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**Taking Threats Seriously: Section 264.1 and Threats as a form of Domestic Violence**  
**-by-**  
**Joanna Birenbaum**  
**Isabel Grant**

**1. Introduction**

An alarming number of women are in abusive relationships where violence and threats of violence pervade their lives.<sup>1</sup> While the rate of homicide has declined in Canada in recent years, the rate of spousal homicide<sup>2</sup> has remained stable since 2004,<sup>3</sup> with the overwhelming majority of victims being women.<sup>4</sup> In Canada, a woman is killed by her intimate partner or former intimate partner every six days.<sup>5</sup> Women report more serious episodes of violence<sup>6</sup> and are more likely than men to be exposed to multiple incidents of violence.<sup>7</sup>

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<sup>1</sup> In 2004, for example, roughly 653,000 women living in common-law or marital relationships indicated that they had been physically or sexually assaulted by a partner at least once during the previous five years, which constitutes approximately 7% of this population. Higher rates of violence are reported by women who have separated from their spouses. In 2004, 21% of these women reported violence in the previous five years. Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: StatCan, 2 October 2006) at 17-18 [*Measuring Violence Against Women*].

<sup>2</sup> The term spouse here includes common law spouses and former spouses.

<sup>3</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2011*, (Ottawa: StatCan 2011) at 8 [*Family Violence*]. While this Report is more recent than the *Measuring Violence Against Women*, *supra* note 1, it is also written in gender neutral terms and fails to account for the unique characteristics of male violence against women.

<sup>4</sup> Between 1974 and 2004, 2178 women were killed in Canada by their male intimate or former intimate partners. This accounts for 77% of all intimate homicides (*Measuring Violence Against Women*, *supra* note 1 at 25). Aboriginal women are particularly vulnerable to spousal homicide with a rate eight times higher than that of non-aboriginal women (*Measuring Violence Against Women*, *supra* note 1 at 67).

<sup>5</sup> This figure was arrived at from data presented in Statistics Canada, *Juristat, Homicide in Canada, 2010* by T Mahoney (Ottawa: StatCan 26 October 2011) at 11, 12 and Statistics Canada, *2011* (Ottawa: StatCan 2011) at 37-38.

<sup>6</sup> For example, in 2009, women were three times more likely to report they had been “sexually assaulted, beaten, choked or threatened with a gun or a knife by their partner or ex-partner in the previous 5 years”. *Family Violence*, *supra* note 3 at 10; Molly Dragiewicz & Yvonne Lindgren, “The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis” (2009) 17 Am U J Gender Soc Pol’y & L 229.

<sup>7</sup> *Family Violence*, *supra* note 3 at 11; Department of Justice, *Spousal Abuse: A Fact Sheet from the Department of Justice Canada*, (Ottawa: Department of Justice, 2001) [*Spousal Abuse Fact Sheet*]. In “Why Women Stay: A Theoretical examination of rational choice and moral reasoning in the context of intimate partner violence” (2012) 45 Australian & New Zealand Journal of Criminology 179 at 179-180, Silke Meyer cites various studies as follows: “Findings from international victim surveys show that IPV affects one in three adult women in most industrialized nations, is a leading cause of injuries to women of reproductive age and is associated with 60% of homicides involving a female victim”.

The criminal justice response to domestic abuse of women has historically focused on discrete acts of physical violence.<sup>8</sup> There is increasing recognition, however, that woman abuse is a “course of conduct crime”<sup>9</sup> in which episodic physical violence is only one mechanism of subjugation of women by abusive men. Overt and subtle threats of violence, as well as emotional and psychological abuse, threats to take custody of children, financial control, and isolation of women from family, friends, employment and other networks of support, create a continuum of terror by which abusive men dominate and control their female partners. Threats are often used to prevent women from leaving a relationship (if you leave I will kill you or your child), to isolate women from other people in their lives (you’ll “get it” if you visit your family or friends), to prevent women from reaching out to police and social services (don’t you dare call police, or if you call the police, you will pay), and to keep women in a constant state of uncertainty and fear. The Ontario Court of Appeal recognized this fact in *R v Bates*:

Crimes involving abuse in domestic relationships are particularly heinous because they are not isolated events in the life of the victim. Rather, the victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender.<sup>10</sup>

This article examines the Manitoba Court of Appeal decision in *R v O’Brien*<sup>11</sup> which is currently under appeal to the Supreme Court of Canada.<sup>12</sup> In *O’Brien*, the accused threatened to kill his

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<sup>8</sup> This is probably true of the criminal justice system generally, which does not respond well to the crimes that occur in the context of ongoing relationships. See e.g. Tamara L Kuennen, “Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence” (2010) 2 Brigham Young University LR 515; Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (New York: Oxford University Press, 2007) [Stark, *Coercive Control*]. More generally, see Mark Kelman, “Interpretive Construction in the Substantive Criminal Law” (1981) 33 Stanford LR 591, who discusses this tendency of the criminal law to focus on the narrow time frame of the acts in question.

<sup>9</sup> Stark, *Coercive Control*, *ibid* at 379; see also Evan Stark, “Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Assymetry in Domestic Violence” (2006) 12:11 Violence Against Women 1019 [Stark, “Commentary on Johnson”] at 1019-21.

<sup>10</sup> *R v Bates*, [2000] OJ No 2558, 134 OAC 156.

<sup>11</sup> *R v O’Brien*, 2012 MBCA 6 [CA Judgment].

<sup>12</sup> The case will be heard on 6 December 2012.

intimate partner when she told him she was going to have an abortion. After a brief summary of *O'Brien*, our analysis will make two central points. First, we argue that in intimate relationships, threats of death and bodily harm are a form of domestic violence, often used by men in concert with physical violence and other forms of intimidation to control and dominate women. The Canadian criminal justice response to charges of uttering threats in intimate partner relationships must fully account for the cumulative, ongoing and dynamic nature of abuse, as well as abused women's complex and varied responses to abuse. Second, we examine the history of s.264.1 of the *Criminal Code* and the case law to argue that the courts in *O'Brien* have applied the elements of the offence improperly and in a manner that is inconsistent with the statutory language and legislative intent. In so doing, the judgments incorrectly burden abused women with testifying to their fear in response to threats by their abusers, despite the fact that such evidence is unnecessary to prove the offence. This error of law reflects the continued privatization of domestic abuse and violence against women more generally. The idea that male violence against women is a private intimate matter between the couple in which the state should be hesitant to intervene has historically hindered state responses to domestic violence.<sup>13</sup> Further, compelling abused women to testify to their fear risks exposing women to increased physical violence and threats and ignores the complex considerations which drive abused women's decision to co-operate in the prosecution of their partners or to support their defence.<sup>14</sup>

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<sup>13</sup> See Frances Olsen, "Constitutional law: Feminist critiques of the public/private distinction" (1993) Const Comment 319 at 6 for a review of literature demonstrating that domestic violence has historically not been vigorously prosecuted because it was seen as a "private" family matter. See also Catherine Moore, "Women and Domestic Violence: The Public/Private Dichotomy in International Law" (2003) 7 International Journal of Human Rights 93; Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in Susan Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 87.

<sup>14</sup> It is beyond the scope of this paper to assess the complex arguments for and against "no drop" policies in the prosecution of domestic violence. For critiques of these policies see e.g. Kuennen, *supra* note 8. Kuennen criticizes no drop policies for failing to take into account the complex relational factors that go into a woman's decision regarding prosecution. See also Lisa Mills, *Insult to Injury: Rethinking Our Responses to Intimate Abuse*

## **2. *R v O'Brien***

At the time of the alleged offence, O'Brien was incarcerated for assault and uttering threats. His criminal record included convictions for uttering threats, assault and assault with a weapon against two former intimate partners. O'Brien called his partner,<sup>15</sup> AW, from a prison phone. During the call, she told him that she was pregnant and that she was scheduled to have an abortion. The accused attempted to persuade her not to have an abortion. When she refused to accede to his request, the accused became increasingly angry and, among other statements, said the following to her:

- I'm going to kill you, man.
- I mean it, man. Watch, man. I'll be, on the 25<sup>th</sup>, on the 25<sup>th</sup> you're getting a bullet in your fucking head you fucking little whore, man, o.k.? O.k.. And the guards just heard me so I'm probably going to get charged for that. So I'm going to fucking kill you you little bitch when I get outta here man. O.k., you fucking hear me? You're dead, you fucking whore. I mean it man. Watch your windows. I'm going to shoot your windows out, bitch.
- You're going to fucking be dead when I get outta here if you fucking keep talking shit.
- I fuckin' mean it. I'll put a bullet right in your fuckin' head, you fuckin' little whore, man, don't fuckin' be stupid, man. You kill my baby, I mean it, man. Watch. You'll be..You won't even get a chance to get skinny man. You won't even get a chance. Watch man. I fuckin' mean it. Who's gonna stop me from killin' you, man? Who's

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(Princeton: Princeton University Press, 2003); Leigh Goodmark, *A Troubled Marriage, Domestic Violence and the Legal System* (New York: New York University Press, 2012); Erin L. Han, "Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases" (2003) 23 BC Third World LJ 159. A central part of these latter critiques is the concern with the denial of women's autonomy and agency and the replication of male disempowerment and coercion of women by the state. In contrast, proponents argue that no-drop policies work against longstanding justifications for inaction and create credible threats of prosecution for batterers. See e.g. Angela Corsilles, "No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?" (1994-1995) 63 Fordham L Rev 853; Kalyani Robbins, "No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?" (1999-2000) 52 Stan L Rev 205; and Cheryl Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 Harvard L Rev 1849.

