The Legal Response to Women Co-offenders: Recognizing Intimate Partner Violence and Coercive Control in Violent Co-offending Cases Involving Women and their Intimate Partners

by

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ABSTRACT

The purpose of this research was to explore the personal characteristics of the women co-accused in cases involving intimate partnership dynamics (i.e., IPV/coercive control). Secondly, the study aimed to explore the statutory and judicial responses to women co-accused of culpable homicide with their intimate partner in Canada. The goal of this research is to ensure just and proportionate treatment of women in the criminal justice system. A mixed-method approach was applied. Legal databases were searched using broad search terms to find Canadian cases of women co-accused of culpable homicide with their intimate partner from 1995 to 2021. Cases for which trial and sentencing decisions were available were analyzed. Analysis included reporting on demographic data, conducting a thematic analysis, and a case study approach. The results revealed that women's involvement in co-accused cases tends to be secondary versus being equally involved or acting as the principal offender. In most cases, however, they are sentenced similarly to their co-accused. The fact that these women often are convicted of the same crime and sentenced similarly to their co-accused may be attributed to a variety of reasons, including the narrow defences available in Canadian criminal law to women in coercive relationships, the legislative treatment imposed for secondary liability, mandatory minimum sentences and the challenges judges and other legal actors have in understanding various types of coercion and their impact on women. Consistent with previous research, the thematic analysis found that these women are most likely to be perceived by the judge as a "bad" woman, followed by a "sad" woman. Only a small proportion of cases mentioned intimate partner violence between the co-accused. In these cases, the defence of duress was rejected at trial and the judges did not believe that the violence endured mitigated the culpability of these women for the purpose of sentencing. This research identified how the legal and judicial system responds to women who are co-accused of culpable homicide with their intimate partner. The findings have important implications for sentencing and law reform and highlight a need to bring the legal processes in sync with psychological factors.

GLOSSARY

The following definitions and the meaning attributed to these words are placed in the context of the current dissertation. These words may in fact have other meanings, but the meanings are presented in how they are used for the purpose of the current research.

Case study: an in-depth investigation of a criminal case to understand the background, relationships, and the judicial response.

Coercive control (Stark, 2007): a pattern of behaviour such as intimidation, isolation, and control that is used almost exclusively by men to dominate and control individual women.

Co-accused: two or more individuals accused of an offence.

Co-offending couple: two accused that are in an intimate relationship at the time of a criminal offence.

Criminal Code of Canada (CCC): a statute that codifies criminal offences and procedures in Canada.

Criminal defences: justifications or excuses that at law remove the criminal liability of someone who has committed an otherwise illegal act.

Culpable homicide (s. 222 CCC): causing death to another person with the intention to kill or with criminal negligence (i.e., murder, manslaughter, infanticide).

Criminal justice system: system of law enforcement that is involved with apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offences.

Culpable: to be legally responsible for a criminal act.

Intersectionality (Crenshaw, 1989): includes identification of multiple forms of inequality that in combination can create increasingly negative effects for an individual or group.

Intimate partner: a person with whom the individual has a close personal relationship (i.e., married, common-law, dating, or spouse).

Intimate partner violence (IPV): physical, sexual, or psychological abuse of a person by their partner or spouse.

Judiciary: the judicial authorities of a country (i.e., judges).

Judicial discretion: the power judges hold and their ability to use their individual discretion to make legal decisions.

Judicial system: the system of courts that interprets, defends, and applies the law in legal cases.

Legal system: is a procedure or process for interpreting and enforcing the law.

Man/men: socially constructed norms, behaviours, and roles associated with being an adult man (vs. biological differences).

Mandatory minimum penalty (MMP): a statutorily imposed sentencing limit which requires judges to impose a specific type and minimum length of sentence to an offender when found guilty.

Mental disorder (DSM5; APA, 2013): a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.

Moral blameworthiness (Berger, 2001): the state of mind of someone who commits an offence required at law in order for someone to be punished. Those who are morally blameworthy should be punished and that if an individual ought to be punished, the punishment should reflect their degree of blameworthiness.

Offender: an individual who is found guilty of committing an illegal act.

Party to an offence (s. 21 CCC): (1) Everyone is a party to an offence who (a) actually commits it (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it.

Poverty: a condition where a person or family is unable to maintain a modest standard of living in their community.

Secondary liability: is a type of liability where the individual aided, abetted or otherwise was involved in a crime. It is used to distinguish between those who are principals (commit the crime) and those who in some way assist someone in its commission.

Sentencing: criminal procedure that occurs after an accused pleads or is found guilty of an offence and then the judge is charged with the responsibility to determine an appropriate penalty to impose on the offender.

Substantive equality (Sangiuliano, 2015): a central aspect of human rights law that focuses on equal opportunities, as well as equitable outcomes, by promoting recognition and response to those who are disadvantaged and/or marginalized.

Thematic analysis: a qualitative method that involves reading through a data set and identifying patterns of meaning that then form overarching themes.

Victimization: the state or process of being harmed by cruel or unjust treatment.

Woman/women: socially constructed norms, behaviours, and roles associated with being an adult woman (vs. biological differences).

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CHAPTER ONE: INTRODUCTION

This dissertation investigated the judicial and wider legal system's response to women members of co-offending couples where at least one member was charged with murder. For the purposes of the current study, a co-offending couple referred to a woman and man co-accused in an intimate relationship at the time they were co-accused of an offence. This research focused on the women members given that there is some evidence to suggest that women may be coerced into the commission of such offences by more powerful, possibly abusive, men partners (Barlow, 2016).

This research intentionally used gender (i.e., women/men) versus biological sex (female/male), as it intended to focus on the social context in which a woman's 'choice' to offend is made, rather than biological differences. Gender is a "multidimensional construct that refers to the different roles, responsibilities, limitations, and experiences provided to an individual based on the presenting sex/gender" (p. 20; Johnson & Repta, 2012). Gender is socially constructed, meaning that gendered ideas can differ, and change based on culture and time periods. In order to fully appreciate the numerous perspectives in which gender is conceptualized, it is important to mention that gender can include institutionalized gender (shaped and responded to by institutions), gender as a constrained choice (individual "choices" impacted by other biological and social influences), gender roles (norms or rules that impact interests, responsibilities, opportunities, limitations, and behaviours), gender identity (how one views themselves in relation to gender), gender relations (how relationships are directed and how opportunities can be restricted or extended by gendered expectations), and gender as a performance (how gender is reflected in an individual's style and mannerisms; Johnson & Repta, 2012).

The current study explored and reported on gender using the abovementioned conceptualizations. It intended to recognize the unique gender-differences between women and men who co-offend (risk, pathways, etc.) so as to bring more awareness to the judicial and wider legal system. Alongside viewing gender as an essential component to better understand women who offend with their intimate partner, this study also took an intersectional lens, which will be discussed in detail in Chapter Three. Women involved in the criminal justice system can present with multiple intersectional factors such as, past/current victimization, mental disorders, race, and poverty, which can create multiple forms of structural oppression and in turn may also mitigate culpability and moral blameworthiness. This dissertation explored the circumstances that impact a woman's 'choice' to violently offend (i.e., murder or manslaughter) with an intimate partner, and was particularly interested in how the judiciary describes these women and their circumstances. There is previous research to suggest that women who offend violently tend to be depicted in a way that perpetuates harmful gendered stereotypes that can impact how they are viewed and treated throughout their involvement in the criminal justice process (see Easteal et al., 2015 & Weare, 2017). The current study also intentionally used the term "offender" to refer to individuals who commit a criminal offence. The debate around using person-centered language to avoid reinforcing stigmatization was considered and the term offender was chosen to be consistent with previous literature and to be congruent with Correctional Services of Canada's terminology (see Cox, 2020).

This dissertation focused on women-men partnerships (vs. men-men or women-women) and used the coercive control model proposed by Stark (2013). Stark's model

argues that coercive control is gendered and, specifically, that men are able to dominate and control women, deriving from gendered inequalities. There also is research that indicates that a woman defendant in an intimate relationship with a man co-accused is more prone to manipulation and coercion (Welle & Falkin, 2000). Jones (2008) explored the relationship between women and their co-offenders and found that there was a high degree of coercion (mental and physical) exercised by the men. Despite evidence of coercion (i.e., direct threat or use of physical violence to influence participation in an offence) in co-offending couples, there are significant differences between the legal and psychological understandings of coercion. If a woman is under coercive control or pressured to commit offences with an intimate partner, she can be met with various sources of unfairness in how she is treated throughout the criminal process (i.e., charges laid, at trial, and sentencing). These factors often intersect and interact to create a very problematic regime.

There are two independent points in the criminal process that will be explored in this dissertation. These include: 1) issues of liability at trial or in entering a guilty plea (e.g., the narrow defences available for these women, concerns with party liability); and 2) problems with the level of blameworthiness at sentencing and punishment (e.g., the impact of mandatory minimum penalties on these offences).

First, there are narrow defences available to women in these circumstances. The legal definition of coercion is outdated and does not account for all circumstances whereby individuals can be coerced. The current criminal law does not view coercion as excusing the offence unless there is an extreme and explicit use of coercion (e.g., the offender has a gun to the person's head). The psychological literature confirms that

coercive control is common in cases of intimate partner violence in which an abusive person gains power and control over another person (Barlow, 2016; Lehman, Pillai, & Simmons, 2012; Stark, 2007). Coercive control can result in subordination (i.e., subjection to another person's control), which may limit a woman's agency when committing offences with their partner (Stark, 2019). It appears that the legal understanding of coercion fails to acknowledge and account for coercive control. Rather, the impact of coercion is only considered at the exact time of a criminal offence and must be explicit (i.e., direct use of force or verbal threat; Welle & Falkin, 2000) and does not account for a woman who may be experiencing subordination. In cases of women who co-offend with their intimate partner, the defence of duress is often attempted but seldom successful because it does not account for other types of coercion (e.g., mental/position of subordination). If there was a more sophisticated defence available that was responsive to psychological research, and if the legal definition of coercion was more in touch with the psychological advances of defining and understanding coercion, it may prevent some women from being found guilty of an offence at trial.

Secondly, there are concerns with party liability for these women. A party is anybody who is involved in any way - as a principal or secondary party. Party liability relates to the notion that once someone is found guilty as a party to an offence, they are guilty of the same offence regardless of how small their role was. Intuitively, it may seem that their culpability is lower as a secondary party to the offence but, nonetheless, they are still guilty of the same offence. The Criminal Code of Canada (CCC) clearly states, under section 21, that co-offending couples are guilty of the same offence, regardless of the role each played in the commission of the offence. A principal offender is the person

who commits the offence, and the secondary party can be of multiple types, the more common ones being aiding or abetting under section 21. The aider or abettor does not require the same type of mens rea ("guilty mind") to commit the offence as the principal offender but, rather, does have to demonstrate the intent to help while knowing or being reckless about the offence the principal is committing. So, to be clear, it is not always that the mens rea is lesser in these cases (although in many cases it may be). The issue is that they have a reduced role (actus reus or "guilty act") in the commission of the offence and despite this, they are still charged (and potentially found guilty) of the same offence as the principal offender. In other words, a woman who is found guilty of merely assisting or encouraging an offence, with knowledge of the type of offence that will be committed, will be sentenced for the same offence as the principal offender.

An additional issue for women co-accused arises at the sentencing stage. For certain crimes the Canadian Criminal Code enforces mandatory minimum penalties. Mandatory minimum penalties are legislative and refer to a minimum penalty that the judge must impose on someone who is found guilty of an offence that carries a mandatory minimum penalty. The mandatory minimum penalty for murder is life which precludes any exercise of judicial discretion. Once the woman is found guilty of murder as a secondary party, the sentencing judge will still have to impose a life sentence regardless of the role she played in the murder or other factors that may impact her moral blameworthiness. "Moral blameworthiness" is a legal term used to describe one of the core principles of Canadian criminal law: those who are morally blameworthy should be punished and that if an individual ought to be punished, the punishment should reflect their degree of blameworthiness (Berger, 2001). When convicted of murder as a

secondary party, although her degree of participation in the offence may be less than that of the man co-accomplice, the woman co-accused will still receive a life sentence because of the operation of mandatory minimum sentences. At this stage, the judge cannot assess the role of coercion and how that impacts moral blameworthiness. Alternatively, if the woman is convicted of manslaughter (for which there is no life sentence mandatory minimum) or, where the woman is convicted of second-degree murder (in which case the judge has some discretion regarding the period of time the offender must spend in custody before they can apply for release to community), the judge is able to exercise some discretion. Judicial discretion, however, may be limited by lack of knowledge and/or adequate understanding, with which to accurately assess and reflect on the level of coercion experienced by the woman, in imposing the sentence.

Given that women are more vulnerable to coercive control (Stark, 2013), it is possible that women in co-offending couples are over-incarcerated (i.e., imprisoned without having a sufficient degree of blameworthiness and/or for too long; Sheehy, 2001). In cases of women who co-offend with a more powerful and possibly abusive intimate partner, the legal system does not currently consider the underlying psychological control tactics that may influence her participation in an offence. To fully understand women co-offenders, the entire intimate partnership needs to be considered rather than viewing the offence as an isolated incident (Barlow, 2016). If this were to occur, it might mitigate the culpability of some women and could impel the legal system to adopt a more nuanced approach to women co-offenders.

To date, no studies have examined this subset of women offenders; to do so, required an interdisciplinary approach and careful consideration of relevant psychological

factors (e.g., women's offending behaviour, intimate partner violence, coercive control) and legal factors (e.g., defences available, party liability, mandatory minimum penalties, and judicial perceptions). The purpose of this dissertation was to better understand the circumstances that lead women to co-offend violently (i.e., culpable homicide) with their intimate partner and how the judicial and wider legal system responded. In the subset of cases that met the definition of coercive control as outlined in the psychological literature, the dissertation examined how the judiciary responded, and assessed for any potential discrepancy between what psychology defines as coercion and how the judicial system responded. The dissertation advances the literature by exploring and reporting on how the judiciary perceived and reported on these women and supplements other research that suggests that women who are accused of violent offences are viewed in a harmful stereotypical way, which may impact how they are treated in the criminal justice process and how they are viewed by others. The recommendations are informed by sentencing and law reform with the goal to bring the legal processes in sync with psychological advancements of understanding coercive control. These recommendations uphold legal values such as, not punishing the morally innocent (*R v Vaillancourt*, 1987; Stuart & Coughlan, 2018), proportionality in sentencing (Mason, 2001), and promote offenders' rehabilitation (Corrections and Conditional Release Act, 1998). This also advances the interests and well-being of women offenders who are often marginalized women, who may need support more than punishment (Sheehy & McIntyre, 2006).

The roadmap for this dissertation is as follows. The next chapter (Chapter Two) will highlight two areas of the criminal process where legal issues arise for women co-accused of culpable homicide with their intimate partner. These legal concerns include

problems surrounding liability at trial or in entering a guilty plea (e.g., the narrow defences available for these women, the potential disproportionate impact resulting from the Canadian legal regime for party liability) and problems with the level of blameworthiness at sentencing and punishment (e.g., the impact of mandatory minimum penalties on these offences). An understanding of the criminal processes at trial and sentencing and how the law is applied is an essential component to this dissertation and was intentionally placed following the introduction because other factors, as well as the cases addressed in the dissertation, will make little sense without a solid understanding of the legal underpinnings and how the criminal law is applied to women and individuals co-accused of murder or manslaughter. The legal response is also central to the analysis in the dissertation as well as the proposed recommendations that will follow.

Chapter Three will describe the theoretical foundation that directed the current study, which is anchored in notions of substantive equality and intersectionality. This chapter builds on the legal response and highlights concerns related to sentencing and how the current regime may not be appropriately responding to the unique and individualized factors of women who become involved in the criminal justice system. It addresses how formal equality (same treatment for everyone) versus substantive equality is guiding criminal law analysis in practice, in a manner that is highly problematic as it perpetuates disadvantage and marginalization. This chapter specifically outlines common intersectional factors that women experience and argues that these overlapping factors create a unique system of disadvantage and marginalization for women accused or convicted of serious offences, which may not be appropriately recognized by the current legal response.

Chapter Four is a literature review related to women involved in the criminal justice system and women who commit violent co-offences. This chapter outlines findings from previous literature and helps provide context to the criminal cases (of women co-accused of murder or manslaughter with their intimate partner) that this dissertation will explore. An important element of this chapter is the research surrounding how women who offend are perceived and described by the media and judiciary as well as the tactics of coercive control that are common in cases of intimate partner violence. These two areas of research are central to how the thematic analysis and case studies were approached in the dissertation.

Following this, Chapter Five will outline the methodology used in the current study, which includes the gathering of trial and sentencing decisions for relevant cases and the use of a thematic analysis to report on judicial perceptions of women in the sample, as well as the use of a case study approach to explore cases of intimate partner violence and the legal and judicial response. Chapter Six will report on the findings from the descriptive statistics. Chapter Seven will report on the findings from the thematic analysis, and Chapter Eight will outline the three case studies. Lastly, Chapter Nine will conclude by linking the research findings to previous research and will propose recommendations for legal reform.

CHAPTER TWO: THE LEGAL RESPONSE

Following a criminal charge, the judicial system has to determine whether someone is criminally liable; in plain terms, whether someone is responsible for breaking the law. If the individual is found guilty at trial, or if the individual charged with the offence pleads guilty and accepts responsibility, the individual will then proceed to sentencing. This chapter will outline liability issues for murder and manslaughter, including secondary liability and legal defences, followed by an introduction to sentencing and sentencing considerations related to culpable homicide.

Liability for Murder & Manslaughter

In co-offending cases, it can be difficult to determine the relative contribution of each party to the offence (Morrissey, 2003) and the Criminal Code does not make a distinction. The Criminal Code at section 21(1)(b) and (c) indicates that individuals who "assist the person committing the actual criminal offence through aiding or abetting are guilty parties of the same criminal offence as the person who commits the crime". In more detail, 'aid' means to help or assist the actor and 'abet' means to encourage, instigate, or promote the crime to occur. There is a high degree of "mens rea" (i.e., criminal intent) that is required in order to be found guilty of being a party to an offence, which has to be proven by the Crown. The two requirements for aiding include: "(1) the intent to assist the principal offender and (2) knowledge of the type but not the exact nature of the crime committed" (Roach, 2018; p. 170). In these instances, it does not mean that the aider or abettor must have the same degree of mens rea or have the same desire to commit the offence as the principal offender (Roach, 2018). The question is whether the individual intended to assist the principal offender. In other words, the

offender typically had to act with guilty intent or knowledge such that they intentionally and knowingly aided or abetted the offence. As seen in *R v Briscoe* (2010) 1 SCR 411, a co-offender does not need to plan the offence in the same way as the principal offender, but intentionally assisting (or supporting in any way) others is a sufficient level of fault to be held responsible (Roach, 2018). Moreover, the act of being present at the time of an offence, is in itself, not enough to be held responsible unless there are other factors such as knowledge that the crime was going to occur. In some instances, 'failure to act', whereby a person refrains from doing anything, can result in being held responsible for an offence, if it aids another person to commit the offence (Roach, 2018).

The famous Colin Thatcher case [*R v Thatcher* (1987) 1 SCR 652] highlighted that there does not have to be a distinction between co-offenders; rather, an aider or abettor is held responsible for the same crime as the 'principal' offender (Roach, 2018). Holding a co-offender accountable for the same crime with all the consequences that follow (i.e., punishment) may seem harsh in some cases (due to their reduced participation); however, in some cases decreased participation can serve as a mitigating factor during sentencing. Judges have a responsibility to use their discretion to determine the level of culpability, considering many more factors than a finding of liability allows for at trial. These factors include the role the parties played in an offence (Roach, 2018). This becomes significant when the offence is subject to a mandatory minimum sentence, as is the case with murder (i.e., situations in which there is no judicial discretion at sentencing). The mandatory minimum sentence for first-degree murder is life with eligibility for parole set at twenty-five years (thus, no judicial discretion in setting the parole eligibility limit), whereas the mandatory minimum sentence for second-degree

murder is life with eligibility for parole ranging from ten to twenty-five years (very minimal discretion). This means that in murder cases the judge cannot consider the sometimes different roles played and how that influences the culpability of each party.

It is ethically problematic that, despite having a reduced level of participation, parties to an offence are held to the same degree of criminal liability in the sense of being found guilty of the same offence as the principal offender (Reed & Bohlander, 2016). It is especially problematic for women who co-offend violently with an intimate partner. There is a body of literature that has found that, generally speaking, women do not offend violently. When in the presence of a powerful, possibly abusive, man co-offender; however, they are more likely to offend violently and the motives for the offence are more likely to match the man's motivations (i.e., instrumental versus reactive-expressive) (Schwarts et al., 2015).

There are certain justifications and excuses that can be applied in the legal system when determining criminal liability at trial. If successfully argued, involvement in a crime may be justified or excused and the offender acquitted. For example, a woman who kills her abusive husband in an act of self-defence, if successfully argued, will be found not guilty and acquitted (i.e., free from criminal charge). Despite evidence that women may experience a lack of agency when committing murder with a coercive partner, the current defences available to women are too limited and restrictive to be successfully argued. Those defences are presented below.

In Canadian criminal law, a person's actions can be defended by offering justifications or excuses. A justification (e.g., self-defence) "challenges the wrongfulness of an action which technically constitutes a crime" (Roach, 2018; p. 355). In other words,

a justification is more focused on the action itself and why the individual was justified in their actions. A defence that excuses a crime (e.g., duress) is one that acknowledges the wrongful action but asserts in the circumstances the accused should not be punished for the crime (Roach, 2018). This section will examine two defences that are most relevant to this dissertation: self-defence and duress.

Self-defence (CCC, s. 34) and duress (CCC, s. 17) may be used when the accused was alleged to have faced external threats or pressures, which led to the commission of an offence (Roach, 2018). For example, self-defence can be argued when an individual intentionally kills another person to protect themself, and duress can be argued when someone commits a crime due to death threats. These defences are available even though the accused might have the actus reus (i.e., acted in a physically voluntary manner) and mens rea (i.e., knew what they were doing) and can result in an acquittal if successfully argued (Roach, 2018).

The Supreme Court established a modified objective standard for the defences of self-defence and duress which includes consideration of what a reasonable person with similar characteristics and experiences would do in a similar situation (Roach, 2018). The provisions in the Criminal Code that outline self-defence are notoriously complex. One legal scholar, Kent Roach, reported that the new section 34 pertaining to self-defence is more concise, however, the amendments are “less structured and predictable” than the old provisions (Roach 2018; p. 378). Although the basic elements for self-defence have remained the same: the accused must “perceive a threat and respond for the purposes of defending themselves or others and there must be a reasonable basis both for the accused perceptions of force and the accused response in the circumstances" (Roach, 2018; p.

379). The jury must determine if 1) there are reasonable grounds to believe that a force or threat of force was made, 2) the act was committed to defend self or others, and 3) the act was reasonable in the circumstances (Roach, 2018).

Excuses, like duress, do not normally involve a calculation of harms avoided versus harms inflicted, but rather, excuses account for the realistic human weaknesses (Roach, 2018). Duress has similar requirements to those noted above, including: 1) imminent peril or danger, 2) no reasonable legal alternative, and 3) proportionality between harm inflicted and harm avoided (Roach, 2018). In regard to the duress defence, section 17 of the Criminal Code indicates that it must be established that the threats were reasonably believed, have a close temporal connection between threat and crime, no safe alternative to escape, and proportionality between threats faced and crime committed (Roach, 2018). It should be noted that section 17 only applies to principal offenders and cannot be invoked for violent crimes; however, the common law defence of duress can be attempted for secondary liability.

The defence of duress for secondary liability includes: 1) a threat of death of serious bodily harm to the accused; 2) a belief on the part of the accused that the threat could be carried out; 3) the threat could cause a reasonable person in the accused's position to do as she did; 4) the accused had no safe avenue of escape; and 5) the accused committed the offence only because of the threats of death or serious bodily harm. *R v Ryan* (2013) 1 SCR 14 clarified the defence by stating "the defence of duress is available when a person commits an offence while under compulsion of a threat made for the purposes of compelling him or her to commit it" (para. 2). In *R v Ryan*, the Supreme Court identified that cases of duress include instances where an individual receives a

message (directly or indirectly), “commit the offence or be assaulted” (para 2). In *R v Keller* (1998) ABCA 357 the Alberta Court of Appeal stated, “the question is whether a reasonable person, with similar history, personal characteristics, abilities, capacities, and human frailties as the accused, would, in the particular circumstances, reasonably believe that there was no safe avenue of escape and that he had no choice but to yield to the coercion” (para. 24). Moreover, the court also stated that if an individual voluntarily puts themselves in a situation where they can be coerced, then it’s unreasonable to conclude that there were no safe ways to escape and therefore, does not meet the threshold of moral involuntariness (Roach, 2018).

In cases of intimate partner violence and coercive control in co-offending relationships, the available criminal defence would be a defence of duress under secondary liability; however, it is very difficult to successfully argue in these cases (Hulley, 2021). In part, it is due to the complex nature of intimate partner violence, in such that many cases do not have an explicit and direct or indirect threat of harm. Rather, there can be past and (at times) recent events that induce the underlying fear and belief that there are reasonable grounds to fear for their lives. In addition, the women in these cases that are in a position of subordination may not necessarily receive the message “commit the offence or be assaulted”, as the violence can be solely psychological (versus physical). For example, Stark (2007) reported that many women who experience coercive control have in fact never been physically assaulted. For these reasons, it is very difficult to argue the common law defence of duress in cases of women who co-offend with their intimate partner.

Another concern with the current defences for women members of co-offending couples charged with murder is that it is 'risky' to attempt to argue a defence, due to mandatory minimum penalties. If a defence is unsuccessful, the woman is held criminally liable for the offence in question. In these cases, often the counsel will encourage the women to plead guilty to a lesser offence (i.e., second-degree murder, manslaughter) to avoid going to trial and potentially being found guilty of first-degree murder which carries the harshest mandatory minimum penalty (i.e., life with no eligibility for parole for 25 years). Notably, research has found that women are likely to plead guilty (vs. plead not guilty and proceed to trial) to an offence, even in cases where they have not committed an offence. Potential reasons can include not wanting to testify, avoiding prospect of family members having to go through the court process, having no other alternatives (i.e., lack of protection for women leaving abusive relationships), inadequate representation/knowledge of the criminal justice process (Parkes & Cunliffe, 2015).

It is especially common that women accused of killing their intimate partner plead guilty to manslaughter, despite having significant evidence that the crime was committed in an act of self-defence. The main difference between manslaughter and murder is the intent of the accused. To be found liable for manslaughter, it must be proven (or accepted with a guilty plea) that the individual committed an unlawful act that caused the death of another person, in which the accused lacks the intent to kill or cause bodily harm that is likely to cause death. An example of manslaughter is assaulting an individual (without the intent to kill or cause bodily harm that is likely to cause death) which resulted in the victim losing balance and falling down a flight of stairs and dying.

The research has identified a concerning number of Indigenous women who plead guilty to an offence against their abusive partner, despite evidence presented highlighting their position of self-defence (Cunliffe & Parks, 2015). Some commentators speculate that, if the cases were properly argued, the women defendants would be deemed to be legally innocent, leading to an acquittal (Sheehy, 2001). However, often the crown prosecutor encourages the woman to plead guilty to manslaughter to avoid the potential outcome of being found guilty at trial of murder. When women take the 'risk' (i.e., life sentence if defence fails) and proceed to trial to argue self-defence, they face discriminatory racial and gendered barriers (Sheehy, 2001). An example of gendered barriers during trial is that the women's response to the violence is often framed as a 'psychological syndrome' versus a rational response to life-threatening violence. In these cases, the woman's symptoms are presented to explain their 'overreaction' (shifts blame on the woman's 'issues') versus emphasizing the actions and trauma inflicted from the deceased that caused the reaction (understanding the context).

Generally, self-defence requires the accused to demonstrate that they actually and reasonably believed they were in serious danger and have to challenge the existing social beliefs that minimize the seriousness of intimate partner violence that women endure (Sheehy, 2001). As such, there are common legal failures to defend battered women on trial. Legal failures have also been demonstrated in the use of discretion by the police, prosecutors, and judges, who frame the case in a certain light by their actions in the process. For example, this bias can be evident in evidence gathering, choice of charges, determinations of admissibility, and jury instructions (Sheehy, 2001). Research has also demonstrated examples of systemic barriers for battered women to proceed to trial and

instead they accept criminal liability. These included: responsibility for young children, the effect of long-term abuse and willingness to publicly testify, and women's remorse in such that they believe they deserve the punishment (Sheehy, 2001). More recently, Sheehy et al. (2012) examined how battered women defendants accused of homicide were charged, conducted, and directed in the criminal process in Canada and argued for manslaughter (vs. murder) charges to be laid in such cases, but acknowledged the many changes needed in the legal culture for this to occur.

Although the research presented above is related to women who kill an abusive spouse (vs. women who co-offend with their intimate partner), these findings are used to demonstrate that the discriminatory and gendered impact present throughout the criminal process are actually worse for women in co-offending relationships with their intimate partner. This is due to the fact that women who co-offend with their intimate partner are at an even greater disadvantage during trial, as self-defence (and the way the battered women's syndrome is factored in the defence) is not applicable when an individual is coerced to commit violence against a third party. The only available defence is duress (as outlined above) and is very strict and unlikely to be successful and therefore, is unlikely to even be attempted in many cases. As a result, women in co-offending couples are even more likely to enter a guilty plea because they do not have a suitable defence available to argue.

Sentencing for Murder and Manslaughter

Sentencing occurs after an accused pleads or is found guilty of an offence. Following this, the judge is charged with the responsibility to determine an appropriate penalty to impose on the offender. The penalty must be proportionate to the degree of

blameworthiness of the offender and the seriousness of the offence (i.e., section 718.1 of the Criminal Code). Sentencing, as a largely discretionary process, is a burdensome task for a judge due to the high consequences at stake and multiple factors that need to be taken into consideration. For example, the potential loss of liberty the accused will face, as well as the multiple pressures from other sources for a particular sentence to be delivered (e.g., victim(s), society, offender; Campbell & Cole, 2020)

During a sentencing hearing, the crown and defence counsel will make a submission to the judge on what they believe would be an appropriate resolution of the case (i.e., imprisonment, fine, length of conditions, probation; Campbell & Cole, 2020). Judges also draw upon multiple other sources (formal and informal) when determining a sentence such as: consultations with colleagues about a fit sentence, intuition as to what sanctions are most effective, professional experiences, and recommendations from other professionals (i.e., pre-sentence reports; Campbell & Cole, 2020). The judge will then take these submissions and perspectives into consideration and decide what the sanction is meant to achieve. Section 718 Criminal Code identifies sentencing objectives as: denunciation, deterrence, incapacitation, rehabilitation, and restoration. These objectives are set out to help judges to consider multiple factors to then determine an appropriate sentence. There is no specific guidance on what objectives should be considered more heavily than others, apart from giving a more punitive approach to more serious offences (Campbell & Cole, 2020). Sentencing is an individualized process in which the unique aspects of each individual offender and the offence in question are taken into consideration. In *R v M(CA)* (1996) 1 SCR 500 Lamer CJ said, “it has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime …

sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction" *(R v M(CA)*, 1996; para 92).

The main functions of imposing a sentence is: "to punish and hold offenders accountable for their actions, to denounce criminal acts, and encourage a moral awakening in the offender" Campbell & Cole, 2020; p. 11) and statutory guidance outline that imprisonment should only be sanctioned when absolutely necessary [e.g., protection of society; section 718.2(2)], especially when sentencing Indigenous offenders (Campbell & Cole, 2020). Despite there being little evidence that imprisonment has been efficient or effective at reducing crime, it is still one of the most common sanctions (Webster & Doob, 2020). The mandatory minimum sentence for first-degree murder is life with parole eligibility after 25 years served, whereas for second-degree murder it is life with parole eligibility within a range of 10 to 25 years to be determined by the judge. The sentence for manslaughter can vary widely from a sentence of probation to a maximum penalty of a life sentence, with the exception when the offence is committed with a firearm in which a mandatory minimum penalty of four to seven years is applied, depending on the circumstances.

Importantly, sentencing options change with the publics and governments' perspectives on crime and justice. For example, despite years of advocating the position that imprisonment is not an effective tool, since the mid-1990s politics continued to move towards a "tough on crime" approach to sentencing policy (Reid, 2020). This included the addition of new mandatory minimum sentences, some mandatory consecutive

sentences, the abolition of accelerated parole (i.e., the faint hope clause), and reduced credit for time spent in pretrial custody (Reid, 2020).

Despite these provisions affecting sentencing, the actual practical effects of these changes have not been noted statistically because imprisonment was already commonly sanctioned. As such, the imprisonment rates have remained relatively stable despite the changes in law approved by the government (Reid, 2020); however, people are spending a much longer time in prisons, there is an increase in older prison population, and by adding mandatory minimums for offences correlated with marginalization and poverty, an increase in the overrepresentation of Indigenous and Black people have been noted. These changes (i.e., mandatory minimum sentences, abolition of accelerated parole, etc.) may be unjustifiably making imprisonment sentences longer for offenders and the research (e.g., see Johnson, 2019) does not demonstrate better outcomes due to longer sentences (i.e., does not help deter future crime).

