

***Wayne Morse Center for Law and Politics Symposium: The Law and Politics of the
Death Penalty: Abolition, Moratorium, or Reform?***

***183 Executing White Masculinities: Learning from Karla Faye Tucker**

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Gender is a constant struggle. [\[FN1\]](#) Throughout our lives, we contend with multiple unstable and oppositional social constructions of gender, or hierarchies of masculinities and femininities. [\[FN2\]](#) Knowing, or trying to know, who is male and who is female, and how men and women should act, is a major part of the structure of our identities, our societies, and our democracy. These gender questions are not separate from race or class; [\[FN3\]](#) together *184 for example, they shape what is expected of a poor young White man or a middle-class, African American grandmother. Racialized and class-based, gender helps to tell us who is frightening, who is powerful, and who is human.

Many observers understand the death penalty in the United States as a story of racial injustice. [\[FN4\]](#) Capital punishment is also a gender struggle. [\[FN5\]](#) The lopsided demographics--men commit most crimes [\[FN6\]](#)--suggest that all crime and punishment is deeply gendered. The fact that death row is even more overwhelmingly *185 male [\[FN7\]](#) than other parts of prison points to capital punishment as a specific construction site of gender. Our system of capital punishment, with its elaborate procedures and ritualized executions, enacts deep and powerful aspirations to masculinity. Kenneth Karst reminds us: "The pursuit of manhood, above all, consists in expressions of power, on repeated occasions." [\[FN8\]](#) Capital punishment consists of repeated expressions of lethal power authorized by law. [\[FN9\]](#) Gender helps to explain why we execute, and it helps to determine who we execute.

As with other parts of the criminal justice system, the masculinities produced and reproduced by the death penalty are deeply racialized. [\[FN10\]](#) Although men of color disproportionately populate death row, [\[FN11\]](#) most death judgments are imposed to punish male killers of White victims. [\[FN12\]](#) A Black man condemned to die, dangerous and without remorse, is one representation of masculinity produced and reproduced by American capital punishment; a Black man, subdued and humiliated, strapped onto the executioner's *186 gurney, is another. [\[FN13\]](#) These different pictures of condemned men enact two versions of Black masculinities, which, in turn, produce different versions of the racialized masculinity of the executioner or even in the execution itself. [\[FN14\]](#) This system of capital punishment can be usefully understood as a performance of White masculinities.

The gender of capital punishment, specifically the White masculinities of the death penalty, help to sustain it. The death penalty consists mainly of gender violence of men against men. [\[FN15\]](#) In short, the masculinities of the death penalty are performed--proven--in relation to the masculinities of the

condemned. Thus, femininity of the condemned disrupts the system's effectiveness, at least symbolically. In some sense, then, executions of feminine subjects are gender mistakes, placing the masculine authority of the state at risk. [FN16] The 1998 execution by Texas of ultra-feminine Karla Faye Tucker was such a gender and racial mistake. Although guilty of a gruesome double murder by pickaxe, by the time of her execution Karla Faye Tucker had been seen by many Americans to be an attractive, pious, charming, and sweet young White woman, the embodiment of White femininity. Karla Faye Tucker's execution was troubling because capital punishment should protect White innocence, not kill it.

Identifying capital punishment as a cultural and political performance *187 or negotiation of White masculinities is not declaring it a problem of White men, or even of men in general or White people in general. [FN17] Support for capital punishment is a political position, one that men and women of all races have the capacity to embrace or reject. Although fewer women than men and fewer Blacks than Whites, support the death penalty, [FN18] women of all races and men of color are just as capable of voting for, prosecuting, affirming, and cheering for executions. [FN19] No natural position inclines men to violence and women to peacefulness, [FN20] or even men to masculinity and women to the feminine. Aspirations to masculinity are not reserved for men.

Understanding the gender in capital punishment requires acknowledging that qualities of masculine and feminine are not necessarily aligned with biological males and females. [FN21] Justice William Rehnquist provides authority for this point. When he *188 was a law clerk, Rehnquist complained in a memo to Justice Clark that the "highest court of the nation" was handling death penalty cases "like a bunch of old women." [FN22] Young Rehnquist's complaint is useful not simply to illustrate the subordinated relationship between the perceived weak, feminine approach versus the strong, masculine approach; [FN23] it also highlights the perfectly coherent sting in describing the all-male court with the sneering charge of acting like old women. Gender is fundamental yet insecure, always ready for renegotiation, never stable, never something on which to rely. Thus, gender is more fluid and dangerous than Kenneth Karst suggests when he writes of the women students at the Virginia Military Institute, "not a single one of them needed to prove that she is a real man." [FN24] Perhaps some of them do. [FN25]

*189 Neither static nor universal, the gender in any system of capital punishment is shaped by its particular culture and history. The Cherokee laws that entrusted women to decide whether captives should be killed or brought into the tribe reflected and created powerful meanings of masculinity and femininity specific to their times and places; [FN26] so do the current Russian (and former Soviet) formal prohibitions against executing women. [FN27] India's explicit recognition that a woman's sex is a factor indicating that she should not be executed, whatever her crime, [FN28] constructs masculinities and femininities in ways different from Russia and from the United States. Given the racial history and context of the death penalty in the United States, the masculinities of our executions are deeply racialized. Through his association with Texas' death penalty, George W. Bush, having racked up 152 executions [FN29] like notches on a revolver, negotiated a particularly potent version of White American masculine identity.

Given the masculinist symbolic and material heft of capital punishment, why is the gender in capital punishment almost [FN30] invisible? *190 Perhaps the maleness of death row [FN31] is such old news [FN32] that it is hardly worth noticing. Perhaps, like the air we breathe, it is considered natural and thus

unnoticed, except in occasional weather outbursts, like tornadoes. Karla Faye Tucker's execution caused such a tornado, but the gender of capital punishment quickly receded from public awareness with six obscure executions of women after Karla Faye Tucker.

Although the gender of capital punishment is forgotten, it has not become less important. Condemning females does not disrupt the masculinities of capital punishment, but condemning femininity does. This Article addresses, in turn, the gender in punishing by death, the gender of those chosen for death, and the gender-bending execution of Karla Faye Tucker. By understanding what Justice Blackmun called the "machinery of death" [FN33] as repeated performances [FN34] of White masculinities, we might loosen *191 our attraction to capital punishment [FN35] and to hierarchies of racialized gender. [FN36]

I Executions Producing Masculinities

A. The Symbolic Power of Crime

Jonathan Simon urges us "to understand why crime is such a compelling story about ourselves." [FN37] The masculinities of crime and punishment are a large part of the answer. All crime and punishment issues carry great cultural meaning. [FN38] In part, we understand ourselves and our society based on how we understand crime and punishment. [FN39] As David Garland has written, the criminal justice system "communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations and a host of other tangential matters." [FN40]

*192 Only recently have we noticed that crime and punishment are largely stories about men trying to be men. [FN41] Masculinities are formed by race and class, in part by competition between men as well as through separation from women and from "feminine" men, or homosexuals. [FN42] These formations are urgent and unsettled, and often policed and defended through violence. [FN43] Lawbreaking, *193 victimhood, and our responses to them perform gender, creating men and women. Capital punishment is an important chapter in this story.

B. The Symbolic Power of Capital Punishment

David Garland draws on sociology and anthropology to suggest that punishment is so symbolically powerful because it is "an arena of social tension and social conflict" [FN44] and because "the intractable problems of social and human existence provide a rich soil for the development of myths, rites and symbols, as cultures strive to control and make sense of these difficult areas of experience." [FN45] Killing is the most extreme form of social conflict; not surprisingly, the death penalty, a terrible murder followed by a state killing, harnesses and creates very strong symbolic meanings. Death penalty cases are exceptional, dramatic, and compelling. We, as a culture, notice them; indeed, as the most visible official response to crime, they are intended to be noticed. The execution has lethal physical consequences on the body of the condemned, but the ritualized killing of human life is fundamentally a performance directed to and undertaken for the public. [FN46]

The death penalty is a kind of popular moral entertainment, [\[FN47\]](#) an exercise of power so flamboyant [\[FN48\]](#) that ordinary people perceive themselves to have participated in it. Supporting the death penalty is taking action and ending frustration [\[FN49\]](#) about crime and *194 general social breakdown. [\[FN50\]](#) Crudely put, capital punishment functions less as crime control policy and more like the closest thing we have to an official snuff film. “Executed bodies perform their political mission well when their utter impotence, their absolute lack of vitality, testifies to the robust agency of the state . . .” [\[FN51\]](#) The cultural and public visibility of the death penalty--as a symbol of power, of taking control, of doing justice--makes it important as a potential site of knowledge about ourselves and our society, and about gender.

Social scientists confirm that attitudes toward the death penalty are highly symbolic. [\[FN52\]](#) Some evidence suggests that “death penalty attitudes are a matter of self-identification.” [\[FN53\]](#) Indeed, perhaps “death penalty attitudes are not based on rational considerations at all, but are fundamentally noninstrumental symbolic attitudes, based on emotions and ideological self-image.” [\[FN54\]](#) The deep symbolic power of crime and punishment is clearly linked to its extreme politicalization; a politician is able to take a stand without fear of being found wrong. “Criminal justice issues . . . are abstractions for most of the electorate. Even those who are victimized by crime have no way of appreciating the consequences of different policies on incarceration.” [\[FN55\]](#) Capital punishment is not really about making anyone safer; it is a symbolic representation of taking revenge against crime. [\[FN56\]](#)

*195 Virtually all powerful symbols of authority, morality, and justice are laden with gender. The symbolic power of capital punishment is the power of violence, both of the underlying crime and of the punishment. [\[FN57\]](#) In a society in which our culture and our identities are bound by deep pressures and anxieties of gender--masculine over feminine, masculine over masculine--the capacity and willingness to do violence is traditionally understood to be crucial for men; or, as we might now say, crucial for performing masculinities. “[V]iolent acts committed by men, whether these acts break the law or are designed to uphold it, are often a way of demonstrating the perpetrator’s manhood.” [\[FN58\]](#) Masculine identity is linked to violence, both of the criminal and of the state. [\[FN59\]](#)

The death penalty makes a statement about the power of violence and the meaning of death. It is an expression of public policy and political will that attempts to make sense of violence by recreating it. State killing sets apart the condemned, choosing them to be dramatically expelled from the community, from civilization, from the world of the living. [\[FN60\]](#) Capital punishment represents the ultimate power of the state over its citizens; at the *196 same time, it reinforces the powerlessness of the state to stop violence. Executions produce deep and complex messages about the might and authority of the state. [\[FN61\]](#)

By dramatizing the violence of the state against the condemned, the death penalty creates a solidarity of people with the state, even among populations normally quite oppositional and resentful toward the government. Popular resentment is somehow harnessed by the state in its war against criminals. [\[FN62\]](#) In some ways, this functions like patriotism, or identification with the state in its violent efforts against a common enemy in war. [\[FN63\]](#)

Phoebe Ellsworth and Samuel Gross have told us:

It is not hard to understand why many people support capital punishment even though they believe it does not deter crime and is not fair. The death penalty is concrete, it is

forceful, *197 and it is final (which nothing else seems to be); it is something, and being for it means that you insist that something be done. [FN64]

In this way, the death penalty promises masculine satisfaction. Borrowing William Rehnquist's words, approving the death penalty means that you are not responding to lawlessness "like a bunch of old women." [FN65]

Supporting the death penalty means that "you insist that something be done," but, of course, the something that is being done is the killing of poor people, [FN66] mainly men, most of whom have been convicted of killing White people. [FN67] Capital punishment as it is enacted tells a twisted story about crime, gender, race, and class. For example, it tells us that the most important victims of crime are White. [FN68] It tells us that the worst criminals are poor. In these and many other ways, the manliness of executions and powerful masculinities of the death penalty, like other executions of gender, are performed through race and class. [FN69]

C. The Manliness of Executions

Manliness is constituted in part by physical strength, superiority, and domination. Historically, executions displayed those traits: "[T]here must be an emphatic affirmation of power and its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it" [FN70] "Manliness is one of those ideas that is often made real with violence." [FN71]

*198 Today the violence of an execution is routinely hidden and minimized. [FN72] The Florida Senate Majority Leader who witnessed Judy Buenoano's electrocution pronounced it "antiseptic," like "a grim ballet When they pulled the switch it was over." [FN73] The civilizing move to lethal injection partially obscures the violence of the execution. [FN74] "Death is the culmination of a long series of procedures, performed by technicians under the surveillance of diverse, carefully trained administrators, recorded in scrupulous detail." [FN75] This new, sanitized version of executions offers the same kind of partial invitation to women to become executioners as computerized warfare welcomes women into battle, that is, from the masculine physicality of the past to the informal masculine technology domain of the present. [FN76]

However sanitized and bureaucratized, executions continue to be associated with White masculinity. This point is made, without subtlety, in the recent film *Monster's Ball*, [FN77] in which the work of capital punishment is linked to cruel, misogynist, White supremacist, violent hyper-masculinity. Billy Bob Thornton plays Hank, a prison guard and an executioner who is racist, mean, woman-hating, and gun-loving. His notion of manhood is domination and cruelty. The film shows his redemption, of which his first step is quitting his job as the executioner at the prison. [FN78] Having rejected the hyper-masculine identity of executioner, Hank ultimately remakes himself as a loving, generous man, someone capable of caring for and embracing the Black victims of the execution. *Monster's Ball* powerfully combines hyper-masculinity of executions with racist identities. Hank's manhood *199 was once established by cruelty to women and to Black men; he becomes human, however, by rejecting this racist hyper-masculine identity. In this, *Monster's Ball* follows William Rehnquist and many others who understand the willingness to impose death as a sign of masculinity. [FN79]

The deep symbolic association between the death penalty and masculinities may influence specific aspects of the capital punishment debate in complex ways. Robert Weisberg, Samuel Gross, and others have written about the profound ambivalence in the United States toward executions, namely that this country wants to have the death penalty, but we want it to exist without much use. [FN80] Perhaps this ambivalence represents a cultural production of masculinity related to combatting the modern distaste for executions. Similarly, perhaps we defend ourselves against international condemnation with a masculine national pride that carelessly dismisses all those countries that have given up executions as simply weak (“like a bunch of old women”). Finally, and more clearly, lack of willingness to conduct executions has marked political candidates as too infirm to lead. Personal aversion to killing is damning for a politician, perhaps because it embodies feminine weakness. In the hyper-agitated world of California politics, Dianne Feinstein beat John Van de Kamp in the 1990 governor’s primary because Dianne Feinstein was “tougher” on the death penalty. [FN81] On this issue, Feinstein wore the mantle of masculinity more effectively than Van de Kamp.

