JUSTIFIABLE HOMICIDE

Battered Women, Self-Defense, and the Law

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Preface

Several years ago, when I was the director of the Northwest Women's Law Center in Seattle, Washington, a woman named Janice Painter came to us asking for help with her case. She had killed her stepson, Ted Painter, a violent young man who resented her marriage to his father. Ted's behavior had become so aggressive and threatening that Janice, at her husband's insistence, had begun carrying a gun to protect herself from him. She killed him when he assaulted her during a family argument. She had tried to get to the phone to call the police, but Ted knocked her to the floor and then came at her with his hands outstretched towards her throat as she lay there, literally paralyzed, on the floor. Although Janice believed that she was acting in self-defense and had no other way to save herself from being severely beaten up or killed, she was arrested and charged with first-degree murder. During her trial, everything she and her husband had done to try to deal with Ted's violent and abusive behavior was twisted around by the prosecutor and used against her to persuade the jury that she had planned to lure Ted into a situation where she could murder him and make it look like self-defense because she couldn't get rid of him any other way. They had, for example, tried to have the young man committed to a mental institution and had tried to get him a job in a distant state; when everything else failed, Janice got a permit to carry a gun and asked the sheriff's department to tell her under what circumstances she could use it to defend herself. The jury, convinced that she was plotting to kill him, found her guilty of premeditated murder. She was sentenced to life in prison. The Law Center was asked to write a brief in support of her appeal, and I took on the job.

My research was unexpectedly brief. Although there had been a few highly publicized cases before 1980 that involved women's right to self-defense and feminists were beginning to recognize that there were some serious problems with the way these cases fared in the courts, there had been almost nothing written on the subject other than a handful of scattered articles in law journals. The prevalence of violence against women in this country had begun to be extensively studied and written about in the late seventies, but books about rape and wife-beating tended to skirt nervously around the subject of women victims fighting back and killing their attackers. No one, understandably, wanted to appear to advocate murder as a solution to personal problems. It was not until 1980 that Ann Jones, in a fine and angry concluding chapter to her book, *Women Who Kill*, brought the subject to light for a general audience.

Janice Painter's appeal was successful, I am happy to say, and she has gone on to become an active and effective advocate of women's right to self-defense. The Northwest Women's Law Center, too, has gone on to represent many other women in self-defense cases. After the brief was written, I continued, out of curiosity, to gather stories about women who had killed men in self-defense, both official case-reports and stories of trials published in newspapers, expecting to turn up a dozen or so. I was amazed at what I found.

With very little effort, I was able to find over two-hundred stories, and this was clearly only the tip of the iceberg. The only cases that appear in official case-reports are those that have gone to trial, resulted in convictions, and been appealed. Incidents in which a woman has not been charged, has pleaded guilty in a plea-bargain agreement, has been tried and acquitted, or (the most common outcome, I suspect) has been tried, convicted, and not appealed—are not collected anywhere. Although a few of these cases have generated a lot of publicity, most are given a few paragraphs on a back page of a local paper, if that; they are very hard to find. Thus, I have no doubt that the cases I turned up represented only a fraction of the total.

The numbers were not the only surprise, however. Another was the recurring pattern in what happened during these lethal confrontations. Almost all the cases involved women who killed men to whom they were married or with whom they lived in an intimate relationship. The men they killed were men who had beaten and abused them in the past and were assaulting or threatening to assault them again. In case after case the scenario was the same: the 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. This story was played out, with minor variations, so many times that I sometimes had the feeling that I was reading the same case over and over again.

The other scenario (not quite as common) involved women who, after years of brutality, despairing of any way of stopping the beatings or escaping their mates, took advantage of an opportunity to catch them off-guard when their backs were turned or they were asleep or passed-out drunk, and killed them to defend themselves against the beatings that they believed were inevitably to come. There were also a number of cases in which a woman killed a man who was raping her or threatening to rape her.

The outcome of all these cases was depressingly similar. The woman was arrested immediately and charged with murder. She subsequently pleaded guilty to murder or manslaughter, hoping that the circumstances of her case would move the judge to be lenient; or she went to trial, was duly convicted, and went to prison. Either way, she was clearly considered to be guilty of a terrible crime.

In every case, the woman freely admitted that she took the man's life and claimed she was acting in the sincere belief that she had to do so to save herself from death or serious injury. However, self-defense cases present particularly difficult problems for someone trying to tell the story of "what really happened and why." Usually the only person who is able to testify about what took place is the person who did the killing, and he or she arguably has every reason to give a self-serving version of the facts. Unless there was an eyewitness, the only person who could tell a different story is dead. Because women who kill in self-defense are most apt to kill violent husbands or lovers in response to domestic assaults, their acts most often take place at home where there are likely to be no witnesses other than an occasional terrified child.