In some cases, mandatory minimum penalties have been found to be unconstitutional, and specifically grossly disproportionate under section 12 of the charter, and struck down (i.e., deemed legally invalid). To date, challenges to the mandatory minimums attached to first- and second-degree murder have been unsuccessful (*R v Luxton* [1990] 2 SCR 711). Based on this, the courts conclude that the offence is not unconstitutional on specific grounds that are raised. Importantly, the faint hope clause still existed as an option at the time this was determined. For example, from 1976 to 2011, offenders that were sentenced to parole ineligibility between fifteen to twenty-five years were able to apply to court for a reduction after serving fifteen years. This was titled the “faint hope” provision that was intended to serve as a safety valve. Legal

professionals have argued for the reinstatement of the faint hope clause since there are now no opportunities for individuals with a parole eligibility set to over fifteen years to be reconsidered for an earlier parole date (Reid, 2020). Today, only one of five (20%) individuals serving a life sentence get parole on their first try (John Howard Society of Canada, 2018), and some individuals are never released. Even if an individual serving a life sentence gets released on parole, it should be noted that they are closely watched by corrections for the rest of their life and can be returned at prison at any time that indicates their risk is increasing (e.g., experiencing homelessness, being intoxicated, experiencing depression, etc.; Correctional Service of Canada, 2019).

A legal scholar, Isabel Grant, completed a report on the sentencing regimen for murder and argued that the harsh periods of parole ineligibility should be abolished, and measures put in place to ensure that sentences can be tailored to fit the crime (Grant, 2001). Although this report is over 20 years old, it still has applicability as the sentencing regime for murder remains largely the same today. Grant (2021)'s work will be presented first followed by a discussion of the more recent work in this area by Debra Parkes (2021). In the report, Grant (2001) highlights cases of women convicted of murdering their abusive spouse who have been held to the rigid sentence of life imprisonment, despite having a wide range of individual culpability, and argues that mitigating factors are rarely considered when sentencing murder (Grant, 2001). Cases discussed by Grant also included *R v Vaillancourt* (1986) 2 SCR 636, in which the court focused on the stigma attached to murder as a main considering factor, and *R v Martineau* (1990) 2 SCR 633, in which the courts shifted towards the principle of proportionality.

Grant reported on the lack of variance between committing first- or second-degree murder. She argued that first-degree murder is not a precise measure of the most culpable murders (Grant, 2001). For example, she argued that first-degree murder in theory is reserved for the worst murderers (e.g., those with the highest level of blameworthiness); however, it is not always the case in practice. The distinction was made in the past to distinguish between capital and non-capital murders, but the degrees of murder were not removed at the time capital punishment was abolished. As a result, Grant reported that degrees of murder can result in overcharging and pressuring accused individuals to plead guilty to a lesser sentence to avoid the maximum and mandatory penalty. Although the intent of having first- and second- degree murder charges are supposed to reflect levels of offence gravity, that is not always the case in practice as people plead guilty to a lesser offence. Specifically, she continued to advocate for more flexibility in the sentencing of murder (whether in first- or second- degree) in which factors in section 231 can be considered along with additional factors (i.e., mitigating and aggravating; Grant, 2001). Grant (2001) reported the following statement to reiterate her arguments:

> The existence of the mandatory life sentence for murder, and the decision-making structures which flow from it, quite clearly have a political rather than a jurisprudential basis. Its rationale has been exposed as confused and contradictory by the courts. The senior judiciary has argued that there is no legitimate philosophical basis for a mandatory sentence for murder, since the offence itself varies so greatly. (Justice Society, 1996; p. 35-36)

Grant (2001) proposed a compromise between an old (focusing on the seriousness of the offence) and new (allowing for flexibility) sentencing regime that would impose a life sentence with seven years of parole ineligibility as a starting point for murder offences. In addition, based on the circumstance of the offence and the offender, there would be a mechanism for departing from the norm in which a sentence would be a

miscarriage of justice (i.e., a statutory versus constitutional exemption). Grant (2001) proposed that this would allow for the judiciary to consider all the evidence before the court (e.g., submissions from both parties, a pre-sentencing report, victim impact statements) and allow for the seriousness of murder to be recognized without the rigidity of the existing sentencing regime.

Although a step in the right direction, even if these changes were implemented and flexibility in sentencing murder could occur in practice, it still may not be enough to result in fair sentencing decisions. The change would also have to come from the judicial perceptions of individuals who commit murder and their willingness to consider various intersectional factors that mitigate their culpability at the time of sentencing. For example, despite the legal requirements deriving from *R v Gladue* (1999) 1 SCR 688 to consider the circumstances of Indigenous offenders at the time of sentencing, this has largely failed in its application (which will be discussed in more detail in Chapter 3). This is due in part to some judges' perceptions of whether they deem these factors to be relevant to the case or not and in some instances the considerations from the Gladue report are misused to establish risk and add weight towards incarceration or longer periods of incarceration (Hannah-Moffat & Maurutto, 2010). As a result, even if more flexibility in the sentencing for murder were granted, judges would also have to be willing to consider and reflect in their decisions the range of culpability associated with murder cases for meaningful change to occur.

More recently, Parkes (2021) has been advocating for legal reform to end mandatory minimum sentences that are applied to "serious violence offences" (i.e., life sentences). In her work she proposed a start would be to address life sentences of those

convicted of murder. Parkes (2021) highlights the wide range of culpability in individuals who commit murder; however, they are largely treated the same at sentencing due to mandatory minimum penalties. She proposed four reasons to support a change.

Parkes's first argument challenges the use of state violence to respond to interpersonal violence, supporting this position with research indicating that carceral responses have not reduced gendered and sexual violence (Levine & Meiners, 2020) and that imprisonment has similarities to being in abusive relationships (e.g., authoritarianism, restriction of movement, violence, etc.; Vetten & Bhana, 2005). Secondly, Parkes outlined "who bears the brunt of these sentences", in which she highlighted marginalization and intersectionality, specifically highlighting the over incarceration of Indigenous women that are most impacted by life sentences ("It is whole families and communities who are doing these life sentence" Parkes, 2021, p. 11). Parkes's third argument emphasized what can be gained by listening to women who are sentenced to life and challenging the narratives that are being told about them. Particularly, when engaging with their lived and often complex realities, it tends to tell a very different story than how they are depicted. Lastly, Parkes proposes ways to move society forward by supporting strategic law reform efforts. Parkes (2021) highlights Senator Kim Pate's bill (Bill S-208; Pate, 2020) to abolish all mandatory minimum sentences that would return the discretion to judges to determine a fit sentence, including in cases of murder (Parkes, 2021).

Ultimately, these proposed amendments from Senator Kim Pate were rejected with the recently passed Bill C-5 (Department of Justice Canada, 2021), which left the mandatory minimum penalties for murder intact. Bill C-5 repealed 14 offences in the

criminal code that carried mandatory minimum penalties, but left mandatory minimum penalties for: murder, high treason, sexual offences, impaired driving offences, and some firearm offences. Bill C-5 identifies that the courts and Parliament recognize that mandatory minimum penalties have been the subject of constitutional challenges in Canada and state that the purpose of repealing these mandatory minimum penalties is to: 1) address disproportionate incarceration rates (including the over incarceration of Indigenous people as well as Black and marginalized Canadians) and 2) promote judicial discretion for sentencing to help ensure that when a person is found guilty of an offence they are sentenced appropriately (including a sentence that is proportionate to the offence and degree of responsibility of the offender, with consideration of all aggravating and mitigating factors; Department of Justice Canada, 2021).

If that is in fact the goal of Bill C-5, the decision to leave mandatory minimum penalties intact for murder is highly problematic for multiple reasons, including, but not limited to: 1) murder carries the highest possible mandatory minimum penalty which leads to individuals likely being incarcerated for the longest period (i.e., life sentence – 25 years), 2) the wide range of culpability in individuals who commit murder for which judges cannot account due to mandatory minimums attached to murder, 3) the various intersectional factors that are often present when an individual commits murder that cannot be considered at the time of sentencing due to mandatory minimum sentences, and 4) Nearly half (39%) of women convicted of homicide are Indigenous (Department of Justice Canada, 2020), which further perpetuates disadvantage and marginalization. These reasons will be explored and addressed in more detail throughout the subsequent chapters.

In summary, the areas of law that this dissertation explores are the concerns related to liability and sentencing, and in particular, the liability and sentencing of women who co-offend with an intimate partner. The concerns related to liability include the lack of appropriate defences available for these women and the problem with secondary liability in which if the woman is found guilty, she is sentenced for the same offence as her co-accused, despite having a secondary role in the offence. In regard to sentencing, the main problems that will be examined are the lack of judicial discretion permitted under mandatory minimum sentences and concerns about stereotypical and harmful judicial perceptions when sentencing women involved in murders. The next chapter will highlight the theoretical framework that grounds this study by introducing theories of substantive equality and intersectionality.

CHAPTER THREE: THEORETICAL FOUNDATION

Now that some background has been provided regarding criminal liability and the sentencing process for murder and manslaughter, this chapter will turn to outlining the theoretical foundation that grounds the dissertation. The substantive equality framework is presented first, which will then lead into a discussion of how some aspects of the Canadian Criminal Code appear to be in line with this approach and yet the application of substantive equality principles may not be occurring in practice. Gendered differences (e.g., mental health, victimization, offence type, etc.) between women and men who offend will be presented to demonstrate how a formal equality (in contrast to a substantive equality) approach may be rendering a disproportionate and unfair impact on women who become involved in the criminal justice system. This chapter will conclude by outlining common forms of intersectional oppression that women in the criminal justice system experience and why it is necessary to consider intersectionality when applying a substantive equality framework.

Substantive Equality

Substantive equality is a central aspect of human rights law that focuses on equal opportunities, as well as equitable outcomes, by promoting recognition and response to those who are disadvantaged and/or marginalized (Sangiuliano, 2014). Substantive equality is different from formal equality, in that formal equality holds the idea that everyone should always be treated the same. According to legal scholar Sheila McIntyre and colleagues (2009), "the formal equality paradigm frequently involves the application of the law with one's eyes shut" (p. 103). She maintains that applying the law without

consideration of the social context in which the law is applied promotes inequalities among citizens in society.

Sandra Fredman (2016), a Rhodes Professor of the Laws of the British Commonwealth and the USA, proposed a four-dimensional framework to better achieve substantive equality. This framework includes: redress disadvantage (address stigma, stereotyping, prejudice, and violence); enhance voice and participation; accommodate differences; and achieve structural change. It is based on the notion that equality should recognize and respond to individuals who are "disadvantaged, demeaned, excluded, or ignored" (Fredman, 2016, p. 713).

Substantive equality has been constitutionally entrenched in Canadian law through authoritative judicial interpretation of section 15 of the Charter. Section 15 states that the law should treat everyone equally without discrimination on certain characteristics. Supreme Court Cases (SCC) such as *Andrews v Law Society of British Columbia* (1989) 1 SCR 143, *R v Kapp* (2008) SCC 41, and more recently, *Fraser v. Canada (Attorney General)* (2020) SCC 28 highlight this notion. *Andrews* was the first Supreme Court of Canada statement on the meaning of section 15 which demonstrated that equality rights are protected by section 15 of the Charter. *Andrews* allowed for historically marginalized groups (i.e., Canada's LGBT community) to also be protected. Substantive equality means that, in order for the results to be equitable, certain disadvantaged groups may have to be treated differently than comparator groups.

The norm of substantive equality is further elaborated and applied in *Fraser*, where it was found that an RCMP pension plan discriminated against women and breached their right to equality because it disadvantaged women. Even though that was

not the intention, it was the effect the regime had on women that was deemed discriminatory. Writing for the majority in *Fraser*, Justice Abella drew on past case law and literature on "adverse effect discrimination", defined to occur "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground" (para 35-39). Legal commentators have argued that adverse effect discrimination (vs. direct discrimination) is more common and poses a greater threat to equality as the discrimination arises from innocent intentions yet results in a disproportionate and unequitable impact on marginalized groups (para 56-58). As a result, in order for the law (as well as state policies and activities) to be constitutional (under section 15) it is necessary not to solely treat people the same, but rather, to recognize and consider how the law affects groups differently and may even unintentionally cause or exacerbate inequality.

Canadian criminal law has lagged behind other areas of law in integrating substantive equality as a core value (Rudin & Roach, 2002). There are some aspects of the Canadian criminal law that, on the surface, appear to be based on the notion of substantive equality; however, in practice the law does not achieve the intended result. For example, section 718.1 of the Canadian Criminal Code outlines the "proportionality principle". After an accused pleads or is found guilty of an offence, the judge is then tasked with the responsibility to determine an appropriate penalty (i.e., sentencing). As described in the earlier chapter, the penalty must be proportionate to the degree of blameworthiness of the offender and the seriousness of the offence. The proportionality principle at times is clearly reflected in sentencing decisions. The way in which proportionality is applied in practice, however, has been widely criticized for being more

congruent with formal proportionality and, thus, not achieving substantive equality (Rudin & Roach, 2002). Recently, the Supreme Court of Canada has emphasized that proportionality should also be considered from the perspective of the offender (e.g., how individual circumstances of the offender may impact the appropriateness of the sanction; Cole & Roberts, 2020).

The application of substantive equality and proportionality was demonstrated in a recent Supreme Court of Canada decision, *R v Hills* (2023) SCC 2 which responded to systemic discrimination in the sentencing process in an explicit way. In this decision, the Supreme Court of Canada engaged with the notion that proportionality should also be considered from the perspective of the offender and outlined that it is not about culpability but rather the impact of incarceration on the individual given systemic background factors. The Supreme Court of Canada relied heavily on the work by legal scholars such Kerr and Berger (2019) to affirm these points in their decision. Specifically, Berger (2020) has argued that the courts must "turn away from a more traditional and narrow responsibility-focused understanding of proportionality and towards an individualized approach that treats an offender's experience of suffering as an essential yardstick for a fit sentence" (p. 372). Berger (2020) emphasizes the need for judges to recognize and appreciate the suffering that has been inflicted on the offender through the criminal process and through the proposed sentence. Further, he has proposed that, when determining a sentence, the judge needs to go further than mere proportionality. He proposed that they can go beyond mere proportionality by considering the unique individualized nature of the offender and weigh the real effects of the criminal process and the proposed sentence will have on their life. Berger (2020) has

also argued that individualized proportionality is necessary to ensure that the sentence is truly fit and proportionate, as required by the Criminal Code. Applying the proportionality principle in this way would be one way in which the Canadian criminal law can move closer to integrating substantive equality as a core value.

Although there have been recent developments in how the proportionality principle is applied in practice in Canadian criminal law (i.e., *R v Hills*), there is a long way to go for this to be common practice and will take time for lower courts to follow suit. In addition, *R v Hills* did not address how courts should approach mitigating factors; rather, it focused on the impact of incarceration (i.e., doing 'harder time'). *R v Hills* did not engage with the way mitigating factors, including systemic gendered power relations, are often missed at the stage of assigning liability as well as sentencing, which can cause a disproportionate and unequitable impact on women. For some criminal offences, judges are required by legislation to enforce mandatory minimum penalties, which do not allow the proportionality principle or mitigating factors to even be considered. Mandatory minimum penalties may therefore be causing unfair and disproportionate outcomes for some vulnerable offenders, due to the inability of the judiciary to reflect an offender's individual circumstances in the sentence given. In these cases, a substantive equality approach cannot be applied. Instead, formal equality (i.e., equal treatment for everyone without consideration of individual differences) is being applied to all individuals. As already highlighted, a formal equality approach to sentencing can exacerbate social inequalities already present in the criminal justice system (Berger, 2020; Rudin & Roach, 2002).

Gendered Differences in the Criminal Justice System

A formal equality approach can lead to a disproportionate and unfair impact of the law on women involved in the criminal justice system. Compared to men, women often enter the criminal justice system with gender-related social and economic marginalization as well as more extensive histories of trauma, substance abuse, and mental and physical health problems (Rose, 2000; Messina, Grella, Burdon, & Prendergast, 2007). Women also are more likely to have higher rates of victimization and trauma; different pathways to and types of offending (i.e., criminal behaviour occurs later, gender-specific reasons for offences); different mental health profiles (i.e., women are at increased risk for some disorders, such as anxiety and depression, and more likely to have comorbid psychological disorders); and differences in risk and protective factors (i.e., pregnancy, sex work, and positive relationships, stable finances; De Vogel and Nicholls, 2016). Research also has found that women (vs. men) have more difficulty adjusting to the prison environment and have a decreased level of community support when released (Hannah-Moffat, 2000). More recently, research continues to demonstrate gender-specific needs (i.e., social, psychological, and physical) for women's psychological adjustment to prison (Fedock, 2017). Despite the well documented gendered differences between women and men who offend, aspects of law and judicial reasoning are applied the same without consideration of gender differences and may be having a disproportionate impact on women who offend.

Researchers also have found that women's pathways to committing a criminal offence is often different than that of men's. One study by Javdani et al. (2011) found evidence for specific 'gendered risk factors' for women to become involved in the criminal justice system. At the base level, gender-common (i.e., same for both men and

women) risk factors included: personality/temperament, genotype, heritability, parenting style, parental monitoring, and deviant peers. At the middle level, gendered-risk factors included early puberty and sexual abuse. The top level included gender-salient contexts that impact a women's risk, such as, romantic partners/sex peers, intimate partner violence, and sex work. This model noted the increasing influence of gender norms, power, and patriarchy from the base of the model (i.e., gender-common risk factors) to the top (i.e., gender salient contexts), which may help better understand the larger context in which a women's pathway to criminal involvement may occur.

In a similar vein, Pollack (2000) reported on changes in the social welfare state, which may disproportionately impact women (vs. men). Pollack (2000) proposed that some changes to the social welfare state may influence or limit a woman's available choices and, in turn, can increase the likelihood of criminal involvement. Examples of such changes included more stringent criteria for social assistance benefits, reduced employment benefits, and financial cuts to childcare, social services, and mental health services. In a more recent article, Pollack (2007) proposed a relational autonomy perspective to better understand women's law-breaking. This perspective "theorizes the impact of oppression on women's choices, identities, and actions to help avoid a purely psychological approach to women's law breaking" (p. 11).

There is some research to suggest that women can become involved in the criminal justice system due to association or influence from a man co-accomplice (Jones, 2008), which will be discussed in more detail in Chapter 4. In some of these cases, the woman may be experiencing intimate partner violence (IPV) with aspects of coercive control. Coercive control is a pattern of controlling behaviours (intimidation, isolation,

threats, humiliation, assault, etc.) which restricts a victim's independence and support and makes them dependent on the perpetrator (Stark, 2007). The tactics used to exercise coercive control have similarities with crimes such as kidnapping, stalking, and harassment, in that the abuse is ongoing and the violence used by the preparators may include methods to hurt, humiliate, intimidate, exploit, isolate, and dominate their victims. The victims of coercive control are often unable to access money, means of communication or transportation, and are often isolated from social support or vocational opportunities (Stark, 2007).

In some instances of criminal involvement, women may experience coercive control and although there may be no direct threats made from the perpetrator at the time of the offence, the woman's behaviour would be under the influence of the man's control and domination from past violence. Again, despite these differences in pathways and contextual factors that may influence a woman to become involved in the criminal justice system, aspects of the law and judicial reasoning are the same for women and men. Substantive equality demands that these gendered factors should be considered and responded to both at trial when determining guilt, and especially at sentencing when deciding upon a proportionate sentence.

Intersectionality

Employing a substantive equality framework requires an intersectional approach. Intersectionality can be understood as multiple forms of inequality in combination that can create increasingly negative effects (Crenshaw, 1989). For example, adverse life experiences can increase the likelihood of a woman becoming involved in the criminal justice system by altering either the choices or the perception of choices she has in

escaping abuse or making life changes (Barlow, 2016). Better understanding these experiences can help provide contextualization of the multiple and overlapping disadvantages, and in turn, promote a deeper understanding of how women can become involved in the criminal justice system. A deeper understanding of intersectional factors that are often building off one another would allow for an approach more congruent with substantive equality. If the judicial system can accurately account for the impact of these intersectional factors when women are accused and/or convicted of crime, it may reduce the woman's culpability and moral blameworthiness, which would result in fairer treatment in the criminal justice process.

Taking an intersectional approach avoids viewing women involved in the criminal justice system as solely "victims" or "offenders", but rather on a continuum (Barlow, 2016). This is in line with other research that has proposed a more nuanced and contingent understanding of women offenders by using a victimization-criminalization continuum as the boundaries between "victim" and "offender" are often blurred (Kaiser-Derrick, 2019; Comack, 1999). Kaiser-Derrick (2019) argued that taking an intersectional approach does not deny women's agency or suggest that involvement in the criminal justice system is solely due to their traumatic past, but rather highlights that these factors can limit their options and support.

The common intersectional factors that this dissertation explores include women's past and current victimization, mental health, race, and socioeconomic status. The next section will examine these factors individually, in order to present the concerns associated with each intersectional factor in a comprehensive manner. However, it should be made clear that the purpose of intersectionality is not to only identify such factors, but

rather, to identify the common overlapping nature of these factors that can create unique and discreet "minorities". In these cases, women are further socially disadvantaged because of the multiple overlapping factors that interact, creating unique systems of marginalization and discrimination (Crenshaw, 1989).

Victimization

It is estimated that approximately 80% of women report experiences of interpersonal victimization prior to involvement in the criminal justice system (Bloom et al., 2004), typically beginning in childhood and then continuing into their intimate relationships (Richie, 2001; Bodkin et al., 2019). Kennedy and colleagues (2018) explored the relationship between interpersonal victimization and women's criminal sentencing and proposed a gendered pathway perspective (GPP). According to the gendered pathway perspective, women become involved in the criminal justice system due to factors that: (1) are not typically seen in men offenders (e.g., prostitution, coercion, and intimate partner violence); (2) are more prevalent in women offenders (e.g., sexual abuse); and (3) common in both genders but have a differential effect on women (e.g., drug use, intimate relationships, poverty, and economic marginalization; Kennedy et al., 2018). Kennedy and colleagues (2018) found support for the gendered pathway perspective, in that victimization can be an important criminal pathway for some women to enter the criminal justice system. Specifically, they found that women who experience patterns of interpersonal victimization (vs. low or non-victimized offenders) receive longer sentences, even when controlling for criminological factors. The researchers also found that sexualized violence may serve as a moderating variable for women who become involved in the criminal justice system (Kennedy et al., 2018). Similarly, in a

qualitative study on sexualized violence, DeHart (2008) found that experiencing sexualized violence influenced; 1) women's sense of agency in relationships, 2) perceptions of their own skills and abilities, and 3) separated them from social supports, education, and work which lead them to involvement in the criminal justice system (DeHart, 2008).

A recent meta-analysis by Bodkin et al. (2019) reported on abuse rates among incarcerated women and men in Canada (both federal and provincial data). These rates included sexual, neglect, physical, and emotional abuse. The researchers used the World Health Organization's definition of abuse: "Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation [of children younger than 18 years], resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power" (The World Health Organization, 2020). The meta-analysis found that 65.7% of women (35.5% of men) had experienced some form of childhood abuse. In particular, about half of incarcerated women (50.4%) experienced sexual abuse in comparison a fifth (21.9%) of men who reported experiencing childhood sexual abuse, demonstrating a significant difference between genders. The prevalence of neglect slightly differed between women and men (i.e., 51.5% of women and 42% and of men) and lastly, the prevalence of physical and emotional abuse was comparable between gender (47.7% and 51.5%, respectively; Bodkin et al., 2019). This research is important to highlight the fact that women involved in the criminal justice system are at a greater risk to have experienced victimization in comparison to men. To further support these findings, other Canadian

statistics report that 85% of incarcerated women reported experiencing physical abuse, followed by 68% reporting sexual abuse prior to incarceration (The Office of the Correctional Investigator, 2015). Women (vs. men) are also at risk for experiencing abuse for a longer period of time. For example, research has found that a women's risk for abuse persists through childhood, adolescence, and adulthood, whereas a man's risk for abuse drops after childhood (Lynch et al., 2012).

Research supports that trauma and victimization symptoms can be exacerbated by incarceration, but also the other direction must be considered: trauma may make the prison experience worse for women (Moloney et al., 2009). The experience of being trapped and at a loss of liberty can increase traumatization and can keep the cycle of victimization going and therefore, may leave little opportunity for rehabilitation due to distress. For example, researchers have highlighted how the prison environment can remind women of past dynamics of abuse due to the power, control, humiliation, isolation, invasion, and shame they may experience from staff or other incarcerated individuals (Pollack, 2007). Alongside of this, both routine and strip searching can be associated with re-traumatization for some women (Girshick, 2003). Women need gender-specific judicial responses and gender-specific treatment for mental health concerns; however, programs are often non-existent or inadequate to address specific needs of women offenders (Barker & Tavcer, 2017).

Mental Health

As discussed above, women with histories of abuse are disproportionately overrepresented in the criminal justice system. In turn, having a history of victimization can lead to the development of a mental health disorder, such as Post-Traumatic Stress

Disorder (PTSD). The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM5; APA, 2013) defines a mental disorder as: "… a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning…" (p. 20). A mental disorder can develop due to biological, developmental, and/or psychosocial factors (Shrivastava & Desousa, 2016). Canadian research has found that the majority (79%) of women offenders have at least one mental health diagnosis (i.e., mood, anxiety, personality, psychotic, or substance abuse disorder) often with a connection to previous violence (i.e., domestic violence, physical and/or sexual abuse; Derkzen et al., 2017). When women are completing their sentence, they are likely to develop new mental health concerns; alternatively, research has found that incarceration can make previous conditions worse (United Nations, 2014). The rate of mental disorder(s) among women offenders is significantly higher than that of a community sample. For example, women in custody (vs. women in the community) are more likely to experience a substance use disorder (76% vs. 2.5%), anxiety disorder (54% vs. 3%), or mood disorder (22% vs. 6%; Pearson et al., 2013). It is estimated that half of incarcerated women meet the lifetime criteria for post-traumatic stress disorder (PTSD) and that women have a higher rate of mental health problems in comparison to men (73% versus 55%; James & Glaze, 2006).

Research by Verdun-Jones and Butler (2013) examined how judges consider mental disorders that have significant neurocognitive impairments (e.g., psychopathy, attention-deficit/hyperactivity disorder – ADHD, post-traumatic stress disorder – PTSD, and fetal alcohol spectrum disorder – FASD) at the time of sentencing. Judges'

considerations are based on the potential impairment in judgement an individual may have had at the time of the offence due to specific neurocognitive issues, in light of which they determine the extent of diminished capacity, if any (Verdun-Jones & Butler, 2013). If there is evidence of impairment, it can decrease blameworthiness and thus, be treated as a mitigating factor. However, it can also create perceptions surrounding an increased risk to reoffend, since some neurological conditions are less amenable to treatment (i.e., psychopathy). As a result, neuro-specific evidence has been referred to as "a double edged sword" (Chandler, 2015). Currently, there are limited alternatives to imprisonment for these offenders who are deemed to have diminished capacity and therefore, diminished blameworthiness; but who also are a safety risk to others if reintegrated back into society (Chandler, 2015).

In their research, Verdun-Jones and Butler (2013) found that judges considered psychopathy to be an aggravating factor, whereas FASD was a mitigating factor with youth offenders, but not consistently a mitigating factor in adult cases. On the other hand, ADHD was not given much weight by judges regardless of the offender's age (Verdun-Jones & Butler, 2013). Verdun-Jones and Butler (2013) found that, the more serious the offence(s), the less often the judges considered neurocognitive impairments as mitigating factors. Additionally, the judges were more likely to consider and recommend treatment options (i.e., rehabilitation) for youth (vs. adult) offenders (Verdun-Jones & Butler, 2013).

The results of Verdun-Jones and Butler's (2013) study were that the judiciary did not consider PTSD to be a "severe mental disorder" in comparison to conditions such as psychosis. As a result, the judiciary often determined PTSD to not be a mitigating factor,

unless it was determined to be causally connected to the offence(s) in question. This finding is surprising as the empirical evidence suggests that trauma conditions can change and impair an individual's behaviour in ways that may not be explicit enough to be 'causally connected' to the offence. Trauma responses can include not only impairment in decision-making/judgement, but also; hypervigilance, numbing, difficulty regulating emotions and interpreting stimuli, and difficulty interpreting experience, all of which may diminish an individual's culpability (Gohara, 2018). It would be important for both the criminal defence counsel to present this evidence as well as the judge to consider these mitigating factors even if they do not appear to be 'causally connected' to the offence when determining a fit and proportionate sentence.

Buchanan and Zonana (2009) have highlighted the challenge of presenting judges with the evidence and the argument required to establish a causal link between an individual's neurocognitive impairment and the offence in question. Buchanan and Zonana (2009) have encouraged the judiciary to adopt a "possibility approach" that shifts the focus to the "possibility" that impairments influence an individual's vulnerability to act in a certain manner. Overall, it appears from the results in Verdun-Jones and Butler (2013) that judges were unaware of the extent and significance of these neurocognitive conditions and the direct impact of the neurocognitive impairments on functioning. The findings of Verdun-Jones and Butler (2013) and Buchanan and Zonana (2009) suggest that mental illness is not always well understood by judges. This is important because if judges do not understand the impact of neurocognitive impairments on functioning, they may be sentencing individuals similarly to those who do not have neurocognitive impairments (i.e., formal equality). In order to move closer to a substantive equality

approach, the judiciary must be aware of the impairments and the position of disadvantage these individuals face in order to actually reach equality in sentencing. Importantly, the majority of cases in these studies included less serious offences (i.e., non-murder) and therefore, the judge would have had judicial discretion. In contrast, offences where mandatory minimum penalties apply do not permit judges to consider mitigating factors related to neurocognitive impairments.

Schneider (2020), a judge and legal scholar in the area of mental health law, discussed how emotional disorders should be considered at the time of sentencing. In particular, he argued that mental health disorders often decrease moral blameworthiness and thus, should be considered a mitigating factor (Schneider, 2020). Judges also can consider that certain sentences (e.g., imprisonment) may worsen a pre-existing condition (as outlined in *R v Hills* above). Schneider referenced *R v Verdins* (2007) VSCA 62 which outlined six ways in which a mental disorder can affect sentencing. These 'Verdins Factors' included: 1) reducing the offenders moral culpability, 2) influencing the type of sentence imposed on the offender, 3) decreasing or eliminating the need for general deterrence in these cases, 4) decreasing or eliminating the need for specific deterrence in these cases, 5) recognition that a sentence weighs more heavily on an offender with mental health concerns (vs. offender in 'normal' health), and 6) knowing imprisonment may worsen an offender's mental health (Schneider, 2020 & *R v. Verdins* 2007).

In a similar vein, recommendations from recent research have suggested that the justice system move towards being more trauma informed. Specifically, Gohara (2018) recommends that defence counsel should be better trained to recognize and therefore, be able to defend accused individuals who experience trauma symptoms. Specifically,

Gohara (2018) recommends an increased recognition by defence lawyers of individuals who present with complex trauma (i.e., repeated and ongoing exposure to victimization or violence), which is often coupled with environmental deprivation (i.e., poverty). As a result of these experiences, Gohara (2018) contends that individual blameworthiness (i.e., moral responsibility) should be mitigated for individuals with a history of trauma and complex trauma symptoms as compared to those without.

Legal scholars have recommended that trauma should be presented as "a theory of mitigation" in which the defence presents their clients' social histories during the sentencing process. For example, the defence counsel may explain the offender's mental health history and how these factors have impacted criminal behaviour, and thus, argue for a reduction in blameworthiness (Gohara, 2018). It should be noted that mental health history is often included in pre-sentence reports; however, the connection between mental health concerns and engagement in criminal activity is not always clear in these documents. Rather, risk assessments have been found to often structure the information presented in the pre-sentence reports (Hannah-Moffat & Maurutto, 2010). Solely engaging with pre-sentence reports may cause the judiciary to only look at mental health as a risk factor versus understanding how the individual's symptoms may have influenced criminal behaviour. If the defence council was able to take on this "ethical imperative" in cases of trauma and provide compelling evidence, this may shift both jurists and lawmakers' perceptions of how trauma can influence behaviour and therefore decrease culpability. Therefore, if more defence lawyers can successfully argue the impacts of trauma, the judicial system may learn more about the reasons people break the law and achieve more proportionate and equitable outcomes (i.e., substantive equality) for

individuals who experience mental health issues and are involved in the criminal justice system (Gohara, 2018).

As discussed earlier, women convicted of a criminal offence are highly likely to meet the criteria for at least one mental health diagnosis. The psychological literature supports that mental disorders can impair an individual's cognitive functioning and can contribute to the likelihood that the individual may become involved in the criminal justice system. The law and criminal justice system, however, have yet to fully appreciate this fact. The fact that women tend to suffer disproportionately from mental disorders and that mental disorders often are not considered at trial is especially problematic in severe offences with mandatory minimum penalties attached to the offence. In these cases, even if a judge was informed about how mental health issues may have contributed to the offence, mandatory minimum sentences make it very difficult for a judge to consider the impact of a woman offender's mental health status as a potential mitigating factor, due to the rigid sentencing regime.

