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SOME QUESTIONS ABOUT GENDER AND THE DEATH PENALTY

Elizabeth Rapaport*

[T]hat Mrs. Spinelli's execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman would hurt California in the eyes of the world; that both the law and the will of the people were against the execution; that Mrs. Spinelli, as the mother of three children, should have special consideration; that California's proud record of never having executed a woman should not be spoiled.¹

— Petition addressed to the Governor of California, as recalled by Clinton Duffy, Warden of San Quentin, to whom it was delivered in 1941, the year in which Eithel Spinelli was executed. Signed by thirty inmates, who also offered to draw straws to go to the gas chamber in Spinelli's stead if her sentence was not commuted.

What is pertinent for distinguishing the sexes is the relationship to death.

— Jean-Francois Lyotard²

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1. C. DUFFY, 88 MEN AND 2 WOMEN 135-36 (1962).
2. Lyotard, *One of the Things at Stake in Women's Struggles*, 20 SUB-STANCE 10 (1978).

*[F]or if it comes it will be their doing, and they will have gained what I cannot but call a fatal victory, for they will have achieved it by bringing about, if they will forgive me for saying so, an enervation, an effeminacy, in the general mind of the country. For what else than effeminacy is it to be so much more shocked by the taking of a man's life than by depriving him of all that makes life desirable or valuable? Is death, then, the greatest of all earthly ills? Usque adeone mori miserum est? Is it, indeed, so dreadful a thing to die? Has it not been from of old one chief part of a manly education to make us despise death — teaching us to account it, if an evil at all, by no means high in the list of evils; at all events, as an inevitable one, and to hold, as it were, our lives in our hands, ready to be given or risked at any moment, for a sufficiently worthy object?*³

— Comment of John Stuart Mill in speech to Parliament on efforts of reformers to bring about a climate of opinion in which capital punishment for murder is unenforceable.

I. ARE WOMEN SPARED?

Throughout American history, executions of women have been rare events when compared to the volume of executions of men. The total number of persons executed from earliest colonial times to the present is estimated to fall between 18,000 and 20,000.⁴ Four hundred of these were women.⁵ The federal government began gathering national data on executions in 1930: It reports 3,963 executions from that date through 1988, of whom

3. John Stuart Mill, *Speech in Favor of Capital Punishment 1868*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 275 (G. Ezorsky ed. 1972).

4. Bedau, *Background and Developments*, in *THE DEATH PENALTY IN AMERICA* 3 (H. Bedau 3d ed. 1982).

5. V. STREIB, *AMERICAN EXECUTIONS OF FEMALE OFFENDERS: A PRELIMINARY INVENTORY OF NAMES, DATES AND OTHER INFORMATION* (3d ed. 1988) (available from Professor Streib, Cleveland Marshall College of Law). See Streib, *Death Penalty for Female Offenders*, 58 *CINCINNATI L. REV.* 845 (1990) on the history of the executions of females in the United States.

33 were women.⁶ Only one woman, North Carolina's Velma Barfield, grandmother and serial arsenic poisoner, has been executed since 1976,⁷ the year in which the Supreme Court decisively repudiated the abolitionist challenge to capital punishment and inaugurated the modern death penalty era. Since that date, 128 men have suffered the same fate as Mrs. Barfield.⁸ There are currently 2,347 death row inmates in the United States, of whom 30 are women.⁹

The execution or capital sentencing of a woman is not merely a rare event; it is an anomalous one as well. There are deep cultural inhibitions against the deliberate killing of women, even women who have been convicted of heinous murders, which war with the criminal law norm of equality of treatment of all cases and the strictures of the fourteenth amendment's equal protection clause. No doubt for some death penalty supporters there is exhilaration and release in defying the inhibition. In their eyes, an evil woman deprives herself of the sanctuary of her sex by engaging in violent conduct forbidden to her, and becomes fair and intoxicating game.¹⁰ Others, like the San Quentin convicts who petitioned the governor to spare the life of Eithel Spinelli, react with revulsion to the prospect of the execution of

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1988, at 9 (1989) [hereinafter CAPITAL PUNISHMENT 1988]; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1986, at 9 (1987) [hereinafter CAPITAL PUNISHMENT 1986] ("Appendix I: Women and the death penalty").

7. See generally *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979).

8. NAACP, DEATH ROW, U.S.A. 1 (May 30, 1990).

9. *Id.* See also V. STREIB, IMPOSITION OF DEATH SENTENCES UPON FEMALE OFFENDERS, JULY 1, 1973, THROUGH JULY 15, 1989 (3d ed. 1989) (available from the author, Cleveland Marshall College of Law).

10. James Reston, Jr., who covered the Barfield execution writes that "a clutch of death-penalty boosters" chanted "Hip, hip hurrah . . . K-I-L-L.' 'Burn, bitch, burn.'" outside the Raleigh prison where the execution took place. "Their delirious cackles floated over the scene like a bad odor." Reston, *Invitation to a Poisoning*, VANITY FAIR, Feb. 1985, at 82.

At 2 a.m. the cheerleaders, inspired by the collective sadism induced by the spectacle, began to chant "Kill her! Kill her!" and at 2:15 it was as if the home team had just scored the winning touchdown. They called out her name over and over, "Velma! Velma! Velma!" and spelled it out, "V-E-L-M-A."

Id. at 101.

a woman, seeing in it an inhumane and dishonorable perversion of the law.¹¹

The rarity of women on death row and the cultural anomalousness of executing women inevitably fuels speculation about whether female murderers receive favorable treatment in sentencing. Prima facie, the grave disparity between the risk of execution faced by men and women suggests that American society is possessed of a chivalrous disinclination to sentence women to die. Such was the conclusion of Justice Marshall in *Furman v. Georgia*.¹² Marshall ranges sex discrimination alongside race discrimination and discrimination against the poor as among the reasons why the death penalty is offensive to contemporary American morality.¹³

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favorable treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.¹⁴

The pattern Marshall stigmatized is essentially unchanged to-day. One in eight persons arrested for murder is a woman,¹⁵ but

11. The New York Times reported that 300 San Quentin inmates offered to die in her stead the first time an execution date was set for Mrs. Spinelli. N.Y. Times, July 17, 1941, at 20, col. 3.

12. 408 U.S. 238 (1972). Sellin reached the same conclusion in his study of the pre-*Furman* death penalty system. See T. SELLIN, *THE PENALTY OF DEATH* 66-68 (1980).

13. *Furman*, 408 U.S. at 364-65 (Marshall, J., concurring). *Furman* held then extant death penalty statutes to be violative of the eighth and fourteenth amendments. The position taken by Justice Marshall, that the death penalty is offensive to contemporary American morality and as such is cruel and unusual punishment forbidden by the eighth amendment, was adopted only by himself and Justice Brennan. Justices Brennan and Marshall remain the only adherents on the Court of the position that the death penalty is per se cruel and unusual punishment. The Court's five member *Furman* majority could agree only that existing death penalty statutes permitted unconstitutionally arbitrary and capricious selection for death. In *Gregg v. Georgia*, 428 U.S. 153 (1976), and two companion cases, the Court reinstated the death sentence. It sanctioned several state death penalty statutes designed to remedy the vices of earlier statutes criticized in *Furman*.

14. *Furman*, 408 U.S. at 365 (Marshall, J., concurring).

15. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 46 (2d ed. 1988) [hereinafter REPORT TO THE NATION ON CRIME AND JUSTICE], reporting FBI Uniform Crime Report (UCR) data.

only one death row inmate in a hundred is a woman.¹⁶ Male murderers are twenty times more likely to be death sentenced than female murderers.¹⁷

Despite the apparent disparity of treatment, the prima facie case for glaring gender discrimination in the application of capital punishment dissolves when subjected to fuller examination. Before considering the case for disparity, it is worth pausing to note that, since *Furman*, a set of counterbalancing developments in constitutional law has rendered gender discrimination in capital sentencing both more constitutionally problematic and, ironically, virtually impervious to constitutional challenge.

In 1976, in *Craig v. Boren*,¹⁸ the Court announced that for purposes of equal protection analysis, government classification by gender would have to withstand intermediate level scrutiny; i.e., gender classifications must serve important government objectives and the means employed to achieve those objectives must be substantially related to them. In 1982, in *Mississippi University for Women v. Hogan*,¹⁹ the Court held that the same standard of review was to apply whether men or women were disadvantaged by government action. Although gender has not been elevated to the same level as race, i.e., that of a suspect classification subject to strict scrutiny analysis,²⁰ intermediate level scrutiny should be sufficient to invalidate any statutory sentencing scheme which explicitly discriminated in favor of either sex. In *MUW*, as in *Craig*, the Court insists that it will look with extreme disfavor on gender stereotyping and the assumption that gender could be used as a "proxy for other, more germane bases of classification."²¹

Even before the *MUW* decision, as early as 1968, courts were deploying equal protection analysis to invalidate disparate

16. CAPITAL PUNISHMENT 1988, *supra* note 6, at 6.

17. In 1986, two percent of males convicted of murder in state courts were death sentenced; one tenth of one percent of female murderers were death sentenced. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF FELONS CONVICTED IN STATE COURTS, 1986, at 9 (Jan. 1990).

18. 429 U.S. 190 (1976).

19. 458 U.S. 718 (1982) [hereinafter referred to in text as *MUW*].

20. *Korematsu v. United States*, 323 U.S. 214 (1944).

21. *MUW*, 458 U.S. at 726 (quoting *Craig*, 429 U.S. at 198).

sentencing schemes that subjected female offenders to longer periods of incarceration than similarly situated male defendants.²² These courts rejected the nineteenth century ideology which held that women, more tractable and educable than men, could derive greater benefit from the rehabilitative influences of a prison regime. After *MUW*, if the Court continues in the course it has set, it is unlikely that any statutory invocation of gender differences as legitimate determinants of sentencing could withstand equal protection review. Consider, as examples, two characteristics which are more frequently found among women than men offenders that could be plausible bases of government policies of leniency for women — having responsibility for children, who will suffer during their incarceration, and having relatively few prior convictions. In the light of *Craig* and *MUW*, it is difficult to imagine that reviewing courts would permit the proxy use of female gender for carrying parental responsibility or relative lack of criminal history. Such proxy use would be an invidious method of serving government objectives, since not all female offenders are responsible parents or criminal neophytes, and some male offenders are parents or have slight criminal records.

No capital punishment statute classifies by gender, but it is arguable that gender bias infects the administration of capital punishment because the discretion of prosecutors, juries and judges is employed to the advantage of female murderers. Prior to *Furman*, capital punishment statutes typically gave sentencing authorities untrammelled discretion to mete out life or death. Although sentencing discretion has been substantially reduced in the modern death penalty regime, it remains arguable post-*Furman* that the sparseness of women on death row testifies to the discriminatory use of capital sentencing discretion. However, in light of the recent decision in *McCleskey v. Kemp*,²³

22. Note, *Sentencing Women: Equal Protection in the Context of Discretionary Decisionmaking*, 6 WOMEN'S RTS. L. REP. 85 (1979-80), discusses these cases: *Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); and *State v. Chambers*, 63 N.J. 287, 307 A.2d 78 (1973). The Note also discusses the unwillingness of courts to grant women relief from discriminatory sentencing practices for some 150 years before the late 1960s.

23. 481 U.S. 279 (1987).

in which the Supreme Court finally took up the question of racial discrimination in the application of the death penalty, it appears that even in the face of convincing evidence of gender disparity, male offenders could not expect to successfully challenge the death penalty on the grounds that males are disproportionately selected for death.

McCleskey, a death sentenced black, argued that he could demonstrate statistically that blacks, and especially blacks who killed whites, are more likely to receive death sentences. The Court brushed aside his fourteenth amendment claim on the grounds that to prevail under the equal protection clause McCleskey would have to prove that he was the victim of purposeful discrimination.²⁴ The Court was more troubled by the related eighth amendment claim that the Georgia capital punishment system allows arbitrary and capricious sentencing, i.e., that sentencing discretion masks racist selection for death. Writing for the majority, Justice Powell surveyed twenty years of Supreme Court cases which have the effect of narrowing the class of murders and of murderers that may be subject to the death penalty while protecting wide discretion to decline to impose a death penalty. He concluded that much abusable discretion has been wrung from the system while preserving the traditional latitude of the sentencer to be responsive to individualized mitigating circumstances and to show mercy. No system can be expected to achieve perfection, i.e., to be incapable of racist abuse. Having surveyed the work of the Court, he finds that what has been done suffices.²⁵

Powell then acknowledged that he had further concerns which buttress the decision to deny McCleskey relief. If impermissible racism were acknowledged to invalidate capital sentencing, the door would be opened for similar complaints about lesser penalties, and the whole fabric of the criminal justice system would be subject to attack. Other unexplained discrepancies in sentencing would also become the bases for claims for sentencing relief: "[T]he claim that [McCleskey's] sentence rests on the irrelevant factor of race easily could be extended to apply to

24. *Id.* at 292-99.

25. *Id.* at 299-306.

claims based on unexplained discrepancies that correlate to membership in other minority groups, and *even to gender*."²⁶

Thus we find that statistically-based challenges to gender discrimination in capital sentencing are doubly barred by *McCleskey*. No defendant may prevail who cannot show that his case was marred by purposeful discrimination. This of course is a virtually impossible task. Additionally, Justice Powell unfurls a *reductio ad absurdum* argument: if statistical evidence were permitted to make out a case for racial bias in capital sentencing, the courts could be asked to hear claims ("even") of gender discrimination. Justice Powell does not stop to explain wherein the absurdity lies.

Although gender discrimination in the application of capital punishment is an unlikely candidate for litigation, the widespread impression, or suspicion, that women receive favorable treatment with respect to society's most severe penalty reverberates. It echoes the widely accepted chivalry thesis, that women receive preferential treatment in the criminal justice system.²⁷ The death penalty, as society's most awesome sanction, symbolizes the power of society to exact justice for the violation of rights it chooses to protect. The impression that women are spared death, despite our gathering commitment to sexual equality, is indicative of the conviction, deep in the culture, that women will continue to lack full moral, political and legal stature, and that they gain certain protections in exchange for accepting these limitations.²⁸ Ripples of corrosive sexism flow from

26. *Id.* at 315-17 (footnotes omitted) (emphasis added).

27. Nagel and Hagan write that "[a] review of the post-1975 literature suggests that the chivalry hypothesis is now wholly accepted." See Nagel & Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME AND JUSTICE, AN ANNUAL REVIEW OF RESEARCH 113 (M. Tonry & N. Morris eds. 1983).

28. I make this claim only and specifically about American society. It is possible that in other societies, with their different histories, the exemption of women from the death penalty could bear a different meaning; it could, for example, amount to dawning recognition of the unjust burdens borne by women in the past. Possibly something of this kind is intended by the exemption of women from the death penalty in the proposed new criminal code of the Soviet Union. That women share the exemption with males under 18 and over 60 does suggest, however, that the Soviets are engaging in a progressive effort to limit the reach of capital punishment by exempting those perceived to be too weak to bear the full weight of societal retribution. See Fletcher, *In Gorbachev's Courts*, N.Y. Rev. Books, May 18, 1989, at 16. The history of the feminist movement in the United States, which has always pressed for civil and political equality, renders it

the perception that female murderers are shielded from the society's most extreme punitive response. Interestingly, the information presently available does not support the proposition that female murderers have a substantial advantage over similarly situated male murderers in avoiding the death penalty. The limited information available suggests that women may be reaping both the rigors of equality and the detriments of the widespread suspicion of privilege.

Available evidence does not support the proposition that the American prosecutors, juries and courts refuse, out of chivalry, to death sentence women in circumstances where a capital sentence would be the fate of male offenders, certainly not to the egregious extent that Justice Marshall's complaint suggests: The fundamental reason why so few women murderers are death sentenced is that women rarely commit the kinds of murders that are subject to capital punishment. Women commit one of every eight murders,²⁹ but are far more likely to commit certain types of murders than others. Most offenders on death row, as many as eighty percent, have been convicted of felony murder, i.e., murder in the course of committing another felony.³⁰ Women commit very few felony murders. Six percent of suspected perpetrators of felony murder are female.³¹ Women do hold their own, however, in the commission of intra-family homicide. They kill spouses and children almost as often as men

impossible to interpret exemption from ultimate criminal liability as anything but explicit or tacit recognition of the undesirability of the full attainment of the expressed goal.

