

Stories of Women in Self-Defense

Justifiable Homicide: Battered Women, Self-Defense, and the Law. By Cynthia K. Gillespie.* Columbus: Ohio State University Press, 1989. Pp. xii, 193.

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In the last chapter of *Tess of the d'Urbervilles* (curiously titled "Phase the Seventh—Fulfilment"), Tess finally confronts her tormentor:

Over the seat of the chair Tess's face was bowed, her posture being a kneeling one in front of it; her hands were clasped over her head, the skirts of her dressing-gown and the embroidery of her night-gown flowed upon the floor behind her, and her stockingless feet, from which the slippers had fallen, protruded upon the carpet. It was from her lips that came the murmur of unspeakable despair.

“And you had used your cruel persuasion upon me . . . you did not stop using it—no—you did not stop! . . . O, you have torn my life all to pieces . . . made me be what I prayed you in pity not to make me be again! . . . O God—I can't bear this!—I cannot!”¹

Tess seizes a carving knife from the breakfast tray and stabs Alec d'Urberville through the heart. She is quickly apprehended and Hardy's tragic novel concludes with her hanging: “‘Justice’ was done, and the President of The Immortals . . . had ended his sport with Tess.”²

Although it is not explicit in the book that Alec d'Urberville has continually abused Tess physically, it is unmistakable that he has raped her and that she is the ongoing victim of his psychological and emotional mistreatment. Tess has been as imprisoned by her brutal lover as if he had actually put her behind bars, and she perceives his death as her only possible escape. Until the stabbing, she has been beaten down, robbed of her spirit, deprived of control of her life. And after the stabbing, Hardy's novel rolls to a swift and inevitable conclusion: for her crime, Tess loses her life. “Justice” is done.

Until recently, women like Tess who killed abusive men remained

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1. T. HARDY, *TESS OF THE D'URBERVILLES* 403 (1975).

2. *Id.* at 420.

safely within the bounds of fiction. Certainly such killings *happened* in real life. In fact, a startling percentage of women who kill have killed their husbands or lovers.³ But no one talked about it. Women who killed were seen as aberrations and were urged to plead insanity; or in the alternative, they had to throw themselves on the mercy of the court and be judged, presumably by men. These legal defense strategies fit into the patriarchal pattern.

But that is all changing. Since the early 1970's, battered women have begun to speak out. In 1973 Erin Pizzey published her groundbreaking book, *Scream Quietly Or the Neighbors Will Hear*, the first book on the subject of battered women, its very title signalling the conspiracy of silence that had surrounded wife abuse. Women's silence at last was broken and a flood of voices came forth to tell their stories, stories startling in their violence and in their similarity. These stories enabled many women to leave their abusive situations and to change their lives as they realized that they were neither singular nor alone. They heard stories remarkably similar to their own and became empowered by them. And society also began to respond: communities created shelters for battered women; police departments trained or instructed officers to respond more effectively; and prosecutors began to bring independent criminal charges against the batterers.⁴

Many women, however, remained deaf to the empowering voices and blind to the community response.⁵ Forced to continue in self-blame and silence, held in the grip of the patriarchal narrative, some were killed by their batterers, others committed suicide, and a few killed their abusive partners. The last are the focus of Cynthia Gillespie's book, which argues for a change from a legal system completely based on "reasonable men"⁶ to one which recognizes that women and women's lives can differ from men and their lives. Many women who kill their abusive mates do so in self-defense, although their actions do not fit into the male (and legal) model of self-defense that presupposes two men of equal strength confronting one another. Some of these women are successfully pleading self-defense, although a number of courts remain recalcitrantly locked into the

3. C. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* xii (1989). See also C. EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 23 (1987); Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 *MERCER L. REV.* 545, 562 (1988).

4. See generally L. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989). Lenore Walker has written much of the seminal work on the battered woman syndrome and provides much of the expert testimony on it. See *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

5. I need to clarify that the community response was not always there, and remains slow and uneven.

6. The idea that the ubiquitous reasonableness standard is derived from the behavior of white males is not, of course, a new one. See, e.g., Griffith, *Sexism, Language, and the Law*, 91 *W. VA. L. REV.* 125 (1988).

patriarchal definition, restricting the plea, controlling jury instructions, and refusing appeals.

