CASE COMMENT

Anti-Carceral Feminism and the Exceptionalism of Intimate Partner Violence: A Comment on *Ahluwalia v Ahluwalia*

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Introduction

In recent years, there has been increasing interest in critiquing what Elizabeth Bernstein has called "carceral feminism", or a feminism that seeks to appropriate the vast power of the state to punish and incarcerate for its own feminist ends.[1] Critiques of carceral feminism, concerned with how carceral solutions to gendered harms also subordinate and oppress based on race, gender, sexuality and class, abound across many different disciplines, fields of interest, and levels of intensity.[2] Yet comparatively little attention has been paid to the outer reaches of what we normally think of as constituting the carceral state. One notable exception is the work of Dorothy Roberts, who has described how nominally non-punitive systems like child welfare come to take on punitive characteristics.[3] Following Roberts's expansive approach, this comment considers recent judicial experiments in addressing intimate partner violence (IPV) outside of the criminal law system, how fault in family law proceedings might take on punitive characteristics, and what feminist theorists should do about it.

In *Ahluwalia v Ahluwalia*, courts have had occasion to decide on one possible civil remedy for IPV: a tort of family violence (TFV). At trial, Mandhane J recognized the existence of a tort of family violence.[4] She found that this tort was made out on the facts of the case, and awarded $150,000 in damages, $50,000 of which were punitive.[5] On appeal to the Ontario Court of Appeal (ONCA), Benotto JA reversed Mandhane J's finding of liability based on TFV—finding instead that the husband was liable under the existing torts of battery, assault, and intentional infliction of emotional distress (IIED)—and reversed the award of punitive damages ($50,000).[6] On May 16, 2024, the Supreme Court of Canada granted leave to appeal and their decision is forthcoming.[7]

Analyses of the *Ahluwalia* decisions so far tell only one kind of story about IPV: one which is concerned with the exceptional (or not) character of IPV and the understanding of fault and punishment as a path to solutions for that exceptional violence.[8] I argue that there is another story

1 Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'" (2007) 18:3 differences 128; Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns" (2010) 36:1 Signs 45.

2 See Mimi E Kim, "From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cultural Diversity Soc Work 219; Brenda Cossman, *The New Sex Wars: Sexual Harm in the #MeToo Era* (New York: New York University Press, 2021); Beth E Richie & Kayla M Martensen, "Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice" (2020) 35:1 Affilia 12.

3 Dorothy E Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families – And How Abolition Can Build a Safer World* (New York: Basic Books, 2022).

4 *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 at para 48 [*Ahluwalia* (ONSC)].

5 *Ibid* at paras 112-20.

6 *Ahluwalia v Ahluwalia*, 2023 ONCA 476 at paras 63, 68, 71 and 133 [*Ahluwalia* (ONCA)].

7 *Ibid*, leave to appeal to SCC granted, 41061 (16 May 2024).

8 Mary-Jo Maur, "The Ontario Court of Appeal's Decision in *Ahluwalia v. Ahluwalia* – Prudence? Or Opportunity Missed?" (2023) 42 CFLQ 107; Deanne Sowter & Jennifer Koshan, "Torts and Family Violence: Ahluwalia v Ahluwalia", (15 September 2023), online: <slaw.ca/2023/09/15/torts-and-family-violence-ahluwalia-v-ahluwalia/>.

to be told: the dire inadequacy of material supports for survivors of IPV and family violence, which negatively impacts their ability to continue their lives after violence. This version of the story crafts an anti-carceral feminist argument against exceptionalizing IPV, paying attention to the risks that fault (and punishment more generally) carry for marginalized and "imperfect" victims; and it proposes an alternative distributive framework for understanding the wrongness of IPV in the context of the gendered political economy.

The application of a distributive lens to the problem of IPV clarifies many aspects of the debate over the existence of a TFV or other tort of IPV. It explains the feminist attachment to torts as a remedy for IPV and other forms of family violence because,[9] unlike the criminal law, in which the primary remedy is incarceration of the perpetrator, the remedies afforded in tort can help meet a survivor's material needs. It also explains the ambivalence that anti-carceral[10] feminists might feel when reading the *Ahluwalia* decisions: that they do not tackle the fraught relationship between the civil and criminal remedies for such violence and assumes that more punishment will result in better outcomes for victims' material needs. Applying a distributional analysis to *Ahluwalia* unsettles a slippage we can observe in the decisions: the elision between fault and/or punishment and the adequacy of remedies for IPV.