29. Twelve percent of persons arrested for murder or nonnegligent manslaughter in 1988 were female. REPORT TO THE NATION ON CRIME AND JUSTICE, *supra* note 15.

30. Gross and Mauro found that over 80% of the death sentences in Florida and Georgia and 75% in Illinois in a five year period, 1976-80, were in cases that involved other felonies. See S. GROSS & R. MAURO, DEATH AND DISCRIMINATION 45 (1989).

31. FBI SUPPLEMENTARY HOMICIDE REPORTS [hereinafter SHR] data for the twelve year period 1976-87 report that there were in total 20,905 suspects known to the police for the particular felony murders of rape, burglary, robbery, larceny, auto theft and arson, and the catch-all category of other felony murders. Females accounted for 1,292 of these suspects. Men therefore were suspected of felony murder of one of these kinds sixteen times as often as women. SUPPLEMENTARY HOMICIDE REPORTS are compiled by the Uniform Crime Reporting section of the FBI based on reports from law enforcement agencies. I am grateful to James Alan Fox of Northeastern University's National Crime Analysis Program for supplying me with the FBI supplemental homicide data used in this article.

do.³² Intra-family homicides rarely give rise to capital sentences, regardless of the sex of the defendant, unless the murder was committed for gain. These homicides are typically read as less blameworthy than those that merit the death penalty, lacking either or both of the qualities of coldbloodedness or predatoriness. Indeed, only the most aggravated murders can sustain a death sentence under modern era capital punishment law.³³

Those who have interpreted the extreme gender lopsidedness of the death row population to reflect chivalry towards women murderers have failed to take into consideration the greater seriousness or heinousness ascribed by our criminal law to felony murder, and to predatory murders generally, as compared with typical family and other intimacy murders which are committed in the heat of anger. Consider robbery murder, by far the largest subclass of felony murders. Over the twelve year period, 1976-87, men were twenty-five times more likely to be robbery murder suspects than were women.³⁴ Male murder defendants are more likely than female murder defendants to be capitally tried and sentenced in part for the legitimate, legally relevant reason that they are more likely to have prior histories of and convictions for violent crimes. More than ninety-five percent of those convicted of violent crimes are male.³⁵ There are other indications, although by no means conclusive proofs, that women are not grossly advantaged in selection for death. Two sets of researchers who have studied post-*Furman* death sentencing report that gender had no significant effect on the fate

32. In the 12 year period, 1976-87, 11,690 women and 16,793 men were suspected of killing spouses, lovers and ex-spouses. Two thousand five hundred and twenty four mothers and 3,265 fathers were suspected of killing their children. Unfortunately, the SHR data does not distinguish between minor and adult victims of parental homicide. See SHR, *supra* note 31.

33. In the five year period 1976-80, there were 96,170 homicide arrests but only 1,011 death sentences meted out, a ratio of 100 to 1. S. GROSS & R. MAURO, *supra* note 30, at 3. Nakell and Hardy studied homicides in North Carolina, a mid-sized death penalty state, for a year period, 1977-78. See B. NAKELL & K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987). They found that most judicial districts brought between 5 and 15% of their murder cases to trial on a first degree murder charge. *Id.* at 152. Of the 611 arrests in the study, 331 cases were indicted for first degree murder, 60 cases went to trial on that charge, 18 resulted in first degree murder verdicts and 8 were death sentenced. *Id.* at 93, 130.

34. According to SHR data, 13,528 men and 565 women were suspected of robbery murder during this 12 year period. See SHR, *supra* note 31.

35. In 1983, 95% of state prison inmates and 96% of federal inmates were male. REPORT TO THE NATION ON CRIME AND JUSTICE, *supra* note 15, at 41.

of persons convicted of murder.³⁶ These studies were conducted to investigate the impact of race on capital sentencing; because the number of women whose cases had the potential for aggravated first degree murder processing is small, it would be imprudent to overgeneralize from these results. Further research is necessary to determine whether prejudice in favor of women murderers plays any role in accounting for the rareness of women on death row.

Given the lack of information about women aggravated murderers, we might be tempted to turn for enlightenment to research about gender bias in the sentencing of offenders convicted of serious violent crime other than aggravated murder, with the expectation that the results would be applicable to capital punishment as well. Such a foray into criminological research is more productive of research hypotheses than of reliable answers to questions about capital punishment. One reason for great caution in extrapolating from sentences for other kinds of serious crime to sentences for aggravated murder is that in the at least somewhat analogous area of racial bias, the extrapolation is not supported by research findings. The most authoritative research does not find that blacks are more harshly sentenced than whites for crimes less severe than aggravated murder.³⁷ But in the arena of capital punishment, there is a substantial body of research that reveals that killers of white victims are more likely to be sentenced to die than killers of black

36. B. NAKELL & K. HARDY, *supra* note 33, at 139-48, concluded that the sex of the over 600 persons arrested for murder in North Carolina in a yearlong period 1977-78 had no significant effect upon the likelihood that they would be tried for first degree murder, be convicted of first degree murder or receive a life or death sentence. In their study of the operation of the death penalty in Georgia between 1979 and 1981, Baldus, Woodworth and Pulaski found that the sex of the defendant did not have a statistically significant impact on sentencing outcomes, although there was a weak correlation between being female and a nondeath penalty result. Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375, 1385 (1985) [hereinafter Baldus]. Caution is necessary in approaching these results. Because the number of women in these studies is small, one cannot generalize from them with any confidence. The smallness of the subject population hampers all research about crimes of violence by women. See Nagel & Hagan, *supra* note 27, at 109.

37. NAT'L RESEARCH COUNCIL, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 69 (A. Blumstein, J. Cohen, S. Martin & M. Tonry, eds. 1983) (discussing determinants of sentences).

victims, all other factors being equal.³⁸ It may well be that whatever present and future research may reveal about less serious crimes, gender and the death penalty may interact to produce a different pattern of results. If prosecutors and juries react more punitively to the death of a white victim, so they may also exhibit some distinctive pattern of reaction that is triggered by the presence of a female offender and aggravated murder.

Caution is also necessary in extrapolating from research about gender bias in sentencing for less serious crime because of lack of agreement among researchers. There is a consensus in criminological research that women benefit from leniency in some pre-sentencing phases of case processing and in sentencing for many relatively minor crimes.³⁹ Researchers are divided as to whether women who commit serious or violent crime are more lightly sentenced than comparable male offenders.⁴⁰ While some believe that leniency carries through into sentencing for serious crime, other researchers believe women convicted of serious or violent crime lose the advantage of being female and are treated no differently or even more harshly than men. Wherever and to the extent that criminologists see an advantage to female gender, they proffer the same explanatory hypothesis, the chivalry or paternalism hypothesis: women are treated as less responsible for their actions, hence less culpable, and perhaps also as posing less continuing danger to society. Researchers who find that women receive sentences as severe as comparable males hypothesize that when a woman is perceived as guilty of a severe or "male" offense she loses the advantage of her gender and is more

38. See U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990) (report to Senate and House Committees on the Judiciary); D. BALDUS, C. PULASKI & G. WOODWORTH, EQUAL JUSTICE AND THE DEATH PENALTY (1990); Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); S. GROSS & R. MAURO, *supra* note 30. Gross and Mauro provide some interesting speculation about why the death penalty is different from other sentences. See *id.* at 187.

39. Nagel and Hagan reach this conclusion in their review of the literature. See *supra* note 27. Some researchers argue that females are more harshly sentenced than males for some minor offenses, e.g., juvenile women are reported to receive harsher treatment for "status" offenses. See Zingraff & Thompson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. Soc. L. 401, 403 (1984).

40. Some researchers who acknowledge relative leniency in sentencing believe it is attributable to legally relevant variables, e.g., seriousness of offense or prior record. Zingraff and Thompson, *supra* note 39, at 402-03, survey the literature in which the controversy between the legalistic and paternalistic positions is played out.

harshly punished because of her violation of gender stereotypical expectations. There is some tendency to conflate two distinct hypotheses, either one of which is confusingly termed the "evil woman" hypothesis. The first hypothesis, which would more appropriately be called the "gender equality" theory, is that women who, perhaps contrary to gender norm expectations, commit high severity offenses, are treated no differently than men. The second, the true "evil woman" theory, is that women who commit high severity offenses are treated more harshly than similarly situated men: they are punished for violating sex role expectations in addition to being punished for their crimes.

It is beyond the scope of this essay to evaluate the power of each of these three theories to account for the fates of female murderers. The next section of this essay does, however, take some first steps towards understanding the impact of gender on capital sentencing. I will review two sets of cases of death sentenced women, the first comprising thirty women who were executed between 1930 and 1967, and the second comprising a group of thirty-nine women, all those death sentenced in a ten year period 1978-87, after capital punishment was reinstated in 1976. I will content myself with providing some tentative answers to questions which may help point the way to more exacting and large scale research: Who were/are these women? Who were/are their victims? Why, at least in the eyes of those who convicted and sentenced them, did they kill? Are there indications that their sentencers took their sex to be salient in judging their crimes or their characters? How do their stories compare with what we know about death sentenced men? The analyses of these cases offer some limited support for the gender equality theory, and tend to disconfirm the evil woman theory, in that the stories of the condemned women resemble the stories of condemned men. I, at least, was somewhat surprised by these results because I shared something of the intuition of those feminists who suspect that women killers, simply because they violate the gender tabu against violent aggression, might be susceptible to harsher treatment than men, whom we expect and sometimes oblige to use violence.

Before turning to the cases of death sentenced women, it may be useful to clarify my orientation towards capital punishment. I hold no brief for the American institution of capital

punishment. It has been ably and persuasively argued that the post-*Furman* death penalty system has not been cleansed of the flaws which the Supreme Court stigmatized in invalidating the prior law.⁴¹ The five member *Furman* majority held that the death penalty violated the eighth and fourteenth amendments because defendants were selected for death in an arbitrary and capricious manner. Among the reasons which brought various of the majority justices to this conclusion, there are three that remain the most troubling criticisms of our death penalty system.

1) The freakish rarity of death sentences: it remains implausible today that the two percent of convicted murderers who are sentenced to die are more reprehensible criminals than some of the murderers who have been life sentenced. The lack of horizontal equity is exacerbated by the history of America's death row inmates after condemnation. Of the more than 3,000 people condemned since 1977, only a few dozen have actually been executed, more than one third have been removed from death row as the result of appellate court actions, and more than 2,000 remain on death row.⁴²

2) Class discrimination: The death sentence remains the meed of the poor.

3) Race discrimination: Although earlier research on racial discrimination against blacks has been challenged for failure to control for important variables — principally the seriousness of the offense and prior criminal record — more recent studies have found that the race of the victim is a highly salient variable.⁴³ The death penalty is used to punish the murder of whites regardless of the race of their killers. In my view, the fact that we have clung to the death penalty despite these flaws more than suggests that its power lies in its symbolism. In the final section of this essay, I will explore one aspect of the symbolic content of the death penalty system which reveals a powerful kind of gender bias disadvantageous to women.

41. See F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (1986), especially the last chapter.

42. *CAPITAL PUNISHMENT* 1988, *supra* note 6, at 1, 8.

43. See NAT'L RESEARCH COUNCIL, *supra* note 37, at 88-110; S. GROSS & R. MAURO, *supra* note 30; Baldus, *supra* note 38.

II. WOMEN OF DEATH ROW

According to the Bureau of Justice Statistics, thirty-two women were executed in the United States between 1930, when the federal government began compiling death row statistics, and 1967, when a ten year moratorium on executions began.⁴⁴ I have been able to verify and obtain information about thirty.⁴⁵ Since the death penalty was reinstated in 1976, at least forty-nine women have been admitted to America's death rows.⁴⁶ Because the number of cases is so small, it has been possible to collect and sift the stories of all the women who were executed between 1930 and 1967 and a large sample of the more recent group, thirty-nine women who were death sentenced in the ten year period 1978-87.⁴⁷ There is at least one important difference between the two groups of women. The first group excludes, while the second does not, women whose sentences were subsequently reduced. Some of the second group of women have already had their sentences reduced and more undoubtedly will, since thus far in the history of the post-*Furman* death penalty regime, at least a third of all death penalty cases have been subject to sentence reduction because of subsequent appellate court action.⁴⁸ The two groups of cases differ, therefore, in that the women in the first group are beyond the help of appellate courts and executive clemency.⁴⁹ Clemency was much more frequently

44. CAPITAL PUNISHMENT 1986, *supra* note 6, at 9.

45. The federal government lists an execution in Louisiana in 1935 and one in Mississippi in 1943, *id.*, that I have not been able to confirm from corrections officials, court records in these states, or nongovernmental sources.

46. See V. STREIB, *supra* note 9.

47. I have excluded from this case review women who were sentenced after 1987, about whom it is relatively difficult to obtain information. I begin the sample decade with the year 1978, the year in which Velma Barfield was sentenced. An additional 14 women were sentenced in 1973-77, spanning a period which began when the future of the death penalty was uncertain in the wake of *Furman* and ended in the year of the first execution in a decade. Each of these 14 women has subsequently left death row alive. See V. STREIB, *supra* note 9.

48. From 1977 through 1988, 1,249 of the 3,057 persons sentenced to die were removed from death row by appellate court action, commutation or death from causes other than execution, i.e., old age, illness, suicide or murder. See CAPITAL PUNISHMENT 1988, *supra* note 6, at 8.

49. In the pre-*Furman* death penalty system it was not uncommon for governors and pardon boards to grant clemency to half or more of those condemned, although the frequency of clemency differed, of course, from state to state and administration to administration. Sellin reports that of the 295 persons sentenced to death in California, 1950-67, 102 (34.6%) were executed. See T. SELLIN, *supra* note 12, at 67. See also Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 191 (1964) (authored by

granted under the pre-*Furman* regime than it is today; the current law includes an elaborate appeals process in which it is possible to gain sentence reduction as well as reversal of conviction.⁵⁰ Sentence reduction on appeal has for the most part replaced executive clemency as the mode of reconsideration of jury sentences. In the post-*Furman* system any woman now on death row may yet get her sentence reduced. The two groups will be discussed separately in order to respect the difference in their compositions and to permit comparisons of the two eras.⁵¹

A. WOMEN EXECUTED BETWEEN 1930 AND 1967

Of the thirty women, the first two were executed in 1930, the last in 1962, by thirteen states and the federal government. Most death penalty states have never executed a woman. Twenty-one of the women were white and nine were black. With one exception, each of the women was executed for a fatal crime.

Eight of the women executed — the largest single grouping — were executed for murder in the course of armed robbery. Each one of these women was successfully portrayed as an aggressive, self-willed killer, either acting alone, or, if acting in concert with another, being the dominant partner or at least fully the peer of her collaborator. None were mere helpmeets of crime; all were the active agents of the destruction of another for

Elkan Abramowitz & David Paget); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & POLICE SCI. 301 (1962). In the pre-*Furman* system, however, those not granted clemency were executed rather than maintained indefinitely on death row. On clemency post-*Furman* see Note, *A Matter of Life and Death: Due Process in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981). The NAACP Legal Defense Fund reports that as of January 1990 52 persons have had their death sentences commuted since 1976. Personal communication with Karima Wicks, editor of NAACP, DEATH ROW, U.S.A., *supra* note 8.

50. See SPANGENBERG GROUP, TIME AND EXPENSE ANALYSIS IN POST-CONVICTION DEATH PENALTY CASES (Feb. 1987) (report prepared for the Senate and House Appropriations Committees of the Florida Legislature and the Office of the Governor of Florida).