Gillespie was drawn into this battle when, as director of the Northwest Women's Law Center in Seattle, she was asked to write a brief in support of an appeal on behalf of a woman who had killed her stepson. Although Janice Painter killed her abusive stepson defending herself from his violence, the jury found her guilty of premeditated murder. After Painter's successful appeal, Gillespie began to gather stories about women who had killed men in self-defense. She found over two hundred in case reports, even though these official reports represent a mere fraction of the total. She also discovered a recurring pattern. The women nearly always killed their husbands or live-in lovers, and the men they killed had abused them repeatedly. Even the details of the scenario had a haunting similarity:

[T]he man, threatening to "whip her ass" or kill her, lunging toward her, holding her and beating or strangling her; the woman grabbing a knife from a kitchen drawer or counter and jabbing it at him trying to break his hold or grabbing a gun—usually his gun—and pointing it at him, telling him to back off and leave her alone; the knife suddenly hitting a vital spot or the man grabbing for the gun and the woman pulling the trigger; the woman calling the police or the ambulance and sitting on the floor cradling her husband's head in her lap begging him not to die.⁷

The outcomes were likewise similar: the women were charged with murder, pleaded or were found guilty, and went to prison. *Justifiable Homicide* is the result of Gillespie's increasing interest in these women and in her conviction that the law of self-defense must be extended to include women. She writes,

It is not my intention to argue that women are entitled to special treatment or that we should apply different legal rules to men and women in self-defense cases. Quite the opposite, I am arguing that we must find ways to fairly extend the right of self-defense, which men already enjoy, to women who must kill to save themselves from serious injury or death.⁸

Justifiable Homicide first provides a thorough and non technical exploration of the historical, societal, and legal reasons why the law of self-defense developed so as to deny women the right to act in self-defense.

7. C. GILLESPIE, *supra* note 3, at viii-ix.

8. *Id.* at xi. Elizabeth Schneider, one of the most prolific writers on battered women's legal rights, makes this crucial distinction between special treatment and equal treatment in *Equal Rights to Trials for Women: Sex Bias in the Law of Self-Defense*: "Much of the . . . literature [about self-defense claims by battered women] ignores the sex bias these women face in court and views their assertions of self-defense as requests for special treatment. The assertions are, however, pleas for equal treatment." 15 HARV. C.R.-C.L. L. REV. 623 (1980).

Gillespie convincingly demonstrates that the law of self-defense reflects a male point of view since it developed in response to male situations. This is perhaps the most novel and valuable section of the book in that it lays bare the patriarchal narrative that gave rise to the current law. The law of self-defense has its roots in the early English system in which a defendant who had acted in self-defense could apply to the king for a pardon; the courts alone had no power to pardon or mitigate the offense. The legal right of self-defense developed quickly in medieval England where because of widespread violent crime, "[a] man generally must have assumed that he must provide his own protection for himself and for his family."⁹ Women, on the other hand, were not expected to protect themselves, but to look to men for protection. The American colonies adopted the English common law of self-defense to cover two kinds of situations: the sudden murderous assault and the ordinary brawl. In the first case, a man or woman was permitted to fight back and even to kill; in the second, a man could kill only if he had no safe avenue of retreat. As in England, women had no legal rights and were expected to turn to men for protection. "As a consequence, as the American law developed, the only two situations in which a self-defense plea was felt to be appropriate (by male judges and male legislators) were still the ancient ones in which men most frequently found themselves: the sudden attack by a stranger and the fight between equals that got out of hand."¹⁰ It was a law for men.

Gillespie then focuses in on three aspects of traditional self-defense that prove particularly problematic for women: that the threatened harm be sufficiently serious to justify using a weapon (the "equal force" requirement); that the harm be imminent; and that the threatened victim attempt to retreat before defending herself. She argues cogently that these elements, rooted in male situations and male physiques (the sudden attack by strangers and the fight between equals that gets out of hand), result in law that discriminates against women who are frequently smaller, weaker, and less independent than men, and thus have fewer options. Traditionally, to justify killing in self-defense, a man had to show that his attacker was armed with a weapon. An assault with hands, fist or feet would not justify killing. For women, however, a man's hands, fist, or feet *can be* deadly weapons, and a physically weaker woman has no choice but to resort to a weapon.

Gillespie also demonstrates that the ultimate question in self-defense cases—whether the defendant's act was "reasonable"—is also embedded in a male standard. It requires juries to imagine circumstances in which they would never likely find themselves: "Every juror enters the jury box with deeply held, if unconscious, ideas about human nature and how rea-

9. C. GILLESPIE, *supra* note 3, at 35.

10. *Id.* at 49.

sonable people behave and about marriage and the proper roles of men and women within it."¹¹ Many jurors are entrenched in the familiar myths about battered women: that they are masochists, nagging shrews, unfaithful wives, or other types who drive innocent, otherwise gentle, men to violence. The jurors attempt to fit the woman's story into one with which they are familiar; if they cannot do this, they reject her story as false.¹² Such a woman is not "reasonable" and does not deserve to be protected by the law of self-defense.