I. Facts

The facts of *Ahluwalia* are tragic. Over the course of their 16-year marriage, the husband Amrit was coercive and controlling toward Kuldeep, in what the trial judge described as an "extreme breach of trust" by him.[11] Since the separation, both children of the marriage have been estranged from their father. Their relationship was characterized by Amrit's immense psychological control over Kuldeep and punctuated by acts of physical violence. He closely monitored her spending and her communications, restricting who she could talk to and how much money she could spend. Although she maintained some relations with her local Punjabi community, as an immigrant woman Kuldeep was isolated from the familial support networks she might otherwise have had. She lived in fear of Amrit. She was diagnosed with depression and anxiety disorders. There was physical violence on three occasions, one of which involved Amrit strangling Kuldeep. Separately, Amrit is also facing outstanding criminal charges (two counts of assault against Kuldeep, and one count of uttering threats to cause death).[12]

9 See e.g. Camille Carey, "Domestic Violence Torts: Righting a Civil Wrong" (2014) 62 Kan L Rev 695; Sowter & Koshan, *supra* note 8; Pamela Laufer-Ukeles, "Reconstructing Fault: The Case for Spousal Torts" (2010) 79 U Cin L Rev 207.

10 I use "anti-carceral" in an expansive way, including a focus on distributive solutions rather than only what Anna Terwiel calls the "binary choice" of solutions between incarceration and non-incarceration: Anna Terwiel, "What Is Carceral Feminism?" (2020) 48:4 Political Theory 421.

11 *Ahluwalia* (ONSC), *supra* note 4 at para 5.

12 *Ibid* at para 19.

On these facts, Mandhane J "recognized[d] a common law tort of family violence", for which Amrit was liable.[13] Justice Mandhane adapted the definition of "family violence" in the *Divorce Act* to establish the new tort.[14] To establish liability for TFV, the conduct must have been in a family relationship and either: (i) violent or threatening; (ii) constitutive of a pattern of coercive and controlling behaviour; or (iii) caused the plaintiff to fear for their own safety or that of another person.[15]

As a remedy, Mandhane J ordered the payment of significant damages of $150,000 to Kuldeep, $100,000 of which comprised compensatory and aggravated damages, and a further $50,000 in punitive damages.[16] This extremely high award of damages was justified, according to Mandhane J, because of the "extreme" nature of the breach of trust by Amrit.[17] For such a breach, Mandhane J found existing torts remedially inadequate in two ways: first, the recognition of a pattern, rather than simply discrete incidents of violence, is likely to better capture the true (and larger) extent of liability, resulting in higher damage awards;[18] in addition, finding new heads of damage in tort law will supplement the inadequacy of the compensatory awards made in spousal support.[19]

While evidence was accepted of incidences of emotional abuse, financial control, and physical violence, Mandhane J pointed to the *pattern* of such behaviour as distinguishing the proposed TFV from existing torts which can cover much of the same ground, like assault, battery, or IIED. It is not the mere fact of these individual incidents (which might each be tortious on their own) that is important, but rather how these incidents contribute to a longer, ongoing pattern of violence and abuse, both physical and psychological: "In the context of damage assessment for family violence, it is the pattern of violence that must be compensated, not the individual incidents."[20] Nevertheless, in proving the existence of a pattern, "specific examples" of incidents will be required.[21]

The TFV was, however, short-lived. On appeal to the ONCA, Benotto JA reversed the finding of a new TFV, holding that the abuse and violence Kuldeep suffered was already adequately covered by the existing torts of battery, assault, and IIED.[22]

Additionally, on appeal, the respondent survivor Kuldeep proposed the recognition of a tort of coercive control (TCC), rather than the TFV recognised at trial.[23] Still, Benotto JA found there was

13 *Ibid* at para 48.

14 *Ibid* at para 52; *Divorce Act*, RSC 1985 c 3, s 2.

15 *Ahluwalia* (ONSC), *supra* note 4 at para 52.

16 *Ibid* at paras 112, 119-20.

17 *Ibid* at para 5.

18 *Ibid* at para 62.

19 *Ibid* at para 66.

20 *Ibid* at para 54.

21 *Ibid* at para 56.

22 *Ahluwalia* (ONCA), *supra* note 6 at paras 63, 68, and 71.

