Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence

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The problems associated with defending battered women who kill their violent partners have for some time now been a central concern of feminist legal scholarship. For feminists working in the area of criminal law in particular, there are few issues that have more demonstrated the failure of the legal system to adequately accommodate and reflect women's experiences and which have, therefore, called for sustained analysis and reform.

Not surprisingly, feminist scholars writing in the area have focused on the need to make existing criminal law defences more hospitable to the claims of battered women who kill. A significant amount of that scholarship is directed to self-defence and the need to expand its scope to accommodate the claims of women who kill in a non-confrontational setting. However, the ramifications of expanding the availability of self-defence have not been thoroughly explored and the appropriate limitations of that defence not sufficiently theorised. This does not mean that the interests of battered women who kill are adequately served by the current legal arrangements. It does mean, however, that feminism must engage in a full dialogue with the doctrinal and jurisprudential issues at stake.

The traditional limitations of self-defence

It is perhaps not surprising that a defence the genesis of which lay in a one-off encounter between two strangers of roughly equivalent size and strength (Sheehy, Stubbs & Tolmie 1992:372) might be ill-suited to the claims of battered women who kill in a context of habitual violence. It is not uncommon for battered women to retaliate in what might be termed 'non-confrontational settings', such as when the abuser is asleep or is in retreat (see, for example, *R v Muy Ky Chhay*: batterer killed by defendant while 'dozing or sleeping' on the floor). This scenario makes a self-defence claim problematic for several reasons. First, it is arguable that the threat of harm is no longer imminent and that the woman has failed to avail herself of an opportunity to retreat and deal with the threat by lawful means. Second, the woman's use of lethal force may appear disproportionate in the circumstances.

It should be noted that since the High Court's decision in *Zecevic* v *DPP* neither imminence nor proportionality are specific requirements in the law of self-defence. Further, it is clear that no 'duty of retreat' as such falls on a defendant wishing to make out the defence (*Zecevic v DPP* 653). The jury is simply required to consider whether the accused believed

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on reasonable grounds that it was necessary in self-defence to do what he or she did. This requires both that the belief be genuinely held and that it meet an objective standard of reasonableness. Nevertheless, an apparent absence of imminent harm, an opportunity to flee or recourse to lethal force in circumstances where a lesser response might have sufficed will almost certainly impair the defendant's self-defence claim, as juries are still likely to refer to these considerations when evaluating both the genuineness and reasonableness of the defendant's belief in 'necessity'.[1]

Many feminist scholars have argued that battered women's legitimate claims to self-defence have been unfairly excluded by a doctrine which is interpreted and applied too narrowly (Schneider 1980). Due to the disparities in strength between men and women, it is often not viable for a woman to strike back while an assault is taking place. Knowing that resistance frequently aggravates the anger of batterers, victims of domestic abuse will sometimes wait until there is a lull in the violence before retaliating (Sheehy, Stubbs & Tolmie 1992). Because of her intimate knowledge of the batterer, the woman may be capable of interpreting signs of impending violence that would not be readily apparent to an outsider. Consequently, she may even decide to use force 'pre-emptively', thus appearing on that occasion to be the initiator of violence. The amount of force employed by the woman may also seem excessive to an outsider, but not to the woman who is able to more readily and accurately predict when her partner's abuse might prove lethal.

Since the woman's response will be evaluated against a yardstick of reasonableness, the manner in which that standard is constituted will obviously affect the law's response to her claim. In respect of self-defence, the notion of reasonableness is formulated with reference to the accused's standpoint and her characteristics, rather than those of the hypothetical and abstracted reasonable person (*Zecevic*). Nevertheless, it may be difficult for an outsider to comprehend that her response was reasonably thought by her to be necessary in the circumstances. The incidents which contextualise her fear may span a considerable length of time and involve events that are unwitnessed by others (Sheehy, Stubbs & Tolmie 1992). This is likely to be compounded by a failure to adequately understand the barriers, material and otherwise, which have prevented the woman from terminating the relationship earlier. The jury's difficulty with why she remained with her partner after prior incidents of abuse may lead them to doubt the severity of the abuse suffered by the defendant, and circumspection as to whether the use of lethal force by her was really necessary on this occasion. Thus, the law's inquiry into the availability of self-defence in the case of battered women is likely to focus on the broader question of why she failed to 'exit' the relationship (Mahoney 1992), an issue which is not, in itself, relevant to the lawfulness of the woman's use of retaliatory force on the occasion in question (Stubbs & Tolmie 1995).