Race, Culture, and Ethnicity

Visible minority women offenders are overrepresented in the criminal justice system and are also more likely to experience violent victimization. In 2014, through a 12-month period, Indigenous (vs. non-Indigenous) women were significantly more likely to be victims of crime (28% vs. 18%) and more likely to experience violent victimization. Indigenous women were three times more likely to experience violent victimization (220 violent incidents per 1000 people versus 81 per 1000 people), despite only accounting for 5% of the Canadian population. In 2019, the Department of Justice reported that, when controlling for risk factors for violent victimization, Indigenous people are no more at

risk than their non-Indigenous counterparts (2019). However, the Department of Justice reported that the presence of multiple risk factors, such as, experiencing childhood maltreatment, substance abuse, experiences of homelessness, mental health, and/or the perception of social disorder in neighborhoods that Indigenous women commonly experience will in fact increase her risk for violent victimization (Department of Justice, 2019).

Indigenous adults are overrepresented both as homicide victims and individuals accused of homicide. Despite comprising only five percent of the Canadian population in 2017, Indigenous persons represented almost one quarter (24%) of homicide victims. In the same year, the number of Indigenous persons accused of homicide was more than twelve times higher (38%) than the rate of non-Indigenous accused (11.12 vs. 0.93 per 100,000 population). In 2018, 32 Indigenous women (25 non-Indigenous women) and 118 Indigenous men (383 non-Indigenous men) were accused of murder (Department of Justice, 2019).

The Aboriginal Justice Inquiry of Manitoba (1999) generated a report on the overrepresentation of incarcerated Indigenous people and attributed this crisis to either Indigenous people committing a disproportionate number of crimes or Indigenous people being victims of discriminate justice. The reality is that it is a combination of both factors. According to legal scholar Mark Carter (2002): “poverty and other instances of social marginalization may not be unique, but how people get there is. No one’s history in this country compares to Aboriginal people’s” (p. 71).

In a 2016 book, Manson and colleagues highlighted the important role and power that judges hold at the time of sentencing because they can significantly influence the

treatment of Indigenous people in the criminal justice system (i.e., sanctions imposed, sentences given, etc.). The Canadian criminal justice system has two landmark cases related to the sentencing of Indigenous people who offend. These cases include *R v Gladue* (1999) 1 SCR 688 and *R v Ipeele*, (2012) 1 SCR 433, both of which developed a legal requirement to take into account the circumstances of Indigenous offenders at the time of sentencing, due to the multi-generational trauma that has been inflicted on Indigenous people (Roach & Rudin, 2020). Gladue principles are found in the Criminal Code under section 718.2(e) and were first introduced in 1999. The sentencing decision from *R v Gladue* in 1999 generated a two-step process for future judges to use when sentencing Indigenous offenders. First, it instructed judges to consider background factors that may have contributed to the offence in question and secondly, to consider these factors when determining a sentence and the impact of sanctions on an Indigenous offender (*R v Gladue, 1999*). To further add to the recommendations surrounding sentencing decisions and Indigenous offenders, 13 years later *R v Ipeelee* (2012) instructed judges to note that the individual's blameworthiness may be lessened, including in serious offences, due to the unique backgrounds of Indigenous offenders. *R v Ipeelee* (2012) reaffirmed the notion that sentencing judges have a statutory duty to consider the unique circumstances of how an Indigenous person comes before the court no matter how serious the offence (Roach & Rudin, 2020).

Although now twenty years post *R v Gladue* (1999), legal scholars and sentencing researchers have demonstrated that the courts have not yet developed clear jurisprudence on how sentences can be restorative or how to appropriately apply sentencing principles (i.e., deterrence, denunciation, incapacitation, proportionality) to Indigenous offenders

(see Roach & Rudin, 2020). More specifically, Roach and Rudin report that there are not the necessary programs in place to be able to use the sentencing options that *R v Gladue* and *Ipeelee* have invited. Moreover, the principles from *R v Gladue* have varied widely in its application across the country. Despite the Criminal Code (section 718.2 e) being applicable to all of Canada and making it mandatory to consider Gladue factors, the constitution gives responsibility to the individual provinces for the administration of justice. In other words, the programs, services, and funding to apply *Gladue* principles come from a provincial level and thus, differ largely in the application from province to province (Roach & Rudin, 2020).

While it had been hoped that *Gladue* would substantially change the way in which the judicial system responds to Indigenous offenders, the system failed to deliver these changes in practice (Roach & Rudin, 2020). Research shows that the criminal justice system routinely imposes sanctions of imprisonment (especially, but not only due to mandatory minimum sentences) and strict release conditions, effectively accelerating the victimization-criminalization cycle, as opposed to slowing or stopping it. This may help explain why Indigenous women are the fastest growing prison population in Canada (Baigent, 2020).

Kent Roach (2019) argues that, to date, Canada has not been able to fully implement recommendations from *Gladue* and *Ipeelee.* Roach asserts that it is not that these approaches do 'not work' but, rather, that they have not been given the chance to work. According to Roach, if judges understood how to appropriately apply principles from *Glaude* and *Ipeelee,* they can apply more appropriate sentences and help reduce Indigenous over-representation in prison. Roach (2019) encourages judges to follow the

two-step process developed from *Gladue*: 1) awareness and consideration of circumstances regarding Indigenous offenders and their communities, and 2) the obligation to use this information in the sentencing decision. Beyond considering the background factors, judges should utilize concepts of moral blameworthiness and *effective* denunciation, deterrence, and incapacitation (versus only applying these factors in relation to sentencing purposes of rehabilitation/restorative; Roach, 2019). For example, Roach suggests that some judges may overestimate the deterrent effect of a prison sentence. To illustrate this, a quote from the decision in *R v Gingell* (1996) 50 CR(4^{th}) 326 stated that, "Jail has not shown to be effective for First Nations people. Every family in Kwanlin Dun has members who have gone to jail. It carries no stigma and therefore is not a deterrent" (para 63). Again, applying these factors does not offer a "discount" or "an excuse" to Indigenous offenders, but rather assists in establishing the context in which the offender came to be involved in the criminal justice system (including colonialism), which in turn can reduce their moral blameworthiness (Roach, 2019). Roach also highlighted the benefits that could come if the judiciary better understood and applied Indigenous Law. This may help connect offenders to their Indigenous roots and community, and for the criminal justice system to be more in line with Indigenous teachings (Roach, 2019).

One way that judges can consider the impact of Indigeneity is through Gladue Reports. Gladue Reports may be requested at the time of sentencing an Indigenous offender and derive from the case *R v. Gladue* (1999). Gladue Reports are specialized reports that were developed to comment on the unique experiences and background of Indigenous people (e.g., marginalization, residential school, racism, chronic substance

use, etc.; Roach, 2019). Gladue Reports provide subjective accounts of the circumstances that bring an Indigenous offender before the court and often will include direct statements from those who were interviewed. Gladue reports do not draw conclusions on risk (Roach & Rudin, 2020). Despite being mandatory when sentencing individuals of Indigenous descent (unless waived by the defendant), Gladue reports have proven difficult to obtain due to lack of funding and professionals trained to complete the reports and as outlined above, the reports differ markedly from province to province (Roach & Rudin, 2020).

Gladue Reports are distinctly different from a Pre-Sentence Report (PSR), which can be requested for any offender. Both types of reports can assist a judge to make an individualized and appropriate sentence, by taking into consideration the individual's background history. PSRs are written from a risk management approach and provide information on the circumstances that may mitigate or aggravate sentences. In practice, some judges use PSRs when working with Indigenous offenders which is highly problematic because the risk factors in the Level of Service Inventory (LSI) target the social disadvantages of women and minorities, which serves to elevate their overall risk level. In other words, Indigenous offenders, especially Indigenous women who offend, can be punished for the state's misconduct, and then further punished if a PSR is used, as it often amplifies their risk (Roach & Rudin, 2020).

Despite landmark cases paving the pathway for a more proportionate sentence based on the race of the offender, this is often not happening in practice. For example, in one study a researcher examined 168 sentencing decisions of violent offenders across the country and found that despite the enacted section of the criminal code (s. 718.2e) which recommends restorative approaches to sentencing and alternatives to incarceration (with

unique consideration given to Aboriginal offenders), the sentencing reforms in practice varied widely across the country (Balfour, 2013). Balfour (2013) found that the law reforms were most often used in sexual assault cases and rarely applied to Aboriginal women. She reported in over 70% of the cases explored, there was no mention of factors considered at the time of sentencing to justify the sanction and little attention was given to the unique circumstances of Aboriginal offenders (e.g., only mentioned in 19% of the cases; Balfour, 2012). The most common mitigating factors were the remorse expressed by the offender, a guilty plea, and having no prior criminal record. On the other hand, the most common aggravating factors were the seriousness of the offence, if the offender had a prior criminal record for violence, and the degree of violence in the offence (Balfour, 2013). The most common sentencing principle applied was denunciation (60%), followed by public safety (44%) and general deterrence (42%). Balfour (2013) reports that restorative practices in some communities (e.g., Northern Territories) are unable to occur due to the vast amount of interpersonal violence charges and the community being unable to address basic needs (e.g., education, employment, housing, and social services). Balfour (2013) concludes that her study demonstrated that there is very little consideration of historical, social, cultural, or economic context of the offender's family or community life at the time of sentencing.

Similar to the experience of Indigenous people, other research has demonstrated the disproportionate incarceration of people of African Descent and has recommended for the judiciary to implement Impact of Race and Culture Assessments for people of African Descent (Dugas, 2020). The Office of the Correctional Investigator (OCI) identified that the African Canadian population of incarcerated individuals has grown over the last two

decades. For example, the OCI reported the population increased 90% from 2003-2013 and 69% from 2005-2015 (2017). A recent court of appeal decision in Nova Scotia affirms the importance of Impact of Race and Culture Assessments (i.e., *R v Anderson* 2021 NSCA 62). This decision drew significantly on the work of legal scholar, Maria Dugas. Dugas and other legal scholars have argued that it is necessary to consider an individual's race and culture when determining a fair sentence. These legal scholars highlight the inherent Whiteness of the criminal justice system and argue that sentencing principles do not reflect the perspectives and circumstances of African Canadian people. The goal of Race and Culture Assessments is to provide the judge with a deeper understanding of the circumstances that bring the offender before the court and, therefore, help produce a more informed, anti-racist, and proportionate sentence (Dugas, 2020).

At sentencing, judges need to go beyond mentioning that they 'considered' mitigating factors but, rather, must examine how race and culture mitigated the sentence (Dugas, 2020). Importantly, Judge Williams stated that, "punishment does not change behavior when the actions are rooted in marginalization, discrimination, and poverty" (*R v Jackson* 2018 ONSC 2527; para 88). *In R v Faulkner* (2019) NSPC 36, Judge Whalen writes that Impact of Race and Culture Assessments are needed because the information they can provide (e.g., background information) are part of the "formula" to determine the most appropriate sanction (*R v Faulkner* 2019 NSPC 36; para 57). Legal scholars have argued that this is providing a "race discount"; however, social worker Robert Wright, an early proponent and provider of Impact of Race and Culture Assessments, has been cited as saying, "it is no discount, but rather calling attention to the fact that the

African Canadian community have been systematically overcharged forever" (Bascaramuty, 2018).

Due to the fact that visible minority women offenders are overrepresented in the criminal justice system and are also more likely to experience violent victimization, it is important that race is considered when examining cases of women who may experience intimate partner violence and co-offend with their partner. Moreover, since the current study is looking at legal responses to these women, it is necessary to include sentencing factors such as those enacted sections of the criminal code (i.e., section 718) as well as more recent shifts to implement Impact of Race and Culture Assessments for people of African Descent.

Poverty & Socio-Economic Marginalization

A Task Force on Federally Sentenced Women was developed in the early 1990s to assess the correctional management of federally women in Canada. The Task Force also discussed how women come to be involved in the correctional system, which can include factors such as experiences of poverty and socio-economic marginalization (Barker & Tavcer, 2017). From this task force, a report titled *Creating Choices* was generated to help guide women's prison reforms in Canada. A key theme of the report was women's "dependency":

> The dependence on men, alcohol or drugs, and/or state financial assistance which is part of the lives of many federally sentenced women, has robbed them of the opportunity and ability to make choices. To break out of this dependent cycle, these women need to experience the success associated with making sound, responsible decisions. (Canada, Task Force on Federally Sentenced Women, 1990, p. 56)

The Task Force on Federally Sentenced Women reported that women involved in the criminal justice system were often dependent on government financial assistance,

which restricted their ability to make certain choices. This intersectional factor continues to be emphasized as "socio-economic marginalization". The Department of Justice Canada (2020) report defines socio-economic marginalization as:

> Being blocked from or denied full access to economic opportunities, social opportunities, or resources (e.g., education, employment, housing) that other members of society have because of one or more personal characteristic(s) (e.g., poverty, health and mental health, sex and gender, race, ethnicity, Indigenous identity, immigrant status). (p. 64)

This section will discuss the impact of poverty specifically (versus socio-economic marginalization as a whole), since there are overlapping (vs. distinct) intersectional factors that are considered in the concept of socio-economic marginalization. Poverty can be described as a condition where a person is unable to maintain a modest standard of living in their community. Canada has recently adopted the Market Basket Measure (e.g., how much a basket of goods and services that an individual or family would need to maintain a modest standard of living; Poverty Hub, 2021).

The impact of poverty is individualized, meaning it can affect everyone differently. Research has found that poverty generally can have negative health effects, malnutrition, negative impacts on education, employment, housing, family violence, and childhood abuse (Ngoma & Mayimbo, 2017). Experiencing poverty as a child can increase the likelihood of experiencing poverty as an adult (Bird, 2013). There are multiple theories in the literature (Choice Theory, Cornish & Clarke, 1989; Social Control Theory, Nye, 1958; Strain Theory, Burton et al., 1994) that seek to connect involvement in the criminal justice system to poverty. These theories have been criticized to be too simplistic to explain such a complex phenomenon. Experiencing poverty does not cause crime, rather, the social psychology of crime suggests that individuals who

experience poverty may live in adverse social environments, which in turn may model and/or provide reinforcements that are connected to antisocial behaviour (Skeem et al., 2011). Some research has found support that poverty can be a mediating variable between mental health and committing a criminal offence. For example, Skeem et al. (2011), found that the correlation between having a mental health diagnosis and committing a criminal offence can be explained by examining the degree of poverty experienced.

Current literature exploring sentencing in Canada has found that poverty is often combined with race in judicial sentencing decisions, as opposed to being treated as a distinct, albeit related, factor. That is, poverty and race often are conflated by using the terms "socially disadvantaged background" versus naming poverty and race, separately. It is important that these factors are named independently as they should both serve as independent mitigating factors at the time of sentencing (in the cases where judicial discretion is able to be applied) and consideration is needed that when these independent factors are experienced together, it creates a unique system of disadvantage (i.e., intersectionality). In particular, in one article a legal scholar, Dale Ives, used cases such as *R v Gladue* (1999) 1 SCR 688, *Wells* (2000) 1 SCR 207, *Borde* (2003) 168 OAC 317, and *Hamilton* (2004) 189 OAC 90 to critique the way the legal system responds (or fails to respond) to inequalities in Canadian society (2004). Using these cases as examples, Ives (2004) discussed how the judiciary engaged with types of inequality to determine if they were considered a mitigating factor. Similar to research presented earlier, Ives found that there had to be a causal link to the type of inequality and the offence in question in order for it to be considered as a mitigating factor.

This is very problematic from a substantive equality standpoint because at face value inequality may not appear to be directly related to the offence committed, which would mean that it is not considered as a mitigating factor. As presented earlier, substantive equality requires that in order for the sentencing outcomes to be equitable, certain disadvantaged groups may have to be treated differently than comparator groups. Adverse effect discrimination may be occurring in these cases when mitigating factors, such as poverty, are not being considered. Although it is not the intention to treat individuals differently in these cases, it is the effect not considering poverty can have on individuals or groups that has been deemed to be the most important (see *R v Andrews, 1989)*. In order to actually achieve equality, recognition is needed of how the law affects marginalized groups differently. Again, in the specific cases where a woman commits a serious and violent offence (e.g., murder) with a mandatory minimum penalty attached to the crime, the judiciary does not have the ability to consider how poverty or other inequalities may be related to the offence. By judges not considering these factors, it is a missed opportunity to learn more about the unique aspects of the offender and the circumstantial factors that led to the offence. In addition, if these factors are not considered, it can also lead to a disproportionate legal response.

In summary, poverty has unique and distinct impacts on physical health, education, employment, and housing that may not be accounted for by looking exclusively at gender, mental disorders, or race. These factors need to be considered independently by the judiciary and there needs to be greater acknowledgement on how experiencing one or more of the following intersectional factors can create unique

systems of disadvantage, which should be reflected in the decision when determining a fit and proportionate sentence.

Summary

This dissertation adopts both a substantive equality approach and intersectional framework. In order to advance substantive equality, it is necessary to consider the impact of intersectionality on women in the criminal justice system. A substantive equality approach does not mean that women should always receive a more lenient sentence, but rather would promote consideration and response to the unique and often intersectional factors (i.e., gender, victimization, mental health, race, and poverty) that bring a woman before the criminal court. It is common that these factors occur in combination, which creates a unique system of disadvantage for some women which ought to be recognized. For example, it is not enough to only consider that a woman may be diagnosed with a mental disorder and experience economic marginalization, but rather, how these co-occurring factors can intersect together and create unique systems of disadvantage, greater than the sum each factor contributes alone. A woman's pathway to criminal offending behaviour is often different than men's and the legal response (i.e., liability/sentencing) needs to recognize and reflect these differences in order to deliver a fair and proportionate response.

Now that both the legal response to women accused and/or convicted of culpable homicide and the theoretical approach of this dissertation have been outlined, the next chapter will review the literature on women involved in the criminal justice system and more specifically, women who co-offend violently with an intimate partner. It will discuss how these women are perceived by the media and judiciary and how these

perceptions are harmful for multiple reasons. It will also discuss intimate partner violence and coercive control and how some women may be coerced into the commission of serious offences but may not be recognized in part due to how judges view women who co-offend violently, as well as the current legal regime surrounding such cases.

CHAPTER FOUR: WOMEN OFFENDERS AND CO-OFFENDING

This chapter will report on statistics related to women in the criminal justice system and women who commit violent co-offences (e.g., culpable homicide). Women accused or found guilty of committing an offence tend to be viewed by the media and judges in negative ways that perpetuate harmful stereotypes that impact all women. Literature related to both media and judicial perceptions will be reported on to help inform this dissertation. Specifically, this dissertation will examine how women accused or convicted of crime are perceived by the judiciary. Relationship dynamics between women and men co-accused will be reported on to better understand the circumstances and that may contribute to the committal of a violent co-offence. Intimate partner violence and the theory of coercive control will be presented to give more contextual factors regarding how abusive relationship dynamics may impact a woman's 'choice' to co-offend violently. This literature informs what factors should be considered when analyzing co-offending cases with reported intimate partner violence.

The Typical Profile of Women in the Criminal Justice System

Women involved in the criminal justice system have unique needs that are often overlooked and understudied (Sarteschi & Vaughn, 2010). There is a need for the legal system to acknowledge the social factors that may help explain offending patterns. As discussed in depth in the previous chapter, women who become involved in the criminal justice system are likely to have experienced previous victimization (i.e., physical/sexual abuse), are more likely to be charged with a non-violent offence and have issues with substance abuse (De Vogel & Nicholls, 2016). When substance use issues are untreated in prison, women are at an increased risk of re-offending (United Nations, 2014).

Importantly, research has found that women charged with violent offences have typically witnessed extensive violence in their family, have significant histories of victimization (i.e., physical and/or sexual abuse), present with mental health problems (Chesney-Lind & Pasko, 2012), and their violent behaviour is most often associated with interpersonal conflicts (Sommers & Baskin, 1993). In addition, women involved in the criminal justice system are commonly from communities experiencing poverty and marginalization (Brennen, 2007).

To better understand how some women come to commit violent crimes with men partners, it is important to first examine what is the typical profile of women offenders. Generally speaking, women commit significantly fewer criminal offences than men, comprising only six percent (*n*= 693) of the 13,141 federally incarcerated individuals in Canada (Public Safety, 2018). Similar to men, the highest rate of offending tended to occur in women aged 18 to 24 (2,803 accused per 100,000 population) and decreased with age (Statistics Canada, 2019). Visible minority woman offenders are overrepresented in the criminal justice system. In December 2021, The Office of the Correctional Investigator released a statement indicating that of all people serving a sentence in federal custody, over 32% are Indigenous people, despite only accounting for 5% of the general population. While non-Indigenous representation in the criminal justice system is decreasing, the Indigenous representation is increasing. In regard to women in the criminal justice system, nearly 50% are Indigenous (Zinger, 2021). In May 2022, it was the first time that half of the women's federal prison population were Indigenous (i.e., 298 non-Indigenous women and 298 Indigenous women; White, 2022).

When accounting for all types of crime, women tended to be accused of property offences (35%), followed by drug violations (7%). In 2015/2016, women accounted for one in five cases (21%) in the adult criminal court and were less likely, compared to men, to be found guilty of violent offences (40% versus 52%; Reitano, 2017). Regarding violent offences, women were most often (70%) accused of assault.

Despite public perceptions that violent crime may be increasing, homicides are relatively rare in Canada (Campbell & Cole, 2020). In 2017, homicide accounted for only 0.2 percent of violent crimes and the national homicide rate was 1.8 victims per 100,000 population (Beattie et al., 2018). Within these numbers, 32 Indigenous women (vs. 118 Indigenous men) and 25 non-Indigenous women (vs. 326 non-Indigenous men) were accused of murder in 2018 (Beattie et al., 2018). Although incarceration rates for homicide do not vary significantly by gender: 17% (*n*= 234) of incarcerated women and 21% (*n*= 4565) of incarcerated men (Public Safety, 2018), the targets of homicide (victims) do vary by gender. Women are more likely to kill a family member (31%) or intimate partner (30%), whereas men are more likely to kill an acquaintance (40%) and less likely to kill an intimate partner (18%) (Statistics Canada, 2019).

Perceptions of Women Involved in the Criminal Justice System

Historically, efforts to understand women (vs. men) offenders have suggested that they must be "mad" (i.e., psychologically unstable or irrational; Heidensohn 1996) "bad" (i.e., inherently evil or malevolent; Ballinger, 2010) or "sad" (i.e., alluding to underlying social issues that may lead women to commit crime) (Easteal et al., 2015). Not surprisingly, previous research has found that the media depictions of women who offend have a crucial role in how they are perceived by the public. This can be problematic when

the media portrays a certain “frame” or “angle” to describe the women offender, versus providing an objective report (Bullock, 2007; Noh et al., 2010). Most women offenders, especially women who co-offend with men, tend to not match up with these simplistic categorizations, as the cases tend to be complex. Moreover, the way women are framed by the media can generate myths that are often influenced by socially constructed stereotypes of traditional gendered roles (e.g., “bad mother”, Easteal et al., 2015). Women who commit crimes have been considered as ‘doubly deviant’ because not only have they violated social expectations of being a law-abiding citizen, but they have also breached what is expected of ‘appropriate’ feminine behaviour (Berrington & Honkatukia, 2002). Easteal (2001) stated, “The woman who commits a crime is perceived as having perpetrated an act that is diametrically in opposition to the traditional characterisation of her sex as gentle, nurturing and angelical. She is far closer to the ‘whore’, the ‘bad’ woman ends of the scale, since her behaviour is deviating from the ‘natural’ feminine traits” (p. 22).

Brennan (2002) reported that women who commit murder are portrayed as extra deviant, as the behaviour is not congruent with society's view of ‘good’ women who are nurturing, passive, emotional, mothers, and cooperative wives. When women kill, “the general public tends to resort to a heightened or frenzied state whenever such events happen”, as it is a rare incident that cuts against social perceptions and norms of femininity (Weatherby et al, 2008; p. 8). Easteal et al. (2015) explored media representations of women who were charged for murder and found that the media tended to downplay information that explained or provided context for the women’s actions. For example, journalists and legal professionals (where the media tends to gather information

about the crime) focused on simple language such as ‘rationality’ or ‘choice’ versus the explanation or context in which the choice was made (Barlow, 2015). Similarly, Estrada et al. (2019) found that simplistic explanations for offending (i.e., rational action, mental illness, other) were more common in media articles where the offender was a woman versus man (30% versus 10%).

Consistent with previous research, Weare (2017) found that “judicial rhetoric” (i.e., judges’ comments) surrounding women who killed children also reinforced dominant narratives that described the woman as either ‘mad’, ‘bad’, or ‘sad’. Weare (2017) argued that these labels create a ‘macro-narrative’ (i.e., tells the overall narrative of the case through lexical choices and rhetoric) rather than the acknowledgement of the true circumstances and complexities (i.e., multiple micro-narratives) that surrounded the murder. The judicial rhetoric that created these macro-narratives consisted of judgements made about the woman accused and their deviance from gendered stereotypes. Weare (2017) argued that the macro-narratives of ‘mad’, ‘bad’, and ‘sad’ to describe women are not always problematic, as in some cases they may accurately reflect the realities and actions of some women; however, in other cases, they are problematic as they create a new dominant identity for these women. For example, macro-narratives can create a singular identity which does not allow for consideration of other micro-narratives (i.e., various contextual factors) to be considered; they deny the agency of women by negating the woman’s degree of choice in the offence; and they also reinforce disapproving gender stereotypes which are harmful for all women (e.g., deviant, pathological, passive; Weare, 2017). Barlow (2016) has suggested that the application of simple narratives to describe

complex crimes can lead to misunderstandings and failure to appreciate the unique aspects of this type of offending behaviour.

Women and Violent Co-offending

When accounting for all offence types, women (vs. men) are more likely to be charged as co-offenders and 33% of police reported co-offences include women and men offenders (Mahoney, 2011). According to Canadian statistics, women over the age of 25 are more likely than younger women to co-offend with the opposite sex (Mahoney, 2011). On the other hand, a psychological researcher, Carrington, found that both women and girls are overrepresented among co-offenders (Carrington, 2016). Dyads that are formed with an adult man and younger girl are 1.4 times more likely than what would be predicted based on what was found in typical age and gender groups. Some women and girls who are found guilty of an offence indicate that their pathway into criminal involvement started with an older man offender, often an intimate partner or relative (Haynie et al., 2005). On the other hand, some research supports that gender/age heterophily are developed because of men being coercive and/or exploitative of younger women (Carrington, 2016). He also found that for more serious/violent offences (i.e., serious drug offences, homicide, sex crimes against children) gender homophily is weaker (Carrington, 2016).

Women who commit offences with their partners are often portrayed in the media as being equally culpable (Jones & Wardle, 2008), if not even more dangerous than the men co-accused, regardless of their involvement in the crime (Kirsta, 1994, Barlow, 2015). For example, Barlow (2015) highlighted multiple cases of co-accused women and demonstrated ways that the media silenced, muted, and distorted the woman's voices. In

all of the cases analyzed, women were portrayed as being either being more involved or equally involved, as compared to the man co-offender, regardless of their level of criminal involvement (Barlow, 2015). For example, in one case a woman member of a group of five co-offenders, 'Jane', was portrayed by the media as being a 'main offender', despite being equally involved as her co-offenders and all being found guilty and receiving lengthy sentences. Quantitative data reported that 'Jane' was mentioned in 476 articles, followed by 'Simon' who received only 95 mentions (p. 54).

No known research in Canada reports on the prevalence of women-men co-offenders charged with murder; however, based on related statistics it can be speculated on how many cases may involve this unique subset of offenders. In 2011, there were 80 pair (gender not specified) offences reported by police, which included being charged with homicide and attempted murder and as mentioned above, if 33% of these cases included men-women pairs (i.e., police report 33% of co-offences include both men and women offenders versus men-men or women-women), and approximately 10% resulted in a conviction (i.e., per statistics, 1 in 10 cases result in a guilty verdict), there would be an average of three cases per year.

These cases tend to garner substantial media attention (Grabe et al., 2006) but, to date, almost no empirical examination. Media attention to such cases may be due to the deviation from gender stereotypes assigned to women (e.g., nurturing, passive, selfless, physically attractive; Grabe et al., 2006). When a woman commits a violent crime with a man partner the case tends to receive double the attention from the media, which is typically the public's main source of information about the crime (Grabe et al., 2006). As mentioned above, women are often not only judged for their involvement in the crime,

but also for their deviation from femininity (e.g., bad mother, sexual deviant, 'other'; Barlow, 2015).

Some have suggested that women seek out men with a similar desire to commit a crime (Morrisey, 2003), whereas others argue that the woman would not have committed the crime in the absence of the influence from the controlling men counterpart (Richie, 1996; Wykes, 1998; Welle & Falkin, 2000). Research shows that women engage in more violent and gender atypical offences when accompanied by a man. For example, Becker and McCorkel (2011) found that women were 2.77 times more likely to commit murder in the presence of one or more men co-offenders.

Schwarts, Conover-Williams, and Clemons (2015) found that violent co-offending has continued to be men-dominated (vs. women-dominated or mixed-gender), instrumental (vs. reactive-expressive), more likely to be against a stranger (vs. acquaintance/family member) and to involve use of weapons. Schwarts et al. (2015) found that when women co-offend, they are more likely to co-offend with men (vs. women); however, men are more likely to offend with other men (vs. women). Research has suggested that this may be due to women not being perceived as having good qualities for a crime partner in the eyes of a man looking for an accomplice (e.g., perceived as not demonstrating enough trustworthiness, strength, emotional stability, daringness to commit crime; Mullins & Cherbonneau, 2011), whereas a woman's entry into criminal activity often includes an introduction from men partners or relatives (Jones, 2008).

Schwarts et al., (2015) also found that the motive for offences in all-men partnerships tended to be instrumental, whereas all-women group offences tended to be

reactive-expressive. When the co-offences were women-men partnered the motive for homicide was generally like all-men groups (i.e., instrumental), whereas aggravated assault motives were similar to all-women groups (i.e., reactive-expressive). These findings were consistent with other research that demonstrated that men partners provide opportunities for women to be involved in more serious or violent crimes (Schwartz et al., 2015; Koons-Witt and Schram, 2003). This research demonstrates that women and men offenders tend to have different motives for violent offending and that the more violent the women-men co-offence is, the more likely the motive will resemble the man's (vs. woman's) motive (i.e., instrumental versus reactive-expressive).

Jones (2008) explored the relationship between women and their co-offenders (N= 50 women co-offenders) and found that there was a high degree of coercion (mental and physical) exercised by the man. Jones (2008) proposed that coercion can explain women co-offending. The co-offending relationships in the Jones (2008) study included women who committed the crime as a result of the men partner's expectation or association (40%; e.g., 'had to stand by their man', men were typically manipulative or abusive); as 'equal' partners with a men (33%) or a women (10%); due to direct threat or use of physical violence from a men partner (12%); or reportedly out of 'love' (5%). Interestingly, love and fear are common themes in the narratives of women co-offenders. Jones (2008) found that women who reported committing a crime out of love were less likely to have experienced physical violence by their partner. It is possible that co-offending serves as a protective factor in some of these relationships. In a sample of thirty-seven African American women caught in coercive relationships and convicted of a co-offence, Richie (1996) found that these women tended to place more importance on

their intimate relationship than their own safety and wellbeing. Whether the crime was committed out of love or fear, it seems that the women co-accused did so to avoid negative outcomes from their partner (e.g., disappointment or making them angry) (see Barlow, 2016).

Although in the area of women's sexual co-offending, research has found that substance abuse and mental illness (Gillespie et al., 2015) as well as impulsivity and emotional regulation concerns (Gannon & Rose, 2008) can be related to coerced offending. Research around women's sexual offending has demonstrated that women sexual co-offenders (vs. solo-offending counterparts) are more likely to have experienced parental attachment injuries (e.g., parental substance abuse, incarceration, and divorce) and intimidation or threats from an adult intimate partner (Comartin et al., 2018). Moreover, researchers also explored 'coerced sexual co-offending' in which the woman was pressured by a man counterpart to participate in a sexual offence. This research has demonstrated that women sexual co-offenders who were coerced into the committal of the offence were more likely to have experienced childhood physical, emotional, and sexual abuse, as well as intimate partner violence (i.e., intimidation, stalking, and sexual abuse) by an adult intimate partner in comparison to their non-coerced counterparts (Comartin et al., 2018). Similarly, recent research has examined internal (i.e., motivational factors) and external factors (i.e., dyadic, familial, and social circumstances) that contributed to sexual co-offending. The themes that emerged from the women's narratives who co-offended included; limited emotional-interpersonal support, intimate partner violence, offending to please the man co-offender, and "giving in" to the men's wishes (DeCou et al., 2015). This research is in congruence with other literature on

women who sexually offend (i.e., Comartin et al., 2018) and may help explain pathways in which women come to commit other violent offences with their intimate partner, such as murder.

