

A Rights' Debate in Canada –
Abuse is wrong in any language, except when you have no status

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INTRODUCTION

The statement that “Abuse is wrong in any language” glares out at a reader from the Department of Justice Canada website¹. Translated into thirteen different languages, it is geared towards providing information to survivors of domestic violence and to answer some of the most frequently asked questions. However, the message should read that ‘Abuse is wrong in any language, *unless you are a person without status*’, because initially this proclamation against violence would seem to suggest that because of the explicit condemnation of abuse, there is already an infrastructure within Canada to combat against abuse, abusers and to protect every woman who is abused. But this is clearly not the case because there is a glaring gap in the system when protection against abuse cannot be extended to all those who are on Canadian soil.

Non-status women who are survivors of domestic violence are left in a very precarious position when faced with the decision of whether to leave an abusive relationship or to stay with the abuser. The website quite explicitly states that women who are Canadian citizens, permanent residents or convention refugees will not be at risk of being deported. Therefore clearly women who are without “...status and want to leave an abusive situation are at risk of being removed from Canada.”² The decision to leave or to stay in an abusive situation is tremendously taxing enough without this further dilemma that fleeing for your life and contacting authorities may in fact get you deported.³ The notion that any woman should be forced into making such a disturbing

¹ <http://www.justice.gc.ca/en/dept/pub/awal/abusxdoj.html>

² CLEO Immigration and Refugee Fact Sheet: Immigrant women and domestic violence (June 2005)

³ “The stark reality is that non-status women are facing a greater risk of experiencing domestic violence because they are probably the most vulnerable members of Canadian society. They are susceptible dire circumstances if they muster the courage to call the police on their domestic partner. For example she could open herself up to the possibility of being deported because the police have discretion to report her to Immigration officials, because of a lack of or limited rights to health care she may not receive the medical

decision is quite plainly a human rights violation, which should be protected by both international and domestic laws alike.

The category of non-status can be dichotomized even further because the plight of non-status women cannot be distilled down to any one particular experience. The complexity of differences between white and non-white women is immense enough even before you bring in the dynamic of not having any legal status to remain in Canada. The racialization of non-white survivors of domestic violence can be translated into economic, political and social disadvantages that differ widely from white women who suffer domestic violence. These disadvantages not only shape the way in which these women may or may not seek help, but will also shape the way in which society responds to these women. Women survivors of domestic violence will have been cocooned by their fear, fear of their abuser, fear of the way in which their family or community will respond, fear of being the one to put their children's father behind bars, fear of a loss of economic security and a sense of self. The fear is completely justified because the reality for non-status women in domestic violence situations is that not only will they have to endure the heavy burden of their fears but also in addition, their access to justice for themselves will be consistently colored by their lack of a 'right' to be in Canada.

The rights debate surrounding this issue is not an easy one to navigate because although you do have the right to access the authorities or medical professionals if you choose, systemic barriers exist that result in the constructive denial of that right. These systemic barriers are completely reflective of the differences that exist between white and

attention she needs for any injuries and with criminal charges pending against her domestic partner she may find herself without a financial or familial security net." Excerpt taken from the Fact Sheet on the Rights of Non-Status Women *supra* see note 1

non-white women without status, making the implementation of our immigration policies by Citizenship and Immigration Canada (CIC) officials, law enforcement, Violence Against Women (VAW) groups and the criminal justice system complicit in the re-victimization of these women.

In order to facilitate a directive of change towards a protection of these women, the government must perform an intensive re-examination of how these women have managed to fall into the gap between theory and practical application. There definitely needs to be a re-examination of the theoretical understandings that initially mobilized the legislature, criminal court systems, VAW movements and law enforcement. In order to accomplish this, re-drafting of current policies and re-education will likely be a function of popular feminist legal critique to shape the process to a certain degree. Thus it is also imperative that these movements distance themselves from the early feminist legal theory model which ascribed a ‘victim’ label to these women and advocated from a platform of ‘essentialism’ rather than creating a space that would be accommodating to the true *complexities* of a women’s predicament.