23 *Ibid* at para 103.

no need for a new TCC, distinct in its recognition of patterns rather than discrete incidents, because existing torts already account for patterns of such abusive conduct, within and without the context of an intimate partner relationship.[24] Existing torts also cover the situation where numerous acts cumulatively constitute a tort.[25] Additionally, the inadequacy of remedies for existing torts does not by itself justify the finding of a new tort.[26]

Justice of Appeal Benotto also rejected Kuldeep's submission that the TCC would be made out without any proof of actual harm caused; all that would be needed was that the conduct "cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm".[27] Going further, Benotto JA cautioned that removing the requirement to show proof of injury would make tort claims easier to bring, which would undermine the efforts made to shift family law away from adversarial, fault-based proceedings to resolution-based ones.[28]

Although no new tort was found to exist, Amrit remained liable under the existing torts of battery, assault, and IIED, though Benotto JA reversed the order for punitive damages ($50,000) because of the lack of reasons given for their award at trial, reducing damages overall to $100,000.[29] However, Benotto JA did not reject the possibility of future awards for punitive damages in similar cases.[30]

II. Feminism Against Exceptionalism

The trial decision in *Ahluwalia* evinces a view of IPV as an exceptional form of violence. The appellate decision does not. For Mandhane J, IPV is exceptional because it is an entirely different kind of violence than similar conduct which takes place outside of the context of an intimate relationship. It is of course not objectionable that, just as the dynamic between intimate partners is *sui generis*, so is the violence and abuse that one partner might inflict on another. Yet it is another thing to argue that because of the intimate context of such violence, it must be separated from other forms of violence and treated differently. The claim I make here is only narrow and cautionary: I seek to point to a few unintended consequences which might arise from accepting the exceptionalism of IPV.

Justice Mandhane argued that because IPV is exceptional, this justifies different remedies (i.e. higher damages awards). In her Honour's view, "the no-fault nature of family law must give way where there are serious allegations of family violence that create independent, and actionable

24 *Ibid* at paras 73-75 (citing *NC v WRB*, [1999] OJ No 3633; *CSF v JF*, [2002] OJ No 1350; *OOE v AOE*, 2019 SKQB 48), and at para 91.

25 *Ahluwalia* (ONCA), *supra* note 6 at para 87 citing *Warman v Grosvenor*, (2008), 92 OR (3d) 663 (Sup Ct).

26 *Ahluwalia* (ONCA), *supra* note 6 at para 52 citing *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24.

27 *Ahluwalia* (ONCA), *supra* note 6 at paras 104-5.

28 *Ibid* at paras 120-22.

29 *Ibid* at para 133.

30 *Ibid*.

harms that cannot be compensated through an award of spousal support".[31] Yet it is not strictly necessary to insist on the exceptionalism of a certain kind of violence to justify higher damages. It does not necessarily follow that reintroducing fault, and its punitive shadow, will enable better material provision for survivors.

Justice Mandhane writes that her proposed TFV would fill a gap in the remedies available under the *Divorce Act*, which otherwise prohibits investigation into fault for the purposes of deciding on spousal support quantum.[32] Yet the assertion that no-fault in family law means a lack of a remedy does not hold much water. IPV can be, and in this case is, dealt with by existing torts and indeed, by the criminal law as well.[33]

This frustration about no-fault is, I believe, misplaced. Instead, what Mandhane J is pointing to is not the lack of a remedy under the *Divorce Act*, but the inappropriateness or inadequacy of the remedies under federal and provincial laws—spousal support[34] and property division[35]—that exist. For Mandhane J, these remedies are inadequate in two senses: first, that they yield insufficient money awards for survivors; and second, that they are not punitive. But these two modes of inadequacy are distinct, such that it is not necessary to have punishment to justify a higher damages award which displaces default equalization principles. Nor does it follow that a new tort must be created to make the remedial armoury available to survivors materially adequate. It is significant that on appeal, Benotto JA did not reverse the compensatory and aggravated damages order despite finding there was no TFV or other IPV-specific tort. Her Honour only reversed the order for punitive damages, which, in any event, was mishandled by the trial judge, who neglected to apply the second part of the two-part test in *Whiten v Pilot Insurance*.[36] There is no suggestion in either decision that a specific tort for IPV would change or displace any of the normal rules for awarding damages for existing torts.[37]

Justice of Appeal Benotto's non-exceptional approach to IPV (the prior misapplication of the *Whiten* test notwithstanding) does not logically need to yield a lower quantum of damages than if the tort for which damages were being claimed was an IPV-specific one.[38] The existing tort of IIED already covers patterns of behaviour and is able to take into account the "context of the relationship

31 *Ahluwalia* (ONSC), *supra* note 4 at para 46.

32 *Ibid* at paras 47-48.

33 Of course, anti-carceral feminists will object to the prioritization of criminal or carceral remedies over other more distributive ones.

34 *Divorce Act*, *supra* note 14, s 15.2.

35 See e.g. *Family Law Act*, RSO 1990, c F.3, s 5(1).

36 2002 SCC 18 [*Whiten*]; *Ahluwalia* (ONCA), *supra* note 6 at para 133.

37 Justice Mandhane specifically noted that the facts in *Ahluwalia* (ONSC), *supra* note 4, satisfied the criteria for the torts of assault and IIED: at paras 103 and 111.