Intimate Partner Violence & Coercive Control

A woman's 'choice' to co-offend should be considered in light of her risk for intimate partner violence (IPV), defined as abusive, controlling, and/or obsessive relationships (Barlow, 2016). In Canada, one in five women have been victims of IPV (Statistics Canada, 2014). Although self-reported incidents of IPV are generally comparable between women and men, women (vs. men) are more likely to report a physical injury (42% vs. 18%), fear for their lives (33% vs. 5%), and experience chronic violence (>11 or more occasions of violence; 20% vs. 7%; Statistics Canada, 2014). In other words, although the self-reported rates of IPV may be comparable between the women and men, the nature and consequences of IPV are far more devastating for women than men. In 2018, women (vs. men) were significantly more likely to report intimate partner violence to the police (79% versus 21%; Department of Justice Canada, 2020).

Stark (2007) and others have argued that traditional definitions of IPV have failed to acknowledge the psychological control tactics that commonly underlie the physical violence. For example, Stark (2007) outlined a coercive control model, which is a pattern of behaviours used almost exclusively by men to dominate and control individual women. Coercive control includes three important tactics: intimidation, isolation, and control, which are commonly associated with repeated physical violence. A perpetrator may restrict the woman's decision-making ability by using control tactics such as

obsessive monitoring (e.g., control, social isolation), gas-lighting (e.g., mind games to make victim second-guess their sanity), low-level violence (e.g., shoving, hair-pulling), and sexual assault (e.g., non-consensual sexual acts). In Stark's (2007) book *Coercive Control: How Men Entrap Women in Personal Life,* he reported:

> The major source for the model of coercive control are the victims and perpetrators of abuse with whom I and others have worked. I detail a range of harms caused by tactics other than violence. But the women in my practice have repeatedly made clear that what was done to them is less important than what their partners have prevented them from doing for themselves by appropriating their resources; undermining their social support; subverting their rights to privacy, self-respect, and autonomy; and depriving them of substantive equality. These harms highlight a key conclusion of this book: that coercive control is a liberty crime rather than a crime of assault. Preventing a substantial group of women from freely applying their agency in economic and political life obstructs overall social development." (p.13)

According to Stark (2007), if 'battering' was conceptualized as *subordination* rather than *violence* it would render very different implications for the victims and would be treated differently by the legal system. For instance, a battered woman who kills her abusive husband might be able to avail herself of the defence of self-defence. To date, however, the only cases where self-defence has been successfully argued have been those that have included significant physical violence suffered by the woman [*R v Mallott* (1998) 1 SCR 123*, R v Lavallee* (1990) 1 SCR 852; Stuart & Coughlan, 2018]. Not surprisingly, it is impossible for a battered woman to argue self-defence if she has killed someone other than her batterer. The only available defence would be duress, which is even more restrictive than the defence of self-defence and is unavailable to argue in cases of violent offences that have mandatory minimum penalties attached to the crime [that is unless the common-law defence of duress can be argued through secondary liability; see *R v Ryan* (2013) 1 SCR 14 and Hulley, 2021]. In a study exploring lawyers' perceptions

of women homicide offenders, Gurian (2015) quoted one lawyer as saying: "It's easy to do the battered woman syndrome where she kills her batterer, but the difficulty is in defending the battered women syndrome using it as a defense when she kills somebody else" (p. 6).

A Canadian legal scholar, Frances Chapman (2013), identified legal cases where women experienced battered women syndrome and were in a position of involuntariness when committing crime(s) with their intimate partner. Chapman argued that a defence of brainwashing could be applied in these cases where violence is perpetrated by a woman and man in an intimate (and abusive) relationship and directed towards a third party. Chapman argued that through prolonged abuse and torture these women came to be paralysed with fear and effectively "brainwashed" to participate in the offence. It was described that these women may have felt trapped and had to be obedient and self-serving in order to protect their own survival. In these cases, some elements related to the impact of intimate partner violence were acknowledged by the judiciary; however, they did not excuse the woman's culpability in the crimes committed. Chapman (2013) argued "… that the brainwashed actor has neither the requisite mens rea nor actus reus. Although the actor appears to be aware of his/her actions, those acts are involuntary and unintended." (p. 1412). If there was a criminal defence of brainwashing and it were to be successfully argued, it could excuse the woman's actions and she could be acquitted.

A small set of research has explored coercion as a pathway to crime, by exploring women members of co-offending couples (Barlow, 2015). In these cases, the 'type' of woman was commonly referenced, which indicated that there is a 'type' of women who can be coerced, which excluded women belonging to higher socioeconomic class and

who were educated (Barlow, 2015). Coercion when explored by Barlow was defined as "the action or practice of persuading, forcing, or encouraging someone to do something (such as commit a criminal act) by using force, threats, abuse of emotion and/or control" (Barlow, 2015; p. 24).

A recent study completed in the UK found that women in violent co-offending and coercive relationships commonly reported histories of violent victimization, mental health issues, and substance use concerns (Hulley, 2021). All twelve women in this sample reported that they had experienced childhood violence, sexual violence, or coercive control in their family home or as an adolescent in their early intimate relationships. Notably, it was very common that the women reported experiencing violence or coercive control not only in childhood *or* adolescence, but in both childhood *and* adolescence (Hulley, 2021).

Barlow (2015) proposes not to look at women co-accused as dichotomous; meaning victims or active agents (influenced or choosing to engage in crime), rather a social constructivist approach to coercion (i.e., media, legal, and broader society) is encouraged. As a result, this allows for a deeper understanding of how agency and coercion are interconnected. As research presented above outlined, women are often described by media and during trial by using over-simplistic gender categorizations; including, bad mother, sexual deviant, and 'other' (i.e., evil or non-human), whereas a man committing an offence is typically normalized. By using these categorizations Barlow (2015) argues that the women's voices are silenced, and individuals (i.e., general public, researchers, etc.) are unable to better understand alternative explanations for offending (i.e., the role of coercion/influence in a relationship with a man counterpart).

Research has identified that the judiciary often argue that the women in these cases had 'rational choice' because there were no direct physical threats at the time of the offence, only psychological and moral influence. This research suggests that the judiciary may not understand various types of coercion (i.e., coercive control) and the impact it has on women (i.e., position of subordination).

Gaps in the Current Literature

To fully understand women co-offenders, the entire intimate partnership needs to be considered rather than viewing the offence as an isolated incident. Examining the bigger picture might serve to mitigate the culpability of some women and could impel the legal system to adopt a more nuanced approach to women co-offenders. Research is needed, however, to determine if evidence supports the need for change in how these cases are perceived, tried, and sentenced. Therefore, this dissertation aimed to address this gap in the current literature by examining the legal and judicial response to women who are co-accused of an offence(s) with their intimate partner, where at least one of them received a murder charge. This dissertation advances the literature by identifying the contextual factors of co-offending in these unique cases and highlights concerns in the current legal and judicial responses in a Canadian sample. The goal was to highlight these concerns so that legal professionals can more fairly and appropriately respond to the unique aspects of women co-offenders in such cases and so that the factors identified are better reflected in the legal process both at the stage of determining culpability and sentencing. Findings have implications for a change in perception of women who commit violent offences in the context of co-offending relationships and demonstrate the need for

changes in legislative treatment imposed for secondary liability, change in defence arguments, and change in law.

CHAPTER FIVE: METHODOLOGY

The empirical portion of this dissertation investigated the legal and judicial responses to women members of co-offending couples where at least one party (i.e., man or woman) was charged with murder. This study examined and reported, based on information from court decisions, on descriptive statistics (e.g., age, past/current victimization including IPV/coercion, gendered differences, mental health, race, poverty) involving women and men convicted of culpable homicide (i.e., murder or manslaughter) in co-offending couples and how women are sentenced in comparison to the man they co-offend with (i.e., similar sentence, different sentence, factors referenced in decision). In addition, a thematic analysis was conducted with the same decisions of co-offending couples convicted of murder or manslaughter and identified and reported on themes that emerged from the judicial rhetoric in trial and sentencing decisions. Lastly, for cases where there was reported intimate partner violence between the co-accused, a case study analysis was conducted and specifically reported on how the judge considered the violence the women experienced and how this factor was reflected in the sentencing decision.

This research required an interdisciplinary approach that allowed for the examination of the *legal response* (i.e., case law, criminal defence, finding of guilt, determining the level of blameworthiness, sentencing) to a *psychological and socio-political phenomenon* (i.e., IPV and coercive control). By exploring this intersection of law and psychology, a more nuanced interpretation of the criminal law and criminal process can be applied in these cases. The goal of the current study was to address the above-mentioned gap in the literature by exploring specific cases of co-offending crimes,

with a focus on factors including the personal characteristics of the woman offender, intimate partnership dynamics (i.e., IPV/coercive control), and the legal and judicial response to women co-offenders (i.e., findings of guilt and sentencing). A case review was conducted using established legal databases by searching women-men co-offending cases from each province and requesting trial and sentencing decisions of relevant cases.

Procedure & Data Analysis

Cases drawn for analyses included co-offending couples where at least one party (i.e., man or woman) was charged with murder in Canada over the last 25 years, since the landmark case of *R v Bernardo* (1997) OAC 244, which was the first highly publicized Canadian case of a co-offending couple charged with murder. Cases were found by searching broad key terms (i.e., "Murder" AND "Co Accused" OR "Two Accused") in established legal databases, LexisNexis, Westlaw, and CanLii. The selected search period was from January 1, 1995 to November 1, 2021. Across all databases, the search results revealed 7802 total cases (see Table 1). Each of these cases were then screened for inclusion and all cases that appeared to meet the study criteria (i.e., co-offending man and woman with at least one party charged with murder) were selected and recorded (N= 87). The research focused on murder as it carries the most severe stigma and the harshest punishment of any crimes in society, and there is research to suggest that some women may be coerced into such offences, which may not be recognized by legal professionals or in the current legal regime. Following the identification of these cases, each document was analyzed and only cases where the judiciary referenced a romantic or intimate relationship between the co-accused were selected for further analysis (i.e., girlfriend/boyfriend, spouse, common-law partner, etc; N= 49). An intimate relationship

between the co-accused was a part of the study criteria to examine and report on the relationship factors (i.e., IPV and/or coercive control) between the co-accused, which previous research suggests may impact a woman's participation in murder cases.

Following identification of cases with a man and woman co-accused in an intimate partnership, all databases were searched for *trial* and *sentencing* decisions for each case and/or co-offender (if tried separately). For the purposes of the current study, the combination of both the trial and sentencing decisions for each case were the only documents that could be consistently found through available databases and thus these documents were used to gather details about the offence, the offenders, and how the judiciary responded, in order to analyze variables of interest across the selected cases. In many cases, both documents were unavailable through the databases and therefore, the courts in which the cases were tried were contacted and document requests were submitted. As noted by other legal researchers (see Craig 2018), legal documents can be very difficult for researchers to obtain. Each province has a different, often complicated and time consuming, administrative process for requesting documents and in some instances, the courts did not respond to the request despite multiple follow ups. As a result, out of the forty-nine cases that met the criteria for the current study, only twenty-three (N= 23) cases had sufficient documentation to be included in analysis (16 cases had both trial and sentencing decisions and seven cases had a trial decision and disposition document from the court that outlined the sentence imposed).

This study used the following research questions to guide the quantitative analysis in this section: 1) What role (i.e., principal offender or aid/abet) do women members of co-offending couples play when committing culpable homicide?; 2) What

intersectional factors are reported when women in co-offending couples commit culpable homicide?; 3) Does the legal system allow or reflect the level of (potential) decreased blameworthiness in these cases (i.e., difference in sentences between co-accused)?; and 4) How and to what extent do judges consider the various intersectional factors (i.e., gender, past/current victimization, mental health, race, or poverty) in these cases into their sentencing decision?

Variables of interest for descriptive statistics were generated from a review of the literature and included: geographic location (by province), whether co-offenders were tried together or separate (together/separate), whether the verdict was appealed (yes/no), relationship status between co-accused (married/common law/dating/infidelity or affair), evidence of abuse in relationship with co-accused (yes/no), evidence of abuse if victim was a past intimate partner (yes/no), if the case had aspects of coercive control in the relationship and/or crime (yes/no), relationship to the victim (biological, step, or foster child/an ex-partner/a current spouse/drug environment involved/ random or acquaintance/roommate, relative, or another romantic involvement), if the co-accused played a similar role when committing the offence (yes/no), and whether the judge reflected the different roles in their sentencing decision (yes/no).

For each individual accused, the variables of interest were informed from the literature review and included: age at time of sentencing, race/ethnicity, charge (first-degree/second-degree/manslaughter), if there was more than one charge (yes/no), plea entered (not guilty/guilty/guilty of a lesser offence), of which crime they were found guilty (first-degree murder/second-degree murder/manslaughter/accessory after the fact/acquitted), if there was more than one finding of guilt (no other charge/attempted

murder/causing bodily harm/unlawful confinement/discharging firearm), prior conviction (yes/no), whether sentencing principles explicitly mentioned at the time of sentencing (yes/no/acquitted), sentence rendered, if the sentence was concurrent (yes/no), conditions outlined in sentence (DNA & weapons/DNA & weapons & no contact order/DNA & weapons & victim surcharge/DNA & weapons & abstain from alcohol/acquitted), whether it was a maximum sentence (yes/no/acquitted), aggravating factors outlined in the sentence (yes/no/acquitted), categories of aggravating factors explicitly mentioned in the sentence, mitigating factors outlined in the sentence (yes/no/acquitted), categories of mitigating factors explicitly mentioned in the sentence, mental health diagnosis mentioned (yes/no), evidence of past abuse (yes/no), and the judge's gender (man/woman).

Following the collection of demographic data, a thematic analysis was conducted to identify common themes regarding how judges reflected on the woman co-accused and which emerged from the trial and sentencing decisions. Thematic analysis is an effective tool for understanding various views and opinions from qualitative data (Neuendorf, 2018). A six-step process was followed that included: 1) familiarization with the text in the trial and sentencing decisions, 2) coding, 3) generating themes, 4) reviewing themes, 5) defining and naming sub-themes, and 6) writing the results. Since past literature has identified themes which have been commonly used to categorize women who offend (i.e., the "bad", "sad", or "mad" woman; Easteal et al., 2015) a deductive approach (i.e., interpreting the data with previously established themes) was applied to identify the themes. Each case was reviewed and based on the judicial comments the case was labeled as whether the woman was depicted as "bad", "sad", "mad", or "neutral". Once the cases

were categorized, a latent approach (i.e., reading into underlying assumptions) was applied to the data to interpret the judicial comments and, where possible, establish distinct sub-themes within the established categories. The goal of the thematic analysis was to better understand how judges perceive and report on women who violently co-offend with an intimate partner and whether the judicial rhetoric is consistent with other research surrounding women who offend (i.e., Easteal et al., 2015). If women are described and depicted in certain categories (i.e., "bad", "sad", "mad", neutral) this has important implications for how women who offend are not only sentenced, but also how they are viewed by others (e.g., society, legal professionals, correctional officers, parole boards, etc.).

Following the thematic analysis, a case study was conducted for three cases in the sample, where the judge specifically mentioned intimate partner violence between the co-accused. These cases were: *R* v *Nichelle Rowe-Boothe and Garfield Boothe* [2014] ONSC 3391*, R* v *Tosha Hubler and Jason Hubler* [2013] ABCA 31*, and R* v *Shelly Elanik and Ronald Sayers* [2003] NWTJ 98. This approach is commonly used in the social sciences to "generate an in-depth, multi-faceted understanding of a complex issue in its real-life context" (Crowe et al., 2011; p. 1). The goal of the three case studies was to assess how the judiciary factor in a woman's experience of intimate partner violence in reaching their decision, to the extent to which the law and the mandatory minimum penalties allow.

Table 1.
Total cases screened for inclusion during data collection from 1995-2021.

Database	Results
WestLaw	736
LexisNexis	3845
CanLii	3221
Total Screened for Inclusion	7802

Search string: "Murder" AND "Co Accused" OR "Two Accused"

Table 2.
Citations for each case included in analysis.
Duplicate citations are present due to the woman and man being tried and sentenced together (i.e., same decision versus separate decision used for analysis).

Case #	Man co-accused	Woman co-accused
1	*R. v. Bahia [2016] BCSC 2327*	*R. v. Athwal [2017] BCJ 2957*
2	*R. v. Baldwin [2017] ONSC 5040*	*R. v. Fenn [2015] ONSC 4369*
3	*R. c. Merceus et Cote [2009] QCCS 3204*	*R. c. Merceus et Cote [2009] QCCS 3204*
4	*No Decision**	*R. v. Losier [2020] NBQB 072*
5	*R. v. Ebanks [2010] OJ 6392*	*R. v. McIntyre [2014] ONSC 467*
6	*R. v. Forslund and Quinn [2007] BCSC 573*	*R. v. Forslund and Quinn [2007] BCSC 573*
7	*R. v. Ronald and Gill [2019] ONSC 6328*	*R. v. Ronald and Gill [2021] ONSC 6328*
8	*R. v. Goforth [2016] SKQB 75*	*R. v. Goforth [2016] SKQB 75*
9	*R. c. Hunt [2019] QCCS 10*	*R. c. Binette [2020] QCCS 18*
10	*R. v. Bottineau and Kidman [2006] OJ 1864*	*R. v. Bottineau and Kidman [2006] OJ 1864*
11	*R. v. Leggette and Henneberry [2015] NSSC 134*	*R. v. Leggette and Henneberry [2015] NSSC 134*
12	*R. v. Maguire and Haley [2010] NSSC 271*	*R. v. Maguire and Haley [2010] NSSC 271*
13	*R. v. McGenn [2018] BCSC 1942*	*R. v. McGenn and Sather [2018] BCSC 1614*
14	*R. v. Poitras and Nelson [1998] OJ 6330*	*R. v. Poitras and Nelson [1998] OJ 6330*
15	*R. v. Rowe-Boothe [2014] ONSC 3391*	*R. v. Rowe-Boothe [2014] ONSC 3391*
16	*R. v. Sayers and Elanik [2003] NWTSC 69*	*R. v. Sayers and Elanik [2003] NWTSC 69*
17	*R. v. Bruso and McKinnon [2004] ABQB 2131*	*R. v. Bruso and McKinnon [2004] ABQB 2131*
18	*R. v. Hubler [2013] ABCA 31*	*R. v. Hubler [2013] ABCA 31*
19	*R. v. Magoon [2015] ABQB 351*	*R. v. Magoon [2015] ABQB 351*
20	*R. v. Kematch and Mckay [2010] MBCA 18*	*R. v. Kematch and Mckay [2010] MBCA 18*
21	*R. v. Radita [2017] ABQB 128*	*R. v. Radita [2017] ABQB 128*
22	*R. v. Cuthill and Rempel [2018] ABCA 321*	*R. v. Cuthill and Rempel [2018] ABCA 321*
23	*R. v. Telfer and Crossman [2019] MBQB 47*	*R. v. Telfer and Crossman [2019] MBQB 47*

**Accused died before trial in a police chase.*

CHAPTER SIX: RESULTS

Descriptive Statistics

Within the cases analyzed, the following descriptive statistics were extracted and are summarized below (*please refer to Table 3 and 4*).

Demographics

The twenty-three cases of co-accused, where at least one member was charged with murder and where the co-accused were in an intimate relationship at the time of the offence, occurred in various provinces across the country. In over a third (*n*= 8, 35%) of the cases analyzed, both co-accused were found guilty of first-degree murder. Overall, six cases were derived from Ontario (26%), five cases from Alberta (22%), three cases from British Columbia (13%), two cases each from Quebec, Nova Scotia, and Manitoba (9%), and one case each in New Brunswick, Saskatchewan, and Northwest Territories (4%). Co-accused included in the analysis were sentenced between the years 1998 to 2020, with five cases from 2016 (22%), three cases from 2010 (13%), and two cases each in 2015 and 2019 (9%). In most cases, the co-accused were tried together (83%, *n*= 19) versus separately. Almost half (48%, *n*= 11) of the co-accused were in a common-law relationship, a quarter (26%, *n*= 6) were married, less than a fifth were dating (17%, *n*= 4), and a few were in an affair with their co-accused (9%, *n*= 2). The men co-accused were on average, M= 36.69 years of age (Range: 23 to 61, SD: 9.68). The women co-accused were, on average, M= 34.87 years of age (Range: 20 to 55, SD: 10.07). The average age difference between each co-accused pairing was 1.75 years, with the man co-accused being older (Range: -16 to 19, SD: 8.72). Of the twenty-three cases, over half appealed the decision (*n*= 16) and in most cases (*n*= 12) the appeal was dismissed, in two

cases the appeal was granted but the verdict did not change, in one case a first-degree charge was overturned to a second-degree charge, and in another case the verdict was overturned, and the woman was found not guilty and was acquitted. Almost a quarter (22%, 5 men and 5 women) were identified in court documents as being from a racial or ethnic minority; however, it should be noted (thus, interpreted with caution) that many trial and sentencing decisions did not make any reference to race or ethnicity. Specifically, in the trial and sentencing decisions of men co-accused, two men were referred to as Indigenous, two men were referred to as African American, and one man was referred to as Jamaican. In the trial and sentencing decisions of women co-accused, four women were referred to as Indigenous, and one woman was referred to as Jamaican.

Findings of Guilt and Judicial Response

Sample of Men Co-accused:

In the sample of men co-accused, the majority (65%, *n*= 15) were charged with first-degree murder, followed by second-degree murder (30%, *n*= 7), and manslaughter (4%, *n*= 1). Over half (52%, *n*= 12) were found guilty of first-degree murder, almost a third (20%, *n*= 7) were found guilty of second-degree murder, followed by manslaughter (13%, *n*= 3) and, in one case, data is missing as the accused died prior to trial (4%). The vast majority (87%, *n*= 20) of cases only had one finding of guilt, whereas three cases had an additional finding of guilt (i.e., attempted murder, causing bodily harm, and unlawful confinement). Although in many cases (57%) the judge did not mention whether the man co-accused had a prior conviction or not, over a third (35%, *n*= 8) of the decisions referenced a previous conviction and a tenth (*n*= 2) referenced the man as being a first-time offender. Twelve men (52%) were sentenced for first-degree murder and

because of mandatory minimum penalties the sentence was already pre-determined; life without parole for 25 years. Almost a third (30%, *n*= 7) of men were sentenced for second-degree murder and received a life sentence with an average parole ineligibility for 16.57 years (range= 13 to 22 years). Three cases (13%) were sentenced for manslaughter and received an average of 12.33 years imprisonment (range= 10 to 15 years). Again, one man died before trial and therefore a sentence was not established. Alongside carceral sentences, judges can impose other conditions that must be met and/or followed. The most common conditions attached to the sentences were DNA order and weapons prohibition order (65%, *n*= 15), followed by DNA order, weapons prohibition order, and a victim surcharge (13%, *n*= 3), and lastly, a DNA order, weapons prohibition order, and a no contact order (4%, *n*= 1). Four cases (17%) were missing the conditions attached to the sentence.

Although a third (35%, *n*= 8) of the men co-accused cases were missing a written sentencing decision which outlined the mitigating and aggravating factors when determining the sentence, this section will report on the data that was available. Nine cases (39%) reported no aggravating factors, followed by a fifth (17%, *n*= 4) reported an aggravating factor to be that the offender was in a position of trust, followed by two cases (9%) reported the brutality of the crime. Regarding mitigating factors, eight cases (35%) referenced no mitigating factors, three cases (13%) mentioned remorse and acceptance of responsibility, two cases (9%) mentioned a guilty plea, and a case each (4%) mentioned the offender's character and having less responsibility in the committal of the offence as a mitigating factor. A fifth of these cases (22%, *n*= 5) mentioned a mental health diagnosis

and more than a tenth (13%, *n*= 3) mentioned evidence of past abuse. The judges in these cases (i.e., man co-accused) were mostly men (57%, *n*= 13) versus women.

Sample of Women Co-accused:

In the sample of women co-accused, they were more likely to be a "party to the offence" (52%, *n*= 12: i.e., aid, abet, or be 'complacent', charged with a lesser offence) than to be a principal offender or have equal participation with the man co-accused (as deemed by the judiciary; 48%, *n*= 11). Of the women co-accused, the majority (61%, *n*= 14) were charged with first-degree murder, followed by second-degree murder (26%, *n*= 6), and manslaughter (13%, *n*= 3). Over a third (35%, *n*= 8) were found guilty of first-degree murder and similarly, almost a third (30%, *n*= 7) were found guilty of second-degree murder, followed by manslaughter (13%, *n*= 3), accessory after the fact to murder/manslaughter (9%, *n*= 2), and three women were acquitted (13%).

In regards to acquittals, in one case (see *R v Quinn 2007*) the woman was found guilty of second-degree murder and upon appeal it was overturned and she was acquitted due to the judge having reasonable doubt as to whether she actually verbally encouraged the offence to occur. In the case of *R v Crossman 2019*, the woman was charged with first-degree murder but was acquitted since the judiciary was unable to prove her knowledge and intent (she was driving and her partner shot someone from the vehicle). In *R v Sather 2018*, Ms. Sather was charged with accessory after the fact; however, the judge found her actions to be innocent in that she was not trying to assist her partner from evading criminal liability, and she was acquitted.

The majority (87%, *n*= 20) of cases only had one finding of guilt, whereas three cases had an additional finding of guilt (i.e., causing bodily harm, discharging a firearm,

and unlawful confinement). Although in many cases (52%) the judge did not mention whether the woman co-accused had a prior conviction or not, about a fifth (22%, *n*= 5) of the decisions referenced a previous conviction and a quarter (*n*= 6) referenced the woman as being a first-time offender. Eight women (35%) were sentenced for first-degree murder and because of mandatory minimum penalties the sentence was already predetermined; life without parole for 25 years. Almost a third (30%, *n*= 7) of women were sentenced for second-degree murder and received a life sentence with an average parole ineligibility for 14.86 years (range= 10 to 22 years). Three cases (13%) were sentenced for manslaughter and received an average of nine years imprisonment (range= 5 to 17 years). The most common conditions attached to the sentences were DNA order and weapons prohibition order (57%, *n*= 13), followed by DNA order, weapons prohibition order, and a victim surcharge (9%, *n*= 2), and lastly, a DNA order, weapons prohibition order, and abstaining from alcohol condition (4%, *n*= 1). Four cases (17%) were missing the conditions attached to the sentence and three cases (13%) were acquitted.

Although almost a third (30%, *n*= 7) of the women co-accused cases were missing a written sentencing decision that outlined the mitigating and aggravating factors when determining the sentence, this section will report on the data that was available. Nine cases (39%) reported aggravating factors; three cases (13%) reported an aggravating factor to be that the offender was in apposition of trust, three cases (13%) reported an aggravating factor to be the brutality of the crime, and three cases (13%) reported that dishonestly/manipulation was an aggravating factor. Regarding mitigating factors, six cases (26%) referenced mitigating factors (30% did not report factors, 30% were missing

documentation, and 13% were acquitted). Of these, three cases (13%) mentioned a guilty plea, two cases (9%) mentioned remorse and acceptance of responsibility, and one case (4%) mentioned the offender's efforts to rehabilitate as a mitigating factor. Over a quarter of the cases (26%, *n*= 6) mentioned a mental health diagnosis and almost half (48%, *n*= 11) mentioned evidence of past abuse. The judges in these cases (i.e., women co-accused) were mostly men (61%, *n*= 14) versus women.

Evidence of Abuse in Current Relationship or Past Relationships

Three of the women co-accused cases (13%) made mention in either the trial or sentencing decision of intimate partner violence occurring in the relationship with the co-accused (*R* v *Nichelle Rowe-Boothe and Garfield Boothe* [2014] ONSC 3391*, R* v *Tosha Hubler and Jason Hubler* [2013] ABCA 31*, and R* v *Shelly Elanik and Ronald Sayers* [2003] NWTJ 98) and appeared to have aspects of coercive control. Additionally, in cases where the victim was the woman co-accused ex-partner, three of the five cases made mention to past intimate partner violence, but no reported violence in current relationship with the co-accused.

Relationship to the Victim

Distinct categories emerged from the data when examining the relationship between the accused and the victims (*please refer to Tables 5-10*). In over a quarter (26%, *n*= 6) of the cases, the victim was a biological, step, foster, or grand- child; in over a fifth of the cases (22%, *n*= 5) the victim was the woman co-accused ex-partner (all men victims), in 17% of the cases (*n*= 4), the victim and co-accused(s) had mutual drug involvement; in 13% of the cases (*n*= 3), the victim was a roommate or relative or romantic interest; in three cases (13%) the victim was random or an acquaintance; and lastly, in 9% of the

cases (*n*= 2) the man co-accused was in an affair with the woman co-accused and they killed his current wife.

Table 3.

Descriptive statistics based on gender of accused.

Variable	*n* | % Men (N= 23)	*n* | % Women (N= 23)
Average age	36.69 (range: 23 to 61) SD: 9.98	34.87 (range: 20 to 55) SD: 10.07
Ethnicity		
Racial/ethnic minority	5 (22%)	5 (22%)
Indigenous	*2 (9%)*	*4 (17%)*
African American	*2 (9%)*	-
Jamaican	*1 (4%)*	*1 (4%)*
Not reported	18 (78%)	18 (78%)
Charge		
First-degree murder	15 (65%)	14 (61%)
Second-degree murder	7 (30%)	6 (26%)
Manslaughter	1 (4%)	3 (13%)
More than one charge		
Yes	5 (22%)	5 (22%)
No	18 (78%)	18 (78%)
Plea		
Not guilty	18 (78%)	18 (78%)
Guilty	2 (9%)	2 (9%)
Guilty of a lesser offence	2 (9%)	3 (13%)
*Missing	1 (4%)	-
Found guilty of		
First-degree murder	12 (52%)	8 (35%)
Second-degree murder	7 (30%)	7 (30%)
Manslaughter	3 (13%)	3 (13%)
Accessory after the fact to murder/manslaughter	-	2 (9%)
Acquitted	-	3 (13%)
*Missing	1 (4%)	-
Another finding of guilt?		
No other charge	20 (87%)	20 (87%)
Attempted murder	1 (4%)	-
Causing bodily harm	1 (4%)	1 (4%)
Unlawful confinement	1 (4%)	1 (4%)
Discharging firearm	-	1 (4%)
Prior conviction?		
Yes	8 (35%)	5 (22%)
No	2 (9%)	6 (26%)
Missing	13 (57%)	12 (52%)
Sentencing principles referenced?		
Yes	9 (39%)	7 (30%)
No	5 (22%)	5 (22%)
Missing	9 (39%)	8 (35%)
Acquitted	-	3 (13%)
Average parole eligibility based on finding of guilt		
First-degree murder	25 years (*n*= 12)	25 years (*n*= 8)
Second-degree murder	16.57 years (*n*= 7)	14.86 years (*n*= 7)
Average manslaughter sentence	12.33 years (*n*= 3)	9.00 years (*n*= 3)

Average accessory after the fact to manslaughter/murder sentence	-	4.25 years (*n*= 2)
Concurrent Sentence		
Yes	6 (26%)	6 (26%)
No	16 (70%)	17 (74%)
*Missing	1 (4%)	-
Conditions		
DNA & weapons	15 (65%)	13 (57%)
DNA & weapons & no contact order	1 (4%)	-
DNA & weapons & victim surcharge	3 (13%)	2 (9%)
DNA & weapons & abstain from alcohol	-	1 (4%)
Acquitted	-	3 (13%)
Missing	4 (17%)	4 (17%)
Aggravating factor mentioned		
Yes	8 (35%)	9 (39%)
No	7 (30%)	4 (17%)
Acquitted	-	3 (13%)
Missing	8 (35%)	7 (30%)
Category of aggravating factor		
None mentioned	9 (39%)	4 (17%)
Brutality of crime	3 (13%)	3 (13%)
Position of trust/breach of trust	4 (17%)	3 (13%)
Dishonesty/manipulation	1 (4%)	3 (13%)
Acquitted	-	3 (13%)
Missing	8 (35%)	7 (30%)
Mitigating factor mentioned		
Yes	7 (30%)	6 (26%)
No	8 (35%)	7 (30%)
Acquitted	-	3 (13%)
Missing	8 (35%)	7 (30%)
Category of mitigating factor		
None	8 (35%)	7 (30%)
Guilty Plea	2 (9%)	3 (13%)
Remorse/Accept responsibility	3 (13%)	2 (9%)
Less responsibility in crime	1 (4%)	-
Character	1 (4%)	-
Efforts to rehabilitate	-	1 (4%)
Acquitted	-	3 (13%)
Missing	8 (35%)	7 (30%)
Mental health diagnosis		
Yes	5 (22%)	6 (26%)
Not Reported	18 (78%)	17 (74%)
Evidence of past abuse reported		
Yes	3 (13%)	11 (48%)
Not Reported	20 (87%)	12 (52%)
Judge's gender		
Man	13 (57%)	14 (61%)
Woman	9 (39%)	9 (39%)
*Missing	1 (4%)	-

**Accused died before trial in a police chase.*

Table 4.