The discussion that follows will argue that in order for any real progress to be made in terms of eradicating the systemic barriers to justice that these women face, the legal institutional regime along with the feminist rights’ advocacy movements must reconfigure their approaches in addressing the needs of these women. These women are essentially *state-less*, but this paper will argue that they are not *right less* by default. Part I of this paper will illuminate the realities of the systemic barriers that non-status women as survivors of domestic violence do face, which ultimately culminates in an unfairly complex decision over whether or not to leave the abuser and the violent situation. Then

the discourse will move forward with an examination of domestic and international law which supports the notion that access to state resources as a women survivor of domestic violence should be considered a fundamental right, regardless of their immigration status. Part II of the discussion will center on the need to shatter the popular ‘victim-rhetoric’ that formed the basis of early feminist thought on this subject, but rather to transform theory and practice that reflect a movement towards empowerment and real, lasting change. Any attempts to produce a generic response to women without status within and coming out of domestic violence situations will fail to address the complexities that non-white women will face and effectively re-victimizes them.

PART I

Domestic Violence

Domestic violence is described as a basic desire to “control and dominate” typically female partners with whom the abuser is intimate with. And that this “purposeful behavior” is born out of a “historical, culturally sanctioned purpose, which was and is for men to keep their wives ‘in their place’.”⁴ In light of this definition, it is not difficult to ascertain why domestic abuse perpetrated against women without status is so prevalent in our communities. The exercise of control would be even more important to an abuser who has re-located himself and his intimate partner from another less-westernized community for example, which was considerably less tolerant of women exercising more control over aspects of their lives. This in no way excuses an abuser’s actions, because there is no acceptable rationale for violence against women. However,

⁴ Anker, Deborah. *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*. 15 Georgetown Immigration Law Journal 392 2000-2001 at p. 401

‘control’ within intimate relationships is arguably culturally entrenched. Domestic violence can take a myriad of forms;

“It takes the form of physical, sexual, psychological and economic violence. Explanations of domestic violence include theories of individual pathology, psychological dysfunction, the inter-generational transmission of violence and sociological accounts that focus on male domination and patriarchy within the family.”⁵

However, even though violence against women will appear in a diverse manner of forms, alternative forms of violence that are not physical are consistently marginalized by society and the legal system as a whole. Violence that leaves a visible marker on a women’s body will undoubtedly mobilize emergency services and the criminal justice system faster than ‘mere’ words.

The statistics collected regarding survivors of domestic violence in Canada are startling, however, not surprisingly, domestic violence statistical information is not gathered with regards to non-status women. It only takes logical reasoning to deduce that women without status are more likely to experience domestic violence than women with status. The following statistics appear in a Fact Sheet prepared by the group **Rights of Non-Status Women**⁶:

- One half of Canadian women have experienced at least one incident of physical or sexual violence since the age of 16
- Almost one-half (45%) of all Canadian women experienced violence by men known to them
- 1 in 4 Canadian women have experienced physical or sexual violence at the hands of a marital partner

⁵ Sheppard, Colleen. *Women as Wives: Immigration Law and Domestic Violence*. 26 Queen’s Law Journal 1 2000-2001 at p. 4

⁶ <http://www.metrac.org/new/nonnstatuswomen.pdf>

- Women who are separated from their spouses are at particularly high risk of intimate femicide

The fact that statistics are not collected on women without status already shows a societal impetus towards ignoring this cross-section of our communities. The number of non-status persons in Canada has been estimated to be around 30,000 to 200,000, however these figures have probably been derived from the number of individuals who have either entered the country legally (i.e. as a temporary visa holder) and whom CIC has simply lost track of. The number of persons without status is probably a far greater number.

Why doesn't she just leave?

For individuals who have had little or no experience with women in domestic violence situations, the simplistic response to a woman claiming abuse would be that she should just leave. The option to leave has been cultivated within society so much so that when a woman does not exercise this option she is seen to be in some way culpable for her situation. It is a tremendously disturbing thought, yet an entire infrastructure of shelters, counselors, advocacy organizations and written information has been created to help women to 'leave'. But 'leaving' may only bring a cessation, and perhaps a temporary one at that, to the violence, while neglecting to address the systemic barriers that exist in terms of women exercising that option in the first place. But we must not neglect the emotional side in that these women may believe that "... it is better to stay with the men because of the children; or they don't want to leave, because they love the men and want to maintain whatever intimacy and sense of connection they can."⁷ There

⁷ Schneider, Elizabeth M. *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*. 67 New York University Law Review (1992) at p. 558

are a cacophony of personal and systemic barriers that may await any women who tries to 'leave'.