The Battered Woman Syndrome

The so-called Battered Woman Syndrome (BWS) emerged as a response to the above constraints, with expert evidence about its features now being regularly called by the defence when battered women are charged with homicide. BWS, which purports to describe the

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1 For example, a jury rejected Marjorie Olson's claim of self-defence in relation to the homicide of her violent husband on the basis of evidence demonstrating significant premeditation by the defendant: 2 October 1996 (Unrept, Vic SC, Hedigan J).

psychological deterioration of recurrently battered women, has proved more controversial within academic circles than judicial ones, with its admissibility now widely accepted by Australian courts.[2] Lenore Walker, the American psychologist whose research is credited with having identified BWS, claims that domestic violence induces a kind of 'learned helplessness', whereby its victims are increasingly disempowered and rendered unable to identify and utilise opportunities to flee the violence (Walker 1979, 1984, 1989). In relation to self-defence the evidence is primarily introduced to buttress the battered woman's claim that she genuinely saw the batterer's death as the only alternative available and that, in the circumstances, this perception should be regarded as reasonable. Such testimony has proved especially important where the woman killed in a non-confrontational setting in which retreat appears to have been an option (see, for example, *Kontinnen*).

The use of BWS evidence has generated a storm of debate in academic circles and, perhaps surprisingly, led to it being criticised with equal vigour from both within and without feminist scholarship. Feminists primarily object to its emphasis on the psychological impediments to escaping an abusive relationship at the expense of material ones (Sheehy, Stubbs & Tolmie 1992:385). Further, they criticise its tendency to privilege the expert's account over the woman's, thus devaluing and distorting her experience of events (Sheehy, Stubbs & Tolmie 1992:384). In addition, concerns have been raised about BWS's tendency to overgeneralise about the experiences of battered women, leading to the creation of a new set of stereotypes about battered women's behaviour and responses (Schneider 1986:200), and about the methodologically flawed research that underpins Lenore Walker's findings (Faigman 1986).

The feminist response

The response of some feminist writers who object to BWS's focus on the woman's psychological deterioration has been to renew emphasis on the life-threatening nature of the batterer's violence, and to affirm the justifiability of the woman's lethal response in the circumstances (see, for example, Stubbs & Tolmie 1994:192). In other words, whereas the concept of learned helplessness seeks to excuse the woman's actions on the basis of putative, or mistaken, self-defence these writers argue that her retaliation was, on an objective view, necessary. One example is Therese McCarthy's recent call for a law which compels a court to have regard to the violent context provided by the batterer's behaviour when a woman is on trial for killing her abusive husband (McCarthy 1994:n27). The aims are to ensure that the batterer's actions are not rendered invisible by expert evidence which medicalises and pathologises the woman's response (McCarthy 1994:144), and to validate the woman's retaliation as objectively necessary, given the context of her partner's violent behaviour.

Whether one favours the BWS approach of arguing self-defence through the testimony of mental health experts, or chooses to focus, as McCarthy does, on the objective danger present in the defendant's circumstances, self-defence is often promoted as the pre-eminent defence strategy for battered women who kill. This emphasis has undoubtedly been produced by both the political imperative of reforming the defence so as to accommodate women's experiences, and the attraction of successfully making out a defence that results

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2 The first Australian court to admit evidence on BWS was the South Australian Supreme Court in *Runjanjic and Kontinnen v The Queen*.

in full acquittal. Such an emphasis is not always appropriate. Self-defence is becoming somewhat overburdened by expectations that are unlikely to bear fruit. While it is vital that battered women's claims to self-defence are given proper recognition and equal treatment by the law, it is also important to recognise the doctrinal limitations which are inherent in that defence, and the difficulties that may result from any attempt to exceed those limitations. While many feminist scholars would understandably like to concentrate on validating the battered woman's lethal response as objectively necessary, we must not be hostile to the reality that battered women kill for a variety of reasons, not all of which can be readily analysed under the rubric of self-defence.