38 *Ahluwalia* (ONCA), *supra* note 6 at para 111. See also at para 86 discussing *McLean v Danicic* (2009) 95 OR (3d) 570 (SC).

and the patterns of controlling behaviour causing harm".[39] It is not necessary to exceptionalize IPV through the finding of a new tort such as TFV in order to justify a higher award of damages: as Benotto JA observed, the quantum of damages under existing torts can be adjusted upwards to reflect "society's abhorrence toward [IPV]".[40]

So, if we accept that exceptionalism was instrumentalized in *Ahluwalia* (ONSC) to justify the award of higher damages, then we can begin to tell a different, distributive story. This distributive approach is preferable for a number of interlocking reasons which are of concern to feminist legal theorists: first, that it does not exceptionalize IPV; second, because of that approach, it does not act as a back door through which fault can re-emerge; and finally, because the insistence on maintaining a no-fault approach to family cases opens up a policy space to explore and experiment with alternative solutions to violence, especially ones that address survivors' material conditions.

Justice Mandhane's decision, sensitive though it was to the profound suffering of survivors of IPV, elides two related but distinct concepts: fault and redistribution. On Mandhane J's account, fault is needed so that redistribution, in the form of higher damages orders, may occur. But this is not necessarily the case. Instead of exceptionalism (and fault), we can reach for a *distributive* perspective to justify higher damages: a greater sensitivity to the real material consequences of leaving abusive relationships, as well as the derived economic dependency[41] of the partner who does not work in the formal labour market (often the wife) on the partner who earns a wage in the market (often the husband), gets us to the same destination, while avoiding exceptionalism's pitfalls.

Mary-Jo Maur argues that if the ONCA had correctly appraised the facts of *Ahluwalia*, they would have found the existence of a tort of coercive control. On her view, this tort is needed to fully capture the distinctiveness of the taking of one partner's autonomy—which is part and parcel of what is wrong about IPV.[42] For Maur, the expressive function of tort law demands the recognition of the exceptionalism of coercive control.[43] It is not that, as some have argued,[44] the use of tort law as an expressive tool is in itself objectionable. It is a source of outrage and horror that IPV is as prevalent in our society as it is. And yet, the risks of insisting on IPV's exceptionalism are too poorly appreciated.

I suggest that feminists should not allow the expressive and condemnatory functions of tort law to occupy the field of concerns about law's response to IPV, especially where this might result in unintended consequences. As Pamela Laufer-Ukeles explains, allowing claims for intentional tortious conduct to be heard at the same time as family law matters might act as a back door through

39 *Ahluwalia* (ONCA), *supra* note 6 at para 107.

40 *Ibid* at para 128.

41 Libby Adler et al, "Gender and Political Economy: Revisiting Distributive Analysis" (2024) 49:4 Signs 701; see also Heidi Hartmann, "The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union" (1979) 8:8 Capital & Class 1.

42 Maur, *supra* note 8.

43 *Ibid* at 125.

44 Kerry Sun & Stephane Serafin, "The Nominalism of the New Nominate Torts" , Ottawa Faculty of Law Working Paper No 2024-16, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4676558#>.

which discussions of fault can return, bringing with it the acrimony that used to characterize family law proceedings in the period before no-fault divorce.[45] Even more than simply a return to more acrimonious proceedings, an emphasis on exceptionalism can serve to introduce punitive logics into family proceedings, an endeavour which brings with it other risks for racialized, Indigenous and sexual minority claimants whose dealings with the legal and carceral systems might already be fraught.

Refusing to exceptionalize IPV does not mean that IPV is not a serious and condemnable form of violence, nor does it negate the fact that it is a type of violence that is done predominantly to women by men, or that its harms have been and continue to be underappreciated.[46] Instead, this feminist refusal is based on different grounds: it is concerned with the co-optation of feminist aims in service of the "domination of a masculinist punitive state".[47]

As Aya Gruber has argued, treating certain harmful conduct as exceptional simply because it involves sex is a slippery slope. Sex exceptionalism instrumentalizes heteronormative, patriarchal ideas of sex in service of a punitive end: a system of mass incarceration which disproportionately affects poor and racialized people.[48] In Canada, this system of incarceration disproportionately affects Indigenous and Black people.[49]

There are other dangers of exceptionalism too. Although on one hand, it is arguable that a specific tort to cover IPV may result in more IPV tort claims being accepted, the reverse is also true. Martha Chamallas cautions that insisting on the exceptionalism of gendered violence, such as IPV, risks singling these claims out for greater scrutiny than other torts, potentially leading to a patriarchal backlash which might result in fewer such claims being accepted.[50] Pinning hope for the end of IPV solely on tailored legal remedies ignores the possibility that such remedies might just as easily be weaponised against survivors of IPV, just as negative myths and stereotypes about the credibility of survivors of IPV have proliferated in courts.[51] More troublingly, exceptional torts might work to reify certain kinds of victims as good and others as bad or undeserving of remedy.