51. Information about these cases was gathered for the most part from appellate reports where they were available and newspapers when cases were not appealed. Several of the women in the first group of cases died without being heard on appeal. Among the later group, several have not yet had their direct appeal, which can take several years in state court systems swamped by death sentence review cases. Gross and Mauro report that as of February 1, 1988, 40% of death row inmates had not yet had their first appeal. S. GROSS & R. MAURO, *supra* note 30, at 220. I have also relied on other sources of information, including trial transcripts, defense and prosecution briefs, and telephone communication with prosecutors, public defenders, defense attorneys, and Watt Espy of the Capital Punishment Research Project in Headlands, Alabama.

gain. Several murdered while male accomplices stood by passively.

Irene Schroeder (Pennsylvania, executed 1931, white, twenty-two years old)⁵² was executed for a Bonnie and Clyde style spree of armed robberies. At her trial she testified that she stole "just to get a thrill out of it."⁵³ One such crime led to a chase by the highway patrol. She, Glenn Dague, with whom she was "living meretriciously,"⁵⁴ and her brother, robbed a store, taking her small child with them in the car to aid escape. She and her companions got the drop on the highway patrol after they were stopped by the officers. Schroeder shot and killed a highway patrolman while he was standing with his hands in the air at her direction. The robbers fled, and were eventually apprehended in Arizona after another confrontation with the law. Schroeder shot a sheriff in the second shoot-out, who also died.

Mary Holmes (Mississippi, 1937, black, thirty-two) was a household cook; she and a male accomplice carefully planned the robbery of her employer's safe. When her employer unexpectedly interrupted their nocturnal intrusion, she and her companion each hid, and waited for the right moment, whereupon her companion struck the householder with an iron pipe. The pair left, but returned several hours later to set the house afire with gasoline. They were dubbed "torch murderers" by the Sharkey County newspaper. The widow of the dead man refused to believe Holmes guilty until she confessed.⁵⁵

Rosanna Phillips (North Carolina, 1942, black, twenty-five) struck the first and fatal blow that killed her employer (the couple were apparently tenant farmers) so that she and her husband could rob him. Her husband testified that the robbery and murder were Rosanna's idea and that he himself had struck the landlord only when and because Rosanna told him to do it.⁵⁶

52. Hereinafter the state in which the offender was executed, the year of execution, her race, and her age at execution, if known, in that order, will be noted in parentheses for each offender.

53. *Commonwealth v. Schroeder*, 302 Pa. 1, 4, 152 A. 835, 838 (1930).

54. *Id.* at 11, 152 A. at 836.

55. *The Deer Creek Pilot*, Apr. 30, 1930, at 1.

56. *Durham Morning Herald*, Oct. 14, 1942, at 1.

Bessie Mae Williams (North Carolina, 1944, white) repeatedly stabbed her cabby victim. A woman accomplice joined her in stabbing the cabby. One male accomplice stood by and another held the cabby. The foursome were after money with which to have a good time.⁵⁷

Helen Fowler (New York, 1944, black, twenty-five), a prostitute, along with a male confederate, severely beat and robbed a trick. The victim was "well into middle age, well along in years,"⁵⁸ and drunk. Helen then dragged him into a back room, where he was left dead or dying. The next night, upon returning from drinking and gambling with the victim's money, and finding him dead, the accomplices threw the body in the river.⁵⁹

Corinne Sykes (Pennsylvania, 1946, black, twenty-two), acting alone, stabbed and robbed her employer. She had been her maid.⁶⁰

Barbara Graham (California, 1955, white) used her unthreatening feminine appearance to gain entrance to the home of an elderly woman invalid. Graham pistol whipped and smothered her victim so that she and her male accomplices could rob her home.⁶¹

Anne Henry (Louisiana, 1942, white) was from a prominent family, but she did not tread the path expected of her; she became a prostitute. She and a male companion committed armed robbery in order to raise capital for a bank robbery. She forced the robbery victim, whom they accosted on a road, to strip naked, then shot him as he begged, on his knees, for his life. Her male accomplice merely stood by.⁶²

Seven of the women killed in the course of serious felonies other than robbery, or to avoid lawful arrest. Like the armed

57. See generally *State v. Thompson*, 224 N.C. 661, 32 S.E.2d 24 (1944).

58. *People v. Fowler*, 133 N.Y. Cases & Briefs on Appeal 57, 58 (1944) (opening statement of prosecutor).

59. *Id.* at 61.

60. See generally *Commonwealth v. Sykes*, 353 Pa. 392, 45 A.2d 43 (1946).

61. See generally *People v. Santo*, 43 Cal. 2d 319, 273 P.2d 249 (1954).

62. See generally *State v. Henry*, 200 La. 875, 9 So. 2d 215 (1942); 196 La. 217, 198 So. 910 (1940).

robber group described above, each of these women was portrayed at her trial and in contemporary press coverage as an aggressive, criminal self-starter, deliberately taking life to reap gain or advantage.

Two were career criminals. Eva Coo (New York, 1935, white, forty-one) was a madam with an establishment in upstate New York. She and one of her prostitutes bludgeoned her retarded handyman, then ran over his body with a car. Her object was to collect on an insurance policy of which she was the beneficiary.⁶³

Eithel "the Duchess" Spinelli (California, 1941, white, fifty-two) and her common law husband led a small-time gang; she ordered the death of a youthful gang member who was thought to be ready to inform on the gang to the police.⁶⁴

Eva Dugan (Arizona, 1930, white, forty-nine) and Anna Marie Hahn (Ohio, 1938, white) victimized lonely older men. They were drifters. Dugan appeared in her victim's town, and became the farm housekeeper of the considerably older man. She was convicted of killing him after his body, skull fractured,

63. I am indebted to Watt Espy, *supra* note 51, for information about the Eva Coo case.

64. See generally *People v. Ives*, 17 Cal. 2d 459, 110 P.2d 408 (1941). Clinton Duffy was warden of San Quentin at the time of Spinelli's execution. A lifelong opponent of the death penalty, Duffy wrote a memoir about the executions he witnessed at San Quentin during his service there. C. DUFFY, *supra* note 1. He unfailingly offered compassion to the death row inmates, tempered only by his hatred of cruelty. His description of prisoner Spinelli suggests the profound effects of sexist stereotyping on the way women murderers were perceived:

[She] was the coldest, hardest character, male or female, I have ever known . . . a merciless gang leader called the Duchess. Even though I knew . . . she was no beauty, I was amazed at her utter lack of feminine appeal. At 52, she was a homely, scrawny, nearsighted, sharp-featured scarecrow, with thin lips, beady eyes, and scraggly black hair flecked with gray. It hardly seemed possible that even young punks with neither brains nor character would take orders from her.

Id. at 134-35.

Spinelli made only one request of Duffy on the eve of her execution: "Will it be all right if those pictures are strapped over my heart when I go in there? She pointed to . . . small photos of her three children and a six-week-old grandchild." *Id.* at 138.

was found in a shallow grave. She had run away with the victim's car in the company of nineteen year old Jack, surname unknown, who was never arrested.⁶⁵ Hahn struck up an acquaintance with several lonely men, whom she defrauded of their money and poisoned with arsenic.⁶⁶

These drifter crimes seem to be patterned on an archetype; terrifying stories of trusting men made weak and needy by age, manipulated and hurt by ruthless younger women, who may, as in the Dugan case, further humiliate their benefactors by giving their favors to a virile young man.

Louise Peete (California, 1947, white) shot in the neck, executioner style, a senile invalid whom she was employed to care for. The murder was part of a scheme to acquire his property. She had served a long prison term for a strikingly similar crime.⁶⁷ She is described as a psychopath with a peaches and cream complexion, who had the power to evoke trust and loyalty from people who had reason to fear her.⁶⁸

Martha Julé Beck (New York, 1951, white, twenty-nine) was a nurse with a history of bad luck with men. She had one child out of wedlock in her teens, and a second by a man she married. She left him, pregnant, when she learned that he had never divorced his wife. She met and fell in love with her future co-defendant, Raymond Fernandez, through a lonely hearts correspondence club. Fernandez' occupation was defrauding women whom he contacted through lonely hearts clubs introductions. Together, they went to Albany to visit one such woman, a wealthy widow. They were staying at her apartment and pursuing a scheme to defraud her. At their joint trial, each defendant accused the other of being responsible for Mrs. Fay's death. Beck admitted to striking her on the head with a hammer. She testified that she did so at Fernandez' insistence. Fernandez countered that Beck struck Mrs. Fay because she was overcome by jealousy when she surprised the widow Fay on an amorous prowl. There was conflicting testimony as to whether Mrs. Fay died from the blow or because she was subsequently strangled

65. See generally *Dugan v. State*, 36 Ariz. 36, 282 P. 481 (1929).

66. See generally *State v. Hahn*, 59 Ohio App. 178, 17 N.E.2d 392 (1938).

67. See generally *People v. Peete*, 28 Cal. 2d 306, 169 P.2d 924 (1946).

68. C. DUFFY, *supra* note 61, at 131.

by Fernandez. Whatever the division of responsibility for the murder, the two absconded with a check made out to Fernandez by the victim. They also carried away the victim's body, which was placed in a trunk and buried ten days and many miles later.⁶⁹

Finally, there is Bonnie Brown Heady (federal, 1953, white, forty-one) who, with Carl Hall, kidnapped a six year old boy. Although Hall was the leading intelligence in this crime, and in his confession frequently described Heady, an alcoholic, as drunk during the kidnapping and murder, she was an active participant in the kidnapping and an accomplice in the murder. She induced the child's school to release him to her on the pretext of taking him to his sick mother, drove with Hall and the boy to a lonely spot, then absented herself for a walk with her boxer dog because she "did not want . . . to witness the actual murdering."⁷⁰ After the murder she assisted in the clean up and in the transportation and disposal of the body, which was buried in her garden. She was sentenced for kidnapping, a capital crime in Missouri, although her crime clearly embraced murder as well. Bonnie Heady seems to have been motivated more by the desire to keep up her drunken party with Hall, whom she had rather recently met, and to enjoy his captivating society, than by the \$600,000 ransom the pair extracted from the child's parents.⁷¹

Nine of the executed women killed a member of their family. Six of these murders were pecuniary crimes.

May Carey (Delaware, 1935, white, fifty-two), a grandmother at the time of her death, was executed for killing her brother to collect her share of his modest estate. Carey, with two of her sons, one then a minor, beat and shot her brother. The jury had recommended mercy but the court sentenced May Carey and one of her sons to hang.⁷²

69. See generally *People v. Fernandez*, 301 N.Y. 302, 93 N.E.2d 859 (1950).

70. *TIME*, Nov. 30, 1953, at 26.

71. *N.Y. Times*, Oct. 11, 1953, § 4, at 2, col. 4; *St. Louis Post Dispatch*, Oct. 11, 1953, at 1.

72. I.M.H. Brandner, *Legal Executions in Delaware* (rev. ed. 1956) (unpublished University of Pennsylvania seminar paper, on file at Delaware Department of Corrections).

Dovie Dean (Ohio, 1953, white, fifty-five) became the housekeeper of her future husband and victim. A few months after their wedding, she poisoned him with arsenic for the life estate in all his property that he willed to her as an inducement to marry him. Dean's crime has more in common with the drifter murders than a typical family murder, since the intention of killing her husband for gain was apparently the reason for marrying him rather than a purpose that evolved after marriage was entered into for more conventional reasons.⁷³

Killing to collect insurance is a perennial theme in the family victim cases; it was the motive in four of the 1930-67 family murders.

Anna Antonio (New York, 1934, white, twenty-seven), the wife of a petty gangster, was executed for hiring two associates of her husband's to kill him. The prosecution claimed she did it for the insurance money. One of the supposed hirelings exonerated Mrs. Antonio in a confession made an hour before his own execution was scheduled to take place. He revealed that the killing was motivated by bad blood between himself and the victim over an unpaid seventy-five dollar debt. She was nonetheless refused clemency. Mrs. Antonio went to the electric chair and her three children went to an institution.⁷⁴

Marie Porter (Illinois, 1938, white, thirty-eight) was unable to convince her brother to retain her as the beneficiary of his life insurance policy after his marriage. To forestall the change, she hired her lover and his brother to kill him. The Chicago Tribune describes the "triggerman," Angelo, as handsome, twenty-two years old, and the lover of his "mentor in crime"; Porter is described as a 250 pound mother of four daughters.⁷⁵

Rosa Stinnette (South Carolina, black, 1947) was executed for the insurance slaying of her husband. Little information is available about this case, which was never heard on appeal.⁷⁶

73. See generally *State v. Dean*, 94 Ohio App. 540, 116 N.E.2d 767 (1953).

74. *People v. Antonio*, 113 N.Y. Cases & Briefs on Appeal 80 (1934); see also N.Y. Times, Aug. 9, 1934, at 1.

75. Chicago Tribune, Jan. 28, 1938, at 1.

76. *The State*, Jan. 18, 1947, at 10 (published in Columbia, S.C.). I learned from Watt Espy, *supra* note 51, that Stinnette was executed for an insurance killing.

Earle Dennison (Alabama, 1953, white, fifty-four), a nurse, poisoned her two and one-half year old niece, on whose life she had taken out a policy naming herself as beneficiary.⁷⁷

Three family murders were calculated and coldblooded crimes, although not for pecuniary gain.

Frances Creighton's (New York, 1936, white, thirty-six) crime takes place against the background of Depression-era straightened circumstances. The Creightons, husband, wife and two children, took in the Appelgates and their daughter. The combined families evolved into a one unit living in what the judge who heard Creighton's appeal described as "sordid conditions."⁷⁸ The Creightons' fifteen year old daughter was regularly sleeping with Everett Appelgate, whom she wanted to marry. Appelgate determined to poison his tedious, grossly overweight wife, apparently to permit him to marry Creighton's daughter. Frances Creighton, who had also been sleeping with Everett Appelgate, prepared the poisoned eggnog that Everett fed to his wife. Evidence was presented at her trial that she had written anonymous letters whose purpose may have been to induce the Appelgates to leave her house; she had learned to dislike Mrs. Appelgate intensely. No clear motive for her action was established at her trial. She claimed that she was under Applegate's domination because he threatened to reveal to her children that she and her husband had been co-defendants in an earlier poisoning case. The jury was unpersuaded.⁷⁹

Rhonda Bell Martin (Alabama, 1957, white, forty-eight) poisoned her husband so that she could marry his son.⁸⁰

Elizabeth Duncan (California, 1962, white) hired two assassins to kill her son's pregnant wife. She had been vehemently opposed to his leaving her to get married. Her rage was relentless; having failed in a most persistent campaign to dissuade her

77. See generally *Dennison v. State*, 259 Ala. 424, 66 So. 2d 552 (1953).

78. *People v. Creighton*, 271 N.Y. 263, 280, 2 N.E.2d 650, 658 (1936).

79. *Id.*

80. *Martin v. State*, 266 Ala. 290, 96 So. 2d 298 (1957).

previously docile and compliant son to give up his plan to marry, she set about finding contract killers to remove her rival.⁸¹

Sue Logue's (South Carolina, 1943, white) crime was committed not upon a family member but to avenge one, her murdered husband. She and her brother-in-law hired someone to kill the man who had been acquitted for the murder of her husband.⁸² Like the Martin and Duncan murders, it arose out of anger rather than the desire for gain, but was a coldblooded and deliberate crime. Likewise, Creighton's was a coldblooded murder, although her motives are obscure, growing somehow out of the tangle of sexual intrigue and animosity in the household.

Two women were executed for homicides that occurred in the wake of arguments with non-intimates. In both cases the victims were white; their killers black.

A waiter in a Montgomery cafe told Selena Gilmore (Alabama, 1930, black) she was being too noisy. She left, returned with a shotgun, and cornered her antagonist. She shot him while he kneeled before her, arms upraised in a plea for mercy. Gilmore said that corn whiskey had made her do it.⁸³ Mildred Johnson (Mississippi, 1944, black) bludgeoned her elderly white landlady after an argument.⁸⁴ Gilmore and Johnson were apparently guilty of wildly excessive retaliation for the slights which society must ask us all to bear more peaceably. These two are rare cases where those who could not or would not accede were women.

Two women were executed for killing lovers in the heat of arguments.