D. Women Performing the Death Penalty

If maintaining the machinery of death is a performance of masculinity, given the deep associations between women and femininities we might expect that women’s rates of participation in *200 and support for capital punishment would be different than men’s.

Historically, women’s civic participation as promoters and practitioners of death penalty policy has been mixed. Women make up a sizeable portion of the American anti-death penalty movement of today, [FN82] and did so in the 1800s. [FN83] Other women (and their children) were part of the crowds that gathered for public executions. For many decades after the end of public killings, women were not permitted to witness executions. [FN84] Louis Masur describes that the end of public executions in the mid-nineteenth century “turned the execution of criminals into an elite event centered around class and gender exclusion rather than communal instruction.” [FN85] More recently, in the era of formal gender equality, which has eliminated most explicitly sex-based exclusions, [FN86] women have witnessed executions as officials, surviving victims, and reporters. [FN87]

Today, social scientists commonly report that more men than women favor the death penalty. [FN88] Isolating gender in this way obscures differences in race and class. If capital punishment is a performance of White masculinities, we would expect that the rates of people of color’s participation in and support for capital punishment would be lower than Whites. Indeed, one study found that almost all district attorneys in death penalty states, the government lawyers with the discretion to seek death, are *201 White. [FN89] As to public opinion, Whites support the death penalty much more than do African Americans or Latinos; [FN90] White men support the death penalty much more than do African American men. [FN91] Americans in high and middle-income levels are more likely than lower-income people to support the death penalty. [FN92]

Women’s attitudes about the death penalty reflect and sustain gendered qualities of violence and punishment. For example, culturally, women, rather than men, are more easily understood to be victims. [FN93] Interestingly, then, more women than men question the death penalty, even though, to the extent that women see themselves as potential victims of crime, [FN94] they may understand themselves to be

the possible beneficiaries of the death penalty. [FN95] Apparent readiness to do violence may conflict with *202 many women's aspirations to femininity. [FN96]

Ordinary citizens participate in capital punishment policy not only as voters or respondents to pollsters, but also as jurors who make the life-or-death decision in capital cases. [FN97] The decision to impose death is presented as a serious duty, one that takes courage, [FN98] a masculine virtue that men and women on the jury are invited to use. Women of all races and men of color are underrepresented on death-qualified juries, that is, juries from which people who would not impose death are eliminated. [FN99] Perhaps the saddest evidence of women as outsiders to capital punishment is the recent social science data suggesting that the presence of women on capital juries has no impact on the outcomes of capital cases. [FN100] The life or death decision is more likely to be *203 determined by the race of the men on the jury. Specifically, in cases with a Black defendant and a White victim, the presence of five or more White male jurors "dramatically increased the likelihood of a death sentence." The presence of even a single Black male juror "substantially reduced the likelihood of a death sentence" in these cases. [FN101] Researchers have not found any impact from the participation of women of any race as capital jurors. [FN102] Of course, in our current era of formal gender equality in which women should not be categorically excluded, the presence of women on the capital jury has a legitimizing role, whatever their impact on the decision being reached.

Thus, today both men and women implement the masculine enterprise of the death penalty. The mechanics of executions have become less overtly violent and less gruesome, and, in our era of formal gender neutrality, many women have proven themselves man enough to participate. Women who participate easily adapt to the masculinity of the enterprise; an execution ordered by a woman is no less lethal, but the woman has proven her toughness. Like Dianne Feinstein, women may earn legitimacy for participation or even leadership in public life in part through the willingness to execute. In those cases, the masculinity of the death penalty empowers the woman, more than the woman changes the masculinity in executing the death penalty. Conversely, women may be particularly vulnerable to being vilified as too soft on crime and ousted from public leadership by pro-death penalty forces, as in the prominent cases of former California Supreme Court Chief Justice Rose Bird and former Tennessee Supreme Court Justice Penny White. [FN103] Even in an era when *204 no formal exclusions prevent women from public leadership, the deeply masculine imperative of capital punishment makes it an issue perhaps uniquely capable of policing women by returning women found too soft to the private sphere where femininity more easily resides.

II Gendering the Condemned

The gendering of capital punishment is, of course, profoundly intertwined not only with the gender of those who carry it out, but also of those being punished. Capital punishment is usually men killing men. The biological sex may change without dislodging the masculinity of the operation; putting someone to death is masculine work, whoever does it. Being put to death is overwhelmingly man's work too, but some women have been found fit for the role throughout history. Although the biological sex of the condemned prisoner is not determinative, the masculinity of the enterprise may be disrupted when the object of the execution is perceptibly and appropriately feminine, that is, a feminine female. Proper femininity is found more easily in White women than in women of color, in heterosexual women instead of lesbians, and in middle-class rather than poor women. However, this kind of profound and complex

gender significance is largely hidden behind the current dominant version of gender equality under the law.

Although gender is much more fluid and complex than a simple dichotomy of biological male or female, our law hides the messy complexities of gender behind the simple dualism of biological men and women, and the requirement of formal equality between the two. Thus, the legal issue of gender in the death penalty is popularly understood as the question of women on death row, and, more specifically, whether male and female capital defendants are treated the same. Although not the complete picture, those questions offer an apt starting place to consider the gender of the capital defendant.

A. The Capital Critique of Formal Equality

Through alignments of timing, the modern, post-Furman death penalty era has also been the era of formal gender equality, the principle by which our laws now struggle for coherence and control *205 over sex and gender. [FN104] This looming legal standard, our official story, contends that the state should treat women and men alike. The history of public opinion related to women being executed does not establish a relentless march toward gender neutrality. In 1937, Gallop polls registered no difference in the level of support for the death penalty in general (fifty-eight percent) as for the death penalty imposed on women (also fifty-eight percent). [FN105] The same questions asked in 1953, shortly after the execution of Ethel Rosenberg, [FN106] revealed that only seventy-five percent of the people who supported the death penalty in general supported it for women. [FN107] By 1991, ninety-five percent of those who favored the death penalty for a “man convicted of murder” also favored it for a “woman convicted of murder.” [FN108] The era of formal gender equality had arrived.

Formal gender equality purports to promote equality by conceiving of and producing gender as an individual attribute that can and should be isolated and ignored. As extensive feminist literature makes clear, formal equality uses the man as the standard for comparison, [FN109] ignores the profound differences in the ways that women live, and thereby strengthens the power disparities that many feminists see at the core of gender rules. [FN110] Embrace of formal equality is one explanation for the persistent and *206 shallow association of feminist reform with retributive policies. [FN111] The isolation of gender hides differences among women, especially those related to class and race, such as the dramatically different arrest rates for White and African American women. [FN112]

As many have suggested, formal equality has turned out to be best for women whose resumés are most like men’s, and consequently has hindered other women in custody battles for their children or maintenance of their standard of living after a divorce. Formal gender equality has meant harsher sentences for women. [FN113] We seem comfortable upholding a vast gulf between the stated premises of formal equality of the law (men and women should be treated identically because they are the same) and the widespread culture of differences between the lives of men and women, including dramatic inequalities. [FN114] As Mary Anne Case suggests, “what [the Court] has required is not that the protection *207 be equal, but that the rule be the same.” [FN115]

Formal equality becomes incoherent when addressing supposedly [FN116] real biological differences between men and women (i.e., pregnancy, postpartum depression, menopause), but otherwise the rules

for women and for men are supposed to be the same. Thus, the law is that sex is irrelevant in such areas as hiring, punishment, and benefits, except when it cannot be, because of biology. [FN117] This non-differentiation principle, or formal equality, is the rule through which courts judge capital cases, and the political backdrop to decisions about clemency. In other words, formal equality requires that, unless they are pregnant, women face the death penalty exactly as do men. The imbedded masculinity of capital punishment complicates this directive in multiple ways.

B. “Warfare Writ Small”

For all the militaristic rhetoric that surrounds criminal justice (i.e., “war on crime,” “war on drugs”), the death penalty is the only domestic punishment in which killing is a deliberate policy. Therefore executions and warfare may share similarly deep-seated yet false knowledge about manhood and womanhood.

Our judges have not had the will to enforce formal gender equality in the important cultural performance of masculinity that is the military. [FN118] A combat exclusion for women still exists, *208 although it is much reduced, [FN119] and the male-only registration of eighteen-year-olds for the draft has been upheld by the Supreme Court. [FN120] What happened to the principle that men and women must be treated the same? Kenneth Karst has an answer: “Masculinity is traditionally defined around the idea of power; the armed forces are the nation’s preeminent symbol of power.” [FN121]

The exclusion of women from mandatory registration and some combat roles protects masculinities in the guise of protecting women. [FN122] Similar impulses may operate in capital punishment; after all, “[c]apital punishment is warfare writ small.” [FN123]

Gender performance is contextual, fluid, and contingent; the masculinities in the death penalty undoubtedly disrupt the demands of formal gender equality differently than do the masculinities of war. For example, any comparison of gender in the military and in the death penalty requires determining the extent to which the military exclusions of women are designed to prevent women from being killed, or to prevent women from being killers. The combat soldier embodies both those possibilities; capital punishment separates them, provoking the question whether the percentage of women executioners is any different *209 from the percentage of women who are on death row. [FN124]

Significantly, the combat exclusion is a categorical exclusion from a certain kind of employment. The gender-based draft registration of eighteen-year-old men is a formal, categorical, positive law exemption of young women from an important duty to our country. Women’s inclusion among the condemned is not barred by a similar structure of transparent and explicit categorical exclusions, but instead is controlled by facially neutral yet gendered eligibility statutes and isolated, discretionary determinations of individuals working the death penalty machinery. William Buckley’s proposal notwithstanding, [FN125] the public does not want a formal exemption to prevent executions of women, perhaps because convicted murderers do not receive the same level of protection as eighteen-year-old daughters of all races and classes, and perhaps because the informal discretionary mechanisms are sufficient to protect the masculinity of the death penalty. Even without any formal exclusion of women, death row is overwhelmingly male.

C. The Masculinist Cycle of Male Killing Male

Death row today is filled with 3717 [FN126] nameless, faceless men. Males arrested for murder are six times more likely to be sentenced to death than females arrested for murder. [FN127] We see gender more easily in the cases of women on death row, [FN128] but *210 gender is just as powerful a force, maybe a more powerful force, in the cases of all the men who sit on death row.

Manliness can be established by bettering other men. [FN129] The crimes considered most worthy of the death penalty are the crimes of men. Elizabeth Rapaport argues convincingly that the main explanation for the maleness of death row is choices about which crimes merit death: “It is the extremely low rate of participation in death penalty echelon crimes that most powerfully explains the low percentage of women on death row.” [FN130] The choice to execute men has not been enacted by statutes limiting the death penalty to serial killers, most of whom are White men, [FN131] but is instead grounded in the legislative policy to expand the scope of capital murders to the category that includes the majority of first degree murders, felony murder. [FN132] The vast majority of felony murders, such as the killing of a person behind the counter in a convenience store robbery, are committed by men, not by women. The inclusion of felony murders within death penalty statutes almost guarantees that most condemned are men.

Death-eligibility choices are, of course, themselves deeply gendered. Men and women commit different murders; the felony murders of men are the highest percentage of capital cases; the domestic murders that women commit generally are not considered *211 death-worthy. [FN133] The fact that domestic murders are not punished as severely as other murders means that many people who kill women are not considered as blameworthy as other murderers, given that women are over-represented as victims of domestic murders. [FN134] Gender operates in these assessments of which categories of murders are considered most terrible, but the low number of women on death row does not itself create some sort of prima facie case of prosecutorial discrimination against men in application of the capital statutes; rather, the gender bias is built into the statutes.

The relative infrequency with which women are sentenced to death does not constitute evidence of discrimination against men. Executions of women transgress taboos against certain kinds of public violence against women, [FN135] but even that reluctance is not offered to all women. We take care of some women, some of the time. Wanda Jean Allen’s life, and most of Karla Faye Tucker’s, were themselves dramatic refutation of the idea that women are protected by chivalry, placed on a pedestal, or taken care of. [FN136] Most of the women charged with capital murder are not sufficiently feminine--because of poverty, mental illness, race, or the violent agency of the crime of which they are accused, to earn the full protection of womanhood through informal immunity from being charged as capital defendants. [FN137]

*212 Women charged with capital murder might have earned punishment through gender transgression in addition to the formalities of the crimes for which they have been convicted. [FN138] Some women on death row seem to represent the gender transgressions of a woman appropriating male roles. Karla Faye Tucker, who gloried in the sexual excitement of her pickaxe killings, seemed to fit that category. Other women embody the danger of a stereotypically female role gone bad, such as the many women on death row who killed their husbands (dangerous wives) [FN139] and mothers who killed their children (bad mothers). [FN140]

Although the number of women on death row is so small that virtually nothing in terms of verifiable social science data is possible, we can see a growing number of women on death row because of killing children. Dangerous wives and bad mothers embody twisted versions of a symbolically female role. If executions generally are a sign of taking control over social disorder, *213 executing these women might be understood as a gesture of taking control over gender disorder. [FN141] Even if most of the violence of capital punishment is masculinities against masculinities, the gender neutral legal regimen allows the execution of these particularly violent versions of womanhood. Or, perhaps, the docility of wives and the self-sacrifice of mothers is so essential to those roles that the deadly crimes render the condemned fundamentally masculine wives and mothers, that is, not really wives or mothers at all.

These questions are entwined with the gendered nature of agency and autonomy. Capital punishment ratifies and reinforces the message that individuals are responsible for their actions. To the extent that capital punishment is supported on the basis of notions of just desserts and retribution, the desired message is that people are responsible and therefore will be punished. [FN142] Women on death row undermine that theme, to the extent that they are feminine subjects who are not understood to be free, autonomous agents. [FN143] “Punishment . . . involves imagining the object of vengeance to be a responsible agent who deserves whatever he gets, and, at the same time, a dangerous monster with whom we must deal.” [FN144] Although feminine “monsters” are well-established in our cultural histories and personal psychologies, the notion of “responsible agency” is deeply masculine. Are real wives and mothers understood to be free and autonomous? Issues about executing women raise complex problems, both de-stablizing and stablizing regimens of capital *214 punishment. [FN145] Women on death row embody the conflict between formal equality of our legal system, and deep-seated cultural understandings of what it is to be a man and what it is to be a woman.