The subjective requirement: an honest belief in necessity

The problems that battered women face in successfully arguing self-defence are often blamed on the law's requirement that her belief in the necessity of a lethal response be *reasonably* held (Schneider 1980). Less attention is paid to the subjective requirement that her belief also be *genuinely* held. The latter is imposed to filter out those defendants who acted for motives other than a need to protect the life of oneself or another. The state of mind which is properly encompassed by self-defence may be distinguished from alternative motives such as anger, revenge or vigilantism.

The manner in which the concept of 'necessity' is understood within the law of self-defence needs to be carefully considered. What exactly is meant by the requirement that she must have believed that her actions were *necessary* to save her life? Are there any limitations — implicit or explicit — which circumscribe the scope of *necessity* and, if so, is it desirable that these limitations be retained? It is important not to simply assume that the mental state of battered women satisfies this subjective test, or to argue that any failure in this regard automatically points to a deficiency in the law's operation.

Other motives

As already mentioned, the law of self-defence is formulated so as to preclude the exoneration of defendants who employ lethal violence for motives, such as anger or revenge, regarded as improper. There is a tendency, though, for some feminist writers to *presume* that battered women employ lethal force for a lawful purpose, and to gloss over evidence to the contrary. Lenore Walker, for example, argues that battered women often retaliate due to losing control of their 'supressed rage' (Walker 1979:69) or to protect their mental health (Walker 1979:41), yet she concluded that women who kill their abusers virtually always do so in self-defence (Walker 1979). Therese McCarthy's recent analysis of *R* v *Raby* indicates that a presumptive approach to self-defence as the appropriate vehicle for exculpation has not abated (McCarthy 1994). McCarthy argues that, had the batterer's violence in that case been rendered more 'visible', then Raby might have been totally exonerated, rather than convicted of manslaughter (McCarthy 1994:150).[3] What McCarthy does not reveal, however, is the actual circumstances surrounding the use of force in that case. These circumstances were summarised by Teague J during sentencing:

> You insisted on being discharged from the hospital. You took a taxi home. The deceased did not let you into the house. You broke a window to get in. The deceased was sitting on

3 Raby was convicted of manslaughter, with the jury apparently accepting the partial defence of provocation. She was sentenced to 28 months jail, with a non-parole period of seven months.

> a chair. You spoke to him. He would not answer. You eased him to the floor, kissed him, and spoke to him endearingly. He swore at you. Said he would leave you, and asked for money. You took up a knife. He laughed. In your dissociated state, you lost control. You stabbed him nine times (*R v Raby* Sentence 748).

The evidence revealed that Margaret Raby did not only wish to remain in a relationship with the deceased, but that she loved him and was made anxious by the thought that he would leave her (*R v Raby* Sentence 746). Naturally such information does not in itself negate self-defence, but in conjunction with the other evidence presented at trial, it is certainly relevant to the question of motive in *Raby*'s case.

It is difficult to see how *Raby*'s case illustrates any deficiencies in the law of self-defence. Certainly, McCarthy points to no evidence which suggests that Raby's final use of lethal force was motivated by a fear for her life. No amount of emphasising the horrendous abuse suffered by Margaret Raby can alter the subjective state of mind which governed her use of force that day. While McCarthy laments that women's experiences are contorted 'to conform to legal categories constructed upon masculinist premises' (1994:145) she similarly subverts Raby's own experiences by ignoring both the circumstances of the killing and the sentiments that Raby expressed about her own husband.

In addition, McCarthy criticises the emphasis placed on Margaret Raby's psychological state, which was described by the expert witnesses at the trial as 'dissociated' (*R v Raby* Sentence 747). However, such a strategy was required by the defence of provocation, which necessitates that the defendant have lost control (*Moffa v R*). It is submitted that, given the circumstances in which the actual killing took place, this defence was the appropriate one. The evidence revealed that the actual threat to which Raby responded was a threat to terminate the relationship, a fact which is not altered by the extreme nature of the violence which she endured. In other words, the background of domestic violence will be a relevant, though not necessarily determinative, consideration.

