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Jennifer Koshan

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## CHALLENGING MYTHS AND STEREOTYPES IN DOMESTIC VIOLENCE CASES

**Jennifer Koshan**<sup>\* \*\*</sup>

*Survivors of domestic violence, who are disproportionately women, face numerous myths and stereotypes about the veracity, nature, and extent of violence they and their children experience. In legal disputes, they encounter allegations that they have lied about or exaggerated domestic violence out of vengeance, jealousy, or to gain an advantage in family law proceedings; that their partners are victims too; that abuse ends at separation or is irrelevant unless it is physical; and that it has no impact on children or only matters if it does. Although scholars and activists have revealed how these allegations are tainted by false and faulty understandings of violence, courts and other decision-makers continue to accept them in many cases. This paper will identify the ongoing influence of myths and stereotypes about domestic violence, focusing on the common and evolving misconceptions that legal actors have about survivors and the violence they*

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\* Jennifer Koshan, Professor, Faculty of Law, University of Calgary.

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*experience. False or faulty assumptions about the credibility of domestic violence claims, as well as the nature and impacts of violence, can have serious implications for the impartiality of decision-makers and result in harm to women and children.*

## INTRODUCTION

Survivors of domestic violence, who are disproportionately women,<sup>1</sup> face numerous myths and stereotypes about the veracity, nature, and extent of violence they and their children experience. In legal disputes, they encounter allegations that they have lied about or exaggerated domestic violence out of vengeance, jealousy, or to gain an advantage in family law proceedings; that their partners are victims too; that abuse ends at separation or is irrelevant unless it is physical; and that it has no impact on children or only matters if it does. Although scholars and activists have revealed how these allegations are tainted by false and faulty understandings of violence, courts and other decision-makers continue to accept them in many cases.<sup>2</sup>

This paper will identify the ongoing influence of myths and stereotypes about domestic violence, focusing on the common and evolving misconceptions that legal actors have about survivors and the violence they experience.<sup>3</sup> Recently, for example, the myth that women

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<sup>1</sup> See the Introduction to this issue, Wendy Chan et al, “Introduction: Domestic Violence and Access to Justice within the Family Law and Intersecting Systems,” (2023) 35:1 Can J Fam L 1. While I focus on male violence against women, I recognize that sexual minority and gender diverse people may encounter high rates of gender-based violence as well as myths and stereotypes about this violence. See *ibid* at 4.

<sup>2</sup> Myths and stereotypes have also been expressly rejected in other cases. See e.g. *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 [*Ahluwalia*] (discussed in Part II). The Ontario Court of Appeal heard an appeal in this case on March 23, 2023.

<sup>3</sup> There are also myths and stereotypes about domestic violence perpetrators. See e.g. Elizabeth L. MacDowell, “Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic

are prone to lie about violence has been recast as “parental alienation” that harms fathers’ relationships with their children.<sup>4</sup> However, false or faulty assumptions about the credibility of domestic violence claims, as well as the nature and impacts of violence, can have serious implications for the impartiality of decision-makers and result in harm to women and children.

Part I reviews the literature on myths and stereotypes by explaining these concepts, cataloguing the erroneous assumptions about domestic violence that have been identified and rebutted by scholars and advocates, and exploring why these assumptions are so entrenched. I identify two overarching and related categories of myths and stereotypes about domestic violence: those about survivors’ credibility, and those about the nature and harms of domestic violence. Part II examines the Supreme Court

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Violence” (2013) 16:2 J Gender Race & Just 531; FREDA Centre for Research on Violence Against Women and Children, “Myths and Stereotypes in Family Law: Exploring the Realities and Impacts of Custody and Access/Shared Parenting” (February 2014), online: *FREDA* <[fredacentre.com/wp-content/uploads/Myths-and-Stereotypes-in-Family-Laws-Freda-Centre.pdf](http://fredacentre.com/wp-content/uploads/Myths-and-Stereotypes-in-Family-Laws-Freda-Centre.pdf)>. See also Debra Parkes & Emma Cunliffe, “Women And Wrongful Convictions: Concepts And Challenges” (2015) 11:3 Intl J Law in Context 219 (on myths and stereotypes about women criminalized as violent).

<sup>4</sup> See e.g. Linda C Neilson, “Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?” (2018), online: *FREDA* <[fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf](http://fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf)>; Elizabeth Sheehy & Susan B Boyd, “Penalizing Women’s Fear: Intimate Partner Violence And Parental Alienation In Canadian Child Custody Cases” (2020) 42:1 J Soc Welfare & Fam L 80; Suzanne Zaccour, “Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Quebec for Judges, Scholars, and Policymakers” (2020) 33:2 Can J Fam L 301.

of Canada's guidance on these myths and stereotypes in criminal and family law decisions. Both Parts I and II draw at times on the identification of myths and stereotypes about sexual violence, which have been more widely recognized than those pertaining to domestic violence. This approach, and the inclusion of both criminal and family contexts, offer important comparative perspectives. Overall, although some misconceptions about domestic violence and survivors remain to be refuted, I argue that the Supreme Court has provided a strong basis for an obligation on lower courts and other legal actors to avoid these myths and stereotypes. Part III concludes with recommendations for addressing myths and stereotypes, focusing on education and training.

Throughout my analysis, I attend to the myths and stereotypes affecting survivors of violence who experience intersecting inequalities. An intersectional analysis is critical given that Indigenous women, racialized women, women with disabilities, young women, and sexual minority women face particular risks of domestic violence.<sup>5</sup> Women and gender diverse persons who experience intersecting inequalities may also be susceptible to unique myths and stereotypes and disproportionate or differential application of the common assumptions about domestic violence, as the next Part will discuss.

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<sup>5</sup> See Wendy Chan et al, *supra* note 1.

## I. THE LITERATURE ON MYTHS, STEREOTYPES, AND DOMESTIC VIOLENCE

### A. WHAT ARE MYTHS AND STEREOTYPES AND WHY MUST THEY BE CHALLENGED?

Courts and scholars tend to use the terms “myth” and “stereotype” together and interchangeably.<sup>6</sup> The Supreme Court of Canada has not offered definitions of these terms in the context of domestic violence, but it has defined a “stereotype” in equality rights case law as “a disadvantaging attitude ... that attributes characteristics to members of a group regardless of their actual capacities.”<sup>7</sup> Its use of the term “myth” in sexual assault cases accords with the dictionary definition of this term, which is “a commonly believed but false idea.”<sup>8</sup> Myths can also be stories we tell ourselves to make sense of the world.<sup>9</sup> Taken together, myths and stereotypes are assumptions or

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<sup>6</sup> For an effort to separate out these concepts, see Wendy Chan & Rebecca Lennox, “This Isn’t Justice: Abused Women Navigate Family Law in Greater Vancouver” (2023) 35:1 Can J Fam L 81 at 110 (in this issue).

<sup>7</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 326 (Abella J).

<sup>8</sup> Cambridge English Dictionary, sub verbo “Myth”, online (Dictionary): <[dictionary.cambridge.org/dictionary/english/myth](https://dictionary.cambridge.org/dictionary/english/myth)>. See e.g. *R v Esau*, [1997] 2 SCR 777 at para 82 (McLachlin J, dissenting, equating a myth to a false assumption).

<sup>9</sup> See e.g. Jonnette Watson Hamilton, “The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts” (2002) 1:2 J L & Equal 155 (comparing stories of rational and irrational hysteria and their link to gendered myths).

expectations that are false or faulty and are linked to disadvantaging beliefs, attitudes, and narratives.

As former Supreme Court Justice Claire L’Heureux-Dubé has noted, myths and stereotypes are often invoked by those in power seeking to maintain the political, social, and economic status quo.<sup>10</sup> Reliance on myths and stereotypes can also be unintentional or based on what may seem to be “common sense.” The prevalence of unconscious bias is well accepted, and myths and stereotypes can flow from misunderstandings about domestic violence and unrealistic expectations of survivors, particularly those who come from different social or economic backgrounds than the decisionmaker.<sup>11</sup> Some of these misconceptions are not surprising given the evolution of societal understandings of domestic violence and of the diversity of survivors and their possible reactions to this violence.<sup>12</sup> Nonetheless, misconceptions are problematic when they ground legal decision-making in ways that impair courts’ truth-seeking role. The recognition and repudiation of myths, stereotypes, and underlying misconceptions and fallacies about domestic

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<sup>10</sup> Claire L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice” (2001) 10:1 *J of Soc Distress & Homeless* 87 at 89.

<sup>11</sup> See e.g. Deborah Epstein & Lisa A Goodman, “Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences” (2019) 167:2 *U Penn L Rev* 399 at 412; Donna Martinson & Margaret Jackson, “Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases” (2017) 30:1 *Can J Fam L* 11 at 34. See also Canadian Judicial Council, *Ethical Principles for Judges* (2021), online (pdf): *CJC* <cjc-ccm.ca/sites/default/files/documents/2021/CJC\_20-301\_Ethical-Principles\_Bilingual\_Final.pdf>, s 4.C.2.

<sup>12</sup> See Chan et al, *supra* note 1.



violence are critical to decisions that are impartial and properly protective of survivors and their children.<sup>13</sup>

In sexual assault cases, the Supreme Court has recognized that judicial reliance on myths and stereotypes leads to prejudicial reasoning, false logic, and errors of law.<sup>14</sup> Recognition that some common assumptions about domestic violence are grounded in myths and stereotypes does not entail acceptance of all domestic violence claims, however. The role of legal decisionmakers remains that of assessing the credibility of these claims and their impact on legal issues and processes. At the same time, legal actors must be alert to what they may not understand and open to evidence, arguments, and education to help avoid the application of myths and stereotypes.<sup>15</sup> In the wake of #MeToo and #IBelieveHer, it is important to acknowledge that many legal actors have yet to start from a point of *not disbelieving women* about domestic violence.

