parl=41&Ses=1&comm_id=11> (Joanne Klineberg); Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, No 46 (31 May 2012) online: <<http://www.parl.gc.ca/content/sen/committee/411/LCJC/49592-E.HTM>> (Emma Cunliffe) [Cunliffe testimony].

¹⁷ *Reforming Criminal Code Defences: Provocation, Self-defence and Defence of Property: A Consultation Paper* (Ottawa: Department of Justice, 1998) at 35 [*Reforming Criminal Code Defences*].

¹⁸ For a good overview, see Elizabeth A Sheehy, *What Would a Women’s Law of Self-Defence Look Like?* (Ottawa: Status of Women Canada, 1995) at 5 [Sheehy, *Women’s Law of Self-Defence*] at 1-2 nn 1-6; Lynn Ratushny, *Self-Defence Review, Final Report* (Ottawa: Department of Justice Canada, 1997) at 134-50.

¹⁹ See Ratushny, *ibid*; Sheehy, “Review,” *supra* note 7; Sheehy, *Women’s Law of Self-Defence, ibid*.

related to battered women, and made suggestions on how to improve it.²⁰ In 1995, Elizabeth Sheehy authored a report for Status of Women Canada, entitled *What Would a Women's Law of Self-Defence Look Like?*²¹ which similarly provided detailed recommendations about how the provisions might be modified to ensure that battered women were better able to take advantage of it.²²

One of the first modern law reform projects to deal with self-defence was a 1985 report by the Law Reform Commission of Canada (LRC) entitled *Recodifying Criminal Law*.²³ It suggested that a new self-defence provision be enacted in the following form:

3(10) Defence of the Person

(a) General Rule. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm and hurt apprehended.

(b) Exception: Law Enforcement. This clause does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present, acting under his authority.²⁴

The commentary accompanying the provision stated that “reasonable necessity” was an objective standard.²⁵ A similar, though not identical, provision was proposed in the early 1990s by a Canadian Bar Association (CBA) Task Force to the Subcommittee on the Recodification of the General Part of the *Criminal Code* of the House of Commons Standing Committee on Justice and the Solicitor General.²⁶ The Subcommittee largely adopted the CBA’s recommendations, though it rejected the suggestion that a partial defence of excessive force in self-defence should be created.²⁷

²⁰ Ratushny, *ibid.*

²¹ Sheehy, *Women's Law of Self-Defence*, *supra* note 18.

²² See also Sheehy, “Review,” *supra* note 7.

²³ Law Reform Commission of Canada, *Recodifying Criminal Law*, vol 1 (Ottawa: Law Reform Commission of Canada, 1986); Law Reform Commission of Canada, *Recodifying Criminal Law*, vol 2 (Ottawa: Law Reform Commission of Canada, 1982).

²⁴ LRC, *Recodifying Criminal Law*, vol 1, *ibid* at 34; LRC, *Recodifying Criminal Law*, vol 2, *ibid* at 36-37.

²⁵ LRC, *Recodifying Criminal Law*, vol 1, *ibid* at 34.

²⁶ *Report of the Subcommittee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General* (Ottawa: House of Commons, 1993) at 71-72.

²⁷ *Ibid* at 71.

In 1985, Christine Boyle, Marie-Andrée Bertrand, Céline Lacerte-Lamontagne and Rebecca Shamaï published *A Feminist Review of Criminal Law*.²⁸ These authors had even broader ambitions than the LRC and the Subcommittee on the Recodification of the General Part of the *Criminal Code*. They analyzed the criminal law, criminal procedure, evidence, and sentencing from a feminist standpoint.²⁹ Their report contained a discussion of self-defence which focussed primarily on battered women, though it also considered other circumstances in which women might claim self-defence.

The authors of *A Feminist Review of Criminal Law* argued for changes to the law of self-defence that have been realized by the new section 34. They suggested that the Code provisions relating to self-defence should include a list of factors to consider in deciding whether self-defence was made out, and that the following factors should be included in that list:

- (1) Were there realistic alternative means which the accused could have used to protect herself or other persons?
- (2) (If relevant) With respect to (1), had the accused attempted alternatives in the past?
- (3) Was she afraid of retaliation if she attempted any alternative?
- (4) What was the accused's economic and psychological state?
- (5) How did the accused and the person she killed or assaulted compare in size and strength?
- (6) Was the accused's action reasonable, given her socialization?³⁰

The *Review* made clear that both the accused's circumstances and broader systemic factors should be considered in determining whether self-defence was available. To support this position, the authors pointed to the following comments of the appeals court in the Washington State case of *State v Wanrow*:

... The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination' ... Until such time as the effects of that history are eradicated, care must be taken to assure that our self-

²⁸ Christine Boyle *et al*, *A Feminist Review of Criminal Law* (Ottawa: Status of Women Canada, 1985).

²⁹ *Ibid* at vii, xix-xxiv.

³⁰ *Ibid* at 41.

defence instructions afford women the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.³¹

The authors thus viewed the self-defence inquiry as being concerned with both the accused's circumstances and with the systemic or structural factors that prevented women as a group from taking advantage of the defence.³²

Justice Ratushny built upon these recommendations in the *Self-Defence Review*.³³ In 1995, the federal government responded to pressure by the Canadian Association of Elizabeth Fry Societies (CAEFS) and established a process to review the cases of women convicted of homicide prior to *Lavallee* in which self-defence was or could have been argued.³⁴ Justice Ratushny examined the files of almost 100 women.³⁵ Her final report included a discussion of how the law of self-defence should be applied following *Lavallee*.³⁶ This discussion drew on many of the themes developed in *A Feminist Review of Criminal Law*.

In particular, Justice Ratushny concluded that in assessing self-defence claims under what was then section 34(2) of the *Criminal Code*,³⁷ she would consider the following factors:

³¹ *Ibid* at 38-39, citing *State v Wanrow*, (1977) 88 Wash 2d 221, 559 [*Wanrow*], cited in Schneider *et al*, "Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault" (1978) 1 Fam L Rev 118. The Supreme Court of Canada cited this passage from *Wanrow* in *Lavallee*, *supra* note 2 at 875.