Descriptive statistics based on case data (N= 23).

Variables	*n* | %
Location	
Atlantic region	3 (13%)
Central Canada	7 (35%)
Prairie provinces	7 (35%)
West coast	3 (13%)
Northern Territories	1 (4%)
Sentencing year	
1996-1999	1 (4%)
2000-2005	1 (9%)
2006-2010	3 (22%)
2011-2015	4 (17%)
2016-2020	10 (43%)
Missing	1 (4%)
Relationship status	
Married	3 (26%)
Common law	11 (48%)
Dating	4 (17%)
Affair with co-accused	2 (9%)
Evidence of abuse & coercion in relationship	
Evidence reported	3 (13%)
No evidence reported	20 (87%)
Evidence of abuse if victim was an ex-partner (*n*= 5)	
Yes	3 (60%)
No	2 (40%)
Women's Role in Offence	
Deemed a principal offender or equally involved	11 (48%)
Aided, abetted, or lesser charge	12 (52%)
Relationship to victim	
Biological/step/foster/grand child	6 (26%)
Co-accused ex-partner	5 (22%)
Victim associated with drug involvement	4 (17%)
Random/acquaintance	3 (13%)
Roommate/relative/romantic interest	3 (13%)
Co-accused current wife	2 (9%)

Table 5.

Victim was a biological, foster, or step- or grand-child.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Goforth			
Kevin Goforth	Manslaughter	15 years	Victim was a foster child living in their care. Ms. Goforth "more
Tammy Lynn Goforth	Second-degree murder	Life – parole 17 years	responsible due to child caregiving her main role in household"
R. v. Bottineau			
Norman Kidman	Second-degree murder	Life – parole 22 years	Victim was the co-accused biological grandson. Judge
Elva Bottineau	Second-degree murder	Life – parole 22 years	mentioned that Ms. Bottineau had more involvement as she was the "main caregiver"
R. v. Rowe-Boothe *			
Garfield Boothe	Second-degree murder	Life – parole 18 years	Victim was Mr. Boothe's biological son. Ms. Rowe-Boothe was
Nichelle Rowe-Boothe	Second-degree murder	Life – parole 13 years	less involved: but 'complacent' (worried her own son would be taken if CPS called)
R. v. Magoon			
Spencer Lee Jordan	Second-degree murder	Life – parole 17 years	Victim was Mr. Jordan's biological daughter. Judge described
Marie Eve Magoon	Second-degree murder	Life – parole 17 years	co-accused as both being equally abusive towards daughter
R. v. Kematch			
Karl McKay	First-degree murder	Life – parole 25 years	Victim was Ms. Kematch's biological daughter.
Samantha Kematch	First-degree murder	Life – parole 25 years	"Kematch observed his actions but did nothing about it."
R. v. Radita			
Emil Radita	First-degree murder	Life – Parole 25 years	Victim was their biological child. Both would not accept/believe
Rodica Radita	First-degree murder	Life – Parole 25 years	the medical diagnosis of diabetes resulting in neglect/starvation

* = Intimate partner violence mentioned in case

Table 6.

Victim was the woman co-accused ex-partner.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Fenn *			
Christopher Baldwin	Manslaughter	12 years imprisonment	"She was under the influence of a new man, Mr. Baldwin the co-
Rachel Fenn	Manslaughter	5 years imprisonment	accused when this crime was committed"
R. v. McIntyre *			
Nathan Kelly	Second-degree murder	Life – parole 16 years	Judge depicts the men as "…having fallen prey to the
Aimee McIntrye	Second-degree murder	Life – parole 11 years	manipulations of the older and more sophisticated Ms. McIntyre". She was not physically present at time of murder.
R. v. Poitras *			
Jean Poitras	First-degree Murder	Life – parole 25 years	"You were motivated perhaps by love or money. We may never
Colette Nelson	Accessory after the fact	7 years imprisonment	know." She was not physically present at time of murder.
R. v. Bruso			
Joseph Bruso	First-degree murder	Life – parole 25 years	She was "out of options financially" and planned to kill ex-
Nancy McKinnon	First-degree murder	Life – parole 25 years	husband for insurance money.
R. v. Cuthill			
Timothy Rempel	First-degree murder	Life – parole 25 years	She gave the "go ahead" text for current partner to kill her
Sheena Cuthill	First-degree murder	Life – parole 25 years	ex/father of her child. She was not physically present at time of murder.

* = Intimate partner violence mentioned in the relationship between co-accused and victim.

Table 7.

Victim was associated with drug involvement

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Merceus			
Michel Cote	Second-degree murder	Life – parole 13 years	"..your moral culpability in the crime of murder is obvious: it
Nedege Merceus	Second-degree murder	Life – parole 14 years	is because of you that Michel Côté began to consume, he who did not even know what crack was before knowing you"

R. v. Losier			
James Curtis	Died before trial	NA	"Ms. Losier's involvement in the offences was at the lower end of the spectrum in terms of her participation; and Ms. Losier was acting partly out of loyalty to her fiancé."
Wendy Losier	Accessory after the fact	18 months imprisonment	
R. c. Binette			
Richard Hunt	First-degree murder x 2	Life – parole 25 years	"The evidence reveals beyond a reasonable doubt that Mélanie Binette had personal knowledge of the increasing pressure exerted on Richard Hunt by Joseph Fluet in order to obtain reimbursement, and that Richard Hunt was at a loss for solutions."
Melanie Binette	Manslaughter x 2	17 years imprisonment	
R. v. Telfer			
Julien Telfer	First-degree Murder	Life – parole 25 years	"I conclude this because clearly Ms. Crossman was not at Reset and had no motive, or grudge, with Mr. Belayneh. This was Mr. Telfer's beef, so to speak; he set the payback in motion. There is no evidence what he told her."
Paige Crossman	Acquitted	NA	

Table 8.

Victim was a roommate, romantic interest, or relative, respectively.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Henneberry			
Blake Legette	First-degree murder	Life – parole 25 years	"The Crown accepts that Ms. Henneberry was not involved in such planning and deliberation."
Victoria Henneberry	Second-degree murder	Life – parole 10 years	
R. v. Maguire			
Desmond Maguire	First-degree murder	Life – parole 25 years	Mr. Maguire had a "romantic interest" in the victim, but Ms. Haley did not approve. Maguire suggested that they kill her.
Ashley Haley	First-degree murder	Life – parole 25 years	
R. v. McGenn			
Shane McGenn	Manslaughter	10 years imprisonment	Acquitted due to "innocent explanation for Ms. Sather's actions" and no intent to assist Mr. McGenn in evading liability of the murder.
Sarah Sather	Acquitted	NA	

Table 9.

Victim was an acquaintance or stranger.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Forslund			
Robert Forslund	Second-degree murder	Life – parole 17 years	Ms. Quinn allegedly said "if you really love me you'll kill him" - on appeal judge had reasonable doubt if this was said
Katherine Quinn	Acquitted	NA	
R. v. Sayers *			
Ronald Sayers	Second-degree murder	Life – parole 14 years	"I do not accept the battered women's syndrome explains Ms. Elanik's actions that night or provides any mitigation in this case. I find the proposition that it would particularly hard to accept when the violence was directed to an innocent third party."
Shelly Elanik	Manslaughter	5 years imprisonment	
R. v. Hubler *			
Jason Hubler	First-degree murder	Life – parole 25 years	Tosha's police statement began with the remark, "have you ever been put in a position where you're terrified either which way you turn". Duress defence attempted; jury did not believe it.
Tosha Hubler	First-degree murder	Life – parole 25 years	

* = Intimate partner violence mentioned in case

Table 10.

Victim was the man co-accused current wife.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Athwal			
Baljunder Bahia	First-degree murder	Life – parole 25 years	Mr. Bahia said the murder happened because his wife was going to leave him and he "couldn't handle that." The co-accused wanted to get married. Third person committed the murder, and they were not physically present.
Tanpreet Athwal	First-degree murder	Life – parole 25 years	
R. v. Ronald			
Bhupinderpal Gill	First-degree murder	Life – parole 25 years	

Gurpreet Ronald	First-degree murder	Life – parole 25 years	"Why murder as opposed to divorce was chosen as the way out is beyond my ability to discern from the evidence before me". She committed the murder, and he was not physically present.

Research Questions Addressed Using Descriptive Statistics

The first research question sought to examine what role women play when committing culpable homicide with a co-accused. The results revealed that a woman's involvement in co-offending intimate relationships tends to be secondary (i.e., aid or abet; as indicated by the woman being legally deemed a party to the offence or by receiving a lesser charge in the offence) versus being a principal or co-principal in the commission of the offence (N = 23; 52% versus 48%, respectively). It should be noted that there were cases in which the woman was legally deemed to be a co-principal in the offence; however, she arguably had less involvement in the actual commission of the offence (e.g., was not present for the murder, complied with the man's demands; but still deemed a co-principal). These findings are in line with previous research that women are 2.77 times more likely to commit murder in the presence of one or more men co-offenders (Becker & McCorkel, 2011). Demographic data revealed that women in these cases were, on average, 35 years old and slightly younger than the man co-accused (men's average age= 37 years old). This is consistent with Canadian statistics that report that women over the age of 25 are more likely than younger women to co-offend with the opposite gender (Mahoney, 2011). Almost half (*n*= 10, 48%) of these women were in a common law relationship (vs. married, dating, or an affair) with the co-accused at the time of the offence and were most likely to be found guilty of first-degree murder (*n*= 8, 35%) or second-degree murder (*n*= 7, 30%). In most cases (*n*= 16, 70%) the co-accused had a relationship with the victim (i.e., child, ex-partner, current partner, roommate/relative, etc.) versus being a stranger or acquaintance (*n*= 7, 30%). These findings are more in line with previous research on women who commit murder, which

found that when women (vs. men) were convicted of homicide, the victim was more likely to be a family member or intimate partner (61%), whereas men are more likely to kill an acquaintance (40%; Mahoney et al., 2017).

The second research question was to identify what intersectional factors (i.e., race, mental health, current/past victimization, poverty) were reported on in the trial or sentencing decisions for women co-offenders in these cases. This study found that these documents (i.e., trial and sentencing decisions) were very inconsistent as to what information was included in the documents across cases and results should be interpreted with caution. The inconsistency in reporting on these variables may reveal problems that the courts have in either identifying characteristics that have been deemed relevant in other contexts (i.e., empirical findings) or that the judges do not view these variables as important to include in the decisions.

Most sentencing decisions did not refer to race/ethnicity (not reported: *n*= 18, 78%), but almost a quarter (*n*= 5, 22%) of the cases did identify the co-accused as an individual from underrepresented racial/ethnic groups [i.e., Indigenous (2 men and 4 women), African American (2 men), and Jamaican (1 man and 1 woman)]. Due to the unavailable data, this may be an underrepresentation as previous research has identified that 39% of women convicted of murder are Indigenous (Department of Justice Canada, 2020). In six cases (26%), the judge referenced the woman co-accused as having at least one mental health diagnosis (not reported: *n*= 17, 74%), which was comparable to the number of mental health diagnosis reported in men (*n*= 5, 22%; not reported: *n*= 18, 78%). Canadian research has reported that the majority (70%) of women who offend

have at least one mental health diagnosis (Derkzen et al., 2017), and therefore this statistic is likely an underestimation due to the unavailable data.

Regarding past abuse (i.e., physical, sexual, emotional abuse), it was referenced in 11 cases (48%) that the woman co-accused had a history of past abuse (not reported: *n*= 12, 52%), whereas in cases of the man co-accused it was less likely to be referenced (*n*= 3, 13%; not reported: *n*= 20, 87%). This may also be an underestimation, as Bloom et al., (2004) reported that around 80% of women report experiences of previous victimization prior to involvement in the criminal justice system. Three cases (13%) referenced current victimization (i.e., intimate partner violence) in the relationship with the co-accused. Noteworthy, the study did not have access to pre-sentence reports (only trial and sentencing decisions) which may have included more information on mental health status of the offender. Research by Jones (2008) has identified that women in relationships with their co-accused often experience a high degree of coercion (mental and physical), which could help explain women co-offending. It could be that in these three cases that reported current intimate partner violence, the violence was explicit (i.e., significant physical violence, past charges) and directly reported, whereas in other cases the violence could be more subtle (i.e., manipulation, coercion) and therefore was not recognized and reported as intimate partner violence. Reference to poverty/socioeconomic status of the co-accused were not directly made and therefore cannot be reported on.

The third research question was concerned with whether the legal system allowed or reflected the level of (potential) decreased blameworthiness in these cases (i.e., difference in sentence length between the co-accused). The study found that eight women co-accused (35%) and 12 men co-accused (52%) were found guilty of first-degree

murder. In these cases, all co-accused received the mandatory minimum life sentence (i.e., 25 years imprisonment; ineligible for parole until 25 years served). In these cases, the judge was unable to use any discretion due to mandatory minimum penalties. Seven women and men co-accused were found guilty of second-degree murder, and all received the mandatory minimum life sentence; however, the average eligibility for parole differed slightly by gender. The women co-accused were sentenced and ineligible for parole for an average of 15 years, whereas men were ineligible for parole for an average of 17 years. Three (13%) women and men co-accused were found guilty of manslaughter. Two women in these cases were sentenced to five years imprisonment, followed by one woman sentenced to 17 years imprisonment (*n*= 3, 9 years imprisonment on average), whereas men were sentenced to 10, 12, and 15 years imprisonment (*n*= 3, 12 years on average). Two women (9%) co-accused were found guilty of accessory after the fact to murder/manslaughter and one woman received a sentence of 18 months imprisonment, whereas the other woman received seven years of imprisonment. Lastly, three women (13%) co-accused were found not guilty and were acquitted. Overall, results showed that women generally received shorter sentences (i.e., fewer years for parole eligibility) when judges can use some discretion. It should be noted however, that over half of these women played a secondary role in the commission of the offences.

The final research question asked how and to what extent do judges consider the various intersectional factors (i.e., gender, past/current victimization, mental health, race, or poverty) in these cases into their sentencing decision. It should be noted that some intersectional factors were in fact mentioned in judicial comments throughout the trial and sentencing decisions. That being said, in the section of the sentencing decisions

where the judge explicitly engaged with the mitigating factors of the case (that were being considered to determine the sentence length), no intersectional factors were reported in this section. Based on the documents available, it appears as though the judges in these cases will reference intersectional factors when reporting on the details about the case; however, the intersectional factors do not end up being considered as mitigating factors when determining the sentence. To examine what factors were considered when reaching a sentence, mitigating and aggravating factors will be reported.

Of the cases which had a written sentencing decision outlined, just over half outlined the sentencing principles in text to help guide their decision (i.e., men co-accused: 9 cases did/5 cases did not; women co-accused 7 cases did/5 cases did not). Of sentencing decisions available, mitigating factors were mentioned in six cases of women co-accused (not referenced/mentioned in 7 cases) and were mentioned in seven cases of men co-accused (not referenced/mentioned in 8 cases). Mitigating factors outlined for women were: guilty plea (*n*= 3), remorse/acceptance of responsibility (*n*= 2), and efforts to rehabilitate (*n*= 1), whereas men were: remorse/acceptance of responsibility (*n*= 3), guilty plea (*n*= 2), character of offender (*n*= 1), and less responsibility in the offence (*n*= 1). Aggravating factors were mentioned in 9 cases of women co-accused (not referenced/mentioned in 4 cases) and were mentioned in eight cases of men co-accused (not referenced/mentioned in 7 cases). Aggravating factors outlined for women were: brutality of the crime (*n*= 3), position of trust/breaching trust (*n*= 3), and dishonesty and/or manipulation (*n*= 3), whereas men were: position of trust/breaching trust (*n*= 4), brutality of the crime (*n*= 3), and dishonesty/manipulation (*n*= 1). Overall, less than half (46%) of available written sentencing decisions for women mentioned mitigating factors,

whereas over half (69%) included reference to aggravating factors. Of the mitigating factors reported for women, no mitigating factors explicitly recognized or mentioned intersectional factors that may mitigate their degree of blameworthiness during the judges determination of a fit sentence.

Again, it should be noted that although some intersectional factors were reported throughout the reporting in the trial and sentencing decisions, in the section of the sentencing decision where the judge explicitly wrote and considered mitigating factors, no intersectional factors that were identified in the previous chapters were explicitly reported. These findings are consistent with Balfour (2012), who found that Gladue factors were rarely referenced and considered to be mitigating factors in the sentencing decision.

CHAPTER SEVEN: THEMATIC ANALYSIS

The thematic analysis revealed distinct themes and subthemes from judicial discourse deriving from the judges' statements in the trial and sentencing decisions. As outlined previously, research has identified common themes that are used to portray women who break the law, and more specifically, women who kill (i.e., the "bad", "sad", or "mad" woman). As discussed earlier, Weare (2017) argued that these labels create a 'macro-narrative' (i.e., tells an overall and often singular narrative of the case through lexical choices and rhetoric) rather than the acknowledgement of the true circumstances and complexities (i.e., multiple micro-narratives) that surround the circumstances of women who violently offend. Importantly, research has found that the men's offending tends to be normalized and their actions are generally not framed and portrayed in a stereotypical or stigmatizing manner. Therefore, a deductive approach (i.e., interpreting the data with previously established themes) was used to identify themes and a latent approach (i.e., goes beyond semantic content in the text and reads into underlying assumptions or ideas) was used to interpret the judicial comments and to establish sub-themes.

Women were mostly (52%) portrayed as 'bad' (e.g., evil or non-human) and three sub-themes were identified in this category: the "evil woman", "bad mom", and the "other woman". The second most common (30%) was women portrayed as 'sad' (e.g., alluding to underlying social issues that lead to the offence), with three sub-themes formed: the "victim of violence", the "easily influenced" woman, and the woman who was "out of options". Lastly, a smaller portion (17%) of cases were described in a neutral or factual way. In the current study, no women were described as predominantly 'mad'

(e.g., pathological or medical discourses to explain deviance; see Weare, 2017); however, this theme emerged as an "add on" to another dominant theme (i.e., "bad" or "sad") in two cases. In one case the judicial discourse portrayed the woman as predominantly "bad" with aspects of "mad" and in another case she was described as "sad" with aspects of "mad". The themes and sub-themes will be reported on below.

Table 11.
Definition of Sub-Themes and Frequencies – Thematic Analysis

Theme	Sub-Theme	Definition	Total Number of Cases in Sub-Theme
Bad (12/23) **52%**	A) "Evil Woman"	Women portrayed as the mastermind, manipulator, and liar	5/12 (42%)
	B) "Bad Mom"	Women portrayed as not following traditional gender roles of being a "good mother"	5/12 (42%)
	C) "Other Woman"	Women in affairs who killed partners wives: depicted as selfish and evil	2/12 (17%)
Sad (7/23) **30%**	A) "Victim of Violence"	Women portrayed as victims of past/current violence	4/7 (57%)
	B) "Easily Influenced"	Women portrayed as being easily influenced or having no agency	2/7 (29%)
	C) "Out of Options"	Women portrayed as having social and financial issues	1/7 (14%)
Mad* (0/23) **0%**	"Mad"	Women portrayed as being psychologically unstable (i.e., pathological or medical discourses to explain offending; Weare, 2017)	0/0 (0%)
Neutral (4/23) **17%**	"Neutral"	A "balanced" or factual report of findings in the case without bias or judgement	4/4 (100%)

**Was not a primary theme for any of the cases but will be discussed in results as a "add on" to an established sub-theme.*

The 'Bad' Woman

Research has found that discourse surrounding women who offend often portrays them as 'bad'; inherently evil or malevolent, manipulative, and bad mothers and/or wives (Ballinger, 2019; Berrington & Honkatukia, 2002). In this macro-narrative they are "framed as responsible for their actions and therefore deserving of punishment" (Brennan & Vandenberg, 2009, p. 145). Research has also found that women who are "economically marginalised, uneducated, young, unwed, or belong to marginalised ethnic groups" have a higher likelihood to be described as 'bad' (Cavaglion, 2008; p. 274).

Congruent with past research, the thematic analysis revealed that judges often used language or rhetoric that categorized women as "bad". This category was the most prevalent with just over half (52%) of the cases in this study falling into this category. The thematic analysis found that judges' comments reported in the trial and sentencing decisions were coming from three distinct sub-themes. Namely, the "evil woman" (42% of cases in the "bad" category) and the "bad mom" (42% of cases in the "bad" category) and lastly, the "other woman" (17% of cases in the "bad" category).

The 'Evil' Woman

The construction of the 'evil' woman was illustrated in the trial and sentencing decisions in the following five cases: *R* v *Aimee McIntyre and Nathan Kelly* (*R v McIntyre 2014*), *R* v *Sheena Cuhtill and Timothy Rempel* (*R v Cuthill 2018*), *R* v *Nedege Merceus and Michel Cote* (*R c Merceus 2009*), *R* v *Victoria Henneberry and Blake Legette* (*R v Henneberry 2015*), and *R* v *Ashley Haley and Desmond Maguire* (*R v Haley 2010*).

In the case of *R v McIntyre 2014*, Ms. McIntyre was convicted of second-degree murder in the death of her ex-partner, Mr. O'Reggio. Although she was not present at the time of the murder, she was charged and convicted as a party to second-degree murder. The murder was physically committed by McIntyre's new intimate partner and his friend. The judge reported in R v McIntyre, 2014 ONSC 467:

> McIntyre also purportedly carried on with seemingly mundane and innocuous daily activities, her conduct indifferent and as callous as it may have been, has no relationship to any motivation to ensure that O'Reggio was dead but is consistent with her failed attempt to deflect any attention that she had any involvement in his murder (para 5) … Although only a party, she was the driving force in O'Reggio's murder and actively aided and abetted Kelly and Ebanks in committing that murder (para 15) … I find that as heartless and callous as McIntyre's reaction was to O'Reggio's stabbing, her lack of intervention in stopping the attack is borne out in the jury's finding that she was a party to second-degree murder … Secondly, McIntyre's failure to call for or render any medical assistance after the stabbing as an aggravating factor. (para 25-30)

In the sentencing decision for her co-accused (R v Ebanks 2010, ONSC 2086, the judge reported:

> The Agreed Statement of Facts casts Ms. McIntyre, who is a former girlfriend of Mr. O'Reggio, as the instigator of and directing mind behind his murder, as well as its attempted cover-up. While Mr. Ebanks and Mr. Kelly take responsibility for their own actions, the Agreed Statement of Facts depicts them as having fallen prey to the manipulations of the older and more sophisticated Ms. McIntyre. (para 11)

In this case, the judge portrays Ms. McIntyre as the mastermind behind the murder of her ex-partner, generating the view of an 'evil' woman. The judge uses language that evokes imagery of an evil woman: "she was the driving force", "heartless and callous", "fallen prey to the manipulations of the older and more sophisticated Ms. McIntyre". Although she was not present at the time of the murder, the judge focused the narrative on Ms. McIntyre's involvement which minimized the involvement by the male co-accused.

In the case *R v Cuthill 2018*, there were comparable circumstances surrounding the offence and the judge responded similarly. Cuthill was charged with first-degree murder of her ex-partner and she was also not present at the time of the offence. It was her more recent intimate partner, with the help of his brother, that physically committed the murder. The judge used text messages and reported that "…Sheena Cuthill counselled Tim and Wil Rempel to commit first-degree murder". The chain of texts messages used as evidence is below (R v Cuthill, 2018 ABCA 321, para 39):

> In the hours before Ryan's disappearance, Sheena and Tim had the following exchanges:
> S. Cuthill: What r u doing
> T. Rempel: Getting things ready Scoured the best spot at the pit
> S. Cuthill: I'm worried about my Jeep Lol
> T. Rempel: It's running good
> Cuthill: Better stay that way lol n better b spotless
> T. Rempel: Give me the okay
> S. Cuthill: Okay

In the case of *R v Cuthill 2018*, she is described as "counselling" the men to commit the murder as indicated by a series of brief text messages. The language used by the judge placed Ms. Cuthill as being the mastermind and principal offender, which is not clear on the facts that it accurately reflects the circumstances of the offence. From the text messages, Ms. Cuthill is not directing or counselling the men on what to do, but rather, Mr. Rempel asked for permission to do something (not specifically reported on what it was) and Ms. Cuthill says "okay". This case is another example of the judiciary using language that amplifies the women's involvement in the offence and minimizes, by muting or not reporting on, the physical actions of the men co-accused.

In the case of *R c Merceus 2009,* Ms. Merceus and her common law partner murdered a drug dealer when he arrived at their apartment to deliver drugs. The co-

accused did not have the money to purchase what they requested. The judge in this case uses a series of statements with language that portrays Ms. Merceus as being an evil woman and more responsible than her co-accused. Importantly, the quotes below were translated from French to English and translation may not be exact (R c. Merceus 2009 QCCS 3204). For example:

> Nadège Mercéus, you are the one who introduced your accomplice to the use of illicit drugs. Despite the fact that you have no criminal record, you admitted, during your testimony, to having trafficked in illicit substances. Fifteen years younger than your accomplice, you have found in him an ideal supplier to satisfy your addiction. As you mentioned to the jury, your moral culpability in the crime of murder is obvious: it is because of you that Michel Côté began to consume, he who did not even know what crack was before knowing you."… "Being born into a dysfunctional family and having a cocaine-addicted mother cannot be an excuse. This "little defect" that you said you had is the direct link with the death of a human being. Yet your prosecutor describes you as a polyglot with above-average intellectual abilities"… "In you too, this excessive consumption of illicit drugs has made you lose all moral sense. Immediately after the arrest of your accomplice, you find another person capable of satisfying your need and when the latter is no longer there, it is your body that you sell"… "As an aggravating factor, the Tribunal also takes into consideration that you are the one who knew the victim and the work he performed. He trusted you enough to come to your apartment around 4:00 in the morning. It was you who called him, opened the door for him and drew him inside. The Tribunal therefore considers that your moral culpability is greater than that of your co-accused and that this must be reflected in the time limit prior to parole. (para 34-37)

It is clear in *R c Merceus 2009* that the judiciary viewed Ms. Merceus as evil or non-human. The judiciary blamed Ms. Merceus for her partner's drug consumption and for the murder. The language used in this case placed Ms. Merceus as the principal and driving force behind the murder and did not let other micro-narratives be considered. In particular, the judiciary disregarded and minimized her lived experiences (i.e., no prior criminal record, dysfunctional family, mother's addiction, her addiction) in an aggressive way to induce shame and blame. The language used by the judge placed Ms. Merceus in an isolated category of an "evil/non-human" woman and silenced other circumstances

that lead to the murder including her co-accused involvement, her addiction, and past victimization.

The cases of *R v Henneberry 2015* and *R v Haley 2010* share similarities and use rhetoric that reflect images of evil women, despite both sentencing decisions being very brief and providing little text for analysis. Both cases are from Nova Scotia and involved murders of acquaintances (i.e., roommate and a 'romantic interest'). Although the women in both cases had less involvement than their dominant co-accomplice, the judiciary responded with associating a high degree of culpability and made grouped comments depicting the women and men as the same.

In *R v Henneberry 2015 NSSC 134* the judge described the co-accused actions as "despicable, horrifying, cowardly and pointless" (para 24) and referring to the victim's family: "On that day, Mr. Leggette and Ms. Henneberry introduced a foul poison into their lives that destroyed their innocence, their sense of security, their trust in others and have left them crushed, broken-hearted and empty" (para 22). In *R v Haley 2010 NSSC 271*, the judge stated: "Words are inadequate to describe the crime. Ms. Horne's murder occurred as a result of a deliberate plan to lure her to her gruesome death. The nature of the injuries inflicted demonstrate a sadistic torture meant to inflict pain. The depraved acts committed by Mr. Maguire and Ms. Haley are beyond human comprehension" (para 2) and "Mr. Maguire and Ms. Haley are persons who should not be allowed to live with others in society" (para 4).

Both the comments in *R v Henneberry 2015* and *R v Haley 2010*, were drawn from the beginning of the sentencing decision where the judge did not provide any analysis or context to the offence. These comments portray the man and woman in a

similar light with the same degree of culpability. For example, in both cases, the judiciary made grouped comments about the co-accused which prevented consideration of individual circumstances of the women that led to the murder. In doing so, it created the illusion that the men and women co-accused were the same and that they had the same level of involvement. If more individual comments were made in these cases, it would allow for a more accurate representation of each offender. In making grouped comments in these cases, it portrays the women as being as equally involved as their co-accused and minimizes the women's voice. It actively prevents alternative narratives to be considered which may mitigate their culpability or lead to a better understanding of the circumstances that lead women to commit murder with an intimate partner.

Overall, in this category, the men (*n*= 5) co-accused all received a life sentence with an average parole ineligibility of 20.8 years, whereas the women (*n*= 5) co-accused all received a life sentence with an average parole ineligibility of 17 years.

The 'Bad Mom'

There are numerous gendered stereotypes and norms attached to women and what behaviours are considered 'appropriate' for women. These stereotypes and norms are especially pronounced in the ideology of motherhood. The "motherhood mandate" is a "culturally prescribed belief that to be complete and successful in the female role, a woman must have children and must spend her time with them" (Mottarella et al., 2009; p. 223). 'Good' mothers enjoy caring for their children, are selfless, and put their children's needs before their own and above all else, a mother's main responsibility is to protect her child. Women who do not conform to these socially constructed norms are considered 'bad' mothers (Crawford & Unger, 2004). Moreover, women who kill their

children are viewed as extra deviant compared to men who killed their children, as they not only deviate from 'appropriate' feminine behaviour, but they also deviate from the motherhood mandate (Weare, 2017).

The construction of the 'bad mom' rhetoric was illustrated in the trial and sentencing decisions in the following cases: *R* v *Tammy Lynn Goforth and Kevin Goforth* (*R v Goforth 2016*), *R* v *Nichelle Rowe-Boothe and Garfield Boothe* (*R v Rowe-Boothe 2014*), *R* v *Marie Eve Magoon and Spencer Lee Jordan* (*R v Magoon 2015*), and *R* v *Samantha Kematch and Karl McKay* (*R v Kematch 2010*).

In *R v Goforth 2016 SKQB 75*, Ms. Goforth was found guilty of second-degree murder, whereas her husband was found guilty of manslaughter from the death of a foster child living in their care. The death occurred from failing to provide the necessities of life to the child. Ms. Goforth was described in the sentencing decision as having a higher degree of culpability as she was 'responsible for the household and the children', whereas her husband worked outside the home. Mr. Goforth's defence largely argued that he relied on Ms. Goforth to take care of all things related to the children in the home. The judge stated in the sentencing decision that: "If food and fluids were to be denied or restricted, it was Tammy Goforth who restricted or denied them. If medical attention was needed to sustain life, it was for Tammy to provide in the first instance" (para 69). These views were reflected in the sentence with Ms. Goforth receiving a life sentence with no eligibility for parole for 17 years, whereas Mr. Goforth received 15 years imprisonment for manslaughter.

Similarly, in *R v Bottineau 2006*, Ms. Bottineau and Mr. Kidman were found guilty of second-degree murder of their grandson and Mr. Kidman argued that he had

little to do with his day-to-day care and therefore, Ms. Bottineau was primarily responsible for the abuse and neglect which led to his death. A very similar judicial rhetoric was found in this case as there was in *R v Goforth 2016*. The judge in R v Bottineau 2006 ONSC 07 038 011 said:

> While both Elva Bottineau and Normal Kidman were and are punishable as principals in the murder of their grandson, Elva Bottineau was the primary caregiver. Her presence was more constant, her involvement more direct. She was, after all, the homemaker who prepared the meals and looked after the care and feeding of those of immature age. If food were to be provided, she provided it. And if nutrition were denied, it was Elva Bottineau who denied it. (para 6)

The judge went on to report on Ms. Bottineau's character, "She is a cunning and manipulative woman, self-centered and self-impressed in the extreme, disinclined, if not incapable, of speaking truthfully about anything of consequence that involves responsibility on her part" (para 104). In this case, both co-accused received a life sentence with parole eligibility set at 22 years.

In *R v Goforth 2016* and *R v Bottineau 2006* the judge centralized the narrative around the woman accused by arguing that these women were not fulfilling their gendered roles of caretaking for their children, which made them more culpable than the man co-accomplice. The language used created an image and narrative of a 'bad' mom, which is not portrayed in the same fashion when the man's involvement is discussed. These stereotypes portrayed by judicial narratives are highly problematic as they are embedded in gendered norms associated with the 'motherhood mandate' and are being punished not only for their crime, but for their deviance and not adhering to traditional 'feminine' qualities/roles. The 'bad' woman narrative, as evil or non-human, continued to be amplified in the case of Bottineau, where the judge referred to her 'bad' character because she was not adhering to stereotypical feminine characteristics.