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- <sup>13</sup> See e.g. L’Heureux-Dubé, *supra* note 10 at 91. See also Martinson & Jackson, *supra* note 11; Linda C Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed, (CanLIIDocs 2: Canadian Legal Information Institute, 2020) at s s 4.5.2, online (ebook): *CanLII* <canlii.ca/t/ng>. Impartiality can be defined as the requirement that judges “be sensitive to their own biases and ... consider different points of view with an open mind”: See *Ethical Principles for Judges*, *supra* note 11, ss 4.C.2, 5.A.4.
- <sup>14</sup> See e.g. *R v A.R.J.D.*, 2018 SCC 6 at para 2; *R v Barton*, 2019 SCC 33 at para 60 [*Barton*].
- <sup>15</sup> See *R v Lavallee*, [1990] 1 SCR 852 at 891 [*Lavallee*] (Wilson, J, accepting expert evidence of the social context of domestic violence). See also Rosemary Cairns-Way and Donna Martinson, “Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada” (2019) 97:2 Can Bar Rev 367 at 398.

An important source for identifying and understanding myths and stereotypes is the socio-legal literature on domestic violence.<sup>16</sup> While these studies do not always use the language of myths and stereotypes, their focus on problematic misconceptions about domestic violence and survivors is aligned with the Supreme Court of Canada's general acceptance of a myths and stereotypes lens.<sup>17</sup>

## B. CREDIBILITY MYTHS AND STEREOTYPES

Many of the myths and stereotypes about domestic violence relate to the credibility of women's claims.<sup>18</sup> As Linda Neilson writes, "[o]ne of the most common and dangerous fallacies in the legal system is the persistence of the erroneous assumption that claims of domestic violence are often false or exaggerated in order to obtain the upper hand in family law cases."<sup>19</sup> This myth was one of the

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<sup>16</sup> I include scholarly literature and reports in this section, prioritizing work that is Canadian, recent, and/or focused on family law. This article was finalized before the release of the Final Report of the Joint Federal / Provincial Commission into the April 2020 Nova Scotia Mass Casualty, *Turning the Tide Together* (Canada: 2023), online: < [masscasualtycommission.ca/final-report/](https://masscasualtycommission.ca/final-report/)>. Volume 3 of the Final Report focuses on Violence and includes a lengthy discussion of myths and stereotypes about domestic violence.

<sup>17</sup> See e.g. *Lavallee*, *supra* note 15.

<sup>18</sup> See e.g. Epstein & Goodman, *supra* note 11, 402 (women's credibility is challenged by their (ex)partners and their lawyers, legal system gatekeepers, and society more generally); Martinson & Jackson, *supra* note 11, 34–35 (referencing credibility assessments by courts and other professionals, such as those preparing parenting reports).

<sup>19</sup> Neilson, *Responding*, *supra* note 13, s 4.5.2. See also Epstein & Goodman, *supra* note 11, 431–432; Rosemary Hunter, "Narratives of Domestic Violence" (2006) 28:4 Sydney L Rev 733 at 768; Janet E

rationales used against the criminalization of marital rape in the early 1980s in Canada, and it has been perpetuated by fathers' rights groups amongst others.<sup>20</sup> Recently, women engaged in family law proceedings in British Columbia raised this myth as an ongoing concern, even though that province was an early adopter of a broad approach to family violence.<sup>21</sup> The continuing power of this myth may be related to the historical position of women, who had little legal basis for claiming custody of their children unless their husbands were convicted of

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Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32:2 Windsor YB Access Just 149 at 167.

- <sup>20</sup> See Constance Backhouse & Lorna Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983) 6 Canadian-USLJ 48 at 53. For the ongoing power of marital rape myths, see Jennifer Koshan, "The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study", in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing, 2017) 257; Ruthy Lowenstein Lazar, "The 'Vindictive Wife': The Credibility of Complainants in Cases of Wife Rape" (2015) 25:2 S Cal Rev L & Soc Justice 1. On the role of fathers' rights groups in promoting the myth of women's false allegations, see e.g. FREDA Centre, *supra* note 3 at 7; Peter G Jaffe & Claire V Crooks, "Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues" (2004) 10:8 Violence Against Women 917 at 920.
- <sup>21</sup> See Haley Hrymak & Kim Hawkins, "Why Can't Everyone Just Get Along: How BC's Family Law System Puts Survivors in Danger" (2013) at 46-47, online (pdf): Rise Women's Legal Centre <[womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf](http://womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf)>; Chan & Lennox, *supra* note 6.

serious violence.<sup>22</sup> Although dominant norms and expectations of women as mothers have evolved,<sup>23</sup> there are persisting assumptions that women will do anything to retain custody of their children (although another myth is that women use children as “bargaining chips” in disputes over property and support).<sup>24</sup>

Similarly, claims of domestic violence may also be misconstrued as false because women are wrongly assumed to be driven by a quest for property entitlements, spousal support, or other financial redress.<sup>25</sup> This is the case even though violence is rarely relevant to these financial remedies, except in claims for damages related to

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<sup>22</sup> See Mary Lydon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (London: I.B. Tauris & Co Ltd, 1989), 167–169.

<sup>23</sup> See Susan B Boyd, “Is There an Ideology of Motherhood in (Post)Modern Child Custody Law?” (1996) 5:4 Soc & Leg Stud 465. For a discussion of the rhetoric of motherhood in relation to Indigenous women, see Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593 at 611–614. See also Chan & Lennox, *supra* note 6 at 109–111.

<sup>24</sup> For arguments that it is men who use children as bargaining chips, see Pamela Cross, “It Shouldn’t Be This Hard: A Gender-Based Analysis of Family Law, Family Court and Violence Against Women” (September 2012) at 71, online (pdf): *Luke’s Place Support & Resource Centre for Women & Children* <lukesplace.ca/pdf/It\_Shouldnt\_Be\_This\_Hard.pdf>; Lori Chambers, Deb Zweep & Nadia Verrelli, “Paternal Filicide and Coercive Control: Reviewing the Evidence in *Cotton v Berry*” (2018) 51:3 UBC L Rev 671 at 683.

<sup>25</sup> See Epstein & Goodman, *supra* note 11 at 426 (referencing stereotypes of women as “welfare queens” and “gold diggers”).

gender-based violence<sup>26</sup>—which may be met with retaliatory actions by abusers.<sup>27</sup> Johnny Depp’s defamation suit against Amber Heard is only one such example, and also illustrates how women may be subject to backlash through social media, which may reinforce myths and stereotypes and provide licence for copycat tactics.<sup>28</sup> However, the media can simultaneously overemphasize and ignore violence, particularly against marginalized women, perpetuating myths and stereotypes about which victims are “deserving” of remedies and which are “undeserving” because of their perceived role in the violence they and their children experience.<sup>29</sup>

The myth of false allegations of domestic violence may also be tied to wider notions of women as manipulative, vindictive, and deceitful, particularly towards their ex-partners.<sup>30</sup> This stereotype about women’s

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<sup>26</sup> See the new tort of family violence recognized in *Ahluwalia*, *supra* note 2, discussed in “Part II”.

<sup>27</sup> See e.g. Neilson, *supra* note 13, s 7.4.32.

<sup>28</sup> See e.g. Farrah Khan & Mandi Gray, “Amber Heard roasting reveals harmful views about intimate partner violence” (31 May 2022), online: *The Star* <[www.thestar.com/opinion/contributors/2022/05/31/amber-heard-roasting-reveals-harmful-views-about-intimate-partner-violence.html](http://www.thestar.com/opinion/contributors/2022/05/31/amber-heard-roasting-reveals-harmful-views-about-intimate-partner-violence.html)>; Neilson, *supra* note 13, s 7.4.32 (noting the spread of perpetrator litigation tactics).

<sup>29</sup> Mandeep Kaur Mucina & Amina Jamal, “Introduction to Special Issue: Assimilation, Interrupted: Transforming Discourses of Culture and Honour-Based Violence in Canada” (2021) 12:1 *Intern J of Child, Youth and Family Studies* 1 at 6.

<sup>30</sup> See e.g. Epstein & Goodman, *supra* note 11 at 433–436; Hunter, *supra* note 19 at 753; Hrymak & Hawkins, *supra* note 21 at 46–47; Suzanne Zaccour, “Crazy Women and Hysterical Mothers: The Gendered Use

essential nature has longstanding historical roots,<sup>31</sup> and has also tainted sexual assault cases.<sup>32</sup> Women's claims of domestic violence may also be discounted because they are labelled as "hysterical" or "crazy", drawing on stereotypes of rationality that are influenced by gender, ability, racialization, sexual identity, and class.<sup>33</sup> Or, disbelief of women may flow from assumptions that because they are "illegal" migrants or have "criminal" involvement, they are therefore non-credible, stereotypes that have direct and disproportionate impacts on migrant, racialized, and Indigenous women.<sup>34</sup> Many survivors do not fit dominant stereotypes of "battered women" in other ways, based on

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of Mental-Health Labels in Custody Disputes" (2018) 31 Can J Fam L 57 at 64–65.