When such women are charged with murder, the prosecution's case is usually, of necessity, an indirect and circumstantial one. Lacking eyewitnesses or other direct evidence to contradict the woman's

story, the prosecutor's two main weapons are most often to cast doubt on her credibility and veracity as a witness and to convince the jury that, even if her story is true, her perception that she was in such serious danger was unreasonable. Generally, the case against her consists not of hard evidence but of speculation and innuendo about what really happened and what her true motive might have been.

How, then, can the readers of this book have any confidence that they are being told the "true" story or even the "whole" story in any of these cases? I have concluded that the best approach is to rely whenever possible on the version of the facts accepted and reported by an appellate court.

There are a number of advantages to using appellate court reports, and some disadvantages. The whole purpose of a criminal trial, of course, is to determine what happened. A jury is a fact-finding body. When a higher state court considers an appeal of a criminal conviction, it has before it the entire transcript of the trial as well as briefs from the attorneys on both sides, each of which will present a version of the facts that it urges the reviewing court to accept. That court, at least in theory, draws on the transcript and the lawyers' arguments to determine the facts of the case as they were proved by the evidence at the trial. It then sets out those facts in its opinion and bases its decision on them. All of the testimony at the trial, which is reproduced in the transcript, will have been given under oath and subject to cross-examination. This is, I believe, as close as we can come to a "true" version of what happened in any given case.

One drawback, of course, is that an appeals court opinion will only exist in cases where the woman was charged with a crime, put on trial, convicted, and her conviction appealed. In those rare cases where a woman kills in self-defense and is not charged or is tried and acquitted, or where (as more commonly happens) she does not appeal her conviction, or accepts an offer to plead guilty to a reduced charge, we must look to the press and other sources for the facts.

Another drawback is that appellate court opinions usually only recite those facts of the case that are necessary to explain its decision. This frequently leaves tantalizing questions unanswered. When I have been able to go to other sources, I have tried to use court records or newspaper reports of trial testimony. The reader is thus at least assured of receiving the same version of the story that the

jury heard, told under courtroom conditions designed to ensure its veracity. Beyond this, I have assumed throughout that, in every case, to the extent that her story is uncontradicted by direct evidence, the woman is telling the truth.

It is my hope that the reader will come to share my view that there are far better reasons to believe than to doubt these women's tragic stories because what emerges from them with stunning clarity is this: we as a society are unwilling to grant women the same right of self-defense that we grant to men. Under the law, a person, regardless of gender, is entitled to kill another if that person reasonably believes that he or she is in imminent danger of death or serious bodily injury at the hands of the other. But when a woman kills a man, especially a man with whom she lives intimately, we are loath to acknowledge that she was acting in self-defense.

This book explores the historical, legal, and societal reasons why women are rarely granted the right to act in self-defense. The problem appears to result from a combination of two things: first, the law itself, which over many centuries has come to embody masculine assumptions about the circumstances that entitle a person to act in self-defense; and second, our society's ambivalent and biased attitudes about women and its acceptance of violence against them. These two components of the problem interact to create a no-win situation for women charged with homicide in these cases. Even where they were clearly acting in self-defense, the law of justifiable homicide often cannot be made to fit the kinds of situations that female victims of male violence find themselves in and the ways that they often must act to defend themselves. Moreover, even where the law does apply to the facts, juries are so beholden to our society's prevailing misconceptions about rape and domestic violence and the myths, stereotypes, and fears about women which are so widely shared by our culture, that they almost always manage to find the women guilty anyway. 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.

Not every woman who kills her husband or lover is acting in self-defense, of course, but what little data there are indicate that

self-defense *is* the reason far more frequently than most people assume. Women, in fact, seldom kill anyone for any reason. Men commit 85 percent of the 20,000 or so homicides that occur in the United States every year, a percentage that has held steady for several decades. Of the homicides that occur between spouses or lovers, men are also far more apt to do the killing. In 1986, for example, men killed wives and girlfriends at nearly twice the rate of women who killed husbands and boyfriends (7.4 percent of all U.S. homicides vs. 4.2 percent for women).