In the case of *R v Rowe-Boothe 2014 ONSC 3391*, Ms. Rowe-Boothe and Mr. Boothe were convicted of second-degree murder in the death of Mr. Boothe's son. Although Ms. Rowe-Boothe did not participate directly in the abuse of her stepson, which ultimately lead to his death, the judge emphasised that "it is perfectly clear that Nichelle was complicit in permitting the practice of chaining Shakeil to his bed to continue" (para 64). It is important to note that in this case, there was evidence presented that Ms. Rowe-Boothe was experiencing intimate partner violence in the relationship with Mr. Boothe, which she reported impacted her ability to protect her stepson. This will be discussed in more detail in the next chapter. With this in mind, the judge continued to highlight her failings to protect her stepson. For example, the judge stated:

> I am satisfied beyond a reasonable doubt, however, that her failure to report Garfield to the authorities aided and encouraged Garfield to commit murder to her knowledge. This is also implicit in the jury's verdict. She also failed to ensure that Shakeil received proper medical attention, failed to provide Shakeil with adequate nutrition, and was complicit in chaining Shakeil to his bed. She knew Shakeil was suffering horrible physical abuse. While she did make some efforts to intervene with Garfield on occasion and did arrange for a Facebook message to Shakeil's mother warning her of abuse, she ultimately abdicated her responsibility to protect Shakeil. (para 98)

In this case, the judge minimized other micro-narratives and focused on the macro-narrative of her being a 'bad stepmom'. For example, the judge mentioned in the sentencing decision that there were multiple occasions and even charges of Mr. Boothe assaulting Ms. Rowe-Boothe. Ms. Rowe-Boothe was also a new mother to her biological child with Mr. Boothe, Ja'den, at the time of her stepson's death. She reported at trial that she was fearful her biological son would be taken if she notified CPS. It appeared that the judge did not consider alternative explanations for her behaviour and sentenced Ms. Rowe-Boothe similarly to Mr. Boothe. The judge stated, "It also seems to me that

Nichelle clearly favoured Ja'den over Shakeil. She ensured Ja'den received medical care but ignored Shakeil's needs and did so for selfish reasons. She was a partner in the abuse and neglect of Shakeil even though she did not commit the physical acts of assault that caused the injuries that led to Shakeil's death." (para 99).

In the case of *R v Magoon 2015 ABQB 351*, Ms. Magoon was found guilty of second-degree murder in the death of her stepdaughter and received the same sentence as her co-accused. Similarly, in *R v Kematch 2010 MBCA 18*, Ms. Kematch was found guilty of first-degree murder of her daughter (from a previous relationship) and received the same sentence as her co-accused. In these cases, the judges reported on their participation in the offence as stepmothers/mothers. The judge described her actions in the following statements,

> Ms. Magoon did not want to deal with Meika's attitude or whining, as she was pregnant, stressed out, and she and Mr. Jordan had been fighting. Ms. Magoon shoved Meika, and kicked her with her foot, at times tripping her, when Meika was trying to run the stairs and Meika hit her head on the wall and the hardwood siding. This happened a number of times at about 4:00 p.m. on Sunday. While cooking dinner, Ms. Magoon pushed Meika a couple of times into the high chair. She also held Meika by the hands, standing over her, repetitively shaking her, causing Meika's head to hit the tile, while asking why Meika would not just do what Mr. Jordan asked. This was between the time that Ms. Magoon cooked supper and baked cookies; the latter activity was what she was doing when the 911 call was made. (para 133)

In *R v Kematch 2010,* the judge reported that,

> This is not a case of a parent exercising disciplinary authority over a child. This is a case, as I have already stated, of a grossly abusive, confining and dominating course of conduct in which Kematch was a willing and active participant. (para 177)… Daniel also stated that the day before Phoenix's death, Kematch and McKay passed her back and forth punching and pushing her. Daniel stated that Kematch was pretty much the same as McKay toward Phoenix, but that she did not use as many weapons. (para 68)

Although there are contextual differences in the five cases, they all have similarities in that the judiciary highlights the women's roles as mothers and how these women were not adhering to the traditional gendered notions of being a "mother". In these cases, the judges did not discuss the roles and responsibilities these fathers/stepfathers had to their children/stepchildren, it was only when referring to the women that judges used this discourse. The women were described as either; primarily responsible, not providing adequate protection, or as an active participant in these cases; without alternative explanations of their behaviour being considered. The language used by judges generated macro-narratives of a 'bad mother' and the women were portrayed in a way that they were deserving of punishment, which was ultimately reflected in the sentencing decisions. All the women (n= 5) received life sentences with the average parole eligibility set at 18.8 years, whereas four men received life sentence with an average parole eligibility set at 19.75 years and one man (i.e., *R v. Goforth*) was found guilty of manslaughter and sentenced to 15 years imprisonment.

The 'Other Woman'

In the final category that emerged under the 'bad' woman category is referred to as the "other woman". These cases involved women in affairs with their co-accused and in both cases, they murdered the wives of the men co-accused, so that they could be in a relationship together. The judicial discourse in this category depicts women as not only evil, but extremely selfish, murdering someone for their own gain. Similar to other themes, the men co-accused in these cases are not depicted in the same light (i.e., evil/selfish), but are rather reported on in a neutral/factual manner. The two cases are: *R* v

Tanpreet Athwal and Balijunder Bahia (*R v Athwal 2017*) and *R* v *Grupreet Ronald and Bhupinderpal Gill* (*R v Ronald 2019*).

In *R v Athwal 2017 BCSC 2419*, Ms. Athwal was depicted as the evil and selfish mastermind who hired and paid a third party to commit the murder so that an intimate relationship between her and Mr. Bahia could occur. The judge reported, "She caused the murder of Amanpreet Bahia, a young mother who was killed in her home in the presence of her two youngest children. The act was one of enormous cruelty. It was driven by inexplicable selfishness of Ms. Athwal. It was purposeless and pointless… (para 2)." In the case of *R v (Gill) Ronald 2021 ONSC 6328*, Ms. Ronald physically committed the murder so that she and Mr. Gill could be in a relationship together. The judge reports factual statements when discussing Mr. Gill's involvement:

> I found that Gurpreet Ronald killed Jagtar Gill. I found that Mr. Gill assisted Ms. Ronald in the murder of his wife, knowing that Gurpreet Ronald intended to kill Jagtar Gill and knowing that she planned and deliberated on that murder. Mr. Gill also planned and deliberated in the murder of his wife. He was not present for the killing however, so his liability is as an aider to Ms. Ronald. I found that Ms. Ronald was the killer of Jagtar Gill. (para 1289)

On the other hand, when the judiciary referenced Ms. Ronald, it was presented with a different way where the judge deemed Ms. Ronald to not have been credible:

> I rejected the evidence of Ms. Ronald. Ms. Ronald was not a credible witness. She lied on multiple occasions in this trial. Ms. Ronald had a selective memory, claiming to forget critical aspects of the evidence in this case and she was sometimes dishonest, which caused me to reject her evidence. Rejected evidence is simply rejected evidence and nothing more. I did not accept that Ms. Ronald attended 174 Brambling Way to pick up tools. I found that she wore her own gloves to the home that day, as I previously explained. (para 1289)

In the case of Ms. Ronald there are difficulties in interpreting the judicial rhetoric. There may in fact be gendered stereotypes; however, the judge also provided justifications for his comments. For example, in the case of Ms. Ronald they gave

evidence the judge deems not to have been credible (i.e., she lied or tried to cover up). It may not be gendered and rather it is more related to the everyday work of the judiciary to call out witnesses or in this case, a defendant, for what the judge determines to be lying. Interestingly, in this case the judge reported, "I found that because Mr. Gill did not participate in the physical killing of his wife, he could not be found guilty as a principal. But he did aid Ms. Ronald in the physical killing of Jagtar Gill (para 1323)." In other cases examined in the current study, the judges often deemed the women to also be a principal co-offender, despite not being physically present at time of the murder. This case there was a distinction explicitly made between offenders.

In the above-mentioned cases, the narratives created by the judiciary cast the woman in an evil and selfish role, whereas the men's behaviour is neutral and/or normalized. Ms. Athwal was the "cause" and was driven by her own 'inexplicable selfishness'; despite Mr. Bahia being actively involved in the planning and charged as a co-accused with the same sentence. In the other case, Ms. Ronald 'lied on multiple occasions', had 'selective memory', was 'dishonest'; however, terms related to the character of Mr. Gill was not reported on. In both cases, the men and women received a life sentence with parole eligibility set at 25 years.

Summary

In summary, the trial and sentencing decisions were most likely to portray women as 'bad' (e.g., evil or non-human) and three sub-themes were identified in this category: the "evil woman", "bad mom", and the "other woman". In these cases, the judiciary reported on these cases in a way that generated a certain image of who these women were, whereas the man co-offender was more often presented in a neutral or factual

manner. When women are portrayed in this way, it creates a singular identity which prevents consideration of alternative explanations for offending. It places women in a "other" category that makes their dominant identity as being 'non-human' or 'monstrous' agents. In doing so, it creates distance between viewing these women as human to an opposite end of the spectrum of viewing them as non-women and non-human. These singular and dominant narratives override all other narratives, which prevents a deeper understanding of circumstances surrounding the offence. Lastly, the creation of a dominant identity of these women impacts all women. In doing so, it prevents consideration of other contextual factors that may have contributed to the offence, creates a singular dominant narrative, and reinforces the stereotype that women must instead be nurturing, selfless, and caretakers (Weare, 2017).

Table 12.

"BAD" cases from thematic analysis sorted in sub-themes with findings of guilt, sentences, and comments.

Case	Main Finding of guilt	Sentence	Judicial Comments/Context
"Evil Woman"			
R. v. McIntyre *			
Nathan Kelly	Second-degree murder	Life – parole 16 years	Judge depicts the men as "…having fallen prey to the manipulations of the older and more sophisticated Ms. McIntyre". She was not physically present at time of murder.
Aimee McIntrye	Second-degree murder	Life – parole 11 years	
R. v. Cuthill			
Timothy Rempel	First-degree murder	Life – parole 25 years	She gave the "go ahead" text for current partner to kill her ex/father of her child. She was not physically present at time of murder.
Sheena Cuthill	First-degree murder	Life – parole 25 years	
R. v. Merceus			
Michel Cote	Second-degree murder	Life – parole 13 years	"your moral culpability in the crime of murder is obvious: it is because of you that Michel Côté began to consume, he who did not even know what crack was before knowing you"
Nedege Merceus	Second-degree murder	Life – parole 14 years	
R. v. Henneberry			
Blake Legette	First-degree murder	Life – parole 25 years	"This was despicable, horrifying, cowardly and pointless." And "The Crown accepts that Ms. Henneberry was not involved in such planning and deliberation."
Victoria Henneberry	Second-degree murder	Life – parole 10 years	
R. v. Haley **			
Desmond Maguire	First-degree murder	Life – parole 25 years	"The depraved acts committed by Mr. Maguire and Ms. Haley are beyond human comprehension" and "Mr. Maguire and Ms. Haley are persons who should not be allowed to live with others in society."
Ashley Haley	First-degree murder	Life – parole 25 years	
"Bad Mom"			
R. v. Goforth			
Kevin Goforth	Manslaughter	15 years	Ms. Goforth's "culpability is higher than Kevin's as she was "responsible for the household and children" and "If food and fluids were to be denied or restricted, it was Tammy Goforth who restricted or denied them"
Tammy Lynn Goforth	Second-degree murder	Life – parole 17 years	
R. v. Bottineau			
Norman Kidman	Second-degree murder	Life – parole 22 years	Ms. Bottineau had more involvement as she was the "main caregiver" and "a liar of near pathologic dimension, manipulative and devoid of empathy"
Elva Bottineau	Second-degree murder	Life – parole 22 years	
R. v. Rowe-Boothe *			
Garfield Boothe	Second-degree murder	Life – parole 18 years	"However, she assumed the role of stepmother to Shakeil." Ms. Rowe-Boothe was less involved but "complacent" to the abuse (worried her biological son would be taken if CPS called)
Nichelle Rowe-Boothe	Second-degree murder	Life – parole 13 years	
R. v. Magoon			
Spencer Lee Jordan	Second-degree murder	Life – parole 17 years	"Ms. Magoon pushed Meika a couple of times into the highchair. She also held Meika by the hands, standing over her, repetitively shaking her, causing Meika's head to hit the tile, while asking why Meika would not just do what Mr. Jordan asked."
Marie Eve Magoon	Second-degree murder	Life – parole 17 years	
R. v. Kematch **			
Karl McKay	First-degree murder	Life – parole 25 years	"This is a case, as I have already stated, of a grossly abusive, confining and dominating course of conduct in which Kematch was a willing and active participant."
Samantha Kematch	First-degree murder	Life – parole 25 years	
"Other Woman"			
R. v. Athwal			
Baljunder Bahia	First-degree murder	Life – parole 25 years	"The act was one of enormous cruelty. It was driven by inexplicable selfishness of Ms. Athwal. It was purposeless and pointless." (Athwal & Bahia wanted to get married)
Tanpreet Athwal	First-degree murder	Life – parole 25 years	
R. v. Ronald			
Bhupinderpal Gill	First-degree murder	Life – parole 25 years	

Gurpreet Ronald	First-degree murder	Life – parole 25 years	"I found that Mr. Gill assisted Ms. Ronald in the murder of his wife, knowing that Gurpreet Ronald intended to kill Jagtar Gill and knowing that she planned and deliberated on that murder."

* = Intimate partner violence mentioned in case
**= Significant age gap between co-accused

The 'Sad' Woman

Previous research has found that some women's offending is portrayed in such a way that the women are not fully responsible for their actions. These cases tend to evoke sympathetic responses and create the perception that they should not be punished for their actions or at least, punished more leniently (Brennan & Vanderberg, 2009). These macro-narratives have been coined 'sad' (e.g., victimization) and 'mad' (e.g., pathological, psychologically unstable).

The second most common category in the current research was women being framed as "sad"; alluding to underlying social issues that may lead women to commit crime (Easteal et al., 2015). Weare (2017) reported that the 'sad' narrative often portrays the multiple micro-narratives that lead to the commission of the offence so that the wider context can be considered. Although it may be a more accurate representation of the factors that contributed to the offence, women can still be portrayed in a harmful gendered lens as a deviation from "appropriate femininity" that is singular and constructs the 'sad' narrative as the woman's dominant identity (Weare, 2017). The 'sad' narrative tends to describe women as 'social casualties' (i.e., victims of society) or having 'irrational responses to their circumstances' (Wilczynski, 1997) or 'unable to cope with social pressures' (Morris & Wilczynski, 1993). Three distinct sub-themes emerged from the thematic analysis in the "sad" theme and were broken up into: 1) women being "victims" of past or current violence (57%), 2) women being "easily influenced" to commit murder (29%), and 3) a woman who was "out of options" (i.e., financial and social pressures; 14%).

The 'Victim of Violence'

The construction of the 'victim of violence' was illustrated in the trial and sentencing decisions in the following four cases: *R* v *Colette Nelson and Jean Poitras* (*R v Nelson 1998*), *R* v *Wendy Losier and James Curtis* (*R v Losier 2020*), *R* v *Shelly Elanik and Ronald Sayers* (*R v Elanik 2003*)*, and R* v *Tosha Hubler and Jason Hubler* (*R v Hubler 2013*).

In the case of *R v Nelson 1998*, Ms. Nelson was charged with accessory after the fact to the murder of her common-law partner. Although the sentencing information was very limited, in the 2002 appeal document (dismissed; R v Poitras 2002 ONCA 2002) the judge highlighted that "Ms. Nelson wanted out of her relationship with Mr. Blake who she knew to be a violent and possessive person" (para 7) and that her co-accused, Mr. Poitras, "decided to kill Mr. Blake so that he and Ms. Nelson could live together as man and wife" (para 7). Of the information that could be interpreted, it appeared as though the sentencing judge was cognisant of the social factors that led to commission of the offence and viewed Ms. Nelson as a victim of violence experienced at the hands of the deceased.

In the case of *R v Losier 2020 NBQB 072*, Ms. Losier was charged with accessory after the fact to murder. Ms. Losier and Mr. Curtis were aggressively confronted in their home by an acquaintance, which resulted in Mr. Curtis shooting and killing the aggressor. The judge reported many micro-narratives surrounding Ms. Losier. For example,

> A pre-sentence report was prepared and filed with respect to Ms. Losier. Ms. Losier is 42 years old and has no criminal record. She had a troubled childhood having suffered both physical and mental abuse from her alcoholic parents. She left home at 18 and eventually relocated from Montreal to Moncton about 12 years ago. She has one child (born in 2005) from a long-term relationship that was marked by physical abuse. She left the relationship in 2018 and became involved with James Curtis. Ms. Losier and Mr. Curtis were engaged at the time that Mr. Curtis killed himself in Ms. Losier's presence in an incident related to the events in question in this matter" and "Ms. Losier reported having mental health issues for which she sought treatment. She currently suffers from depression, anxiety

> and PTSD as a result of the incidents that form the basis of the charges against her and her resulting incarceration. Ms. Losier has struggled with drug addiction, particularly crystal meth. She described her addiction as severe in 2017. She sought rehabilitation in 2017 but relapsed. Ms. Losier admitted to being under the influence of illegal drugs when these offences were committed. (para 8-10)

The judge went on to highlight mitigating factors including her guilty plea, no past criminal record, her sobriety since 2018, and her lower level of involvement in the offence. In this case, the judge portrayed Ms. Losier as a victim of violence and circumstance congruent with the dominant 'sad' theme and more specifically, with the sub-theme of 'victim of violence'.

In the case of *R v Elanik 2003 NWTSC 69*, Ms. Elanik was found guilty of manslaughter in the death of a hotel attendant. Her intimate partner, and co-accused, Mr. Sayers was found guilty of second-degree murder. Much of the content in the sentencing decision surrounded Ms. Elanik's defence of 'battered women's syndrome' and whether that mitigated her culpability. For example, the judge stated:

> I do not find the cases of abused or battered women who kill their abusive spouses to be applicable in this case. There is, in my view, an element of self-defence or provocation in those cases making them entirely different from this case where the victim was an innocent person and there is no evidence whatsoever of provocation. As well, as I have noted, the victim was a very venerable person. And, as I have said, since I am satisfied on the evidence that Ms. Elanik was able to and did make choices as to her own conduct on October 17, 2001, the battered women's syndrome does not affect the sentence that I am going to give her. (p. 27)

The judge went on to further identify other circumstances surrounding Ms. Elanik. The judge reported that she is 20 years old (18 at the time of the offence), is a mother to a two-year-old son, has no criminal record, has very little education and work history, and is an Aboriginal person. Although they did not consider the violence, she

endured to mitigate her culpability, it is evident that the judge viewed her as a victim of violence and reflected on multiple factors congruent with the 'sad' narrative.

In a similar circumstance, Ms. Hubler (*R v Hubler 2013 ABCA 31*) was found guilty of first-degree murder alongside her husband. Ms. Hubler attempted the defence of duress, but it failed. The trial and sentencing decision outlined incidents of threats and violence perpetrated by Mr. Hubler towards Ms. Hubler and their family. In particular, it referenced her fear if she did not comply with his requests on the day of the murder. The jury was not persuaded, and Ms. Hubler was found guilty of first-degree murder and received the same sentence as her husband. The trial decision outlined:

> Tosha's police statement began with the remark, 'have you ever been put in a position where you're terrified either which way you turn'. She said she was in that position. She stated that Jason started talking about killing Johnson shortly after Johnson visited their home for the first time. Jason called Johnson, saying he had more things to sell. They talked about having Johnson come over and Jason hounded Tosha to get the wooden trunk out so they could put Johnson's body in it. She did so. She also helped cover the windows before Johnson arrived so no one could see into their house. (para 8)

All the above cases fit with the pre-established theme of 'sad'. This is consistent with Wilczynski's (1997) findings that women who commit crimes can be portrayed as a 'social casualty' or more specifically, a victim of society. The judicial discourse in these cases highlight the women's circumstances in a way that they are portrayed as not fully responsible for the offence in question due to being a victim of past and/or current violence. This is an important recognition; however, in many of these cases they still blame the woman for her 'choice' to participate, and she is held responsible for her 'choices', by imposing criminal liability. For example, in *R v Elanik 2003*, the judge acknowledges the violence she endured by her co-accused, but then states that he does not consider it to be a mitigating factor for her participation in the offence. This may be

due to their actions (i.e., aiding with murder) being a deviation from gendered stereotypes and what is considered appropriate femininity (i.e., nurturing, passive, caring), as well as not fully understanding the position of subordination associated with intimate partner violence and/or coercive control. In some of these cases, the woman may be subject to another person's control and is, in fact, not able to make active choices due to fear and/or subordination. If coercive control were in fact truly recognized, it would result in an acquittal in these cases. This depiction can be problematic as it creates a dominant identity of a victim, but then also blames the woman for her 'choices', without a full appreciation (i.e., impact of intimate partner violence and/or coercive control) of the context in which the choice was made.

In the aforementioned cases, the men all received life sentences (*n*= 3; *R v Losier 2020* died before trial) with an average eligibility for parole set at 21.3 years, whereas the women's sentences varied depending on the findings of guilt. In two cases, the women were found guilty of accessory after the fact and received seven years and 18 months imprisonment, respectively. In the other two cases, one woman was found guilty of manslaughter and sentenced to five years imprisonment and in the last case, the woman was found guilty of first-degree murder and received a life sentence with parole eligibility set at 25 years.

The 'Easily Influenced' Woman

The construction of the 'easily influenced' woman was illustrated in the trial and sentencing decisions in the following two cases: *R* v *Rachel Fenn and Christopher Baldwin* (*R v Fenn 2015*) *and R* v *Melanie Binette and Richard Hunt* (*R c Binette 2020*).

In these cases, the women are portrayed in a way that they are easily influenced into the commission of the offence. In *R v Fenn 2015 ONSC 4369*, Ms. Fenn was found guilty of manslaughter described by the judge as having the "Tendency of associating with undesirable boyfriends and being a follower. She was under the influence of a new man, Mr. Baldwin, the co-accused when this crime was committed" (para 30). The judge continued with reports on physical ailments that would have made it hard for her to participate in the offence.

Similarly, in *R c Binette 2020 QCCS 18* (translated to English), Ms. Binette was charged with two counts of manslaughter in which she led the victims into a wooded area where her spouse then murdered them. The judge reported: "The evidence reveals beyond a reasonable doubt that Mélanie Binette had personal knowledge of the increasing pressure exerted on Richard Hunt by Joseph Fluet in order to obtain reimbursement, and that Richard Hunt was at a loss for solutions" (para 45). The judge referenced her decreased participation in the offence and highlighted that "The accused, through her affair with the co-accused, adopted criminal values with disregard for the lives of others" (para 41).

In these cases, the judge portrays the women in a way that labels them as a 'follower' and fits under the established theme of 'sad'. It is also consistent with previous research that found women tend to be portrayed as 'unable to cope with social pressures' (Morris & Wilczynski, 1993). This depiction is problematic as it creates a pathological dominant identity that blames the woman's coping abilities for her actions and does not allow for consideration of all the circumstantial factors that led to the offence. In the first case, the man received a 12-year sentence for manslaughter, whereas the woman received

a 5-year sentence for manslaughter. In the last case, the man received a life sentence with parole eligibility set at 25 years for two counts of first-degree murder and the woman received a 17-year sentence for two counts of manslaughter.

The 'Out of Options' Woman

One case in the present study developed the narrative of a woman who was 'out of options'. This was illustrated in the trial and sentencing decisions in *R v McKinnon 2004 ABQB 2131*. In this case, Ms. McKinnon hired someone to kill her ex-partner in hopes to receive his life insurance. The judge made comments that she was 'desperate for relief' due to her current life circumstances and that she saw this opportunity as a way out. The judge reported:

> … Her life had become chaotic. She had lost the day-to-day care and control of her youngest child to the deceased, who was constantly harassing and haranguing her by attending unannounced and phoning her at her residence, and he was bothersome to her two children that she still had the care and control of. As I indicated earlier, she had serious financial problems as well, and she believed that the deceased both had insurance on his life - although she had believed it to be higher, I find, than eventually proven - and she knew that the home at Crossfield that they held joint title to was going into foreclosure and would be lost. Her relationship with Andreae was not going well. He was becoming increasingly frustrated, providing her with funds and not having any long-term security, particularly in achieving his wish, marriage. He owned the condo in which she resided in Calgary. He had given her money whenever she needed it, and she expected that that source of funding and that arrangement would be coming to an end. (para 6-8)

It is clear in the above excerpt that the judge considered the multiple social circumstances that contributed to Ms. McKinnon's behaviour and that she was portrayed as "out of options". This portrayal is consistent with the 'sad' narrative that has been used to describe why women offend. More specifically, it is consistent with other findings that women are portrayed to have 'irrational responses to their circumstances' (Wilczynski,

1997). In this case, the co-accused received a life sentence with parole eligibility after 25 years served.

Summary

In summary, the 'sad' woman category revealed three distinct sub-themes: women being victims of past or current violence, women being "easily influenced" to commit murder, and a woman who was "out of options". In these cases, the women are presented in a way that is more considerate and sympathetic of their current circumstances and makes a case that they should be treated more leniently. This appeared to be true in some of the cases in the current study, but not all. In some cases, the judge presented the multiple micro-narratives that contributed to the women committing the offence in question, but the women were still sentenced to a high degree of criminal responsibility, perhaps due to their deviation away from appropriate femininity and/or legal restrictions (i.e., mandatory minimum penalties).

Although this category may have a more accurate reflection of the circumstances of these women, it still creates a singular identity and portrays them in a way that engenders pity. Again, in the above cases they are viewed as social casualties as either a result of violence, being unable to stand up for themselves, or having irrational responses to life circumstances. Women in the 'sad' category were recognized as having human (vs. non-human, monstrous, evil) characteristics and capable of making decisions (unlike the 'bad' category); however, these women are portrayed as being unable to make *appropriate* decisions due to their tragic circumstances and perhaps, without a full appreciation of their circumstances.

Table 13.

"SAD" cases from thematic analysis sorted in sub-themes with findings of guilt, sentences, and comments.

Case	Main Finding of guilt	Sentence	Judicial Comments
"Victim of Violence"			
R. v. Nelson *			
Jean Poitras	First-degree Murder	Life – parole 25 years	"Ms. Nelson wanted out of her relationship with Mr. Blake who she knew to be a violent and possessive person." She was not physically present at time of murder.
Colette Nelson	Accessory after the fact	7 years imprisonment	
R. v. Losier			
James Curtis	Died before trial	NA	"Ms. Losier's involvement in the offences was at the lower end of the spectrum in terms of her participation; and Ms. Losier was acting partly out of loyalty to her fiancé."
Wendy Losier	Accessory after the fact	18 months imprisonment	
R. v. Elanik *			
Ronald Sayers	Second-degree murder	Life – parole 14 years	"I do not accept the battered women's syndrome explains Ms. Elanik's actions that night or provides any mitigation in this case. I find the proposition that it would particularly hard to accept when the violence was directed to an innocent third party."
Shelly Elanik	Manslaughter	5 years imprisonment	
R. v. Hubler *			
Jason Hubler	First-degree murder	Life – parole 25 years	Tosha's police statement began with the remark, "have you ever been put in a position where you're terrified either which way you turn". Duress defence attempted; jury did not believe it.
Tosha Hubler	First-degree murder	Life – parole 25 years	
"Easily Influenced"			
R. v. Fenn *			
Christopher Baldwin	Manslaughter	12 years imprisonment	"She was under the influence of a new man, Mr. Baldwin the co-accused when this crime was committed"
Rachel Fenn	Manslaughter	5 years imprisonment	
R. c. Binette			
Richard Hunt	First-degree murder x 2	Life – parole 25 years	"The evidence reveals beyond a reasonable doubt that Mélanie Binette had personal knowledge of the increasing pressure exerted on Richard Hunt by Joseph Fluet in order to obtain reimbursement, and that Richard Hunt was at a loss for solutions."
Melanie Binette	Manslaughter x 2	17 years imprisonment	
"Out of Options"			
R. v. McKinnon			
Joseph Bruso	First-degree murder	Life – parole 25 years	"Her life had become chaotic" and she was "out of options" and planned to kill ex-husband for insurance money.
Nancy McKinnon	First-degree murder	Life – parole 25 years	

* = Intimate partner violence mentioned in case

**= Significant age gap between co-accused

The 'Mad' Woman

Past research has identified that women who kill are often portrayed by the media and criminal justice system as being "mad" (i.e., pathological or medical discourses to explain offending; see Weare, 2017). The research did not find that this was a primary theme that judges used to depict women in co-offending cases. In turn, the "mad" frame was often mentioned alongside another dominating/primary theme and therefore, was an "add on" or secondary theme in two cases.

In *R v Bottineau 2006 ONSC 07 038 011*, the woman was primarily depicted as being a "bad mom", but the judge also made pathologizing comments. An example of this is when they said: "Elva Bottineau displays several traits that are consistent with a personality disorder, a constellation of maladaptive personality traits and coping mechanisms that are unrelated to cognition. She is a liar of near pathologic dimension, manipulative and devoid of empathy. She shirts for control but flees from responsibility. Ms. Bottineau is intellectually impoverished, but morally bankrupt" (para 30). This portrayal of the woman is consistent with previous research that places women in both the bad and mad categories. Barnett (2006) found that women who killed their children were rarely portrayed as 'sad' (alluding to underlying social issues) and were much more likely to be framed in the bad/mad context. For example, their research found that they were either framed as the 'perfect' mother who killed because they had a mental illness or the 'bad mom'/'evil woman' who killed because they were inept at their mothering/caregiving responsibilities (Barnett, 2006). The statements the judge made in the case of Ms. Bottineau is consistent with both the bad and mad categorizations, as she is portrayed as an 'evil woman', 'bad mother', and having a personality disorder.

In another case, *R v Fenn 2015 ONSC 4369*, the woman was found guilty of manslaughter in the death of her ex-partner. Although her sentencing decision was unavailable for analysis, a reason for judgement on a bail hearing was used to gather information on the judicial discourse. In this document, she primarily was portrayed as "sad" and being under the influence of a more dominant man co-offender, but the judge did make comments on her emotional state. They said:

> Ms. Fenn presents as having many physical and emotional issues. Although there is no assessment, there is no doubt that Ms. Fenn has mental health issues. (para 15)
>
> and
>
> I am also very concerned with the fact that Ms. Fenn could argue memory loss should she ever breach any of the conditions or commit other crimes. I am not satisfied that she is suffering memory losses but she certainly seems to be able to manipulate the different situations she finds herself in depending on her agenda. (para 36)

In this case, Ms. Fenn's "physical and emotional issues" were highlighted in the reasons for judgement alongside underlying social issues that led to the commission of the offence. When the judge makes these comments, it shifts the portrayal of Ms. Fenn from the 'sad' categorization (i.e., victim of circumstances) to a 'mad' woman who has significant physical and mental health concerns. When these comments are made, it minimizes the context (i.e., 'sad' narrative) and shifts the blame to her mental health or her 'madness' that contributed to the crime; Ms. Fenn is not solely a victim of circumstances, she is physically and emotionally ill. *R v Fenn 2015* appears to contrast with previous research (i.e., Brennan & Vanderberg, 2009) that found the 'sad' or 'mad' narrative tends to evoke sympathetic responses and creates the perception that they should not be punished for their actions or at least, punished more leniently (Brennan &

Vanderberg, 2009). The language that is used in this case is harsh and portrays the woman as deserving of punishment. Although the discourse was harsh, the judge reflected differential sentences between the two co-accused. Ms. Fenn was sentenced to five years imprisonment for manslaughter, whereas her partner was sentenced for twelve years.

It should be noted that it is extremely important that mitigating factors, including mental health factors, ought to be considered and reported on in the sentencing decisions. The way in which these factors are presented by the judge and how they are worded however, has significant implications. As found in other research on women who kill (see Weare, 2017), as well as the cases analyzed in this dissertation, the language the judge uses to depict these factors tend to be presented in a harmful and stigmatizing way. The argument is not to remove reference to these factors, but rather, to present the factors in a manner that is not biased or harmful for women. For example, in the cases analyzed above, the judge used the women's mental health symptoms to amplify the responsibility rather than excuse, diminish, (i.e., use it in a mitigating way) or present the symptoms in a neutral or factual way. For example, in *R v Bottineau 2006*, the judge quoted: "she has, I have not the slightest doubt, a personality disorder" (para 104) and she is "intellectually impoverished, but morally bankrupt" (para 30). The judge could have phrased the above in a less stigmatizing way, such as, Ms. Bottineau has tendencies associated with the diagnosis of a personality disorder, presents with a lower IQ, and has behaved in ways that have been morally wrong. Even still, these comments may likely be more of a reflection on how the judge perceives the woman versus objective findings of the mental health status of the woman. If so, personal perceptions from the view of the judge should

be avoided as their role in the legal system is to be a trier of the facts and to be impartial decision-makers.