³² For a discussion of the distinction between these factors in the immigration context, see Jamie Liew, "Taking it Personally: Delimiting Gender-Based Refugee Claims using the Complementary Protection Provision" (2014), 26:2 CJWL (forthcoming). Liew's contrasting of the "personal" and the "systemic" helped clarify my understanding of the weaknesses of the current approach to self-defence; see also Sheehy, "Review," *supra* note 7.

³³ Sheehy, "Review," *ibid*; Ratushny, *supra* note 18 at 149.

³⁴ Ratushny, *ibid* at 11, 16; Sheehy, "Review," *ibid* at 197-98, 217.

³⁵ Ratushny, *ibid* at 15; Sheehy, "Review," *ibid* at 202.

³⁶ Ratushny, *ibid* at 47-52, Sheehy, "Review," *ibid* at 211-12.

³⁷ The previous version of this section read:

34(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

- (a) the nature, duration and history of the relationship between the defender and the adversary, including prior acts of violence or threats on the part of the adversary, whether directed to the defender or to others;
- (b) any past abuse suffered by the defender;
- (c) the age, race, sex and physical characteristics of the defender and the adversary;
- (d) the nature and imminence of the force used or threatened by the adversary;
- (e) the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force; and
- (f) any other relevant factors.³⁸

She also considered these factors in assessing self-defence claims under sections 34(1) and 37 of the Code.

In addition to making findings about specific cases, Justice Ratushny also recommended changes to the law of self-defence. She stated explicitly that her recommendations were influenced by *A Feminist Review of Criminal Law*, explaining:

... I believe the authors of the Feminist Review make an important point – that it is very important, perhaps more important than the actual standard employed, to articulate the factors that should be taken into account in applying the standard ... [T]he model self-defence provision I propose contains specific reference to the circumstances that should be considered in determining the reasonableness of the accused's use of force.³⁹

The list of factors Justice Ratushny developed tracked the factors she employed in reviewing individual cases for the *Review*.⁴⁰ In addition, she would have also required an unlawful assault or a threat of an assault; that the accused reasonably believe that “the use of force is necessary for self-protection or for the protection of a third party from the assault,” and that the “degree of force used [wa]s reasonable.”⁴¹

Other law reform efforts proceeded in the years between *A Feminist Review of Criminal Law* and the *Self-Defence Review*. Many were aimed

³⁸ Ratushny, *supra* note 18 at 84.

³⁹ *Ibid* at 149-50.

⁴⁰ *Ibid* at 154-55; Sheehy, “Review,” *supra* note 7 at 203-204.

⁴¹ Ratushny, *ibid* at 154.

at creating “a new General Part for the Criminal Code.”⁴² Following the LRC’s Report in 1985, the federal government began to consider comprehensive reforms to the Code. In 1993 it released *The White Paper on Proposals to Amend the Criminal Code (General Principles)*.⁴³ The Department of Justice also produced two further documents canvassing “reform options” for the General Part of the Code, including self-defence.⁴⁴ The *White Paper* contained a new self-defence provision. The government made little effort to rationalize its choice of provision other than to state that it was “prop[os]ing a greatly simplified defence in place of the existing sections.”⁴⁵

Still, the *White Paper* defence contained at least one important feature. It provided that self-defence would be made out if, “in the circumstances as the person believe[d] them to be,”⁴⁶ his or her actions were “necessary, reasonable, and proportionate.”⁴⁷ The Department of Justice noted that “[t]his approach gives greater emphasis to the accused’s point of view than is the case under the existing law.”⁴⁸

Sheehy’s 1995 report *What Would a Woman’s Law of Self-Defence Look Like?* was critical of the *White Paper*.⁴⁹ Echoing concerns articulated by the authors of *A Feminist Review of Criminal Law*, Sheehy argued that systemic factors needed to be taken into account in developing a new approach to self-defence.⁵⁰ She noted that sexism, racism, and other forms of discrimination had resulted in meritorious self-defence claims being denied. For this reason, she explained, “the project of law reform for the defence of self-defence should be conducted within an equality rights framework.”⁵¹ Drawing on the work of academics from Australia and New Zealand, she argued that the existing law of self-defence could result in the systematic denial of self-defence to Indigenous accused in particular.⁵²

⁴² See *Toward a New General Part for the Criminal Code of Canada* (Ottawa: Department of Justice, 1991) [*New General Part*]; James O’Reilly, *Toward a New General Part of the Criminal Code of Canada: Details on Reform Options* (Ottawa: Department of Justice, 1994).

⁴³ *White Paper on Proposals to Amend the Criminal Code (General Principles)* (Ottawa: Department of Justice Canada, 1993) [*White Paper*].

⁴⁴ *New General Part*, *supra* note 42; O’Reilly, *supra* note 42.

⁴⁵ O’Reilly, *ibid* at 31.

⁴⁶ *Ibid* at 32; *White Paper*, *supra* note 43 at 22.

⁴⁷ O’Reilly, *supra* note 42 at 31.

⁴⁸ *Ibid* at 32; Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 21.

⁴⁹ Sheehy, *Women’s Law of Self-Defence*, *ibid*.

⁵⁰ *Ibid* at 3, 16-17, 28.

⁵¹ *Ibid* at 21. A similar argument was made by Emma Cunliffe in her testimony before the Senate Committee considering Bill C-26, *supra* note 16

⁵² Sheehy, *Women’s Law of Self-Defence*, *ibid* at 17.

These concerns required that law reform efforts be attuned to systemic barriers to successfully claiming self-defence.