Men and women do not only kill their spouses and lovers at different rates; they appear to kill them under different circumstances as well. There are no hard statistics but there are clear indications that in a large percentage of instances in which women kill their mates, they are acting to defend themselves against violent assaults. In his study of spousal homicides, sociologist Marvin Wolfgang found that 53 percent of the victims were wives killed by their husbands and 47 percent were husbands killed by their wives. However, over half (60 percent) of the husbands who were killed had precipitated their own deaths by assaulting their wives, who responded by killing them. In 1969, a report by the National Commission on the Causes and Prevention of Violence concluded that women who commit homicides are seven times more likely to have been acting in self-defense than are men. An unpublished study of women inmates of the Cook County Women's Correctional Institute in Chicago (conducted in 1975 and 1976) found that, of the 132 women awaiting trial for murder or manslaughter, 53 (40 percent) said they were defending themselves against violent husbands or boyfriends when they killed.

Other studies of spousal homicides have also found that when women kill their husbands, they are apt to be responding to the man's violence. A study of spouse killings in Florida between 1970 and 1980, for example, found that 73 percent of the wives who killed their husbands had been beaten by them in the past and were reacting to yet another assault by their mates. Every woman in Peter Chimbos' study of spousal homicides in Canada had been beaten by her husband and three-quarters of them were being beaten or had just been beaten when they struck back. Sixty-seven percent of the women incarcerated for killing their spouses, who were interviewed by Jane Totman, reported that they had acted to defend themselves or their children; 93 percent reported that they had been abused

during their marriages. Whatever the actual figure, these data suggest that when a woman kills a man she is married to or lives intimately with, there is better than an even chance that she was acting in self-defense. If this is so, then there may be as many as 500 such killings every year.

As the stories in the following chapters will make clear, when a woman kills her husband or boyfriend in self-defense, that fact is usually perfectly obvious from the moment the police arrive and ask her what happened. Such a woman should not even be charged with a crime, much less tried and convicted. That so many are is a miscarriage of justice that has too long gone unrecognized in our society.

On its face, the law of self-defense is the same for men and women. It ought to treat them exactly alike. As we shall see, however, it operates very differently for women than for men because of the assumptions built into it and the sex bias that all of the actors in the criminal justice system—but especially jurors (including women jurors)—bring into it. In recent years women's rights advocates and feminist thinkers have been turning their attention more and more to these intractable situations where there are equal legal rights but, for women, disproportionately unfavorable legal results. Most of this attention has been focused on employment rules, such as minimum height and weight or load-lifting requirements, that apply to everybody but effectively bar mostly women from certain jobs. More recently, concern has been raised about divorce and custody laws that, in operation, leave women far worse off than men and disability-leave policies that are inadequate to cover even a normal pregnancy and, in effect, allow pregnant workers to be fired. *Treating people the same, on paper, is no guarantee that justice or fairness will result.* I believe that self-defense law provides a chilling example of how this can happen in the arena of the criminal law.

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OVERVIEW: When Women Fight Back

In the early morning hours of November 12, 1979, Caroline Mae Scott, a twenty-nine-year-old mother of five from Kankakee, Illinois, picked up a .357 magnum pistol from where it lay on her bed and fired six shots at Arthur Lee, her housemate of eight years and the father of three of her children. He was sitting down when she shot him, about four feet from where she stood. She called the police immediately and waited for them to arrive and arrest her.

Caroline Scott was charged with murder. At her trial, the prosecutor argued that she killed Arthur Lee in a jealous rage when he threatened to leave her for another woman. The judge refused the defense attorney's request to allow the jury to consider a verdict of manslaughter or a finding that she had acted in self-defense. Lee had been seated a safe distance away and had made no move toward her. She picked up the gun and deliberately shot him dead. Murder, pure and simple. The jury found her guilty, and she was sentenced to serve twenty years in prison. Hell hath no fury like a woman scorned, as everybody knows, and she never denied that she pulled the trigger. It would appear that Caroline Scott got exactly what she deserved.

But the killing of Arthur Lee was not the vengeful act of a jealous woman. It was, instead, the last desperate attempt of a woman who had suffered eight years of unspeakable brutality to save herself from another round of torture and—this time, she feared—quite probably death.

Caroline Scott had every reason to fear Arthur Lee and to believe that he was capable of killing her. She and her two children had moved in with him in 1971 after her first marriage had ended. She was a high school dropout, only twenty years old. It was just a few

months later that he beat her up for the first time when he came home to find her dressed up and, without giving her a chance to explain, accused her of getting ready to go out with another man. From that time on, Caroline was the target of an unfounded jealousy that rapidly grew to insane proportions. He made her a virtual prisoner in her own home, cutting her off from contact with friends, neighbors and her own family. She was not allowed to go out or to allow anyone in. Even so, he imagined that she was constantly engaged in sexual relationships with other men. He would accuse her of having an affair and then beat her unmercifully until she "confessed." He beat her with his fists, his gun, a blackjack, belts, broomhandles, coat hangers, and extension cords. He kicked her and threw things at her and several times tried to smother her with pillows. Once he threw her out of the house stark naked. When she was eight months pregnant, he accused her of having an affair with the landlord and threw her down a flight of stairs. Another time, he held one of the children's teddy bears next to her head and, telling her she might be next, pulled out his gun and shot a hole in it. By 1973 (she testified at her trial) these beatings were coming as often as two or three times a week.