Interestingly, as Elizabeth Rapaport has pointed out, bias in favor of women is suggested by the rates of leaving death row, whether by appellate reversal [FN146] or clemency. [FN147] As to reversible error on appeal, Rapaport suggests that “[h]igh as the incidence of reversible error was found to be in death cases generally, it is possible that the error rate in female death cases is higher still.” [FN148] She posits that the relative rarity of women on death row might give their cases the particular scrutiny reserved for noteworthy cases, and suggests that further research may show that women tend to benefit more than men from proportionality review because women are less severe aggravators with fewer prior crimes of violence. [FN149] Regarding clemency, Rapaport shows that women have received a disproportionately high number of the post-Furman, merit-based grants of clemency--seven of forty-four. [FN150]

These numbers are not surprising. Harmlessness is more easily discoverable in women than in men; violent crimes are more easily understood as aberrational, [FN151] so redemption can be more easily seen. Women are more easily understood, by themselves and others, as victims. [FN152] Especially to the extent that mitigation evidence suggests victimhood, women facing death sentences might be more willing to allow such evidence to be investigated *215 and revealed. [FN153] To the extent that women are less likely to sustain the impression of being fully responsible for their acts, they are more likely to be removed from death row. And perhaps appellate courts and governors are able to act more like protective fathers, [FN154] further removed from the shocking and frightening crime for which the woman has been condemned. In short, feminine subjects will clean up better for the appellate and

clemency processes. We should not be surprised that the lottery of selection for execution might disfavor those who most easily sustain the masculinity of the enterprise.

Every female and male defendant is considered within unspoken but powerful constructions of masculinities and femininities. Condemned women have forsaken their femininity, or perhaps never had it, and thereby lose their claim to life. [FN155] Men who are on death row need to be punished precisely because of their masculine identity, wrapped up as it is with their class and racial identities, chosen and imposed. [FN156] Men on death row rarely transgress their gender assignments. [FN157] If anything, they are condemned for embodying frighteningly fierce masculinity, provoking condemnation especially from other, different, men. [FN158] The uneasiness with executing more women may be because capital *216 punishment is centrally about asserting, proving, and re-enacting masculinities. In other words, changing the gender identity of the person being executed changes the gender of the executioner [FN159] and of the execution.

If the death penalty consists mainly of gender violence of men against men, feminine capital defendants who are women may disrupt the meaning and power of the system. If executions are mainly about taking some control over perceived lawlessness, the person being executed has to have the qualities of being frightening and relatively easily de-humanized. Race, of course, is highly relevant to both of these characteristics. Race matters; class matters; gender matters. Feminine subjects, not female bodies, confuse and disarm the symbolic machinery of death. To make appropriately condemned, women need to have lost their femininity, whether through subordinated status or through their actions.

These gendered tensions are manifested in the life or death determination in each individual capital case.

D. The Impossibility of Gender Neutral Individualized Consideration

The fact that there are so many ways to be a woman--and some females who are not even recognized as women--does not suggest the casualness or unimportance of gender, but instead proves the opposite, the need for powerful symbols and reinforcement of our identities. We live our own lives and we judge others as performances of gender, or proof of gender. Thus, gender is a constant struggle, and the decision whether to execute a capital defendant is in part a judgment about gender.

Capital cases are structured by a series of highly discretionary decisions leading to life or death. [FN160] The individualized sentencing*217 required by *Woodson v. North Carolina* [FN161] and *Lockett v. Ohio* [FN162] mandates that each defendant be judged as a unique human being, in light of his or her entire life experience, and that no one's crimes require a death sentence. Is this a person who deserves to live? Or is this person too dangerous to live? Is this even a person, or an animal? [FN163] Unlike an employment, housing, or school admission decision, the entire life of the person can be scrutinized. At trial the worthiness or culpability of the accused is not formally compared with anyone else's, except perhaps the victim's. The law provides no right answer.

This discretion, at charging, penalty phase, appellate level, post-conviction stages, and clemency invites the social impulses, biases, and other forms of socially constructed knowledge to shape the narrowing process from death-eligible to executed. In the penalty phase, we literally judge the value of a life, comparing the value of the defendant's life with the value of the victim's, already lost. The

extraordinary discretion provided to decisionmakers in capital cases leaves the gendered symbolic power of capital punishment unrestrained.

In this life, we notice everybody's sex and gender. That is, often the first things we see about the person is whether a person is male and recognizably and appropriately masculine, or female and recognizably and appropriately feminine. We do not have the capacity to ignore sex and gender in any kind of encounter, unless it is rendered invisible because it is so ordinary. So, for example, we do not necessarily notice that a receptionist is a woman; we would notice if she was a man, particularly an older, distinguished man. How then, when it comes to judging a life, in a capital case, could sex and gender not matter?

The foolish inadequacy of attempting to safeguard against discrimination by ignoring sex or gender can be seen in the federal instruction and verdict certificate designed to eradicate sex or gender bias in federal capital decisionmaking. The jury is instructed that the sex of the defendant cannot be considered, and that "the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for *218 the crime in question no matter what the . . . sex of the defendant." [FN164] As part of the verdict, each juror must supply a certificate pledging that he or she did not consider the sex (or any other prohibited characteristic) of the offender. [FN165] Imagine the difficulty of applying this formula in Karla Faye Tucker's case. Karla Faye Tucker was brought into prostitution as a child by her mother, and began taking drugs at age eight. [FN166] She dreamt of being the first female quarterback in the National Football League. At the age of ten, her older sister's boyfriend provided her first heroin injection in the hope of sex. Like her mother, Karla Faye Tucker learned to sell sex for money, drugs, and independence. Or consider Wanda Jean Allen, executed by Oklahoma in 2001 for killing her woman lover. The jury that condemned Wanda Jean Allen was told that she was the man in the family. [FN167] What would it mean to disregard her life as a woman? With whom could she be compared?

Imagine a jury asked to consider Andrea Yates without taking into account her sex. [FN168] Andrea Yates, the Texan who faced a death sentence for drowning her five children, has drawn extraordinary *219 public interest. The excitement might have related to her position as a White, college-educated, middle class woman. Andrea Yates' case riveted in part because she embodied conflicting positions in our culture wars. Anti-feminists ridiculed compassion for Yates, [FN169] a fundamentalist Christian, anti-abortion, capital defendant whose crimes were bound up with home schooling and relentless motherhood. In formal legal terms, assessing the appropriateness of a death verdict against Andrea Yates should have been easy; mental illness reduces culpability. Under a regime of supposed gender-blind equality, however, the gendered source of her psychosis, post-partum depression, confused this simple truth, as if recognizing the mitigation in a mental illness unique to women would mean impermissibly favoring women. The cultural meaning of Andrea Yates' crime is confused because her terrible crimes can be attributed to the pressures of her life as a wife and mother. [FN170] Could any honest person evaluating the case of Andrea Yates sign a certificate such as that now required in federal capital cases [FN171] verifying that the sex of the defendant was not considered in the sentencing? The gender-blind regime of formal equality obscures truths about women's lives while inviting unrestrained and unacknowledged attitudes about gender to impact life or death decisions.

Karla Faye Tucker's execution changed popular support for *220 the death penalty in this country, [FN172] yet her execution has been followed by six executions of women, [FN173] none of which

caused any national [\[FN174\]](#) outcry, discomfort, or even much notice. If gender matters, how can the executions of Judy Buenoano, Betty Lou Beets, Christina Riggs, Wanda Jean Allen, Marilyn Plantz, and Lois Nadean Smith be explained? The explanation lies in remembering that biological sex by itself explains very little. Gender is more than biology, and gender does not exist as separate from race or class or sexual identity. [\[FN175\]](#) At least in this world, a woman without a race cannot exist, so gender is not separate from race. [\[FN176\]](#) The gender identities continuously imposed on and created by a professional Black woman are very different from the gender identities or expectations imposed upon a poor White woman. A speech about capital punishment entitled “The Black Man’s Burden” [\[FN177\]](#) describes particular, highly contextual manifestations of the meanings of African American manhood. The fact that gender identities are not identical--in fact are *221 hugely different from one man to another or from one woman to another--does not make them less powerful as constraints or pressures on the material and imaginable choices of either women or men. Just the opposite is true.

Consider, for example, the gender of Karla Faye Tucker, when executed by Texas in 1998, and the gender of Wanda Jean Allen, one of three women executed by Oklahoma in 2001. [\[FN178\]](#) Karla Faye Tucker was a White, articulate, charming, sweet, attractive, devoutly heterosexual (married to a minister) woman. Wanda Jean Allen was also religious, but her Christian identity was undercut by her lesbianism. Wanda Jean Allen was an African American lesbian, described in her trial as “the man in the relationship.” She was convicted and sentenced to die for killing her lover in a domestic dispute. Allen and her partner were both African American women who had met in prison while serving homicide sentences.

We know that many Americans did not have the stomach for the execution of an attractive, articulate, white, married (heterosexual), Christian woman. To add the modifiers is not to dilute the importance of “woman”; the reaction to Karla Faye Tucker does not make sense except as a reaction to a woman. The public has not been interested in the many decent and likeable men on death row who have transformed their lives through religious conversion. [\[FN179\]](#)

However, as Simone de Beauvoir famously advised us, women are made, not born. Race, class, attractiveness, and gender-appropriate behavior make the woman, not biology. Karla Faye Tucker herself understood that no one would have recognized her as a woman at the time of her crime. [\[FN180\]](#) Although we have too little social science data on the women of death row, one study suggests that “death-sentenced women of color and lesbians are over-represented in the kinds of murders that, according *222 to prior research, are at low risk of resulting in the death penalty.” [\[FN181\]](#) Executing women who transgress feminine norms helps to reaffirm those traditional norms of womanhood in the face of pressures, including those of feminism. [\[FN182\]](#)

Thus, gender is neither simple nor static. It is complex and contingent; it can be lost. That is, some females are not seen as women just as some males are not understood to be real men. We cannot talk about gender without talking about race, class, age, and other qualities. The gender-blind version of formal gender equality, of course, sees none of those individual characteristics or any others beyond biological assignment as male or female. [\[FN183\]](#)

A narrow and simplistic focus on sex--executing some women--will not de-stabilize capital punishment. Indeed, the focus on women on death row helps to legitimize capital punishment. When executions are in danger of being too routine to muster much interest, [\[FN184\]](#) any noteworthy

executions help to sustain the power of the death penalty. By being exceptional, [\[FN185\]](#) women on death row fortify the death penalty system by reminding us of the individual cases, the horrible crimes, and our justification for vengeance. [\[FN186\]](#) More particularly, if imposing death is understood as performing a difficult duty, overcoming discomfort and applying *223 the law “fairly” by executing women helps to legitimize capital punishment. Under an inoculation theory, we need to execute some women to prove that gender is not a consideration. [\[FN187\]](#) (In what other public debate are we concerned with fairness to the condemned? Is this another manifestation of the expendability of women?)

We might even understand that executing women can reinforce the masculinity of the death penalty, in reaction. In her study of the Los Angeles Police Department, Janis Appier suggests that the presence of women as police officers had the paradoxical effect of masculinizing the police department; since the 1970’s, police forces have become much more masculine, leaving behind the greater service orientation of earlier eras, when officers performed caring tasks, including assisting children and homeless people. [\[FN188\]](#) The renewed masculinity of capital punishment in the face of executions of women may relate to an anxious backlash, reasserting the masculinist power of executions in the face of apparent weakness in killing women. Or, more directly, perhaps the direct masculinist impulse of undertaking the duty of disciplining women who have gone too far is quite consistent with the masculinist impulse to vanquish other men.

The death penalty is relentlessly aimed at poor people, and death judgments protect White lives. If the death penalty regime is so successful at targeting those subordinated by class and race, why not by sex? Perhaps even better than other spheres of public life, crime and punishment prove the impossibility of attempting to separate race, class, and gender and then draw comparisons between them. Race and gender in criminal justice are spectacularly asymmetrical. [\[FN189\]](#) Renee Heberle has suggested that private violence against women fulfills the subordination function against women that executions fulfill against poor men, *224 especially men of color. [\[FN190\]](#) The death penalty reinforces manliness through powerful, public violence against frightening, masculine men, but the meanings of public violence against feminine subjects can be quite different. Most women who have been executed have not been proper feminine subjects. Most women we have executed have not disrupted the masculinity of the enterprise.

III Executing Femininities: Karla Faye Tucker

Consider again the dilemma of then-Governor Bush in determining whether to allow Karla Faye Tucker to live. His choice was not difficult. The question whether any woman should have her death sentence commuted is, of course, now inextricably complicated by the formal requirement of gender blindness. By allowing Karla Faye Tucker to be executed, Bush was able to prove his commitment to fairness and equality and perform toughness and masculinity. Bush wrapped himself in the duty of the decision, much as jurors understand the decision to vote for death as somehow compelled by duty. [\[FN191\]](#) In his campaign autobiography, Bush presented himself as pained by the decision (“one of the hardest things I have ever done” [\[FN192\]](#)), but committed to the principle of gender equality. “My responsibility is to ensure our laws are enforced fairly and evenly without preference or special treatment.” [\[FN193\]](#)

Bush's decision to execute did not hurt him, as a supporter of the death penalty, but it did have an impact on public support for executions generally. The fact that it was politically safe for *225 then-Governor George W. Bush to deny clemency to Karla Faye Tucker [FN194] did not mean that the public was easy with her execution. By presenting the execution as compelled by gender neutrality, then-Governor Bush exploited our widespread discomfort with formalized, explicit exemptions for women, in spite of the many profound differences between the lives of men and women, many of which disadvantage women severely. Immediately prior to the scheduled execution of Karla Faye Tucker, only three percent of those polled agreed that the execution should be cancelled because Tucker was a woman. [FN195] Those results reflect the resistance to formalized categorical exclusions from executions for women.