- <sup>31</sup> See e.g. Carissa Harris, "800 years of rape culture" (2021), online: *aeon* <[aeon.co/essays/the-hypocrisies-of-rape-culture-have-medieval-roots](https://www.aeon.co/essays/the-hypocrisies-of-rape-culture-have-medieval-roots)>.
- <sup>32</sup> See e.g. Hunter, *supra* note 19 at 753, 770; Lisa Dufrainmont, "Current Complications in the Law on Myths and Stereotypes" (2021) 99 Can Bar Rev 536 at 540.
- <sup>33</sup> See Watson Hamilton, *supra* note 9 at 188–190; Zaccour, "Crazy Women", *supra* note 30.
- <sup>34</sup> See e.g. Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Fam L 297 (in this issue); Patrina Duhaney; "Contextualizing the Experiences of Black Women Arrested for Intimate Partner Violence in Canada" (2021) *Journal of Interpersonal Violence* 1; Stephanie Ehret, "'You Can't Look the Other Way': Justice as 'Recognition' for Intimate Partner Violence" (2022) 34:1 *CJWL* 146.

the types of violence they experience or how they respond.<sup>35</sup>

The response to this cluster of credibility myths is research indicating that women are often reluctant to raise domestic violence lest their motives be questioned and that false allegations are “much less common than the problem of genuine victims who fail to report abuse.”<sup>36</sup> This rebuttal is supported by Canadian statistics<sup>37</sup> and by research that women are frequently told by their lawyers not to raise domestic violence in family law proceedings.<sup>38</sup>

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- <sup>35</sup> See e.g. Patrina Duhaney, “Criminalized Black Women’s Experiences of Intimate Partner Violence in Canada” (2021) *Violence Against Women* 1 at 2–4 (noting how responses to domestic violence against Black women ignore differences related to racialization, class, and immigration status); Snyder et al, *supra* note 23 at 595 (noting unique forms of institutional violence against Indigenous women); Valérie Grand’Maison & Edelweiss Murillo Lafuente, “Dys-Femicide: Conceptualizing the Femicides of Women and Girls with Disabilities” (2022) 21:1 *Sociation* 89 (noting the invisibility of women with disabilities who experience gendered violence).
- <sup>36</sup> *National Domestic and Family Violence Bench Book* (Australia, 2021), online: <[dfvbenchbook.aija.org.au/dvbb/docs/NDFVBB-June-2021.pdf](https://dfvbenchbook.aija.org.au/dvbb/docs/NDFVBB-June-2021.pdf)> s 3.1.11, as cited by Neilson, *supra* note 13, s 4.5.2 [*Bench Book*]. See also s 4.1. See also Jaffe & Crooks, *supra* note 20 at 920; Canada, Department of Justice, *Family Violence: Relevance in family law* (Ottawa: Research in Brief, 2018) at 5, online (pdf): *Department of Justice* <<https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/sept01.pdf>>.
- <sup>37</sup> Shana Conroy, *Spousal Violence in Canada, 2019* (Ottawa: Statistics Canada, 2021) at 3 (finding that 80% of spousal violence is not reported to police).
- <sup>38</sup> See e.g. Hrymak & Hawkins, *supra* note 21 at 37; Joanna Radbord & Deborah Sinclair, “In Children’s Best Interests: Addressing Intimate Partner Violence in Parenting Cases” (2021) 34:12 *Ontario Family Law Reporter* 153 at 156.

The risk that women's reports of domestic violence will be seen as "parental alienation" or otherwise harm their credibility also calls into question why they would make false allegations when this strategy does not result in any "upper hand" at all.<sup>39</sup> The influence of allegations of parental alienation on the credibility of survivors and the outcome of parenting disputes is a worldwide problem that has become so serious, the United Nations Special Rapporteur on violence against women and girls has undertaken a study of the issue.<sup>40</sup> Research substantiates that the focus should instead be on "the widespread false denials and minimisation of abuse by perpetrators"<sup>41</sup> as

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<sup>39</sup> See e.g. Mavis Morton et al, "The degendering of male perpetrated intimate partner violence against female partners in Ontario family law courts" (2021) 43:2 J Social Welfare & Fam L 104 at 110; Neilson, *supra* note 4; Sheehy & Boyd, *supra* note 4. This is also an issue for allegations of child (sexual) abuse, which is beyond the scope of this article. See Boyd, *supra* note 23 at 504–505.

<sup>40</sup> See e.g. Elizabeth Sheehy & Simon Lapierre, "Introduction to the special issue" (2020) 42 J Social Welfare & Fam Law (a special volume on parental alienation across different jurisdictions); Jean Mercer & Margaret Drew, eds, *Challenging Parental Alienation: New Directions for Professionals and Parents* (Routledge, 2021); United Nations Human Rights Council, Report of the Special Rapporteur on violence against women and girls, its causes and consequences, *Custody, violence against women and violence against children* (13 April 2023) A/HRC/53/36, online: *United Nations* <documents-dds-ny.un.org/doc/UNDOC/GEN/G23/070/18/PDF/G2307018.pdf?OpenElement> (finding that parental alienation is a "discredited and unscientific pseudo-concept" that is used by abusers in family law proceedings "as a tool to continue their abuse and coercion and to undermine and discredit allegations of domestic violence made by mothers who are trying to keep their children safe," at para 73).

<sup>41</sup> *Bench Book*, *supra* note 36. See also Martinson & Jackson, *supra* note 11 at 52. On the methodological challenges of this research, see Yoav



well as their manipulation of the legal system to perpetuate control and avoid responsibility for their abuse.<sup>42</sup> Abusive men may also seek revenge on their (ex)partners through threats of deportation; false reports to police, child protection, and social services; and femicide and filicide.<sup>43</sup>

Other assumptions relate to the ways in which survivors are expected to respond to domestic violence. They may be disbelieved about the presence or extent of violence if they have not left, or have reconciled with, their abusers.<sup>44</sup> If survivors stay with abusive partners, their actions may be misconstrued as “choice”, as provoking

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Mazeh et al, “The Rate of False Allegations of Partner Violence” (2016) 31 J Fam Viol 1035.

<sup>42</sup> See e.g. Cross, *It Shouldn't Be This Hard*, *supra* note 24 at 70; Heather Douglas, “Legal systems abuse and coercive control” (2018) 18:1 Can J Corr 84; Hrymak & Hawkins, *supra* note 21 at 30–36; Mosher, *supra* note 19 at 168; Neilson, *supra* note 13, s 7.4.1.

<sup>43</sup> See e.g. Cross, *supra* note 24 at 71; Mosher, *supra* note 34; Wanda Wiegers, “The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence” (2023) 35:1 Can J Fam L 183 (in this issue); Heather Douglas & Emma Fell, “Malicious reports of child maltreatment as coercive control: mothers and domestic and family violence” (2020) 35:8 Journal of Family Violence 827; Canadian Femicide Observatory for Justice and Accountability, *#CallItFemicide: Understanding sex/gender related killings of women and girls in Canada, 2020*, online: <[femicideinCanada.ca/callitfemicide2020.pdf](http://femicideinCanada.ca/callitfemicide2020.pdf)>. In the case of intimate partner femicide, another myth is its romanticization as a “crime of passion.” See Kate Fitz-Gibbon & Elizabeth Sheehy, “The merits of restricting provocation to indictable offences: A critical analysis of provocation law reform in Canada and New South Wales, Australia” (2019) 31:2 CJWL 197 at 218.

<sup>44</sup> See e.g. Hunter, *supra* note 19 at 751; Martinson & Jackson, *supra* note 11 at 34.

men into violence, or—if they use force to protect themselves or their children—as unreasonable or even criminal.<sup>45</sup> On the other hand, women who do leave with their children may be accused of acting contrary to their interests,<sup>46</sup> or of failing to maintain the family unit.<sup>47</sup>

Survivors are also expected to promptly report domestic violence and to cooperate with police and other authorities, failing which their claims may be seen as non-credible.<sup>48</sup> This can be a particular issue for marginalized women and gender-diverse survivors, who may avoid the police and legal system because of the systemic colonialism, racism, and other forms of oppression that have impacted their interactions with law enforcement, child protection, immigration, and other authorities.<sup>49</sup> Survivors may not report domestic violence to their family

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<sup>45</sup> See e.g. Duhaney, *supra* note 35; Hunter, *supra* note 19 at 751–752.

<sup>46</sup> Boyd, *supra* note 23 at 506.

<sup>47</sup> See e.g. bell hooks, *Talking Back: Thinking Feminist. Thinking Black* (South End Press, 1989), 89.

<sup>48</sup> See Epstein & Goodman, *supra* note 11 at 413–416; Hrymak & Hawkins, *supra* note 21 at 47; Martinson & Jackson, *supra* note 11 at 34; Neilson, *supra* note 13, s 4.5.2; Melanie Randall, “Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law” (2004) 23 St Louis U Pub L Rev 107 at 136–38.

<sup>49</sup> See e.g. Duhaney, *supra* note 34; Hunter, *supra* note 19 at 745–48; Dianne Martin & Janet Mosher, “Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse” (1995) 8 CJWL 3; Patricia Monture, “A Vicious Circle: Child Welfare and the First Nations” (1989) 3 CJWL 1; Mosher, *supra* note 34; *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (The Inquiry: 2019) [MMIWG], vol 1a at 339ff.

lawyers either, given the lack of screening and understanding of domestic violence by many lawyers.<sup>50</sup> Many survivors are also unable to afford lawyers or are ineligible for legal services that could assist them with understanding the potential relevance of domestic violence to their claims.<sup>51</sup> Consequently, when domestic violence is disclosed in family proceedings, it may be seen as “too late” and therefore fabricated.<sup>52</sup> Conversely, women who report domestic violence early on—for example, to obtain a protection—order may be characterized as having tried to manipulate the outcome of later family proceedings.<sup>53</sup>

These myths can again be rebutted by research showing that domestic violence is underreported to police,

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- <sup>50</sup> See e.g. Pamela Cross et al, *What You Don't Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners* (Department of Justice Canada, 2018); Katrina Milaney & Nicole Williams, *Examining Domestic Violence Screening Practices of Mediators and Lawyers* (Calgary Domestic Violence Collective, 2018); Mosher, *supra* note 19 at 168.
- <sup>51</sup> See Chan & Lennox, *supra* note 6; Hrymak & Hawkins, *supra* note 21 at 22–23; Jennifer Koshan, Janet Mosher & Wanda Wiegers, “The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy” in Trevor Farrow & Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 149 at 150–51; Martinson & Jackson, *supra* note 11 at 36–37.
- <sup>52</sup> For a discussion repudiating this myth, see Epstein & Goodman, *supra* note 11 at 419; Neilson, *supra* note 13, ss 5.4.8, 21.2.4.
- <sup>53</sup> See Jennifer Koshan, “Preventive Justice? Domestic Violence Protection Orders and their Intersections with Family and Other Laws and Legal Systems” 35:1 (2023) Can J Fam L 241 (in this issue), for a discussion of case law reflecting this myth.

lawyers, and other authorities for a multitude of reasons.<sup>54</sup> This research helps explain why women may not report or cooperate with authorities, and also supports the understanding that if they do, they are often overcoming tremendous pressures to stay silent.