Further, the use of expert testimony to explain the effects of recurrent domestic violence on individuals should not be judged too harshly. While some commentators, such as McCarthy, express amazement that expert testimony should be required to explain the effects of a phenomenon as prevalent as domestic violence (McCarthy 1994:145), courts now accept that experts can usefully aid the jury in understanding the effects of phenomena with which the layperson has some acquaintance (see *E v Australian Red Cross Society* at 335 per Pincus J). Researchers in the fields of psychology and sociology, for example, regularly engage in the systematic study and analysis of common experiences, the effects of which are not necessarily comprehensible by sheer virtue of their commonality.[4] It may be that myths and stereotypes operate to veil the real nature of some occurrences, and that a measure of 'debunking' is required.[5] It would be surprising if feminists doubted the existence of such myths in relation to domestic violence. Even if the expert's testimony goes to the woman's mental health, it is surely acceptable to affirm that recurrent abuse might endanger one's mental as well as physical well-being.[6] This is not to say that it will always be proper to place the emphasis on the woman's mental state, but that

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4 The need for expert evidence to shed light on human behaviour was emphasised by Wilson J in *Lavallee* at 111.

5 Ian Freckelton (1994) has argued that the function of expert testimony in the context of battered women's trials should be primarily educative, rather than diagnostic.

6 Lenore Walker's research focused on this particular aspect of domestic violence. See also Sheehy (1994:187) who discusses the findings of Dr Judith Herman that the experience of repeated trauma through 'captivity' causes profound damage including loss of the will to live, robotisation and personality erosion.

such a strategy may be appropriate where she has killed in a context of terrible violence, but where her actions resist classification as self-defence.

Imminence reconceptualised

While 'imminence' is not a separate requirement in the law of self-defence, it undoubtedly still informs the central concept of necessity. In other words, it will be difficult to argue that the defendant genuinely (and reasonably) thought that the use of force was necessary in the circumstances if the violence being resisted was not imminent. In such a case, it will usually be concluded that the defendant could have retreated and dealt with the threat by seeking external assistance. Seen in this way, the underlying notion of imminence, which adds a temporal dimension to the idea of necessity, denies the defence to those who employ self-help as a solution to violence. If the woman had time to call the police before being attacked, the jury is likely to regard a lethal retaliation as the woman unnecessarily 'taking the law into her own hands'.

A number of feminists now argue that, in order to properly accommodate the self-defence claims of battered women, either 'necessity' should be divorced from the notion of imminence (Stubbs & Tolmie 1995:143) or imminence should be interpreted so that it is no longer taken to mean immediate (Mahoney 1991:84). This goal is generally shared by proponents of BWS as well as its feminist critics. Whereas the latter are likely to emphasise the *actual* necessity of the woman's response, BWS proponents generally maintain that the woman's *mistaken* belief in the necessity of lethal force should be regarded as reasonable in the circumstances, even if it appears that she had time to retreat (Walker 1979:48ff). Either way, the notion of necessity has become distanced from imminence, and the woman's assessment of her options is judged in the 'long run'. If the woman killed in a non-confrontational setting, it will usually be difficult to maintain that she genuinely regarded her actions as 'necessary' to save her life unless the concept of necessity is understood in an expanded sense. This sense transcends the concept's former connections to an *immediate* threat, and locates the defendant's choices within a broader framework. Her recourse to lethal violence is now prompted by the perceived *inadequacy* of alternative courses rather than their complete nonexistence.

The possibility of locating the battered woman's choices within a broader context of constraint was canvassed in the case of *Lavallee* v *R*, the first Canadian case to admit BWS evidence. In that case, the defendant shot the batterer in the back of the head as he was leaving the room, shortly after he issued a threat to kill her later that night. Writing the majority judgment, Wilson J remarked that the nature of violence against women is such that it is generally inappropriate for women to wait until an attack is under way before retaliating (*Lavallee* at 25). The battered woman's situation may be likened to that of a hostage who has been told by her captor that she will be killed in the near future. It would be permissible for retaliatory violence to be used by the hostage at any point after the threat had been issued (*Lavallee* at 30). In a similar vein, Julie Stubbs and Julia Tolmie (1995:144) point to the interpretation which imminence was given in the assault case of *Zanker* v *Vartokas* and argue that a similarly expanded definition could be employed in the context of self-defence. In that case, a threat of future harm, which was issued by the defendant to a woman trapped with him in a rapidly moving car, was held to induce in the victim a continuing fear of 'relatively imminent violence'. White J stated that the victim was never at liberty, but was at the mercy of the assailant throughout the journey (*Zanker v Vartokas* at 16).