Personal Barriers

Any discussion, which seeks to uncover the personal and systemic barriers that a woman living with domestic violence will face, must address the “experience of fear...[that] is demarcated along class, race, ethnicity and citizenship status lines.”⁸ This necessitates at this point in the discussion to illuminate where these demarcations would have originated. Historical Canadian nation-building practices have been an exercise in exclusivity for a number of years “...by legally distinguishing between ‘preferred’ and ‘non-preferred’ race immigrants...”⁹ A nation that was a replica of ‘white’ European society was the most desired, while immigrants from continents like Africa and Asia were discouraged. Given this propensity towards opening borders only to those desired individuals to help create the faces of the nation, it is clear that this racism has its deepest roots from the inception of this country’s immigration policies. These discriminatory practices also resonated along gender lines as well. Non-white women were distinguished as undesirable members of society in some of the cruelest ways.

“In cases where third world women were admitted into the country, as in the case of domestic workers from the Caribbean, they were allowed in only as single adults, compelled to leave their own children and families behind.¹⁰ Thus while women of the ‘preferred races’ were

⁸ Martin, Dianne L.; Mosher, Janet E. *Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse*. 8 Canadian Journal of Women and Law 4 (1995) at p. 35

⁹ Thobani, Sunera. *Nationalizing Canadians: Bordering Immigrant Women in the Late 20th Century*. 12 Canadian Journal of Women and Law, 281 (2000) at p. 281

¹⁰ Agnes Calliste, “Race and Gender and Canadian Immigration Policy: Blacks from the Caribbean, 1900-32,” in Joy Parr and Mark Rosenfield, eds., *Gender and History in Canada* (Toronto: Copp Clarke, 1996) 70. in Thobani, Sunera. *Nationalizing Canadians: Bordering Immigrant Women in the Late 20th Century*. 12 Canadian Journal of Women and Law, 281 (2000) at p. 287

being defined by the state as ‘mothers’ of the nation, with a key role to play in reproducing the nation and its institutions, women of the ‘non-preferred races’ were being constructed as a threat to the nation.”¹¹

The re-characterization of minority women as something other than ‘mothers’ and ‘wives’ highlights the ways in which our societal constructs of these women were initially so destructive as to deny them an identity that could be revered, protected and valued. This sheds some light on the legacy of racism and discrimination that non-white women are forced to overcome.

Canadian immigration laws and policies have been constructed to ensure against the perceived drain on Canadian resources, and although “...white women immigrants...could escape the ‘drain-on-the-nation’ status...because their whiteness constructs them as valuable members-of-the-nation and facilitates their integration into it,”¹² non-white women are still haunted by this categorization. This bright line of division cannot help but reveal itself explicitly in the way in which minority women without status will be treated by for example local government offices in the provision of basic social services.

“Studies conducted in Britain have found that when accessing social services, black claimants are regularly made to present their passports, regardless of their citizenship status, and white claimants are often not subjected to this policing...[c]omparable studies within Canada have yet to be undertaken...”¹³

¹¹ Thobani, Sunera. *Nationalizing Canadians: Bordering Immigrant Women in the Late 20th Century*. 12 Canadian Journal of Women and Law, 281 (2000) at p. 287

¹² *ibid* at p. 297

¹³ Amina Mama, *The Hidden Struggle: Statutory and Voluntary Sector Responses to Violence against Black Women in the Home* (London: London Race and Housing Research Unit, 1989). In Thobani, Sunera. *Nationalizing Canadians: Bordering Immigrant Women in the Late 20th Century*. 12 Canadian Journal of Women and Law, 281 (2000) at p. 298

Persons without status will already live in constant fear of being found out and reported to the immigration authorities, eventually leading to detention and deportation. It is this 'constant fear' that will act as a deterrent for non-status women towards seeking medical assistance or even calling the police.

Toronto as one of the most diverse cities in the world, if not the most diverse, is a perfect example of this style of community living spaces that are inhabited primarily by immigrants. Undoubtedly, economics plays a part in the development of certain communities, but so does culture. Areas like 'Jane & Finch', 'Jamestown' and 'Malvern' are just a sample of communities that represent home for a large number of minority immigrants, who endeavor to recreate certain ethnic and cultural communities within Toronto. Since the created communities might indeed become a microcosm of a larger society back in the nation they left, similar patriarchal systems of hierarchy will more than likely transplant themselves here, but in a far more concentrated environment. Whether cultural practices dictate a women's subordination to her partner or even in less oppressive settings, women will be representative of familial order and her husband's potency as a head of the household.