Lena Baker (Georgia, 1945, black, forty-four) became the lover of her sixty-seven year old white employer. His sons had hired her to care for him after he sustained a leg injury. Both were heavy drinkers. Baker shot her lover in the head at the

81. See generally *People v. Duncan*, 53 Cal. 2d 803, 350 P.2d 103, 3 Cal. Rptr. 351 (1960).

82. See generally *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1943).

83. *The Birmingham News* (Alabama), Jan. 24, 1930.

84. See generally *Johnson v. State*, 196 Miss. 402, 17 So. 2d 446 (1944). See also *Vicksburg Evening Post* (Mississippi), May 19, 1944.

culmination of an argument that broke out during a long drinking bout. She shot him, she said, because he wouldn't let her leave.⁸⁵

Betty Butler (Ohio, 1954, black, twenty-seven) was executed after a sensational trial for strangling and drowning her would-be lesbian lover. Both women were black. A month before the homicide, Butler, the destitute young mother of two, found herself unable to get either ADC payments or help from her family. She was befriended by her victim, who offered first to pay her, then to keep her, in exchange for sex. The women apparently lived together. Butler sometimes agreed to grant Evelyn Clark what the *Cleveland Post and Call* archly refers to as an "intimacy," but more often she refused. They had violent quarrels. On the day of the killing, Butler and Clark went on an outing to a lake with friends; they had both been drinking. Clark made her last sexual demand. Betty throttled her and drowned her in the lake.⁸⁶

Finally, there is the case of Ethel Rosenberg (federal, 1953, white, thirty-five), the only one of these thirty women not responsible for the death of another human being.⁸⁷ She and her husband Julius, American communists, were convicted of passing atomic secrets to the Soviet Union during the Cold War. Espionage, however, was "worse than murder" in the eyes of the judge who sentenced them.⁸⁸ Judge Kaufman held them responsible for our Korean War dead and for putting millions more at risk. President Eisenhower concurred: he was unmoved by the worldwide campaign for clemency for Ethel as the mother of two small children because of the enormity of her crime.⁸⁹

The last five cases recounted break the pattern established by the previously discussed twenty-five, in which each defendant deliberately realized a plan to kill, either to reap advantage or destroy an enemy. All of the first twenty-five crimes are squarely

85. Watt Espy, *supra* note 51, who read the trial transcript of Baker's case at the Randolph County courthouse, related these facts to me.

86. *Cleveland Call & Post*, Mar. 14, 1953, at 1; *id.*, June 12, 1954, at 1; *id.*, June 19, 1954, at 1.

87. See generally *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838, *reh'g denied*, 344 U.S. 889 (1952).

88. See A. Ross, *No RESPECT* 17 (1989).

89. *Id.* at 75.

within the range of deliberate and aggravated homicides which remain eligible for capital trials under modern era capital punishment statutes. Post-*Furman* death penalty statutes limit and enumerate the kinds of homicides which may be subject to capital processing. They typically list aggravating factors at least one of which must be found to be present if a death penalty is to be imposed.⁹⁰ These modern era statutes articulate longstanding and traditional wisdom as to what qualities render a crime and a criminal eligible for capital sentencing. As such, they offer a guide to the values applied by juries and courts in the pre-*Gregg* era, when sentencing was not subject to elaborate statutory control. Each of the first twenty-five cases involves one or more of five aggravating factors which are among the most frequently included in modern death penalty statutes, and which, when found to be present, most often lead to the imposition of death. These factors are: 1) that the murder was committed in connection with a separate violent felony (twenty-five states),⁹¹ 2) that the murder was committed for pecuniary gain (thirty-three states),⁹² 3) that the murder was done to prevent arrest (twenty-one states),⁹³ 4) that another person was hired to do the killing

90. Note, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1227-32 (1984) provides an analysis of how many times each aggravating factor appears in the statutes. Thirty-four states enumerate lists of factors while the three additional death penalty states, Oregon, Texas and Virginia, stipulate the categories of murder which may be capitally punished. A recent survey of the statutes found some changes but few significant trends since publication of the above Note. The reader will be referred to the Note for statutory citations, except where there have been new developments, which will be noted. Overlapping categories as well as vague or ambiguous categories complicate the job of tallying occurrences. My interest throughout is in a method of identifying what Americans regard as particularly heinous murder rather than in the particular statutes, aggravating circumstances or frequency of occurrences for their own sakes.

91. Since the publication of Note, *supra* note 90, the total number of statutes with this aggravating circumstance remains the same, although Vermont, which has since instituted capital punishment, has joined the list, VT. STAT. ANN. tit. 13, § 2303(d)(3) (1989), and Massachusetts has been deleted, due to the invalidation of the death penalty by the Massachusetts Supreme Judicial Court. See Note, *supra* note 90, at 1230-31.

92. Note, *supra* note 90, at 1227-28.

93. *Id.* at 1228. Colorado has added this factor. COLO. REV. STAT. § 16-11-103(6) (1986).

(eighteen states),⁹⁴ 5) that the murder was especially brutal, inhuman or cruel (twenty-four states).⁹⁵ Four states treat use of poison as a means as a separate aggravating factor while others treat the use of poison as a circumstance which renders the death exceptionally cruel.⁹⁶ These twenty-five cases are largely indistinguishable from typical cases which have garnered the death penalty for men.

The last five cases, and most severely the last three, do not fit the typical death penalty mold of coldblooded, predatory crime.

With respect to the Gilmore and Johnson in-the-wake-of-argument murders, it is difficult to suppress entirely doubts as to whether contemporary perceptions of these two crimes were compromised by racism; both of these cases involve black on white violence in the old South. The Birmingham News account upon which I relied for information about Gilmore's crime and execution, indeed, was written by the victim's bereaved uncle.⁹⁷ In light of the pervasive racism of the environment in which these crimes took place, it is possible that the white victims of these crimes were not as innocent of responsibility as portrayed or that the black murderers were not as brutal and implacable as they were portrayed.

Lena Baker and Betty Butler were poor blacks engaged in forbidden and reviled sexual relationships, one crossing color barriers in Georgia in 1944, and the other violating the prohibition against homosexuality in the 1950s. It is difficult to imagine a middleclass white of either sex being executed for shooting a lover while both were drunk. It is even more difficult to imagine the middleclass analogue to Betty Butler's plight: Unable to get ADC payments or help from her family, unable either to forego or accept the protection of her would-be lover.

94. Note, *supra* note 90, at 1229. Illinois has added this factor. ILL. ANN. STAT. ch. 38, para. 9-1(b)(5) (Smith-Hurd 1990).

95. Note, *supra* note 90, at 1228-29. Three states have added this factor. ARK. STAT. ANN. § 5-4-604 (1989); NEV. REV. STAT. § 200.033 (1989); VT. STAT. ANN. tit. 13, § 2303(d) (1989).

96. Note, *supra* note 90, at 1229.

97. See The Birmingham News, *supra* note 83.

Viewed against the background of the first twenty-five cases examined, the Ethel Rosenberg case is the most anomalous of all, since she killed no one — unless of course one sees her as the sentencing judge did: as a treasonous actor whose crime had an epochal effect on national security. Many, although by no means all, commentators argue that the Rosenbergs were martyred by Cold War anticommunist hysteria. Critics of the Rosenberg executions have argued for decades that there was little evidence against Julius and less against Ethel to sustain a conviction for espionage, and that even if the Rosenbergs were guilty of the espionage charged, the information passed to the Soviets as a result had virtually no military or strategic value.⁹⁸

The foregoing review of the 1930-62 cases points to the conclusion that, except where prejudices were activated that had nothing to do with the sex of the defendants — race prejudice, hostility to homosexuals, and Cold War anticommunism — these cases offer little that distinguishes them from the similar cases of thousands of men who have suffered execution. In each of the first twenty-five cases, apart from atmospheric, e.g., the drifter theme or the prevalence of poison as a weapon,⁹⁹ the women were condemned and executed for paradigmatic crimes of aggravated first-degree murder.

B. WOMEN DEATH SENTENCED 1978-87

In the ten year period 1978-87, thirty-nine women have been sentenced to die. One has been executed. Twenty-one have thus far had their sentences reduced, and if the future is like the recent past, further sentence reductions will occur. Several of these women have yet to have their direct appeal to their states'

98. R. RADOSH & J. MILTON, *THE ROSENBERG FILE: A SEARCH FOR TRUTH* (1984), provides a bibliography and commentary on the Rosenberg literature, much of which, both pro and con, was written from a polemic and partisan point of view.

99. There is a popular belief that poison is a woman's weapon. There is truth in the perception only to this extent: women, according to SHR data, *supra* note 31, were responsible for a greater percentage of the total number of poisonings, 1976-87, than they were for any other form of murder. Men, however, were responsible for more than twice as many poisonings as were women. Only .2% of women murderers poisoned their victims. Handguns were the weapons most commonly employed. They were used by almost half the murderers of both sexes. Knives were employed by 28% of the women murderers and by almost 19% of the men.

appellate courts, where a substantial proportion of death row inmates have obtained sentencing relief.¹⁰⁰ Those who do not find relief on direct appeal or collateral review in state courts will turn to the federal courts in search of relief, where, again, a substantial number of capital habeas corpus petitioners have been successful.¹⁰¹ Sentence reductions have been granted for reasons including appellate rulings that death was an excessive sentence, procedural violations and constitutional invalidation of statutes under which defendants were sentenced.

The practice of execution was in decline when *Furman* was decided, and has suffered further decay in the modern capital punishment era.¹⁰² Thus far in the post-*Furman* history of capital punishment, three percent of those on death row have suffered execution.¹⁰³ If this ratio persists, few, if any, of the women on death row will ever be executed. For a large majority of death

100. Forty-one percent of those whose direct appeals were decided between 1973 and February 1988 have won sentence reduction, while an additional seven percent achieved sentence reduction in state collateral review. S. GROSS & R. MAURO, *supra* note 30, at 220.

101. Gross and Mauro report that 26% of petitioners obtain relief at the district court level while 40% of the appeals to circuit courts have been successful. *Id.*

The post-sentencing phases of the capital punishment system have been examined and dissected by a number of commentators who have revealed the actual achievements of the system. In what is perhaps the most telling image employed to invoke the death penalty in the modern era, Jack Greenberg likens the system to a roller coaster:

It is a roller coaster system of capital justice, in which large numbers of people are constantly spilling into and out of death row, but virtually no actual executions take place.

Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 926 (1982).

One could add that it is a roller coaster in slow motion, since many years are typically passed on death row, for those who are subsequently removed, for those who eventually have been executed, and for those who simply stay on death row. The median time on death row for the more than 2,000 persons on death row at year end 1988 was three years and nine months. See CAPITAL PUNISHMENT 1988, *supra* note 6, at 1. The average time on death row for those executed since 1977 was six years and five months. *Id.* at 10. There were 400 death row inmates who had been on death row for at least seven years. *Id.* at 12.

102. Even prior to the 1967-76 moratorium, the number of executions conducted annually had been dropping off steeply, from a high of 199 in 1935 to roughly 50 per year by 1960. Bedau, *supra* note 4, at 25, table 1-3. The peak post-*Gregg* year for executions was 1987, in which only half that number of executions, 25, were performed. NAACP, *supra* note 8, at 3. All predictions of bloodbath and exponential increase in the number of executions once the moratorium was lifted have thus far proven incorrect. See M. MELTSNER, CRUEL AND UNUSUAL (1974) (history of the moratorium period).

103. CAPITAL PUNISHMENT 1988, *supra* note 6, at 10.

sentenced offenders, the capital ritual will no longer include actual extinction, unless the ambivalence that paralyzes the system is thrown off.¹⁰⁴ In light of uncertainties about sentence reduction and the unlikelihood of actual execution, the most productive way to study gender in the modern era capital punishment system may well be to focus on the characteristics of the crimes and the offenders which have led post-*Furman* courts to impose death sentences on women, whether or not they have later been extricated from death row.

Of the thirty-nine women who were sent to death row 1978-87, thirty-one are white, seven are black and one is Native American. Fewer than half, seventeen, of the thirty-seven death penalty states, have had women on death row in the period 1978-87. Four were teenagers at the time they committed murder, the youngest of whom was fifteen when she killed, while at least two were fifty or more.

Some of these cases fall into categories which are familiar from the 1930-67 cases, while others do not; in particular, in addition to the more prosaic categories of murder that women were sentenced for committing in an earlier era, some women were death sentenced in 1978-87 for sex and sadism murders and for mass murder. I will begin by examining the more familiar categories of killing.

Thus far the only death sentences to survive are those imposed on women offenders whose degree of responsibility for homicide has been read to be at the same consummate level as was imputed to the women who died in the earlier period. In particular, those women who were peripherally involved in murder, mere accomplices of deliberate murderers, have won sentence reduction. This result is in fact required by the Supreme

104. Greenberg, *supra* note 101, provides an eloquent diagnosis of American ambivalence about the death penalty, as do F. ZIMRING & G. HAWKINS, *supra* note 41.

The Supreme Court has acted in recent years to curb what it perceives as abuses of the writ of habeas corpus by death row inmates. If those like myself who believe that American society is too riven about capital punishment to have much of an appetite for actual executions are correct, the restriction of federal habeas corpus relief will be offset by compensatory adjustments at other loci in the system — in prosecutors' offices, in trial courts and in state appellate courts.

Court's ruling in *Enmund v. Florida*.¹⁰⁵ The Court held that the *Coker* proportionality requirement would be violated if a death sentence were imposed upon an accomplice who did not intend to take life.¹⁰⁶ Women who are perceived as playing a supporting role in the crime of a murderous spouse have benefitted from the *Enmund* requirement, as have men in analogously peripheral roles.

Nine of the women committed armed robbery murder.

Debra Bracewell (Alabama, sentenced in 1978, white)¹⁰⁷ was seventeen years old when she shot a grocer in the course of a robbery. She was newly married to Charles Bracewell, a man nine years her senior. Charles had a substantial criminal record. Bracewell easily dominated and led Debra, who, with an IQ of sixty-two, is mentally retarded. He drew Debra into committing a series of burglaries and thefts. One morning in Elba, Alabama, they graduated to armed robbery. Having gained admittance to a small grocery store before it was fully opened for business, Charles held a gun on the owner. Charles told Debra to take the owner's pistol, and then he told her to shoot him in the back of the head. She shot him once and ran. Charles shot him in the head eight times. Charles took his wallet and fled. At her second trial, the mitigating factors of her age when the crime was committed, her mental retardation, and deprived background allowed her to avoid a second death sentence. She was sentenced to life imprisonment without possibility of parole.¹⁰⁸

105. 458 U.S. 782 (1982) (an accomplice who does not himself contemplate that life may be taken in the course of a felony may not be executed for felony murder). *Enmund* was cut back in *Tison v. Arizona*, 481 U.S. 137 (1987) (permitting capital liability if participation in the crime is, unlike *Enmund*'s, substantial).

106. See *infra* notes 178 & 179 and accompanying text.

107. Hereafter the date of sentence in each case will appear between the jurisdiction and the offender's race.

108. See generally *Bracewell v. State*, 401 So. 2d 124 (Ala. Crim. App.), writ denied *sub nom. Ex parte Bracewell*, 401 So. 2d 130 (Ala.), vacated *sub nom. Bracewell v. Alabama*, 449 U.S. 915 (1980). See Streib & Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. (1990) (forthcoming) for a more detailed account of the *Bracewell* case, and a comprehensive account of the history of the treatment of juvenile female offenders in the United States. I am indebted to Victor Streib for the benefit of a prepublication copy of his article, on which I have relied for information about the four female juveniles who have been on death row in the ten year period under discussion.