Sheehy also suggested that context played an important role in evaluating self-defence claims.⁵³ She argued that the following factors should be considered in determining whether women's self-defence claims were made out:

... threats by [her partner], including threats as to immigration status and child custody; systemic racism and gender bias; the accused's own experience of legal systems, both foreign and domestic; her access to the legal system in light of barriers posed by language and systemic failure to accommodate disabilities; her need for economic support and her responsibility to care for children or others.⁵⁴

Finally, in 1998, the federal government released *Reforming Criminal Code Defences: Provocation, Self-defence and Defence of Property: A Consultation Paper*.⁵⁵ As the executive summary made clear, the consultation paper "[did] not reflect government policy" but was merely "intended to generate discussion on the issues raised." The consultation paper was largely structured around the formulations of self-defence articulated in the *Self-Defence Review* and in the 1993 *White Paper*. It raised the issue of the extent to which the accused's "mental state" and other "subjective" factors were relevant to the self-defence inquiry,⁵⁶ and queried whether the reasonableness of the accused's actions should be assessed on the basis of enumerated factors.⁵⁷

These law reform proposals and discussion documents all share some features in common with the newly enacted self-defence provision. The most distinctive feature of the new section 34 is the list of factors that triers of fact must consider in determining whether the accused's actions were reasonable in the circumstances. This approach to self-defence was recommended by *A Feminist Review of Criminal Law*, the *Self-Defence Review*, and by *What Would a Women's Law of Self-Defence Look Like?* The new provision reflects some of the concerns of feminist law reformers, who have consistently argued that the law of self-defence needs to be better attuned to the reality of women's lives.⁵⁸ As I have noted, the new provision is heavily focused on context and instructs triers of fact to

⁵³ *Ibid* at 31.

⁵⁴ *Ibid*.

⁵⁵ *Reforming Criminal Code Defences*, *supra* note 17.

⁵⁶ *Ibid* at 25.

⁵⁷ *Ibid* at 33.

⁵⁸ See *A Feminist Review of Criminal Law*, *supra* note 28; Sheehy, "Review," *supra* note 7; Sheehy, *Women's Law of Self-Defence*, *supra* note 18.

consider “the size, age, gender and physical capabilities of the parties to the incident,”⁵⁹ “the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat,”⁶⁰ and “any history of interaction or communication between the parties to the incident,”⁶¹ among other factors.

At the same time, section 34 does not list abuse extraneous to the relationship as a relevant factor, as the *Self-Defence Review* recommended,⁶² nor other factors raised in these reviews that might be important in assessing an individual’s self-defence claim.⁶³ The list also excludes systemic factors.⁶⁴ Although courts have at times acknowledged the role that systemic factors play in assessing self-defence claims, they have given weight to them sparingly and in discrete contexts.⁶⁵ The Court in *Lavallee* was clear that systemic factors are relevant to the self-defence analysis, at least where battered women are concerned.⁶⁶

Nothing in the new section 34 prevents triers of fact from considering these factors. The new subsection 34(2) states explicitly that “[i]n determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act.” The question is whether trial judges will view this language as an invitation to adopt a broad contextual approach.⁶⁷

4. *The New Law: Progressive Development or Status Quo?*

Under the old section 34(2) of the *Criminal Code*, as under the new provision, the reasonableness of the accused’s actions was measured against a modified objective standard.⁶⁸ The operative inquiry was whether the accused was under “reasonable apprehension of death or grievous bodily harm” at the time he or she acted in self-defence and whether he or she “believe[d], on reasonable grounds, that [s]he c[ould not] otherwise preserve himself [or herself] from death or grievous bodily

⁵⁹ *Criminal Code*, *supra* note 11, s 34(2)(e).

⁶⁰ *Ibid*, s 34(2)(f).

⁶¹ *Ibid*, s 34(2)(f.1).

⁶² Ratushny, *supra* note 18 at 154.

⁶³ Cunliffe testimony, *supra* note 16.

⁶⁴ House of Commons, Standing Committee on Justice and Human, *Evidence*, No 19 (9 February 2012) online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5374446&Language=E&Mode=1>> (Kim Pate).

⁶⁵ See Part 4 below.

⁶⁶ *Lavallee*, *supra* note 2 at 874-75.

⁶⁷ Sheehy Interview, *supra* note 8.

⁶⁸ Roach, *supra* note 9 at 287.

harm.”⁶⁹ One of the concerns that arose under the old regime was that counsel might not adequately convey the importance of certain contextual factors in their submissions, and that judges and juries might not be alive to the significance of these factors in assessing a self-defence claim.⁷⁰ Under the new provision, the accused’s acts are again measured against a reasonableness standard, except that the trier of fact is now instructed to consider reasonableness against the backdrop of a list of specific factors.

Lavallee is the leading case on the role of context in assessing the self-defence claims of battered women. *Lavallee* had been the victim of ongoing domestic abuse at the hands of her partner.⁷¹ On the night she killed him, the couple had friends over to their home. During the gathering, the deceased assaulted *Lavallee* in the bedroom and told her that one of them was going to die after their guests had gone home for the evening.⁷² After placing a gun in her hands, he turned to walk out of the bedroom.⁷³ *Lavallee* shot him in the back of the head.⁷⁴

In support of *Lavallee*’s argument that she reasonably believed that she faced a threat to her life and that she had no choice but to kill the deceased, the defence sought to tender the evidence of an expert in battered woman syndrome who had interviewed *Lavallee*.⁷⁵ In holding that this evidence was admissible, Wilson J, writing for the majority, noted that without the expert’s evidence, the jury might fall prey to pervasive “myths and stereotypes” about battered women.⁷⁶ This evidence was also required so that the jury could properly assess whether the accused’s actions were reasonable. She noted:

If it strains credulity to imagine what the “ordinary man” would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be

⁶⁹ *Criminal Code*, s 34(2) [repealed]; Isabel Grant and Debra Parkes, “Contextualizing Criminal Defences: Exploring the Contributions of Justice Bertha Wilson” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2009); Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2003) 158.

⁷⁰ Sheehy Interview, *supra* note 8.

⁷¹ *Lavallee*, *supra* note 2 at 857.

⁷² *Ibid* at 856-57.

⁷³ *Ibid* at 857.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at 859-60.

⁷⁶ *Ibid* at 873, citing *State v Kelly*, 478 A.2d 364 (1984) at 379; Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 5.

adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man.”⁷⁷

Wilson J then enumerated a list of factors to consider in assessing reasonableness, including “lack of job skills, the presence of children to care for, [and] fear of retaliation by the man.”⁷⁸ These factors continue to be relevant in deciding self-defence claims under the new law.