People did not want all women to be protected, but they did not want to execute Karla Faye Tucker. [FN196] In spite of the reluctance to permit formal exemption on the basis of sex, Tucker's execution was sufficiently controversial in the country, in Texas, and even in Houston, to undermine support for capital punishment. In the period prior to her execution, a poll conducted by the Dallas Morning News found that only forty-five percent of Texans supported Tucker's execution, although seventy-five percent supported the death penalty. [FN197] By another account, support for the death penalty among Texans fell from eighty-five percent in 1994 to sixty-eight percent six weeks after Karla Faye Tucker's execution. [FN198] Shortly after Karla Faye Tucker's execution, an ABC News and Washington Post poll found that a majority of Americans (fifty-one percent) supported a national moratorium on the death penalty. [FN199] If the death penalty law cannot discriminate between the monstrous and the likeable, some people do not want it.

Karla Faye Tucker's transformation was especially perverse in *226 its reversed entanglings of killing and sexuality. The most masculine aspect of her shocking crime was her boast that she experienced sexual climax every time she swung the pickaxe into the bodies. [FN200] Her linking killing with sexual satisfaction marked how far from feminine identity she had wandered. But, perhaps alone among the women executed since 1976, by the time of her execution, Karla Faye Tucker was conventionally attractive, a person who exuded not just charm but also sex. Beverly Lowry described meeting Tucker: "In that cold, walled-off setting, surrounded by cold, walled-off people, Karla Faye threw her head back and guffawed--a hearty, full, genuine body-shaking guffaw--and I could see her direct, uncompromised, highly sexual charm." [FN201] Perhaps her execution was especially troubling because the extermination of a sexually desirable woman came dangerously close to something akin to a snuff film fantasy. Perhaps that helps to explain the persistence of official (male) resistance to even noticing, let alone acting favorably upon, Karla Faye Tucker's womanhood.

Judith Butler has usefully deployed the notion of "drag": "The performance of drag plays upon the distinction between the anatomy of the performer and the gender that is being performed." [FN202] Some of Karla Faye Tucker's influence on public attitudes about the death penalty was based on her performance as "drag"; by the time of her execution, she was a criminal in drag as a super-feminine, likeable, attractive woman. Or maybe she was really a feminine person, with just one powerful masculine performance to live down. Karla Faye Tucker's execution was a "gender parody" [FN203] in ways that Wanda Jean Allen's and others' were not.

Karla Faye Tucker was troubling in part because even in her resistance to special treatment, [FN204] she presented herself as the kind of woman who should be respected, should be helped. Part *227 of her

charm and attractiveness was her desire not to be given special protection as a woman. “I say gender should not play any role in this at all.” [\[FN205\]](#) How feminine and self-sacrificing. This is the kind of woman who merits respect, not the kind to be complaining about her lot or asking for special treatment. “Special treatment” is serious, powerful coded language in U.S. culture wars about racial justice, gay and lesbian rights, and women’s rights. Special treatment would be contrary to the formal equality paradigm within which we operate. Executing such a presentable, feminine, White woman undercut public support for the death penalty. The act of killing such an agreeable and lovely (feminine, White) person undercut the power of the execution. Killing a grim old White woman or a poor African American lesbian can be satisfying. But the death penalty should protect White innocence, not kill it.

In at least one popular account of the execution of Karla Faye Tucker, she was said to have broken the “glass ceiling” of the death penalty. Bringing to capital punishment that phrase borrowed from feminist tales of discrimination in the workplace trumpets the “equality” of the death penalty and thereby legitimizes it. Camille Paglia supported the execution, claiming to be an “equal opportunity feminist.” [\[FN206\]](#) Again, we live in an era in which formal equality between men and women--no special treatment--is a dominant, controlling construct, both in law and in popular consciousness. [\[FN207\]](#) Confined to that construct, some *228 feminists called for the execution of Karla Faye Tucker in order not to set back women’s progress.

We also heard some anti-feminists chortling or sneering over the right to equal access to lethal injection that feminist politics had earned for women. [\[FN208\]](#) Not otherwise known for his commitment to fairness to women or to death rows inmates, then-governor George W. Bush embraced Karla Faye Tucker’s execution with anti-affirmative action rhetoric; “My responsibility is to make sure our laws are enforced fairly and evenly without preference or special treatment.” [\[FN209\]](#)

That version of feminism is not mine. My version of feminism is something like this. Crime is constructed as masculine. The socially constructed and endlessly reproduced identity of many men, especially poor men, especially African American and Latino men, is that of a criminal. [\[FN210\]](#) The continuing use of violence and crime to construct masculinities is dangerous. Security and justice are unlikely in a political economy in which racialized and masculinist rituals of violence substitute for effective crime control policies. The deeply embedded associations between criminality and masculinities might mean that feminine criminal subjects allow us to see the criminal person, and therefore the causes and answers to crime. Women may be more easily separated from the crimes that they have committed. We should create justice for capital defendants by making each of them as visible, as human, as was Karla Faye Tucker.

My feminist response is to present Karla Faye Tucker not as exceptional because she was a woman, but as exceptional because her gender transformation gave her the ability to be seen. [\[FN211\]](#) Karla Faye Tucker was a very unusual woman. By her words and her face, she challenged important American misconceptions *229 about crime, rehabilitation, and capital punishment. She seemed like a criminal when she was charged: poor, strung out, arrogant, lethal, sexually dangerous. Her crude, brutal crime was all the more shocking because she was a woman. Her transformation allowed America to see her as somebody who did not seem like a criminal. By the time of her execution, she seemed redeemed. She was faithful, sweet, pious, and articulate. There was no question of future dangerousness. Karla Faye Tucker was so thoroughly feminine that even her choice of a last meal --” Banana, Peach and Garden Salad with Ranch Dressing”--is starkly abberational amidst the usual steaks, burgers, and pizzas on the

list of final meal requests published by the Texas Department of Criminal Justice. [FN212] For those not titillated, the senselessness of Karla Faye Tucker's execution was easy to see. Her execution became a formal duty, justified by fairness to everyone else on death row.

Because of the crimes for which they have been convicted, and because of entrenched systems of subordination that selected them for the ultimate punishment, most capital defendants do not have the capacity to be valued by disinterested strangers. Through an accident of gender transformation--gaining a striking feminine attractiveness--Karla Faye Tucker had that capacity. My version of feminism says that we honor women, we honor ourselves, not by pretending not to care about Karla Faye Tucker, but by using the lesson of our caring about her to learn to care about the others on death row, the fifty-four women and 3717 men of all races, [FN213] whether illiterate, ugly, miserable, or frightening, whose executions would be just as senseless as was hers.

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[FN1]. "To the extent that gender is an assignment, it is an assignment which is never quite carried out according to expectation, whose addressee never quite inhabits the ideal s/he is compelled to approximate." Judith Butler, *Bodies That Matter* 231 (1993) [hereinafter Butler, *Bodies*].

[FN2]. By gender, I mean a systematic social construction of masculinity and femininity that is little, if at all, constrained by biology. See generally, Sandra Harding, Introduction: Is There a Feminist Methodology?, in *Feminism and Methodology* 1 (Sandra Harding ed., 1987). The social constructs of masculine and feminine are "metaphors we live by." George Lakoff & Mark Johnson, *Metaphors We Live By* (1980). Use of the plural terms "masculinities" and "femininities" emphasizes the "diverse and differentially empowered" versions of masculinities or femininities and deliberately complicates the idea of a single, uniform masculinity or femininity understood predominantly in relation to each other. Richard Collier, *Masculinities, Crime and Criminology* 4 (1998).

[FN3]. On the inseparability of race and gender, see Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 111, 113-20 (Mari J. Matsuda et al. eds., 1993); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, in *Critical Race Feminism: A Reader* 27 (Adrien Katherine Wing ed., 1997); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *Duke L.J.* 365, 374.

[FN4]. See, e.g., Amnesty Int'l USA, *Killing With Prejudice: Race and the Death Penalty* (1999); David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990); Jesse Jackson, Sr., et al., *Legal Lynching: The Death Penalty and America's Future* (2001); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3

U. Pa. J. Const. L. 3 (2001) [hereinafter Baldus, Peremptory Challenges]; David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998); John H. Blume et al., Post-McCleskey Racial Discrimination Claims in Capital Cases, 83 Cornell L. Rev. 1771 (1998); Stephen B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433 (1995); Erwin Chemerinsky, Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act, 35 Santa Clara L. Rev. 519 (1995); Ruth E. Friedman, Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty, 11 La Raza L.J. 75 (1999); Cynthia K.Y. Lee, Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies, 73 Chi.- Kent L. Rev. 533 (1998); Jeffrey J. Pokorak, Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors, 83 Cornell L. Rev. 1811 (1998).

[FN5]. See, e.g., Joan W. Howarth, Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors, 1994 Wis. L. Rev. 1345 [hereinafter Howarth, Deciding to Kill].

The power of the law is manifest in [the decision of a jury to punish someone by death].
If gendered structures in fact operate within apparently neutral legal principles and procedures, they will be deeply at work in the legal procedures that give the ultimate task--deciding life or death--to a person, a juror.

Id. at 1350; see also Victor L. Streib, Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary, 63 Ohio St. L.J. 433 (2002) [hereinafter Streib, Gendering].

[FN6]. "One of the more striking features of crime--both violent and nonviolent--is its maleness." Ngairé Naffine, Book Review, 26 Signs: J. Women Culture & Soc'y 572 (2001); see also Lawrence M. Friedman, Crime and Punishment in American History 211 (1993) (explaining that women have historically been "shut out of key roles in criminal justice" and that "women criminals were always in short supply"). Ninety-two percent of federal inmates are men; ninety-five percent of state inmates are men. U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Offenders Statistics, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Apr. 11, 2002).

[FN7]. Approximately 98.5% of the people on death row in this country are men. NAACP Legal Defense and Education Fund, Inc., Death Row U.S.A.: Spring 2002, at 3, at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf> (last visited Apr. 6, 2002) [hereinafter Death Row U.S.A.].

[FN8]. Kenneth L. Karst, "The Way Women Are": Some Notes in the Margin for Ruth Bader Ginsburg, 20 U. Haw. L. Rev. 619, 622 (1998) [hereinafter Karst, Women].

[FN9]. As the person on death row is objectified/destroyed, the legal process that carries out the execution is objectified/glorified. The death penalty ritual is a symbolic power surge that reflects and builds the power of law. Each execution sends an arrogant message, boasting that the legal system is capable of using its own rules to convert killing a person into something lawful. The legal process and its participants absorb and assume the power rendered by the execution. Joan W. Howarth, Review Essay: Feminism, Lawyering, and Death Row, 2 S. Cal. Rev. L. & Women's Stud. 401, 418 (1992) [hereinafter Howarth, Feminism].

[FN10]. Gender is not something that we inhabit or embody so much as something we negotiate on an ongoing basis within the context of power relations.... [Radically destabilizing conflicts of gender systems make] gender available to all sides in any context, which, in turn, means that the variability of gender presents both dangers and powerful possibilities to the strategies of the condemned and of the state.

Barbara Cruikshank, *Feminism and Punishment*, 24 *Signs: J. Women Culture & Soc'y* 1113, 1115 (1999); see, e.g., James W. Messerschmidt, *Masculinities and Crime: Critique and Reconceptualization of Theory* (1993); *Race and the Subject of Masculinities* (Harry Stecopoulos & Michael Uebel eds., 1997); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 *Stan. L. Rev.* 777, 779 (2000).

[FN11]. *Death Row U.S.A.*, supra note 7, at 3. Death row consists of 1678 Whites, 1593 African Americans, 347 Latina/os, 41 Asians, and 41 Native Americans. *Id.*

[FN12]. Eighty-one percent of the victims of defendants executed since 1976 have been White. *Id.* at 8.

[FN13]. See, e.g., Joan W. Howarth, *Representing Black Male Innocence*, 1 *J. Gender Race & Just.* 97, 102-08 (1997) [hereinafter Howarth, *Black Male Innocence*] (discussing socially constructed identity of African American men as dangerous criminals). Currently forty-three percent of the men on death row are African American. *Death Row U.S.A.*, supra note 7, at 3.

[FN14]. See infra text accompanying notes 57-81 (describing capital punishment as a gender performance); cf. Robert A. Burt, *Democracy, Equality, and the Death Penalty*, in *The Rule of Law* 80, 93 (Ian Shapiro ed., 1994) [hereinafter Burt, *Democracy*] (suggesting that support for the death penalty reflects White fear of Black retaliations for subjugation).

[FN15]. Cf. Harris, supra note 10, at 779 (“since most victims of violent crime are male, it may be that more men than women suffer from gender violence.”).

[FN16]. Timothy Kaufman-Osborn has argued that, given the state’s need to “obscure the brutality of official killing,” the execution of a woman, like a botched execution, “may impair the state’s quest to secure unequivocal control over the semiotic import of its violence.” Timothy V. Kaufman-Osborn, *Reviving the Late Liberal State: On Capital Punishment in an Age of Gender Confusion*, 24 *Signs: J. Women Culture & Soc'y* 1119, 1124 (1999) [hereinafter Kaufman-Osborn, *Reviving*]. The controversial execution of convicted Communist spy Ethel Rosenberg in 1953 was, in fact, botched, in that second and third cycles of electricity were required to kill her. Robert Jay Lifton & Greg Mitchell, *Who Owns Death?: Capital Punishment, the American Conscience, and the End of Executions* 51 (2000).

[FN17]. I am suggesting that, in the United States, the cultural practice of Whiteness (see Ian F. Haney Lopez, *White By Law: The Legal Construction of Race* (1996)) and of capital punishment reinforce each other. For a discussion of race as culture, see Neil Gotanda, *A Critique of “Our Constitution is Color Blind,”* 44 *Stan. L. Rev.* 1, 4-5, 56-58 (1991). For a demonstration that some meanings of Whiteness are not necessarily limited to Whites, see, e.g., Suzanne A. Kim, *Comment, “Yellow” Skin, “White” Masks: Asian American “Impersonations” of Whiteness and the Feminist Critique of Liberal*

Equality, 8 Asian L.J. 89 (2001); see also Janine Young Kim, Note, Are Asians Black? The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 Yale L.J. 2385 (1999).

[FN18]. See, e.g., Lifton & Mitchell, *supra* note 16, at 217-18; Phoebe C. Ellsworth & Samuel R. Gross, Hardening of the Attitudes: Americans' Views on the Death Penalty, *J. Soc. Issues*, Summer 1994, at 24 [hereinafter Ellsworth & Gross, Hardening of the Attitudes]; see also *infra* text accompanying notes 88-92 (discussing distortion of isolating gender from race or class in this comparison between men and women).