Neutral Reporting

The thematic analysis revealed a fourth category in which the judges discussed women's involvement in the co-offence in neutral or balanced terms. In these four cases (17%), the reader was unable to interpret how the judge viewed the woman and therefore, did not place the women in a particular category because the reporting was primarily factual. These cases included: *R* v *Rodica Radita and Emil Radita* (*R v Radita 2017*), *R* v *Paige Crossman and Julien Telfer* (*R v Crossman 2019*), *R* v *Katherine Quinn and Robert Forslund* (*R v Quinn 2007*) *and, R* v *Sarah Sather and Shane McGenn* (*R v Sather 2018*).

In the case of *R v Radita 2017 ABQB 128*, the Radita's were found guilty of first-degree murder of their son, as they knowingly failed to provide medical treatment for his diabetes. Almost all the cases which involved the killing of a child referred to traditional gendered roles of women having childcare duties and alluded to them having a greater degree of culpability in the offences; however, in this case the judge looked at the woman and man equally and makes an effort to represent a shared level of culpability. For example,

> Their legal obligations to Alex are the same. Although Mrs. Radita was the homemaker, they had equal obligations to ensure Alex received proper diabetic care and medical attention when required. I am satisfied that they were joint principals in unlawful act manslaughter, and first-degree murder, for the reasons that follow. (para 225)

The judicial rhetoric in this case is in stark contrast to two similar cases (i.e., *R v Goforth 2016* and *R v Bottineau 2006*) examined previously, in which the women were recognized as the 'homemakers' and then described them as more culpable than the man co-accomplice. For example, in *R v Goforth 2016 SKQB 75* the judge stated, "If food and

fluids were to be denied or restricted, it was Tammy Goforth who restricted or denied them. If medical attention was needed to sustain life, it was for Tammy to provide in the first instance" (para 69), and in *R v Bottineau 2006 ONSC 07 038 011*, "Elva Bottineau was the primary caregiver. Her presence was more constant, her involvement more direct. She was, after all, the homemaker who prepared the meals and looked after the care and feeding of those of immature age. If food were to be provided, she provided it. And if nutrition were denied, it was Elva Bottineau who denied it" (para 6). In *R v Radita 2017*, the judge acknowledged Ms. Radita as being the homemaker, but they also acknowledged that both the woman and man had equal responsibilities to ensure their child received proper care. The reporting *R v Radita 2017* did not perpetuate harmful and stereotypical gendered roles and instead focused on accepting parity of caregiving obligations.

In the other cases, the judges similarly referenced factual aspects of the women and the case instead of using language or descriptions that place women into categories (i.e., 'bad', 'sad', 'mad'). Importantly, all three cases resulted in an acquittal. In *R v Crossman 2019 MBQB 47*, Ms. Crossman was driving the vehicle when her partner fired at another vehicle which resulted in a man dying. The judge reported:

> To recap, for Ms. Crossman to be convicted of murder I must be sure that she also intended to kill or that she intended to help Mr. Telfer kill. If I cannot be sure this is the only reasonable inference, I am compelled by law to find a reasonable doubt and to acquit her. Disregarding the intercepts for a moment, on the evidence I have reviewed thus far, I cannot be sure of her state of mind at the time the shooting took place. (para 44)

Throughout the trial and sentencing decisions, the judiciary did not portray Ms. Crossman in a particular frame. Ms. Crossman was acquitted.

The judiciary had a similar response in *R v Sather 2018 BCSC 1614*, where she was charged with accessory after the fact to murder:

> In fact, I find that there is an innocent explanation for Ms. Sather's actions and nothing in the evidence to establish that she also intended to assist Mr. McGenn in evading liability for the murder of Mr. Delaney. The evidence of her cleaning up the bathroom, washing the knife, her conversations with Ms. McGenn and her texts to Mr. McGenn do not satisfy me that any of these activities were performed with a view to assist Mr. McGenn from evading criminal liability. (para 187)

Lastly, in *R v Quinn 2007 BCSC 573*, Ms. Quinn was charged with second-degree murder for abetting her partner to commit murder to a random passerby. The judge reported that there was a reasonable doubt as to whether Ms. Quinn made comments that encouraged the murder to occur. As a result, she was acquitted. The judge reported in the trial decision: "With respect to Quinn, she is a young woman with three young children. Her participation in the event came at a point in time when Forslund had already been engaged in the assault on Martins for a considerable length of time." (para 54) and in the oral reasons for judgement (*R v Quinn 2010 BCSC* on May 31, 2010), "As I am left with a reasonable doubt about whether Ms. Quinn made the statements attributed to her, I must find her not guilty and acquit her of the charge of second-degree murder" (para 258). Ms. Sather and Ms. Quinn were both acquitted.

The discourse in these cases is important and in stark contrast to how most of the previous cases were portrayed. Neutral reporting does not construct new dominant identities for these women. The judiciary presents the case information in a factual or neutral way, which does not perpetuate harmful gender stereotypes and allows for consideration of multiple factors that lead to the crime, versus the women being attached to a particular frame or category. It is recognized that the facts in the above cases are different in comparison to earlier cases presented, which may explain the difference in reporting. For example, in three of four of these cases, the women were acquitted. It may be the case in these instances that there is no sentencing decision for these women and

therefore, there is no need for the judiciary to feel the need to try to explain the women's actions in these cases, which in the other cases typically resulted in placing women in a category/new dominant identity.

Table 14.

"Neutral" cases from thematic analysis with findings of guilt, sentences, and comments.

Case	Main Finding of guilt	Sentence	Judicial Comments
R. v. Radita			
Emil Radita	First-degree murder	Life – Parole 25 years	Both would not accept/believe the medical diagnosis of diabetes resulting in neglect/starvation and judge stated; "their legal obligations to Alex are the same"
Rodica Radita	First-degree murder	Life – Parole 25 years	
R. v. Crossman			
Julien Telfer	First-degree Murder	Life – parole 25 years	"I conclude this because clearly Ms. Crossman was not at Reset and had no motive, or grudge, with Mr. Belayneh. This was Mr. Telfer's beef, so to speak; he set the payback in motion. There is no evidence what he told her."
Paige Crossman	Acquitted	NA	
R. v. Quinn			
Robert Forslund	Second-degree murder	Life – parole 17 years	"Her participation in the event came at a point in time when Forslund had already been engaged in the assault on Martins for a considerable length of time"
Katherine Quinn	Acquitted	NA	
R. v. Sather			
Shane McGenn	Manslaughter	10 years imprisonment	"In fact, I find that there is an innocent explanation for Ms. Sather's actions and nothing in the evidence to establish that she also intended to assist Mr. McGenn in evading liability for the murder of Mr. Delaney"
Sarah Sather	Acquitted	NA	

Summary of the Thematic Analysis

Consistent with previous research (i.e., Easteal et al., 2015; Weare, 2017), women accused of murder were most likely to be described by the judge as being either "bad" (evil or non-human) or "sad" (reporting on social issues that contributed to the crime). No women in the current study were primarily described as "mad" (pathological or psychologically unstable) and in a small subset of cases, women were described in a neutral or factual manner without bias or judgement. Importantly, almost all these cases involved women who were acquitted. When examining judicial rhetoric in the cases, distinct sub-themes emerged.

Three sub-themes were identified in the "bad" category. These included the "evil woman": women portrayed as the mastermind, the manipulator, the liar; the "bad mom": women portrayed as not following traditional gender roles of being a good mother; and the "other woman": women in affairs who killed their romantic partners wife and depicted as selfish and evil. Importantly, men in these cases who were charged with the exact same crime were generally not reported in a stereotypical or stigmatizing way.

The depiction of women in these cases is problematic as it can generate a singular identity for these women which prevents the consideration of other factors that led to the offence. It places the women in a 'non-human' like category and creates distance so that alternative explanations do not get considered. Consistent with other research (see Weare, 2017), women in this category were likely to be sentenced harshly and viewed as fully responsible for their actions versus considering alternative explanations. Not surprisingly, all women in these cases were given a life sentence. Of course, those found guilty of first-degree murder were ineligible for parole until twenty-five years is served. In the cases

where the co-accused were both charged with second-degree murder (*n*= 5), the average ineligibility for parole was seventeen years for the man co-accused and fifteen years for the woman co-accused.

Likewise, three sub-themes were established in the "sad" category. These included the "victim of violence": women portrayed as victims of past or current violence; the "easily influenced" woman: women portrayed as being easily influenced or having little agency; and the woman "out of options": woman portrayed as having significant social and financial insecurity with no other choices. Research in this area (i.e., Weare, 2017) found that women in the 'sad' category tend to be presented in a way that presents multiple micro-narratives that influenced the women to commit murder, which is important, but then the women are still sentenced to a high degree of criminal responsibility due to their 'choices' that were made in these contexts. More specifically, the judges often present the context (i.e., micro-narratives), but then do not consider their circumstances to be mitigating. In the current cases, these women were still sentenced to a high degree of criminal responsibility, perhaps due to their deviation away from appropriate femininity and due to the impact of mandatory minimum penalties. Again, the portrayal of women may be more accurate and reflective of their current circumstances; however, the way these factors are presented can still be problematic. Unlike the "bad" category, women portrayed in this manner are viewed as capable of making decisions, but they are framed as not able to make *appropriate* decisions due to their tragic situation (e.g., victim, limited social or coping skills). In some of these cases, the woman was found guilty of a lesser offence than their co-accused (i.e., accessory after the fact or manslaughter) and therefore in some cases, did receive a more lenient sentence

than their co-accomplice, whereas in other cases the context was considered but then the women and men received the same sentence.

Another key finding that emerged from the data was the fact that it was unlikely for the judiciary to describe the women co-offenders as predominantly "mad". As outlined in Chapter Four, previous literature has examined the media portrayal of women who offend and has reported that these women are commonly depicted as being the "mad" woman to help explain her offending (see Easteal et al., 2015). This notion was not supported when examining the judicial discourse in these cases, as women were more likely to be portrayed by the judiciary in a way that created the image of a "bad" or "sad" woman. This finding may speak to the tension regarding the agency of women co-offenders and the judiciary's role to legally punish these women. For example, the woman cannot be solely "mad", but she also must be empowered in a way that she has agency and is fully responsible for her actions and thus, criminally responsible.

The next chapter will conduct a case study approach on the three cases where judges identified intimate partner violence between the co-accused. The case study approach will help connect patterns of coercive control these women experienced to the circumstances of the co-offence. In doing so, the next chapter will provide a detailed account of the cases and how the judges considered the circumstances of intimate partner violence during sentencing; to the extent in which the law and mandatory minimum penalties allow.

CHAPTER EIGHT: A CASE STUDY APPROACH

The Judicial Response: Intimate Partner Violence & Coercive Control

The next section of this dissertation will employ a case study approach on three cases in the data in which the judge mentioned intimate partner violence between the man and woman co-accused. Importantly, there may have been more cases in the sample in which intimate partner violence occurred between the co-accused; however, intimate partner violence was only specifically reported in three of the cases (*n*= 3, 13%) where the trial and sentencing decisions were available. In each case, the crime committed will be reported first, followed by a summary of the woman's characteristics and relationship factors that were mentioned in the documents analyzed. Each case study will conclude with an analysis of the role attributed to the intimate partner violence in the case and how that was justified by the sentencing judge. In these three cases, Stark (2007)'s model of coercive control will be applied to help understand the relationship factors and circumstances that may have contributed to the women's actions.

Stark (2007) developed the coercive control model after years of working in domestic violence shelters from the 1970s onward. Based on professional experience, Stark learned from the women that it was not only physical violence that many of these women endured, but also a pattern of abuse that involved dominating, coercive, and controlling behaviours. These behaviours resulted in harm to the women's "personhood, autonomy, dignity, equality, as well as to their physical integrity" (Stark, 2019; p. 19). Research shows that the combination of coercion and control is the most common and harmful form of abuse (Stark, 2013).

As outlined in the literature review, Stark (2013) outlined coercive control as, "a strategic course of self-interested behaviour designed to secure and expand gender-based privilege by establishing a regime of domination in personal life" (p. 21). Coercive control is ongoing (vs. episodic) whereby men establish and maintain power over women (i.e., isolation or control). The exertion of this power results in a condition of subordination (referred to as "entrapment" in the coercive control model). Most commonly, men use control strategies that target women's roles as mothers, homemakers, and sexual partners (Stark, 2013). Coercive control has three main tactics which include: intimidation, isolation, control, and in some cases, can also include physical violence. Coercion results from the use of force or threats to urge or dismiss a particular response. On the other hand, controlling behaviour causes (or prevents) the victim to do something she does not (or wants) want to do and provokes fear, regardless if physical assault is involved or not (David Adams, 1988; p.191). Coercion and controlling behaviour harm an individual's autonomy, liberty, and security, and ultimately restricts their ability to make decisions (Stark, 2013).

The coercive control model will be applied to cases where intimate partner violence was identified in the trial and/or sentencing decisions to provide a deeper understanding of the circumstances these women experienced and to examine how the judges responded. The cases analyzed are: *R* v *Shelly Elanik and Ronald Sayers* (*R v Elanik 2003*)*, R* v *Tosha Hubler and Jason Hubler* (*R v Hubler 2013*)*, and R v Nichelle Rowe-Boothe and Garfield Boothe* (*R v Rowe-Boothe 2014*)*.*

Case Study 1: R v Shelly Elanik and Ronald Sayers (2003) NWTSC 69

Introduction

Ms. Shelly Elanik and Ronald Sayers were jointly charged with second-degree murder of a night auditor working at a hotel in Inuvik. The co-accused robbed the hotel and during the process, the night auditor was severely beaten and died from his injuries. Ms. Elanik and Mr. Sayers were intimate partners for about two years at the time of the offence. She was 18 years old and her co-accused was 21 years old. At the time of the offence, the couple had a newborn baby. In the decision, the judge acknowledged that Ms. Elanik was an Aboriginal person, which will be discussed in detail below. During the trial, Ms. Elanik held the position that she was not the principal offender but, rather, a party to the offence. In addition, Ms. Elanik attempted the defence of duress, but it was unsuccessful. Evidence was presented at trial that demonstrated the significant violence (i.e., physical, sexual, emotional) that she endured from Mr. Sayers. Ms. Elanik claimed that she participated in the offence due to threats of violence from Mr. Sayers towards herself and their newborn. Mr. Sayers was charged with assault towards Ms. Elanik the month before the murder.

The Crime

In the early hours of October 17, 2001, Ms. Elanik and Mr. Sayers went to the MacKenzie Hotel in Inuvik and Mr. Sayers decided to rob the hotel. Ms. Elanik was sober and Mr. Sayers was intoxicated. She testified that Mr. Sayers said that if she did not help him, he would "take her outside and beat her until she was almost dead" (p. 17). Upon entering the lobby, Mr. Sayers held a knife to the victim's cheek in the lobby and held him down while Ms. Elanik helped look for money. At some point, Mr. Sayers

instructed Ms. Elanik to get a rock from outside, in which she complied, and retrieved a 19-pound rock and brought it inside. The rock was used by Mr. Sayers to attack the 48-year-old victim who had a physical disability, which ultimately killed him. The co-accused left the hotel with the evidence (i.e., knife and rock) and stole money and the hotel keys. They went to Mr. Sayers' younger brother's place and asked him to dispose of evidence. Mr. Sayers was found guilty of second-degree murder and received a life sentence with parole ineligibility set at 14 years.

Ms. Elanik testified that earlier that night, Mr. Sayers sexually assaulted her with a bat and showed her a knife with what looked like blood on it and told her that he killed their baby. During that night he also mentioned killing her, the baby, and himself. During her defence, Ms. Elanik reported that she always acted out of fear of Mr. Sayers. Ms. Elanik was found guilty of manslaughter and sentenced to imprisonment for five years.

Woman Co-accused Characteristics & Relationship Factors

Ms. Elanik was 18 years old at the time of the offence and had a newborn baby with the co-accused. The judge recognized that she was an aboriginal person; however, reported that there were no unique systemic factors to consider and therefore did not reflect her status in their sentencing decision. The judge reported in the sentencing decision that she only attended school until the 9th grade and had little work history, although she aspired to pursue a career in nursing. She had no prior criminal record.

The relationship between her and Mr. Sayers was reported to have significant violence. Witnesses were called that recounted incidents of intimate partner violence that Ms. Elanik experienced. Evidence presented included: physical injuries, statements made by Ms. Elanik to others about the violence, her changes in behaviour since the beginning

of the relationship with Mr. Sayers and when he was near her, his possessive manner toward Ms. Elanik, his past assault charges, and findings of guilt toward Ms. Elanik, and expert evidence from a forensic psychologist that at the time of the murder she was experiencing battered woman's syndrome.

Legal/Psychological Analysis (Coercive Control)

The verdict from the jury was that Ms. Elanik was guilty of manslaughter and therefore, the duress defence was not believed beyond a reasonable doubt. Despite significant evidence of intimate partner violence in the relationship between the co-accused, the judge still did not understand and reflect how this could impact Ms. Elanik's behaviour and participation in the offence. Mr. Elanik attempted a defence of duress and of the three cases the reported intimate partner violence, this is the only case that called upon an expert forensic psychologist to explain battered women's syndrome. The expert witness described Mr. Elanik's actions as being consistent with those of battered women in that Ms. Elanik was always acting in fear of Mr. Sayers. The expert explained that Ms. Elanik was in a state of physical exhaustion from the abuse (including the sexual abuse that occurred hours before the murder).

The judge reported that he had no doubt that Ms. Elanik was abused on multiple occasions and acknowledged Mr. Sayers past charges as well as the eyewitness testimony that reported the abuse Ms. Elanik endured; however, he still did not believe that battered women's syndrome played a role in the offence. For example, despite the expert opinion, the judge stated:

> I have given this a great deal of thought and, with all due respect to Dr. Pugh, I did not find his opinion particularly compelling. I did not find him to be unbiased, but, rather, I found that he had decided that Ms. Elanik fit the characteristics of

> the battered women's syndrome and then tried to explain away all her actions in a way that would fit into that syndrome. (p. 19-20)

In a similar vein, the judge continued:

> I do not find the cases of abused or battered women who kill their abusive spouses to be applicable in this case. There is, in my view, an element of self-defence or provocation in those cases making them entirely different from this case where the victim was an innocent person and there is no evidence whatsoever of provocation. As well, as I have noted, the victim was a very vulnerable person. And, as I have said, since I am satisfied on the evidence that Ms. Elanik was able to and did make a choice as to her own conduct on October 17, 2001, the battered women's syndrome does not affect the sentence that I am going to give her. (p. 27)

Lastly, the judge stated, "I do not accept the battered women's syndrome explains Ms. Elanik's actions that night or provides any mitigation in this case. I find the proposition that it would be particularly hard to accept when the violence was directed to an innocent third party." (p. 20).

According to Stark (2007), over the past three decades, the domestic violence revolution has elevated the issue of 'battered women's syndrome' and has protected some abuse victims from going to jail. In most cases, however, it has not protected abused women who commit crimes against their abusive partner or women who have committed crimes in the context of being abused. For example, it becomes increasingly difficult when an abused woman kills someone other than her abuser. One lawyer has stated that, "It's easy to do the battered woman syndrome where she kills her batterer, but the difficulty is in defending the battered women syndrome using it as a defense when she kills somebody else" (p. 6; Gurian, 2015). In this case (*R v Elanik 2003*), along with others (i.e., cases the lawyer was referring to), it appears as though judges have difficulty understanding how the violence can be directed at an innocent third party (vs. the perpetrator) in cases of intimate partner violence. As outlined by Chapman (2013) and

Stark (2007) an individual experiencing intimate partner violence could feel the need to comply with the demands from their abuser, due to the domination and fear they have for their lives, as well as their lack of autonomy resulting from the ongoing abuse. This is demonstrated through concepts of 'brainwashing' (i.e., Chapman, 2013) as well as 'subordination' (Stark, 2007).

The judge specifically took issue with Ms. Elanik's ability to make choices on that night; however, he did not consider in what context those choices were made. For example, he stated:

> He (forensic psychologist) did acknowledge that Ms. Elanik on the night in question appeared to be able to pick and choose which demands of Mr. Sayers she would comply with. He explained this by saying that she exercised choices in accordance with her principles, which, to my mind, on a common sense approach, indicates that she was able to exercise some choices as to what she would or would not do. (p. 20)

There is evidence from the trial and sentencing decisions that Mr. Sayers used tactics of coercive control over Ms. Elanik. Based on the documents available, these tactics included: 1) violence (physical assault), 2) intimidation (by use of threats), and 3) control (evidence reported that he was controlling in the relationship). In the context surrounding the offence and the ongoing relationship dynamics, Ms. Elanik would have been able to decipher what demands she had to comply with based on how or what Mr. Sayers was doing at that moment in time. These choices to an outside person may look like the individual has autonomy and freedom over their decisions, but that may not be the case.

As Stark (2007) has reported, the tactics of coercive control are personalized, ongoing, and continue through social spaces. He further states that:

> Although coercive control can be devastating psychologically, its key dynamic involves an objective state of subordination, and the resistance women mount to free themselves from domination. Women's right to use whatever means are available to liberate themselves from coercive control derives from the mode men use to oppress them, not from the proximate physical or psychological harms they may suffer because of the abuse. (p. 5)

The judge also stated, "Ms. Elanik was sober at the time of the events, and while she may be a generally timid and not sophisticated nor intelligent person, as testified by Dr. Pugh, she has to take responsibility for the choice she made and the things that she did" (p. 23).

Indeed, it is important that Ms. Elanik takes responsibility for her actions; however, these actions should also be considered in the context where she was in a position of subordination, feared for her and her newborns safety, and had been sexually assaulted just a few hours prior. Even though the judge had expert testimony to help educate him about battered women's syndrome, he still rejected this notion. As a result, he did not consider the circumstances and constraints in decision making Ms. Elanik faced. If the judge believed these factors, it could have rendered a different and arguably, more just, judicial response for Ms. Elanik (i.e., acquittal).

It should also be noted that the judge in this case also failed to give effect to the Gladue factors, despite Ms. Elanik being an Aboriginal person. The judge stated:

> I take into account the principles of sentencing including that she is an Aboriginal person. However, no unique or systemic factors, as referred to in the Gladue case from the Supreme Court of Canada, have been identified as having any effect on her being where she is today, convicted of manslaughter. In addition, the offence is one involving violence, and I see no basis to treat Ms. Elanik any different because of her Aboriginal status than I would any other offender in this situation. (p. 25-26)

As Roach and Rudin (2020) have highlighted, that despite the intentions formed from *R v Gladue* (1999) in which a legal requirement was developed where judges must

take into account the circumstances of Indigenous offenders at the time of sentencing, due to the multi-generational trauma that was inflicted on Indigenous people, the consideration of Gladue factors have largely been unsuccessful in its application. The judge's comments in this case are an example of how the Gladue factors are not being appropriately considered in practice and this lack of consideration contributes to speeding up the victimization-criminalization cycle (as opposed to slowing or stopping it) by not appropriately using these factors of mitigation in the sentence imposed.

The intersectional dimension of gender, victimization, and Indigeneity seems to negatively affect (vs. provide context for) Ms. Elanik in this case. Any evidence or information that was provided to help give context to how a woman with no criminal record became involved in a murder was refuted by the judge; therefore, Ms. Elanik was found guilty and sentenced for manslaughter without consideration of the factors that led to her participation in the offence. The judicial response in this case is congruent with the formal equality approach (i.e., everyone should be treated the same), versus the substantive equality approach (i.e., equitable outcomes for those who are disadvantaged and/or marginalized; Sangiuliano, 2015). Legal scholars, such as McIntyre and colleagues (2009) have suggested that, if the social context surrounding an offence is not considered when applying the law, inequalities among citizens are perpetuated. The judge in *R v Elanik 2003* reported the various contextual factors (i.e., intimate partner violence, aboriginal descent, lack of education, recent pregnancy, etc.), but clearly stated that they did not consider the impact these factors played in her participation in the offence when determining the sentence. Not only were the various factors ignored individually, but the

intersectionality of these factors also was not considered. For Ms. Elanik, this created an overlapping system of disadvantage.

It is well established in the literature that a woman's pathway to criminal involvement is often different then men's (e,g., Javdani et al., 2011) and the legal response (i.e., liability and sentencing) needs to recognize and reflect these differences to deliver a fair and proportionate response to women who offend. Ms. Elanik was found guilty of manslaughter and sentenced to imprisonment for five years. *R v Elanik 2003* is yet another example where a judge references multiple factors that should decrease the woman's moral culpability, but instead they intentionally choose not to let these factors be reflected in their sentencing decision. As such, the intersectionality of multiple factors was ignored and a formal equality (vs. substantive equality) approach was applied by the judiciary.

Case Study 2: R v Tosha Hubler and Jason Hubler (2013) ABCA 31

Introduction

Jason and Tosha Hubler, husband and wife, were convicted of first-degree murder and indecency to a human body of a 78-year-old man in 2011. At the time of sentencing, Mr. Hubler was 38 years old and Ms. Hubler was 32 years old. In 2008, the co-accused had seen the victim at a flea market, where he was known to have a hobby of buying and selling items. At the time, the victim was driving a brand-new white truck. Shortly after this encounter, Mr. Hubler was reported to have told friends that he would soon be getting a new white truck but did not provide specific details. Ms. Hubler testified that on the day of the flea market and the week following, Mr. Hubler repeatedly brought up how easy it would be to kill the victim and acquire his truck. Mr. Hubler had a past criminal record, Ms. Hubler did not.

The Crime

On January 30, 2009, the victim went to the Hubler's residence in response to an ad for a yard sale. That was the last time the victim was seen. Later that day, the co-accused were seen driving the victim's truck and in the following days, they used his credit cards. When arrested, the police found evidence of the victim inside their house, including blood.

Police statements were inconsistent between the co-accused. Mr. Hubler gave a statement about an accidental death (i.e., victim fell down the stairs) and Ms. Hubler reported that Mr. Hubler planned the murder and she assisted. Her statement recounted that when the victim entered the house, Mr. Hubler physically assaulted him with a weapon until he was not responsive, and she helped by doing what Mr. Hubler asked of

her (i.e., retrieving a wooden trunk, covering the windows, laying the victim flat, etc.). They put the victim's body in a wooden box and dumped it by nearby railroad tracks. The medical examiner stated that Ms. Hubler's explanation of events was more likely than Mr. Hubler's. During this statement Ms. Hubler reported intimate partner violence that she experienced in the relationship which included physical violence (including attempts to kill her) and threats towards her and her family.

Woman Co-accused Characteristics & Relationship Factors

At the beginning of the police interview, Ms. Hubler said, "have you ever been put in a position where you're terrified either which way you turn" (para 8), she said that was her position. She reported that Mr. Hubler started talking about killing the victim after he came to their house for the first time (prior to the murder). She reported that Mr. Hubler would on occasion, make 'jokes' about killing people and at one time he had attempted to kill her. She reported that she experienced physical violence in the relationship and that Mr. Hubler has made threats to harm her, their children, and her family, and that she also had witnessed him be violent towards others. Ms. Hubler attempted the defence of duress. She testified that on the day of the murder, she felt like she had to comply with Mr. Hubler because, if she did not, he might kill her instead. The jury rejected this defence.

Legal/Psychological Analysis (Coercive Control)

Ms. Hubler was charged and found guilty of assisting her husband commit first-degree murder. Ms. Hubler attempted the defence of duress due to the intimate partner violence she endured at the hands of Mr. Hubler and that this impacted her participation

in the offence; however, the jury ultimately was not satisfied by this defence beyond a reasonable doubt.

To establish this defence, Ms. Hubler had to demonstrate evidence that her actions were not "morally voluntary" due to her experience of threats and harm from Mr. Hubler. Importantly, this case occurred prior to the clarification of duress in the Supreme Court of Canada in *R v Ryan* 2013 SCC 3. At the time of this trial, the elements needed to support the defence of duress included: 1) a threat of death of serious bodily harm to the accused; 2) a belief on the part of the accused that the threat could be carried out; 3) the threat could cause a reasonable person in the accused's position to do as she did; 4) the accused had no safe avenue of escape; and 5) the accused committed the offence only because of the threats of death or serious bodily harm. There was some evidence presented that supported each element in the defence of duress. For example, Ms. Hubler presented evidence that explained her fear of Mr. Hubler and reported that there were "ongoing threats"; both explicit and implied over extended periods of time and not necessarily explicit during the planning or commission of the murder. Ms. Hubler reported that on the day of the murder, she felt like she had to comply with Mr. Hubler due to their relationship history that included threats and violence because she feared that if she did not, she may be killed instead. On appeal, Ms. Hubler argued that the instructions to the jury failed to highlight the possibility of implied threats (vs. explicit/expressed threats). The appeal was denied.

The Hubler case is another example whereby the judiciary and legal system failed to demonstrate an adequate understanding of the impact of intimate partner violence. More specifically, there seems to be a lack of understanding about the relationship

between coercive control and physical violence. Based on the information in documents available, there is evidence of tactics Mr. Hubler used to gain coercive control over Ms. Hubler. Specifically, Mr. Hubler used: 1) violence (specifically, physical assault) and 2) intimidation (making Ms. Hubler fearful by use of threats towards herself and family). Perhaps due to the lack of information or discussion surrounding intimate partner violence in the documents, there wasn't evidence presented to substantiate tactics of 3) isolation or 4) control.

Evan Stark (2008), the developer of the Coercive Control Model wrote:

> "The most important anomalous evidence indicates that violence in abusive relationships is ongoing rather than incident-specific, and that the harms it causes are more readily explained by these factors than by its severity. Among these harms, the dominant approach identifies two for which it fails to adequately account: the entrapment of victims in relationships where ongoing abuse is virtually inevitable and the development of a problem profile that distinguishes abused women from every other class of assault victim. (p. 12)

In these cases, the violence is different from other forms of assault. The woman experiences hundreds to thousands of incidents by the same perpetrator, she experiences the suppression of conflict versus the resolution of conflict, and over time it can have growing effects on her autonomy. In assault, the loss of autonomy can be a secondary effect; however, in coercive control, the victim's personhood is the primary target. As a result, over time this can lead to subordination (Stark, 2007). This loss of liberty, accompanied with fear, can impact a woman to feel as though she has no other option than to comply with the perpetrator's demands. With this in mind, it makes sense that her police statement began with "have you ever been put in a position where you're terrified either which way you turn" (para 8). There was evidence document in the decision to support the conclusion that Ms. Hubler was terrified to participate in the offence and

terrified to not comply with her husband's demands. It appears the judge and jury in this case did not understand how someone could be in such a position.

Due to the limitations associated with defence of duress, it could not adequately protect Ms. Hubler from criminal responsibility. As mentioned above, Ms. Hubler was convicted as a party to the offence and facts were presented at trial that demonstrated a different level of involvement in planning and participating in the offence. Interestingly, she was not found guilty of a lesser offence. Moreover, due to the restrictions imposed by mandatory minimum penalties, Ms. Hubler received a life sentence with no eligibility for parole for 25 years. Since the crime was committed in 2009, Ms. Hubler will be able to apply for accelerated parole through the faint hope provision where she can apply to court for a reduction after serving fifteen years. That being said, the faint hope provision was abolished in 2011 and is currently not available to individuals convicted of first-degree murder. Meaning, individuals convicted of first-degree murder must now serve twenty-five years before they can apply for parole.

Ms. Hubler took the risk to attempt the defence of duress (vs. a guilty plea to a lesser offence) and ultimately, was punished to the highest degree. Since the defence was unsuccessful, she was sentenced to the mandatory minimum penalty for murder (i.e., life with no eligibility for parole for 25 years). If her defence would have been successful, she would have been acquitted (i.e., no sentence). The research supports that women in these cases often plead guilty to lesser offence (i.e., second-degree murder or manslaughter) even though they may not be morally culpable in an effort to avoid the harshest minimum penalty, in which Ms. Hubler received.

Based on the evidence presented at trial, Ms. Hubler was in an abusive relationship with her co-accused and was put in an impossible position which resulted in killing someone other than her abuser. The current defences available in the Canadian legal system were inadequate to protect Ms. Hubler against criminal liability. Even though Ms. Hubler arguably had a decreased level of moral blameworthiness and because she was convicted of the same offence as her co-accused, the mandatory minimum penalty was applied. The evidence presented demonstrated that she felt that she either had to comply with her partner's wishes or the alternative, she risked her own safety and/or life.

Case Study 3: R v Nichelle Rowe-Boothe and Garfield Boothe (2014) ONSC 3391

Introduction

Nichelle Rowe-Boothe and Garfield Boothe first met in Florida where they were illegal immigrants. Garfield had a son from a previous relationship, Shakeil, who was born in 2000 and he lived with his biological mom in Jamaica. Garfield and Nichelle married in 2005 and both met Shakeil for the first time following their marriage. Evidence at trial revealed that domestic violence and multiple separations were factors in their relationship from the beginning. The violence continued and Garfield moved to Canada where he had permanent residence status and Nichelle followed shortly after. During a period of time during which Nichelle and Garfield were separated in Canada, Garfield asked Shakeil's biological mother if Shakeil could move to Canada for a "better life". Garfield and Nichelle eventually got back together. In 2009, Shakeil moved to Canada. Shakeil's move to Canada was a complete surprise to Nichelle; however, the judge stated that despite Nichelle being uninvolved in the decision making where it was decided that Shakeil was moving to Canada, she 'assumed the role of step-mother to Shakeil'. Shakeil was enrolled in school and both Nichelle and Garfield had employment. During his first year in Canada, Shakeil had some minor behavioural concerns at school and his dad, Garfield, responded to this by using physical discipline. Nichelle became pregnant and gave birth to their son, Ja'den, in September of 2010. The sentencing decision described this time period as a "turning point in the case" as less attention was paid to Shakeil and the physical abuse escalated.