<sup>15</sup> It is not clear from the evidence whether O'Brien and AW were former or current intimate partners.

gonna stop me?

- You're telling me you're gonna fuckin' kill my kid and shit, I wanna talk to you. I'm trying to fuckin'..I wanna fuckin'..Maybe that's what it is cuz I'm not calling you and shit man. And because I beat you up and shit.<sup>16</sup>

As the accused predicted, prison officials reported the conversation to the police and O'Brien was charged with two counts of uttering threats and two counts of breach of probation. AW was compelled to testify by the Crown.<sup>17</sup> She testified that she wasn't "worried about it" and "that's the way he normally talks".<sup>18</sup> On cross examination she agreed that she was "not personally scared" and that the accused "runs at the mouth a lot", "says a bunch of garbage sometimes", "says trash talk" and "was just being loud and belligerent...and that's all it was".<sup>19</sup> She also testified that her fourth child, present in the courthouse during the trial, was the baby fathered by O'Brien.<sup>20</sup>

The trial judge acquitted the accused on all counts on the basis that, while the *actus reus* of threatening had been established, the testimony of the complainant left her with a reasonable doubt that the accused had intended that his words be threatening or intimidating. The trial judge conceded that objectively the words were concerning, given the context in which they were made, the tone of voice and the fact that they were repeated. However, she put a great deal of

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<sup>16</sup> *R v O'Brien*, 2012 MBCA 6 (Factum of the Appellant) at paras 8, 10; CA Judgment, *supra* note 11 at paras 6, 7.

<sup>17</sup> AW's testimony was extremely brief. The Crown asked her where she lived; the number of children she had; confirmed that AW's testimony was compelled; asked AW to identify herself and O'Brien as the voices on the recorded telephone call; asked whether AW knew why O'Brien had called on the day in question; confirmed that AW had said on the call that she wanted O'Brien "out of her life"; and asked how "being on the receiving end" of the threat made AW "feel". The Crown did not follow up with any further questioning in response to AW's testimony that she wasn't "worried" about the threat. The transcript of the Crown's direct examination is approximately 2 ¼ pages and the transcript of the cross examination by defence counsel is approximately 2 ½ pages long. Transcript of Proceedings, April 7, 2011 ["Trial Transcript"].

<sup>18</sup> *Ibid* at p 8, lines 28-32, p 9, lines 29-34 and p 10, lines 1-11; see also CA Judgment, *supra* note 11 at para 11.

<sup>19</sup> *Ibid* at p 9, lines 29-34, p 10, lines 1-11, p 11, lines 6-9; CA Judgment, *supra* note 11 at para 11.

<sup>20</sup> *Ibid* at p 9, lines 24-28.

weight on the fact that AW testified that she did not take them seriously. After finding that the *actus reus* was made out, the trial judge continued:

So I have to consider the evidence of Ms. [W] when I consider the mental element or the *mens rea*. Normally the *mens rea* is taken from the words of the accused, absent any explanation from the accused, and as I pointed out at the outset you have chosen not to testify, as is your right. But the evidence in this case is somewhat unusual in the sense that Ms. [W] has told the court that she was not concerned about the threats, that you shoot your mouth off, if I can use the vernacular, that she did not want you charged, she did not take the threat seriously. And so it is incumbent, and the court is required, to consider the words in the context of the evidence of Ms. [W], and when I do so, despite the fact that I am actually quite concerned about the *actus* of the offence, the comments, the words, *I must say that I do have a reasonable doubt about the mental element of the mens rea of the offence because of the evidence of Ms. [W], the fact she did not take them seriously, and as I pointed out at the outset it is incumbent upon the Crown to prove all elements of the case beyond a reasonable doubt.*<sup>21</sup>

A divided Manitoba Court of Appeal upheld the acquittals.<sup>22</sup> The majority agreed that the *mens rea* requires only that the “accused had the required subjective intent, being that he meant his words to intimidate or to be taken seriously” and that “it is clear that the test is not whether the person who is the subject of the words uttered by the accused felt threatened, as it is not necessary for the Crown to prove that the person even had knowledge of them”.<sup>23</sup> The majority also held that where the subject of the alleged threats is aware of the threat, his or her evidence “is not to be ignored” and his or her testimony “forms part of the context within which the words were uttered and must be considered as part of the circumstances that will determine whether a reasonable person would find that the words *were meant to intimidate or be taken seriously*”.<sup>24</sup>

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<sup>21</sup> CA Judgment, *supra* note 11 at para 12.

<sup>22</sup> *Per* Beard, MacInnes JJA, Steel JA dissenting.

<sup>23</sup> CA Judgment, *supra* note 11 at para 28.

<sup>24</sup> *Ibid* at para 29, emphasis added.

The Crown had argued before the Manitoba Court of Appeal that the trial judge erred by ignoring the evidence and context of domestic violence. The majority dismissed these arguments for several reasons. It found there was insufficient evidence of domestic violence, as there was nothing on the record other than the accused's admission in the phone call that he beat her up. The majority stated that on a fact specific review of this case, which is "very dependent on seeing and hearing [AW] testify,"<sup>25</sup> AW was "taunting" the accused and her voice on the phone calls showed no hesitation or fear.<sup>26</sup> The Court further held that "there was no evidence to suggest that [AW] was afraid of the accused, or that she was testifying as she did to protect herself or anyone else from future violence".<sup>27</sup> Finally, the Court also noted that the trial judge was an experienced judge who frequently heard cases of domestic violence and that she would "doubtless, have been alive to any concern as to whether [AW]'s evidence was, or could have been, affected by being the victim of domestic violence such that she was not expressing her true interpretation of the accused's words".<sup>28</sup>

In her dissenting judgment, Steel JA held that the accused's words were not ambiguous or careless; they were not spoken in jest, but were spoken seriously, with the accused himself acknowledging that criminal charges could result.<sup>29</sup> She reasoned that whether or not AW provoked the accused, "the law does not sanction threats to kill as a method to convince a woman to carry a pregnancy to term".<sup>30</sup> She persuasively concluded that:

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<sup>25</sup> *Ibid* at para 49.

<sup>26</sup> *Ibid* at paras 5, 44.

<sup>27</sup> *Ibid* at para 45.

<sup>28</sup> *Ibid* at para 46. Our view, discussed below, is that even if A.W. had testified that she was afraid, that would not have told us much about the accused's intention; rather, it would have told us that the words were perceived as threatening, which we argue goes to *actus reus* not *mens rea*.

<sup>29</sup> *Ibid* at para 62.

<sup>30</sup> *Ibid* at para 64.



... it does not matter if this particular accused is an individual with an explosive temper who often makes threats that are not then carried out. The fact “[t]hat’s the way [the accused] normally talks” does not legitimate the threats. It does not matter whether the accused intended to carry out his threats. It does not matter if the recipient of those threats did not in fact feel intimidated. If the accused intended to intimidate the complainant or instill fear in her when he uttered the threats, then he intended them to be taken seriously and should be sanctioned accordingly.<sup>31</sup>

### 3. Analysis:

#### i) *Threats as a form of domestic violence*

Threats of death or bodily harm in intimate relationships are a form of domestic violence against women. The United Nations’ 1993 *Declaration on the Elimination of Violence Against Women* defines domestic violence as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, *including threats of such acts*, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>32</sup> In Canada, numerous provincial domestic violence statutes include threatening within the definition of domestic violence.<sup>33</sup> The prohibition against criminal harassment, which includes threatening behaviour as one of four forms of harassment, was added to the *Criminal Code* in 1993<sup>34</sup> “as a specific response to violence against women, particularly to domestic violence

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<sup>31</sup> *Ibid* at para 67.

<sup>32</sup> *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UNGAOR, Supp No 49 at 217, UN Doc A/48/49 (1993). Statistics Canada indicates that this definition has been widely accepted by the international community. Its study of domestic violence explicitly includes threats of violence as a form of physical violence. *Measuring Violence Against Women*, *supra* note 1 at 8-9.

<sup>33</sup> *Protection Against Family Violence Act*, RSA 2000, c P-27, s 1(e)(ii); *The Domestic Violence and Stalking Act*, CCSM, c D93, s 2(1.1)(b); *Protection Against Family Violence Act*, SNWT 2003, c 24, s 2(b); *Family Violence Protection Act*, SNL 2005, c F-3.1, s 3(1)(c); *Domestic Violence Intervention Act*, SNS 2001, c 29, s 5(1)(b),(e); *Victims of Domestic Violence Act*, SS 1994, c V-6.02, s 2(d)(ii); *Victims of Family Violence Act*, RSPEI 1988, c V-3.2, s 2(2)(c), (e), (f); *Family Violence Protection Act*, RSY 2002, c 84, s 1.