After painstakingly developing this background, Gillespie moves into a area of current controversy, the use of expert testimony in trials when abused women plead self-defense. The battle over its use is being fought both in the courts and in feminist circles, courts objecting to its legality, feminists believing that it negatively stereotypes women. In general, expert testimony functions to fit an individual story into a larger cultural narrative: this medical procedure is like (or unlike) other medical procedures; this behavior is like (or unlike) the behavior of others with schizophrenia. The expert, who is skilled in a particular area and is thus qualified to speak authoritatively about matters not common knowledge to ordinary people, tells a story about others like the defendant so that the defendant's unfamiliar story can be seen in a larger context.

In cases in which a battered woman has killed her batterer, the injustice that results from stereotyping "reasonable" men and women may be avoided if an expert can educate the jury about battered women: why they do not leave their abusers; why they may see killing as the only possible response; why they do not turn to others for help—all questions that prosecutors tend to raise in order to debunk a woman's claim that she feared for her life. The expert testimony helps to dispel the commonly-held notions with which the jury interprets the woman's individual story, the myths that the prosecutor may exploit; it counters the cultural brainwashing to which we all have been exposed; it can make a plea of self-defense make sense.

Some courts, nonetheless, have been reluctant to allow expert testimony in these cases. They see a psychiatrist's testimony about the battered woman syndrome as invading the province of the jury; fear for one's life, they say, is a common emotion within the jury's understanding. Or they disallow it because they feel that the state of the art is not widely-recognized; the research on battered women is still speculative. Or they

11. *Id.* at 94.

12. For a fascinating discussion of jurors' tendency to "do justice" in the courtroom by fitting the witnesses' stories into traditional narratives, see W. BENNETT & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981). Kim Lane Scheppelle also discusses the force and exclusionary quality of traditional narratives in *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989). She writes: "The claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives." *Id.* at 2097.

may respond to a concern sometimes voiced by the public (and by prosecutors): that allowing self-defense pleas and supporting expert testimony legitimizes killing as a means of escape. Or to put it more crudely, this defense could mean "open season on men."

On the other front, feminists fear that expert testimony about the battered woman syndrome forces women to be viewed as alien or, more subtly, encourages the natural inevitability of violence against women. Some believe that describing many battered women as weak, passive, victimized, and without options other than killing invites an insidious sex-stereotyping. Some feminist legal scholars are apprehensive that the "reasonable battered woman" standard could replace the "reasonable man" standard in these self-defense cases, still preventing a woman's individual acts from being considered and judged as reasonable or not in the context of her situation.¹³ Other feminists argue that concentrating on the battered woman syndrome defense focuses on the wrong problem; it treats an effect rather than the cause. The tragedy of battering should be confronted where it begins—with violent, abusive men—and where it is first remedied—by the police and prosecutors.

Gillespie devotes her penultimate chapter to answering some of the feminists' objections. She refuses to brush with broad strokes, recognizing the legitimacy of many of these concerns. She carefully carves out her position, which is a pragmatic, practitioner's approach:

It would be tragic if the one most promising approach to achieving justice for women who are defendants in self-defense cases should develop into yet another set of assumptions to be used against them. It is certainly essential that defense attorneys and mental health professionals who testify in women's self-defense trials be sensitive to the implications of what they say in court and how that might be interpreted. This is a very different question, however, from whether the courts should permit such testimony. When a battered woman defendant believes that testimony on the battered woman syndrome will be useful to her case, simple justice requires that she be allowed to present it. Under our system, every criminal defendant is guaranteed the right to put on the most effective defense. A battered woman defendant is asking for no special favors from the courts in this regard. All she is asking is the opportunity to help the jury understand the reality of the danger she faced and to try to convince them of the reasonableness of her response.¹⁴

It does even more violence to a battered woman who pleads self-defense to refuse to listen to her story just because we think she should have told her story sooner.

13. See Mather, *supra* note 3.

14. C. GILLESPIE, *supra* note 3, at 181.

These feminist concerns may be met, I think, by a kind of radical feminism that is not uneasy about recognizing differences between men and women, that argues that "[i]njustice does not flow directly from recognizing differences; injustice results when those differences are transformed into social and economic deprivation."¹⁵ Women have been and remain in situations in which they are rendered weak and dependent, economically, socially, and emotionally. Their existence has been bifurcated because of gender; until that is changed, the law should discern and respond to their different status. Women, moreover, tend to be smaller than men; a confrontation between a woman and a man is rarely a confrontation between physical equals. Interpreting the law of self-defense to embrace these realities serves to loosen the grip of the patriarchal narrative on our law and on our lives. Women's stories count, too.