The Crime

Multiple times a week, Garfield whipped Shakeil with a belt to the point of drawing blood. As another form of 'discipline', Shakeil's food was frequently restricted, and he became malnourished. By November 2010, he was not attending school. School officials were told that he returned to Jamaica for an early Christmas and when he did not return in the new year, Garfield told his school that Shakeil was now enrolled in school in Jamaica. In reality, Shakeil was being chained to his bed and subject to beatings and food deprivation. Neighbours and relatives saw very little of Shakeil over the following months and it is suspected that his death occurred on May 26, 2011. Evidence revealed that his cause of death was multiple injuries over a prolonged period of time, as well as chronic malnourishment. The medical examiner also stated that Shakeil likely suffered significant abuse minutes to hours before the time of death.

Garfield admitted to whipping Shakeil frequently. Nichelle admitted that she too whipped Shakeil on one occasion in September of 2010. Each co-accused testified that the other had been the one to chain Shakeil to his bed for long periods of time. Both also testified that they knew Shakeil was sick but felt that they could not bring him to a doctor because it would reveal the abuse, which would then be a breach of probation for Garfield (for his assaults on Nichelle) and Children's Aid would likely take their son, Ja'den, which they both wanted to avoid at all costs.

During the trial, one of the main questions to be determined was who committed the final assault on Shakeil that ultimately resulted in his death. Each reported that it was the other that perpetrated the final assault; however, both co-accused accepted that their actions made them guilty of manslaughter. The jury and judge concluded that Garfield was guilty of the final assault and that Nichelle was an aider or abettor in the murder of

Shakeil. The judge also stated that there was very little evidence of Nichelle being involved in physical assaults towards Shakeil. Garfield was sentenced to life imprisonment without eligibility for parole for 15 years and Nichelle was sentenced to life imprisonment without eligibility for parole for 13 years.

Woman Co-accused Characteristics & Relationship Factors

The judge reported that there was little evidence that Nichelle was involved in the assaults; however, they argued that she did not protect Shakeil or report Garfield to the police. As a result, they reported that Nichelle was guilty of murder as an aider or abettor pursuant of s. 21(2) of the Criminal Code. There was evidence presented at trial that a Facebook message was sent to Shakeil's biological mom to warn her of the abuse and that Nichelle also took pictures of Shakeil chained to his bed, as she was planning on sending them to his biological mom. The judge concluded that Nichelle was complacent in allowing Shakeil to continue to be chained to his bed and that she failed in her responsibility to protect him. After Garfield and Nichelle found Shakeil dead, there were text messages that show that Nichelle encouraged Garfield to call the police.

Nichelle attempted the defence of duress; however, the jury rejected it. Nichelle testified that Garfield had always been controlling, mistrustful, and that he was violent and abusive towards her, especially when under the influence of substances (i.e., alcohol or marijuana). When questioned on why she did not seek medical attention for Shakeil she responded that she was afraid of Garfield and how he would respond if she did so. The judge reported that the evidence was clear that she was physically and emotionally abused by Garfield. Evidence was presented at trial in which on multiple occasions Nichelle would call the police and report verbal arguments and physical assault. She

testified that on many occasions she would ultimately lie to the police and tell them that she "had exaggerated or that she had not been assaulted when she had been" (para 70). On two occasions, Garfield was charged with assault towards Nichelle and pleaded guilty.

The judge acknowledged that she was a victim of domestic violence but went on to say that "the evidence shows she was capable of asserting herself to Garfield directly and also by calling the police. She was aware of community resources that were available to assist her with issues related to domestic violence. Nonetheless, the difficulty of breaking away from such circumstances is well known" (para 96). The judge stated that he believed it was Nichelle's selfish concerns versus her fear of Garfield that got in the way of protecting Shakeil. Her selfish concerns were reported to be that Ja'den would be taken by Child Protective Services if the abuse was reported.

Legal/Psychological Analysis (Coercive Control)

The judge in the case of *R v Rowe-Boothe 2014* made a ruling as to whether the defence of duress was to be left with the jury to determine the likelihood that Ms. Rowe-Boothe was acting under duress, and he ultimately concluded to do so. The jury had to determine whether Ms. Rowe-Boothe met the requirements for the defence of duress under the Canadian Criminal Law which includes: 1) imminent peril or danger, 2) no reasonable legal alternative, and 3) proportionality between harm inflicted and harm avoided (Roach, 2018). In this case, the judge outlined that the defence of duress was being applied to an individual who was claiming duress in a battering relationship. The case of R v Ryan (2013) SCC 3 was referenced in which the Supreme Court found "the defence of duress is available when a person commits an offence while under compulsion

of a threat made for the purposes of compelling him or her to commit it" (para. 2). In R v Ryan, the Supreme Court identified that cases of duress include instances where an individual receives a message (directly or indirectly), "commit the offence or be assaulted". Even in the absence of explicit threats, it is possible that in abusive relationships, an individual can act in a way they believe the batterer wants them to act. In these cases, the entire context of domination and subjugation should be considered versus looking at events as isolated incidents (Stark, 2007).

Based on the evidence presented at trial in R v Rowe-Boothe 2014 it seems that Nichelle experienced physical violence and verbal threats throughout the relationship, yet these were not considered to be coercive enough to mitigate her criminal responsibility. For example, Ms. Rowe-Boothe may have been compelled to act (or not act) in a certain manner that ultimately resulted in harm to Shakeil. The judge took issue with the fact that there was no direct evidence that Mr. Boothe would assault Ms. Rowe-Boothe for things related to Shakeil (i.e., protecting or harming him), but rather the evidence showed that she was threatened and beaten on multiple occasions, at any given time. As mentioned earlier, Garfield was charged with assaulting Nichelle on two occasions. The crown took the position that Ms. Rowe-Boothe had a legal duty to protect Shakeil and committed the unlawful act of not providing the necessities of life that contributed to his death. Evidence was presented where Ms. Rowe-Boothe asked for permission to take Shakeil to get medical help, but Mr. Boothe refused. The judge identified that due to the intimate partner violence, it was possible that Ms. Rowe-Boothe felt the need to comply with Mr. Boothe's wishes to prevent individual harm to herself even without explicit threats. The judge followed with comments that alluded to the notion that although this could be a

possibility, they did not think this was a strong position. The jury ultimately rejected the defence of duress and Ms. Rowe-Boothe was convicted of second-degree murder received a life sentence with eligibility of parole starting after 13 years severed, just two years earlier than her co-accused, Mr. Boothe.

In the case of *R v Rowe-Boothe 2014*, the sentencing judge considered, to some degree, the intimate partner violence Ms. Rowe-Boothe endured and how this may have impacted her ability to take action to protect Shakeil; however, she was still held to a high degree of responsibility. Due to mandatory minimum penalties and since she was found guilty of second-degree murder, the most lenient sentence that would be available would have been a life sentence with eligibility of parole starting after 10 years severed. The judge must have viewed her action/inaction to not be at the lowest end of the spectrum since her ineligibility for parole was set at 13 years. This represented only two years difference in parole ineligibility, despite the fact that her co-accused was the perpetrator of the violent physical assaults to their son and she was the victim of intimate partner violence.

The findings from the thematic analysis in this study may help inform the lack of sentencing discrepancy between the co-accused. The thematic analysis revealed that the judicial rhetoric in this case fit under the category of "bad woman" or, more specifically, "bad mom". This perception may have impacted the sentencing decision. It appears that Ms. Rowe-Boothe was held to be doubly deviant for 1) breaking the law and 2) for not following stereotypical feminine roles of being primarily 'selfless' and 'nurturing' and more specifically, placing her need for security above another child's (i.e., her stepson.

If the coercive control model was better understood by the judge in this case or by the legal system (in defences available to women), there may have been a different outcome. Based on Stark's (2007) model, it appears that Mr. Boothe used tactics of coercive control over Ms. Rowe-Boothe. Based on the documents available, there is some evidence for all four tactics. Mr. Boothe used 1) violence (specifically, physical assault), 2) intimidation (making Ms. Rowe-Boothe fearful by use of threats, 3) isolation (Ms. Rowe-Boothe moved away from family to be with Mr. Boothe), 4) control (would not let Ms. Rowe-Boothe seek medical help for stepson, would not let specific people in the house). Ms. Rowe-Boothe experienced coercion (i.e., "entails the use of force or threats to compel or dispel a particular response", Stark, 2013; p.22) and controlling behaviour (i.e., "causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid… regardless of whether assault is involved"; Adams, 1988 as cited in Stark, 2007). As a result, she was in a position of subordination which resulted in individual harm and restricted her ability to make decisions (Stark, 2013).

The judge did not view Ms. Rowe-Boothe's position as one of subordination as they assert in the sentencing decision that: "it is perfectly clear that Nichelle was complicit in permitting the practice of chaining Shakeil to his bed to continue" (para 64). The judge did not seem to have awareness or understanding that Ms. Rowe-Boothe may have been in a position of subordination and fear. Based on the accounts from Ms. Rowe-Boothe which described the physical and emotional violence in the relationship, it is likely that she was too fearful to say anything to Mr. Boothe due to the repercussions to both her and Shakeil's safety if she did so. The judge continued "… I take into account

that Nichelle was abused by Garfield but I also take note of the fact that she could be assertive with Garfield and had often called the police. She was capable of taking steps to protect Shakeil but I find that her selfish concerns, more than her fear of Garfield, led her not to. She knew if she reported the abuse, she would be found to be complicit. This would likely result in Ja'den being taken from her" (para 101).

These statements and perceptions are concerning. It frames Ms. Rowe-Boothe as being responsible because she "could be assertive" and "often called the police". This perpetuates the problematic image that, for violence to be believed and taken seriously, the victim must be so passive and traumatized to a point that they are incapable of trying to protect themselves (i.e., assertive) or ask for help (i.e., call the police). The judge then goes on to say that her selfishness outweighed her fear of her husband that led her to not take the steps to protect Shakeil. If this were the case, there would not be evidence of Ms. Rowe-Boothe asking for permission to take Shakeil to receive medical care or her attempts of notifying Shakeil's biological mom of the abuse her son was experiencing. Further, this statement fails to acknowledge the position many women who experience intimate partner violence are in, in that they have no good options and are constantly calculating the risks associated with their actions, versus being "selfish". The judge's statement furthers the stereotypical view associated with "why did she not just take action" or "why did she not just leave", versus a deeper understanding that there is a much more complicated dynamic at play.

In the case of *R v Rowe-Boothe 2014*, the judge acknowledged the intimate partner violence between the co-accused but used rhetoric that minimized the impact of abuse and blamed Ms. Rowe-Boothe for not acting. Therefore, the judge did not consider

how the violence endured could impact Ms. Rowe-Boothe's actions. The closest mention of coercive control in this case was when the defence of duress was raised and the rulings from R v Ryan 2013 SCC 3 were reported on, although it did not carry much weight with the judge, as they verbally reported that the position was not a strong one. If the impacts of coercive control (i.e., position of subordination) were better understood by the legal system (i.e., defences available to women) or by the judge, it may have led to a much more proportionate sentencing decision and a deeper understanding of the circumstances of some women in abusive relationships.

Case Study Summary

Although there was only a small subset of cases in which the judiciary identified intimate partner violence between the co-accused, this may be an underrepresentation. As with many other factors explored in this study, data across trial and sentencing decisions were inconsistent and incomplete. Since intimate partner violence is arguably more recognized than coercive control currently in the judicial system, the cases with IPV were used to apply the model of coercive control for analysis, as they can commonly co-occur. It can also be the case that other women in this study experienced coercive control; however, it may not have been recognized since the tactics of coercive control are not as explicit as the traditional features of intimate partner violence.

The study found that in all three cases of intimate partner violence, the judges and jurists rejected the defence of duress and did not believe that the violence endured mitigated the culpability of these women. In the first case, *R v Elanik 2003*, she was found guilty of manslaughter and sentenced to imprisonment for 5 years. The judge clearly articulated the impact of the abuse she endured did not in fact mitigate her culpability and intersectional factors were not considered. In the second case, *R v Hubler 2013*, she was found guilty as a principal offender. In this case, she helped her violent and abusive husband commit first-degree murder and she was sentenced to life with parole eligibility after 25 years served. In the last case, *R v Rowe-Boothe 2014*, the woman was found guilty of aiding her abusive husband to commit second-degree murder and received a life sentence with parole eligibility set at 13 years, just two years sooner than her co-accused.

In the three cases where intimate partner violence was recognized between the co-accused, it can be argued that the women did not receive a fair and proportionate sentence, due to multiple factors. These include: 1) the lack of effective defences available in Canadian criminal law to women in coercive relationships, 2) the legislative treatment imposed for secondary liability, 3) mandatory minimum sentences, and 4) the challenges judges and other legal actors have in understanding various types of coercion and their impact on women.

The next chapter will discuss all findings from the dissertation and position this research in the current literature as well as discuss the limitations of the current legal regime. The next chapter will also discuss implications and recommendations from the findings, as well as acknowledging the study limitations.

CHAPTER NINE: DISCUSSION, IMPLICATIONS, AND CONCLUSION

The purpose of this research was to explore and report on cases of co-offending couples accused of culpable homicide (murder or manslaughter) in Canada. Research has suggested that some women may be coerced into the commission of such offences by more powerful, possibly abusive, men partners (Barlow, 2016); however, in most cases this is not recognized due to the limitations in the current legal regime. In particular, the circumstances of these women may not be accurately considered due the narrow defences available for these women, legislative treatment imposed for secondary liability where both parties are held criminally responsible for the same offence, and the impact of mandatory minimum penalties. Therefore, the goal for the current research was to see if this was the case by exploring the personal characteristics (including intersectionality) of women co-accused with a focus on investigating intimate partnership dynamics (i.e., intimate partner violence/coercive control). The study examined the legal (i.e., criminal code) and judicial response (i.e., judges' perceptions and the sentence imposed) to women co-accused of murder or manslaughter with their intimate partner. The study also was interested in how these women are described in trial and sentencing decisions by judges, as some limited research has suggested that women accused of violent crimes may be viewed in harmful ways that generate problematic narratives and perpetuate negative stereotypes for women.

One of the main findings of the dissertation was that from a legal perspective (i.e., judicial findings of liability or culpability) the women's involvement tended to be deemed as secondary (i.e., aid or abet murder) versus principal offender or equally involved. In some cases, the women were in fact deemed to be a co-principal (from a

legal perspective) in the offence; however, the circumstances of the offence demonstrated that the women's actual involvement in the offence was lesser than the man co-accomplice. In most cases, women were sentenced similarly to their co-accused, largely due to mandatory minimum penalties. While the judges in these cases reported on some intersectional factors in their decision, such as victimization or race, they did not specifically mention them as being mitigating factors when determining sentence length in any of the cases.

The thematic analysis found that these women are most likely to be depicted by the judiciary as a "bad" woman (evil woman, bad mom, or the 'other' woman), followed by a "sad" woman (victim of violence, easily influenced, or out of options). In this analysis, some of the judicial rhetoric perpetuates harmful stereotypes of women. In the sample of available cases, only a small proportion of mentioned intimate partner violence between the co-accused; however, this may be an underestimation due to document accessibility and whether the judiciary determined this factor relevant to include in the trial and sentencing decisions. In these three cases, it appeared as though all women experienced elements of coercive control and the men were identified to have used psychological control tactics over the woman co-accused. The judges and jurists rejected the defence of duress in these cases and did not believe that the violence endured mitigated the culpability of these women. These three cases highlighted multiple limitations in the current legal regime.

The descriptive findings demonstrated that most of the women co-accused of murder either assisted or encouraged the offence versus being the principal offender or having equal participation. The victim was most likely to be known to the co-accused

(e.g., child, ex-partner, current partner, roommate/relative, etc.) versus being a stranger. This finding is more in line with research on women (vs. men) convicted of murder as the victim is more likely to be known to the woman (i.e., 61% of women's victims are either a family member or intimate partner whereas men are more likely to kill an acquaintance – 40%; Mahoney et al., 2017).

On average, women co-accused in the cases of interest were in their mid-thirties and were slightly younger than the man accomplice. This is consistent with Canadian statistics that report that women over the age of 25 are more likely than younger women to co-offend with the opposite gender (Mahoney, 2011). Moreover, women often are introduced to criminal activities by older men, such as an intimate partner or relative (Haynie et al., 2005). Over half (65%) of these women were found guilty of either first- or second- degree murder. As a result, they received the mandatory minimum sentence of life imprisonment. The average parole ineligibility for women found guilty of second-degree murder was fifteen years (whereas men were on average ineligible for seventeen years). Women found guilty of manslaughter received an average of nine years imprisonment, whereas the men were sentenced to twelve years. There were three women who were found not guilty and as a result, were acquitted. Although the findings show a slight difference in sentencing (i.e., women receiving more lenient sentences), most of these women's role was either helping or encouraging their co-accused and still they were held to a very high degree of criminal responsibility and individual factors (e.g., coercion, intersectionality) that contributed to the commission of the offence may not have been appropriately considered at trial (i.e., lack of defences available) or at sentencing (i.e., mandatory minimum penalties and judicial perceptions).

The thematic analysis was consistent with previous literature (see Easteal et al., 2015 & Weare, 2017) in that it was found that the judges commonly described these women as being 'bad' and 'sad'. In doing so, it created dominant, often singular, narratives that are problematic and harmful for these women. In the cases of women described as 'bad' it prevents consideration of alternative factors that lead to the offence. All women depicted in this manner received life sentences, which is consistent with previous research that demonstrated women depicted as 'bad' tend to be portrayed in a way that they are deserving of punishment (Easteal et al., 2015 & Weare, 2017). In cases where the women were depicted as 'sad' the judges often presented contextual factors that lead to the offence, which is important, but often said that these factors did not mitigate their blameworthiness and alluded to the fact that the women were not be able to make 'appropriate' decisions due to their tragic situation and/or limited skills. In some of these cases, women were likely to receive a lesser sentence in comparison to their co-accomplice, consistent with previous findings that narrative engenders pity for the woman's plight (Easteal et al., 2015 & Weare, 2017). Contrary to the established literature of media depictions of women who offend, the results from thematic analysis revealed that the judiciary did not depict women who co-offend as being a predominantly "mad" woman. This may be due to the notion that for the women to be criminally responsible for their actions the judiciary must demonstrate that the woman has agency and therefore depicts women in a way that's more congruent with the "bad" or "sad" woman to justify severe punishment. The results from the thematic analysis also advance the literature through the identification of unique sub-themes found in these cases. Specifically, the judges commonly described these women as being 'bad'; which was

broken down into sub-themes of “evil woman”, “bad mom”, or “the other woman” and ‘sad’; which was broken down into “victim of violence”, “easily influenced”, or “out of options”.

Lastly, the findings from the three case studies where intimate partner violence was referenced revealed important results. First, in all three cases it appeared that the violence the women experienced was consistent with the coercive control model (see Stark 2007) of ‘coercive and controlling behaviour’, which can put an individual in a position of subordination. In these cases, the women appeared to be subject to the men’s control and domination; however, this was not recognized by the judges. In all cases, the defence of duress was attempted, but it was unsuccessful in its efforts to protect these women from criminal responsibility. The case studies confirmed multiple problems in the current legal regime for women who are in coercive relationships which included: the lack of effective defences available in Canadian criminal law (Cunliffe & Parks, 2015; Sheehy, 2001 & 2012), the potential disproportionate impact in the legislative treatment imposed for secondary liability where women are held criminally responsible for the same offence as their co-accused, the rigid regime imposed by mandatory minimum sentences and inability for judicial discretion to be applied (Grant, 2001; Parkes, 2021), and lastly, the challenges judges and other legal actors have in understanding various types of coercion and their impact on women (Stark, 2007). This helps advance the literature to include a Canadian sample and demonstrate the unfair treatment women in coercive relationships experience throughout the criminal justice process.

Study Recommendations

Despite women in coercive relationships being in a position of subordination and having a reduced level of participation, they are still held to a high degree (or same degree) of criminal responsibility when they commit violent offences with their intimate partner. This is due, in part, to the outdated and narrow view of coercion in criminal law and the lack of criminal defences available to women in such cases. For example, in these contexts, the criminal law doctrine remains rooted in the idea that there must be direct and explicit physical violence that is feared and evidence of efforts to avoid assault, versus the deeper understanding that, in some cases, coercive control does not include physical violence. As outlined in the coercive control model presented in the literature review, Stark (2007) has found that some of the most fearful and subjugated women have never been assaulted. Coercive control is a series of tactics used by men to dominate and control women which limits their independence and makes them dependent on their perpetrator, which puts them in a position of entrapment in the relationship and in a state of subordination (Stark, 2007).

A bedrock principle in criminal law is that "criminal liability requires voluntary conduct". Moral voluntariness reflects individual choice and with choice comes responsibility for one's actions [*R v Aravena* (2015) ONCA 250]. In these cases, the woman's 'choice' to offend should be considered in the context of a relationship where she may be experiencing coercive control. The legal system does not currently appreciate the impact of coercive control and needs to consider this occurrence, to be congruent with the criminal justices' notions of "individual choice and freedom" that is required in order to be held responsible (Cunliffe & Parks, 2015). Moreover, if the impact of coercive control on these women is not recognized and responded to by the legal system it fails to

achieve principles of substantive equality (i.e., equal opportunities and equitable outcomes by promoting recognition and response to those who are disadvantaged and/or marginalized; Sangiuliano, 2015) and in some instances, are protected under section 15 of the Charter.

A revision of the defence of duress and/or the development of a new criminal defence that includes various aspects of coercion (e.g., coercive control) is warranted based on the evidence and the impact coercive control has on women, especially when they are facing life sentences for their 'choices' (i.e., decisions made in the context of intimate partner violence). The current defence of duress is too restrictive, as it fails to account for the underlying psychological control tactics that may put a woman in a position where in her worldview, she has no other options but to yield to the coercion or risk her life. The criminal defences available to women in these cases are outdated and are not in sync with the psychological advances in understanding coercive and controlling behaviour. A criminal defence that recognizes the position of subordination resulting from coercive and controlling behaviour could help appropriately defend these women, which would negate their criminal liability for participation in offences while experiencing coercive control. Alongside a new criminal defence, mandatory education for criminal defence lawyers related to the research developments in intimate partner violence and coercive control would be highly beneficial. The goal would be for criminal defence lawyers to be up to date with recent developments and be able to bring relevant evidence to help defend women co-accused with their intimate partner.

There are problems with the provision of secondary liability and mandatory minimum sentences for women in coercive and co-offending relationships. Secondary

liability is especially problematic for these women because when found guilty, they end up being sentenced for the same offence as their co-accused. This then follows mandatory minimum sentences for cases of murder. The sentences are predetermined and mitigating factors, such as reduced participation and intersectional factors, cannot impact the sentence given (with exception for second-degree murder parole eligibility can range from 10-25 years) and therefore, these women are sentenced very similarly to their co-accused despite being in a potentially coercive relationship, having decreased level of participation in the offence, and diminished blameworthiness.

A revision to the provision of secondary liability is warranted in these cases. Despite women in co-offending relationships having a decreased participation in the offence, if found guilty, they are sentenced for the same offence as their co-accused. A revision to this provision could include acknowledgement of differing roles in the offence in which the woman is not necessarily sentenced to the same offence as the man if found guilty. This would allow for the actual level of blameworthiness to be reflected in these cases as well as increase the likelihood that proportionality in sentencing could be achieved in practice. The current provision of secondary liability is especially problematic if the offence carries a mandatory minimum penalty, as will be discussed below.

Over the last few decades, legal scholars in Canada have been advocating for all mandatory minimum penalties to be abolished (i.e., Senator Kim Pate's bill: Bill S-208; Pate, 2020) and most recently, Parkes (2021) proposed that starting with abolishing mandatory minimum sentences for murder specifically should be considered a priority due to the wide range of culpability associated with the offence and the high stakes

associated with being found guilty (i.e., life sentence). Despite these efforts, Bill C-5 (Department of Justice Canada, 2021) recently passed, which left the mandatory minimum penalties for murder intact, although they repealed other mandatory minimum penalties. The goal stated for these changes were to address over incarceration rates and promote judicial discretion for sentencing, to help ensure that when a person is found guilty of an offence they are sentenced appropriately. Based on this, it appears the courts and Parliament recognize that mandatory minimum penalties are problematic but left them applicable to the offence that carries not only the longest period of incarceration but also the harshest penalty with little allowance for judicial discretion to be applied, which seems illogical.

It is problematic that the courts and Parliament recognize the disproportionate impact mandatory minimum sentences can have on marginalized individuals but have left them in place for the offences that keep individuals imprisoned for the longest period and do not allow judges to apply their discretion in these cases, despite the noted wide range of moral blameworthiness an individual may have in these cases. If mandatory minimum sentences were also abolished for murder, it would help achieve a fairer and more proportionate sentence for women in coercive relationships who are co-accused of murder, as it may allow judges to meaningfully consider mitigating factors and allow for a more nuanced understanding of these women.

Although this would be a step in the right direction, the results from the current study revealed that even when judges were able to apply some discretion in sentencing for second-degree murder (i.e., parole eligibility), women in these cases were still sentenced similarly. Moreover, the judges' perceptions of women co-accused of murder

or manslaughter with an intimate partner were very problematic. Consistent with previous research (see Weare, 2017) these women were often portrayed by the judges in a harmful way with negative stereotypical views related to their gender. In a similar vein, although an aim of this research was to highlight the intersectional factors (i.e., race, mental health, current/past victimization, and socio-economic marginalization) in these sentencing decisions and how these factors impacted the sentence imposed, this was not able to occur since intersectional factors were not explicitly factored into the determination of a fit and proportionate sentence. Rather, intersectional factors were discussed in various sections of the trial and sentencing decisions, but of the decisions that reported mitigating factors, no intersectional factors made it into consideration at this stage of the sentencing decision (also see Balfour, 2012). This suggests that either judges are unaware of how intersectional factors may contribute to women becoming involved in the criminal justice system or that they do not deem them as being as mitigating or important to the sentence and therefore, do not report on them as being mitigating factors. Taken together, these findings suggest that just abolishing mandatory minimum sentences may not be enough to deliver a proportionate sentence for women co-accused of murder and who have a decreased level of blameworthiness and that there needs to be a shift in how judges view and report on women.

There appears to be a need for more consistency in what factors should be considered and referenced in the trial and sentencing decisions. Across the cases in this sample, these crucial documents had a wide range of what information was considered and reported on. This suggests that the very 'individualized' nature of sentencing may not be occurring in practice (as many factors appeared to not actually be considered in

determining a fit sentence) and individuals are treated largely the same without consideration of their unique factors (i.e., formal equality versus substantive equality). The results suggest that judges may benefit from sentencing guidelines on how to appropriately consider intersectional factors. Specifically, sentencing guidelines could include the need for judges to explicitly engage with intersectional factors when identifying aggravating and mitigating factors in the determination of a fit sentence. As identified in this study and others (see Balfour 2012), factors are often mentioned in the trial and sentencing decisions, but they do not make it into actual consideration of how these factors are mitigating. The presence of one or multiple intersectional factors reduces the woman's blameworthiness and needs to be reflected in order to achieve actual proportionality in sentencing. Thus, in these cases, a sentence that may be different from comparator groups, but would be justified based on the notions of substantive equality, as encouraged by the principles of the criminal justice system, and entrenched under section 15 of the Charter.

In addition, criminal prosecutors and judges who sentence women who violently co-offend with their intimate partner may benefit from exposure to the psychological literature that offers statistics and explanations of the circumstances that are common in these cases (e.g., intersectionality, coercive control, etc.) to increase their awareness of what factors ought to be considered in these cases and how it should to mitigate their criminal liability or diminish their moral blameworthiness. For example, their 'choice' to co-offend may be made in a position of subordination (i.e., subject to the man's control). The use of prosecutorial discretion early in the criminal process could impact the charges that are pursued at trial and may help some of these women from being found and/or

pleading guilty to a charge that carries a mandatory minimum sentence, which then also prevents judicial discretion. On the other hand, judges could also benefit from exposure to their bias in trial and sentencing decisions and the implications of such views. How they report on these women can create harmful narratives (i.e., the "bad", "sad", and "mad" narratives) that generate a singular identity and perpetuate harmful stereotypes for all women. Judges may be able to confront the biases they have through mandatory judicial education, as recently mandated for sexual assault. Specifically, criminal prosecutors and judges could benefit from mandatory education on intersectionality and coercive control. The goal would be to encourage more neutral and factual reporting, as often seen in the reporting on their co-accused (i.e., men) as well as a move towards a more proportionate judicial response that reflects notions of substantive equality.

Study Limitations

The current dissertation must be considered in light of its limitations. The first limitation relates to document accessibility. As mentioned in the methodology, trial and sentencing decisions were not possible to retrieve for all the cases that appeared to meet the study criteria; therefore, the results are not exhaustive of all Canadian cases between 1995 and 2021. In addition, the sample was limited to cases that were uploaded to the established legal databases and may not be exhaustive of every case. A criterion for the study was that the judge recognized an intimate partner relationship between the co-accused and had to mention it in one of these decisions and therefore, there may be cases that are not included because the judges did not explicitly mention such relationship. In addition, the current study focused on how the women in these cases were depicted and perceived and it should be recognized as a study limitation that there was not a

comparable review of judicial discourse surrounding men who were co-accused of a crime. Another limitation is the potential for bias in the interpretation of these cases regarding the judicial comments. One of the aims of the current study was to identify judicial discourse and identify stigmatizing and/or bias in their reporting. It should be noted as a limitation that researchers are also not without bias and my own lens may reflect similar bias, to the judiciary that is being critiqued. Additionally, the findings are only suggestive, and the findings may not be generalizable beyond the current cases examined. Although bias and lack of generalization is noted as a limitation with all qualitative research (see Zainal, 2007), the dissertation tried to account for this by including extracts of the written judicial statements for each case in the results section to support the themes that were found. Still, the potential for bias and lack of generalization is recognized and noted as a limitation. Notwithstanding the noted limitations, a strength of the current study design is that it allowed for an in-depth examination to real-life cases and helped identify and explore the complexities surrounding women who co-offend and how they are depicted in the criminal process through analysis of trial and sentencing decisions.

Future Directions & Study Implications

Future research would benefit from an investigation into how women who co-offend violently with an intimate partner describe their involvement in the offence and the relationship factors that may have contributed. The current research is missing women's voices that may help provide a deeper contextualization and understanding of how women come to offend violently with an intimate partner and the impact of coercive control in a Canadian sample. The current literature would also benefit from more

research that investigate other samples of judicial discourse and identify other areas where there may be harmful and stigmatizing judicial bias, in order to ensure fair treatment of individuals in the criminal justice system and to help judges increase awareness and confront individual bias.

This research is important given that there is evidence that a woman's participation in violent offences with a co-accused may be due to the impact of intimate partner violence and coercive control (see Stark, 2007; Jones, 2008, Chapman, 2013, Barlow, 2015). Despite this evidence, the legal system does not currently have a defence to help protect these women from criminal liability and moreover, based on the results from the current study, the judiciary does not seem to understand how these factors could mitigate their moral blameworthiness and the women end up being sentenced similarly to the man co-accused. This is an important finding because this legal response does not uphold legal values such as; not punishing the morally innocent and proportionality in sentencing. In addition, these findings reveal that women may be incarcerated without having a sufficient level of blameworthiness and are serving very severe and lengthy sentences. Based on previous and the current research, it is likely that most of these women have a significant history of disadvantage and marginalization including victimization, mental health, race, and poverty. This research encourages consideration of the needs and well-being of women who offend and often present in the criminal justice system with overlapping systems of disadvantage (i.e., intersectionality), who may need support more than punishment. It is hoped that the findings from the current study are considered by other criminal justice researchers and advocates, lawyers, judges, and policymakers who can consider these findings and who have the authority to implement

change in how women who co-offend with their partner are perceived, tried, and sentenced.

Conclusion

The present research aimed to explore and report on women co-accused with their intimate partner of murder or manslaughter in Canada. Women in these cases tend to play a secondary role but are still held to a high degree of criminal responsibility, largely due to the strict legal regime. Evidence of coercive control was found in three cases but was not recognized as such by legal professionals. The study highlighted legal limitations related to criminal defences available for these women, legislative treatment imposed by party liability, the impact of mandatory minimum penalties, as well as the identification of harmful judicial perceptions towards women in these cases. The findings confirm a need for change in how these women are tried, perceived, and sentenced. Recommendations for bringing the legal system in sync with the psychological realities of these women included changes in criminal defences, the need to repeal mandatory minimum sentences for murder, and the need for change in how women are perceived by judges and how individualized factors are reported and considered in these cases.

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