<sup>34</sup> *An Act to amend the Criminal Code and the Young Offenders Act*, RS 1993, c 45 s 2. See *Criminal Code*, RSC 1985, c C-46, s 264.

against women”.<sup>35</sup> Government of Canada and provincial government publications across the country include threats in their definitions or descriptions of intimate partner abuse.<sup>36</sup> A federal Department of Justice Family Violence Initiative publication on “spousal abuse”, for example, recognizes that “there are many different forms of spousal abuse, and a person may be subjected to more than one form” and that spousal abuse includes “using criticism, *verbal threats*, social isolation, intimidation or exploitation to dominate another person”.<sup>37</sup>

In cases involving intimate partners, the offence of uttering threats under s 264.1 of the *Criminal Code* must be understood in this context. Threats of death and bodily harm in intimate relationships are often part of a constellation of behaviours which seek to control the choices and actions of the women involved. Threats constitute a form of abuse in a number of ways. First, they play a particularly powerful role in the domination and control of abused women through intimidation and fear and by attacking women’s self-worth and self-esteem (e.g. “I can do what I want to you, no one will help you, no one will believe you”). Section 264.1(1) of the *Code* prohibits the use of threats as a mechanism for instilling fear and exercising control over the person threatened. The Supreme Court of Canada described the purpose of s 264.1 in *R v McCraw*:

Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her

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<sup>35</sup> Department of Justice Canada, *Criminal Harassment: A Handbook for Police and Crown Prosecutors* (Ottawa: Minister of Justice, March 2002) at 25 [*Criminal Harassment Handbook*]; Isabel Grant, Natasha Bone & Kathy Grant, “Canada’s Criminal Harassment Provisions: A Review of the First Ten Years” (2003) 29 *Queens LJ* 175.

<sup>36</sup> *Criminal Harassment Handbook*, *ibid* at 25; Alberta Justice Communications, *Domestic Violence Handbook for Police and Crown Prosecutors in Alberta* (Edmonton: Alberta Ministry of Justice and Solicitor General, February 2008) at 11, 29, 70 [*Alberta Domestic Violence Handbook*]; OHSCO, “Domestic Violence Doesn’t Stop When You Go to Work: How to get Help or Support a Colleague who may Need Help” (Toronto: Occupational Health and Safety Council of Ontario, February 2010) at 2; Nova Scotia Domestic Violence Prevention Committee, *Report of the Domestic Violence Prevention Committee* (Halifax: Government of Nova Scotia, 2009) at 4.

<sup>37</sup> *Spousal Abuse Fact Sheet*, *supra* note 7.

objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the achievement of the goals sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.<sup>38</sup>

The power of threats in abusive relationships should not be underestimated. Abusive men do not necessarily use frequent physical violence to control their female partners. As criminologist and expert on battered women, Professor Evan Stark, notes, “[i]ntimidation can establish a regime of control even when the victim has not been assaulted...In coercive control the idea of physical harm implanted in the victim’s mind can have more devastating effects than actual violence”.<sup>39</sup>

Research by sociologist Michael P. Johnson on “intimate terrorists” (who deploy violence to control their partners<sup>40</sup>) reveals that while severe physical violence and injury are more likely to occur and escalate in the context of intimate terrorism, this is

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<sup>38</sup> *R v McCraw*, [1991] 3 SCR 72 at para 24 [*McCraw*].

<sup>39</sup> Stark, *Coercive Control*, *supra* note 8 at 251. A recent study on women’s perceptions of their safety after police intervention for domestic violence concluded: “It is not the violence itself that causes women to feel in danger, but rather the meaning of the violence and the context in which the violence occurs with battering, lethality threats, and sexual violence holding particular meaning.” Melissa E Dichter & Richard J Gelles, “Women’s Perceptions of Safety and Risk Following Police Intervention for Intimate Partner Violence” (2012) 18 *Violence Against Women* 44 at 57.. Battering is defined (at 46) as “a pattern of violence used to gain coercive control over the victim; through violence and threats of violence, the batterer establishes dominance in the relationship and decreases the victim’s independence”.

<sup>40</sup> Michael Johnson’s work identifies three major typologies of intimate partner violence: intimate terrorism, where the violent perpetrator uses violence in combination with a variety of other coercive control tactics in order to attempt to take general control over his partner; situational couple violence, where physical aggression does not involve a pattern of coercive control and which may be rooted in anger management, substance abuse, or a whole variety of possible dynamics and factors; and violent resistance, which is the violence engaged in by many of the women who are entrapped in a relationship with an intimate partner. Johnson also notes that there may be a fourth type of intimate partner violence, mutual violent control, which involves two partners fighting for control of each other, but notes that “it shows up only in very small numbers in most samples, and there is considerable controversy regarding its very existence.” See Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Boston: Northeastern University Press, 2008) [Johnson, *Domestic Violence*] and Michael P Johnson, “Langhinrichsen-Rolling’s Confirmation of the Feminist Analysis of Intimate Partner Violence: Comment on Controversies Involving Gender and Intimate Partner Violence in the United States” (2010) 62 *Sex Roles* 212 at 212-213 [Johnson, *Langhinrichsen-Rolling’s Confirmation*]. The arguments made in this article would apply to threats uttered in the context of intimate terrorism and situational couple violence, in which threats and psychological abuse can escalate to physical and even fatal violence.

not necessarily the case.<sup>41</sup> Physical violence may not be severe or frequent. In fact, in one study relied on by Johnson, 12% of women experiencing intimate terrorism had never been injured at all and 22% reported being physically assaulted less often than once a year.<sup>42</sup> Moreover, due to the effectiveness of non-physically-violent forms of subjugation and intimidation of battered women, rates of physical violence and injury may decrease over time.<sup>43</sup> Such a decline does not, however, make the relationship any less abusive or dangerous.

Second, the serious role of threats in abusive relationships is revealed by their impact on women who may live for years in a constant state of dread and terror. Abused women report that psychological abuse is often more damaging, and the effects longer lasting, than any physical violence, in part because of its duration and greater frequency.<sup>44</sup> Verbal abuse undermines self-esteem and self-worth in its victims.<sup>45</sup> Other studies

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<sup>41</sup> Johnson, *Domestic Violence*, *ibid* at 29; Johnson, *Langhinrichsen-Rolling's Confirmation*, *ibid*; Michael P Johnson and Janel M Leone, "Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey" (2005) 26 *Journal of Family Issues* 322 at 332-334.

<sup>42</sup> Johnson, *Domestic Violence*, *ibid* at 29.

<sup>43</sup> Stark, *Coercive Control*, *supra* note 8 at 278, citing Minna Piispa, "Complexity of Patterns of Violence Against Women in Heterosexual Partnerships" (2002) 8 *Violence Against Women* 873.

<sup>44</sup> Miriam K Ehrensaft, "Family and Relationship Predictors of Psychological and Physical Aggression" in Daniel O'Leary and Erica M. Woodin, eds, *Psychological and Physical Aggression in Couples* (Washington: American Psychological Association, 2009) at 107; Roland Maiuro, "Sticks and Stones May Break My Bones, But Names Will Also Hurt Me: Psychological Abuse in Domestically Violent Relationships" in K Daniel O'Leary & Roland Maiuro, eds, *Psychological Abuse in Violent Domestic Relationships* (New York: Springer Publishing, 2001) [Maiuro, "Preface"]; Diane R Follingstad et al, "The Role of Emotional Abuse in Physically Abusive Relationships" (1990) 5 *Journal of Family Violence* 107.

<sup>45</sup> Stark, *Coercive Control*, *supra* note 8 at 258-259; Johnson, *Domestic Violence*, *supra* note 40 at 41; Lisa Goodman & Deborah Epstein, *Listening to Battered Women* (Washington: American Psychological Association, 2008) at 18-19. Stark refers to women who report feeling "dead" inside; Johnson refers to social work professor Valerie Chang's book, *I Just Lost Myself: Psychological Abuse of Women in Marriage* (Westport, Conn: Preager, 1996), which bears its title due to the centrality of the loss of self-esteem to the women survivors interviewed in the book. A recent example in Canada is the testimony of Nicole Patricia Doucet, who was charged with counseling to commit the murder of her abusive husband, Michael Ryan. Doucet was acquitted of these charges on the basis of the defence of duress by the Nova Scotia Supreme Court and Nova Scotia Court of Appeal. A Crown appeal of these acquittals is currently pending before the SCC. Doucet testified to the subjugation and loss of any sense of self. For example, she testified that the reason she didn't go to the police after Ryan's sexual and other assaults was that: "I was afraid. I was afraid because of what he would do if I ever refused. I just had to protect Aimee [Doucet's daughter]. I had to protect myself. You keep the peace. If you don't disobey, you're keeping the peace. You don't know what to do. You feel helpless. You feel worthless. You don't even feel like a human being anymore, but you know that you have to do it in order to be safe" (*R v Ryan*, 2011 NSCA 30 at para 21, emphasis added).

indicate that psychological abuse may be a much greater predictor of fear than physical abuse and may cause more emotional harm than physical abuse.<sup>46</sup>

Third, while threats of death or bodily harm are in and of themselves criminal conduct and a form of domestic abuse (particularly when employed as a tactic of control and domination), there is a relationship between threats and intimidation and the escalation of physical abuse and femicide. Psychological abuse (which may include threats) has been described as a “key predictor” of future physical abuse in intimate relationships.<sup>47</sup> Research also indicates that physical abuse rarely occurs in the absence of psychological aggression.<sup>48</sup> Domestic violence risk assessment tools used across North America identify death threats, and in particular threats with a lethal weapon such as a gun, as a significant risk factor for intimate femicide.<sup>49</sup> Attempts to control the autonomy of one's partner also increase the risk of further and potentially more dangerous violence. A comparative study of women killed by their intimate partners in

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<sup>46</sup> Leslie Sackett & Douglas Saunders, “The Impact of Different Forms of Psychological Abuse on Battered Women” (1999) 14 *Violence and Victims* 105.