[FN19]. See, e.g., Jeffrey Toobin, Women in Black, *N. Yorker*, Oct. 30, 2000, at 48, 54 (describing fierce death penalty records of two women judges in Texas).

[FN20]. See Howarth, *Feminism*, *supra* note 9, at 411.

My argument is not that feminists should oppose executions because violence is male, or because women's nature is nonviolent. Such claims obscure the more complicated and perhaps distressing reality.... Feminists should work against the death penalty not because women are nonviolent, but because the opposite is true. Opposition to executions is a political choice of women and men, all of whom have the capacity for violence and destruction.

Id. (footnotes omitted).

[FN21]. Judith Butler has written:

When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that man and masculine might just as easily signify a female body as a male one, and woman and feminine a male body as easily as a female one.

Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 6 (1990) [hereinafter Butler, *Gender Trouble*]. See generally Judith Halberstam, *Female Masculinity* (1998).

[FN22]. David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* 34 (1992). We may find some irony in the fact that the two sitting justices of the Supreme Court who have expressed reservations about our death penalty system are the two old women. See, e.g., Henry Weinstein, *Death Penalty Study Suggests Errors*, *L.A. Times*, Feb. 11, 2002, at A13 (“[E]ven two Supreme Court justices--Sandra Day O'Connor and Ruth Bader Ginsburg--[have] recently expressed doubts about whether the process is working fairly.”); Charles Lane & Michael A. Fletcher, *High Court Takes Up Two Big Issues: School Vouchers and Death Penalty Spark Lively Debate*, *Wash. Post*, Feb. 21, 2002, at A6 (“Two justices, [Sandra Day] O'Connor and Ruth Bader Ginsburg, have publicly voiced their concerns about the quality of legal advice given to capital defendants.”). Noting that Minnesota does not have the death penalty, Justice O'Connor told the Minnesota Women Lawyers' Association, “You must breathe a big sigh of relief every day.” *O'Connor Questions Death Penalty*, *N.Y. Times*, July 4, 2001, at A9.

[FN23]. We know that Rehnquist did not choose the metaphor of old women to suggest that the Court's handling of capital cases was marked by wisdom, endurance, and strength. More likely he meant that the Court was too nervous about executions, perhaps too

fussy, and certainly too weak. Rehnquist wanted the capital doctrine produced by the most authoritative court to be clear, forceful, and more--well, manly.

Howarth, *Deciding to Kill*, supra note 5, at 1354.

[FN24]. Karst, *Women*, supra note 8, at 625. Some women aviators in the Navy, for example, have embraced the masculine culture.

Many women who made a career as Navy aviators, though they were not allowed in combat, had become part of the swaggering subculture--a group whose death-defying daily routines set them apart within the Navy. They talked tough and weren't prissy about sex, and one would occasionally show her spirit by grabbing a male colleague's crotch and shouting, "Package check!"

Peter J. Boyer, *Admiral Boorda's War*, *N. Yorker*, Sept. 16, 1996, at 68, 71-72.

[FN25]. See generally Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum. L. Rev.* 392 (2001) (promoting focus on transgender rights to challenge misguided association of gender with biology); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265 (1999); Julie A. Greenberg, *When Is a Man a Man, and When is a Woman a Woman?*, 52 *Fla. L. Rev.* 745, 746 n.7 (2000) (citing estimates that between .1% and 4% of the population are intersexual, defined as people whose biological sex attributes are not all congruent).

[FN26]. Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* 26 (1975). Similarly, women were a force protecting accused murderers from the clan revenge system for dealing with homicide. *Id.*

[FN27]. See Victor L. Streib, *Death Penalty for Female Offenders*, 58 *U. Cin. L. Rev.* 845, 880 (1990) [hereinafter *Streib, Female Offenders*].

[FN28]. See *Streib, Gendering*, supra note 5, at 433.

[FN29]. The State of Texas Department of Corrections maintains a list of Texas executions. Texas Dep't of Criminal Justice, *Death Row Information, Executed Offenders*, at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last updated June 26, 2002).

[FN30]. The legal scholars who work this field are Professors Phyllis Crocker, Elizabeth Rapaport, Victor Streib, and myself. See, e.g., Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 *N.C. L. Rev.* 1143 (1999); Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 *St. Mary's L.J.* 981 (1998); Phyllis L. Crocker, *Is the Death Penalty Good for Women?*, 4 *Buff. Crim. L. Rev.* 917 (2001); Howarth, *Deciding to Kill*, supra note 5; Howarth, *Feminism*, supra note 9; Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 *SMU L. Rev.* 1507 (1996) [hereinafter, *Rapaport, Domestic Discount*]; Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 *Buff. Crim. L. Rev.* 967 (2001) [hereinafter *Rapaport, Staying Alive*]; Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 *Ohio N.U.L. Rev.* 581 (2000) [hereinafter *Rapaport, Damned*]; Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 *Golden Gate U. L. Rev.* 501 (1990); Elizabeth

Rapaport, *The Death Penalty and Gender Discrimination*, 25 *Law & Soc’y Rev.* 367 (1991) [hereinafter Rapaport, *Gender Discrimination*]; Victor L. Streib, *America’s Adversion to Executing Women*, 1 *Ohio N.U. Women’s L.J.* 1 (1997); Victor L. Streib, *Death Penalty for Battered Women*, 20 *Fla. St. U. L. Rev.* 163 (1992); Victor L. Streib, *Death Penalty for Lesbians*, 1 *Nat’l. J. Sexual Orientation L.* 104 (1995); Streib, *Female Offenders*, supra note 27; Streib, *Gendering*, supra note 5; see also Cruikshank, supra note 10; Renée Heberle, *Disciplining Gender; or, are Women Getting away with Murder?*, 24 *Signs: J. Women Culture & Soc’y* 1103 (1999); Timothy V. Kaufman-Osborn, *Gender and the Death Penalty: Introduction*, 24 *Signs: J. Women Culture & Soc’y* 1097 (1999) [hereinafter Kaufman-Osborn, *Introduction*]; Kaufman-Osborn, *Reviving*, supra note 16.

[FN31]. As of January 1, 2002, there were 3657 men and fifty-four women on death rows in the United States. *Death Row U.S.A.*, supra note 7, at 3. The percentage of women on death row has been consistently around two percent for several years. Streib, *Gendering*, supra note 5, at 439.

[FN32]. Justice Thurgood Marshall noted “overwhelming evidence that the death penalty is employed against men and not women” thirty years ago. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

[FN33]. *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from den. of cert.).

[FN34]. See, e.g., Butler, *Gender Trouble*, supra note 21, at 136-39 (describing gender as a performance). “The practice by which gendering occurs, the embodying of norms, is a compulsory practice, a forcible production...” Butler, *Bodies*, supra note 1, at 231.

In this sense, gender is not a noun, but neither is it a set of free-floating attributes....

Hence,... gender proves to be performative--that is, constituting the identity it is purported to be. In this sense, gender is always a doing, though not a doing by a subject who might be said to preexist the deed.

Butler, *Gender Trouble*, supra note 21, at 24-25.

[FN35]. See also Streib, *Gendering*, supra note 5, at 437-38 (calling the death penalty a “masculine sanctuary” and arguing that “[t]his perspective reveals more clearly than any other the true motivating forces behind the general death penalty debate.”).

[FN36]. “A serious feminist project for the theory of law is not simply to embrace the ‘female’ side of these dualisms, the task undertaken by relational feminists, but further to strip away the false male cover to reveal the messier reality--that is, to reject the basic dichotomies.” Howarth, *Deciding to Kill*, supra note 5, at 1350 (citing to Zillah Eisenstein, *The Female Body and the Law* 4-5 (1988) and Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *Women’s Rts. L. Rep.* 7 (1989)).

[FN37]. Jonathan Simon, *Governing Through Crime*, in *The Crime Conundrum: Essays on Criminal Justice* 171, 175 (Lawrence M. Friedman & George Fisher eds., 1997).

[FN38]. For a discussion of the cultural meanings of criminal justice, see David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 *Stud. L. Politics & Soc’y* 191 (1991).

More than most legal phenomena, the practices of prohibiting and punishing are directed outwards, towards the public--towards "society"--and claim to embody the sentiments and the moral vision not of lawyers, but of "the people." And whether or not this claim can be sustained, it makes penalty a particularly apposite site of a culturalist approach...

Id. at 192.

[FN39]. Id. at 192-93 ("the law's last-resort power to punish... relies on meaning and symbols and representations that construe its own actions and weave them into the belief-systems, sensibilities, and cultural narratives of the social actors and audiences involved."). "Punishment is a dramatic, performative representation of the way things officially are and ought to be, whatever else the deviant would make of them." Id. at 208. "In the acts and institutions of punishment, the state--or ruling elite of whatever kind-- self-consciously constructs its own public image and, in part, its own reality." Id.

[FN40]. Id. at 195. Garland continues,

Penal signs and symbols are one part of a complex array of institutional discourses that seek to organize our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimize and illegitimize, order and disorder. Through their judgments, condemnations, and classifications they teach us how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. These signifying practices also tell us where to locate social authority, how to preserve order and community, where to look for social dangers and how to feel about these matters....

Id. at 195.

[FN41]. For considerations of gender in crime, see Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 *Loy. L.A. L. Rev.* 691 (2001); *Criminology at the Crossroads: Feminist Readings in Crime and Justice* (Kathleen Daly & Lisa Maher eds., 1998) [hereinafter *Criminology at the Crossroads*]; Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 *Crime & Just.* 201 (1997); Janis Appier, *Policing Women: The Sexual Politics of Law Enforcement and the LAPD* (1998); Ngaire Naffine, *Female Crime: The Construction of Women in Criminology* (1987); Dana M. Britton, *Feminism in Criminology: Engendering the Outlaw*, 571 *Annals Am. Acad. Pol. & Soc. Sci.* 57, 58 (2000). "Criminology remains one of the most thoroughly masculinized of all social science fields; certainly, it is one of the last academic bastions in which scholars regularly restrict their studies to the activities and habits of men without feeling compelled to account for this." Id. (citation omitted). For discussions of masculinities in crime, see Messerschmidt, *supra* note 10; *Just Boys Doing Business? Men, Masculinities, and Crime* (Tim Newburn & Elizabeth A. Stanko eds., 1994); Kenneth Polk, *Masculinity, Honour, and Confrontational Homicide*, in *Criminology at the Crossroads*, *supra* note 41, at 188.

[FN42]. See, e.g., Messerschmidt, *supra* note 10; *Race and the Subject of Masculinities*, *supra* note 10.

[FN43]. Law enforcement, like military combat, is culturally gendered male partly to preserve for men a monopoly of legitimize violence--a myth they cannot relinquish without also surrendering what many men seem to believe, consciously or not, to be an

indispensable core of their masculine identity, the capacity for domination of others and the regular performance of that domination to ensure their place in the male hierarchy.

Gale, *supra* note 41, at 728 (footnote omitted).

Men disempowered by racial or class status develop alternative rebellious ways of proving their manhood; at the same time, “dominant” men may envy “subordinate” men, and rebellious men may long to be accepted into the mainstream. In addition to these complex relationships with one another, all men experience the pressures not to be women and not to be “faggots.” The instability of masculine identity in the face of all these pressure makes violence in defense of self-identity a constant possibility.

Harris, *supra* note 10, at 780.

[FN44]. Garland, *supra* note 38, at 216.

[FN45]. *Id.* at 216. “The practical business of punishing offenders thus takes place within a cultural space that is already laden with meaning and that lends itself easily to symbolic use.” *Id.*

[FN46]. See, e.g., *id.* at 197 (“[R]ituals and symbolic practices [of punishment] continue to operate as a kind of strategic counterpoint to policies of regulation--their chief target being the law-abiding population and those who straddle the boundaries between deviance and the norm.”).

[FN47]. Cf. Simon, *supra* note 37, at 184 (“[I]nstead of backing away from our commitment to governing through crime, we openly offer punishment for the purposes of warehousing the untrustworthy and creating moral entertainments (like chain gangs) for the virtuous. Whatever the merits of these purposes, neither augurs well for democratic practice.”).

[FN48]. Cf. Burt, *Democracy*, *supra* note 14, at 93 (referring to the flamboyance of capital punishment).

[FN49]. See Ellsworth & Gross, *Hardening of the Attitudes*, *supra* note 18, at 42 (“If there is any one emotion that mediates between crime and support of the death penalty, it is probably frustration rather than fear.”). Ellsworth and Gross suggest that research about death penalty attitudes should focus on emotions, especially frustration and anger. *Id.* at 45. They also posit that frustration and anger, not fear are the driving emotions. *Id.*

Anger is the most positive of the negative emotions, because it is the only one that confers a sense of power. When politicians argue, angrily, for the death penalty, they may communicate that they are in control, and at the same time arouse a satisfying sense of outrage and power in the voter.

Id.

[FN50]. See, e.g., Simon, *supra* note 37, at 176. Simon argues that voters in the United States and elsewhere have “affirmed the belief that social control is breaking down and that punishment of crime is the most promising strategy for checking that breakdown.” *Id.* (footnote omitted).

[FN51]. Kaufman-Osborn, *Reviving*, *supra* note 16, at 1121.

[FN52]. See, e.g., Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *Stud. L. Politics, & Soc’y* 71, 88 (1993) [hereinafter Gross, *Romance*] (referencing Phoebe C. Ellsworth &

Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *Crime & Delinq.* 116, 161-65 (1983)); see also Burt, *Democracy*, *supra* note 14, at 93 (suggesting that support for the death penalty reflects White fear of Black retaliations for subjugation).

[FN53]. Ellsworth & Gross, *Hardening of the Attitudes*, *supra* note 18, at 24.

[FN54]. *Id.* at 31 (citations omitted).

[FN55]. Gross, *Romance*, *supra* note 52, at 88.

[FN56]. “People want the death penalty for revenge.” Gross, *Romance*, *supra* note 52, at 79. Is the desire for revenge a masculine emotion? Samuel Gross uses as a prototype of personal vengeance “the grieving father tracking down and killing the killer of his child.” *Id.* Perhaps our death penalty system is not only a substitute for the personal revenge of the father, but also an elaborate system to invite the mother to have a means of revenge. “The process by which we carry out this judgment has little in common with the conduct of an avenger. It is slow, passionless, impersonal--unreliable, and rare.” *Id.* at 80.