Another issue is that courts and other legal actors are not always aware of how trauma can affect survivors' memory, testimony, and demeanour.<sup>55</sup> Expectations about how survivors should appear and recount their abuse are based on unconscious norms that are gendered, racialized, and influenced by other dominant misconceptions.<sup>56</sup> Other factors that can influence survivors' credibility as witnesses or "good" legal system participants are related to structural barriers and access to justice considerations that decision-makers may overlook, like the ability to afford a lawyer or expert reports by professionals with the necessary trauma-informed expertise; lack of child care or the inability to take time off work to attend proceedings;

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<sup>54</sup> See Conroy, *supra* note 37; Hrymak & Hawkins, *supra* note 21 at 39–42; Neilson, *supra* note 13, ss 4.3, 4.5.2. See also note 49 and accompanying text.

<sup>55</sup> See e.g. Epstein & Goodman, *supra* note 11 at 406–11, 421; Kayla Gurski & Tiffany Butler, "Shifting Toward a Trauma-Informed, Holistic Legal Service Model for Survivors of Violence: The Calgary Legal Guidance Family Law Program" in Tod Augusta-Scott et al, eds, *Innovations in Interventions to Address Intimate Partner Violence: Research and Practice* (New York: Routledge, 2017) 139; Morton et al, *supra* note 39 at 111–12; Neilson, *supra* note 13, s 5.2.2.1; Radbord & Sinclair, *supra* note 38 at 158. The legal system itself can also cause trauma for survivors. See e.g. Negar Katirai, "Retraumatized in Court" (2020) 62 *Arizona L Rev* 81.

<sup>56</sup> See e.g. Duhaney, *supra* note 35 at 3; Zaccour, *supra* note 30.

and insufficient access to appropriate supports and services.<sup>57</sup>

### C. DOMESTIC VIOLENCE MYTHS AND STEREOTYPES

Other myths and stereotypes relate to the nature, extent, causes, timing, and harms of the violence that survivors experience. Misconceptions exist that domestic violence is not serious unless it is physical; that it is typically a mutual and/or gender-neutral problem; that it is caused by controllable factors such as alcohol or drug abuse; and that it ends at separation.<sup>58</sup> Legal actors may also mislabel violence as “high conflict” or communication problems, which elides the violence, minimizes its legal and systemic significance, and misplaces responsibility on both parties.<sup>59</sup> In turn, this may affect the reports that survivors make if they assume that only physical violence during their relationship matters to legal outcomes.<sup>60</sup>

Violence may also be ignored where it is directed towards women and not their children, suggesting women

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<sup>57</sup> See Epstein & Goodman, *supra* note 11 at 404; Hunter, *supra* note 19 at 745–47; Martin & Mosher, *supra* note 49; Martinson & Jackson, *supra* note 11 at 32; MMIWG, *supra* note 49, vol 1a at 578–79.

<sup>58</sup> See Epstein & Goodman, *ibid*, 416–18; Hunter, *ibid* at 751–52; MMIWG, *ibid*, vol 1a at 634; Morton et al, *supra* note 39 at 107–08; Randall, *supra* note 48 at 121–22, 148; Zaccour, *supra* note 30 at 65–66; Zaccour, *supra* note 4, 330–31.

<sup>59</sup> See Hunter, *ibid*, 751–53; Morton et al, *ibid*, 105, 107; Snyder et al, *supra* note 23, 618.

<sup>60</sup> See Nadia Verrelli & Lori Chambers, *No Legal Way Out: R v Ryan, Domestic Abuse, and the Defence of Duress* (Vancouver: UBC Press, 2021), 17–19; Morton et al, *ibid*, 107.

are not deserving of protection or legal remedies themselves.<sup>61</sup> This focus also perpetuates the myth that intimate partner violence has no impact on children unless they are direct targets, nor on the parenting ability of the perpetrator,<sup>62</sup> with the corollary assumption that shared parenting or maximum contact with both parents is in the best interests of children regardless of domestic violence.<sup>63</sup> Women who seek to limit contact to protect their children are then labelled as alienating or vindictive.<sup>64</sup>

These assumptions can be rebutted through research showing the prevalence and harms of coercive control, the rarity of mutual violence, the risk of violence post-separation, and the impact of domestic violence on children subjected to continued contact with abusive parents.<sup>65</sup> It is also important to note how these assumptions can shift in the child protection context or in parenting cases where women have new partners, where women are often blamed for failing to protect children and may be cast as selfish or uncaring mothers, without considering the lack of appropriate supports to assist them

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<sup>61</sup> See Hunter, *supra* note 19, 759.

<sup>62</sup> See e.g. Hunter, *ibid*, 752; Neilson, *supra* note 13, s 6.2; Zaccour, *supra* note 30, 66–67.

<sup>63</sup> Susan B Boyd & Ruben Lindy, “Violence Against Women and the B.C. Family Law Act: Early Jurisprudence” (2015) 35:2 Can Fam LQ 101 at 136–37; Chambers, Zweep & Verrelli, *supra* note 24, 674; FREDA Centre, *supra* note 3, 3–4; Martinson & Jackson, *supra* note 11, 34; Sheehy & Boyd, *supra* note 4, 88–89.

<sup>64</sup> Chambers et al, *ibid*, 676; Sheehy & Boyd, *ibid*.

<sup>65</sup> Chan et al, *supra* note 1; FREDA Centre, *supra* note 3 at 4, 6.

in leaving violent relationships.<sup>66</sup> Women may also face contradictory pressures to protect children and facilitate contact with abusive ex-partners.<sup>67</sup>

There are also stereotypes associated with the types of families in which domestic violence is expected to occur. For example, the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* notes how legal and social services professionals may “normalize” violence in Indigenous families, leading to a lack of recognition and appropriate responses when survivors report violence.<sup>68</sup> This may be true for other families as well when domestic violence is mistakenly viewed as a cultural, religious, class-based, or “other” norm.<sup>69</sup> Conversely, we also know that Indigenous, racialized, and poor families are vastly overrepresented in the child protection system, which suggests the opposite

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<sup>66</sup> See Marianne Hester, “The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children’s Safety in Contexts of Domestic Violence” (2011) 41 *Brit J Soc Work* 837; Wiegers, *supra* note 43.

<sup>67</sup> See Hester, *ibid*; Jennifer Koshan, Janet Mosher, & Wanda Wiegers, “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2021) 57:3 *Osgoode Hall Law Journal* 739 at 798.

<sup>68</sup> MMIWG, *supra* note 49, vol 1b at 154, 206. See also Renée Hoffart & Nicholas Jones, “Intimate Partner Violence and Intergenerational Trauma among Indigenous Women” (2018) 28:1 *Int’l Criminal Justice Rev* 25 at 38–40; Wiegers, *supra* note 43.

<sup>69</sup> See e.g. Duhaney, *supra* note 35; hooks, *supra* note 46, 86; Hunter, *supra* note 19, 754, 770–72; Sherene Razack, “Should Feminists Stop Talking About Culture in the Context of Violence Against Muslim Women? The Case of ‘Honour Killing’” (2021) 12:1 *Intern J Child, Youth and Family Studies* 31.

problem of over-reacting to violence, blaming mothers, and removing children, rather than providing adequate material and other supports.<sup>70</sup>

#### **D. THE CHALLENGE OF MYTHS AND STEREOTYPES**

This discussion of myths, stereotypes, and misconceptions reveals the conflicting norms and expectations that legal decision-makers may impose upon survivors.<sup>71</sup> This Catch-22 can be explained in part by how dominant understandings of domestic violence and survivors demand both passive victimization and active agency, depending on the context.<sup>72</sup> It may also be related to the competing demands of neoliberalism, where individuals are seen as responsible for overcoming social problems like domestic violence unless the problem is one that the government has decided to penalize, in which case they must be compliant victims.<sup>73</sup> The common misconceptions about domestic violence and expectations of survivors fail to acknowledge

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<sup>70</sup> See e.g. Monture, *supra* note 49; MMIWG, *supra* note 49, vol 1a at 339ff.

<sup>71</sup> See also Morton et al, *supra* note 39, 109–11 (finding that “male judges were more likely to negatively assess mothers”).

<sup>72</sup> Randall, *supra* note 48, 109, 144–45. See also Watson Hamilton, *supra* note 9, 190; Epstein & Goodman, *supra* note 11, 422.

<sup>73</sup> See Chan et al, *supra* note 1. See also Isabel Grant, “Intimate partner criminal harassment through a lens of responsabilization” (2015) 52:2 Osgoode Hall LJ 552 at 561–68 (critiquing the “responsibilization” of survivors of gendered violence); Tuulia Law & Chris Bruckett, “Expanding the Frame/ing of Gendered Violence: A Multidimensional Analysis of Gendered Workplace Violence” (2021) 32:1 Alternate Routes 111 at 129 (arguing that “interlocking socio-economic systems” like neoliberalism produce structural violence).



the structural barriers and systemic forms of oppression that contribute to the occurrence of violence and shape survivors' actions.<sup>74</sup>

Many of these myths and stereotypes can be traced to assessments of women's credibility, but they also flow from fundamental fallacies about domestic violence. These two general categories of myths and stereotypes are interrelated and mutually reinforcing.<sup>75</sup> If survivors' claims about the nature and harms of domestic violence do not accord with the assumptions of decision-makers, their claims may be seen as non-credible, and if their credibility is impugned based on the range of misassumptions about survivors, the domestic violence may be seen as unlikely.<sup>76</sup> In other instances, even if claims of domestic violence are believed, courts and other legal actors may erroneously find that the violence has little relevance to the legal issues

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<sup>74</sup> See e.g. Hunter, *supra* note 19; MMIWG, vol 1a, *supra* note 49, 111, 587–93; Randall, *supra* note 48, 112; Watson Hamilton, *supra* note 9, 202.

<sup>75</sup> Epstein & Goodman, *supra* note 11, also identify two categories whereby survivors' credibility is discounted: the implausibility of the violence and the untrustworthiness of women. In "Parental Alienation", *supra* note 4, Zaccour identifies "twin myths" that domestic violence ends at separation and has minimal impact on children. See also Hunter, *supra* note 19, 750–54 (identifying thirteen "non-feminist understandings of domestic violence"); *Bench Book*, *supra* note 36, s 3.1.11 (listing eleven myths and stereotypes about domestic violence).