<sup>47</sup> Ehrensaft, *supra* note 44 at 108, citing KD O’Leary, Slep Smith, & SG O’Leary, “Multivariate Models of Men’s and Women’s Partner Aggression” (2007) 75 *Journal of Consulting and Clinical Psychology* 752; Jacquelyn W White, Lex L Merrill & Mary P Koss, “Predictors of Premilitary Courtship Violence in a Navy Recruit Sample” (2001) 16 *Journal of Interpersonal Violence* 910; see also K Daniel O’Leary, “Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence” in K Daniel O’Leary & Roland Maiuro, eds, *Psychological Abuse in Violent Domestic Relationships* (New York: Springer Publishing, 2001), 3-28 [O’Leary, *Psychological Abuse*].

<sup>48</sup> Maiuro, “Preface”, *supra* note 44 at xii; O’Leary, *Psychological Abuse, ibid*; Kris Henning & Lisa M Klesges, “Prevalence and Characteristics of Psychological Abuse Reported by Court-Involved Battered Women” (2003) 18 *J Interpers Violence* 857.

<sup>49</sup> Department of Justice, *Inventory of Spousal Violence Risk Assessment Tools Used in Canada* (Ottawa: Department of Justice, 2009), citing J Campbell, *Danger Assessment* (2004), available online at <[www.dangerassessment.org](http://www.dangerassessment.org)>; J Campbell et al, “The Danger Assessment validation of a lethality risk assessment instrument for intimate partner femicide” (2009) 24 *Journal of Interpersonal Violence* 653. See also Domestic Violence Death Review Committee, Death Risk Factor Coding Form, *Eighth Annual Report* (Ontario: Office of the Chief Coroner, 2010) [DVDRC]

the United States concluded that a “highly controlling” abuser, combined with separation, increased an abused woman’s risk of fatality ninefold.<sup>50</sup>

Threats of death and bodily harm by intimate partners or former intimate partners, therefore, should not be approached as discrete acts or isolated incidents, nor normalized as the way a man usually speaks to his partner. Rather, such threats should be understood in the context of the dynamics of abusive relationships. As Professor Stark argues:

The emphasis on discrete acts of violence contrasts markedly with experience-based accounts where battered women report abuse is “ongoing”; includes a pattern of intimidation, isolation, and control, as well as assault; and exacts high levels of fear and entrapment even when violence has stopped.<sup>51</sup>

An incident-specific response to domestic violence by the criminal justice system not only fails to recognize the cumulative nature and seriousness of a threat or series of threats in creating conditions of fear and entrapment for the abused woman, but also may contribute to her subjugation. Stark points out that when an incident-specific approach to woman abuse is used by the criminal justice system (and other services providers like medical personnel), “the oppression battered women experience is disaggregated, trivialized, normalized, or rendered invisible...”<sup>52</sup> In response to the criminal law’s focus on discrete incidents of physical violence, Stark observes that “because the vast majority of domestic violence involves ‘minor’ assaults (e.g. pushes,

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<sup>50</sup> Stark, “Commentary on Johnson”, *supra* note 9 at 1022-23; Stark, *Coercive Control*, *supra* note 8 at 276-277, citing Nancy Glass, Jennifer Magaello & Jacquelyn Campbell, “Risk for Intimate Partner Femicide in Violent Relationships” (2003-2004) 9 *DV Report* at 1, 2, 30-33.

<sup>51</sup> Stark, “Commentary on Johnson”, *supra* note 9 at 1020.

<sup>52</sup> Evan Stark, “Rethinking *Coercive Control*” (2010) 15 *Violence Against Women* 1510 [Stark, “Rethinking *Coercive Control*”].

shoves), when the law requires police and courts to view abuse through the prism of discrete acts of violence, woman battering is downgraded [to a less serious offence]”.<sup>53</sup>

Further, in the context of abusive relationships in which violence or threats of violence are used to create conditions of captivity (referred to in this paper as “intimate terrorism” or “coercive control”), threats not only instill fear, but draw on and reinforce sexist stereotypes to control women and erode their sense of self-worth. The *gendered exploitation* inherent in abusive relationships in which violence is “embedded in the context of general power and control”<sup>54</sup> is lost when viewed in a disaggregated way. A “core tactic” of coercive control is to exploit gendered norms to microregulate and subjugate women in their traditional sex-roles, like cooking, cleaning, caregiving, providing sexual services and reproduction.<sup>55</sup> Violence or threats of violence are employed because the meal wasn’t good enough, the house not tidy enough or the woman didn’t perform “well enough” sexually. Threats may be directed at forcing women to comply with subjugating demands, such as sexual acts which the woman finds degrading or degrading rituals at mealtime. The ultimate purpose of a threat, for example, to choke a woman if a meal is even five minutes late or if she answers the phone on the fourth ring instead of the second ring (microregulation and entrapment), and the impact of this ongoing threat on the woman (captivity), is missed unless the centrality of sexual inequality to the “technology” of control is recognized.<sup>56</sup>

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<sup>53</sup> Stark, “Commentary on Johnson”, *supra* note 9 at 1019.

<sup>54</sup> *Ibid* at 1021.

<sup>55</sup> Stark, *Coercive Control*, *supra* note 8 at 210-211; Stark, “Commentary on Johnson”, *supra* note 9 at 1022.

<sup>56</sup> Stark notes that while women and men may assault their partners in similar ways and with similar motives, he has “never seen a case that involved a female perpetrator of coercive control, and no such cases are documented in the literature.” This is because of the centrality of sexual inequality to why and how abusive men control the woman they abuse. Stark explains that “the asymmetry in coercive control reflects the asymmetric nature of sexual inequality” and that the particularity of coercive control includes its “focus on imposing sex stereotypes in everyday life”. Stark, *Coercive Control*, *supra* note 8 at 205, 377-378.

Domestic abuse must be assessed like a movie, not as a snapshot.<sup>57</sup> Focusing on isolated events fails to contextualize the course of conduct that can have such devastating effects on women. Uttering threats is often central to patterns of control and domination, sometimes enforced through “minor” or infrequent violence and sometimes not enforced with violence at all. Death threats are not acceptable when made out of anger to a police officer, a crown counsel or other third party; their seriousness should not be downgraded when made to an intimate partner, particularly given empirical evidence that threats are often used to control and subjugate. Even where the abuse in a relationship cannot be characterized as “intimate terrorism”, threats are a risk factor for (or a predictor of) physical violence and must be treated seriously, not dismissed or privatized as “that’s just the way he talks to his wife/girlfriend when he gets mad”.

#### ii) *Interpreting Section 264.1*

#### **The Legislation:**

Section 264.1 (1) of the *Code* provides:

Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

- (a) to cause death or bodily harm to any person;
- (b) to burn, destroy or damage real or personal property.

Uttering threats comes under the "Assault" heading in the *Criminal Code*: legislative recognition that uttering threats is a form of assault. This provision in its current form was first enacted in 1985.<sup>58</sup> Prior to 1985, the provision prohibited threats communicated by “letter, telegram,

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<sup>57</sup> Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons From the Transcripts*, manuscript on file with authors.

<sup>58</sup> *Criminal Law Amendment Act, 1985*, RS 1985, c 27, s 38.



telephone, cable, radio, or otherwise”.<sup>59</sup> Prosecutions under this provision led to confusion about what modes of communication were to be criminalized. In *R v Nabis*,<sup>60</sup> the Supreme Court of Canada held that “or otherwise” did not include oral threats. The 1985 provision removed this limitation by clarifying that threatening “in any manner” was criminalized.<sup>61</sup>

The 1985 provision required a threat to cause “*serious* bodily harm”. In 1994 the requirement of “serious bodily harm” was changed to simply “*bodily harm* or death”.<sup>62</sup> At the same time, the offence was changed from an indictable offence to a hybrid offence, allowing for the possibility of prosecution on summary conviction.<sup>63</sup> These changes were brought in at the same time as changes were made to peace bonds that aimed to make peace bonds more effective in responding to violence against women.<sup>64</sup> The changes were implemented as “tools” to prevent and respond to domestic violence<sup>65</sup> and were made shortly after the first criminal harassment provisions were enacted in 1993<sup>66</sup> in response to several high profile cases involving the harassment and murder of women.<sup>67</sup> The criminal harassment provisions in s 264 explicitly require that the complainant be afraid, probably because the conduct involved in criminal harassment may otherwise be legal without the repetition and fear it induces. The uttering threats provision in s 264.1, by contrast, does not require fear, presumably because the behaviour of threatening bodily harm or death is in itself criminal. While no explicit links were made between violence against women and the changes to the threatening provision, we believe that this historical context is nonetheless

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<sup>59</sup> *Criminal Code*, 1953-54, 2-3 Eliz II, c 5.

<sup>60</sup> *R v Nabis*, [1975] 2 SCR 485.

<sup>61</sup> *Criminal Law Amendment Act*, *supra* note 58.

<sup>62</sup> *Criminal Law Amendment Act, 1994*, RS 1994, c 44 s 16, emphasis added.

<sup>63</sup> *Ibid.*

<sup>64</sup> *House of Commons Debates*, 35th Parl, 1st Session, No 103 (4 Oct 1994) at 6521 (Hon Sue Barnes).

<sup>65</sup> *Ibid* at 6522 (Hon Sue Barnes).

