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PUBLIC RESPONSES TO INTIMATE VIOLENCE: A GLANCE AT THE PAST

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In 2004, a California jury sentenced Scott Peterson to death for killing his wife and future child.¹ Peterson is an anomaly on death row, which is mostly occupied by men who committed serial murders, killed law-enforcement officers, or caused death during other violent crimes, such as armed robbery.² Yet, the outcome of his case recalls a nineteenth-century tradition of executing men for murdering their lovers, wives, or other family members.³ Although no adequate public response to the problem of intimate violence was achieved in the past, the criminal justice system suffered from different flaws and biases in this regard than one might expect.

A REVISIONIST VIEW

Lack of attention to non-lethal intimate violence may have been “the normal state of affairs” throughout most of American history.⁴ Prior to the 1980s, only the colonial era (especially 1640 to 1680) and the late Victorian era (especially 1870 to 1890) witnessed sustained efforts to curb wife-beating and “unnatural severity” toward children.⁴ However, scholars have overstated the level of public apathy toward men’s homicidal aggression against women. Leading criminal law casebooks,⁵ numerous law review articles,^{6,7,8,9} and books by influential American legal scholars and historians^{10,11,12, 13,14} repeat the erroneous claim that, in the past, the legal doctrines of self-defense and provocation endorsed men’s brutality, whereas women were severely punished for perpetrating intimate violence.

In fact, the converse was true. Data culled from dusty criminal case files in New York and Colorado demonstrate that, in both the eastern and western United States, men accused of killing their intimates often received stern punishment, while women charged with similar crimes were treated with leniency.³ Moreover, the capital punishment of men who murdered their lovers, spouses, or other family members constituted a higher percentage of total executions in the late nineteenth and early twentieth centuries than today.³ Thus, despite widespread scholarly agreement that

public responses to intimate violence were inadequate, newly discovered historical data indicates that feminist criminal-law researchers, such as myself, must reexamine the underpinnings of our theories.

Recent research also unearths the pre-history of the “battered woman’s syndrome defense.”³ In modern criminal trials, battered woman’s syndrome evidence bolsters the credibility of women who kill their batterers by explaining that “learned helplessness” prevents such women from leaving abusive relationships before they escalate to homicide.¹⁵ Another interpretation, favored by Martha Mahoney and others, depicts the female defendant’s plight in less pathological terms as part of an ongoing struggle for power and control.¹⁶ Both modern approaches suggest that, when assessing the culpability of a battered woman who kills, the jury should be allowed to take her history of abuse into account. No formal battered woman’s syndrome defense existed in the late 1800s and early 1900s. However, juries and courts implicitly recognized one and even extended it to women who killed to avenge infidelity or abandonment.³ Indeed, the paternalistic understanding of social relations that was prevalent in the Victorian era tended to equate physical and emotional maltreatment of women.

The harsh attitude of jurors and other legal actors toward men who perpetrated intimate murders, and the corresponding sympathy for abused women, harmonized with a wide array of late Victorian cultural forms. Judicial opinions, family conduct manuals, and the public messages of political leaders like Theodore Roosevelt, who denounced wife-beating, associated manliness with protection of the female sex.³ Of course, paternalistic efforts to stop male abuse of women did not go uncontested. Yet, the ineptitude of the state in curbing such abuse was attributable to the deficiency and corruption of early policing, as well as to cultural conflict over the role of violence in family government. It was not the product of a hegemonic gender ideology tolerant of extreme violence against women.³

LENIENT TREATMENT OF ABUSED WOMEN WHO COMMITTED INTIMATE HOMICIDE

Throughout history, men have committed homicide more often than women have.¹⁷ But women sometimes killed their intimates, and when they did, two outcomes were prevalent: acquittal or conviction for a

less serious offense than murder.³ Juries seem to have based acquittals either on the insanity defense or on a self-defense theory that looked to past abuse, rather than simply focusing on the specific incident during which the homicide occurred.

Self-defense theories often succeeded when the homicide victim was an adult man. In New York in 1891, for example, Ella Nelson was exculpated for killing her philandering lover when he threatened her with a pistol.³ A jury in the same city exonerated Maria Barbieri at her second trial after an appellate court ruled that evidence of her seduction, rape, and abandonment by the deceased were relevant to understanding why she slashed his throat in a saloon.³ More than a thousand miles away, a Colorado jury acquitted a domestic servant who fatally shot her abusive employer—a man with whom she also had a sexual relationship.³

By contrast, the ideal of the nurturing mother made insanity claims the only route to acquittal for women who intentionally killed their children. For instance, in 1890, New Yorker Wilhelmine Lebkuchner was found not guilty by reason of insanity after she killed her small sons by putting rat poison in their tea. Lebkuchner resumed work as a laundress following her acquittal, rather than being institutionalized.³

The degree of moral denunciation directed at the men who allegedly drove these female defendants to kill constitutes the most remarkable aspect of the cases. Even child-murderers often contended that they had been rendered insane by maltreatment at the hands of a husband or male relative. For instance, Lebkuchner alleged that her brother-in-law disowned her after her husband's death, leaving her destitute and terrified that she would lose custody of her children.³ At least until 1920, when females gained a constitutional right to vote, the ideal man "remained protective of women and displayed reverence for their presumptively greater moral purity."³ A man who beat, raped, or abandoned a woman failed in his duty to protect the so-called weaker sex; his actions thus justified or at least excused the woman's homicidal response.