Gillespie concludes with modest but specific proposals for changes in the law of self-defense to curtail its discriminating effect on women. Her legal reforms operate along two interconnected lines: the assumptions built into the legal standards themselves, and the attitudes and biases of the actors in the criminal justice system, such as prosecutors, judges, and jurors. Her suggestions focus on the equal force, imminence, and retreat requirements under current law; on rape (that the right to use deadly force in defense against rape should be recognized); on reasonableness; and on expert testimony. Her aim, as she explains it, "is not to revolutionize the law of self-defense but merely to nudge it gently toward sufficient flexibility to meet the needs of women who must defend themselves."¹⁶

Gillespie's suggestions are neither groundbreaking nor original. In fact, she acknowledges that each of her proposals "has been adopted by some jurisdiction with no adverse consequences."¹⁷ Nor does her work extend the current scholarship in the field or resolve the feminist tension concerning the battered woman syndrome defense. Gillespie, instead, offers a cogent (sometimes even passionate) hands-on practitioner's approach that steers clear of theory. And there is certainly a place for this; it responds directly to the question Mari Matsuda poses in her recent article, *Multiple Consciousness As Jurisprudential Method*:

High talk about language, meaning, sign, process, and law can mask racist and sexist ugliness if we never stop to ask: "Exactly what are you talking about and what is the implication of what you are saying for my sister who is carrying buckets of water up five flights of stairs

15. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1396 (1986). See also MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

16. C. GILLESPIE, *supra* note 3, at 190.

17. *Id.*

in a welfare hotel? What do you propose to do for her *today*, not in some abstract future that you are creating in your mind?"¹⁸

Justifiable Homicide is an overview of the present situation, suitable reading for non-lawyers or lawyers new to battered woman cases.¹⁹ Those better acquainted with the area will find it superficial, and I suppose it's easy enough to quibble with Gillespie's non theoretical approach. But that, it seems to me, misreads both the book and Gillespie's intent. The book may just be accessible enough that all sorts of people read it: police officers, social workers, prosecutors, public defenders, prospective jurors. And these may comprise the most crucial audience of all.

Throughout *Justifiable Homicide*, Gillespie relates the actual stories of battered women culled from the over 200 cases she has researched. These stories, which Gillespie intersperses into her theoretical discussions, are both the best and the worst thing about the book: best because they represent a narrative approach to the law that is essential to good legal analysis; worst because they are just plain painful to read. The abuse that many women have suffered at the hands of their "lovers" compares to the stories of torture we hear from Amnesty International.

The stories make emphatically clear, however, that extending the law of self-defense to cover battered women defendants is not the complete solution. It protects women long after they need our help. Such extensions, similarly, would not have worked to vindicate Tess of the d'Urbervilles and to alter the tragic end of Hardy's novel. Gillespie acknowledges this by concluding that the law is only part of the problem; the overriding problem is the sexism that prevents us from controlling and punishing male violence *before* a woman must defend herself. Feminism must be brought to bear on all aspects of the problem, from women's continued inferior socio economic status to their unwilling desperate acts of self-defense in freeing themselves from abuse.

But Gillespie's book, with its piercing narratives, is a step in the right direction as it seeks to remove the sexism that hears only men's stories and adheres to the reasonable man standard. We exist in a legal universe composed by men; the stories and the legal rules are *male* stories and rules. In this patriarchal system, men are the standard, the departing point, and the

18. Matsuda, *When the First Quail Calls: Multiple Consciousness As Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

19. For more groundbreaking work, see C. EWING, *supra* note 3. Ewing proposes that the courts recognize a "carefully circumscribed doctrine of psychological self-defense" which would apply "only where the battered woman defendant could prove that her lethal act was reasonably necessary to protect herself from the infliction of extremely serious psychological [as opposed to physical] harm." *Id.* at 96. See also Rittenmyer, *Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389 (1981), who claims that allowing a battered woman self-defense constitutes gender-based discrimination; Schneider, *supra* note 8; and Schneider and Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978), from whom much of Gillespie's work derives.

perspective. This patriarchal legal narrative is both incomplete and inauthentic: incomplete because it excludes a female perspective and inauthentic because it is based on a national narrative that saw women as non persons.²⁰ Only by listening and responding to women's own stories can we correct the excesses and limitations of the patriarchal narrative. And only then can we scrutinize and change the rules that are rooted in it.

20. See Law, *The Founders on Families*, 39 FLA. L. REV. 583 (1987). Law argues that "the founders' dominant conceptions of families denied the liberty, equality, and even personhood of women." *Id.* at 585.

