

September 2014

Book Review: Defending Battered Women on Trial

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Recommended Citation

Rebecca M. Bromwich, "Book Review: Defending Battered Women on Trial", (2014) 5:1 online: UWO J Leg Stud 1 <<https://ir.lib.uwo.ca/uwojls/vol5/iss1/1>>.

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Book Review: Defending Battered Women on Trial

Abstract

This is a book review of: Elizabeth A Sheehy, *Defending Battered Women: Lessons from the Transcripts* (Vancouver: UBC Press, 2014).

Keywords

feminist theory, criminal law, legal theory, defences, battered women, book review, Canada, self-defence, criminal code, Nussbaum, Sheehy, Judith Butler, Nelson Mandelafeminist theory, criminal law, legal theory, defenc, battered women, book review, Canada, self-defence, criminal code, Nussbaum, Sheehy, Judith Butler, Nelson Mandela, UBC, femcrit

Cover Page Footnote

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BOOK REVIEW: DEFENDING BATTERED WOMEN ON TRIAL BY ELIZABETH A SHEEHY (VANCOUVER: UBC PRESS, 2014)

REBECCA JAREMKO BROMWICH*

The battered woman defence is a legal defence in Canadian criminal law that relaxes the necessity for immediate peril required in regular self-defence by recognizing the accumulated effects of spousal abuse. Its role in Canadian legal history is complex to say the least. This book explores transcripts from historical Canadian cases where women were on trial for killing abusive husbands or intimate partners. The book is meticulous in its chronicling of details from case transcripts. It offers precise historical legal scholarship about the selected cases. The core value of this contribution to legal literature is in making visible the appalling conditions in which abused women lived and the ways in which unjust laws failed them. Focusing legal work and advocacy on the conditions of inequality and violence that have been faced—and continue to be faced—by women and girls is a worthwhile endeavour. This book gleans from legal transcripts the narratives not found in judgments. In doing so, the book uncovers a history and legacy of judicial inequality based on clear gender discrimination.

The book received remarkably negative coverage in Canada's mainstream news.¹ Many criticisms regressively resort to and re-inscribe old binary tropes of feminist/anti-feminist and man-hating/woman-hating binaries. Feminist scholars can do better than to simplistically defend this book on the basis of politics. A dispassionate look at what value the book brings to scholarship, and where it falls short, can advance the discussion around justice and domestic violence in Canada.

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¹ See for example: Barbara Kay, "Prof Makes Bizarre Plea to Place Battered Women Above the Law" *National Post* (13 December 2013), online: National Post

<<http://fullcomment.nationalpost.com/2013/12/13/barbara-kay-prof-makes-bizarre-plea-to-place-battered-women-above-the-law/>>; Barbara Kay, "Battered Women Should Not Get Away with Statutory Murder" *National Post* (20 December 2013), online: National Post

<<http://fullcomment.nationalpost.com/2013/12/20/barbara-kay-battered-women-should-not-get-away-with-statutory-murder/>>.

There are some methodological problems with the book as a piece of social science scholarship. First, there are statistical concerns about sampling methodology: unusually, the author “chose to analyze” 11 of 36 available transcripts and provides little in the way of a rationale for that selection.² Second, the appropriateness of the author’s claims of unfairness in the existing system are questionable in the face of quantitative results that show many domestic violence cases resulting in acquittals. Many of the cases the author studied actually led to acquittals by juries.³ Finally, it is noted in the introduction that the self-defence laws critiqued in the text were amended favourably in 2012.⁴ Consequently, the book seems to proffer solutions looking for a problem.

The most troubling gap in the analysis in this book is not methodological but theoretical. By treating the categories of “abusive men” and “battered women” (as well as “men” and “women”) as closed, self-evident, and stable, the book rests on gaps in theory that leave significant holes in its practicality. The figuration of the “battered woman” that the author is not, in fairness, responsible for crafting, is not problematized and is ultimately left unexamined. This theoretical flaw is not a minor issue that is peripheral to the value of the book’s suggestions for law reform; in fact, it is devastating to their appropriateness. The book only makes a cursory nod to potential criticisms of the category of battered woman as unitary.⁵ Men and masculinities are, even more problematically, left untroubled. The figuration of the “batterer” or “abusive man” emerges in the text as monolithic and is unchallenged and unconsidered. The reliance on unexamined assumptions about male and female identities in this book leaves many questions unresolved. Even more dangerously, this kind of analysis provides no scope for reflexivity on the part of agents identified as women when they do exercise power.