Lee was always armed because he worked as a correctional officer at the Kankakee jail, and he always carried handcuffs. He frequently tied Caroline up or handcuffed her before he beat her. The handcuffs, in fact, became such an integral part of his torture routine that he had only to give a signal—tapping his left wrist with his right hand and pointing to where they were kept—to tell her to get the cuffs and bring them to him so he could shackle her and begin the beating.

Several times she left him, going to stay with her mother, but that was never more than a temporary refuge. Lee always found ways to get her to come back. He would come and tell her how sorry he was and how much he loved her; he would promise never to do it again. And she wanted to believe him because she loved him; because she wanted so badly to keep her family together for the sake of the children; and, no doubt, because—as a black woman who had dropped out of high school to marry and who had five children to care for—she didn't perceive herself to have very many other options. When she wavered and it appeared his pleas and promises might not work, he would threaten to kill her if she refused to come home, threats which his past behavior gave her every reason to take seriously.

Through it all she loved him, amazing as that might seem to those not familiar with this very common aspect of the battered woman's experience. She did not want to leave him; she wanted him to stop beating her, and she just kept hoping, desperately, that someday he would stop treating her the way he did.

The night her hope ran out, Lee came home extremely drunk and pounded on the door. Caroline went to the door with the .357 magnum in her hand because Arthur had ordered her never to answer the door unarmed. When he came in, he shoved her around and began accusing her of having an affair for the past eight years with a man named Slim, once a friend of Lee's. When she denied it, he took his 9 mm. pistol from the clip on his pants and began smashing her in the face with it. She was still holding the .357 magnum, but he took it away from her and threw it on the bed. Then he hit her some more with his own gun and with his fists. He let her go then and made a phone call to a woman named Bonnie, telling her that Caroline would be "gone" in forty-five minutes.

Afraid that this time he was intending to kill her—and knowing that, at the least, she was in for another of the severe beatings that always followed his accusations of infidelity—Caroline wandered around the house trying to figure out a way to take her youngest child and get away without his catching them. Finally, hopeless, she sat down on the bed where at least she could keep an eye on Lee, who was still on the telephone and still holding his gun. The .357 magnum remained on the bed where Lee had thrown it earlier. At length, he hung up the phone; and she saw him give the dreaded signal, tapping his wrist and pointing to the handcuffs. She got up and walked toward where they were kept but suddenly turned back toward the bed, picked up the pistol, pointed it toward him, closed her eyes and pulled the trigger. She intended to fire only one shot, to frighten him, but the gun kept firing until it was empty. Arthur Lee died instantly.

Under the law of Illinois, as in every other state, Caroline Scott would not have been guilty of murder, or any crime at all, if she was acting in self-defense because she reasonably believed that it was necessary to kill Arthur Lee to avoid an immediate danger of being killed or seriously injured by him. Surely Caroline Scott believed that she was about to be seriously hurt or killed. Surely she believed that firing the gun was the only way she could stop him from doing

what he was about to do. Surely her belief was reasonable. He had seriously hurt her and threatened to kill her many times before. The situation was the same as the ones in which he had beaten her most severely in the past. That night he had told her that he would make her confess everything "or else." His remark to Bonnie on the telephone that she would be "gone" in forty-five minutes sounded like this time he intended to kill her. He was armed with a gun. He was about to render her absolutely helpless. She could not get away.

How could what Caroline did have been anything but self-defense? How could she conceivably have been convicted of murder and sentenced to twenty years in prison for her desperate act? How could everyone along the line—the police who arrested her, the prosecutor who decided to seek a murder charge and argued that she was a cold-blooded killer, the judge who believed her action was so clearly not self-defense that he wouldn't allow the jury even to consider that possibility, the jury that convicted her—have been so determined to assume the worst about her and so unwilling or unable to understand what had happened in that house that night?