<sup>66</sup> I Grant, N Bone & K Grant, *supra* note 34 at 1; *Criminal Harassment Handbook*, *supra* note 35 at 25.

<sup>67</sup> I Grant, N Bone & K Grant, *ibid.*

significant as demonstrating a legislative intent to strengthen criminal laws dealing with violence against women.

Both criminal harassment and uttering threats are gendered crimes in the context of intimate relationships. With respect to uttering specifically, a 2009 Statistics Canada Report indicates:

Similar to patterns seen among physical and sexual assaults, female victims of criminal threats were more often victimized by a spouse or dating partner than were male victims. In particular, the proportion of females (18%) threatened by a spouse or ex-spouse was 6 times higher compared to their male counterparts (3%). The proportion of female victims threatened by a current or former dating partner (12%) was also about 6 times higher than for male victims (2%) of uttering threat offences. In contrast, males (24%) were about twice as likely as females (12%) to be threatened by a stranger.<sup>68</sup>

### **The Elements of the Offence:**

At first glance, it appears simple to break down the elements of the offence in s 264.1(1)(a). The *actus reus* requires that a threat of serious bodily harm or death be uttered, conveyed *or* received by any person. Uttering threats is not a consequence crime in the sense that it need not be shown that the accused caused the victim to be afraid.<sup>69</sup> It is well-established that whether an utterance is threatening is to be assessed by the reasonable objective observer. The *actus reus* was clearly described in *McCraw*:

[T]o determine whether spoken or written words constitute a threat to cause serious bodily harm they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed in the circumstances in which they were uttered. They should be viewed in an objective way and the meaning attributed to the words should be that which a reasonable person would give to them.<sup>70</sup>

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<sup>68</sup> Statistics Canada, *Gender Differences in Police-reported Violent Crime in Canada, 2008* by Roxan Vaillancourt (Ottawa: Canadian Centre for Justice Statistics, May 2010) at 12. Females were victims in 73% of the criminal harassment crimes (at 12).

<sup>69</sup> *R v LeBlanc*, [1989] 1 SCR 1583.

<sup>70</sup> *McCraw*, *supra* note 38 at para 42.

The *mens rea* requires that the utterance or conveyance of the threat be done *knowingly*. This element is more difficult as there are several possible interpretations of this requirement. The most minimal intent requirement would be that the accused knew he was uttering the words and that he knew the nature of the words, *i.e.* the characteristics that made them threatening.<sup>71</sup> The Courts have by and large taken a more restrictive approach to *mens rea*, although it is not clear that the level of intent has been conclusively determined. The Manitoba Court of Appeal, as well as other trial and appellate courts across the country, concluded that s 264.1 requires an intent to instill fear or intimidate or an intent that the words be taken seriously.<sup>72</sup> These three articulations of intent are frequently used interchangeably, despite the potentially different meanings they carry.<sup>73</sup> *McCraw* is usually relied upon for this more restrictive interpretation of *mens rea*, where the Court spoke of an accused using threats to carry out his goal of intimidation.<sup>74</sup>

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<sup>71</sup> Because whether words constitute a threat is a question of law (*McCraw*, *supra* note 38 at para 26), a mistake in this regard by the accused would be a mistake of law. This is analogous to the interpretation of “knowingly” in the obscenity context, where the accused need not know that the material is legally obscene if he or she knows the characteristics of the material that render it obscene. See *R v Jorgensen*, [1995] 4 SCR 55 at para 98. A slightly different analogy could be made to sexual assault. The accused need not know that his nonconsensual touching is of a sexual nature nor that the complainant will perceive it as sexual. See *R v Chase*, [1987] 2 SCR 293 at para 11.

<sup>72</sup> See e.g. CA Judgment, *supra* note 11 at para 24; *R v Bone*, [1993] MJ No 222 (CA) at 4; *R v Giancone*, [2008] OJ No 690 (Ct Justice) at para 10; *R v McRae*, [2010] BCJ No 725 (SC) at para 107, which go so far as to characterize the *mens rea* as specific intent. But to the contrary see *R v Neve*, [1993] AJ No 993 (CA) at para 2 which held that the Crown need not prove a “specific intent” to instill fear or to intimidate, but only an intention that the words be taken seriously. See also cases cited at note 74 below.

<sup>73</sup> Some courts have held that the words “intent to instill fear or to intimidate” or the words “be taken seriously” are to be interpreted disjunctively. See e.g. discussion in *R v Fenton*, [2008] AJ No439 (QB) at paras 46-55.

<sup>74</sup> It is important to note that *McCraw*, *supra* note 38, never said that the offence was one of specific intent nor did the Court state this in *R v Clemente* [1994] 2 SCR 758, a case dealing directly with *mens rea*. Many cases, however, appear to import a specific intent, either explicitly (see citations, *supra* note 72) or implicitly suggesting that intoxication could negate the *mens rea* of uttering. See e.g. *R v BKS*, [2002] MJ No 543 (Prov Ct), *R v Priske*, [1994] YJ No 67 (Terr Ct) and *R v Watchmaker*, [1994] AJ No.100 (Prov Ct), where intoxication was considered as relevant to *mens rea* but rejected on the facts. See also. *R v Standing*, [2007] SJ No 469 (Prov Ct) and *R v Moar*, [1995] MJ No 251 (Prov Ct) where intoxication was one of the factors that contributed to the conclusion that the accused did not have the *mens rea* for uttering.

Where the accused does not testify, as in *O'Brien*, or where we are otherwise uncertain about his intention, we look to his utterances to infer what he was thinking at the time.<sup>75</sup> The Manitoba Court of Appeal recognized this in an earlier decision on uttering threats:

As was pointed out by Cory, J., in *R. v. McCraw* (at p. 82), "[T]he determination as to whether there was such a subjective intent will often have to be based to a large extent upon a consideration of the words used by the accused." Nonetheless, a trier of fact must find the accused to have had the subjective intent, an intent which goes beyond the mere utterance of the words.

Although an inference can be drawn from the words used that the accused intended to instill fear in someone, they must be considered in the context of the circumstances in which they were uttered. The specific intent to instill fear can only be inferred if the circumstances permit. ....<sup>76</sup>

Although the reasonable meaning of his words will inevitably influence the factual determination of what the accused must have been thinking, the inquiry should still be focused on his subjective mental state.<sup>77</sup> Our argument in the following section is not that the high level of *mens rea* is necessarily inappropriate for this offence but rather that this *mens rea* requirement has been misapplied through a blurring of the *actus reus* and *mens rea* requirements. Some confusion about these elements is not surprising, given that whether the words are objectively a threat (*actus reus*) will inevitably be influenced by the trier of fact's assessment as to how the accused meant the words to be perceived (*mens rea*). However, we argue that the consideration of whether the reasonable person would have found the words threatening is strictly an *actus*

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<sup>75</sup> *R v Cooper*, [1993] 1 SCR 146.

<sup>76</sup> *R v KWB* (1993), 85 Man R (2d) 220 (CA) at paras 17-18, cited with approval in CA Judgment, *supra* note 11 at para 22.

<sup>77</sup> In *O'Brien*, after judgment was rendered, the trial judge permitted O'Brien's father to address the Court (although not in the form of evidence). The father made a plea for understanding from the Court, saying that his son suffered from Fetal Alcohol Spectrum Disorder, had sought assistance from his First Nations band, and had effectively been in prison since he was 15. These statements were not tendered as evidence either of any diagnosis of FASD or as being relevant to O'Brien's state of mind when he uttered the threats. It is beyond the scope of this paper to consider how disability might affect *mens rea* in a case where there is evidence presented at trial that the accused did have such a disability.

*reus* inquiry going to the question of whether the words uttered were a threat. It is not necessary to consider this in answering whether the accused knew the words he was uttering were threatening. The cases however, frequently lump together the elements and apply a reasonable person standard to both *actus reus* and *mens rea*, with detrimental consequences for women, as we will explain below.

**j:**

The proposition that *mens rea* is based on a consideration of whether a reasonable person would consider the words threatening demonstrates a misunderstanding of the elements of the offence. Objective tests relying on the reasonable person are usually applied to establish the *mens rea* for negligence offences. The *mens rea* for threatening is clearly not a negligence standard, as evidenced by the use of the word “knowingly”. The reasonable person test simply confuses the *mens rea* analysis. A careful analysis of the case law demonstrates that the role of the reasonable person in uttering threats is in assessing the *actus reus* of whether the words were a threat, not whether the accused meant the words to be threatening. To determine whether he meant the words to be threatening, we look to the actual words and the context in which he spoke them to infer what he must have intended. The test is not what other people (including the victim) thought about his utterances or even what a reasonable person might have thought. The test is whether he *intended* the words to intimidate or be taken seriously, not whether they *were* taken seriously. That can best be determined from an analysis of his actions, not from the responses of the recipient of the threat.