In practice, criminal lawyers purposefully try to fit clients, victims, and other parties to cases into paradigmatic identities. This helps lawyers to develop the theories of their cases, and is crucial in advocacy, especially when the triers of fact are juries. It is worrisome that, in strategically accepting certain identities without challenging them, the cases that result re-inscribe and renew existing gender hierarchies and processes of silencing.

In 1999, Harvard legal ethicist Martha Nussbaum criticized post-modern gender theorist Judith Butler’s attempts to break down gender binaries: “Hungry women are not fed by this, battered women are not sheltered by it, raped women do not find justice in it, gays and lesbians do not achieve legal protections through it.”⁶ The conceptual gaps in this book’s suggestions for law reform illustrate the opposite: theorizing about constructions of masculinity and femininity and the maintenance of the gender binary help target suggestions for law reform in a way that tracks power, and the abuse of power, more

² Elizabeth A Sheehy, *Defending Battered Women: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) at 11.

³ *Ibid* at 10.

⁴ *Ibid* at 17.

⁵ *Ibid* at 12-13.

⁶ Martha Nussbaum, "The Professor of Parody" *The New Republic* (February 1999), online: The New Republic <<http://www.newrepublic.com>>.

precisely. This book effectively presents a tidy answer to Martha Nussbaum's critique of Judith Butler. The gaps in the book demonstrate that those who could be helped in their intimate relationships by deconstruction of gender binaries include Canadians. To make appropriate suggestions for just law reform, we need to start with a clear understanding of to whom and how identifiers of man and woman are assigned, achieved, and constructed. Battered, vulnerable, exploited, and otherwise oppressed agents will find justice only if those identities are analyzed and understood.

An optimal way to move this conversation forward would be the production of feminist legal writing that engages more closely with constructivist feminist theory.⁷ Constructivist theoretical grounding would advance thinking about the important issue of how to deal with self-help remedies in the context of intimate partner violence. There needs to be greater recognition that not all intimate partner violence conforms to the stereotypical roles of the battered woman and the abusive man.

The gaps in this book show exactly how recent feminist theory can enrich feminist legal thinking and afford it a larger and more nuanced vision.

As Sheehy has shown so well by meticulously reviewing the judgments in these cases and the transcripts of their proceedings, the conditions in which battered spouses—often women—find themselves can be as deplorable as captivity. A conversation between social constructivist feminist theory and this second-wave text could afford an opportunity to fulfill Nelson Mandela's admonition to "free not just the prisoner but the jailer as well"⁸—to emancipate from patterns of abuse of power both the actor who is captive and the actor who exercises coercive control.

⁷ By constructivist feminist thought, I mean thought based on the view of gender as a socially constructed category. In this field of feminist theory, writers explore ways in which the social categories of gender and even sex are not biologically determined, essential, or natural but rather built in human interaction. Judith Butler is a major leading thinker in this area of feminist theory. The notable works in this area include: Judith Butler, "Performative Acts and Gender Constitution" in Sue-Ellen Case, ed, *Performing Feminisms* (Baltimore: Johns Hopkins University Press, 1990) 270; Judith Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernism'" (1991) 11 *Praxis International* 150-165; Judith Butler, *Bodies that Matter*, (London: Routledge, 1993); Judith Butler, *The Psychic Life of Power* (Stanford: Stanford University Press, 1997); Judith Butler, *Gender Trouble* 2d ed (London: Routledge, 1990).

⁸ See Nelson Mandela, "Inaugural Speech, Pretoria" (10 May 1994), online: University of Pennsylvania, African Studies Centre <<http://www.africa.upenn.edu>>: "We commit ourselves to the construction of a complete, just and lasting peace. We have triumphed in the effort to implant hope in the breasts of the millions of our people. We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity—a rainbow nation at peace with itself and the world."