Women without status can be members of unique familial structures that further serve to inculcate them from the ability to get help. Many women are apart of " ...[an] extended family where several generations live together, there may be no privacy on the telephone, no opportunity to leave the house and no understanding of public phones."¹⁴ A woman may be forced to endure in silence the abuse because the repercussions could be catastrophic to her. She could end up being ostracized by her family, forced to leave

¹⁴ Hodgkin, Deanna, 'Mail-Order' Brides Marry Pain to Get Green Cards, Washington Times, April 16, 1991, at El. in Crenshaw, Kimberle. *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*. 43 Stanford Law Review 1241 at p. 1248

without her children or be cast out of the enclave without any economic or social support. In many cultures as well the shame that a woman could bring upon her family and community by reporting the violence could be too overwhelming to risk incurring.

Extended family and community are influential, but ultimately may not overshadow the type of power that an intimate partner will have over the abused partner. Women without status are often in the complete dark regarding their actual immigration status or even any rights that they may have because they are completely "...depend[ant] on their husbands for information..."¹⁵ Women without status are not only subjected to the typical barriers to flight such as lack of money, childcare, employment, shelter and continued emotional dependency on their intimate partners¹⁶, but they are forced to add the threat of deportation into their woes. Regardless of whether or not the abuser has some sort of immigration status or not, the structure of the immigration mechanisms typically require a principal applicant with the accompanying or unaccompanying family members are added on to the application of the principal. This patriarchal structure ensures that a woman will be financially dependent on the abuser.¹⁷

"Immigration policies, which too often subsume a wife's identity to her husband, require and reinforce economic dependency within the family unit, remain inaccessible and discretionary and create systemic obstacles to leaving an abusive family situation..."¹⁸

¹⁵ *ibid*

¹⁶ Schneider, Elizabeth M. *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*. 67 New York University Law Review (1992) at p. 558

¹⁷ *ibid*

¹⁸ Sheppard, Colleen. *Women as Wives: Immigration Law and Domestic Violence*. 26 Queen's Law Journal 1 2000-2001 at p. 2

As a stranger in a new country, most likely living underground to avoid being subject to deportation proceedings, for many non-status women their family, as imperfect as it is, will be their only semblance of stability and relevance. An abuser will hold a tremendous amount of power over a woman by threatening that any attempts to leave or to try to get help could result in her lack of status being revealed and her being deported back to her country of origin.

Systemic Barriers

Despite the success of VAW campaigns, or creation of domestic and international instruments to promote legal protections for women who are survivors of violence, the stark truth is that “[d]omestic violence continues to be viewed as a private matter which is often ignored by the police...”¹⁹ Although, advocacy campaigns have attempted to educate law enforcement and the public-at-large regarding the diversity of forms that domestic violence can take, the greater impetus towards action on behalf of law enforcement necessitates scars, black eyes, broken limbs and unfortunately death. This suggests that it is the visually identifiable situations that are considered valid. But even this understanding will be of no use to a women without status, no matter how badly she is beaten, if she fears that the responding authorities will report her to immigration officials. So for many women without status, the option of calling 9-1-1 is considerably less appealing not only because of the risk of deportation, but because;

“...it would not address the other aspects of their suffering...their economic insecurity, and their sense of isolation. In fact, leaving would worsen their situations, for they would have even less money, they would lose

¹⁹ Lawyers Committee For Human Rights, Critique: Review of the Department of State Country Reports on Human Rights Practices for 1992, at 201 (July 1993).

everything they had worked so hard for, they would bring shame on their communities and would risk losing their places in their communities.”²⁰

The consequences that may unfold after calling 9-1-1 will mostly likely have far reaching effects. Not only do the police have it at their discretion to report the woman without status to the immigration authorities, but also if the abuser is without status he could be subject to detention and finally to removal as well. This could happen regardless of whether any criminal charges against the abuser make it through the criminal hearing process. If the abuser is not a Canadian citizen, a criminal record could also result in deportation based on criminality. Yet another scary reality is that the police could end up placing charges against both the woman and the man in their response to a “domestic abuse” situation. Add this to the prospect that the Children’s Aid Society may be called to assess the level of risk to safety for any children in the home and the prospect of involving the authorities becomes less of a chance for safety and more of an exacerbation to an already nightmarish situation.²¹ The dialing of 9-1-1 may set off a chain of events that a woman without status will undoubtedly be unable to control, and that may in fact end up punishing her more for seeking out help.