It may be that a TFV or TCC does not bring with it the baggage that sex exceptionalism carries

45 Laufer-Ukeles, *supra* note 9.

46 Statistics Canada, *Family violence in Canada: A statistical profile, 2018*, Section 2. Police-reported intimate partner violence in Canada, 2018, by Marta Burczycka, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 December 2019).

47 Mimi E Kim, "The Carceral Creep: Gender-Based Violence, Rape, and the Expansion of the Punitive State, 1973-1983" (2020) 67 Soc Problems 251 at 256.

48 Aya Gruber, "Sex Exceptionalism in Criminal Law" (2023) 75 Stan L Rev 755; Aya Gruber, "Rape, Feminism, and the War on Crime" (2009) 84 Wash L Rev 581.

49 Statistics Canada, *Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021*, by Paul Robinson et al, Catalogue No 85-002-Z (Ottawa: Statistics Canada, 12 July 2023); Vicki Chartrand, "The quotidian violence of incarcerating Indigenous people in the Canadian state" in Chris Cunneen et al, eds, *The Routledge international handbook on decolonizing justice* (New York: Routledge, 2023).

50 Martha Chamallas, "Will Tort Law Have Its #Me Too Moment?" (2018) 11:1 J Tort L 39.

51 Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35 CJFL 33.

in the criminal context—this remains to be seen. Yet despite the considerable boost for tort's expressive function in *Ahluwalia* (ONSC),[52] I want to disarticulate the argument for a new tort from the argument about remedial (in)adequacy. Note, for example, that Mandhane J's original decision (which emphasized how the tort, through recognizing patterns and a lower threshold of harm, would yield higher damages) has little purchase when the reason for the difference in damages between the trial and appellate decisions was due to an error in applying the test for punitive damages, rather than the decision to find the respondent liable under existing torts.[53] I submit that, for feminists skeptical about the expansion of the punitive state, the double-edged sword that is exceptionalism might be better avoided.

III. Fault and Punishment

The feminist argument against exceptionalism outlined above pays attention to the risks associated with punishment. Fault's slide into punishment is worrying for feminist legal theorists for reasons similar to those which plague exceptionalism: first, that the morphing of fault into punishment carries unintended consequences for victims of IPV and people subordinated because of their gender and/or sexuality; and secondly, that fault and punishment have a tendency to dominate, to the detriment of other kinds of feminist responses—namely attention to distribution.

One notable feature of academic commentary surrounding *Ahluwalia* has been a frustration with the no-fault nature of family law proceedings in situations of IPV. Such frustration is evident in Mandhane J's decision (quoted above)[54] and in Maur's assessment of the ONCA decision: a resolution-based system is "largely a good thing, but it is not always just, especially in abuse cases".[55] (On appeal, however, Benotto JA reaffirmed the no-fault principle and the move towards a resolution-based system in family law proceedings, in order to reduce conflict and enable cooperation between ex-partners.[56])

A recourse to punitive logics abounds in the trial decision. Justice Mandhane drew upon the language of accountability and responsibility to describe some of the justifications for the new tort: "the Mother is entitled to a remedy in tort that properly accounts for the extreme breach of trust occasioned by the Father's violence, and that brings some degree of *personal accountability* to his conduct".[57] Elsewhere, Mandhane J, citing *R v Lavallee*,[58] the leading criminal law decision concerning a battered

52 As noted by scholars like Maur, *supra* note 8. See also Sowter & Koshan, *supra* note 8.

53 *Ahluwalia* (ONCA), *supra* note 6 at para 133.

54 *Ahluwalia* (ONSC), *supra* note 4 at para 46.

55 Maur, *supra* note 8 at 116.

56 *Ahluwalia* (ONCA), *supra* note 6 at paras 120-22. Perhaps unsurprisingly, Benotto JA also affirmed the centrality of the court system in dealing with IPV. See also Deanne M Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor YB Access Just 401; Forrest S Mosten & Lara Traum, "The Family Lawyer's Role in Preventive Legal and Conflict Wellness" (2017) 55:1 Fam Ct Rev 26; Robert E Emery et al, "Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution" (2001) 69:2 J Consulting and Clinical Psychology 323.

57 *Ahluwalia* (ONSC), *supra* note 4 at para 5 [emphasis added].

woman's use of self-defence, explains that the TFV is needed to reflect the "normative standard of personal responsibility in our society".[59] In light of these references, and Mandhane J's reference to the *Criminal Code*'s recognition of the harms of IPV in sentencing,[60] we can observe the creep of discourses of punishment into family proceedings.