[FN57]. See, e.g., Samuel R. Gross, *Update: American Public Opinion on the Death Penalty--It’s Getting Personal*, 83 *Cornell L. Rev.* 1448, 1471 (1998) [hereinafter *Gross, Update*] (citing Ellsworth & Gross, *Hardening of the Attitudes*, *supra* note 18, at 32-33 (“Death penalty attitudes are about killing.”)).

[FN58]. Harris, *supra* note 10, at 780 (calling this violence “gender violence”).

[FN59]. See, e.g., John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in *Crime Control and Women: Feminist Implications of Criminal Justice Policy* 151 (Susan L. Miller ed., 1998) [hereinafter *Crime Control and Women*].

Violence is gendered: it is a problem and consequence of masculinity. Contemporary state interventions to control violence are no less gendered: structures of response, from arrest through imprisonment, glorify tough cops, celebrate adversarial relations, and construct a virtuous ‘protective’ state by incarcerating or, in some countries, killing the “bad guys.”

Id. at 151. In some ways, the complex idea of moral violence itself represents dueling masculinities.

[FN60]. See Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in *The Killing State: Capital Punishment in Law, Politics, and Culture* 3, 9-10 (Austin Sarat ed., 1999) [hereinafter *The Killing State*].

[FN61]. David Garland describes the meaning of a public execution:

The public execution takes the form of a theatrical spectacle in which the sheer force of the sovereign’s power is publicly displayed on the body of the condemned. At the same time, the vital connection between the sovereign and God is reinforced, not just by the display of the sovereign’s power over life and death, but also by the religious language and symbolism (of the publicly announced sentence, the offender’s ritualized confession and the cleric’s prayers and benediction) that tie the law of the sovereign to the will of

God and the natural order of things. In this form of punishment, authority is construed as absolute, divinely inspired and socially ascendent.

Garland, *supra* note 38, at 208-09. Then Texas Governor George W. Bush explicitly invoked religious authority while justifying his own refusal to intervene in his statement upon Karla Faye Tucker's execution: "Judgments about the heart and soul of an individual on death row are best made by a higher authority." Jesse Katz, *Texas Executes Born-Again Woman After Appeal Fails*, L.A. Times, Feb. 4, 1998, at A1. The constitutionally-mandated discretion as to whether any particular defendant should be executed (see *infra* text accompanying notes 160-63) co-exists uneasily with this ascendent, absolute authority. Garland suggests that, under a social contract theory of punishment, punishment must be "dispensed in a controlled and lawful manner. The power that they symbolize, though still awesome in its way, is circumspect, clearly defined and precisely limited. It has the authority of duly enacted law." Garland, *supra* note 38, at 209. This is masculine at war with discretion. Certainty is at war with discretion. Force is at war with individuality. *Id.* at 208-09.

[FN62]. See generally William E. Connolly, *The Will, Capital Punishment, and Cultural War*, in *The Killing State*, *supra* note 60, at 187 (describing politics of capital punishment within a culture of resentment).

[FN63]. The current "War on Terrorism" might provoke a return to popular embrace of state legitimacy and purpose that permits a decline in the need to use symbolic gestures such as the death penalty to respond to an otherwise "chronic 'legitimacy deficit.'" Cf. Kaufman-Osborn, *Reviving*, *supra* note 16, at 1120 (drawing upon Jurgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans., 1975)). The masculine imagery and rhetoric of the War on Terrorism has been pervasive, suggesting that it might be functioning as a response to a perhaps chronic "masculinity deficit" as well.

[FN64]. Ellsworth & Gross, *Hardening of the Attitudes*, *supra* note 18, at 42; cf. Howarth, *Deciding to Kill*, *supra* note 5, at 1354.

[FN65]. Howarth, *Deciding to Kill*, *supra* note 5, at 1353-54.

[FN66]. See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *Santa Clara L. Rev.* 547, 563 (1995) (describing profound poverty in histories of most capital defendants).

[FN67]. Eighty-one percent of the victims of defendants executed since 1976 have been white. *Death Row U.S.A.*, *supra* note 7, at 8.

[FN68]. *Id.*

[FN69]. Cf. Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 *Gender & Soc'y* 527 (1996).

[FN70]. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 49 (Alan Sheridan trans., 1979).

[FN71]. Harris, *supra* note 10, at 781, drawing on the work of literary theorist Elaine Scarry in *The Body in Pain: The Making and Unmaking of the World* 13-14 (1985); see also Kaufman-Osborn, *Reviving*, *supra* note 16, at 1121 (assessing the death penalty in light of Scarry's work). "Although Scarry draws her examples from the domains of war and torture, a perhaps still more obvious instance of what she calls 'analogical verification' is human sacrifice." *Id.* "[T]he consummation of a death sentence is one of the more striking means by which... 'real human pain' is 'converted into a regime's fiction of power.'" *Id.* at 18 (quoting Scarry).

[FN72]. For a discussion of the role of law in hiding the violence of the death penalty, see Howarth, *Deciding to Kill*, *supra* note 5, at 1390-91.

[FN73]. Lifton & Mitchell, *supra* note 16, at 59.

[FN74]. Cf. Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986).

[FN75]. Anne Norton, *After the Terror: Mortality, Equality, Fraternity*, in *The Killing State*, *supra* note 60, at 27.

[FN76]. Perhaps in some way the move to lethal injections is related to the dominant ideology of supposed gender-neutrality in public life. See *infra* text accompanying notes 104-71 (discussing application of formal gender equality to the death penalty).

[FN77]. *Monster's Ball* (Lions Gate Films 2001).

[FN78]. His son, Sonny, manifests kindness, cross-racial friendships, and decency. He is sneered at by his father and grandfather as being womanly. His kindness to a condemned prisoner and his physical revulsion at the execution are key signs of his womanly weakness. *Id.*

[FN79]. For example, Lifton and Mitchell ask about the prosecutor of Harris County, Texas, who has led Houston to become the death capital of the country, "Yet how tough is Holmes, really? He never attends an execution.... [L]ike so many others caught up in the killing process, he is all too willing to pass along responsibility. 'Everyone who got death in Harris County,' he said, 'has gotten it from a jury.'" Lifton & Mitchell, *supra* note 16, at 110-11. "Holmes claims he is not 'blood-thirsty'; he's 'just a lawyer. I follow the law.'" *Id.* at 110.

[FN80]. See Gross, *Romance*, *supra* note 52; Robert Weisberg, *Deregulating Death*, 1983 *Sup. Ct. Rev.* 305 (1983); cf. Kaufman-Osborn, *Reviving*, *supra* note 16, at 1120 (predicting that the liberal state's dilemma related to executing women will be resolved with more women sentenced to death but few executed).

[FN81]. Gross, *Romance*, *supra* note 52, at 92.

[FN82]. For a description of the anti-death penalty movement, see Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (1996). Perhaps the most prominent anti-death penalty activist is Sister Helen Prejean, author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (1993).

[FN83]. Lifton & Mitchell, *supra* note 16, at 34.

[FN84]. *Id.* at 31.

[FN85]. Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1875*, at 6 (1989).

[FN86]. See *infra* text accompanying notes 104-17 (discussing formal gender equality especially as it relates to women being executed).

[FN87]. State Senator Ginny Brown-Waite witnessed a bloody execution in Florida in 1999 and interpreted the blood on the condemned man's shirt as a cross, a sign from God that either the condemned had made his peace with God or that God "was giving his blessing to Florida's execution policy." Lifton & Mitchell, *supra* note 16, at 60.

[FN88]. E.g., Ellsworth & Gross, *Hardening of the Attitudes*, *supra* note 18, at 21; Lifton & Mitchell, *supra* note 16, at 217-18 (finding the gender gap less than might be expected for an issue of "violence" and noting that the 2000 ABC poll found male support for the death penalty at seventy-three percent, female at fifty-six percent).

[FN89]. Pokorak, *supra* note 4, at 1817 (97.5% of district attorneys in death penalty states are White; 1.2% are African American; 1.2% are Latino).

[FN90]. See, e.g., Pamela Paul, *Pulse: The Death Penalty*, *Am. Demographics*, Nov. 2001, at 22 ("In 2001, seventy-three percent of whites support the death penalty, compared with sixty-three percent of Hispanics and only forty-six percent of Blacks."). In January 2000 a survey for ABC News found a difference of thirty-one percentage points between White and Black support for the death penalty; sixty-nine percent of Whites but only thirty-eight percent of Blacks favored the death penalty. Lifton & Mitchell, *supra* note 16, at 217.

[FN91]. One 1994 poll that adjusted results for race and gender found levels of support for the death penalty at 82.8% of White men, 74.9% of White women, 56.7% of Black males, and 47.5% of Black women. Baldus, *Peremptory Challenge*, *supra* note 4, at 20 n.40.

[FN92]. See, e.g., *id.* at 21 (higher income correlates with support for the death penalty); Ellsworth and Gross, *Hardening of the Attitudes*, *supra* note 18, at 21 (middle class favors death penalty more than poor). Samuel Gross has suggested that our continued support for the death penalty (instead of following the many nations whose elites abolished capital punishment in spite of its popular support) may be based on the relatively stronger democratization of our criminal justice system. Gross, *Romance*, *supra* note 52, at 88. This supposition does not deal adequately with the evidence that Americans of lower incomes are less likely than wealthier ones to support the death penalty, and promotes a reassuring notion of effective democracy that is not justified by voting patterns and the race and class patterns of criminal justice in particular.

[FN93]. See, e.g., *People v. Humphrey*, 921 P.2d 1, 25 (Cal. 1996) (claiming that its decision upholding use of “battered women’s syndrome” would not “compel adoption of a ‘reasonable gang member’ standard”); Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 *Wis. Women’s L.J.* 283, 288 (1996) (abused men on death row unlikely to have stories heard as women’s may be heard); cf. Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 *U. Ark. Little Rock L. Rev.* 41 (2001) (arguing that courts routinely deny to typically male and African American criminal defendants the same quality of evidence admitted for victimized women).

[FN94]. See Esther Madriz, *Nothing Bad Happens to Good Girls: Fear of Crime in Women’s Lives* (1997).

[FN95]. Perhaps ironically, much of women’s vulnerability to crime is hidden from official statistics, in part because it is routine and legitimized. Britton, *supra* note 41, at 68. Again, however, the isolation of gender from race and class distorts this information. According to official statistics, women, compared to men, are underrepresented as victims of crime. *Id.* at 63-64. This un-raced category of “women” submerges important racial differences: African American women are more likely than White women to be victims of all kinds of violent crimes, with victimization rates that approximate White men’s. African American women are more likely than White men to be victims of homicide. *Id.* at 64. African American men’s rates of homicide victimization are eight times higher than White men’s. *Id.* Thus endorsement of capital punishment as policy appears not to correlate with real or perceived increased risks of criminal victimization. Official statistics, of course, reflect class and racial bias in policing.

[FN96]. See Howarth, *Deciding to Kill*, *supra* note 5, at 1363 (suggesting that women may be less likely to qualify for capital juries because the readiness to inflict violence conflicts with feminine identities).

[FN97]. See generally *id.*

[FN98]. For example, the jurors in Timothy McVeigh’s case were told by the prosecutor to “look into the eyes of a coward and tell him you will have courage.” Lifton & Mitchell, *supra* note 16, at 147.

[FN99]. Valerie P. Hans, *Death by Jury*, in *Challenging Capital Punishment: Legal and Social Science Approaches* (Kenneth C. Haas & James A. Inciardi eds., 1998). “Jurors who survive death qualification are demographically distinctive: They are more likely to be male, to be White, to be well off financially, to be Republican, and to be Protestant or Catholic.” *Id.* See *Morgan v. Illinois*, 504 U.S. 719 (1992) (upholding the exclusion of potential jurors who acknowledge that they will automatically vote for death, which might serve to exclude disproportionate numbers of White men); *Grigsby v. Mabry*, 758 F.2d 226, 231 n.9 (8th Cir. 1985) (Blacks subject to “systematic disproportionate removal”), overruled *sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986); *People v. Fields*, 673 P.2d 680, 692 n.7 (Cal. 1983), cert denied, 469 U.S. 892 (1984) (potential disproportionate exclusion of women and Blacks alleviated by practice of also excluding automatic voters for the death penalty, assumed to be more male and White).

[FN100]. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 *U. Pa. J. Const. L.* 171, 196 (2001).

Why is it that the number of black women or white women on the jury did not appreciably affect the likelihood of a death sentence is uncertain at this point? There is ample evidence that women behave differently in group interaction and group decision settings and that they are more reserved and less confrontational than men. But whatever female jurors add to the dynamics of jury deliberations, it did not appear to influence the sentencing outcomes significantly toward death or life.

Id.

[FN101]. Id. at 195.

[FN102]. Id. at 196.

[FN103]. Conversely, women may be particularly vulnerable to being vilified as “soft on crime” and ousted from political life by pro-death penalty forces. See, e.g., John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 470-74 (1999) (discussing votes ousting former California Supreme Court Justice Rose Elizabeth Bird and Tennessee Supreme Court Justice Penny White); Mark Hansen, *A Run for the Bench*, 84 A.B.A. J. 68 (1998) (same).

[FN104]. Phyllis Crocker made this point in *Feminism and Defending Men on Death Row*, supra note 30, at 981-82. *Gregg v. Georgia*, 428 U.S. 153 (1976), reinstated the death penalty in 1976. Leading cases finding that the Equal Protection Clause requires formal gender equality included *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Craig v. Boren*, 429 U.S. 190 (1976). See also Rapaport, *Damned*, supra note 30, at 588 (noting the confluence of gender equality and post-Furman death penalty world).

[FN105]. Ellsworth & Gross, *Hardening of the Attitudes*, supra note 18, at 38-39 (citing to Gallup polling that in 1937, fifty-eight percent of the population supported the death penalty for women and the same percentage supported the death penalty generally).

[FN106]. Gross, *Update*, supra note 57, at 1465. That controversial execution of a wife and mother may have influenced public opinion in ways similar to the execution forty-five years later of Karla Faye Tucker. See *infra* text accompanying notes 172, 197-99 (discussing impact on public opinion of Karla Faye Tucker’s execution).

[FN107]. In 1953, support for the death penalty generally had risen to sixty-eight percent, but only fifty-one percent supported it for women. Ellsworth & Gross, *Hardening of the Attitudes*, supra note 18.

[FN108]. Gross, *Update*, supra note 57, at 1466 (showing that sixty-three percent answered affirmatively about imposing the death penalty on a woman, compared to sixty-six percent in general).

[FN109]. Catherine A. MacKinnon, *Feminism Unmodified: Discourse on Life and Law* 34 (1987).