Some of the confusion dates back to a misinterpretation of the Supreme Court of Canada's decision in *R v McCraw*.<sup>78</sup> In *McCraw*, the Court had to address whether a written threat of rape (along with a detailed account of the sexual acts he was going to perform) sent to several women by the accused constituted a threat of “serious bodily harm or death”. The trial judge held that this was not a threat of serious bodily harm or death, and characterized the letters as “more of an adoring fantasy than a threat to cause serious bodily harm”.<sup>79</sup> He held that rape may or may not involve serious bodily harm but that it does not inevitably do so. The Court of Appeal overturned this decision, noting that the object of the threat was to create fear that serious force would be used if the complainants did not submit to sexual intercourse with the accused. Thus, the issue before the Supreme Court of Canada was the *actus reus* of uttering: was there a threat of serious bodily harm? The Court concluded that serious bodily harm was “any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant”.<sup>80</sup>

The Court could have concluded that a threat of rape meets this definition and left it at that. But instead it made a number of other statements regarding the scope of s 264.1(1)(a). First, it acknowledged that threats are an attempt to use intimidation to accomplish one’s objects.<sup>81</sup> The threat need not be carried out; rather it is a tool of intimidation designed to instill a sense of fear in the recipient.<sup>82</sup> Second, relying on its own earlier decision in *R v LeBlanc*,<sup>83</sup> the Court concluded that it is irrelevant whether the accused actually intended to carry out the threat.

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<sup>78</sup> *McCraw*, *supra* note 38.

<sup>79</sup> *Ibid* at para 8. For a critique of the trial judge’s assessment, see Christine Boyle, “Disembodied Sexual Assault: *McCraw v. R*” (1992) 26 UBC L Rev 281 at paras 7-8.

<sup>80</sup> *McCraw*, *supra* note 38 at para 23.

<sup>81</sup> *Ibid* at para 24.

<sup>82</sup> *Ibid*.

<sup>83</sup> [1989] 1 SCR 1583.

Rather, the criminal sanction is aimed at the *intent to instill fear*.<sup>84</sup> Third, the intent to instill fear will be based "to a large extent upon a consideration of the words used by the accused".<sup>85</sup> If, for example, the accused did not understand the words, he may not have the necessary intent.

The Court then went on to consider how to determine if particular words contravene the section. This is still an *actus reus* inquiry, *i.e.* the question is whether there was a threat of (then serious) bodily harm. This is where the reasonable person enters the equation:

The nature of the threat must be looked at objectively; that is, as it would be by the ordinary reasonable person. The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well some thought must be given to the situation of the recipient of the threat.

The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?<sup>86</sup>

At the risk of being repetitive, these words set out the test for determining whether the words were threatening (not an issue in *O'Brien*) not whether the accused meant them to be uttered as a threat.<sup>87</sup> The accused's *mens rea* in *McCraw* was not at issue. Again, at the end of its judgment the Court sums up:

to determine whether spoken or written words constitute a threat to cause serious bodily harm they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed and the

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<sup>84</sup> It is this language that has led some of the courts to conclude that uttering is the specific intent offence even though the use of "knowingly" does not always trigger such a conclusion.

<sup>85</sup> *McCraw*, *supra* note 38 at para 25. Had this instruction been followed in *O'Brien*, the result may well have been different.

<sup>86</sup> *Ibid* at paras 26-27.

<sup>87</sup> As we will argue below, we do not think a reasonable person test is sufficient when dealing with a veiled threat. In other words, where a threat is ambiguous and has particular meaning for the person threatened, an objective reasonable person may not perceive the words as a threat. In that context, it is necessary to look at the circumstances of the relationship between the parties that demonstrate why the words spoken were threatening in the context.

circumstances in which they were uttered. They should be viewed in an objective way and the meaning attributed to the words should be that which a reasonable person would give to them.<sup>88</sup>

The Supreme Court addressed the *mens rea* of s 264.1(1) in *R v Clemente*.<sup>89</sup> There, the accused uttered a threat to his social worker that if he was transferred to another social worker, people would find a dead body in the second social worker's office. The Court held that *mens rea* was the intent to intimidate, or an intent that the words be taken seriously, treating these formulations as virtually interchangeable. In the absence of testimony from the accused, intent will be determined "by the words used, the context in which they were spoken, and the person to whom they were directed".<sup>90</sup> In *Clemente*, a case where the intended victim never heard the threat and could thus not have been frightened, the Court somewhat blurred the *actus reus* and *mens rea*:

Under the present section the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.

*To determine if a reasonable person would consider that the words were uttered as a threat* the court must regard them objectively, and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.

Obviously words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat.<sup>91</sup>

The second paragraph here blurs the role of the reasonable person test – which goes to question of whether there was a threat – with whether the accused meant the words to be threatening. The *McCraw* Court had made it clear that the reasonable person test went to whether the words

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<sup>88</sup> *McCraw*, *supra* note 38 at para 42.

<sup>89</sup> *Supra* note 74.

<sup>90</sup> *Ibid* at para 9.

<sup>91</sup> *Ibid* at paras 12-14 (emphasis added).



constituted a threat, whereas *Clemente* shifts that focus to whether the words were “uttered as a threat”, which appears to refer to *mens rea*, although it may not have been so intended.<sup>92</sup> In our view this is what led to the confusion in *O'Brien*.

Why does it matter whether we use reasonableness as going to *mens rea* or *actus reus*? This use of the objective test in assessing *mens rea* is problematic because in practice it has shifted the attention away from what the accused has done and his intent in doing so to the unpredictable response of the subject of his threat. The factors we look at to infer *mens rea* when an accused does not testify, such as the manner in which he said the words, and the person to whom they were spoken, is about inferring what must have been going on in his head at the time he spoke and keeps the focus on his behaviour and his intent. We consider the person to whom they were addressed, not to assess her fear (since she or he may never have heard the threats) but to consider why the particular person was targeted by the accused for a threat.<sup>93</sup>

The dangers of relying on the reaction of the woman who is the subject of the threat can be seen in the Crown’s factum on appeal to the Supreme Court. To its credit, the Crown does attempt to put threats in the context of domestic violence but we have some concerns about the way in which it does so. The Crown factum suggests that an abused woman might not feel fear because the traumatic impact of abuse can blunt her responses to it.<sup>94</sup> The Crown asserts that AW’s

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<sup>92</sup> *Ibid* at para 13.

<sup>93</sup> The section was correctly applied by the Ontario Court of Appeal in *R v Tibando*, [1994] OJ No 188 (CA) where the Court held, at para 8, that there is no “room to argue on the wording of the present section that it must be shown that the person to whom the threat is addressed is threatened or put in fear”. See also *R v Armstrong*, 2012 BCCA 248 at para 16 [*Armstrong*] where the Court of Appeal describes the trial judge’s decision, which correctly applied the objective test to the *actus reus*.

<sup>94</sup> *R v O'Brien*, [2012] SCCA No 91 (Factum of the Appellant) File No 34694 at paras 65-70; available on the Supreme Court of Canada website at <[http://www.scc-csc.gc.ca/factums-memoires/34694/FM010\\_Appellant\\_Her-Majesty-the-Queen.pdf](http://www.scc-csc.gc.ca/factums-memoires/34694/FM010_Appellant_Her-Majesty-the-Queen.pdf)>.

evidence should be rejected because she was in denial of her fear as a result of Post Traumatic Stress Disorder (PTSD), thus characterizing her response to the threats as unreasonable or pathological. The Crown's approach is problematic in two respects. First, it shifts the legal focus away from the accused's intention to instill fear to the woman who is the subject of the threat. In addition to being wrong doctrinally, as discussed above, it is troubling in that it makes the crime about the woman (the "victim") rather than the behaviour and intention of the (male) aggressor. This slippage has a long (and discredited) history in the sexual assault context where women are disbelieved because of the perceived "inadequacy" of their resistance to male violence.<sup>95</sup> Second, while it is true that some battered women suffer from PTSD, others do not. This argument pathologizes abused women's rational decisions to recant or refuse to co-operate in the prosecution of their intimate partner. In fact, an abused woman may be all too aware of the danger she is in and may make rational calculations about keeping herself safe.<sup>96</sup> One significant reason why women refuse to co-operate is the serious risk that their testimony will lead to escalated coercion and violence.<sup>97</sup> This is particularly true given that the police and the justice system have historically not done a good job of protecting women from further abuse.<sup>98</sup>

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<sup>95</sup> Elizabeth Sheehy, "From Women's Duty to Resist to Men's Duty to Ask: How Far have we Come?" (2000) 20 Canadian Woman Studies 98 at 98-100; Constance Backhouse, "Nineteenth-Century Canadian Rape Law 1800-92" in David H Flattery, ed, *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1981) 200.

<sup>96</sup> See e.g. Robbin S Ogle & Susan Jacobs, *Self-Defense and Battered Women who Kill: A New Framework* (Westport, CT: Praeger Publishers 2002) at 83-84; Julie Blackman, "Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill" (1986) 9 Women's Rights Law Reporter 227 at 229, quoted in *R v Lavallee*, [1990] 1 SCR 852 at para 48. See also Dichter & Gelles, *supra* note 39 at 45, *Alberta Domestic Violence Handbook*, *supra* note 36 at 33-35, 111-112 .

<sup>97</sup> Dichter & Gelles, *ibid*; Barbara Hart, "Battered Women and the Criminal Justice System" (1993) 36 American Behavioural Scientist 624.