<sup>76</sup> See Epstein & Goodman, *ibid*, 405.

in dispute, even in spite of legislative directives to the contrary.<sup>77</sup>

Also relevant to the focus of this volume is that claims of domestic violence are often raised in multiple legal contexts, which may facilitate the assumption that domestic violence is falsely reported or exaggerated in one forum to gain advantage in another.<sup>78</sup> This assumption problematically recasts the reliance on legal remedies for domestic violence—remedies that women fought hard to achieve—into motives tinged with myths and stereotypes.<sup>79</sup> Viewed through the lens of access to justice, it is deeply concerning that legitimately relying on one’s legal rights can reinforce myths and stereotypes about domestic violence.

Credibility and domestic violence myths have serious harms for survivors in the context of legal decisions: they can revictimize them, deny them and their children access to protective remedies, and put them at risk of further violence.<sup>80</sup> Myths and stereotypes are also contrary to constitutional and international protections of

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<sup>77</sup> See e.g. Boyd and Lindy, *supra* note 63, 136–37; Epstein & Goodman, *ibid* at 446.

<sup>78</sup> See e.g. Epstein & Goodman, *ibid* at 430.

<sup>79</sup> Not all survivors rely on legal remedies for domestic violence equally, however. See e.g. Koshan et al, *supra* note 67 at 764ff (finding no Indigenous litigants in family cases during the first 10 weeks of the pandemic); Morton et al, *supra* note 39, n 1 (finding only cases involving heterosexual and presumably cisgender (ex)couples in their review of Ontario family cases).

<sup>80</sup> See e.g. Boyd & Lindy, *supra* note 63 at 137; Epstein & Goodman, *supra* note 11 at 446–47; Katirai, *supra* note 55.

women's and children's rights to substantive equality, security, and autonomy.<sup>81</sup> Interpersonal violence deprives survivors of full participation in society, and so does legal actors' reliance on myths and stereotypes about this violence.<sup>82</sup>

As the next Part will show, only a few myths and stereotypes about domestic violence and survivors' credibility have been repudiated by a majority of the Supreme Court of Canada. Nevertheless, the Court has laid important groundwork for the continued rejection of false and faulty assumptions about gender-based violence that can guide decision-making.

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<sup>81</sup> See e.g. Martinson & Jackson, *supra* note 11.

<sup>82</sup> See Isabel Grant, "Second Chances: Bill C-72 and the *Charter*" (1995) 33 Osgoode Hall LJ 379 at 388.

## II: MYTHS, STEREOTYPES, AND DOMESTIC VIOLENCE AT THE SUPREME COURT OF CANADA<sup>83</sup>

This Part begins with an examination of criminal law cases, where the Court first identified myths and stereotypes about domestic violence and where the credibility of survivors is often at issue. I include decisions involving sexual violence that are relevant to the recognition of myths and stereotypes about domestic violence. I then discuss family law decisions on myths and stereotypes, including a recent child protection case.<sup>84</sup> Throughout, I identify decisions that explicitly and implicitly critique the two categories of myths, stereotypes, and misconceptions related to domestic violence that I identified in Part I, including those arising from survivors' engagement with intersecting legal systems. I also note decisions where the

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<sup>83</sup> For this Part, I used Can LII's Supreme Court of Canada database and the search terms "domestic violence", "family violence", "intimate partner violence", "coercive control", "spousal abuse or assault", and "myths/stereotypes." I include discussion of all cases on family/domestic violence that were captured by this search and that discuss myths and stereotypes using those or other terms. I also reference Supreme Court of Canada decisions on myths and stereotypes in sexual assault cases, beginning with the Court's first such recognition in *R v Seaboyer*, [1991] 2 SCR 577. I use the sexual assault decisions in an illustrative rather than comprehensive manner, focusing on cases where analogies or overlaps can be drawn between sexual violence and domestic violence.

<sup>84</sup> There are no Supreme Court of Canada decisions directly considering civil protection order legislation. See, however, *R v Penunsi*, 2019 SCC 39 at para 37 (Karakatsanis J, recognizing that peace bonds are "an important tool used to protect women leaving abusive relationships").

Court failed to identify myths and stereotypes in spite of having had the opportunity to do so.

### A. CRIMINAL LAW DECISIONS

The Supreme Court first repudiated a myth about gender-based violence in 1990 in *Lavallee*, which involved a claim of self-defence by a woman who killed her abusive partner.<sup>85</sup> Writing for the majority, Justice Bertha Wilson noted that “popular mythology about domestic violence” includes the belief that women who do not leave their partners were either “not as badly beaten as [they claim]” or “must have stayed out of some masochistic enjoyment of it.”<sup>86</sup> Her identification of this myth led her to find that expert evidence about “battered women’s syndrome” was admissible to assist the jury in avoiding problematic assumptions about the accused’s behaviour.<sup>87</sup> Justice Wilson also recognized that “environmental factors” may impair a survivor’s ability to leave, including “lack of job skills, the presence of children to care for, fear of retaliation by the man, etc.”<sup>88</sup>

While *Lavallee* is positive for its initial recognition of one of the most persistent myths about the credibility of survivors, many feminists critiqued the Court’s reliance on

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<sup>85</sup> *Lavallee*, *supra* note 15.

<sup>86</sup> *Ibid* at 873.

<sup>87</sup> *Ibid* (citing American case law as well as scholarly literature).

<sup>88</sup> *Lavallee*, *ibid* at 886–87.

a “syndrome.”<sup>89</sup> This critique was acknowledged in *R v Malott* in 1998, where Justices Claire L’Heureux-Dubé and Beverley McLachlin noted the “new stereotype” of the battered woman as “victimized, passive, helpless, [and] dependent” and recognized that many survivors of domestic violence stray from this stereotype, including “women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions.”<sup>90</sup> They also expanded on *Lavallee*’s list of factors explaining why women often do not leave abusive partners, adding “a woman’s need to protect her children from abuse, a fear of losing custody of her children, pressures to keep the family together, weaknesses of social and financial support for battered women, and no guarantee that the violence would cease simply because she left.”<sup>91</sup> These observations importantly recognized how domestic violence, and survivors’ reactions to that violence, can impact family law disputes, particularly when women are seeking to protect their children. Nevertheless, *Malott* has not been cited in any reported family law decisions at the Supreme Court or lower court levels.

*Lavallee* and *Malott* are ultimately cases about women’s lack of options in the face of domestic violence and the impact that their actions may have on the credibility

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<sup>89</sup> See e.g. Carol Aylward, *Canadian Critical Race Theory* (Halifax: Fernwood Publishing, 1999) at 47 (noting that *Lavallee* was a Métis woman but this was not discussed by the Court).

<sup>90</sup> *R v Malott*, [1998] 1 SCR 123, paras 39–40 (concurring, citing secondary literature).

<sup>91</sup> *Ibid* at para 42.

of their claims of self-defence. In other cases, however, the Court has failed to fully recognize the circumstances in which women may be driven to kill their abusive partners.<sup>92</sup> Expectations that women will leave abusive relationships also continue to influence lower courts in their assessments of credibility and moral culpability, and even positive decisions may still rely on battered women's syndrome rather than the more modern understanding of coercive controlling violence.<sup>93</sup>

In another series of cases, the Court has discussed the challenges faced by survivors of violence in the context of criminal investigations and proceedings, although without explicitly using the language of myths and stereotypes. These cases note how complainants in domestic violence cases can experience pressures from the police, accused, and others,<sup>94</sup> and that these pressures can lead to delays or reluctance in reporting as well as

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<sup>92</sup> See *R v Gladue*, [1999] 1 SCR 688 (recognizing systemic discrimination against Indigenous persons in sentencing, yet failing to fully consider the circumstances of a woman who pleaded guilty to manslaughter for killing her abusive husband. For a critique see Elizabeth Sheehy, *Defending Battered Women on Trial* (Vancouver: UBC Press, 2014) at 161–62, 198); *R v Ryan*, 2013 SCC 3 (rejecting the defence of duress where an abused woman hired someone to kill her spouse. For a critique see Verrelli & Chambers, *supra* note 60).

<sup>93</sup> See e.g. *R v Naslund*, 2022 ABCA 6 (a sentencing decision involving a survivor who killed her abusive partner). For a discussion of coercive control, see Chan et al, *supra* note 1.

<sup>94</sup> *R v B(KG)*, [1993] 1 SCR 740 at 826 (Cory J). See also *R v Friesen*, 2020 SCC 9, para 128 (Wagner CJ and Rowe J, recognizing that dependency relationships can affect reporting in cases involving domestic violence).

recantation, which can impugn survivors' credibility without knowledge of the context.<sup>95</sup>

More recently, in *R v Stairs*, Justices Michael Moldaver and Mahmud Jamal (for the majority) affirmed broad police powers to search the accused's home when responding to a domestic violence call, noting the importance of victim safety, the reality of victim non-cooperation with police, and the "emotionally charged and volatile" nature of these cases.<sup>96</sup> However, the dissenting reasons of Justice Andromache Karakatsanis recognized that overbroad police search powers can deter victims from reporting domestic violence, noting that the victim in this case was arrested herself.<sup>97</sup> None of the judges dealt with the concern that broad police powers will adversely impact those who are over-criminalized, including racialized and Indigenous persons—a concern for survivors of domestic violence as well as accused persons. While *Stairs* supports previous jurisprudence identifying barriers to reporting that debunk some credibility myths, and the dissent implicitly challenges the assumption that police will invariably protect survivors, the case was a missed opportunity to recognize intersecting inequalities in this context.<sup>98</sup>

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<sup>95</sup> *R v Marquard*, [1993] 4 SCR 223 at 270 (L'Heureux Dubé J, dissenting). See also *R v Godoy*, [1999] 1 SCR 311 (para 21) and *R v Reeves*, 2018 SCC 56 (para 84).

<sup>96</sup> *R v Stairs*, 2022 SCC 11, para 93.

<sup>97</sup> *Ibid* at para 123.