Feminists should be wary of this shift. Laura Buckingham's 2007 analysis of 25 tort cases involving spousal violence found that the phenomenon of bringing tort claims for spousal violence coincided with the removal of fault-based grounds for divorce.[61] For Buckingham, the emergence of a tort law remedy filled a gap left by no-fault family law and "offers an important psychological benefit to victims of violence that would be otherwise unavailable".[62]

Yet fault can be used to subordinate based on gender and sexuality just as much as it might be used to alleviate gendered harms. Take, for example, the historic treatment of lesbian women in divorce proceedings. Homosexual conduct remained a ground of divorce even after the introduction of no-fault divorce in the *Divorce Act, 1968*.[63] Despite the confusion of judges who found it difficult to understand homosexual sex between two women, the existence of that ground fed into a sexual politics of respectability which disadvantages and endangers women who engage in non-heteronormative sexual behaviour.[64] Just as with exceptionalism, fault and its resulting blame game can encourage the construction of some survivors as deserving and others as undeserving of relief. The criminal context provides a sample of how this might manifest in family proceedings: Leigh Goodmark found that "imperfect" victims—women who fight back—are criminalized by the same laws which were meant to protect them.[65] Eden Hoffer and C Nadine Wathen also note that further criminalization of IPV carries special risks for racialized women, who might be doubly victimized by the carceral system because of their race.[66]

Feminists do not need to flirt with punishment to achieve an adequate remedy for victims of IPV; it is possible to disarticulate fault from remedial inadequacy. Indeed, the strategy of turning to torts is itself a method of softly questioning why carceral punishment is the remedy of choice for IPV.

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58 [1990] 1 SCR 852.

59 *Ahluwalia* (ONSC), *supra* note 4 at para 70 citing *R v Lavallee*, *supra* note 58 at 872-73.

60 *Ahluwalia* (ONSC), *supra* note 4 at para 70 citing *Criminal Code*, RSC 1985, c C-46, s 718.2.

61 Laura Buckingham, "Striking Back: The Tort Action for Spousal Violence" (2007) 23 Can J Fam L 273 at 304-05.

62 *Ibid* at 310.

63 SC 1968, c 24.

64 Karen Pearlston, "Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the *Divorce Act*, 1968" (2017) 32:1 CJLS 37; Ruthann Robson, *Sappho goes to law school: fragments in lesbian legal theory* (New York: Columbia University Press, 1998) at 24.

65 Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (Berkeley: University of California Press, 2023).

66 Eden Hoffer & C Nadine Wathen, "Criminalizing coercive control may seem like a good idea, but could it further victimize women?", (11 July 2024), online: <theconversation.com/criminalizing-coercive-control-may-seem-like-a-good-idea-but-could-it-further-victimize-women-233407>.

As Camille Carey writes, dealing with IPV as a tort opens new avenues of redress for survivors beyond (although not necessarily in lieu of) incarceration. Dealing with IPV as a tort provides remedies which the criminal system does not: notably, the possibility of monetary damages, which can aid in a survivor's long-term financial security.[67] This approach is better served by setting fault aside and focusing instead on the economic and material challenges survivors face because of IPV.

There will be, no doubt, those who object to this argument because they think that there is something important and necessary about fault *qua* punishment. Yet, as I have argued above, punishment carries unforeseen risks for a feminist political project. The search for who is at fault can subordinate through gender, race or sexuality by allowing for the crystallization of a normative "perfect" victim, just as much as it distracts from survivors' forward-looking material concerns. Following Goodmark, we could pose the question differently: why, when so far punishment has not worked to end IPV, should we support implementing more kinds of punishment?[68]

The focus on fault *qua* punishment often involves foreclosing the possibility of other solutions. Joan Pennell, writing about her work with Indigenous women in Newfoundland and Labrador, has given us one example of a different path not (yet) taken: procedures of restorative justice among kinship networks as a way to address family violence as a community without compelling a reconciliation between partners.[69]

The further question for feminists seeking to resist carcerality is whether an IPV tort is actually a viable anti-carceral strategy. There is no evidence to suggest that *Ahluwalia* should be read as a move to replace criminal law with tort law as the main or sole legal remedy for IPV. Indeed, there are separate and ongoing criminal proceedings against Amrit; and Benotto JA herself stipulated that her decision was not calling into question the continued usefulness of legal remedies for IPV—only that she doubted the necessity of a specific tort for IPV.[70]

Optimistically, torts, whether they are specific to IPV or general, might be understood as a pressure-release valve for an otherwise onward march into further criminalization of IPV. Still, strategies to eliminate IPV must be wary of what Mimi Kim calls "carceral creep", the co-optation and modification of feminist movements against family violence into ones which bolster the "masculinist arm of the state" through mass incarceration, which serves only to continue the subordination of those movements.[71] Indeed, one does not need to be an anti-carceral feminist to note the ability of a patriarchal state to co-opt once-feminist reforms for its own ends, thereby undercutting the original feminist goals.[72] Here, I understand the movement toward reintroducing

67 Carey, *supra* note 9.

68 Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (Berkeley: University of California Press, 2018).