<sup>98</sup> Louisa Russell, "What Women Need Now from Police and Prosecutors: 35 Years of Working to Improve Police Response to Male Violence Against Women" (2010) 28 Canadian Woman Studies 28; Elizabeth Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 Canadian Woman Studies 62; Lee Lakeman, *Obsession, with Intent: Violence Against Women* (Montreal: Black Rose Books, 2005); Diana Ginn, "Wife Assault, the Justice System and Professional Responsibility" (1995) 33 Alta L Rev 908. See also Goodman & Epstein, *supra* note 45 at 75 who refer to American studies which report that "20% to 30% of arrested offenders reassault their partners before the court process has concluded or shortly afterward, often as retaliation for involving them in the justice system". They also refer to a National Institute of Justice Study that found "that increased prosecution rates for domestic assault were associated with increased levels homicide among White married couples, Black unmarried

We are not suggesting that a woman's fear is never relevant evidence in considering the elements of uttering threats. In many uttering cases women testify as to how afraid they were. In our view, a woman's fear is evidence supporting the Crown's assertion that there was a threat, *i.e.* that the *actus reus* is established- she is afraid because she feels threatened. Such evidence is particularly important where the threat is veiled or ambiguous as discussed further below. Her lack of fear, in rare cases, could be relevant to *mens rea* if, for example, she supported the suggestion that the accused was joking. As discussed below, we have found no such cases and find it difficult to imagine any. What we are saying is that her fear is not an essential element of the offence and that, correspondingly, a lack of fear should never be determinative in deciding whether the accused meant his words to be intimidating or taken seriously. A police officer may not feel fear if a detained individual threatens the officer's life but this is not determinative of the suspect's intent. As the Ontario Court of Appeal stated in *R v MacDonald*:

it is not an essential element of the offence that the person subjected to the threat actually fear for his or her safety as a result of the threat. Indeed, that person does not even have to know that the threat was made. *The reaction of the person threatened is of evidentiary significance only.*<sup>99</sup>

In the context of a threat made against a police officer, one trial judge put it even more strongly:

"It is trite but true that whether or not the police were actually intimidated or took his threats seriously is irrelevant. What is relevant is the accused intent in saying them".<sup>100</sup>

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couples, and White unmarried women, even when controlling for other relevant variables". Finally, they note that sentencing of domestic offenders tends to be lenient and even when men receive a prison sentence, it is likely to be shorter than for other types of offenders.

<sup>99</sup> *R v MacDonald*, [2002] OJ No 4657 (CA) at para 27 (emphasis added, citations omitted) [*MacDonald*].

<sup>100</sup> *BKS*, *supra* note 74 at para 55.

In our view, a woman's fear or lack thereof is more relevant to whether the utterance was threatening than to whether the accused intended it to be. Moreover, where, as in *O'Brien*, there is an undisputed record of what was said, where the threat is unambiguous and the accused's subjective intent can be assessed from the words used repeatedly, the woman's asserted lack of fear should not be necessary to establish either the *actus reus* or the *mens rea*.

### **Re-Assessing *O'Brien***

The Court of Appeal in *O'Brien* explicitly separates physical violence from threatened lethal violence, concluding that there was no foundation for determining that the complainant was abused, despite the accused's admission that he beat her up. The Court failed to acknowledge that repeated exposure to threats of death or bodily harm is abusive whether or not there is clear proof that he beat her up.<sup>101</sup> We are not arguing that the Crown should have to prove abuse but rather that repeated threatening by a man of his intimate partner is abuse, regardless of whether there is physical violence, and that the interpretation of the elements of uttering threats and the complainant's testimony about the threats, must be viewed in that context.

In our view, both the trial judgment and the majority of the Court of Appeal in *O'Brien* normalize repeated threats of violence in the context of intimate relationships. As Madam Justice Steel recognized in dissent in *O'Brien*, it is untenable to argue that because the accused regularly threatens death or bodily harm, the threats do not meet the threshold of the criminal law. The

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<sup>101</sup> We are concerned about the possibility that occasional violence is not considered sufficient to constitute abuse. See *R v Cairney*, 2011 ABCA 272, where the accused killed the abusive spouse of his cousin. In denying the provocation defence, the Alberta Court of Appeal emphasized the fact that the violence against the cousin had decreased and was only happening once or twice a year, demonstrating a disturbing acceptance of occasional violence against women. While we are not suggesting that the provocation defence should have been successful here, we do believe that the history of violence against the accused's cousin should have been considered as part of the history of the insult.

fact that a woman may have endured many threats does not negate criminal liability any more than it would for a complainant who, “used” to being sexually assaulted by her intimate partner, no longer resists. Repeating threats in most contexts is likely to be seen as inculpatory.<sup>102</sup> There is no reason why the repetition of threats in an intimate relationship should serve as a mitigating factor.

Similarly, to suggest that anger can negate the *mens rea* for uttering threats is inconsistent with Supreme Court of Canada jurisprudence regarding *mens rea* generally.<sup>103</sup> In *Parent*, that Court held that extreme anger, on its own, could not reduce murder to manslaughter by negating *mens rea*.<sup>104</sup> Extreme anger was only relevant if all the conditions of a specific defence were made out (such as automatism or provocation). In *R v MacDonald* the Ontario Court of Appeal correctly characterized the accused’s anger at his wife as supporting his guilt, rather than negating it.<sup>105</sup> In *O’Brien*, extreme anger was translated into “blowing off steam”.

The “blowing off steam” analysis is highly problematic. In *R v Tucker*<sup>106</sup> the accused threatened to kill his common-law spouse by slicing her from ear to ear. The trial judge found that the complainant felt intimidated and expressed fear “but she also indicated that she was not concerned for her safety”.<sup>107</sup> At other points in the judgment, he stressed that the complainant had not been afraid. In other words, she did not think he was going to slice her ear to ear. The

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<sup>102</sup> See e.g. *Armstrong*, *supra* note 93.

<sup>103</sup> *R v Parent*, 2001 SCC 30, [2001] 1 SCR 761.

<sup>104</sup> *Ibid* at para 10: “Anger is not a stand-alone defence. It may form part of the defence of provocation when all the requirements of that defence are met...” See also paras 11-15.

<sup>105</sup> *MacDonald*, *supra* note 99 at para 25. The Court was not explicit about whether the accused’s anger was relevant to *mens rea* or *actus reus*.

<sup>106</sup> *R v Tucker*, [2006] NJ No 179 (Prov Ct).

<sup>107</sup> *Ibid* at para 8.

trial judge thus concluded that the accused was just blowing off steam and did not intend his words to be taken as intimidating.

Although s 264.1 does not require threats of death, both *Tucker* and *O'Brien* involved very serious threats of murder. Both were spoken in extreme anger and, in *O'Brien*, to persuade the recipient to change her mind about having an abortion. As we have established earlier, verbal abuse is but one form of violence used to control women in abusive relationships. It is highly correlated with physical violence. Characterizing death threats as “blowing off steam” or “just the way the accused talks” only in the context of domestic violence normalizes intimate violence.

We recognize that those involved in intimate relationships argue and sometimes say things in anger that they do not mean. Not all such disagreements deserve the intervention of the criminal law and the potential for a criminal record for the threatener. However, the law has drawn the line at threats of bodily harm and death that are meant to intimidate. We know that such threats in the domestic context are predictive of future violence. If we attempt to draw a further line between intimate partners and others and accept that threats are permissible in the former context, we are essentially saying that this kind of abuse is a private, family matter that is unreachable by the law, an approach that has seriously disadvantaged women in the context of domestic violence.<sup>108</sup>

This paper argues that on the facts of *O'Brien*, AW’s evidence of lack of fear was not relevant to *mens rea* (nor would it have been relevant to the *actus reus*). There may, however, be situations where testimony from the recipient of the threat will be necessary to prove the crime. Where

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<sup>108</sup> See work cited *supra* note 13.

there is a dispute about what was said, it may be necessary to hear from the recipient of the threat. Where the threat is of a veiled nature, which may not appear to an objective observer to be threatening but when seen in the context of the relationship takes on special significance, it may be necessary for the complainant to explain that significance to demonstrate why otherwise neutral words could constitute a serious threat in the circumstances.<sup>109</sup> For example, where there is a history of violence between the parties, the complainant may be aware of certain words or cues that signal the onset of violence even though to an objective observer those words might not be seen as threatening. (“You know what will happen when we are alone”.)

Further, the case law is clear that threats made “in jest” are not captured by s 264.1. We think it is important to distinguish threats that were “in jest” and threats that were a result of out-of-control anger or frustration. We were unable to find any cases in the context of intimate partner violence in which the accused advanced a defence that the threat was a “joke” or made “in jest” and we do not find this language helpful in understanding *mens rea*.<sup>110</sup> In theory, in exceptional cases, a complainant’s evidence might support the assertion that the accused was speaking “in jest” as described in the case law, however it is difficult to imagine such a case in reality and

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<sup>109</sup> In this respect, *O’Brien* should have been an easy case. There was a clear record of what was said and the words were unambiguously threatening. For an example of a conviction following a veiled threat in the domestic context see *R v MacDonald*, *supra* note 99, where in the midst of an argument with the complainant, the accused said “You’re next,” words she took to mean he would beat her up again. See also *Armstrong*, *supra* note 93, where the accused repeatedly threatened a corrections worker although in a somewhat veiled manner.