The intersection between criminal law and immigration law is a precarious balancing act, especially due to the fact that Canadian law enforcement agencies such as the police are given discretionary powers in terms of reporting these women without status to immigration.

In an attempt to move domestic violence out of the private sphere and onto the public stage as a societal problem, feminist legal theorists can be looked to as the source

²⁰ Excerpt from *Women as Wives* at p. 6 – S. San Sy & S. Chodin, *Legal Information and Wife Abuse in Immigrant Families* (Ottawa: Department of Justice Canada, 1994)

²¹ Legal Information for Women Experiencing Violence. *Basic Immigration Issues*. METRAC

for advocating an increase in “criminal justice intervention.”²² Women who suffer through abusive relationships are “strongly encouraged” to call the police first and to press charges against their abuser. “For two decades, advocates and others have endorsed resorting to the police and criminal courts maintaining that it is the best, even the only, solution to the abuse.”²³ Thus the criminal courts’ response to the epidemic of domestic violence has been to characterize “taking wife abuse seriously” as synonymous with prosecuting whenever a charge is laid.²⁴ This places an inordinate amount of power in the hands of individuals who are solely trained as ‘first responders’ and therefore are ignorant of the collateral effect of their actions. And the collateral effect could involve a woman losing everything that she holds dear.

Canada as a Human Rights Violator?

Canada (Attorney General) v. Ward, [1993] 2 SCR 689 marks a transition in refugee and human rights law in Canadian legal history as the ‘non-state actor’ in the context of violence against women was officially recognized. But how does this translate for a failed refugee claimant or a woman who would not meet the requirements of a convention refugee so does not even bother to apply and lives in secrecy without status? Is the violence that occurs on Canadian soil not as serious as that for a woman fleeing violence in another country of origin?

“In many countries where protection is not available, it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that [a] state

²² Martin, Dianne L.; Mosher, Janet E. *Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse*. 8 Canadian Journal of Women and Law 4 (1995) at p. 6

²³ *ibid* at p. 4

²⁴ *ibid* at p. 18

does not adequately protect women from domestic and sexual violence is both an institutional manifestation of the degraded social status of women and a cause of its perpetuation.”²⁵

This paper has already illuminated the way in which a woman could constructively be prevented from receiving help due to the systemic barriers that they could face. Feminist legal theorists have shed light on the progression of domestic violence out of private obscurity and reason that “[t]he failure of the state to act to prevent or redress violence in the family...[is] a public choice.”²⁶ Canada in its failure to protect against the harmful effect of systemic barriers to non-status women may actually make the nation as a whole complicit in the perpetration of the violence.

International Law

The emergence of domestic violence as an international human rights concern was a difficult initiative in the making in large part due to the fact that domestic law and enforcement officials had for the longest time not been able to recognize this phenomenon as a public rather than a private harm. If the domestic sphere could not acknowledge this type of harm, then it definitely did not fall within the realm of international human rights law because it was shielded by the four-walls of a person’s home. It has only been with the creation of “...international human rights instruments and institutions...[that] domestic violence as a human rights violation [to] the right to life

²⁵ Anker, Deborah. *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*. 15 *Georgetown Immigration Law Journal* 392 2000-2001 at p. 392-393

²⁶ Sheppard, Colleen. *Women as Wives: Immigration Law and Domestic Violence*. 26 *Queen’s Law Journal* 1 2000-2001 at p. 22

and to bodily integrity...” has been recognized. And it should be protected as one of the “core fundamental rights.”²⁷

In particular, the Declaration on the Elimination of Violence Against Women²⁸ in Article 4 lays out a framework for holding nation states accountable for protecting women from domestic violence, as well as necessitating a legal and social framework to accommodate all women independent of culture, race, class or citizenship.

Article 4(d) – “...women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered...”

Article 4(f) – “Develop, in a comprehensive way, preventive approaches and all those measures of legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;”

...

Article 4(l) – “Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;”

Article 4 of the Declaration clearly dictates to countries, as signatories that they must provide the institutional framework to ensure the unbiased implementation of the law towards the protection of women from violence. Article 4(d) provides instruction that calls for a ‘national’ action towards this reformation to ensure uniformity, so it follows that any response within the country towards re-working their legal systems in light of international promises to protect, should also be a national undertaking. This should ensure uniformity and fairness.

