

No Justice in Vigilantism

Alan Dershowitz, *Boston Herald*. Boston, Mass. : Apr 19, 1993 . pg. 29

Daniel Mark Driver will never receive the fair trial to which he was entitled under our Constitution. He was denied that fundamental right, because Ellie Nesler – whose son he was accused of abusing at a summer church camp several years ago – took the law under her own hands and gunned Driver down in the courtroom. Now Ellie Nesler is seeking a fair trial. Hopefully, Daniel Mark Driver does not have any angry friend or relative who is gunning for Ellie Nesler. If he did, the cycle of vigilante violence could continue endlessly – as it does in Sicily and in the former Yugoslavia .

The need for vengeance is older than recorded history. Aggrieved people took “the law” into their own hands even before there was a law. Indeed, one of the reasons the criminal law came into being was to channel personal vengeance into a more formal societal system of justice. “Lex Talionis” – the law of retaliation – may sound like an oxymoron, since “law” and “retaliation” may seem incompatible. But retaliation is an important part of every just legal system. Retaliation is not all there is to a system of justice, since prevention, rehabilitation and treatment are also important. But vengeance too has its claims, so long as it is administered by society and is proportional to the harm, culpability and danger of the offense and offender. The Bible’s demand for “eye for eye,” “tooth for tooth,” and “hand for hand” is a primitive description of the need for proportionality in the law. “No more than an eye for an eye” is the way the Talmud interprets that influential but oft-misunderstood verse.

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Ellie Nesler violated every rule of justice, Lex Talionis, and “eye for eye”. She denied the legal system – which represents all of us – the chance to do justice. She became judge, jury and executioner. She imposed the death penalty for a crime that traditionally carries a prison sentence of several years and that cannot – under our Constitution – be punished by death.

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And now Ellie Nesler has become something of a hero, a female of Bernard Goetz. Lawyers, including Melvin Belli, are clamoring to defend her. But what she did was far worse than what Goetz did. Bernard Goetz – the so-called subway vigilante – shot his assailants while they were in the act of trying to rob him. Goetz believed he was in danger from the gang of young hoods who surrounded him. In my view, Goetz overreacted and used his illegal weapon promiscuously, but at least the excuse of arguing that the law was not there to protect him.

Ellie Nesler, on the other hand, shot Daniel Mark Driver in the back as he was unarmed and in the custody of the police.

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Nesler enjoys a presumption of innocence, though she hardly denies that she killed Driver in plain view of dozens of witnesses. But so too did Driver enjoy a presumption of innocence. For all we know, he may not even have molested Nesler's son. Erroneous charges of child molestation are not unheard of – as evidenced by recent acquittals and appellate reversals in several such cases. But Nesler decided to kill Driver on the basis of what she believed was a “smirk,” by which he meant to say, “I’ve done it before and I’ll do it again.” Nesler’s sister justified the act by saying: “It was that...smirk.”

Columnist Patrick Buchanan also seemed to be justifying Nesler’s lethal act when he wrote: “Danny Driver smirked once too often.”

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Ellie Nesler will get the fair trial she denied Daniel Mark Driver. She will probably get off easy because her lawyer will put the victim on trial. Some who complain when rape defendants put their alleged victims on trial will applaud the tactic here.

Either of those results would send a message to other potential vigilantes that crime pays, so long as you pick your victim well. But an even more dangerous message was sent: that the cowardly act of shooting a confined man in the back will be turned by some into an act of courage, and that vigilante injustice is seen by many as American justice.

Buchanan quotes a local citizen as saying that people are saying that Nesler “deserves a medal and they want to be on the jury so they can let her go.” It seems like too many Americans, including Buchanan, are watching too many bad vigilante movies and reading too few good books – including the Bible – which preach justice for all.

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