As explained, the point of departure between Walker's theories and many feminist commentators is the extent to which the battered woman's perceptions should be regarded

as mistaken. While BWS evidence also goes to the reasonableness of the woman's responses and can serve an educative function in the courtroom, the central role played by 'learned helplessness' inevitably results in the battered woman's beliefs about the inability of escape being characterised as deluded. Writers such as Julia Tolmie are concerned at the use of such evidence in cases where the evidence reveals the existence of an objective threat which 'may have necessitated the kind of defensive response she in fact engaged in'.[7] The case of *Secretary*, a recent decision of the Northern Territory Court of Criminal Appeal, is employed by Tolmie to illustrate this point. The accused shot and killed her sleeping husband after enduring eight years of extreme cruelty and violence, which escalated in the 24 hours preceding his death. At first instance the trial judge, Kearney J, withheld self-defence from the jury on the basis that the provisions of the *Criminal Code Act* 1983 (NT) (the Code) require that the defendant have responded to 'imminent' danger, and the deceased have had a present ability (actual or apparent) to effect his threat, which a sleeping aggressor could not. The majority of the Court of Criminal Appeal, Angel and Mildren JJ, upheld the appellant's arguments that the Code's provisions impose no requirement of imminence, and that a sleeping aggressor should not, by definition, be regarded as unable to execute a threat (Tolmie 1996:224).

The result of the court's reasoning is that the threat itself must be current or 'on foot' (Tolmie 1996:225), but that the harm which it promises need not. As such, a pre-emptive strike in the face of a current threat may be permitted, even if the aggressor is temporarily disabled from carrying it out. While the result in *Secretary* turned on the court's interpretation of the Code's provisions, there is no reason why the requirements of self-defence at common law could not be similarly formulated. Certainly, Tolmie sees the jettisoning of imminence as a much needed precondition to the introduction of a broader inquiry into the circumstances in which battered women kill. Courts would then be free to address such issues as the likely effectiveness of legal protection, the woman's financial situation, access to affordable child care, and so on (Tolmie 1996:226). Tolmie's analysis builds on the wider notion of imminence employed in *Lavallee*, but shifts the emphasis from psychological impediments to the woman fleeing (*Lavallee* at 124), to objective and material ones.

Since the law of self-defence does not require the defendant's perceptions to be accurate, the divergence between BWS and Tolmie's analysis primarily turns on whether expert testimony regarding the woman's mental state is introduced. Both approaches focus on self-defence as the primary vehicle for defending battered women, and both rely on an expanded concept of necessity in order to accomplish this. Whereas retreat was previously understood in the limited sense of leaving the house or seeking assistance, it now potentially encompasses setting up house elsewhere. As already indicated, this not only affects the objective limb of self-defence, but goes to the heart of what it means to say that the defendant honestly saw lethal force as *necessary* to save his or her life. As the common law is presently understood and applied, a perception (accurate or otherwise) that one is trapped within a relationship or particular domestic setting would not be enough, notwithstanding the risks which may accompany separation.[8] As Catherine MacKinnon reminds us 'you don't exactly get to kill someone in the hope of improving your future life' (1982:713). As it stands, the law defines necessity in such a way as to preclude pre-emptive violence. While an expanded concept of 'necessity' may seem appropriate in the case of

7 Tolmie (1996:229) 'Case and Comment: *Secretary*'. The case is set down for a retrial in the Northern Territory Supreme Court on 3 November 1997.

8 Mahoney (1991) discusses the escalation in violence that often accompanies attempted separation.

battered women whose life choices are greatly constrained, the consequences which flow from this reformulation of self-defence need to be examined closely.