69 Joan Pennell, *A Restorative Approach to Family Violence: Feminist Kin-Making* (London: Routledge, 2022).

70 *Ahluwalia* (ONCA), *supra* note 6 at para 122.

71 Kim, *supra* note 47.

fault into family law as a distraction which serves to jeopardize feminist aims to secure material support for survivors of gendered violence.

IV. A Feminist Experiment in Distributive Analysis

Accepting that exceptionalism and punishment can both carry negative consequences, I want to suggest an alternative experiment for feminists concerned with IPV. This experiment takes a distributive analysis as its centre.[73] In the most basic sense, finding abusers civilly liable for IPV results in a redistribution (i.e. damages) from abuser to survivor. Yet a proper distributive analysis would also call on us to look further afield, to political-economic trends which negatively affect the ability of IPV survivors to live their lives after violence. This is a lens which takes seriously the constraints that money and resources have on the ability of survivors of IPV to leave their abusers and to heal, recover, and flourish.[74]

This approach is distinct, yet not unrelated to the anti-carceral feminist moves described above. A focus on the distribution of resources as an alternative framework to the consequences of violence is downstream of the rejection of carceral solutions to that violence.[75] As Bernstein explains, carceral feminism's danger lies in how it "seeks social remedies through criminal justice interventions rather than through a redistributive welfare state, and that it advocates for the beneficence of the privileged rather than the empowerment of the oppressed".[76]

A different story about *Ahluwalia* could foreground the distributional questions and the feminization of poverty, especially but not limited to survivors of IPV. Scholars who have cited Mandhane J's decision approvingly note that the creation of a new tort, which purports to lessen the proof required and allow for larger damages awards, would help survivors of IPV to support

72 Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010).

73 Adler et al, *supra* note 41.

74 Survivors of IPV routinely face difficulty securing safe housing and good employment: see Premila Chellapermal, *Intersections Between Employment and Safety Among Racialized Women* (Toronto: WomanACT, 2022); WomanACT, *Successful Tenancies: Exploring Survivor's Experiences in the Private Rental Market in Toronto* (Toronto: WomanACT); Nihaya Daoud et al, "Pathways and Trajectories Linking Housing Instability and Poor Health Among Low-income Women Experiencing Intimate Partner Violence (IPV): Toward a Conceptual Framework" (2016) 56:2 Women & Health 208.

75 Jamie R Abrams, "Is Domestic Violence Politicized Too Narrowly?" in Jane K Stoever, ed, *The Politicization of Safety: Critical Perspectives on Domestic Violence Responses* (New York: New York University Press, 2019); Maria Silva D'Avolio, Roxana Pessoa Cavalcanti & Deanna Dadusc, "Anti-Carceral Feminism: Abolitionist Conversations on Gender-Based Violence" in Sohini Chatterjee & Po-Han Lee, eds, *Plural Feminisms: Navigating Resistance as Everyday Praxis* (London: Bloomsbury Academic, 2023); Lola Olufemi, *Feminism, Interrupted: Disrupting Power* (London: Pluto Press, 2020).

76 Bernstein, *supra* note 1 at 137.

themselves materially and financially, allowing them to thrive after the violence inflicted upon them.[77] This is, undoubtedly, something to be celebrated. And yet, as I have argued above, this outcome would be much better achieved without looking back to fault, as Mandhane J's decision seemed to do.

Using a distributive analysis to widen our gaze further allows us to see how the tragedy of *Ahluwalia* takes place against the backdrop of the receding public provision of social goods. Survivors of IPV are but one constituency hurt by the conscription of the "private" realm to provide goods that used to be publicly provided. Neoliberal austerity politics and the ideology of individual responsibility in Ontario have resulted in the withering away of income supports like social assistance which are of high importance to survivors of IPV, many of whom have spent years outside of the formal labour market.[78] Through the operation of clawbacks, spousal support awards reduce, rather than supplement, social assistance payments.[79] The inadequacy of these rates has the effect of encouraging (and perhaps coercing) recipients to seek alternative sources of income, such as a former conjugal partner or poorly paid, precarious work. Troublingly, Janet Mosher has found that the inadequacy of social assistance leads some survivors of domestic violence to return to their abusers for financial support.[80]

These conditions constitute the background against which tragedies like Kuldeep's play out. The path dependency of our current gendered political-economic order means that we do not often ask questions like: why should a survivor of IPV have to sue her abuser to have money in her pocket so that she can buy groceries or pay her rent? Yet this question, and others like it, are critical in the search for a holistic remedy for IPV.