The Court’s willingness to consider the experiences of battered women in assessing their self-defence claims was a welcome development for some feminists, though many harboured misgivings about how *Lavallee* might be interpreted in subsequent cases.⁷⁹ For many feminists, the key was to establish the proper context for assessing the self-defence claim.⁸⁰ As Sheehy explains,

... the judicial understanding of [battered woman syndrome] in *Lavallee* was not in fact focussed on the question of whether a woman displays the “syndrome,” but rather on the need for *information and context* regarding the violence of the situation confronting the accused and a realistic assessment of her options.⁸¹

In the aftermath of *Lavallee*, Sheehy, Grant and others drew on American literature to critique the risk of “syndromization” that a judicial emphasis on battered woman syndrome might create.⁸² Two judges of the Supreme Court took up these concerns in *R v Mallot*, noting that *Lavallee* was concerned with context rather than with establishing that the accused was suffering from battered woman syndrome at the time she committed the act.⁸³ In addition to re-affirming the list of contextual factors articulated by the Court in *Lavallee*, L’Heureux-Dubé and McLachlin JJ noted that the relevant context could include “a woman’s need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered

⁷⁷ *Lavallee*, *supra* note 2 at 874, cited in Sheehy, *Women’s Law of Self-Defence*, *ibid* at 4.

⁷⁸ *Lavallee*, *ibid* at 887.

⁷⁹ Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 6; Schaffer, *supra* note 3 at 1; Martinson *et al*, *supra* at 23.

⁸⁰ Sheehy, *Women’s Law of Self-Defence*, *ibid* at 5; Martinson, *supra* note 3 at 25, 30; Marilyn McCrimmon, “The Social Construction of Reality and the Rules of Evidence” (1991) 25 UBCLR 36 at 39-40.

⁸¹ Sheehy, *Women’s Law of Self-Defence*, *ibid* at 5 [emphasis added].

⁸² *Ibid*; Isabel Grant, “The Syndromization of Women’s Experiences” (1991) 25 UBC L Rev 51; Schaffer, *supra* note 3 at 1.

⁸³ *Mallot*, *supra* note 3 at paras 39-41.

women, and no guarantee that the violence would cease simply because she left.”⁸⁴

Importantly, the two judges also took pains to underscore the systemic dimension of the issues addressed in *Lavallee*:

A crucial implication of the admissibility of expert evidence in *Lavallee* is the legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly. *Lavallee* accepted that the myths and stereotypes which are the products and the tools of this unfair treatment interfere with the capacity of judges and juries to justly determine a battered woman’s claim of self-defence, and can only be dispelled by expert evidence designed to overcome the stereotypical thinking.⁸⁵

Although this aspect of *Lavallee* has not been explicitly incorporated into the new self-defence provision, it continues to inform the assessment of self-defence claims. In thinking about how self-defence might apply in the context of marginalized and vulnerable groups, therefore, it is important to move beyond the immediate context of the accused’s self-defence claim to consider the role of race, gender, sexual orientation and/or disability more broadly.

Courts have applied the reasoning in *Lavallee* very sparingly in self-defence cases not involving battered women accused.⁸⁶ In some cases, courts have fallen prey to the “syndromization” approach that feminist scholars warned of. Thus, in *R v McConnell*,⁸⁷ the Court considered evidence of “prison environment syndrome” in assessing the accused’s self-defence claim. In *R v Kagan*,⁸⁸ the Court heard expert evidence about the influence of Asperger’s Syndrome on an accused claiming self-defence. And in *R v Nelson*, the Court considered the accused’s “intellectual impairment”⁸⁹ in evaluating his self-defence claim. While it is encouraging that courts are considering context in their self-defence analysis, the need to first identify and then establish the presence of a “syndrome” to justify such an approach greatly limits the impact of *Lavallee*. The Court’s approach in *Nelson* most closely approximates the more contextualized, non-syndromized approach that *Lavallee* requires.

⁸⁴ *Ibid* at para 42.

⁸⁵ *Ibid* at para 36.

⁸⁶ See Kent Roach *et al*, *Criminal Law and Procedure*, 10th ed (Toronto: Emond Montgomery, 2010) at 973-74.

⁸⁷ [1996] 1 SCR 1075 [*McConnell*], cited in Roach *et al*, *ibid* at 973.

⁸⁸ (2004), 185 CCC (3d) 417 (NSCA), cited in Roach *et al*, *ibid* at 973.

⁸⁹ *R v Nelson* (1992), 71 CCC (3d) 449 (ONCA), cited in Roach *et al*, *ibid* at 974.

The evidence in all three of these cases was tendered through experts.

There, the Court admitted and considered evidence of the accused's "low intelligence" despite the fact that it was not particularly "specific[]."90

This is not to say that courts have completely ignored context in routine self-defence cases.⁹¹ In most cases, judges and juries consider *some* degree of context.⁹² In *R v Jacko*, for example, an Indigenous accused went to trial on a charge of manslaughter.⁹³ The accused and the deceased had been drinking heavily on the day in question. At some point the accused hit the deceased with a large bone and caused his death. The deceased was known to be a violent drinker, and the trial judge accepted the accused's evidence that the deceased initiated the altercation.⁹⁴ The Court also noted that the accused was no match physically for the deceased.⁹⁵ The trial judge explained that these were important contextual factors to consider in assessing the accused's self-defence claim,⁹⁶ as was the fact that the deceased was known to be a "Bearwalker," meaning "a person who causes harm to others by the use of bad medicine."⁹⁷ The accused's self-defence claim, the Court noted, "must be viewed in light of his culture, beliefs and native spirituality."⁹⁸

Notwithstanding this example, a thorough assessment of context has typically been reserved for cases involving battered women accused. In some cases, the court's analysis has been nuanced and intersectional. In *R v Eyapaise*,⁹⁹ for example, the accused was charged with assault with a weapon after stabbing a man who made sexual advances toward her. The Court heard evidence that the accused had been the victim of abuse at the hands of men throughout her life.¹⁰⁰ After she was sexually assaulted by multiple assailants and the assailants were convicted of the crime, she "hear[d] a person in authority consoling one of the rapists by saying that he ought not to worry because she was only an Indian."¹⁰¹ The judge noted

90 *Ibid.*

91 Thank you to Bayly Guslits for sharing this insight with me.

92 *R v Hill*, [1986] 1 SCR 313 at paras 332, 334; Grant and Parkes, *supra* note 69 at 153.