The second juvenile armed robber, Paula Cooper (Indiana, 1986, black), has become an international cause celebre, attracting appeals for clemency from, among others, Pope John Paul II. Paula Cooper, then fifteen years of age, and three other black teenage girls, gained admittance to the home of a seventy-eight year old white widow who lived in their Gary neighborhood. The girls told Mrs. Pelke that they wanted information about her Bible classes. Cooper was the aggressive member of the quartet. She pushed Mrs. Pelke to the floor, hit her on the head with a vase, and then stabbed her thirty-three times. The girls made off with ten dollars and Mrs. Pelke's car. Cooper pled guilty to capital murder and was sentenced to death by a judge. The Indiana Supreme Court has subsequently reduced her sentence on the grounds of her youth.¹⁰⁹

Emma Cunningham (Georgia, 1979, white) and her husband, having failed in their efforts to borrow money, went to the home of a man who had befriended them. Her husband attacked him with a large wrench. While her husband beat the victim, Emma went to the victim's bedroom to gather valuables. In light of the savagery of the beating and the circumstance that the victim was left to die, the murder was found to be aggravated by torture of the victim. Emma was given a new trial because evidence against her was wrongfully admitted at her first trial. At her second trial, Emma Cunningham was sentenced to life imprisonment.¹¹⁰

Karla Windsor (Idaho, 1984, white) and her boyfriend arrived at the home of a recent acquaintance with no money and

109. See generally *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989). The Indiana Supreme Court held that, since subsequent Indiana law banned executions of persons below 15 when they committed the capital offense and no 15 year old offender had ever been executed in Indiana, the sentence was disproportionate. It also held that under *Thompson v. Oklahoma*, 487 U.S. 815 (1988), no 15 year old offender could be executed unless there was explicit statutory authorization for executing one so young.

110. See generally *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982); *Cunningham v. State*, 248 Ga. 558, 284 S.E.2d 390 (1981).

The 1978-87 women's cases which have been remanded for new trials have not, at least where retrials have thus far taken place, resulted in fresh death sentences. My impression is that the same result is common when male defendants are retried. For example, Chief Justice Exum of the North Carolina Supreme Court reports that of 14 cases remanded by his court as of March 1, 1986, only 2 or 3 have resulted in a second imposition of death. See Exum, *The Death Penalty in America*, 8 CAMPBELL L. REV. 1, 6-7 (1985).

no place to stay. They were seeking to raise some money to permit them to go out of state to seek work. Their victim invited them to stay for dinner and sleep in his spare room, but refused to lend them his pickup truck. The pair decided to steal the truck, and proceeded to bind and gag the victim with duct tape. In a sudden rage brought on by his resistance, Windsor's boyfriend stabbed him. Windsor and her boyfriend left in the victim's pickup with some of his valuables. The Idaho Supreme Court reduced Windsor's sentence because, among other factors, Windsor was not the actual killer.¹¹¹

Sharon Young (Ohio, 1983, white) went to a gay bar in Cincinnati with some women friends. She had been drinking that night and continued drinking at the bar. At closing, she accepted the offer of a ride from the bar owner, whose gun she had taken from behind the bar earlier in the evening. The gun was the only yield of an attempt to rob the cash register. Young shot the bar owner once in the back of the head, then took his car and money. She denied intending to shoot him, insisting that her intoxication was such that she could not form the intent to kill. She won a new trial on appeal, and at her second trial was sentenced to life imprisonment with eligibility for parole after thirty years.¹¹²

Each of the previous five cases included a factor — i.e., youth, peripheral participation in the murder, and drink — which tended to diminish the extent to which the defendant was perceived as culpable and which eventually led to the avoidance of the original sentence. The next three cases lack any such quality.

Doris Foster (Maryland, 1984, Native American) decided to rob the manager of the motel where she lived with her husband. Having armed herself with a screwdriver, she lured the manager to a vacant room with a story about unexplained noises. Her sixteen year old daughter Liz followed her mother, who had tried to persuade Liz and her friend to help in the robbery. She saw her mother assaulting the manager from the doorway. Liz feigned hearing the police arrive in order to induce her mother

111. See generally *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964 (1986).

112. See generally *State v. Young*, 40 Ohio St. 3d 704, 534 N.E.2d 842 (1988).

to break off the assault and leave. Doris went back to her room, drank some beer, took another screwdriver, and returned to the vacant room, again assaulting the manager, who died as a result of one or both of these attacks. Doris, her husband and daughter shared the valuables in the manager's living quarters. They then threw the body in a canal. The appellate court noted with disapproval that Foster had tried to shift blame for the murder to both her husband and her daughter; her conviction and sentence were affirmed on appeal in 1986.¹¹³ In 1987 the governor of Maryland commuted her sentence to life without possibility of parole.¹¹⁴

Pamela Perillo (Texas, 1984, white) met a married couple named Briddle on the road, and the three began hitchhiking together. The trio were given a ride by a man named Banks. Banks fed them, entertained them, put them up, and hired them to help him move. Excited by Banks' bulging wallet, James Briddle proposed robbing Banks. Perillo's response was enthusiastic. She and James Briddle tied up Banks and a friend of his, Skeens, who had also come to help with the move. Perillo took both their wallets, and together with Briddle, pulled on a rope around Banks' neck until he lost consciousness. They apparently also killed Skeens, but the state's star witness, Briddle's now former wife, did not actually see Skeens murdered. Briddle and Perillo were tried, convicted and sentenced to die for one count of aggravated murder. To date, Perillo has not been able to obtain sentencing relief.¹¹⁵

Karla Faye Tucker (Texas, 1984, white) and her boyfriend Danny Garrett set off in the middle of the night to intimidate, rob, and collect money from a man named Jerry Dean. Their principal objective was to steal Dean's motorcycle. Tucker and Garrett did steal his motorcycle, but they also brutally murdered Dean and his girlfriend Deborah Thornton. Upon entering

113. See generally *Foster v. State*, 305 Md. 306, 503 A.2d 1326 (1986), denying reconsideration of *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985).

114. The record is bare of any information about the commutation other than that Foster's sentence was commuted by executive order. Personal communication with Peter Cobb, Office of the Governor of Maryland.

115. See generally *Briddle v. State*, 742 S.W.2d 379 (Tex. Crim. App. 1987), cert. denied, 109 S. Ct. 543 (1988).

Dean's apartment, Tucker and Garrett found Dean and Thornton asleep. Dean had, among other things strewn around his apartment, a partially built motorcycle and some gardening tools. Garrett picked up a hammer and assaulted Dean. Dean began to beg for his life. Tucker's response was to hit him repeatedly with a pickax. She later told her sister that "she got a 'thrill' while 'picking' Dean," and that "every time she picked Jerry, she looked up and she grinned and got a nut and hit him again."¹¹⁶ Tucker told her sister's boyfriend that "I come with every stroke."¹¹⁷ Danny and Karla Faye then discovered the terrified Deborah Thornton in the room and began to "pick" her.¹¹⁸ Thornton "begged for them to kill her because she couldn't take anymore."¹¹⁹ The next day a friend of Dean's discovered the bodies, the pickax still embedded in Deborah Thornton's chest.

The Texas Court of Criminal Appeals affirmed Tucker's conviction and sentence, and was clearly deeply appalled by this senseless, apparently under-motivated crime, and the admission that sexual gratification had overtaken any other purpose during repeated assaults on the victims. The appellate court found ample evidence to support the jury's finding that Tucker would continue to pose a dangerous threat to society. The court summarized evidence of her "turbulent past," her propensity to get into fights and her even more disturbingly unfeminine manner of owning to the propensity with equanimity and satisfaction. Tucker testified that she had been in "at least three good fights that someone was hurt."¹²⁰ Tucker also admitted that she and Garrett planned to kill and plunder in the future, testifying that they talked of raiding drug labs.

With the pickax murders we are in a new Clockwork Orange world of sadism and random violence. The themes of sadism and thrill seeking barely broke the surface of the 1930-62 murders. The 1930 Irene Schroeder case came closest, with its motifs of sexual license and the cult of outlawry. Schroeder, who robbed

116. *Tucker v. State*, 771 S.W.2d 523, 526-27 (Tex. Crim. App. 1988), *cert. denied*, 109 S. Ct. 3230 (1989).

117. *Id.* at 527.

118. *Id.* at 526.

119. *Id.*

120. *Id.* at 527.

people for the thrill and shot it out with lawmen, can be seen as a precursor to Karla Tucker. Tucker is a paradigmatic example of at least one type of female murderer, male-like in her aggressiveness, drawn to violence, under no man's domination or control. At the same time she is the female exemplar of the most feared kind of modern era violent criminal, for whom material motives if present are a thin coating over essentially sadistic crime.¹²¹

The most recent and the last of the armed robbery murder cases brings us back from the realm of explicit sexual sadism.

Kaysie Dudley (Florida, 1987, white) was death sentenced for robbing and killing her mother's former employer. Her mother had been the paid companion of an elderly woman. She was discharged several days before the murder. Dudley and her boyfriend Michael Sorrentino went to the victim's home to steal some rings. Dudley admits choking the victim with her belt, but claims that she left the room when her boyfriend took over the choking to return only after Sorrentino had cut the old woman's throat with a knife she had given him. Dudley's case has been remanded for resentencing because inadmissible evidence was admitted at trial.¹²²

With the exception of one case involving fraud, all the remaining pecuniarily motivated crimes were committed against family members or other intimates.

121. Tucker appealed her sentence in part on the grounds that her drug history and intoxication on the night of the murders should have been considered as a mitigating circumstance. The jury heard extensive evidence of her drug history, but was instructed that it could find it mitigating only if Tucker was temporarily insane when she murdered Dean and Thornton.

Tucker's drug use began at age eight:

she began to use marijuana at the age of eight and was already using heroin intravenously by age ten Her use of drugs was so extensive that one expert stated that she had probably been off drugs for only two weeks out of her entire life. During the two days before the killings, appellant had been taking Valium, Placidyl, Percodan, Soma, Wygesic, Dilaudid, and methamphetamine. In her own words, appellant was "wired."

Id. at 533.

The Texas Court of Criminal Appeals held that consideration of her drug addiction during the penalty phase of her trial was properly limited under Texas law to the question of whether it rendered her temporarily insane.

122. See generally *Dudley v. State*, 545 So. 2d 857 (Fla. 1989).

Dee Dyne Casteel (Florida, 1987, white) was a waitress in an International House of Pancakes whose manager, James Bryant, and owner, Art Venecia, were lovers. The Venecia/Bryant relationship deteriorated. The younger man, Bryant, was caught both skimming the receipts in the restaurant and in infidelity. Bryant approached Casteel, a woman approximately fifty years of age, for assistance in finding someone to kill Venecia. She was able to put him in touch with two men who agreed to kill Venecia for \$5,000. After the murder, Casteel and Bryant embarked on a more sustained collaboration. Employing various forms of fraud and impersonation, they began selling off Venecia's possessions and financial assets. When Venecia's aged and moderately senile mother, who lived in a house on his property, became less convinced of their lies about her son's whereabouts, the pair took out a contract on her as well. Dee Casteel has yet to have her direct appeal to the Florida Supreme Court.¹²³

Fifteen women killed family members or other intimates. Twelve of these killed for pecuniary gain. The first four cases below involve the familiar family murder objective of insurance benefits.

Cecilia Williamson (Mississippi, 1984, white) hired two men to kill her husband. He was shot in the back with a shotgun, after which the house was set on fire. She was to pay her accomplices with money from insurance proceeds. It is not clear how substantially she expected to profit from the murder in addition to obtaining the price of killing her husband. In 1987 her case was remanded for a new trial because her sixth amendment confrontation rights were violated at the first trial. Williamson has not returned to death row.¹²⁴

Judi Buenoano (Florida, 1985, white) was sentenced in 1985 for the 1971 arsenic poisoning of her husband. At her trial, evidence was presented that she had attempted the poisoning murder of the man with whom she was living until his illness prompted his suspicions, suspicions that ultimately led to her arrest. There was also evidence that she had fatally poisoned a

123. Personal communication with Charles Fahlbusch, Assistant District Attorney, Dade County, who prosecuted the case.

124. See generally *Williamson v. State*, 512 So. 2d 868 (Miss. 1987).

second man, with whom she had lived after the death of her husband. The motive for killing both men had been to collect insurance benefits.¹²⁵

Lois Thacker (Indiana, 1985, white) hired a man to kill her husband. She drew in another man who eventually did the actual shooting by playing on his emotions. She told Matthew Music that her husband had killed his best friend and was in pursuit of Music's girlfriend. Thacker's motive was to collect on a substantial insurance policy on her husband's life which named her as beneficiary. Her case has yet to be decided on direct appeal.¹²⁶

After some unsuccessful attempts to hire a killer, Carla Caillier (Florida, 1987, white) persuaded her lover to kill her husband. Caillier wanted the insurance on her husband's life and the custody of her son. Her lover was sentenced to life but Caillier was sentenced to die, despite the jury's recommendation that a life sentence be imposed. The trial judge imposed death, making use of his power under the Florida death penalty statute to override a jury recommendation for a life sentence. The Florida Supreme Court reduced her sentence to life without possibility of parole for twenty-five years on the grounds that her case did not support the judicial override.¹²⁷

Five women murdered intimates for forms of pecuniary gain other than insurance. Velma Barfield murdered her fiance. Three victims were husbands and one was murdered by the woman he kept.

Barfield, known as "Margie," was executed in 1984, the first woman to be executed in the United States since the resumption of the practice in 1977. The last woman to be executed in the United States prior to Barfield had been Elizabeth Duncan in 1962.¹²⁸

125. See generally *Buenoano v. State*, 527 So. 2d 194 (Fla. 1988). At her trial a friend of the defendant's testified that "Buenoano advised her not to divorce her husband, but rather told her to take out additional life insurance on his life and then poison him." *Id.* at 199.

126. Personal communication with Mark Bates, Office of the Clerk, Indiana Supreme Court; Statement of the Facts, State's Appellate Brief,

127. See generally *Caillier v. State*, 523 So. 2d 158 (Fla. 1988).

128. See *supra* note 81 and accompanying text.

Velma Barfield (North Carolina, sentenced in 1978, executed in 1984, white, fifty-two) was sentenced to die for the arsenic poisoning of her fiancé, Stewart Taylor, a tobacco farmer. She admitted to poisoning three other persons, her mother and an elderly couple who employed her to take care of them. She was also suspected of poisoning her husband. Barfield poisoned Taylor to prevent him from learning that she had forged checks in his name to pay for prescription drugs. She was addicted to tranquilizers, and had for years engaged in devious ploys to feed her addiction. She built up a stock of prescriptions by consulting a number of doctors each of whom was unaware of her contacts with the others and, when pressed, forged checks to pay for the drugs. Stewart Taylor had threatened her with prosecution after discovering that she had forged his signature. Barfield admitted killing him, in a panic, to prevent detection and prosecution for forgery, a pattern evinced in several of her admitted murders. The jury that sentenced her found that her crime was aggravated both by its pecuniary motive and the desire to avoid the legal consequences of exposure.¹²⁹

Barfield's sentencing had a sequel unique among the women sentenced to die since 1976. So many death sentenced offenders regardless of sex have for so many seemingly different reasons been spared the exaction of their sentences. Barfield's execution inevitably inspires the question, why didn't her sex protect Barfield if nothing else could save her life? How is it possible that after twenty-two years without the execution of a woman, this fifty-two year old grandmother was strapped to a gurney and wheeled to her death by lethal injection in a windowless top floor room in Raleigh's Central Prison?¹³⁰

Margie Barfield was neither the first nor the last North Carolinian executed in the modern era,¹³¹ but her execution occasioned unusual interest because no woman had been executed in the United States for so long. In the glare of national publicity, her supporters, including Ruth Graham, wife of evangelist Billy Graham, pressed North Carolina's then Governor Jim Hunt to

129. See generally *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980).

130. N.Y. Times, Nov. 2, 1984, at A1.

131. James Hutchins was executed in March 1984, and John Rook was executed in September 1986. NAACP, *supra* note 8.

commute her sentence.¹³² Attention was all the more riveted on Hunt because he was trying, in a bitterly contested election, to wrest a seat in the United States Senate from Jesse Helms.¹³³ Hunt could only have been unpleasantly surprised when a superior court judge set a date for Barfield's execution four days before election day.¹³⁴ Hunt was the champion of the progressive wing of the North Carolina Democratic Party. As such, his support of the death penalty, although on the record, was suspect. Once the execution date was set for the eve of the election, the born-again christian grandmother, now drug free, well adjusted and extraordinarily well liked, even loved, at Women's Prison, threatened Hunt's election chances.¹³⁵ Clemency would hurt him with the pro-capital punishment electorate — at least seventy percent were pro-capital punishment and as many as eighty percent favored executing Barfield — while denying clemency would offend his staunchest supporters.¹³⁶ There was open speculation in the press that Hunt's decision to allow the execution to go forward was dictated by the urgencies of the campaign.¹³⁷ Either of two contradictory lessons can be drawn from the execution of Velma Barfield: It can be seen as confirmation that extraordinary circumstances are necessary to breach the inhibition against the state's deliberate killing of a woman. Or it can be seen as confirmation that in easily imaginable circumstances — including a pliant and politically cautious chief executive — the inhibition, to the extent that it exists, melts away.