[FN110]. For a generous partial rehabilitation of formal equality, see Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447 (2000).

[FN111]. For criticism of feminist criminal justice policy reforms, see Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 *Osgoode Hall L.J.* 151 (1998). For a critique of damage wreaked by formal gender equality in criminal law, see Britton, *supra* note 41, at 57. See generally Angela Davis & Gina Dent, *Conversations: Prison as a Border: A Conversation on Gender, Globalization, and Punishment*, 26 *Signs: J. Women Culture & Soc'y* 1235 (2001). Angela Davis criticizes the impact of formal gender equality on women prisoners, decrying the strange but predictable way feminism has been embraced by custodial hierarchies. The demand for more women guards and high-level officers has been complemented by the demand to treat women prisoners the same as men prisoners.... Thus putatively feminist positions have bolstered the trend toward more repressive imprisonment practices for women and specifically the move from the cottage/campus architectural model to the concrete fortresses being constructed today. An interesting example of this feminism that demands formal equality of men and women prisoners is some wardens' insistence that women prisoners have the right to be considered every bit as dangerous as men.

Id. at 1239. Further, a former woman warden successfully "lobbied for the right to shoot at women escapees." *Id.*; see also Meda Chesney-Lind & Joycelyn M. Pollock, *Women's Prisons: Equality with a Vengeance*, in *Women, Law, and Social Control* 155, 167 (Alida V. Merlo & Joycelyn M. Pollock eds., 1995) (arguing that making women's prisons more like men's was initially beneficial to the women prisoners but ultimately worsened their conditions of confinement).

[FN112]. See, e.g., Britton, *supra* note 41, at 60 ("for some offenses... arrest rates for African American women most closely match those for white men.").

[FN113]. See Daly & Tonry, *supra* note 41, at 205.

[FN114]. Our self-image of gender equality is quite a feat in an era when women still do eighty percent of childcare and two-thirds of the housework; when ninety-two percent of mothers do not work the kind of overtime required by many of the best jobs; when ninety-five percent of upper-level management, and a similar percentage of the best blue-collar jobs, are held by men.

Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 *Chi.-Kent L. Rev.* 1441, 1471 (2001).

[FN115]. *Case*, *supra* note 110, at 1474. The gender neutrality of formal equality offers so little that we might follow Mary Anne Case in describing it instead as the normative principle that "sex should be irrelevant to an individual's treatment by the law." *Id.* at 1473.

[FN116]. See, e.g., Butler, *Gender Trouble*, *supra* note 21, at 6-7 (defining the gender of sex itself).

[FN117]. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding statutory distinction between foreign-born non-marital children of citizen fathers and those of citizen mothers on the basis of biological difference between fathers and mothers); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding statutory rape provision that applied only to males on the basis that females were sufficiently deterred by risk of pregnancy).

[FN118]. For important commentary on the “maleness” of the military, see Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 *Minn. L. Rev.* 305 (1998); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. Rev.* 499, 501 (1991) [hereinafter Karst, *Manhood*]; see also Judith Gardam, *Gender and Non-Combatant Immunity*, 3 *Transnat’l L. & Contemp. Probs.* 345 (1993) (describing ways in which the law of armed combat is structured by a gendered distinction between combatants (masculine warriors) and non-combatants (often understood to be women)).

[FN119]. See Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 1104-06 (4th ed. 2000).

[FN120]. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

[FN121]. Karst, *Manhood*, supra note 118, at 501. Wendy Williams provided a similar analysis: What does our culture identify as quintessentially masculine? Where is the locus of traditional masculine pride and self-identity? What can we identify in men’s cultural experience that most divides it from women’s cultural experience? Surely, one rather indisputable answer to that question is “war”: physical combat and its modern equivalents.

Wendy W. Williams, *The Equality Crisis: Some Reflections On Culture, Courts, and Feminism*, 7 *Women’s Rts. L. Rep.* 175, 183 (1982). For proof of the cultural anxiety about emasculation of the military, see Stephanie Gutmann, *The Kinder, Gentler Military: Can America’s Gender-Neutral Fighting Force Still Win Wars* (2000); see also Mark M. Hager, *G.I. Jane and the Limits of Liberalism*, 10 *Transnat’l L. & Contemp. Probs.* 219, 221 (2000) (using Gutmann’s work as a platform for “reflection on the relationships of equality, sex roles, military issues, and social control in a liberal society”).

[FN122]. Karst, *Women*, supra note 8, at 624 (quoting Michael Wright, *The Marine Corps Faces the Future*, *N.Y. Times*, June 20, 1982, § 6 (Magazine), at 16, 74 (quoting General Robert H. Barrow)). One former Commandant of the Marines explained that allowing women in combat “tramples the male ego. When you come right down to it, you have to protect the manliness of war.” *Id.*

[FN123]. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 *Mich. L. Rev.* 1741, 1764 (1987).

[FN124]. In the film *Monster’s Ball*, one of the execution team is a woman. Her job, checking the identifications of the witnesses, positions her with the witnesses, not the participants, and Hank checks to make sure that she is alright. *Monster’s Ball*, supra note 77. Ivan Solotoroff’s recent book about executioners does not mention any women executioners. See Ivan Solotaroff, *The Last Face You’ll Ever See: The Private Life of the American Death Penalty* (2001).

[FN125]. See William F. Buckley, Jr., *Miss Tucker’s Plea*, *Nat’l Rev.*, Mar. 9, 1998, at 71 (discussing the “quite understandable reluctance to execute women” but finding that “revival of the idea of special protection contends against the tidal wave of equality”). Buckley has recommended that we borrow from the combat exclusion a formal exclusion from executions in order to avoid the “terribly taxing” reality of pleas based on sex from each of the women on death row. *Id.* In suggesting a formal

immunity, Buckley is (probably unwittingly) borrowing from the former Soviet and current Russian capital punishment regimes.

[FN126]. *Death Row U.S.A.*, supra note 7, at 3.

[FN127]. Streib, *Gendering*, supra note 5, at 442.

[FN128]. Cf. Devon W. Carbado, *Straight Out of the Closet*, 15 *Berkeley Women's L.J.* 76, 86 (2000). Generally speaking, men do not perceive themselves to be en-gendered. Gender, for men, is a term that relates to women and women's experiences; it is synonymous with "female." Thus, men have not paid much attention to the ways in which the social constructions of gender shape and define men's experiences as men.

Id.

[FN129]. Harris, supra note 10, at 779-80. ("Exploration of the violence in the criminal justice system-- the violence of both private and public actors-- begins to reveal the extent to which masculine identity is shaped by relations of repulsion and desire between men.").

[FN130]. Rapaport, *Damned*, supra note 30, at 583; Rapaport, *Domestic Discount*, supra note 30; Rapaport, *Gender Discrimination*, supra note 30.

[FN131]. See Jack Levin & James Alan Fox, *Female Serial Killers*, in *Female Criminality: The State of the Art* 249, 250 (Concetta C. Culliver ed., 1993) ("Typically, serial killers are white males in their late 20's or 30's..."); but see Candice Skrapec, *The Female Serial Killer: An Evolving Criminality*, in *Moving Targets: Women, Murder and Representations* 241, 243 (Helen Birch ed., 1994) (suggesting that women account for close to the same percentage of serial murders as of murder (twelve to fifteen percent)).

[FN132]. See Rapaport, *Domestic Discount*, supra note 30, at 510 (supporting claim that seventy-five percent of capital murders are felony murders); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 *N.Y.U. L. Rev.* 1283 (1997) (discussing impact of making felony murders death-eligible, thereby making most murders death eligible).

[FN133]. Rapaport, *Domestic Discount*, supra note 30.

[FN134]. Id. at 1512.

[FN135]. Heberle, supra note 30, at 1103. ("While the state-sanctioned killing of women has yet to be normalized, women's bodies as sexualized objects have been regarded as the appropriate targets of extralegal violence and as undeserving of the full protections of the state.").

[FN136]. Wanda Jean Allen, a poor, African American lesbian executed by Oklahoma in 2001, and Kayla Faye Tucker are discussed infra in text accompanying notes 166-67, 178.

[FN137]. But see Streib, *Gendering*, supra note 5; Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 *Am. U. J. Gender Soc. Pol'y & L.* 427 (2000).

At any rate, the Court's refusal to engage a race discrimination claim without evidence of intent to discriminate specific to a particular case seems to foreclose successful gender attacks based on statistical evidence. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). Indeed, Justice Powell explicitly rejected the race claim in part because it could also invite "even" gender claims. *Id.* at 317. That is, one reason to block claims of systemic race discrimination was to foreclose claims of systemic gender discrimination.

Although Constitutional law draws us into such comparisons, analogies between gender and race are rarely useful. Such comparisons oversimplify both race and gender, reinforcing the false notion that they are separate, and the equally false notion that they somehow have equivalent meanings, histories, or contexts. See Stephanie M. Wildman, *Privilege Revealed: How Invisible Preference Undermines America* 85-102 (1996). Even if they could be separated, the meanings of race and gender in criminal justice would be spectacularly asymmetrical. See Daly & Tonry, *supra* note 41. In addition, our public rhetoric of gender is very different from that of race. Sex can be noticed and spoken of in ways that race is not. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) ("Inherent differences' between men and women, we have come to appreciate, remain cause for celebration."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994), J. O'Connor, concurring ("one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experiences will be relevant to his or her view of the case."); see also Carri Geer Thevenot, *Women Convicted of Killing Stepdaughter Sentenced to Life in Prison*, *Las Vegas Rev.-J.*, Feb. 21, 2002, at B1 (expressly comparing the three female defendants he had sentenced for homicide, sentencing judge declared this defendant "the worst of the lot"). This willingness to express rather than silence gendered comparisons might help to reveal the evidence of intentional gender bias operating in an specific case apparently required by *McCleskey*. To make a discrimination claim on behalf of a male capital defendant, the sex of the defendant would have to be noteworthy and commented upon. But such comments are highly unlikely, because the sex and gender of most capital defendants is as unremarkable as the fact that the receptionist is a young woman. Most capital defendants are simply more men, in a sea of men.

[FN138]. See Howarth, *Feminism*, *supra* note 9, at 402. See generally Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 *Tex. L. Rev.* 1413 (1997) (discussing death penalty for transgressive women).

[FN139]. Professor Victor Streib reports that thirteen women who killed their husbands are currently on death row, five of whom have been sentenced in the last four years. Victor L. Streib, *Death Penalty for Female Offenders; January 1, 1973, Through June 30, 2002*, at 3, at <http://www.law.onu.edu/faculty/streib/femdeath.htm> (July 26, 2002) [hereinafter Report: 1973-2002].

[FN140]. Ten women are on death row for killing their children, four of whom were sentenced in the last four years. *Id.*

[FN141]. Renee Heberle makes this point:

Society wonders whether women, as women, need to be rendered more commonly subject to the disciplinary sanctions of the state, not in the name of equality but in the name of managing the disorder engendered by unequal relations of power. The concern about women's immunity from society's worst sanction might be taken, accordingly, to indicate that other forms of disciplining women are perceived as no longer adequate.

Heberle, *supra* note 30, at 1104.

[FN142]. “Capital punishment, after all, construes the condemned as having the will and capacities proper to human beings.” Norton, *supra* note 75, at 36.

[FN143]. On women’s agency, see Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 *Wm. & Mary L. Rev.* 805(1999); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 *Colum. L. Rev.* 304 (1995).

[FN144]. Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in Dead Man Walking and Last Dance*, in *The Killing State*, *supra* note 60, at 227, 239 [hereinafter Sarat, *The Cultural Life of Capital Punishment*] (citing William Connolly, *The Ethos of Pluralization* 47 (1995)).

[FN145]. The underlying message of responsibility and control is, of course, provoked by and in constant tension with the experience of powerlessness that fuels the desire for the death penalty.

[FN146]. Professor Rapaport uses the Liebman Study of error rates in capital cases, 1973-1995. See Rapaport, *Staying Alive*, *supra* note 30, at 976 n.38 (citing to James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at <http://justice.policy.net/jpreport/finrep.PDF> (Mar. 13, 2001)).

[FN147]. Rapaport, *Damned*, *supra* note 30, at 583-88; Rapaport, *Staying Alive*, *supra* note 30, at 976-84; see also Lifton & Mitchell, *supra* note 16, at xiii (describing clemency granted by conservative Alabama Governor Fob James to a woman convicted of a particularly gruesome crime).

[FN148]. Rapaport, *Staying Alive*, *supra* note 30, at 979.

[FN149]. *Id.* at 979-80.

[FN150]. *Id.* at 981.

[FN151]. *Cf.* Britton, *supra* note 41, at 60.

[FN152]. See, e.g., Elizabeth A. Stanko, *Warnings to Women: Police Advice and Women’s Safety in Britain*, in *Crime Control and Women*, *supra* note 59, at 52 (describing particular consequences of association between women and victimization).

[FN153]. See Streib, *Gendering*, *supra* note 5, at 463 (decisionmakers might more easily find sympathetic factors for women than for men, perhaps because women might be less reluctant to expose these factors).

[FN154]. Mary Ellen Gale has identified “the patriarchal norm that assigns the task of serious punishment both within and outside the family to persons acting as fathers rather than mothers.” Gale, *supra* note 41, at 737 n.194. Is the appellate court more like a forgiving father? See Howarth, *Deciding to Kill*, *supra* note 5, at 1405-21 (describing “male” quality of judges contrasted with “female” juries). Perhaps clemency is an unusual amalgamation of feminine caring (mercy) with masculine authority. If

so, the recent relative rarity of clemency grants may suggest a resurgence in the masculine discipline of capital punishment. See Rapaport, *Staying Alive*, supra note 30, at 967; see also Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 *Chi-Kent L. Rev.* 1501, 1506-07 (describing the “timorous executive” of today’s explanations for reluctance to use clemency power).

[FN155]. See Howarth, *Feminism*, supra note 9; see also Heberle, supra note 30, at 1106.

[FN156]. See generally Howarth, *Black Male Innocence*, supra note 13, at 102- 08 (discussing imposed and chosen identities, and links between them).

[FN157]. An important exception is gay men, whose gender transgressions can put them at risk for a death sentence. See, e.g., *Missouri v. Lingar*, 726 S.W.2d 728 (Mo. 1987).