<sup>110</sup> In fact there are few “joke” cases of any sort. The closest we could find involved two young offenders who, as a stunt, wrote a note indicating they were going to shoot others in the school then kill themselves. They realized how foolish this was and threw the note away; however, the crumpled up note was taken to the school principal who called the police. The Court held that they abandoned their initial intention to have the threat taken seriously and, when they discarded it, did not intend for it to be communicated to anyone. See *R v CWP*, 2008 BCPC 477. See also *R v Franklin*, [2009] NJ No 130. When the accused did not get what he wanted from City Hall he said he ought to get a machete or machine gun and spray the place. Two witnesses said they took it as a joke, laughed and one made a joke about getting bullet proof vests, but the complainants took the threat more seriously and told their supervisor who in turn called the police. The trial judge held that no objective person would have taken the comment as an actual threat to cause harm to the complainants. In our view this is a mistaken interpretation- the test is not whether he intended to harm them but whether he intended to intimidate them.

difficult to imagine charges being laid in these circumstances.<sup>111</sup> In *O'Brien*, there was no suggestion that the accused had been “kidding”. There was a clear record of what was said, the words the accused used were obviously threatening, spoken in extreme anger with a raised voice, and intended to interfere with her reproductive freedom. The guards who heard the conversation were concerned enough to take action as the accused explicitly predicted they would. In this respect, *O'Brien* could have been resolved very simply. There was no doubt about the *actus reus*. The trial judge and the Court of Appeal agreed that there was a threat of death. With respect to *mens rea*, the accused stated in the phone call “and the guards just heard me so I’ll (sic) probably going to get charged for that” indicating that he knew his words were threatening. Instead, the trial judge complicated the analysis by considering whether the complainant felt frightened in deciding whether the accused meant to be threatening.

We are concerned, too, that the judgment below was influenced by misperceptions and stereotypes about women who experience abuse. In cases of threats uttered by an intimate partner, it is critical that the criminal justice system avoid typecasting the complainant or creating classes of deserving and undeserving victims. In *O'Brien*, the majority of the Court of Appeal held that “relevant” to the context of domestic violence was the fact that AW was “taunting” the accused, that her tone of voice was not fearful, that she laughed during the conversation, and that “she responded to his words in an equally aggressive and forceful manner when he made the statements...”.<sup>112</sup> That these factors are relevant to whether O’Brien intended his threats to intimidate or instill fear (and also to whether O’Brien may have abused AW) suggests a misapprehension of the dynamics of abusive relationships. As the minority judgment

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<sup>111</sup> *Clemente*, *supra* note 74 at para 8.

<sup>112</sup> CA Judgment, *supra* note 11 at para 46.



of the Supreme Court of Canada in *R v Malott* emphasizes, courts must be careful not to perpetuate any stereotypes of abused women as

victimized, passive, helpless, dependent”, penalizing those who do not fit into the “stereotypical image of the archetypal battered woman” such as those “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>113</sup>

Women’s responses to abuse are varied and complex. Women frequently use a combination of strategies to decrease or cope with abuse,<sup>114</sup> which may include shows of verbal strength or even “violent resistance” in self-defence or as a mechanism for exercising “control in a context of no control”.<sup>115</sup> The Domestic Violence Handbook for Police and Crown Prosecutors in Alberta, for example, lists “self-defence” and “initiating violence as a means of gaining some control” as two of seven “common survival or coping strategies” of abused women.<sup>116</sup> Moreover, women’s responses to abuse may not appear coherent or consistent. They may resort to “subordination of self” (as a form of rational and “active problem-solving”)<sup>117</sup> in some circumstances and “stand their ground” in others, such as reproductive choice.<sup>118</sup> The point being threefold, that: (i) women who experience abuse engage a range of strategies that should not be pathologized, stereotyped or oversimplified; (ii) a woman’s demonstration of strength (verbal or otherwise) does not mean she is not subject to coercive control or abuse; and (iii) a woman’s strength or

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<sup>113</sup> *R v Malott*, [1998] 1 SCR 123 at para 40, concurring minority judgment of L’Heureux-Dubé J (McLachlin J, as she was then, concurring).

<sup>114</sup> Jacquelyn Campbell, Linda Rose & Joan Kub, “Voices of Strength and Resistance, A Contextual and Longitudinal Analysis of Women’s Responses to Battering” (1998) 13 *Journal of Interpersonal Violence* 743.

<sup>115</sup> Stark, “Rethinking Coercive Control”, *supra* note 52 at 1514.

<sup>116</sup> *Alberta Domestic Violence Handbook*, *supra* note 36 at 34. The other five coping strategies listed are: Taking responsibility for the violence; Using alcohol or drugs as a numbing effect; Seeking help; Remaining in the abusive relationship to avoid escalation of violence.

<sup>117</sup> Campbell, Rose & Kub, *supra* note 114.

<sup>118</sup> Campbell, Rose & Kub, *ibid* give examples of women who relied on subordination in some instances to avoid being hit, but who fought in other instances, for example with respect to keeping their jobs or decisions with respect to their children.

resistance should not minimize or justify her partner's threats of death or bodily harm nor be viewed as evidence that he didn't really mean to control or intimidate her. In *O'Brien*, AW's anger or assertiveness should not affect the Court's assessment of O'Brien's subjective intention to coerce AW into one of the most significant life and health decisions any woman can make: having a child. This decision can have physical, psychological, economic and other consequences for AW, but could also tie her to O'Brien for the rest of her life.

We have argued that threats of death or bodily harm intended to intimidate and control women are in and of themselves a form of domestic violence and that evidence of physical violence should not be required before threats are taken seriously. The context of domestic violence is not limited only to cases where there is a proven history of abuse. In addition to the threat itself being a form of violent control, here exerted most troublingly over reproductive decision-making, it is important to remember that abuse in intimate partner relationships can begin at any time. In some cases, abuse even begins when the woman becomes pregnant<sup>119</sup> and, as we have said, threats are often a precursor to and predictor of physical violence.<sup>120</sup> While evidence of past violence in an intimate partner relationship can strengthen the prosecution's case, it should not be necessary or determinative, except perhaps in cases involving veiled threats where the

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<sup>119</sup> In a study reported in Donna E Stewart & Anthony Cecutti, "Physical Abuse in Pregnancy" (1993) 149 Canadian Medical Association Journal 1257, 13.9% of abused pregnant women said that abuse had commenced during pregnancy, and 63.9% of respondents indicated that abuse which had commenced prior to pregnancy escalated once they became pregnant (at 1261). J Cook & S Bewley, "Acknowledging a persistent truth: domestic violence in pregnancy" (2008) 101 Journal of Royal Society of Medicine 358 at 359, report that pregnancy may alter the pattern of assault, with pregnant women more likely to be struck on the abdomen or have multiple sites of injury. In other studies of abuse frequency, 1-2% of women reported that abuse began during pregnancy: Sandra L Martin et al, "Physical Abuse of Women Before, During, and After Pregnancy" (2003) 285 Journal of the American Medical Association 1581 (at 1582); Patricia A Janssen et al, "Intimate Partner Violence and Adverse Pregnancy Outcomes: a Population-Based Study" (2003) American Journal of Obstetrics & Gynecology 1341 (at 1344). Best Start (Ontario's Maternal, Newborn and Early Child Development Resource Centre), "Abuse in Pregnancy," online: <[http://beststart.org/resources/anti-violence/pdf/bs\\_abuse\\_lr\\_f.pdf](http://beststart.org/resources/anti-violence/pdf/bs_abuse_lr_f.pdf)> reports that one in five abused women were first abused during pregnancy, but the original research reference for this figure is not provided.

<sup>120</sup> *Supra* notes 47, 48.

history of abuse may be required to prove the *actus reus*. As well, as noted above, the burden of adducing evidence of past abuse has detrimental implications for women who may not wish to testify to abuse because of fears of escalation of violence, deep feelings of shame, or difficulty recognizing (or believing others will recognize) that even slaps, grabs, shoves and other forms of “minor” violence constitute abuse. In *O’Brien* it appears from the accused’s telephone statement that he had been physically violent toward AW. Ultimately, however, even if there were no history of threats and physical assaults, the absence of prior abuse does not make a repeated threat to put a “bullet in the head” of a woman who intends to terminate a pregnancy any less serious, intimidating, controlling, or criminally culpable.

#### **4. Conclusion**

We do not know whether AW was subject to ongoing violence at the hands of the accused or whether O’Brien’s threats influenced her ultimate decision to carry the pregnancy to term. But we do know that for many Canadian women, ongoing abuse is a serious problem and that threats play an integral role in the coercive control of these women. Any interpretation of s 264.1(1)(a) must take this tragic reality into account. The majority judgment in *O’Brien* essentially creates a new defence for those accused of uttering threats: the *mens rea* of the offence can be negated if the victim testifies that she did not feel threatened. This adds more pressure on women in abusive relationships to testify in support of their abusers, and can endanger their safety even further. Where there is an undisputed record of what was said and where the threat is unambiguous, the complainant’s asserted lack of fear should not be relevant. We are also concerned that men are more likely to be given the “benefit of the doubt” on the *mens rea* issue in

domestic cases in a way that we do not see when police officers or other public officials are threatened. This is particularly troubling given that police officers are generally in positions of considerable power over those charged with uttering threats at them while in custody or under arrest and handcuffed or in the back of a cruiser. Threats directed at police officers by drunk offenders, while a serious matter, are not as likely to exert control over the behaviour of the officer. The opposite is true in the domestic context, where the position of power held by abusive men goes to the heart of the reason for criminalizing the uttering of threats of death or bodily harm: the abuser is using his position of physical, economic and social power to intimidate and control his female partner. We would urge the Supreme Court of Canada to reject any disparities in approaches to uttering cases in light of the central role threats play in male violence against women. Threats in the domestic context require heightened, not downgraded, attention and concern.