LaVerne O'Bryan (Kentucky, 1980, white) poisoned her husband with arsenic to keep money and real estate she would have lost if she had divorced him. Her case was remanded for

132. N.Y. Times, Sept. 27, 1984, at A1, col. 1.

133. *Id.*, Sept. 28, 1984, at A1, col. 1.

134. *Id.*, Sept. 27, 1984, at A1, col. 1.

135. To a friend [Barfield] said "The best years of my life were in Women's Prison." Her sincerity was testified to not only by the preachers who counseled her but by the guards who attended her. (At Barfield's memorial service, Jenny Lancaster, the superintendent of Women's Prison, spoke of her profound grief and sense of bereavement. "I feel as if I've lost a child.")

Reston, *supra* note 10, at 84. Reston also reports that matrons to assist at the execution had to be imported because Barfield was held in such affection by her jailers at Women's Prison. *Id.* at 83.

136. N.Y. Times, Sept. 17, 1984, at A16, col. 1. See also Reston, *supra* note 10, at 82.

137. N.Y. Times, *supra* note 136; Reston, *supra* note 10. See F. ZIMRING & G. HAWKINS, *supra* note 41, at 126-28.

retrial due to improper admission of evidence that she had poisoned the man with whom she had lived prior to her marriage to her victim. O'Bryan has not been returned to death row.¹³⁸

Patricia Hendrickson (Arkansas, 1984, white) was tried twice for paying two college students \$16,000 to kill her husband. She was to gain over \$600,000 through her husband's death. At her second trial she was sentenced to life.¹³⁹

Betty Lou Beets (Texas, 1985, white) shot her husband with a more modest object in view; she wanted to end her marriage but resisted divorce because she would then lose her trailer home. There was evidence at her trial that she killed her first husband as well. The Texas Court of Criminal Appeals reduced her sentence to life because there was no evidence to support the aggravating circumstance which led to her being sentenced to death. She was found to have killed "for remuneration," which the appellate court construed to mean murder "for hire," not murder "for profit."¹⁴⁰

Donna Sue Cox (North Carolina, 1987, white), from the rural and depressed eastern portion of North Carolina from which Velma Barfield hailed, was kept by a wholesale used car dealer in a little house in the country. She conspired with her boyfriend to kill the car dealer. Their object was to rob him. The victim was brutally beaten to death by Cox's boyfriend. Cox was death sentenced on the strength of two aggravating factors: that the murder was especially heinous, atrocious and cruel and that it

138. See generally *O'Bryan v. Commonwealth*, 634 S.W.2d 153 (Ky. 1982).

139. See generally *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420 (1986), *modifying Williams v. State*, 258 Ark. 207, 523 S.W.2d 377 (1975).

The Hendrickson case provides an example of a female defendant attempting to exploit her sex to avoid the death penalty. At her second trial, a defense psychologist testified, although the testimony was subsequently withdrawn, that Hendrickson had a below average IQ, 81, and that she tended to be "a very feminine, mousy, passive, dependent kind of person who would be expected to be very easily led." *Hendrickson*, 290 Ark. at 322, 719 S.W.2d at 422. No doubt such tactics have been used by other female defendants. The interesting question, of course, is not whether defendants on trial for their lives will employ such tactics but the distinct question of whether, and how often, they succeed.

140. See generally *Beets v. State*, 767 S.W.2d 711 (Tex. Crim. App. 1987), *cert. denied*, 109 S. Ct. 3272, *reh'g denied*, 110 S. Ct. 26 (1989).

was done for pecuniary gain. Cox has yet to be heard on direct appeal.¹⁴¹

Three insurance motivated murders of intimates that drew death sentences were committed on victims other than husbands.

Mary Lou Anderson (Texas, 1978, white) and her accomplice John Granger were death sentenced for murdering her father. At trial, Anderson cast the lion's share of the responsibility on Granger. She testified that she told him that she would collect a \$5,000 insurance benefit if her father died, and that she coveted the money because she was trying to cover some bad checks. Subsequently, Granger decided to kill her father and forced her to cooperate. He forced her to accompany him in the car when he set out to her father's house, tying her up and leaving her in the car before he entered the house. She testified that he threatened to kill her and her child if she defied him. Granger tied up her father and his wife, then shot her father. The jury was apparently unpersuaded of her relative blamelessness and sentenced her to die. Within ten days of testifying against her accomplice, she was granted a new trial at which she was sentenced to fifty years imprisonment.¹⁴²

Theresa Whittington (Georgia, 1982, white) graduated high school in May 1981 and went to work at a Starvin' Marvin Store in Athens, Georgia. In October, Rick Soto came into the store, and the two started dating. She discovered he was married but was mollified by Rick's assurances that he had married for money. By January, Rick had persuaded Theresa to shoot his wife so that the two could enjoy both each other and the insurance on his wife's life. Theresa made a statement that was admitted into evidence at her trial which gave the history of her relationship with Rick and explained why she agreed to shoot Cheryl Soto. "He said that if I loved him, I would do it."¹⁴³

141. Personal communication with Staples Hughes, Assistant Public Defender, Office of the North Carolina Appellate Defender. Cox's case was prosecuted by Joe Freeman Britt, the same district attorney who prosecuted Velma Barfield.

142. See generally *Granger v. State*, 683 S.W.2d 387 (Tex. Crim. App. 1984), cert. denied, 472 U.S. 1012 (1985).

143. Here, more amply, is what Rick said to Theresa, according to her statement, "Rick said I would have to be the one that did it. He said that if I loved him, I would do it. That same day, he showed me how to shoot the gun. He told me he didn't know if he

When Rick was absent by prearrangement, Theresa went to the Soto home, shot Cheryl twice, and left her to die. The Georgia Supreme Court set aside Theresa's sentence on the grounds that other comparable murders had received life sentences.

Rosalie Grant (Ohio, 1983, black) was sentenced to die for the arson murder of her two children. She was convicted of setting her house on fire in order to collect the insurance. Her two children were asleep in the house. She has yet to be heard on direct appeal.¹⁴⁴

Three women were sentenced to die for killing husbands who were, in various ways and degrees, cruel to them. A fourth was sentenced to die for her cruelty to her victim, her fourteen year old daughter.

Rebecca Detter (North Carolina, 1978, white) poisoned her husband, whom she accused of cruelty to herself and her children. The report of her appeal does not convey what form Detter's husband's cruelty took. The jury that sentenced her to die was apparently not greatly moved by her accusations. The jury considered the murder heinous, atrocious and cruel because of the agonizing nature of death by arsenic poisoning, and therefore deserving of the death penalty. Her sentence was reduced to life imprisonment on the grounds that death was an impermissible *ex post facto* punishment in her case: The North Carolina Supreme Court held that the death penalty was not in effect for the period in which Detter's crime was committed.¹⁴⁵

Shirley Tyler (Georgia, 1979, black) poisoned her husband because he had abused her and her children. In 1986 the Eleventh Circuit Court of Appeals held that Tyler had ineffective assistance of counsel during the sentencing phase of her trial. The circuit court held that counsel should have presented evidence that Tyler's husband, who had once knocked out her teeth, was abusive, as well as evidence that she had no prior

could pull the trigger. That was why I had to do it." *Whittington v. State*, 252 Ga. 168, 169, 313 S.E.2d 73, 75 (1984).

144. Personal communication with Adele Shank, Public Defender, Columbus, Ohio, who is representing Rosalie Grant on appeal. According to Shank, Grant denies having set the fire that killed her two children.

145. See generally *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979).

criminal record, had provided for her family, and had a good reputation as a wife and mother.¹⁴⁶ Shirley Tyler was resented and is now serving a life term.¹⁴⁷

Gaile Owens (Tennessee, 1986, white) paid a man \$17,000 to shoot her husband. She invoked her husband's mental cruelty to explain her actions: "We've just had a bad marriage over the years, and I just felt like he had mentally, I just felt he had been cruel to me. There was very little physical violence."¹⁴⁸ Gaile Owens was denied sentencing relief when her case came up on direct appeal in 1988, and remains on death row.

Judy Lane Houston (Mississippi, 1985, white) was sentenced to die for murder while engaged in felonious child abuse of her fourteen year old daughter Paula. Houston and Paula, a petite teenager, got into an argument one morning while her daughter was dressing for school. In the course of the argument, Houston choked Paula with a macrame belt. Although there was no intent to do severe or life threatening damage, Houston choked the life out of her. Finding her daughter to be dead, Houston smuggled the body out of the house and dumped it into a river. At trial, evidence of episodes of abuse spanning seven years was admitted. Evidence was heard of welts inflicted with a belt buckle and of lasting damage to one eye in such a beating. Paula had been a straight A student scheduled to graduate from grammar school with multiple honors. Until her mother ended her life, Paula had apparently found resources that allowed her to at least partially compensate for the defects of her home environment. The Mississippi Supreme Court remanded the case for a new trial in part because the evidence of seven years of child abuse was held to be irrelevant and prejudicial to Houston.¹⁴⁹

146. See generally *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, reh'g denied, 454 U.S. 1093 (1981), *habeas corpus granted sub nom. Tyler v. Kemp*, 755 F.2d 741 (11th Cir.), reh'g denied, 765 F.2d 154 (11th Cir. 1985).

147. Personal communication with Georgia Department of Corrections.

148. See *State v. Porterfield*, 746 S.W.2d 441, 444 (Tenn.), cert. denied, 486 U.S. 1017 (1988).

149. See generally *Houston v. State*, 531 So. 2d 598 (Miss. 1988). Although the Mississippi Supreme Court reversed Houston's conviction and sentence, it has affirmed two other capital child abuse murder cases, in *Monk v. State*, 532 So. 2d 592 (Miss. 1988) and *Faraga v. State*, 514 So. 2d 295 (Miss. 1987). Part III below discusses the issue of capital child abuse murder.

Two women murdered for revenge.

Attina Cannaday (Mississippi, 1982, white) stabbed her former lover to death in circumstances that qualify her case for the sex and sadism murders to be considered below. Cannaday was sixteen at the time of her crime, with a horrendous personal history, including rape by her father and stepfather. She was divorced at age fourteen, and had been both a stripper and a prostitute. She was additionally handicapped by an IQ of seventy-one. Cannaday had lived for a time with an army sergeant named Wojcik. When Wojcik learned Cannaday was only sixteen, he broke off the relationship out of fear that his superiors would discover he was living with a minor. Wojcik soon filled the void, and Cannaday was jealous of his new lover, Sandra Sowash. Cannaday went with two friends, twenty-eight year old David Gray and fifteen year old Dawn Bushart, to the apartment of her former lover. The three found Wojcik in bed with Sowash. They carried off the couple in Wojcik's van. While Cannaday drove, Gray raped Sowash at knifepoint in the back of the van. When the van stopped, Sowash escaped, but Wojcik was beaten by Gray and stabbed nineteen times in the upper body by Cannaday. The Mississippi Supreme Court threw out the death sentence in part because of Cannaday's age. She is now serving a life term.¹⁵⁰

Lois Nadean Smith (Oklahoma, 1982, white) was sentenced to die for a bizarre revenge slaying. The victim was her son Greg's former girlfriend, who had apparently threatened to kill Greg. Smith, Greg, and his new girlfriend, Teresa Baker, abducted Cindy Baillee and drove her to Greg's father's house. While in the car Smith began her verbal assault on Baillee, and stabbed her in the throat. When they arrived at their destination, Greg's father and others were threatened and warned not to interfere. Baillee was forced to sit in a reclining chair, and was taunted with a pistol by the wild and exultant mother, who shot her at point blank range five times in the chest and twice in the head. Like Elizabeth Duncan's contract slaying of her son's pregnant wife,¹⁵¹ this murder invites psychoanalytic speculation

150. See generally *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 469 U.S. 1221 (1985).

151. See *supra* note 81 and accompanying text.

about the etiology of Smith's maternal rage. Smith remains on death row.¹⁵²

Two women have been sentenced to die for killing persons who receive the special protection of modern era death penalty statutes, policemen and corrections employees.

Michelle Binsz (Oklahoma, 1979, white) killed a department of corrections employee. Her conviction and sentence was reversed and her case remanded for a new trial for denial of due process in her first trial. She has not returned to death row.¹⁵³

Andrea Jackson (Florida, 1984, black) was arrested for filing a false report alleging that her car had been vandalized. Neighbors told police that Jackson had in fact destroyed her own car. She was placed under arrest, which she resisted, and forcibly put in a patrol car. Once in the back of the patrol car, she feigned searching the floor of the car for her lost keys. When the arresting officer seated beside her bent to assist with the search, she shot him six times, four times in the head, and fled. Andrea Jackson remains on death row.¹⁵⁴

152. See generally *Smith v. State*, 727 P.2d 1366 (Okla. Crim. App. 1986), cert. denied, 483 U.S. 1033, reh'g denied, 483 U.S. 1044 (1987).

153. See generally *Binsz v. State*, 675 P.2d 448 (Okla. Crim. App. 1984).

154. See generally *Jackson v. State*, 498 So. 2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010, reh'g denied, 483 U.S. 1041 (1987).

There are two gender motifs in the Jackson case that are perhaps worth noting. 1) After the shooting she went to the home of a friend, whom she told that she had shot the officer because she "wasn't going back to jail" and she didn't like men touching her." *Id.* at 409. There had been a rough physical exchange between Jackson and the officer when she resisted arrest. It is possible that Jackson's lethal outburst was triggered by the residue of whatever experiences had made her dislike men touching her. 2) In her unsuccessful appeal to the Florida Supreme Court, Jackson protested a statement at her trial by the prosecutor to the effect that the sex of the defendant should not influence the jurors' decision. She argued that under *Lockett v. Ohio*, 438 U.S. 586 (1977), she was entitled to submit any mitigating factor, including her gender, to the jury. *Jackson*, 498 So. 2d at 412. The Florida Supreme Court took the occasion to correct her reading of *Lockett*. *Lockett*, it held, requires that

any aspect of a defendant's character or record be considered in mitigation. Appellant's sex sheds light on neither. In fact, as we stated in *State v. Dixon*, "Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex."

Jackson, 498 So. 2d at 412 (quoting *Dixon v. State*, 283 So. 2d 1, 10 (1973) (emphasis added in *Jackson*)).

Two women were sentenced to die for killing in the course of quarrels with bare acquaintances.

Patricia Ann Thomas Jackson (Alabama, 1981, black) had a drinking problem. She got into an argument with a woman from whom she was trying to buy whiskey. Bonnie Walker at first agreed to the sale, then changed her mind. Jackson was the chief belligerent; her antagonist futilely sought to bring the encounter to an uneventful close. Jackson stabbed her in the chest with a knife. Jackson was herself impaled on an Alabama statute that makes a prior conviction for a first or second degree murder an aggravating factor. She had a previous second degree murder conviction.¹⁵⁵

Sheila Summers (Nevada, 1983, white) became involved — her degree of involvement was never convincingly established — in a quarrel between her friend Joan Mack and Mack's best friend Joy Spinney. Summers claimed to have met Spinney only once previous to the night of her death. At her trial, Summers testified that on that night, Mack phoned her and asked her to come to her trailer, where Mack and Spinney had been drinking heavily. Summers claimed that Spinney was dead when she arrived. Mack explained that she had shot Spinney because she had criticized or interfered in her relationship with a boyfriend. But a police informant fitted with a concealed recording device taped an admission by Summers, while drunk and high on drugs, that she had shot Spinney, whom she believed to be already mortally wounded. In her taped admission Summers claims to have shot the victim to put her out of her misery. A suicide note written in jail by Mack also accused Summers. The case was remanded for retrial because the note was wrongfully admitted into evidence. Summers has not returned to death row.¹⁵⁶

Five women were sentenced to die for murders committed with male accomplices on other women or on female children in connection with the rape, sexual abuse and torture of the victims. This kind of murder is unknown in the 1930-62 cases.