²⁷ Stop Violence Against Women: A project by Minnesota Advocates for Human Rights - http://www.stopvaw.org/Domestic_Violence_Explore_the_Issue.html

²⁸ GA Res. 48/104, 48th Sess., 48 UN GAOR Supp. (No. 49), UN Doc. A/48/49 (1993) at 217 [hereinafter *Declaration*]

The marriage between international and domestic law has been difficult at best, considering the reluctance in jurisprudence to invoke international law as the definitive boundary to their decision making process. This would entail allowing for another instrument other than laws and policy that are formed from Canadian ideals to be paramount in Canadian judicial decision-making. But as the previous discussion regarding Canada's nation-building practices highlights, it may not be that bad of an idea to seek out another source of authority.

It is debatable whether or not human rights can ever truly be universal given the fact that all interested parties will bring their own agendas to the bargaining table given cultural practices and societal norms. However, that being said, domestic violence as defined earlier in terms of a method of controlling and inflicting harm on women has a distinguishable quality because it is a deliberate action where a woman is either verbally or non-verbally torn down physically, emotionally or psychologically. The practice is undeniably wrong and necessitates protection of basic fundamental rights to life, liberty and security of person.

DOMESTIC LAW

The right to 'life, liberty and security of person' is a constitutional guarantee that should be enjoyed by all those within the borders of this nation regardless of immigration status. The *Charter of Rights and Freedom* provides the backdrop for all other Canadian legislation and this single theme should resonate through every aspect of society through the implementation of the laws themselves. This argument is not purporting to impart status to these women because of this right, but it does necessitate that the nation be responsible to protect women against their 'status' being used against them in their

pursuit of an end to the violence. “The author [Colleen Sheppard] argues that the state, through its immigration law and policy, is implicated in potential human rights violation...”²⁹ if it does not.

Within this discussion, ‘discretionary powers’ are identified as having potentially detrimental consequences for women without status, particularly in terms of law enforcement reporting women who call for help to the immigration officials. This fear over “the discretionary nature” of legal interventions into these women’s lives is real and completely justified. “While discretion may operate to protect against the formalism of rigid rules, it has a disproportionate effect on those with less power in society.”³⁰ This discretion will essentially place women without status at the mercy of a legal system that was not historically designed to be inclusive culturally or racially and further that is averse to allowing those without legal ‘status’ access to the nation’s resources. “In many ways, discretion appears to operate based on rules that are unwritten and norms of acceptability that are culturally coded and inaccessible across the divides of power, class, culture and language.”³¹ Exposure to this type of discretion can leave a woman without status in a legal abyss void of options. This is entirely unfair and should not be the case in a democratic society that professes equality under the law. Asking a woman who has already been stripped of her pride, dignity and security of person by an abuser to decide whether or not she values her life more or her ability to remain in Canada, which could very well mean life itself to her depending on where she has immigrated from, is tantamount to cruelty.

²⁹ Sheppard, Colleen. *Women as Wives: Immigration Law and Domestic Violence*. 26 Queen’s Law Journal 1 2000-2001 at p. 1

³⁰ *ibid* at p. 30-31

³¹ *ibid* at p. 31

“Once a woman is faced with domestic abuse, she should know that she may act to protect her life, liberty and security of the person without risking her right to remain in Canada. Immigration officials should be given explicit directives to ensure that no woman in Canada is faced with such a dilemma.”³²

A woman is essentially being re-victimized by the use of a police officer’s discretionary powers of reporting the individual to immigration authorities.

Very recently, the ‘Don’t Ask Don’t Tell’ (DADT) campaign that arose out of the notable advocacy movement ‘No One is Illegal’ in March of 2004 experienced a victory in their fight to regularize all persons without status. “[O]n February 15th...the Toronto Police Services Board unanimously approved a policy that would ensure that city police officers are barred from asking witnesses or victims of criminal activity questions regarding their immigration status.”³³ The difficulty with these types of campaigns towards regularization is that the ‘victory’ although making strides does not fully address the dilemmas that non-status women will come up against in a consistent manner because it is municipally concentrated. Discretion still plays an intimate role in the decision making process for these police officers because an officer can choose to disclose a person’s immigration status if he or she feels that there is a *bona fide* reason to do so. It may be pessimistic, but one need not even imagine under what circumstances this ‘caveat’ would be activated and under what circumstances it would likely be deemed necessary further subjecting non-status women to systemic barriers.