93 *R v Jacko*, [1998] 1 CNLR 164 (Ont CJ).

94 *Ibid* at para 76.

95 *Ibid* at paras 76-77.

96 *Ibid* at para 77.

97 *Ibid* at para 52.

98 *Ibid* at para 75.

99 (1993), 20 CR (4th) 246 (Alta QB).

100 *Ibid* at paras 6-11.

101 *Ibid* at para 6.

that “[i]t is in the context of th[is] history that the plea of self-defence is raised,”¹⁰² before ultimately denying her claim.

The new section 34 requires judges and juries to engage in a *Lavallee*-style contextual analysis of all self-defence claims. This is the type of analysis that feminist law reformers have been recommending for more than 30 years. While case law under the new provision remains sparse, the jurisprudence suggests that judges are applying self-defence in a manner tailored to the context of the case.¹⁰³ Courts should continue to build upon this practice.

Lavallee gives us a sense of what a contextual approach to self-defence might look like in cases involving battered women. But it is worth asking what it means, more broadly, to say that the new section 34 requires the trier of fact to consider context. After all, most legal standards permit or even require the trier of fact to consider context.¹⁰⁴ Does it simply mean that the trier of fact must consider the factors enumerated in section 34(2)? Or does the new section mandate something more?

In an insightful paper about how Wilson J understood context in her analysis of criminal defences, Parkes and Grant explain that Wilson J conceptualized context as being related to our constitutional commitment to equality.¹⁰⁵ In its most robust form, a contextual analysis underpinned by a commitment to equality requires triers of fact to consider the systemic barriers that equality-seeking groups may face in invoking self-defence. It also recognizes that there may be a disparity between the trier of fact’s expectations about how an individual should respond to threatening action and the choices available to an accused.¹⁰⁶ In most self-defence cases, then, “the relevant circumstances of the person”¹⁰⁷ will include his or her gender, race, sexual orientation and abilities, as well as other factors that flow from the accused’s social location. As Sheehy explains, writing in the

¹⁰² *Ibid* at para 11. Technically, the Court held that it was unnecessary to determine the relevance of these factors: see para 14.

¹⁰³ See e.g. *R v IAOS*, 2013 BCPC 166, [2013] BCCJ No 1418 (QL); *R v Heaton*, 2013 ABPC 266, [2013] AJ No 1169 (QL).

¹⁰⁴ Grant and Parkes, *supra* note 69 at 153: “It can be argued that, in all areas including criminal law, judging involves choosing to consider some contextual or explanatory factors over others. Therefore, the question becomes *what sort of* context is relevant rather than *whether* context is relevant.”

¹⁰⁵ Grant and Parkes, *ibid* at 154. See also Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 21; Cunliffe testimony, *supra* note 16.

¹⁰⁶ *Lavallee*, *supra* note 2; Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 5; Grant and Parkes, *supra* note 69 at 160.

¹⁰⁷ *Criminal Code*, *supra* note 11, s 34(2).

context of battered women, these factors must be considered for courts to make “a realistic assessment of [an accused’s] options.”¹⁰⁸

It is sometimes argued that the excessive “subjectivization” of an objective standard will undermine the rationale behind adopting an objective test.¹⁰⁹ Justice Ratushny articulated this tension in the *Self-Defence Review Final Report* in the following manner:

If the objective inquiry is to be a meaningful one, it must be more limited than the subjective inquiry. In other words, if all the defendant’s characteristics were part of the objective branch of the defence, it would cease to be objective. It would no longer serve as a standard against which to measure the defendant’s actions but would simply be a mirror of the defendant herself. On the other hand, the objective inquiry should not be artificial or sterile. Clearly, there is a great deal about the defender and her circumstances that is relevant to the reasonableness of her beliefs and conduct. This is the lesson of *Lavallee*.¹¹⁰

Of course, objective standards must be grounded in objective criteria. At the same time, a strict approach to assessing reasonableness can result in valid self-defence claims being denied.¹¹¹ The self-defence inquiry should therefore focus on the accused’s actual options.¹¹² For example, it might not be reasonable to expect individuals from over-policed communities who routinely experience discrimination in the application of the criminal law to go to police rather than exercise self-help when faced with a dangerous situation.¹¹³ An Aboriginal woman on reserve with extremely limited access to resources and services cannot be expected to take extraordinary steps before acting in self-defence.¹¹⁴ Self-defence cannot be

¹⁰⁸ Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 5 [emphasis added]. I will use this language throughout.

¹⁰⁹ On “subjectivizing self-defence,” see Sheehy, *Women’s Law of Self-Defence*, *ibid* at 21-24; Ratushny, *supra* note 18 at 79. See also *R v Beatty*, 2008 SCC 5, 1 SCR 49.

¹¹⁰ Ratushny, *ibid*.

¹¹¹ *Feminist Review of Criminal Law*, *supra* note 28; Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 28.

¹¹² Sheehy, *Women’s Law of Self-Defence*, *ibid* at 5; Grant and Parkes, *supra* note 69; Hester Lessard, “Equality and Access to Justice in the Work of Bertha Wilson” (1992) 15 Dal LJ 35.

¹¹³ Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 21, citing Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Toronto: Carswell, 1994) at 6-56.