<sup>98</sup> See also *R v Thibert*, [1996] 1 SCR 337; *R v Stone*, [1999] 2 SCR 290; *R v Tran*, 2010 SCC 58 (claims by accused men that they were provoked into violence by their wives; the Court did not address myths and stereotypes surrounding provocation). See also Isabel Grant & Debra Parkes, "Equality and the Defence of Provocation:



A myth that the Court has not yet directly tackled in the criminal realm is that of false allegations of domestic violence. In *R v Couture*, the Court considered the admissibility of a spouse's out-of-court statements about her abusive husband that incriminated him for a previous murder.<sup>99</sup> Responding to defence counsel's arguments at trial, Justice Marshall Rothstein found that "estrangement itself could not serve as motivation for concoction", nor were the spouse's actions "motivated by a sense of vengeance arising from spousal abuse."<sup>100</sup> However, his remarks were based on the facts and did not challenge the credibility myth that survivors have motive to lie about domestic violence.<sup>101</sup>

Also relevant in the criminal law area are sexual assault decisions that address myths and stereotypes about

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Irreconcilable Differences" (2017) 40:2 Dal L Rev 455 (discussing provocation myths and stereotypes).

<sup>99</sup> *R v Couture*, 2007 SCC 28.

<sup>100</sup> *Ibid* at para 127 (Bastarache, Deschamps and Abella JJ. concurring). See also *R v Gerrard*, 2022 SCC 13 (challenging domestic violence-related convictions on the basis the complainant had "long threatened" to report the accused to the police and had fabricated allegations when he insulted her. In brief oral reasons, the Court (per Moldaver J.) dismissed the appeal, discussing motive to lie generally but not in the context of domestic violence).

<sup>101</sup> *Couture* also illustrates how myths and stereotypes may be introduced by lawyers. For a discussion of the ethics of this practice, see Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2013) 51 Osgoode Hall LJ 427; Deanne Sowter, "Lawyering in a Family Justice System That Masks Violence" (4 March 2022) online: *Slaw* <[www.slaw.ca/2022/03/04/lawyering-in-a-family-justice-system-that-masks-violence/](http://www.slaw.ca/2022/03/04/lawyering-in-a-family-justice-system-that-masks-violence/)>. A detailed examination of the obligation of lawyers to combat myths and stereotypes is beyond the scope of this paper, but lawyer education is discussed in Part III.

intimate partner sexual violence, sexual violence more generally, or about survivors of this violence.<sup>102</sup> In *R v Seaboyer*, a majority of the Court recognized what are known as the twin myths: “that unchaste women [are] more likely to consent to intercourse and ... [are] less worthy of belief.”<sup>103</sup> Justice L’Heureux-Dubé, dissenting in part, identified a longer list, including the credibility-related stereotypes that “the feminine character is especially filled with malice” and that women are fickle, spiteful, and vengeful towards past partners.<sup>104</sup> In *R v Mills*, the Court extended this analysis by impugning the “invidious” myth that a survivor’s “consultation with a psychiatrist is, by itself, an indication of untrustworthiness”.<sup>105</sup> *Mills* also noted the consultations that lead to reforms protecting survivors of sexual violence, suggesting courts should be cautious in questioning survivors’ reliance on hard-won legal remedies when assessing their credibility.<sup>106</sup>

In *R v Goldfinch*, a case involving an alleged sexual assault between former intimate partners, Justice Karakatsanis recognized the myth that “sexual assault is

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<sup>102</sup> For recent discussions of rape myths and stereotypes see e.g. Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen’s University Press, 2018), ch 2; Dufraimont, *supra* note 32.

<sup>103</sup> *Supra* note 83 at 604 (McLachlin, J).

<sup>104</sup> *Ibid* at 653 (relying on secondary literature). See also *R v Ewanchuk*, [1999] 1 SCR 330, L’Heureux-Dubé J (concurring, discussing myths and stereotypes affecting analysis of complainant credibility).

<sup>105</sup> [1999] 3 SCR 668 at para 119, McLachlin and Iacobucci JJ.

<sup>106</sup> *Ibid* at para 125. See also *R v JJ*, 2022 SCC 28, Wagner CJ and Moldaver J (upholding the production regime for complainants’ private records in possession of the accused).

less harmful to those who are sexually active or in relationships”.<sup>107</sup> Relatedly, she impugned the myth “that sexual assault is a crime committed by persons who are strangers to their targets.”<sup>108</sup> Both statements serve to discredit myths about the harms and context of gender-based violence. Justice Karakatsanis also found that the defence’s attempt to introduce evidence of the complainant and accused’s relationship was for the improper purpose of suggesting the complainant had consented on the occasion in question—in other words, to imply that her claim of sexual violence was not credible because of their past relationship.<sup>109</sup> Similarly, in *R v A.R.J.D.*, the Court recognized that sexual assault complainants should not be disbelieved because they have had consensual contact with the accused after the alleged violence.<sup>110</sup> Finally, in *R v J.J.*, the Court acknowledged the myth that there is any one “appropriate reaction” by complainants in sexual offence

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<sup>107</sup> 2019 SCC 38 at para 45 [*Goldfinch*] (relying on statistics, literature, and previous case law). See also *R v McCraw*, [1991] 3 SCR 72 at para 23 (Cory J found that threats of sexual assault amount to bodily harm and that “psychological harm may often be more pervasive and permanent in its effect than any physical harm”); *R v Brown*, 2022 SCC 18 at para 10, Kasirer J (recognizing women’s vulnerability to “intoxicated sexual and domestic violence”).

<sup>108</sup> *Goldfinch*, *supra* note 107 at para 2. See also *R v Kirkpatrick*, 2022 SCC 33 at para 61, Martin J (recognizing that survivors of intimate partner violence are particularly vulnerable to condom abuse).

<sup>109</sup> *Goldfinch*, *supra* note 107 at para 45. For cases where the Supreme Court has declined to comment on myths and stereotypes about intimate partner sexual violence, see Koshan, *supra* note 20 at 259–60.

<sup>110</sup> *Supra* note 14, Wagner CJ. See also *JJ*, *supra* note 106 at para 132.

proceedings.<sup>111</sup> The latter decisions thus repudiate credibility myths that may arise in domestic violence cases.

## B. FAMILY LAW DECISIONS

In a series of cases in the 1990s, Justice L'Heureux-Dubé identified a number of myths and stereotypes related to the interpretation and application of family law. None of these decisions explicitly dealt with domestic violence, but they recognized the feminization of poverty and its connection to divorce and stereotypes of the traditional marriage;<sup>112</sup> the myth that vengeful custodial parents often obstruct the access of the other parent to children, when studies show the opposite;<sup>113</sup> and how child poverty in single-parent families is related to the substantive inequalities flowing from the breakdown of spousal relationships.<sup>114</sup>

It was not until the mid-2000s that the Court first used the language of domestic violence in a family law decision.<sup>115</sup> In *Leskun v. Leskun*, Justice Ian Binnie noted

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<sup>111</sup> *JJ*, *supra* note 106 at para 175.

<sup>112</sup> *Moge v Moge*, [1992] 3 SCR 813 at 847, 853–54.

<sup>113</sup> *Young v Young*, [1993] 4 SCR 3 at 60 [*Young*] (dissenting in the result). See also *DBS v SRG*, 2006 SCC 37 at para 101, Bastarache J [*DBS*] (for the majority, recognizing that it is reasonable for a child support claimant to fear the payor parent “would react vindictively”). For a discussion linking this concern to domestic violence, see Natasha Bakht et al, “*D.B.S. v. S.R.G.: Promoting Women's Equality through the Automatic Recalculation of Child Support*” (2006) 18:2 *Can J Women & L* 535 at 549.

<sup>114</sup> *Willick v Willick*, [1994] 3 SCR 670 at paras 51–54.

<sup>115</sup> Earlier cases sometimes considered “cruelty” as grounds for divorce. See e.g. *Hood v. Hood*, [1972] SCR 244. See also *Miglin v. Miglin*, 2003 SCC 24 at para 212, LeBel and Deschamps JJ [*Miglin*]

that although the *Divorce Act* did not attribute fault, the consequences of spousal misconduct could be relevant to spousal support claims, for example where “spousal abuse trigger[s] a depression so serious as to make a claimant spouse unemployable”.<sup>116</sup> While this decision did not explicitly reference myths and stereotypes, it did acknowledge the emotional and economic impact domestic violence can have on survivors, implicitly repudiating the myth that domestic violence must be physical in order to be harmful.

There are no further decisions explicitly discussing domestic violence and family law until 2020. In *Michel v. Graydon*, Justice Sheilah Martin discussed the importance of access to justice and how “fear and danger” may affect a parent’s ability to apply for child support from their abuser.<sup>117</sup> She recognized that domestic violence is disproportionately experienced by women and can result in emotional harm, financial insecurity, and housing needs.<sup>118</sup> Justice Martin also accepted that “some abusive fathers may use the child support process as a way to continue to exercise dominance and control over their ex-wives”.<sup>119</sup> This might include a “counter-application for custody” and lead to women’s “fear of losing custody due to

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(recognizing the impact of abuse on the negotiation of settlement agreements).

<sup>116</sup> 2006 SCC 25 at para 21 [*Leskun*]. See also *Divorce Act*, RSC 1985, c 3 (2nd Supp).

<sup>117</sup> 2020 SCC 24 at para 86, Martin J [*Michel*] (concurring, with Wagner J). See also *DBS*, *supra* note 113 at para 101.

<sup>118</sup> *Michel*, *ibid* at para 95 (referencing statistics on family violence).

<sup>119</sup> *Ibid*, quoting secondary literature (references omitted).

discrimination or stereotyping.”<sup>120</sup> Justice Martin also noted the importance of attending to “the gendered dimensions of poverty” and its intersections “with race, disability, religion, gender modality, sexual orientation, and socioeconomic class”.<sup>121</sup> Her decision provides important recognition of coercive control and systems abuse and their influence on the actions of domestic violence survivors, which should prove helpful in debunking credibility and domestic violence myths.

