

When Self-Defence Fails

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Introduction

Feminist efforts to reform criminal defences to homicide have largely focused on expanding self-defence for women who kill their abusers on the one hand, and constricting defences for men who kill their female partners and former partners on the other. Self-defence is the preferred defence for battered women who kill: it is a complete defence; it conveys that the woman's act was justified; and its elements permit the jury to hear evidence about the experience of battering and the social realities that provide context to the woman's acts.

Yet self-defence may fail. So much depends upon judicial rulings on the evidence offered by the defence. Jurors may not hear all the testimony about the deceased's violence or threats.¹ The woman's claim to self-defence may be hobbled by the fact that she failed to disclose the abuse, seek help or leave the relationship. Women who kill outside of a live confrontation may be denied self-defence even without a formal 'imminence' requirement. And, women's credibility will be challenged by prosecutors who point to evidence of independence or prior violence by the woman to contest whether she was a 'real' battered woman who faced lethal danger or rather a batterer herself or even, as some prosecutors propose, someone who chose homicide as the preferred way out of an unhappy marriage. In addition, even on an expansive reading of self-defence, not all battered women who kill do so in circumstances that are a good fit with self-defence.

For these reasons we turn our attention to other complete defences to homicide that may be available to women who kill an abusive partner. These have attracted less scholarly attention than self-defence or provocation, and an assessment of their potential application to battered women's homicide cases seems overdue. The Victorian Law Reform Commission reference on defences to homicide made brief mention of the possible use of automatism by battered women defendants (2003: para 5.180) but did not consider mental incapacity from that perspective and the final report recommended no change to those defences (2004: 216, 252). Recent reforms in several Australian States that have extended the defences of duress and necessity to murder (consistent with recommendations by the Victorian Law Reform Commission in 2004 and the Model Criminal Code Officers Committee in 1992) and the novel use of duress in a recent Canadian case provide added reasons for this inquiry.

¹ *R v Craig* 2011 ONCA 142.

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