¹¹⁴ Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) at 141-43 [Sheehy, *Defending Battered Women*]; see also *Eyapaise*, *supra* note 99.

modelled on a naïve view of how the police treat racialized minorities or of the effects of colonialism on Indigenous people.¹¹⁵

Grant and Parkes note that taking context into account may also result in courts interpreting legal standards differently than they might otherwise.¹¹⁶ As Hester Lessard explains,

[One of the] consequence[s] of using a contextualized methodology is that it transforms the way we define legal issues. It does not simply correct an imbalance by adding some more voices to the debate over whose context should count the most in a particular legal dispute. Rather it changes the content of debate and the nature of the debate's resolution. It goes beyond being "just method" to the extent that it changes how we understand what is happening in a legal dispute.¹¹⁷

This is what occurred in *Lavallee*.¹¹⁸ There, the Court recognized that the existing interpretation of self-defence needed to be altered to better take account of women's experiences. This way of understanding context has important implications for the new law of self-defence. Courts must make an effort to interpret the new law in a way that makes self-defence available to all individuals with a valid claim. They must interrogate the assumptions that undergird the law and not hesitate to use the right to equality to craft a law of self-defence that is fair to all.

Is the new section 34 likely to be interpreted and applied in a manner that upholds the goals of equality and non-discrimination? The feminist law reform efforts I have reviewed suggest that a factors-based approach should lead to a more just law of self-defence. On the other hand, strict adherence to the new law could dilute the robustness of the analysis mandated by *Lavallee*. Although the list of factors included in section 34(2) is not meant to be exhaustive, courts may treat it as more or less covering the range of relevant considerations.¹¹⁹ It will be important for counsel for battered women to continue to insist upon a deep, functional

¹¹⁵ Sheehy, *Defending Battered Women*, *ibid* at 127, 130-31; Rakhi Ruparelia, "Defending Battered Women on Trial by Elizabeth Sheehy: Voices in Response," panel discussion, University of Ottawa Faculty of Law, Ottawa, Ontario, 18 February 2014.

¹¹⁶ Grant and Parkes, *supra* note 69 at 160-61.

¹¹⁷ Lessard, *supra* note 112 at 61.

¹¹⁸ Grant and Parkes, *supra* note 69 at 160-61.

¹¹⁹ House of Commons, Standing Committee on Justice and Human, *Evidence*, No 19 (9 February 2012) online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5374446&Language=E&Mode=1>> (Eric Gottardi); House of Commons, Standing Committee on Justice and Human, *Evidence*, No 22 (28 February 2012) online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5408308&Language=E&Mode=1>> (Oliver Abergel).

approach to context. This means that a wider range of factors than those listed in s 34(2) will usually be relevant in assessing reasonableness.

More broadly, Gerry Ferguson and Benjamin Berger explain that “[w]hile a general reasonableness standard simplifies the defences of self-defence and defence of others, it also gives judges and juries a significant amount of unstructured discretion in determining what is ‘reasonable.’”¹²⁰ This unstructured discretion could be a positive or negative development for accused persons from equality-seeking groups. The trier of fact could rely on the open-endedness of the new provision to ensure that all relevant factors are considered in assessing an accused’s self-defence claim. This would require the trier of fact to adopt an anti-discrimination approach to self-defence, however, and there is no guarantee that a judge or jury will approach the case from such a perspective.¹²¹

When a judge hears a self-defence case, her reasons for decision must demonstrate that she has properly considered the factors set out in s 34(2).¹²² In theory, the writing of reasons can have a disciplining effect on judges, though the evidence on this point is inconclusive.¹²³ Guthie, Rachlinski and Wistrich suggest that writing reasons for decision can force judges out of an “intuitive” mode of reasoning into a more “deliberative” one, and that this may correct errors in reasoning.¹²⁴ This is important, they explain, because discriminatory views tend to spring from intuitive modes of thinking.¹²⁵ Judges, like jurors, do not always share the experiences of the individuals whose cases they are adjudicating. Deliberative reasoning is not straightforward, however.¹²⁶ As Guthie, Rachlinski and Wistrich put it, “[t]he intuitive approach to decision making is quick, effortless, and simple, while the deliberative approach to decision making is slow, effortful, and complex.”¹²⁷

¹²⁰ Gerry Ferguson and Benjamin L Berger, “Recent Developments in Canadian Criminal Law” (2013) 37 Crim LJ 315 at 321.

¹²¹ *Feminist Review of Criminal Law*, *supra* note 28; Sheehy, *Women’s Law of Self-Defence*, *supra* note 18 at 28; *R v Ryan*, 2013 SCC 3, 1 SCR 14 (factum of the interveners, CAEFS and LEAF).

¹²² Thank you to Benjamin Berger for pointing this out to me, and for encouraging me to think about how the law might operate differently depending on whether it is being applied by a judge or a jury.

¹²³ See *R v Sheppard*, 2002 SCC 26 at para 23, 1 SCR 869; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 39. See also Chris Guthrie, Jeffery Rachlinski and Andrew J Wistrich, “Blinking on the Bench: How Judges Decide Cases” (2007-2008) 93:1 Cornell L Rev 1 at 37-38.

¹²⁴ Guthie, Rachlinski and Wistrich, *ibid* at 31, 33.

¹²⁵ *Ibid* at 31.

¹²⁶ *Ibid* at 29.

¹²⁷ *Ibid*.

Guthie, Rachlinski and Wistrich suggest that “scripts, checklists and multi-factor tests”¹²⁸ can help advance the goal of deliberation. Parliament’s decision to adopt a list of factors to consider in assessing a self-defence claim could serve to structure a judge’s decision-making so that she properly considers the significance of context. Under the old regime, context could essentially be ignored or taken into account as a judge saw fit. Now, a judge would have to work to be acontextual in her approach.¹²⁹ Such an approach could also give rise to a successful appeal.

Even here, however, some concerns persist. As I noted above, a judge may simply run through the list of factors in section 34(2) without thinking seriously about which factors are actually germane to the accused’s case. Moreover, important factors could be left out of the analysis because they have not been specifically enumerated. In other words, the enumeration of factors could result in a less functional analysis.¹³⁰

On the whole, the approach adopted by Parliament seems to represent a useful middle ground. It would have been preferable for other contextual elements, especially race, to be specifically enumerated. The language of the new section 34 does allow judges to embark on a contextual inquiry without unduly constraining them or applying a single standard across individuals, however. The list of factors may structure the judge’s written reasons in a manner that is likely to produce more contextualized judgments.