155. See generally *Jackson v. State*, 501 So. 2d 542 (Ala. Crim. App. 1986), cert. denied, 483 U.S. 1010 (1987).

156. See generally *Summers v. State*, 102 Nev. 195, 718 P.2d 676 (1986).

Annette Stebbing (Maryland, 1981, white) was at the time of her sentencing nineteen years of age. She is mildly retarded. She is married to her accomplice, a man nineteen years her senior. Her husband Bernard lusted after his step-niece, Dena. One night the Stebbings offered Dena a lift in their van. Bernard decided to rape Dena. Acting willingly and apparently happily on his instructions, the 155 pound Annette sat on the slender and petite Dena while Stebbing raped and sodomized her in the back of the van. Annette then strangled the victim at Bernard's request. Annette Stebbing's death sentence was affirmed in 1984.¹⁵⁷ In 1985 her sentence was modified to life imprisonment by order of the judge who had tried the case.¹⁵⁸

Janice Buttrum (Georgia, 1981, white) was seventeen when she and her husband raped and murdered nineteen year old Demetra Parker. Buttrum had been married at fifteen to a mildly retarded man eleven years her senior. At the time of the murder, she was the mother of a toddler and pregnant with her second daughter. The victim was staying at the same motel where the Buttrums were living, and had become a friend. One afternoon the Buttrums came to Demetra's room on a pretext of concern about their child being ill, whereupon Danny, Janice's husband, raped and beat the victim, with Janice's avid assistance and participation in sexual abuse. The Buttrums then stabbed Demetra to death. Ninety-seven stab wounds inflicted with a penknife were identified on the horribly mutilated body of the pretty nineteen year old victim. The Buttrums stole some of the dead girl's possessions and took off in her car. Buttrum remains on death row, the only one of the four juvenile offenders in the 1978-87 cases who has not escaped death row because of her age at the time of the offense.¹⁵⁹

Marie Moore (New Jersey, 1984, white) was a woman of about thirty-five when she and a teenage accomplice horribly tortured, abused and finally killed twelve year old Theresa Feury. Her death put an end to an ordeal of more than a year's

157. *Stebbing v. State*, 299 Md. 331, 473 A.2d 903, *cert. denied*, 469 U.S. 900 (1984).

158. By order of J. Close, Harford County Circuit Court, docket no. 7681. Personal communication with the Office of the Clerk, Harford County Court.

159. See generally *Buttrum v. State*, 249 Ga. 652, 293 S.E.2d 334 (Ga. 1982), *cert. denied*, 459 U.S. 1156, *reh'g denied*, 460 U.S. 1048 (1983), *habeas corpus granted in part sub nom.* *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989).

duration. Marie Moore was living with her twelve year old daughter and a fifty year old friend named Mary Gardullo. In the summer of 1981, her home became a second home to three under-supervised children roughly her daughter's age. Marie took them on beach and bowling alley outings, and gave them an exciting and enjoyable summer. In September she began to fake phone calls from the singer, Billy Joel, who she said was her ex-husband. Billy required that certain punishments be inflicted on the visitor children and Mary. Fourteen year old Ricky Flores became Moore and Billy's agent in inflicting the punishments. The punishments escalated in ferocity over the course of a year, during which time Billy began to speak through Moore without the aid of a telephone. He decided that Ricky was to become Moore's lover. As the punishments escalated from beatings to painful and prolonged torture and sexual abuse, one by one the victims made their escape from the household. The lone victim left to take Moore's and Flores' full fury was Theresa. Theresa had become a full-time inmate in the Moore household after some ineffectual inquiries about her whereabouts were abandoned by the grandmother with whom she had lived. She endured a regimen of beatings, sexual abuse, cigarette lighter burnings, and being painfully harnessed by day to a kitchen wall and confined in the bathtub at night. One day while Flores was untying her to transfer her from one place of torture to another, she hit her head on the bathtub and then a tile floor. She did not regain consciousness. Flores and Moore allowed her to die and then hid her corpse. At her trial Moore brought forward evidence that she suffered from a multiple personality disorder. The New Jersey Supreme Court remanded Moore's case for a new trial on the grounds that the evidence did not support the jury's finding that she killed Theresa by her own conduct. Marie Moore has not returned to death row.¹⁶⁰

We come now to two women whose crimes, terrible crimes, were committed at the behest of husbands who completely dominated them. The parallels in the lives and marital histories of the two killers are so striking that after a brief description of their crimes, the two cases will be discussed in tandem.¹⁶¹

160. See generally *State v. Moore*, 113 N.J. 239, 550 A.2d 117 (1988).

161. For information on Debra Brown's case I have relied on the "Statement of the Facts" section of the state's brief filed with the Indiana Supreme Court and the defendant's brief filed at the Ohio Court of Appeals, which were supplied respectively by the

Debra Brown (Ohio, 1985, black) is on death row in Ohio but is under sentence of death in both Indiana and Ohio. Debra Brown and her husband, Alton Coleman, received multiple death sentences for killing three black female children and adolescents. More information is available about the killing of Tamika Turks, aged six, in Gary, than the other crimes, because a child who was abducted along with Tamika survived the attack. Annie Hilliard, aged nine, and Tamika were approached by Brown and Coleman, who offered to give them some clothes if the children accompanied them. Coleman fell back, so that the children would be seen to walk with Brown, and the children were taken to some woods. Annie testified that Coleman beat Tamika because she started to cry. Brown held Tamika to facilitate the beating, then the pair threw her body in the weeds. Coleman threatened to kill Annie also if she resisted. Annie was forced to provide oral sex for man and wife, then Coleman raped her. Tamika, who had been left for dead, started to moan. Brown then went and killed Tamika, after which Brown and Coleman choked Annie with their belts and left her unconscious and presumed dead. She awoke and was able to walk out of the woods to find help.

Judith Neelley (Alabama, 1983, white) lured first a thirteen-year-old, then a young woman, to motels so that her husband Alvin could have sex with them. In each case the victims were held prisoner for a time, then killed by Judy Neelley on Alvin's instructions. Thirteen year old Lisa Ann Millican was injected by Neelley with Drano prior to being taken away and shot because Alvin believed it would make her docile and easy to kill.

Each of the women was young and inexperienced — Debra Brown was a borderline mentally retarded drop-out whose first paid employment was the forty-five cents an hour she made in the prison laundry after her incarceration. Judy Neelley was persuaded by Alvin to give up high school to marry him, then promptly taken away from her family and familiar surroundings.

Office of the Clerk of the Indiana Supreme Court and Brown's attorneys for her Ohio appeal. For Judith Neelley's case, see generally *Neelley v. State*, 494 So. 2d 669 (Ala. Crim. App. 1985), *aff'd sub nom. Ex parte Neelley*, 494 So. 2d 697 (Ala. 1986), *cert. denied* 480 U.S. 926 (1987). I also relied on her brief filed in support of petition for writ of certiorari to the Alabama Court of Criminal Appeals, which was sent to me by her attorney, Robert French, of Fort Payne, Alabama.

Each came from deprived backgrounds. Each of their husbands, according to the testimony of former wives, had a marriage behind him in which he had been a vicious and compulsive wife beater. The ex-wives testified to having been virtual prisoners of their husbands. They testified that their husbands had been motivated in part by powerful but unfounded fears that their wives were interested in other men. Brown and Neelley each began by taking the blame for the murders entirely on themselves, but were weaned away from this protectiveness in the course of their legal proceedings. Each now asserts domination in an effort to mitigate or avoid blame and punishment.

Judy Neelley has apparently come further in the process of acknowledging herself to be a battered wife who was used and manipulated by her husband than has Debra Brown. Although Brown asserts in her appeal that she participated in the crimes solely out of fear of Alton Coleman and to prove that she loved him, Debra may still believe, as she did at the time of her trial, that Alton's brutal love is the only valuable thing in her life. The manipulative Coleman persuaded her to play the evil woman in her testimony at his trial. Judy Neelley took the step at her appeal of attempting to mount a battered wife defense. She asserted that she had lost the capacity for independent action and judgment through ferocious bouts of abuse and humiliation and through fear of her husband. The Alabama Court of Criminal Appeals rebuked her efforts to stretch the nascent and embattled battered wife defense to cover killing another at the behest of the battering husband.

The last two cases in the set are those of women who were sentenced for what are sometimes termed mass murders, the killing of three or more persons within a brief compass of time.¹⁶² Such crimes are unknown among the executed women in the 1930-1962 cases.

Priscilla Ford (Nevada, 1982, black) deliberately drove her car up onto a downtown Reno sidewalk into a throng of Thanksgiving holiday shoppers, killing six people and injuring over a score more. The fifty-one year old woman had returned to

162. See, e.g., TENN. CODE ANN. § 39-2-203(i)(12) (1982), which so defines mass murder, which in Tennessee is an aggravating factor that may warrant imposition of capital punishment.

Reno after an absence of seven years. Seven years before the massacre she had been employed at a private Reno rest home. A dispute with her employer had led to her arrest for trespassing, and her arrest had led to the placement of her daughter in a juvenile detention center. Ford was never reunited with the child.¹⁶³ She avenged herself by turning her automobile on the holiday crowd.¹⁶⁴

Lafonda Fay Foster (Kentucky, 1987, white) was a twenty-two year old drug addicted prostitute when she and her lover, Tina Powell, killed five people. Both the victims and the killers were intoxicated on drink or drugs or both when the murders took place. Fay Foster occasionally made money by caring for an elderly man, Carlos Kearns, who paid her for giving him baths and performing household services. When Foster and Powell went to Kearns' Lexington apartment on the night of the murders, they found Kearns, his alcoholic wife, and three friends drinking heavily. Later that night the two killers and the five

163. Reno Evening Gazette, Nov. 28, 1980, at 3, col. 1.

164. See generally *Ford v. State*, 102 Nev. 126, 717 P.2d 27 (1986), *post-conviction relief dismissed*, 784 P.2d 951 (Nev. 1989).

The Ford case provoked the Nevada Supreme Court to chastise the handling of the case below in a remarkable footnote:

Notwithstanding our disposition of this appeal, we do not perceive this case to be among the brightest stars in the judicial firmament. The senseless nature of Mrs. Ford's conduct, coupled with her troubled and poignant history as wife and mother, lead us to conclude that the better course would have been a negotiated resolution assuring society of the defendant's permanent sequestration. Such a resolution would have been just considering the ambivalent nuances of her mental condition and the unrelenting obsession of a mother deprived of her child that haunted her life for many years prior to her unfocused act of vengeance. A partial list of direct trial costs involving special disbursements totaled \$274,494. These costs do not include such allocable costs as attorneys' fees attributable to the district attorney's and public defender's offices, judicial salaries, judicial support staff salaries and the prolonged commitment of limited physical resources and facilities. All of the foregoing items are substantially increased by costs incident to this appeal and will continue to increase by future expenditures on such matters as determining the point at which Mrs. Ford will be competent to receive her decreed punishment.

Ford, 102 Nev. at 138 n.8, 717 P.2d at 34 n.8.

In personal communication, the warden of the prison where she is incarcerated has told me that Priscilla Ford is well adjusted, even content, with life on death row. She finds the solitude congenial.

victims went out driving in Carlos' car. In a series of events over several hours all five victims were stabbed, shot and run over. The violence apparently erupted in the course of an argument among members of the macabre one car parade, although the circumstances remain far from clear. Fay Foster has yet to be heard on direct appeal.¹⁶⁵

Perhaps the most interesting pairing in the modern era cases is that of Karla Tucker and Judy Neelley. Karla Tucker, as she was seen by her sentencers, is at once in the tradition of male-like female murderers, aggressive and self-willed, whom we have long been willing to capitally sentence and execute. Indeed, in her penalty phase testimony, as well as in her confessions to friends and family after the crimes, she seems to have embraced the two-fisted bad girl portrait of herself that helped to put her on death row. Karla Tucker also takes us beyond the canon of pre-*Furman* female murderers by the explicit sadism of her crimes, a troubling and pervasive modern era theme.

Judy Neelley was sentenced as someone whose character and crimes closely resemble Karla Tucker's. Indeed, her husband Alvin insisted that *she* was the battering spouse and that the murders were her work alone. He also accused her of taking vicarious enjoyment from his sexual relations with their victims and of having sexual relations with them as well. Unlike Karla Tucker, Judy Neelley is combatting this portrayal of herself as a self-willed sadist. She seeks to represent herself rather as the apotheosis of female oppression. Her bid for recognition of her status as a battered wife as legally relevant to the determination of her guilt and sentence poses a problem for feminist analysis because it exposes the tension between efforts to claim equality of treatment and efforts to uncloak, name and seek redress for oppression.

165. Personal communication with Neal Walker, Assistant Public Advocate, who is representing Foster on appeal; Appellant's Brief, *Foster v. Commonwealth* (No. 87-SC-356-MR).

Neal Walker describes Fay Foster as the victim in childhood and adolescence of the most extreme abuse, physical and sexual, of any defendant he has represented. He believes that Carlos Kearns and his party triggered unbearable memories of abuse at the hands of other older men in Foster's childhood and adolescence.

It is perhaps also instructive that only two of the modern era cases involve the violation of what is recognized as the most sacred and privileged duty of women — a mother's duty to protect and nurture her children.¹⁶⁶ Rosalie Grant was sentenced for the insurance motivated arson murder of her children. Judy Houston was death sentenced for the abuse murder of her fourteen year old daughter. Grant's sentence is probably explicable as an instance of the likelihood that felony murder and multiple homicide will be death sentenced rather than as a response to her relationship to her victims. The Houston case is an expression of a controversial national trend to upgrade parental child abuse murder to murder in the first degree.¹⁶⁷ Murders that take place in the context of family violence have to date generally not been amenable to capital sentencing. As a society we have been willing neither to hold family murderers capitally accountable — absent pecuniary motivation — nor, for the most part, to acknowledge that the Fay Fosters and their male brethren on death row are products of the cauldrons of family sadism in which they were steeped as children.

The 1978-87 cases, like the earlier set of cases of executed women, lend some support to the proposition that when women are perceived to have done the things that are most likely to result in death sentences for men — notably, commit felony or profit-motivated murder, kill more than one victim or kill sadistically — they, like men, are exposed to capital punishment.¹⁶⁸

III. GENDER, HOMICIDE AND THE HIERARCHY OF HEINOUSNESS

Under the ancient common law of England, all felonies were punishable by death. Over a span of hundreds of years, it has proven necessary progressively to restrict the use of the capital

166. Although men commit 25% more parental murders of children than do women, a higher percentage of women's murders are murders of their children — 10% for women versus 2% for men. SHR, *supra* note 31.

167. The way in which our criminal law responds to parental murder of children is one of the foci of the concluding section of this essay.

168. Gross and Mauro found that felony circumstance, stranger victim, and multiple victims were the three factors most likely to lead to death sentences. See S. Gross & R. MAURO, *supra* note 30, at 45-50. Baldus, Woodworth and Pulaski found that the death penalty was imposed in 30% of the Georgia death eligible cases where the factor that the murder was vile, horrible or inhuman was present. See Baldus, *supra* note 36, at 1380.

sanction in order to align the criminal law with evolving community moral sentiment. In the twelfth century, clerics were granted the privilege, known as benefit of clergy, of trial in ecclesiastical courts, courts that did not impose the death penalty.¹⁶⁹ Benefit of clergy, now as the privilege of being spared the death penalty after the pronouncement of guilt in royal courts, was gradually extended to all lay persons for the frank purpose of avoiding the liberal use of capital punishment.¹⁷⁰ In addition to being granted benefit of clergy, a convicted felon could hope to escape death by means of a pardon. Although both manslaughter and murder were punishable with death, pardons were more easily obtained for manslaughter than for murder, and virtually unobtainable for crimes we have since learned to call first degree murder.¹⁷¹ In the sixteenth century, benefit of clergy was denied by statute to murderers, although not to persons guilty of manslaughter.¹⁷² In the nineteenth century, American statutes introduced the distinction between first and second degree murder in order to reserve capital punishment only for those murders the community deemed sufficiently heinous to merit death.¹⁷³

In the more recent past, this winnowing trend has continued.¹⁷⁴ Beginning in the 1940s, the number of executions consummated annually in the United States began to drop precipitously, from a high of 199 in 1935 to below 50 in the late 1950s and 1960s.¹⁷⁵ These statistics reflect a long term trend to circumscribe the crimes which are subject to capital punishment and to replace mandatory death penalty statutes with discretionary

169. B. NAKELL & K. HARDY, *supra* note 33, at 7.

170. *Id.*

171. *Id.* at 6.