Premeditated homicide: self-defence v self-help

By extending the concept of necessity to encompass the defendant's perception of his or her long term options, the prospect of exonerating significantly premeditated homicide is introduced. If necessity can be assessed with reference to the likely ineffectiveness of police assistance, for example, there seems no doctrinal basis for distinguishing between a defendant who waits an hour, and one who waits a year. Indeed, Lenore Walker once sought to testify on behalf of a woman who employed a man to execute her abusive husband, and who then attempted to argue self-defence on the basis of necessity (*Martin*). Certainly, the more premeditated a killing is, the more difficult it will be to convince a jury that no other course of conduct was honestly and reasonably thought by the defendant to be possible. However, there is nothing in principle which would prevent a defendant from justifying a significantly premeditated act on the basis that lawful assistance would be unlikely to help. This mooted reformulation of 'necessity' would, of course, also apply in the context of violence perpetrated by men in the name of self-defence, potentially allowing an inquiry into the likely efficacy of lawful assistance whenever the defence is raised.

Certainly, few situations involve the kind of ongoing threat represented by domestic violence, but the suggestion that battered women be permitted to engage in retaliatory violence even where time allowed lawful assistance to be obtained[9] effectively removes the law's basis for distinguishing between self-defence and self-help. The collapsing of this distinction results in a fundamental change in the way that self-defence is conceptualised and, as such, demands that the ramifications of doing so be carefully considered.

Third parties

If premeditated homicide is justified on the basis of necessity judged in a broader context, third parties who collaborate in the execution of the plan could also be acquitted by claiming defence of another.[10] Of course, such a prospect would rest on the third party establishing that he or she shared the woman's view that the use of lethal force was *necessary* in the circumstances. However, once necessity's temporal dimension is abandoned, a third party might be exonerated from a significantly premeditated homicide on the strength of a reasonable and honest judgment that lawful assistance would be ineffective. Indeed, the third party need not be a collaborator, but might be a party acting alone who determines that the battered woman's life is at risk and that police assistance would be unlikely to remove the threat. This reasoning also affects third parties who have an opportunity to intervene and prevent the death of a batterer at the hands of the battered woman. The police, for example, might be justified in allowing the battered woman to commit retaliatory violence once apprised of the violent nature of her relationship with the batterer.

Retreat

As explained earlier, the law of self-defence does not strictly impose on the defendant an obligation to retreat, but such a 'duty' has been covertly imposed by virtue of the narrow interpretation given to imminence and necessity. Essentially, imminence has been understood

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9 In fact, Cynthia Gillespie (1989:186) cites the likely ineffectiveness of police intervention as a key reason for eliminating the imminence requirement from self-defence.

10 Self-defence clearly incorporates defence of another's life: *R v Duffy*.

to mean so immediate that lawful assistance could not be obtained. The ability to call for police assistance is the primary factor which distinguishes the situation of many battered women who kill in non-confrontational settings[11] and the hostage threatened by her captor with future harm, or the woman trapped with her assailant in a speeding car. While the notion of *imminent fear* in the latter two examples employs an expanded notion of imminence, it is not so expanded that it requires the women to choose retaliatory violence over lawful assistance. As White J stated in *Zanker* v *Vartzokas* (at 16), the reason why the woman trapped in the assailant's car was never really at liberty was because there was 'no reasonable possibility of a novus actus interveniens to break the causal link between the threat and the expected infliction of harm'. Presumably, an opportunity to call for police assistance would have been sufficient to remove the imminence of the woman's fear in that case. Thus, the broader concept of imminence that some feminist scholars are canvassing goes significantly further than the notion of imminence in a hostage/captor scenario or the additional breadth given to the term in *Zanker* v *Vartzokas.*

While the case of *Lavallee* offers some authority for a broader articulation of necessity, Wilson J's judgment is somewhat ambiguous on the question of retreat. While she analogises between a battered woman who kills and the captive who engages in pre-emptive violence when threatened with future harm, Wilson J asserts that we must ask of both whether escape was thought to be impossible (*Lavallee* at 125). As Christine Boyle (1991:63) points out, of what relevance is the possibility of escape if there is no duty to retreat? It would be a generous reading of *Lavallee* indeed which interpreted 'escape' in this context as wider than an opportunity to seek lawful help.

Determinism

The criminal justice system has a limited capacity to absorb what might be termed 'determinist discourses'. The notions of free will and blameworthiness, which are embodied in the concept of 'mens rea', provide the moral foundation for punishing the perpetrators of criminal acts (Brett, Waller & Williams 1997:7). As much as we may suspect that individuals' life choices are overwhelmingly determined by social constraints, such as class and gender, the criminal justice system requires individuals to be regarded as the architects of their destiny in order to found a basis for holding them accountable at law.