³² *ibid* at p. 32

³³ “Campaign in Support of non-status people makes significant gains at Police Services Board” by Craig Fortier. Shahrvand, February 20, 2006 at <http://toronto.nooneisillegal.org/node/137>

Part II

Victim Rhetoric

Throughout the discourse thus far the subjects of this essay, namely women without status have been identified purposefully as survivors of domestic abuse because of the acknowledgement of this idea of ‘partial agency’.

“...[F]eminist approaches to social policy and law reform have become increasingly focused on reinforcing women’s ‘partial agency’ by removing structural or systemic obstacles that reduce it. The idea of ‘partial agency’ recognizes that women are survivors. They are agents in their own lives. Partial agency resists the victimization script of early feminist theory. The stories of abused immigrant women do not convey a sense of hopelessness.”³⁴

Particularly interesting in this quote is the thought that these women should be identified as agents in their own lives, suggesting some type of power, when for the entire first part of the discussion the argument has been based on the fact that minority non-status women are in an increasingly precarious situation due to systemic barriers. However, the need for advocates to move away from the ‘victim’ label is a matter of urgency. Empowering these women holds itself out as a bastion of hope and gives them license to foster their own well-being. Survivors of domestic violence have already been subjected to the actions of an abuser who seeks to have power over them, so any attempt by the legal system or society to re-affirm a sense of power over the abused party would only result in a painful reliving of the subordination that domestic violence involves.

The so-called “battered women’s movement” has at its beginnings accepted the need to create “...certain definitional categories and certain characterizations of battered

³⁴ Sheppard, Colleen. *Women as Wives: Immigration Law and Domestic Violence*. 26 Queen’s Law Journal 1 2000-2001 at p. 38-39

women's experiences..."³⁵ Audrey Macklin argues the necessity of categories in the refugee determination process because of the reality that a person's "agency" is rightly or wrongly at the behest of another's decision making authority and how society as a whole defines itself and others.³⁶ Unfortunately though, these categories are minimizing the potency of a women's agency both within a domestic violence situation and in society as a whole. Needs to be protected does not in and of itself denote weakness or identify some personal incapacity within a woman. Instead it can be described as a reminder of the societal obligation to ensure that society should treat all of its members with fairness and respect equally. It is an attempt at 'balancing the playing field' to where it should have been in the first place. This is why categorical thinking and labeling can be dangerous to women who have survived domestic violence, because the tendency is to identify a victim, and all those who do not fit into this politically created mold are left to fend for themselves.

The vocabulary used by feminist critiques and the VAW movement, as noted earlier on in this discussion, can also have deleterious effects on a women's agency. The term "battered woman" actually has the effect of ascribing a woman's "qualities" to her narrowly, limiting her entire life experience, as if all she is amounts to the abuse she's suffered at the hand of the abuser and nothing more.³⁷ "Thus, the term "battered woman" conjures up images of helplessness and defeat rather than survival and resistance."³⁸ The desire to categorize a woman by her experiences will have the

³⁵ Schneider, Elizabeth M. *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*. 67 New York University Law Review (1992) at p. 527

³⁶ Macklin, Audrey. *Refugee Women and the Imperative of Categories*. 17 Human Rights Quarterly 213 (1995) at p. 277

³⁷ *supra* see note 35 at p. 530

³⁸ *ibid* at p. 531

immediate effect of limiting what may already be a small number of choices, since each category will undoubtedly have a prescribed set of options available.

“This argument becomes clearer when one compares the static term “battered woman” to the phrase, “woman who has been sexually harassed,” or even “sexual harassment victim,” or “woman who has been raped” or even “rape victim.” Despite the problematic characterization of the term “victim,” these phrases describe a woman who has been subjected to an external harm: they focus on the problem of the harm—the batterer, the rapist—and leave the woman intact.”³⁹

Much more recently the VAW campaigns have begun to see the light and instead “...emphasize women’s survival skills and resources and characterize battered women as survivors not victims.”⁴⁰ It is imperative that the VAW movement continues to identify and address this harmful vocabulary because it is in direct contradiction to what the movement should be addressing, which is empowerment for these women.

Essentialism – Illuminating the Gaps

It is not only the vocabulary of the movement that needs to be changed, but in addition, focus must be diverted away from the essentialist thinking that helps to form the categories because there are many women who will fall outside of those categories. Aside from any concerns regarding the use of the term ‘victim’, the notion of ‘re-victimization’ is not just a fancy word without any truth or meaning behind it, especially within this context of domestic violence. And it is also terrifying to note that the re-victimization could actually trap a woman in a cycle of disempowerment and minimization as she will have to deal with her family, community, society, police, the court system, immigration, shelters and other emergency services.