Female defendants who defied gender norms by drinking or engaging in illicit sex could expect harsher verdicts than those who played more traditional roles. However, when juries found such deviant women guilty of any criminal homicide, they typically convicted them of milder, non-capital offenses.³ Female defendants' testimony about being brutally abused by their alleged victims counterbalanced their violation of Victorian prescriptions for proper feminine behavior. Juries thus spared them from long prison sentences or the death penalty.

SEVERE PUNISHMENT OF MEN WHO KILLED THEIR INTIMATES

The outcomes for men charged with intimate homicide in the late 1800s and early 1900s differed substantially from those for female defendants.^{3,17} At criminal law, the heat-of-passion doctrine offered the most promising defense strategy for a man who killed his unfaithful wife. The idea behind this doctrine was that the deceased's outrageous conduct caused the defendant to lose control of his emotions and fly into a homicidal fury. A successful heat-of-passion claim led to a conviction for manslaughter, rather than murder. However, while many feminist scholars have disparaged the heat-of-passion doctrine for punishing intimate killings less harshly than a lethal attack by a stranger,^{6,7,9,12,18} data from the west and the northeast show that neither judges nor all-male juries in those regions felt much empathy for men charged with killing their wives.³

Under the common law, the heat-of-passion defense was limited to five forms of provocation: extreme assault or battery on the defendant; mutual combat; illegal arrest of the defendant; injury or serious abuse of a close relative; and sudden discovery of a spouse's adultery.¹⁹ A defendant was ineligible for heat-of-passion mitigation if he merely suspected infidelity, but had not actually caught his wife in the sex act,²⁰ or if enough time elapsed between the provocation and the homicide for his emotions to cool.²¹ As I have demonstrated in another paper, "Trial judges in Colorado and New York often refused to instruct [juries] on provocation because the evidence showed cooling time or other factors precluding the defense as a matter of law."³ Such convictions were typically affirmed on appeal.³

Some states abandoned both the common-law provocation categories and the cooling-time restriction in the late twentieth century.²² By contrast, courts and juries in the 1800s and early 1900s returned capital verdicts for "male defendants who claimed that simmering jealousy, anger, or fear led them to commit homicide."³ Scholars therefore must avoid the hasty assumption that the modern criminal justice system punishes intimate killers more rigorously than it did in the past.

The relative severity of outcomes for men in the late Victorian and Progressive eras stemmed from social values that associated manliness with sobriety, industry, and self-restraint, as well as with protectiveness toward women. The norms underpinning the stern treatment of male defendants were not, in any sense, feminist. However, they were gender-biased in a way that benefited women. Indeed, "verdicts exonerating

women due to their victims' past violence or romantic inconstancy contrasted with the *lack* of empathy for similar stories when a man was on trial."³ Juries even convicted men of first-degree murder in the face of insanity claims, which often led to the exculpation of female defendants.³

THE FAILURE TO PREVENT INTIMATE VIOLENCE FROM OCCURRING

Data showing the disparity in outcomes for male and female murder defendants do not explain "why the public criminal justice system in the late nineteenth and early twentieth centuries punished intimate murders [committed by men], but failed to prevent them from occurring. The problem of intimate violence was allowed to fester until it produced autopsies, coroner's inquisitions, and murder trials, in addition to bruises and broken bones."³ While several scholars describe the reluctance of both private societies and the state to intervene on abused women's behalf,^{4,23} the reasons for such reluctance are not well understood.

Several alternate explanations besides sexism may be possible. First, at the end of the nineteenth century, police forces in cities like New York and Denver were understaffed and controlled by the political machine.^{24,25} I have argued elsewhere that "the decline of neighborly and family intervention against intimate violence thrust the problem on a police force that was too corrupt and brutal to handle it effectively."³ Second, the unwillingness of terrified victims to report abuse hampered the arrest and prosecution of batterers, just as it does today. This underreporting stemmed both from fear of violent reprisals and from the socioeconomic need of women and children who depended on an abusive breadwinner for sustenance.^{3,26,27} Finally, despite predominantly middle-class norms urging male self-restraint, "some American men continued to believe that 'a few thumps once in a while can do no harm.'"³ Indeed, the view that male violence against women was acceptable if females failed to be diffident and maternal seems to have gained strength around 1920, when women began to assert themselves in the political and economic sphere.^{3,28}

CONCLUSION

A system that prevented intimate violence would not need prisons or capital punishment to make murderers pay a retributive and deterrent price for killing their intimate partners, children, or other relatives. Despite the surprisingly harsh penal response to inti-

mate murders committed by American men during the late Victorian and Progressive eras, the picture that emerges from historical study is not a pretty or comforting one. The system too often punished men for killing, but not for inflicting non-lethal violence. Men who died on the gallows or in the electric chair came disproportionately from the lower-class and non-white population.³ Moreover, even the willingness of courts and jurors to consider past-abuse evidence when female defendants stood trial for intimate murder stemmed from paternalistic attitudes about women's supposed weakness.

In the final analysis, the best that can be said is that the lack of an effective policy against intimate violence in the late nineteenth and early twentieth centuries did not arise from a male conspiracy against women. Such a conclusion corrects overstatements in the scholarly literature but does not exonerate the criminal justice system, then or now, for failing to remedy the crisis of unchecked violence in intimate relationships.

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