[FN158]. Heberle, supra note 30, at 1105-06 (“When men commit violence in the private sphere, they are in a sense fulfilling the grim assumptions society holds about masculinity. They do not have to be remasculinized to be considered redeemable or ‘human.’ Instead, judgment turns on whether they took their masculinity too far.”).

[FN159]. For example, Alexander Cockburn stated that “Bush Jr. proved he was man enough to kill a woman.” Alexander Cockburn, *A Day for the ‘Hang ‘em’ Ghouls*, *L.A. Times*, Feb. 5, 1998, at B9; see Streib, *Gendering*, supra note 5, at 34 (“To bolster their manliness, they need to dispatch the toughest of male opponents;... executing a woman does not give them that masculine rush. To the contrary, it stains them as ‘guys who hit girls,’ the ultimate wimps on the playground.”); see also *The Green Mile* (Castle Rock Entertainment 1999) (film in which White executioner played by Tom Hanks is transformed by saintly condemned African American man).

[FN160]. For a discussion of the gender in the guided discretion of capital cases, see Howarth, *Deciding to Kill*, supra note 5, at 1364-81.

[FN161]. 428 U.S. 280 (1976).

[FN162]. 438 U.S. 586 (1978). Death penalty schemes must enable consideration of “any aspect of a defendant’s character or record... that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604.

[FN163]. See Howarth, *Black Male Innocence*, supra note 13, at 136-38 (describing racialized animals analogies in capital cases).

[FN164]. 18 U.S.C. § 3593(f) (1994).

[FN165]. *Id.* Victor Streib advocates using this or a similar instruction to minimize sex bias in state capital cases. Streib, *Gendering*, supra note 5.

[FN166]. For a compelling account of Karla Faye Tucker’s life, see Beverly Lowry, *Crossed Over: A Murder, A Memoir* (1992). These descriptions of Karla Faye Tucker’s life are derived from this work; see also Howarth, *Feminism*, supra note 9 (describing Tucker’s life).

[FN167]. See *Allen v. State*, 871 P.2d 79, 95 (Okla. Crim. App.), cert denied, 513 U.S. 952 (1994). For a description of Wanda Jean Allen's case, see Michael B. Shortnacy, Comment, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecution of Misconduct in Death Penalty Cases*, 51 *Am. U.L. Rev.* 309, 341-44 (2001).

[FN168]. Patricia J. Williams, *Beyond the Village Pale*, *Nation*, July 16, 2001, at 9 ("But the Yates case revealed a deep gender divide about the isolation and stress of family and motherhood in a society that extols self-sufficiency as its premiere human value."); see also Anna Quindlen, *Playing God on No Sleep*, *Newsweek*, July 2, 2001, at 64.

Every mother I've asked about the Yates case has the same reaction. She's appalled; she's aghast. And then she gets this look. And the look says that at some forbidden level she understands. The looks says that there are two very different kinds of horror here. There is the unimaginable idea of the killings. And then there is the entirely imaginable idea of going quietly bonkers in the house with five kids under the age of 7.

Id. The fierce difficulty of mothering is not acceptable to acknowledge. "So that when someone does something as horrifying as what Andrea Yates did, there is no room for even a little bit of understanding." Anna Picard, *Could You Too be a Killer Mummy?*, *N. Statesman*, July 9, 2001, at 29. "In Houston, there is little liberal sympathy for a woman seen as having so many blessings. To many, Yates has destroyed the precious illusion that such murders are the province of poverty or evil." *Id.*

In sex- and war-torn America, mothers who kill are seen as "getting away with it" America is tired of the "hormonal" defense. It sounds too menstrual, irrational, and self-indulgent. The feminists don't like it because it implies that women cannot think when they are bleeding or lactating. The "feminazi-haters" don't like it because it reminds them of their mothers.

Id.

[FN169]. E.g., Ann Coulter, *Stop Persecuting Andrea Yates!!!*, *Human Events*, Sept. 10, 2001, at 5 (satirical parody of supposed National Organization for Women letter of support for Andrea Yates).

[FN170]. The complexities of knowing whether a woman is being helped or hurt by her female identities can be seen in the public polling that showed forty-four percent of the people polled supported execution of Andrea Yates, compared with seventy-eight percent for Timothy McVeigh. The willingness of so many Americans to support death for a mentally ill Andrea Yates--where even the Houston prosecutor told the jury that death was not required--is chilling. Paul, *supra* note 90, at 22 (forty-four percent polled by Gallop supported execution of Andrea Yates, compared to sixty-two percent for Juan Raul Garza and seventy-eight percent for Timothy McVeigh).

[FN171]. See 18 U.S.C. § 3593(f).

[FN172]. See, e.g., Paul, *supra* note 90, at 22 (identifying the execution of Karla Faye Tucker as one of the reasons for a reversal in 1998 of what had been thirty-years of steady increases in support for the death penalty and citing April 2001 poll conducted by ABC News and the Washington Post that found a majority of Americans (fifty-one percent) supported a moratorium on the death penalty).

[FN173]. See Streib, *Report: 1973-2001*, *supra* note 139, at 4-5.

[FN174]. Outcry did occur in other countries. For example, “[a]n average person in France could not help but be familiar with the case of Betty Lou Beets.” Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. Times, Feb. 26, 2000, at A8.

[FN175]. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241 (1991) (describing intersections of gender and race); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *Conn. L. Rev.* 561, 641 (1997) (emphasizing inseparability and multidimensionality of race, gender, and sexuality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 *Hastings L.J.* 1257, 1275-76, 1280 (1997) (emphasizing complex ways that race, gender, and sexuality constitute each other).

[FN176]. If part of what it means to be a woman is not to be sentenced to death, the womanhood of those who were executed was invisible before the law. That the majority of women who have been executed were Black reveals that the protection of womanhood was really the protection of white womanhood. Barbara Smith explains that “[w]hen you read about Black women being lynched, they aren’t thinking of us as females. The horrors that we have experienced have absolutely everything to do with them not even viewing us as women.” Howarth, *Feminism*, *supra* note 9, at 417 (quoting Barbara Smith, as quoted in Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 37 (1988)).

[FN177]. See Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 *Or. L. Rev.* 15 (2002).

[FN178]. For a compelling account of Karla Faye Tucker, see Beverly Lowry, *The Good Bad Girl*, N. Yorker, Feb. 9, 1998, at 60. Wanda Jean Allen is the subject of a powerful documentary film, *The Execution of Wanda Jean* (HBO 2002). See also *Allen v. Oklahoma*, 871 P.2d 79, 104-05, J. Lane, dissenting (dissenting from majority conclusion finding probative evidence that Allen was “man” in the relationship).

[FN179]. See, e.g., Lifton & Mitchell, *supra* note 16, at 224. “Men who find religion and lead decent lives on death row still carry with them the implicit threat of their maleness.” Howarth, *Feminism*, *supra* note 9, at 415.

[FN180]. “Had you seen me fourteen years ago, you wouldn’t have called me a woman.” 60 Minutes, *Woman on Death Row Gets Support for the Christian Community* (CBS television broadcast, Dec. 7, 1997) (Karla Faye Tucker to Leslie Stahl).

[FN181]. Kathryn Ann Farr, *Aggravating and Differentiating Factors in the Cases of White and Minority Women on Death Row*, 43 *Crime & Delinq.* 260 (1997).

[FN182]. See Howarth, *Feminism*, *supra* note 9; see also Kaufman-Osborn, *Introduction*, *supra* note 30, at 1100.

[FN183]. See, e.g., Kaufman-Osborn, *Reviving*, supra note 16, at 1122.

If a liberal regime is to make good on its promise of formal equality, if its justice is to be truly blind, the body caught up within its legal complex must become an abstraction, a being stripped all of the differentiating features that make it this body rather than that one.

Id.; cf. Joan W. Howarth, *First and Last Chance: Looking for Lesbians in Fifties Bar Cases*, 5 *S. Cal. Rev. L. & Women's Stud.* 153 (1995) (discussing loss of rights when courts confronted specific differentiating features of gay men and lesbians).

[FN184]. Sentencing is a signifying practice of some importance. Garland, supra note 38, at 200. "The importance of the communication--and the fact that it is a communication--is dramatically highlighted if the symbolic message that it contains is unexpected or in some way controversial." Id. at 199.

[FN185]. Rapaport, *Damned*, supra note 30 (discussing the salience of women on death row).

[FN186]. Samuel Gross explains the public preference for very few actual executions in part because of the need to notice each execution:

A single execution is not truly an act of revenge but it looks like revenge, it symbolizes our desire and our willingness to seek vengeance. When we single out one murderer we can focus on what he did to deserve death. But if we were to conduct a hundred executions in close order we would lose any illusion of individual vengeance; all we would see is mass killing by the state, slaughter. The symbolism would change; the issue would now be the nature of our society, our culture.

Gross, *Romance*, supra note 52 at 94; cf. Sarat, *The Cultural Life of Capital Punishment*, supra note 144, at 248 (finding that the films *Dead Man Walking* and *Last Dance* legitimize capital punishment by their "biographical focus" and "by insisting that all that counts is the question of responsibility").

[FN187]. For a similar argument, see Kaufman-Osborn, *Reviving*, supra note 16, at 1123 ("the occasional state-sponsored killing of a woman materializes and so reinforces the liberal ideal of equality before the law, a principle that is otherwise mocked by the incredibly long odds against achieving this status.").

[FN188]. See generally, Appier, supra note 41.

[FN189]. See generally Daly & Tonry, supra note 41.

[FN190]. Is femininity, unlike race or class, beyond the controlling mechanisms of the state? Or is it more likely that gender, as one axis of social relations of inequality, simply does not require formalized state sanction as a means of discipline at this point in its history? When gender is challenged, extralegal violences, ranging from sexual harassment to rape and domestic violence, do the same work that law's violence does in managing the potential instability inspired by racial and class subordination.

Heberle, supra note 30, at 1104 (footnote omitted).

[FN191]. See Howarth, *Deciding to Kill*, supra note 5.

[FN192]. George W. Bush, *A Charge to Keep* 153-54 (1999). By this account, the pain of the execution is appropriated by the person carrying it out. For a similar stance, in which a Ninth Circuit judge presents his suffering (sleepless nights) in the face of having to deal with (in his judgment) baseless appeals from death row prisoners, see Alex Kozinski, *Tinkering With Death*, *N. Yorker*, Feb. 10, 1997, at 48.

[FN193]. Bush, *supra* note 192, at 154.

[FN194]. For a discussion of that political safety, see Rapaport, *Damned*, *supra* note 30, at 594-99.

[FN195]. Gross, *Update*, *supra* note 57, at 1466.

[FN196]. As Karla Faye Tucker's execution date drew close, less than half of the Texans polled, forty-eight percent, supported the execution, although sixty-one percent of those polled supported capital punishment as policy. Sam Howe Verhovek, *Texas, in First Time in 135 Years, is Set to Execute Woman*, *N.Y. Times*, Feb. 3, 1998, at A1.

[FN197]. Katz, *supra* note 61. A *Houston Chronicle* poll found that forty-eight percent believed Tucker should be executed, twenty-four percent believed her sentence should be commuted to life, and twenty-seven percent said they did not know enough about her to make a decision. *Id.*

[FN198]. Kaufman-Osborn, *Reviving*, *supra* note 16, at 1120.

[FN199]. Paul, *supra* note 90, at 22.

[FN200]. See, e.g., Howarth, *Feminism*, *supra* note 9; Katz, *supra* note 61.

[FN201]. Lowry, *supra* note 178, at 61.

[FN202]. Butler, *Gender Trouble*, *supra* note 21, at 137. Drag highlights the "radical contingency in the relation between sex and gender in the face of cultural configurations of causal unities that are regularly assumed to be natural and necessary." *Id.* at 138.

[FN203]. *Id.* at 138.

[FN204]. "Either you believe in the death penalty for everybody or you don't believe in it for anybody." Carol Rust, 'Gender Shouldn't be an Issue'; *Death Row Inmate Claims Responsibility for Crimes*, *Houston Chron.*, Dec. 14, 1997, at A1 (quoting Karla Faye Tucker). Karla Faye Tucker also stated "[g]ender shouldn't be an issue, period." *Id.*

[FN205]. Daniel Pedersen, *Praying for Time*, *Newsweek*, Feb. 2, 1998, at 66.

[FN206]. Cockburn, *supra* note 159.

As an equity feminist, I believe that women cannot demand equal opportunities in society without also being ready to accept equal risks and responsibilities. Women should not

ask for special protections based on gender--on death row or on the battlefield, where women with the right level of physical stamina and training should be sent into combat. Camille Paglia, Ask Camille, at <http://www.salon.com/col/pagl/1998/02/17pagl2.html> (last visited Mar. 16, 2002).

[FN207]. See Kathryn Abrams, *The Constitution of Women*, 48 Ala. L. Rev. 861, 862 (1997) (discussing “constitutive” function of legal decisionmaking, that is the role of law in furthering popular knowledge).

The law, in the course of fulfilling its prescriptive function, projects images of the groups appearing before the Court. These images then shape the way such groups are viewed by the larger society. Law in this sense performs a function analogous to that of political rhetoric or the imagery of popular culture: it characterizes groups in ways that ultimately filter into popular understandings and counteract, or reinforce, the assumptions and stereotypes that already exist.

Id. Abrams acknowledges the popular dominance of formal gender equality, which she calls “equality theory” or “liberal feminism.” Id. at 867-68.

According to Abrams, formal gender equality “also advanced a notion--a notion still treated as synonymous with the term ‘feminist’--that women are pervasively similar to men.” Id.

[FN208]. “To disregard the question of gender in making sense of [Karla Faye Tucker’s execution] is to fail to understand why this media extravaganza elicited such barely concealed glee from feminism’s detractors.” Kaufman- Osborn, Introduction, *supra* note 30, at 1097.

[FN209]. Katz, *supra* note 61 (quoting statement released by Bush).

[FN210]. See, e.g., Howarth, *Black Male Innocence*, *supra* note 13 (discussing social constructions associating men of color with criminality).

[FN211]. Karla Faye Tucker promoted her own case in similar terms.

[FN212]. Tex. Dep’t of Criminal Justice, Final Meal Requests, at <http://www.tdcj.state.tx.us/stat/finalmeals.htm> (last visited July 11, 2002).

[FN213]. *Death Row U.S.A.*, *supra* note 7, at 3. They are 1593 African Americans, 347 Latinos/as, 41 Asians, 41 Native Americans, and 1678 Whites. Id.