The answer lies partly in the law itself and partly in attitudes about violence toward women that are shared by many people in our society and are reflected in the workings of the criminal justice system—especially in the deliberations of juries. These two factors operate together to create a situation that is extremely unfair to women defendants in self-defense cases. Caroline Scott's case was by no means a fluke. Hundreds of women like Caroline are found guilty of manslaughter or murder and sent to prison for defending themselves against the life-threatening assaults of violent men. Our society is simply unwilling to grant to women the same right of self-defense that it grants to men.

The law of self-defense is a law for men. It developed over many centuries in response to two basic kinds of situations that men found themselves in. The first was the sudden assault by a murderous stranger, such as when someone, perhaps bent on robbery, comes out of a dark alley with a gun and threatens to kill a person walking innocently down the street. The second is the fist fight or brawl that gets out of hand and suddenly turns deadly. Usually this is the sort of bar-fight situation where both participants willingly enter into a punching match; and one of them, believing he is losing, suddenly pulls out a weapon and threatens to kill the other.

These were the only situations in which a self-defense killing was traditionally excused by the law, and the rules surrounding each one were different so that it was important that such a killing fit into one category or the other. However, the assumption in both situations was that the antagonists were men of relatively equal size, strength, and fighting ability. A further assumption was that the antagonists were strangers, or perhaps acquaintances, whose confrontation was an isolated incident occurring in a public place from which one or both could withdraw or escape and so end the conflict without bloodshed, unless the attack was so sudden as to make retreat impossible.

The self-defense situation that a woman is most likely to find herself in, however, is very different. Women rarely kill to defend themselves against violent assaults by strangers although there are some cases in which women have killed rapists, and we will look at a number of them. Nor do women often get involved in punchouts in which one antagonist finally kills the other. Like Caroline Scott, the overwhelming majority of women who kill men in self-defense, kill their husbands or lovers—violent men who have beaten them and threatened them many times before. Such a woman's situation does not fit within either of the traditional, masculine, self-defense categories. Her assailant is neither a stranger nor someone with whom she has voluntarily engaged in a fist fight. The result is that when she does strike back, in the sincere belief that she is acting to save herself, the law of self-defense often cannot be made to apply to her action.

As we shall see, a whole series of rules and requirements grew up in the criminal law that were intended to restrict self-defense pleas to only those situations that men recognized as legitimate. Moreover, the law was concerned to make certain that, even within these situations, no one could use the plea of self-defense to excuse a killing that was not absolutely necessary. Such a killing would only be considered necessary if the person acting in self-defense had conformed to the standard of behavior that was expected of a *man* facing dangerous circumstances.

A man was expected to meet his adversary face to face and knuckles to knuckles. He was expected to use no more force than was needed to repel the attack, which meant that he was not to use a weapon unless one was being used against him. If forced to resort to a weapon, he was expected to handle it with sufficient expertise

to disable, rather than kill, his opponent if possible. He could not use deadly force to defend himself against a mere threat or an anticipated attack that had not yet begun. He was not permitted to indulge in cowardly behavior like ambushing his opponent from behind or catching him off guard or making any kind of pre-emptive strike. If he could avoid killing by escaping or backing down from the fight, he was expected (at least in some states) to do so.

All of this translated into a law of self-defense that held a killing was only justified if it was in response to an armed assault that was already underway, if one had tried to escape or retreat, and if one wielded a defensive weapon no more violently than necessary to repel the attack. The touchstone was whether one had acted, under the circumstances, the way a reasonable man would act.

It was a law that made perfectly good sense in the sorts of situations that it was developed to apply to, and still does. It is clearly in society's interest to discourage unnecessary violence—especially the use of deadly weapons—in people's everyday interactions with one another. If a man is walking down a dark street and is suddenly confronted by a stranger whose appearance is menacing but who has done nothing overtly threatening, he has no right to pull out a gun and kill the stranger, no matter how genuine his fear might be that the stranger means to do him harm. If two men are drinking in a bar and get into an argument that they can't or won't settle without coming to blows, it is reasonable to expect them not to fight with anything more lethal than fists. No matter how badly he is losing, a man who has willingly entered into a fist fight has no right to resort to a weapon if all he faces is a humiliating thrashing at the hands of his opponent. Even if he is minding his own business and is unilaterally attacked, he ought not to defend himself against another man's fists with a deadly weapon. He must rely on his own fists as well. If, during the course of their argument, one man threatens to kill the other or tear him apart or cut off his balls, it would hardly be reasonable for the target of the threats to react by killing the man who makes them. The harm threatened is serious, certainly, but there is no reason to assume that the threats will ever be carried out. One is, in short, never justified in making a lethal confrontation out of a nonlethal one. The assumption is, always, that a man can avoid letting this happen by fighting fair, by taking his medicine if he comes out the loser, or by backing