Where a jury hears a self-defence case, the focus shifts to the trial judge’s jury instructions. Judges have not always done a good job of charging juries on the contextual factors relevant to an accused’s defence,

¹²⁸ *Ibid* at 40.

¹²⁹ There is a deep body of literature that questions the extent to which judges are actually guided by legal rules; see e.g. Roscoe Pound, “The Call for a Realist Jurisprudence” (1931) 44:5 *Harv L Rev* 706; Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921). See also Howard Gillman, “What’s Law Got to Do with It? Judicial Behaviouralists Test the ‘Legal Model’ of Judicial Decision Making” (2001) 26:2 *Law and Soc Inquiry* 465 at 496, citing Pound, *ibid* (review of Harold J Spaeth and Jeffrey A Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (New York: Cambridge University Press, 1999)).

¹³⁰ Guthie, Rachlinski and Wistrich, *supra* note 123 at 41:

When judges excessively rely on multifactor tests, as well as on scripts and checklists, there is a risk of mechanical jurisprudence. Excessive rigidity may unduly restrict judges from tailoring their analysis to the case. Further, multifactor or balancing tests may be indeterminate, and applying or weighing some of the factors may require intuition. Finally, judges sometimes employ heuristics to circumvent the multifactor analysis by relying on just a few of the factors in making their decision, thereby diminishing the value of the test as a corrective device.

partly because of their view that juries will naturally consider these factors.¹³¹ This is troubling given that many accused come from marginalized or vulnerable groups and triers of fact may not share their experiences.¹³² Jurors must understand the accused's circumstances to properly assess his or her self-defence claim. This requires stronger submissions from counsel on the significance of context and stronger charges from judges.

In practice, taking context seriously would mean that in each case, the trial judge would consciously identify the relevant contextual elements that frame the self-defence claim. She would ask herself, "What circumstances are relevant in assessing this self-defence claim? What systemic factors are at play?" Once she had considered these questions, she would develop a jury charge that clearly communicated the importance of this context to the jury. Rather than leaving these matters to the "collective good sense of the jury,"¹³³ the court would recognize that without proper prompting from trial judges, juries might not adequately consider context, particularly where systemic issues are concerned.

To say that context matters is not to say that experts need necessarily be called to establish the significance of particular contextual elements. Feminist scholarship has demonstrated the problems associated with requiring these elements to be proven using expert evidence.¹³⁴ The use of experts can signal (incorrectly) to a jury that an accused's situation is unique or "pathological" and therefore deserving of a special explanation.¹³⁵ It will usually be sufficient for the parties to lead evidence of context and to make legal submissions on the significance of this evidence, and for judges to charge juries accordingly.

Even a strong jury charge may not be enough, however. While Sheehy notes that "Canadian jurors given liberal access to the woman's story ...

¹³¹ *Recodifying Criminal Law*, *supra* note 23 at 35; *Hill*, *supra* note 92 at 331; Grant and Parkes, *supra* note 69 at 156-57.

¹³² See e.g. Report of the Independent Review Conducted by The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (February 2013) online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/pdf/First_Nations_Representation_Ontario_Juries.pdf> at para 133.

¹³³ *Hill*, *supra* note 92 at 331 (internal quotation marks removed).

¹³⁴ Sheehy, *Women's Law of Self-Defence*, *supra* note 18 at 6, citing Celia Wells, "Battered Woman Syndrome and Defences to Homicide: Where Now?" (1994) 14 LS 266 at 274-75, citing Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16:6 Crim L Rev 387; Sheehy, *Defending Battered Women*, *supra* note 114 at 312-13.

¹³⁵ Sheehy, *Defending Battered Women*, *ibid*; Grant, *supra* note 82.

are often quite fair with battered women,”¹³⁶ bias and discrimination persist in the jury pool.¹³⁷ It is at least conceivable that under the new regime, juries will reach decisions that are less, and not more, fair to accused persons from marginalized groups. Jurors tend to conceptualize cases by reference to their own personal “experiences”.¹³⁸ This means that it can be difficult for them to recognize the inherent limitations in their thinking. Even where jurors are told that they must not engage in biased or acontextual reasoning in relation to the accused’s case, it may take considerable intellectual effort for a juror to dislodge or “correct” this way of thinking.¹³⁹ Wegener *et al* suggest that individuals have different levels of “motivation” when it comes to correcting bias.¹⁴⁰ Thus, while the research suggests that very direct instructions on this point can dislodge some biased thinking,¹⁴¹ the eradication of these views cannot be guaranteed.

Jurors may also ignore explicit jury instructions if they conflict with their view of how a case should be resolved. In such cases, there is a difference between the juror’s “personal” or intuitive sense of the merits of a case and its “legally relevant ... characteristics.”¹⁴² This aspect of jury decision-making can disadvantage battered women and other marginalized groups. While the legal framework within which battered women’s self-defence cases is adjudicated does not require that a woman be facing an “uplifted knife,”¹⁴³ jurors may still retain some scepticism about a self-defence case that does not involve an obvious and immediate threat of

¹³⁶ Sheehy, *Defending Battered Women*, *ibid* at 2; see also Cheryl A Terrance, Kimberly Matheson, and Nicholas P Spanos, “Effects of Judicial Instructions and Case Characteristics in a Mock Jury Trial of Battered Women Who Kill” (2000) 24(2) *Law and Human Behaviour* 207.

¹³⁷ *R v Williams*, [1998] 1 SCR 1128; *R v Parks* (1993), 84 CCC (3d) 353 (Ont CA); Cynthia Peterson, “Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process” (1993) 38 *McGill L J* 147; Duane T Wegener *et al*, “Flexible Corrections of Juror Judgments: Implications for Jury Instructions” (2000) 6:3 *Psychology, Public Policy and Law* 629.