³⁹ *ibid* at p. 530

⁴⁰ *ibid* at p. 531

“It is crucial that our theoretical framework be expanded, and traps of essentialist thinking be avoided, for in practice battered women are not all similarly situated. The variety of pressures shaping the battered woman’s experience are often linked to the specific dynamics of the community in which the abuse occurs. Thus, efforts to aid battered women must be tailored to meet their differing needs.”⁴¹

The VAW movement was “...largely shaped by the experience and understanding of white women.”⁴² This will obviously not translate smoothly into a non-white women’s needs and thus leaves these women in an even more dire situation because their avenues for help are homogeneous in nature, shaped by a nation-building exercise that has made a concerted effort to ignore them.

“...[I]nstitutional racism and its impact on communities of color is felt acutely by the battered woman who locates her experiences not only as an abused individual but as an abused person who is a member of an abused community.”⁴³

In efforts to formulate a response that will address the so-called basic concerns of a woman who has survived domestic violence, the VAW movement has been remiss in creating safe-spaces for all women. The precious resource of time may need to be sacrificed in order to ensure that a woman’s complete set of experiences, and those factors like race, class and culture that have influenced those experiences can be taken into account when trying to prescribe a particular remedy.

“...[F]eminist legal theorists must...describe and name legal problems for women-describing them in detail and in context, and translating them to legal and public arenas of change. We must do this in a way that is not only accurate to the realities of women’s experiences but that also takes

⁴¹ *ibid* at p. 532

⁴² *ibid*

⁴³ *ibid* at p. 534

into account the complexity of these experiences and allows for change.”⁴⁴

This is especially true given that the role for feminist legal theorists will be even more important as they will likely be the resource that law makers will turn to in order to reformulate the legal response to domestic violence. In addition, feminist legal theorists will be consulted by the VAW movement to translate their theory into practical application.

The movement in general will have to refocus away from the tradition of categories because they are “inadequate and incomplete”. The role of culture has not been incorporated into the way in which the movement responds. Cultural images shape societal perceptions of women who survive through domestic violence, and it also shapes the way in which society responds to these women.

“...[T]he most critical aspects of these problems may revolve less around the political agendas of separate race and gender-sensitive groups, and more around the social and cultural devaluation of women of color.”⁴⁵

Non-white women as survivors of domestic violence are not allowed to simply be helpless ‘victims’ because cultural imagery may have already constructed a role for them.

“Women working in the field of domestic violence have sometimes reproduced the subordination and marginalization of women of color by adopting policies, priorities, or strategies of empowerment that either elide or wholly disregard the particular intersectional needs of women of color. While gender, race, and class intersect to create the particular context in which women of color experience violence, certain choices made by “allies” can

⁴⁴ *ibid* at p. 549-550

⁴⁵ Crenshaw, Kimberle. *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*. 43 Stanford Law Review 1241 at p. 1282

reproduce intersectional subordination within the very resistance strategies designed to respond to the problem.”⁴⁶

Empowerment should not be just a catch phrase in the vocabulary of social response to women who have survived domestic violence, as it must become a primary goal.

Therefore a singular focus on the ‘violence’ that a woman has suffered will not be sufficient. Acknowledgement of the cultural factors that may have precipitated the violence or affect the way in which these women seek assistance and the type of response that they need is imperative.

CONCLUSION

Non-white women without status who are survivors of domestic violence seem by their very name and existence to attract some sort of categorical thinking. However, a move away from the typical victim rhetoric is necessary in order to sufficiently address the gaps in the current legal and advocacy institutional construct created to assist these women. Domestic violence is an exercise of power by the abuser, but the systemic barriers that exist will only serve to exert more power over these women, and could possibly make this nation complicit in their re-victimization. There is an obligation under international and domestic law that dictates a role for Canada, as a nation to be wholly responsible for the protection of these women regardless of race, culture, class or immigration status. The need to adhere to standards that provide for the protection of basic fundamental human rights such as ‘life, liberty and security of person’ are paramount. And the bridge between theory and practice will be reformed by the input of feminist legal theorists, so the impetus is on them to challenge the categories that have

⁴⁶ *ibid* at p. 1262

been formed by narrow essentialist thoughts and bring to the forefront the realities of minority, non-status women. Only then can a space be created for these women that is truly respectful of their complex experiences and sufficiently responsive to their needs.