The distributive analysis of IPV does not need to displace other frames—exceptionalism and punishment are but two—through which we can understand IPV. But by placing IPV in the context of the political economy, and particularly a miserly welfare state, we can better address a different set of dire needs faced by survivors of IPV: their material ones. Indeed, Maur is correct when she says that we must be careful to separate claims in family law, which are bounded by the ability of the parties to pay, and damages in tort, which are not subject to that ceiling.[81] Yet even accepting the importance of the condemnatory and denunciatory functions of an extremely large damages award (which is, in any event, only viable when the perpetrator can pay), I would argue that this should not be the only solution we explore.

We might canvass a few other solutions. This is the question taken up by Craig Brown and Melanie Randall, who argue for a publicly funded compensation scheme for victims of IPV and family violence.[82]

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77 Sowter & Koshan, *supra* note 8. On feminized poverty and the politics of distribution, see Margot Young, "Women's Work and a Guaranteed Income" in Shelley AM Gavigan & Dorothy E Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford: Hart, 2010).

78 Peter Graefe, "Social Assistance in Ontario" in Daniel Béland & Pierre-Marc Daigneault, eds, *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective* (Toronto: University of Toronto Press, 2015).

79 Ontario, Ontario Disability Support Program Directive 5.15 (December 2021); Ontario, Ontario Works Directive 5.5 (December 2021). See also *Smith v Smith*, 2008 CarswellOnt 1921.

80 Janet E Mosher, "Intimate Intrusions" in Gavigan & Chunn, *supra* note 77; Goodmark, *supra* note 68 at 41.

81 Maur, *supra* note 8 at 127.

Making analogies to traffic accident victims and homeowner's insurance, Brown and Randall put forward a non-exceptional understanding of family violence which properly locates responsibility for IPV in the social realm, as well as in the individual or private relations. Treating the issue of IPV as a public, social one is imperative to ensure fair remedies for all, regardless of their socio-economic position or that of their abuser. Beyond explicit, publicly funded redistributions like the one Brown and Randall suggest, a feminist distributive analysis of IPV might wonder if a reordering of priorities between legal remedies, both civil and criminal, and redistributive solutions such as social assistance, job training, improved access to healthcare and improved access to housing might serve survivors better.

This time of heightened judicial interest in IPV may also be an apt moment for feminist legal theorists to consider the limits of legal activism and law reform. Such a moment of reconsideration and experimentation is not limited to legal scholarship. In social scientific research, scholars have pointed to a relative lack of inquiry into the effectiveness of solutions and remedies for IPV.[83] Torts and civil legal remedies surely number among them. Following Amna Akbar's suggestion to be sensitive to law's limits in effecting real, radical social change, perhaps it is time for feminist legal theorists to conduct different experiments.[84] One small step in that direction would be to leave fault in family law firmly in the past.

Conclusion

Ahluwalia is a microcosm of the changing landscape of feminist thought on questions of violence, punishment and the political economy. I have argued that feminists should be wary of the movement to reintroduce fault into family law proceedings not only because, as Benotto JA says, it risks putting in jeopardy the gains a less adversarial, more cooperative family dispute resolution system has made, but also because it flirts with a punitive, carceral state. The punitive logic of such an approach, even in family proceedings, holds many dangers for those of us critical of the overreaches of the carceral state.

In a similar vein, the exceptionalism underlying the trial decision and some academic commentary surrounding it must be handled with caution. This is not to say that IPV is less grave or a less serious kind of violence than others. Instead, it is to disturb and unsettle the link many make between the adequacy of legal remedies for IPV, including civil and criminal ones, and the exceptionalism of IPV as a form of gendered violence against women. I suggest what might be a generative reorientation: feminists can understand *Ahluwalia* to also be about an anxiety to secure the fulfilment of IPV survivors' material needs. These needs can and should be disarticulated from a desire to reinstate fault and punishment in family proceedings. A distributive analysis of IPV holds promise as a feminist approach which takes seriously the needs of survivors while refusing to bolster a punitive state apparatus which can revictimize survivors of IPV just as easily as it can protect them.

82 Craig Brown & Melanie Randall, "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30:1 Queen's LJ 311.

83 C Nadine Wathen et al, "A Scoping Review of Intimate Partner Violence Research in Canada" (2024) Trauma, Violence, & Abuse 15248380.

84 Amna A Akbar, "Non-Reformist Reforms and Struggles over Life, Death, and Democracy" (2023) 132 Yale LJ 2497.