In two subsequent cases, the Court commented on the use of family dispute resolution (FDR) processes. In *Colucci v Colucci* — an application for retroactive child support — Justice Martin wrote for a unanimous Court in noting the legal tactics that may be used in family disputes, imploring courts to be “cautious to distinguish bad faith” of litigants from situations where their conduct “results from safety concerns arising from a history of family violence.”<sup>122</sup> This is an implicit recognition that the conduct of survivors in *pursuing* legal rights and remedies, as with their *failure* to pursue legal action, must be considered without relying on misconceptions about “appropriate” responses to domestic violence. She also found that “family violence” and “significant power imbalances” should be exceptions to the trend in encouraging FDR.<sup>123</sup> In *Association de médiation familiale du Québec v Bouvier*, Justice Nicholas Kasirer’s majority reasons viewed FDR more benignly, suggesting that

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<sup>120</sup> *Ibid* at para 85 and note 6 (citing secondary literature).

<sup>121</sup> *Ibid* at para 101.

<sup>122</sup> 2021 SCC 24 at para 99 [*Colucci*].

<sup>123</sup> *Ibid* at para 69. See also *Miglin*, *supra* note 115 at para 212.

mediation “involves inherent protections to guard against the possibility that vulnerable parties will unknowingly end up bound by an ill considered agreement.”<sup>124</sup> Although he pointed to legislated training requirements on domestic violence for mediators in Quebec and their obligation to consider violence when assessing the (in)equality of bargaining power,<sup>125</sup> not all Canadian jurisdictions have similar training or screening requirements.<sup>126</sup> The concurring judgment of Justice Karakatsanis better recognized the unique vulnerabilities, power imbalances, and “[a]busive dynamics” that can arise in the FDR context, implicitly acknowledging the harms of domestic violence and their impact on legal processes.<sup>127</sup>

The Court recently considered the relevance of domestic violence to a mother’s relocation application under the 2021 *Divorce Act* amendments in *Barendregt v Grebliunas*.<sup>128</sup> Justice Karakatsanis’s majority judgment

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<sup>124</sup> 2021 SCC 54 at para 88 [*Bouvier*].

<sup>125</sup> *Ibid* at paras 60–61.

<sup>126</sup> See Chan et al, *supra* note 1; Michaela Keet & Jeff Edgar, “Mediator Discretion in Cases Involving Intimate Partner Violence” (2023) 35:1 Can J Fam L 131 (in this issue, noting the problems with the efficacy of these training requirements in practice).

<sup>127</sup> *Bouvier*, *supra* note 124 at para 155. See also *ibid* at paras 134–37, Karakatsanis J (Abella and Martin JJ, concurring).

<sup>128</sup> 2022 SCC 22 [*Barendregt*]. See also “Factum of West Coast Legal Education and Action Fund Association and Rise Women’s Legal Centre,” online (pdf): *Supreme Court of Canada* <[www.scc-csc.ca/WebDocuments-DocumentsWeb/39533/FM040\\_Intervenors\\_West-Coast-LEAF-Association\\_&\\_Rise-Women's-Legal-Centre.pdf](http://www.scc-csc.ca/WebDocuments-DocumentsWeb/39533/FM040_Intervenors_West-Coast-LEAF-Association_&_Rise-Women's-Legal-Centre.pdf)> (cited by the Court in *Barendregt* at paras 144 and 183, along with secondary literature for the points below).

did not explicitly mention myths and stereotypes, but she recognized that “[t]he suggestion that domestic abuse ... has no impact on the children and has nothing to do with the perpetrator’s parenting ability is untenable.”<sup>129</sup> Domestic violence was also acknowledged as “notoriously difficult to prove”<sup>130</sup> and as often ongoing after separation,<sup>131</sup> with Justice Karakatsanis noting “the social and legal barriers to women disclosing family violence in family law proceedings.”<sup>132</sup> Accordingly, “proof of even one incident may raise safety concerns for the victim” and may support “the need for limited contact.”<sup>133</sup> This discussion of domestic violence in the context of a parenting dispute helpfully repudiates several misconceptions impacting survivors’ credibility and the safety of women and children.

Most recently, *B.J.T. v J.D.* involved a custody dispute that arose when a director of child protection ended a child’s foster parent arrangement with his maternal grandmother in favour of his biological father.<sup>134</sup> Justice Martin upheld the hearing judge’s decision that it was in the child’s best interests to be placed with his grandmother, and found that the judge properly considered the Director’s evidence and conduct in assessing credibility in relation to

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<sup>129</sup> *Barendregt, ibid* at para 143.

<sup>130</sup> *Ibid* at para 144.

<sup>131</sup> *Ibid* at para 184. See additionally *ibid* at para 186 (“cooperating, staying, or reconciling with a party does not necessarily indicate that an incident of abuse or violence was not serious”).

<sup>132</sup> *Ibid* at para 183.

<sup>133</sup> *Ibid* at para 144.

<sup>134</sup> 2022 SCC 24 [*BJT*].



the child's best interests.<sup>135</sup> However, Justice Martin did not comment on the relevance of evidence that the father had perpetrated violence against the child's mother and half-sibling, nor on the failures of the decision-makers below to give this evidence any weight in considering whether the child would be safe in the father's care.<sup>136</sup> The case focused on the credibility of the grandmother's claim that she would facilitate access to the father, and was thus a missed opportunity to discuss domestic violence myths and stereotypes in the child protection context.<sup>137</sup>

### C. A SUMMARY OF THE COURT'S GUIDANCE ON MYTHS AND STEREOTYPES

This review confirms the Court's progress in recognizing and repudiating false and faulty assumptions about domestic violence and about survivors. A majority of the Court has done so in *Lavallee* (on why women's credibility or actions should not be adversely affected by their decision not to leave violent relationships or to report to police),<sup>138</sup> *Goldfinch* (on the credibility of those claiming intimate partner sexual violence and on its harms),<sup>139</sup> *Colucci* (on the harms of domestic violence, including resulting power imbalances, and the contrast between

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<sup>135</sup> *Ibid* at para 108, Martin J (recognizing both the "tender years" doctrine and the favouring of close biological ties as "stereotyped and formulaic solutions"). See also *Young*, *supra* note 113 at 34–38.

<sup>136</sup> *BJT*, *ibid* at paras 8, 17–18.

<sup>137</sup> *Ibid* at paras 78–79. For further discussion of this case and context see Wieggers, *supra* note 43. There are no other Supreme Court decisions that discuss domestic violence in the child protection context.

<sup>138</sup> *Supra* note 15.

<sup>139</sup> *Supra* note 107.

perpetrators' litigation tactics and survivors' safety measures),<sup>140</sup> and *Barendregt v. Grebliunas* (on the harms of domestic violence, its relevance to the best interests of children, and the barriers survivors face in disclosing and proving violence).<sup>141</sup>

Although the Court has not explicitly recognized the myth that women falsely allege domestic violence to gain an advantage in family proceedings, *Colucci* confirms that courts should not make assumptions about the credibility of domestic violence claims based solely on survivors' conduct in family and other legal processes.<sup>142</sup> This point is supported by sexual assault decisions repudiating the stereotype that women have a general propensity to falsely claim violence, including that by ex-partners. Similarly, *Mills* suggests that survivors' reliance on legal remedies for gender-based violence should not itself undermine their credibility, which is particularly relevant for domestic violence claims made in intersecting legal systems.<sup>143</sup>

While the Court has rejected the myth that sexual violence is primarily perpetrated by strangers,<sup>144</sup> violence in intimate relationships is still seen as largely

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<sup>140</sup> *Supra* note 122.

<sup>141</sup> *Supra* note 128.

<sup>142</sup> *Supra* note 122. See also *Malott*, *supra* note 90, and *Michel*, *supra* note 117.

<sup>143</sup> *Supra* note 105.

<sup>144</sup> See e.g., *Goldfinch*, *supra* note 107.

exceptional.<sup>145</sup> However, a different myth may prevail for women from racialized, Indigenous, and other marginalized communities, where assumptions persist that domestic violence is endemic, reinforcing its exceptionalism in other communities.<sup>146</sup>

Unfortunately, the Court's jurisprudence is sparse in identifying how domestic violence myths and stereotypes may uniquely or disproportionately affect members of marginalized groups, apart from the general comments in *Malott* (on how marginalized women may not fit the battered women stereotype) and *Michel v Graydon* (on the need to analyze intersecting inequalities in family disputes)<sup>147</sup>. Sexual assault caselaw is somewhat stronger in this regard and can provide guidance in the domestic violence context.<sup>148</sup>

There are also some promising lower court decisions that address misconceptions about domestic violence and intersecting inequalities. In *Ahluwalia v. Ahluwalia*, Justice Renu Mandhane recognized a new tort of family violence and repudiated several myths and stereotypes.<sup>149</sup> Relying on the *Divorce Act* amendments and appellate jurisprudence, she noted that domestic

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<sup>145</sup> See e.g. Chan & Lennox, *supra* note 6 at 7; Hunter, *supra* note 19 at 752. See also *Ahluwalia*, *supra* note 2.

<sup>146</sup> See references, *supra* note 68.

<sup>147</sup> *Malott*, *supra* note 90; *Michel*, *supra* note 117.

<sup>148</sup> See e.g. *Barton*, *supra* note 14 at para 2 (noting myths and stereotypes about Indigenous women and sex workers); *R. v. Slatter*, 2020 SCC 36 at para 2 (noting myths and stereotypes about individuals with disabilities).

<sup>149</sup> *Ahluwalia*, *supra* note 2.

violence is harmful to children as well as their mothers;<sup>150</sup> that it may involve coercive control, such that analysis should focus on patterns rather than incidents;<sup>151</sup> that it may result in economic harms;<sup>152</sup> that survivors may immigrate with their abusers, and should not be disbelieved if they do;<sup>153</sup> that survivors may not report domestic violence to police or medical authorities until after separation;<sup>154</sup> and that survivors may be wrongly accused of fabricating domestic violence for financial gain or out of anger.<sup>155</sup> This decision is under appeal, but it exemplifies how recent legislative amendments and Supreme Court jurisprudence support the refutation of common misconceptions about domestic violence.

At the same time, even some of the more positive decisions discussed in this Part reveal the ongoing power of myths and stereotypes. *Ahluwalia v. Ahluwalia* may inadvertently reinforce the myth that domestic violence is exceptional by grounding compensation for family violence in the finding that it was atypical of marriages and therefore unaddressed in the *Divorce Act*, requiring a common law remedy.<sup>156</sup> Similarly, the recognition in

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<sup>150</sup> *Ibid* at paras 43 (citing the *Divorce Act*), 119.