It has been argued that, in the case of battered women who kill, the contribution made by broader social forces should be taken into account when determining their criminal liability for retaliatory violence. This goes beyond evaluating the nature of the threat presented by the batterer's violence to examining the factors which condition the woman's response to it. Donna Martinson, for example, argues that the model of human behaviour which underpins criminal responsibility (and which emphasises individual will) inappropriately abstracts the woman's responses from the constraints imposed by 'history, socialisation, class, race or gender and complex interactions of these factors' (Martinson 1991:39). Martinson points out that a woman's choices are more likely to be revealed as reasonable when such factors are taken into account. For example, a woman's choice to remain in a relationship with an abusive partner is comprehensible when one considers the value placed on 'interconnectedness' by the web of social meaning in which many women's lives are played out. Martha Mahoney agrees that the law places too much emphasis on the notion of 'exit' and fails to regard the 'ongoing construction of relationships' (Mahoney 1992:1284) as a valid

11 It is not being claimed that *all* battered women who kill in non-confrontational settings had an opportunity to seek lawful assistance.

model of agency. According to her, love and loyalty are two of the primary reasons which battered women give for remaining in abusive relationships. By focusing on exit and self-sufficiency as the only rational goals of an individual faced with danger, the law privileges fear over love (1992:1300) and emphasises 'mutual freedom to leave' (1992:1289).

While these analyses primarily aim to describe a context within which the battered woman's choices can be revealed as rational/reasonable, they are accompanied by an attempt to present that decision-making as constrained or determined by the broader social context.[12] Because women are conditioned to approach relationships in a manner which emphasises loyalty and love, Mahoney doubts the authenticity of the battered woman's apparent ability to leave. The woman's 'free will' is affected not just by the threat constituted by the batterer's violence, but by the entire social context within which her decision-making occurs.

As MacKinnon (1982) has argued, however, if we abandon temporality on behalf of women and examine their acts within the context of longer term considerations, then the same may be done for male offenders. There is no reason why the man's resort to violence should not be seen in the context of his 'inculcation to aggression' (MacKinnon 1982:727). While it is arguable that the battered woman's constraints are more material than psychological, a firm demarcation between these two dimensions cannot be maintained. A woman's belief as to whether she can 'survive' outside an abusive relationship (and whether it would be desirable to try), for example, can never be entirely separated from her *perception* of the choices available, notwithstanding the financial constraints and threats of retaliatory violence that she may face. The woman's own psychological makeup, including the values and beliefs which she has acquired via socialisation, will inevitably play some role in her decision to remain within the relationship rather than face the risks of leaving.[13] This is not to say that the woman's response might not be perfectly understandable given her circumstances and her past experiences. It is, however, important to acknowledge that the legal system does not generally accept that individual's choices are determined by their personal histories. Consequently, the criminal justice system is unlikely to move any significant distance down the path of eschewing the model of individual autonomy and agency and, if it did, might end up at a place that many feminists would not want to go. The violence perpetuated by many male criminals, for example, may well be comprensible when regard is had to their personal experiences of violence and the teachings of a patriarchal culture.

Conclusion

While self-defence will always play an important role in the defence of battered women who kill, not all battered women's experiences are easily accommodated by that defence. Certainly, some elasticity can be found in the defence's elements, however, it is limited and any expansion of the defence's scope will have broader implications that need to be acknowledged. The need to ensure that women's interests are adequately represented by the criminal defences offered by the legal system is, of course, still a vital project. Nevertheless,

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12 Mark Kelman (1981) argues that the more the law goes back in time and takes into account the antecedents of an incident, the more 'determined' it will be regarded. Conversely, the shorter the time frame within which the incident is placed, the more freely willed it will appear.

13 For example, Lenore Walker (Walker & Browne 1985:180) found that beliefs acquired in childhood about gender roles strongly influence a woman's response to domestic violence.

feminist scholars must remain open to the diversity of women's experiences and not attempt to ameliorate those differences in order to obtain a less differentiated and more politically useful portrait of womanhood. The time has come to respond to that diversity and to more fully explore legal alternatives other than self-defence for battered women who kill their abusive partners.

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