¹³⁸ Jacqueline Horan, *Juries in the 21st Century* (Sydney: The Federation Press, 2012) at 56.

¹³⁹ Wegener *et al*, *supra* note 137 at 632, 635.

¹⁴⁰ *Ibid* at 637.

¹⁴¹ *Ibid*.

¹⁴² Cortney A Franklin and Noelle E Fearn, “Gender, Race and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?” (2008) 36 *J Crim J* 279 at 280; Wegener *et al*, *supra* note 137 at 635; Jeffrey E Pfeifer and James R P Ogloff, “Mock Juror Ratings of Guilt in Canada: Modern Racism and Ethnic Heritage” (2003) 31:3 *Soc Behaviour and Personality* 301 at 309.

¹⁴³ *Lavallee*, *supra* note 2 at 876.

violence.¹⁴⁴ In other words, a battered woman's self-defence claim may be more likely to succeed when it has the trappings of a traditional self-defence case.¹⁴⁵

It is not easy to craft a law of self-defence that meaningfully addresses these concerns. The simplification in the law should reduce misunderstanding.¹⁴⁶ This is likely to benefit at least some accused by decreasing the likelihood that jurors will abandon the more difficult task of applying the law and reach a decision based on (potentially biased) instinct.¹⁴⁷ Beyond this, we must confront the very mixed record of jury instructions. The legal system places a great deal of emphasis on jury instructions, despite evidence that jurors do not always comply with them.¹⁴⁸ On some level, the problem of juries flouting jury instructions is intractable. At the same time, Horan and others have argued that at least marginal improvements in the jurors' compliance with jury instructions are possible if judges develop more effective strategies for instructing them. The effectiveness of jury instructions can depend on a number of factors, such as when the instructions are given,¹⁴⁹ whether jurors are given time to absorb the instructions,¹⁵⁰ and whether and how often the instructions are repeated.¹⁵¹

Some authors also suggest that structured legal tests can reduce undesirable juror behaviour.¹⁵² A study by Pfeifer and Ogloff involving mock jurors found that "Canadian participants, like their US counterparts, were unable (or unwilling) to express their prejudicial attitudes when specifically asked to evaluate the defendant's guilt based on [a] legal standard because of the lack of situational ambiguity." On the other hand, "when simply asked whether they believed the defendant to be guilty (i.e. Subjective Guilt Rating), participants had no specific standard to guide them in their determination of the defendant's guilt and consequently may have been guided by their prejudices."¹⁵³ On Pfeifer and Ogloff's account,

¹⁴⁴ Terrance, Matheson and Spanos, *supra* note 136 at 210.

¹⁴⁵ *Ibid* at 212: "The specific circumstances under which a woman kills her spouse plays an important role in determining the outcome of the trial. In the literature, it is clear that women have a greater chance of acquittal when their self-defensive actions took place while an attack by their abuser was underway."

¹⁴⁶ This was one of the stated goals of the amendments; see Nicholson testimony, *supra* note 5.

¹⁴⁷ Wegener *et al*, *supra* note 137; Pfeifer and Ogloff, *supra* note 142 at 309.

¹⁴⁸ Wegener *et al*, *ibid* at 630; Horan, *supra* note 138 at 187.

¹⁴⁹ Wegener *et al*, *ibid* at 648; Horan, *ibid*.

¹⁵⁰ Wegener *et al*, *ibid* at 649.

¹⁵¹ Horan, *supra* note 138.

¹⁵² Pfeifer and Ogloff, *supra* note 142 at 309.

¹⁵³ *Ibid*.

then, *specific standards to guide jurors* can reduce the space within which de-contextualized or biased decision-making takes place. This suggests that a move to a more open-ended approach to self-defence may be a negative development.

An abundance of structure is not necessarily the answer, however. To take just one example, sentencing guidelines have been adopted in parts of the United States to reduce the possibility that jurors (who in the United States participate in the sentencing process) will impose harsher sentences on marginalized offenders.¹⁵⁴ One of the drawbacks of this more structured approach has been that it does not always allow justice to be done in individual cases.¹⁵⁵ In fact, it can sometimes harm the very groups it is intended to benefit. As Franklin and Fearn explain, “[r]esearch suggests that recent efforts aimed at equalizing treatment across male and female offending populations have resulted in unintended negative consequences where women are worse off than they were prior to these equality-motivated legislative efforts.”¹⁵⁶

The new self-defence provision seems to strike a middle ground. On the one hand, it is less structured than the old provision. This allows the trier of fact to apply the self-defence analysis in a manner that is tailored to the context of the case. It does not proceed on the false assumption that the best approach is to treat all self-defence cases the same way. At the same time, the provision does contain some degree of structure, in the form of the three basic requirements contained in section 34(a) and the list of factors contained in section 34(b). The presence of these factors reduces the scope for acontextual reasoning. The legal requirements established by the section should explicitly turn the juror’s mind to gender and other factors in a productive manner rather than leaving space for discriminatory, intuition-based reasoning.

In sum, where both judges and juries are concerned, there are no easy answers. It appears as though the new self-defence provision does as good a job as possible at preventing discriminatory modes of reasoning while at the same time giving judges and jurors a solid legal framework within which to deliberate.

5. Conclusion: A More Progressive Law of Self-Defence

In this paper I have suggested that the new law of self-defence aligns closely with feminist law reform efforts and with the Supreme Court’s

¹⁵⁴ Franklin and Fearn, *supra* note 142 at 287 n 2.

¹⁵⁵ *Ibid* at 286.

¹⁵⁶ *Ibid* at 287.

decision in *Lavallee*. While there is no easy way to craft a law of self-defence that will do justice in all cases, the factors-based analysis that feminist law reformers have advocated for and that Parliament has adopted stands as good a chance as any of realizing the goals of equality and non-discrimination in the application of self-defence. Law is a blunt tool for doing justice. No legal test or standard can fully eradicate deeply flawed ways of thinking about vulnerable and marginalized people; deeper social change is required to accomplish this goal. Within its limits, however, the new provision seems to have the potential to bring about positive changes to the law of self-defence.