<sup>151</sup> *Ibid* at para 54.

<sup>152</sup> *Ibid* at para 45 (citing *Leskun*, *supra* note 116).

<sup>153</sup> *Ahluwalia*, *ibid* at paras 63–65, 74 (citing *Lavallee*, *supra* note 15; *Malott*, *supra* note 90; *Naslund*, *supra* note 93). See also *Kanthasamy v. Canada*, 2015 SCC 61, at para 98 (recognizing the connections between family violence and immigration policy).

<sup>154</sup> *Ahluwalia*, *ibid* at para 94.

<sup>155</sup> *Ibid* at para 74.

<sup>156</sup> *Ibid* at para 5.

*Barendregt v. Grebliunas* that “even one incident may raise safety concerns for the victim”, while positive, may perpetuate an incident-based approach focusing on physical acts of domestic violence rather than coercive control.<sup>157</sup> The other articles in this volume that include discussions of case law also illustrate the ways in which myths and stereotypes can continue to influence judicial decisions.<sup>158</sup> For example, the myth that women falsely allege domestic violence persists in case law reviewing emergency protection orders, where lawyers and courts continue to argue and accept that such applications are made to gain an advantage in family disputes.<sup>159</sup> The conclusion briefly reviews some potential responses to the ongoing influence of myths and stereotypes.

### III. CONCLUSION: CHALLENGING MYTHS AND STEREOTYPES

I have identified two mutually reinforcing categories of myths and stereotypes in this paper: those about survivors’ credibility, and those about domestic violence itself. The social context underlying and refuting these misconceptions is well established by the literature in Part I; the Supreme Court decisions discussed in Part II bolster the relevance of this context and should guide the future recognition of domestic violence myths and stereotypes. Yet judicial decisions and the actions of other legal actors such as lawyers continue to reveal the ongoing application

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<sup>157</sup> *Supra* note 128 at para 144.

<sup>158</sup> See Wiegers, *supra* note 43; Koshan, *supra* note 53; Mosher, *supra* note 34 (pertaining to family law, child protection, civil protection orders, immigration issues, and their intersections).

<sup>159</sup> Koshan, *ibid.*

of false and faulty assumptions about domestic violence and survivors, revealing how entrenched they can be.

Education is often recommended as a way of rooting out myths and stereotypes.<sup>160</sup> Judicial education is especially important in family law, where cases are often heard by generalist judges with no background in the area.<sup>161</sup> When the recent amendments to the *Divorce Act* were before Parliament, anti-violence and equality advocates unsuccessfully sought to include judicial education requirements on myths, stereotypes, and misconceptions about family disputes.<sup>162</sup> The Canadian Judicial Council's *Professional Development Policies and Guidelines* do explicitly call on judges to ensure they have an awareness of social context, including family

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<sup>160</sup> See e.g. Amanda Dale et al, *A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence* (Ottawa: Women's Shelters Canada, 2021) at 121ff; Martinson & Jackson, *supra* note 11 at 40ff; Standing Committee on the Status of Women, *Towards a Violence-Free Canada: Addressing and Eliminating Intimate Partner and Family Violence* (June 2022), recommendation 14.

<sup>161</sup> Martinson & Jackson, *ibid* at 13.

<sup>162</sup> Brief by Luke's Place and the National Association of Women and the Law on Bill C-78: *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* (2018) at 3, online (pdf): [nawl.ca/wp-content/uploads/attachments/NAWL\\_Lukes\\_Place\\_Brief\\_on\\_C-78\\_\(final\\_for\\_resubmission\).pdf](http://nawl.ca/wp-content/uploads/attachments/NAWL_Lukes_Place_Brief_on_C-78_(final_for_resubmission).pdf). See also *ibid*, at 10 (recommendation 16). They also sought an amendment that would have directed courts to avoid myths and stereotypes about domestic violence (recommendation 4.7 at 6).

violence.<sup>163</sup> However, the judiciary has traditionally considered social context education to be voluntary, with information about its full scope protected by judicial independence.<sup>164</sup>

Recent legislative initiatives around judicial education on myths and stereotypes began in the sexual assault realm federally and have now been extended to apply to domestic violence, including coercive control.<sup>165</sup> Although they are framed permissively, these measures were intended to enhance the impartiality and accountability of the judiciary and the transparency of

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<sup>163</sup> See Deanne Sowter & Jennifer Koshan, “Judging Family Violence: Recommendations for Judicial Practices and Guidelines in Family Violence Cases” (20 December 2021), online: *ABlawg* <[ablawg.ca/wp-content/uploads/2021/12/Blog\\_DS\\_JK\\_Family\\_Violence\\_Dec\\_2021.pdf](http://ablawg.ca/wp-content/uploads/2021/12/Blog_DS_JK_Family_Violence_Dec_2021.pdf)>.

<sup>164</sup> Cairns-Way & Martinson, *supra* note 15 at 379. The National Judicial Institute (NJI)’s annual reports provide some information on judicial education on domestic violence. See *Innovation in Judicial Education* (2021-2022), online: *NJI* <[www.nji-inm.ca/index.cfm/judicial-education/in-review-2021-2022/](http://www.nji-inm.ca/index.cfm/judicial-education/in-review-2021-2022/)>.

<sup>165</sup> See Bill C-3, *An Act to amend the Judges Act and the Criminal Code*, 2nd Sess, 43rd Parl, 2021 c 8 (assented to 6 May 2021), amending the *Judges Act*, RSC 1985, c J-1, ss 3(b), 60, 62.1; Bill C-233, *An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner)*, 1st Sess, 44th Parl, 2022 (assented to 27 April 2023) (also known as “Keira’s Law”). With the exception of Quebec, provincial judicial education initiatives are currently limited to sexual assault. See *The Provincial Court Act*, CCSM, c C275, ss 3(2), 8.1.1; *An Act to create a court specialized in sexual violence and domestic violence*, SQ 2021, c 32 s 4, amending the *Courts of Justice Act*, CQLR c T-16, s 83.0.1; *Provincial Court Act*, RSPEI 1988, c P-25.1, s 6(2); *Provincial Court (Sexual Assault Awareness Training) Amendment Act*, 2022, SA 2022, c 15 (comes into force on Proclamation).

judicial education.<sup>166</sup> Rosemary Cairns-Way and Donna Martinson—experts on social context education—argue that judicial independence is a means to the end of judicial impartiality, noting that judicial impartiality has been recognized as the “pre-eminent judicial obligation.”<sup>167</sup> A commitment to impartiality supports the need for judicial education on myths, stereotypes, and misconceptions about domestic violence that is developed in consultation with survivors and associated organizations.<sup>168</sup> Lawyers, scholars, and anti-violence advocates can also contribute to this effort by calling out domestic violence myths and stereotypes where they arise in legal processes and decisions.

Not all family disputes involving domestic violence are resolved in formal court proceedings, so education on domestic violence myths and stereotypes should also be mandated for FDR professionals in all Canadian jurisdictions to help ensure that FDR processes are conducted free of the influence of such myths and stereotypes.<sup>169</sup> Education for lawyers and law students on domestic violence is necessary as well, including the importance of screening, of alerting courts and other legal actors to the relevance of domestic violence in family disputes, and of avoiding and responding to arguments

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<sup>166</sup> Bill C-3, *ibid* at preamble.

<sup>167</sup> Cairns-Way & Martinson, *supra* note 15 at 379 (referencing the NJI’s Social Context Education Program).

<sup>168</sup> *Ibid* at 379, 396–97. See also Martinson & Jackson, *supra* note 11.

<sup>169</sup> See Chan et al, *supra* note 1; Keet & Edgar, *supra* note 126 (in this issue). This may require regulation of a range of professional contexts.



based on myths and stereotypes.<sup>170</sup> Judges also have a crucial oversight obligation for lawyer conduct in this context to ensure that legal arguments are not a continuing site for the perpetuation of myths and stereotypes.<sup>171</sup>

For all legal system actors, education on domestic violence should be ongoing, adequately resourced, developed in consultation with appropriate anti-violence experts, and inclusive of social context and lived experiences of intersecting inequalities.<sup>172</sup> Returning to the theme of this volume, education initiatives should also tackle the myth that survivors' reliance on legal rights and remedies supports the assumption that their domestic violence claims are false or exaggerated. This myth in particular perpetuates inequality, impedes access to justice, and undermines rather than supports the legal responses to

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<sup>170</sup> See e.g. Hrymak & Hawkins, *supra* note 21 at 66ff; Law Commission of Ontario, *Curriculum Modules in Ontario Law Schools: A Framework For Teaching About Violence Against Women* (2012), online: LCO <[www.lco-cdo.org/wp-content/uploads/2012/10/violence-against-women-modules-final-report.pdf?msclkid=b538a32fc27011ec98807bfd6b15884f](http://www.lco-cdo.org/wp-content/uploads/2012/10/violence-against-women-modules-final-report.pdf?msclkid=b538a32fc27011ec98807bfd6b15884f)>; Office of the Chief Coroner of Ontario, *Domestic Violence Death Review Committee, Eighth Annual Report* (2010), online: <[www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office\\_coroner/PublicationsandReports/DVDR/DVDR\\_2010.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/PublicationsandReports/DVDR/DVDR_2010.html)>; *Recommendations from the Domestic Violence Death Review Committee 2018* (New Brunswick: Office of the Chief Coroner, 2019), online (pdf): <[www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/Publications/DomesticViolence2018.pdf](http://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/Publications/DomesticViolence2018.pdf)>; Luke's Place and National Association of Women and the Law, "Letter to the Federation of Law Societies on the National Requirement Review" (December 2022), online: NAWL <[nawl.ca/letter-to-federation-of-law-societies/](http://nawl.ca/letter-to-federation-of-law-societies/)>.

<sup>171</sup> See Martinson & Jackson, *supra* note 11, 46–48.

<sup>172</sup> See e.g. Dale et al, *supra* note 160 at 121–22; Martinson & Jackson, *ibid* at 65ff.

domestic violence intended to protect survivors and children.