172. *Id.* at 8.

173. Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 703 (1937).

The earliest such statute was enacted in Pennsylvania. It reserved first degree murder for premeditated and deliberate killing, killing in the course of a serious felony, or killing a peace officer or public official. Not all statutory schemes classified the same crimes as first rather than second degree murder. See W. CLARK & W. MARSHALL, *A TREATISE ON THE LAW OF CRIMES*, 332-34 (J. Kearney 5th ed. 1952) (comparing the Pennsylvania scheme with those introduced by New York and Massachusetts).

174. In this respect the history of capital punishment in the United States parallels that of other western democracies, although we have not joined them in total abolition. See Bedau, *supra* note 4, at 27, table 1-4.

175. W. BOWERS, *LEGAL HOMICIDE*, 25-26, table 1-4 (1984).

sentencing procedures.¹⁷⁶ Today, only especially egregious types of murder remain eligible for capital sentencing.

The Supreme Court, in a series of modern era cases, has done little more than place the imprimatur of constitutional requirement on this emergent state of affairs. It has eliminated vestiges and pockets of ethico-legal consciousness that contradict the historical trend.¹⁷⁷ The Court has invalidated statutes which make capital punishment mandatory for particular crimes.¹⁷⁸ In *Coker v. Georgia*, death was held to be a disproportionate penalty for the crime of raping an adult woman.¹⁷⁹ The *Coker* decision, read broadly, invalidates the death penalty for any nonfatal crime committed against an adult. In *Enmund v. Florida*, the Court limited capital liability for felony murder for accomplices not directly involved in murder.¹⁸⁰

The Court has also required that sentencing discretion be curtailed and channeled by statute so that death is reserved only for crimes that the community regards as sufficiently reprehensible to be eligible for capital punishment.¹⁸¹ The most common route taken by death penalty states in their effort to meet this constitutional obligation has been statutory stipulation of aggravating factors.¹⁸²

176. Bedau, *supra* note 4, at 6-12.

177. The Court has, however, introduced very significant innovations in the realm of procedure, requiring what has aptly been called "super due process" for death penalty cases. See Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). But see, Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (arguing that procedural restrictions have been dismantled in subsequent cases).

178. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

179. *Coker v. Georgia*, 433 U.S. 584 (1977).

Only one person is currently on death row for a nonfatal crime, the capital rape of a child in Mississippi. CAPITAL PUNISHMENT 1988, *supra* note 6, at 1, table 1-4.

From 1930, when the federal government began to keep such statistics, until 1967 when the decade-long moratorium on executions began, murder was the most common crime for which persons were executed: 86% of the almost 4,000 executions were for murder; 12% of the executed were rapists. U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1977, at 12 (1978).

180. *Enmund v. Florida*, 458 U.S. 782 (1982). See *supra* note 105.

181. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

Whether the system in operation actually comes close enough to selecting for death all or only the most reprehensible murderers to be considered a success in its own terms remains of course a question on which abolitionists and their opponents disagree.

182. See *supra* note 90 and accompanying text.

Three kinds of murders are stigmatized as sufficiently heinous to expose their perpetrators to the risk of capital sentencing in at least half of the thirty-four states that employ aggravating factors in their capital statutory schemes: 1) predatory murders, 2) murders that hinder or threaten law enforcement or governmental operations, and 3) murders that have, for want of a better term, the quality of excess.

1) To murder for gain or advantage, whether monetary or sexual, whether for profit or for the sake of domination itself, is the most frequently stigmatized kind of murder. Murder for pecuniary gain or for hire is an aggravating factor in thirty-three states.¹⁸³ Murder in the course of another violent felony is an aggravating factor in twenty-five states.¹⁸⁴ Hiring another to murder is also a common aggravating factor, adopted by eighteen states.¹⁸⁵

2) Murder in the course of resisting law enforcement or challenging other aspects of the state's majesty appears as an aggravating factor in most statutes. Twenty-one states make killing to prevent arrest or make good an escape an aggravating circumstance.¹⁸⁶ Twenty-five states list killing a policeman, fireman or corrections employee among aggravating factors.¹⁸⁷ To kill a judge or prosecutor is an aggravating circumstance in fifteen states.¹⁸⁸ Fifteen states so stigmatize killing to eliminate a witness.¹⁸⁹ Murdering while a prisoner is an aggravating factor in twenty-five states.¹⁹⁰ Seven states make killing that interferes with any governmental function an aggravating factor.¹⁹¹

183. See *supra* note 92 and accompanying text.

184. See *supra* note 91 and accompanying text.

185. See *supra* note 94 and accompanying text.

186. See *supra* note 93 and accompanying text.

187. See Note, *supra* note 90, at 1231. The tally has dropped because Massachusetts has left the ranks of capital punishment jurisdictions.

188. *Id.* at 1232.

189. *Id.* Two states have added this factor. CAL. PENAL CODE § 190.2(a) (West 1990); N.J. STAT. ANN. § 2C:11-3(c)(4) (West 1989).

190. Note, *supra* note 90, at 1229-30. Four additional states have this factor. GA. CODE § 17-10-30(b)(9) (1982); IND. CODE ANN. § 35-50-2-9(b)(9) (West 1989); N.J. STAT. ANN. § 2C:11-3(4) (West 1989); VT. STAT. ANN. tit. 13, § 2303(d) (1989).

191. Note, *supra* note 90, at 1228.

3) To use exceptional cruelty, to kill many, or put many at risk of death, or to have a violent or murderous history are factors which most death penalty states treat as aggravating circumstances. In twenty-four states exceptional cruelty or brutality is an aggravating circumstance.¹⁹² Twelve states treat torture as a factor in aggravation.¹⁹³ In twenty-three states a history of violence or a prior conviction for a violent felony is an aggravating factor.¹⁹⁴ In twenty-three states a prior murder or capital conviction is an aggravating factor.¹⁹⁵ Knowingly creating a great risk of harm to more than one person is aggravating in twenty-four states.¹⁹⁶ The use of explosives to kill is aggravating in sixteen states.¹⁹⁷ Fourteen states treat the killing of multiple victims as an aggravating factor.¹⁹⁸

Let us stop to examine the import of these patterns from a feminist point of view. It is striking from this perspective that while the capital statutes offer their special protection to representatives of the state and to the interaction of non-intimates, the third of the three spheres into which society can be divided, family life, is notably absent from the statutes' universe of concerns.¹⁹⁹ Women's traditional interest in the sanctity of the

192. See *supra* note 95 and accompanying text.

193. Note, *supra* note 90, at 1229. Three additional states have this factor. S.D. CODIFIED LAWS ANN. § 23A-27A-1 (1988); TENN. CODE ANN. § 39-2-203(i) (1982); UTAH CODE ANN. § 76-5-202(1) (1989).

194. Note, *supra* note 90, at 1230. Three states have added this factor. COLO. REV. STAT. § 16-11-103(6) (1986); IDAHO CODE § 19-25-15(g) (1987); VT. STAT. ANN. tit. 13, § 2303(d) (1989).

195. Note, *supra* note 90, at 1230. Eleven states have added this factor. ALA. CODE § 13A-5-49(2) (1985); DEL. CODE ANN. tit. 11, § 4209(e) (1989); FLA. STAT. ANN. § 921.141(5) (West 1989); LA. CODE CRIM. PROC. ANN. art. 905.4(A) (West 1989); NEB. REV. STAT. § 29-2523(1) (1985); NEV. REV. STAT. ANN. § 200.033 (Michie 1989); N.H. REV. STAT. ANN. § 630:4(II)(a) (1986); N.C. GEN. STAT. § 15A-2000(e) (1988); OHIO REV. CODE ANN. § 2929.04(A) (Page 1987); 42 PA. CONS. STAT. ANN. § 9711(d) (Purdon 1989); WYO. STAT. § 6-2-102(h) (1988).

196. Note, *supra* note 90, at 1231.

197. Note, *supra* note 90, at 1229. Ten additional states have this factor. FLA. STAT. ANN. § 921.141(5) (West 1989); GA. CODE § 17-10-30(b) (1982); KY. REV. STAT. ANN. § 532.025(2)(a) (Baldwin 1989); MO. ANN. STAT. § 565.032.2 (Vernon 1990); NEV. REV. STAT. ANN. § 200.033 (Michie 1989); N.C. GEN. STAT. § 15A-2000(e) (1988); S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. Supp. 1989); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (1988); TENN. CODE ANN. § 39-2-203(i) (1982); WYO. STAT. § 6-2-102(h) (1988).

198. Note, *supra* note 90, at 1232. Four states have added this factor. ARIZ. REV. STAT. ANN. § 13-703(F) (1989); N.H. REV. STAT. ANN. § 630:4(II)(a) (1986); OHIO REV. CODE ANN. § 2929.04(A) (Page 1987); VT. STAT. ANN. tit. 13, § 2303(d) (1989).

199. Hegel makes this tripartite division of ethical life. See G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox trans. 1952).

home, its peace and safety, is not supported by the prestige that would be symbolically conveyed by the attachment of the capital sanction to the most egregious family homicides. Of course, if a family murder has a pecuniary motive, the alchemy of money transmutes it into a killing as heinous as one committed on a stranger. And capital statutes do reflect the opprobrium with which rape and other sexual offense killings, whose victims are far more likely to be women or children than adult men, are regarded.²⁰⁰ These provisions, although they might also apply to crimes against family victims, reflect the extreme disapprobation which our society reserves for crimes inflicted on other men's women and children.

Capital punishment, then, is used primarily to reinforce and solemnize the code of conduct governing relations among persons who do not warm themselves at the same hearth; the sanction is largely reserved for predatory murder, the kind of crime men (and women) fear that male strangers will inflict upon themselves and their families.²⁰¹

Our law of homicide reveals a moral outlook in which greater opprobrium normally attaches to the killing of strangers than to the killing of intimates. This hierarchy of opprobrium is chivalrous to women as perpetrators, since such a high percentage of the homicides women commit are domestic; but it is not chivalrous to women as victims, since the blameworthiness of domestic homicide is discounted relative to stranger killing.²⁰²

200. Recently there has been a movement to include child sexual abuse murder among the types of felony murder that can sustain a death penalty. As of December 1988, 13 states had amended their felony murder statutes so that the underlying felony may be child sexual abuse. J. REPELLA, PROSECUTION OF CHILD ABUSE DEATHS—STATUTORY FRAMEWORK 2 (available from National Center for the Prosecution of Child Abuse, 1033 North Fairfax St., Alexandria, Va. 22314). New Mexico and Montana have made child sexual abuse a factor in aggravation of homicide. N.M. STAT. ANN. § 31-20A-5.B (1989); MONT. CODE ANN. § 46-18-302(9) (1989). There have also been recent statutory innovations which seek to enhance the protection of children from nonsexual assault. See *infra* note 203.

201. Stranger murders comprise less than one-fifth of all murders. The largest number of murders are of the acquaintance type, where victim and killer are neither strangers nor intimates. Ninety-six percent of all stranger murderers are males as are four-fifths of their victims, according to SHR data. See *supra* note 31.

202. In 1988, 31% of female murder victims were slain by their husbands or boyfriends, while 5% of male victims were killed by wives or girlfriends. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT 1988, at 13 (1989) [hereinafter UCR].

The hierarchy is remarkably indifferent to the substantial number of child victims who perish at the hands of their parents and other caretakers each year, and therefore also unresponsive to the traditional concern of women for the safety and welfare of children.²⁰³ No state has enumerated spousal victims among those under the explicit protection of the capital sanction. Nonetheless, it is certainly conceptually possible to regard the betrayal of the trust and special obligations that reside in family relationships as at least as heinous as predatory stranger murder. The vulnerability of typical victims of family murder, bred by weakness or dependency, could be viewed as an aggravating factor rendering such homicides eligible for capital sentencing. But such is not the tenor of the law.

One can imagine a critique of modern era capital punishment law, issuing, let us say, from feminists of a spartan temper, who were not out of sympathy with the death penalty *per se*, along the following lines: One purpose of the death penalty in modern era criminal law is to make it possible for society adequately to express the extent of its condemnation of the worst crimes, and thereby also teach and reaffirm the moral grading of offenses that informs the criminal law. Current law holds it to be more heinous to kill for gain than to kill a spouse or child in anger. From a feminist point of view, the privileging of robbery murder but not domestic murder as among the most serious homicides expresses the male orientation of the law of homicide. We propose that serious and habitual family abuse be elevated by statute to the status of a felony capable of sustaining a death sentence. To do so would bring the criminal law into alignment with emerging awareness of the gravity and magnitude of the problem of family violence. We are well aware that the death

203. Two states, however, have recently amended their statutes to include child abuse among the felony circumstances that render a homicide eligible for capital sentencing. MISS. CODE ANN. § 99-19-101(5)(d) (1988); UTAH CODE ANN. § 76-5-202(10)(d) (1989). Five states make the murder of a child an aggravating factor, regardless of the nature of the homicide. ARIZ. REV. STAT. ANN. § 13-703(F)(9) (1989); ILL. ANN. STAT. ¶ 38-9-1(b)(7); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(10) (1989); S.C. CODE ANN. § 16-3-20(C)(a)(9) (1989); TENN. CODE ANN. § 39-2-203(i)(1). Delaware treats murdering any defenseless victim as an aggravating circumstance. DEL. CODE ANN. tit. 11, § 4209(e)(1)(s) (1989). Seven states, both capital punishment and noncapital punishment states, have elevated child abuse homicide to first degree murder. See J. REPPELLA, *supra* note 200, at 3.

penalty is rarely imposed in our society. If, however, it is nonetheless symbolically important to retain the death penalty to stigmatize and occasionally execute those who prey on strangers it should be no less important to so stigmatize family murderers.

Our purpose is to integrate women's value orientation into the law of homicide. The proposal certainly does not favor women offenders. Female murderers of spouses and children would face capital trials more frequently than they do under the current capital regime. Nonetheless, it must be said that the lack of heinousness attached to family abuse murder is undoubtedly one symptom or effect of the traditional family privacy doctrine that has generally supported male domestic authority and tolerated male violence in the home. Indeed, there are indications that the efforts of men to exercise and defend the traditional male prerogative of supremacy in the home is the root cause of perhaps the majority of spousal killings regardless of the sex of the victim. In his classic study of spousal murder in Philadelphia, Marvin Wolfgang found that in the majority of cases of wives who killed their husbands, the husband-victims strongly provoked their wives to attack.²⁰⁴ Wolfgang attributes the relative leniency of sentences given to female spousal killers to the prevalence of husband provocation.²⁰⁵ A more recent study building on Wolfgang's insights suggests that the most common type of murder of wives by husbands occurs in circumstances where the husband understands himself to be retaliating for his wife's desertion or infidelity.²⁰⁶ Recent investigations

204. M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 216-17 (1958).

205. *Id.*

206. Barnard, Vera, Vera & Newman, *Till Death Do Us Part: A Study of Spouse Murder*, 10 *BULL. AM. ACAD. PSYCHIATRY & L.* 271 (1982).

Barnard did psychiatric evaluations of 34 spousal killers for the courts of north central Florida, 1970-80, 11 women and 23 men. Eight of the female killers fit Wolfgang's description of "victim-precipitated homicide." Barnard *et al.* call the most common type of male spousal killing "sex-role threat homicide." "The men who engaged in this type of uxoricide felt they were reacting to a previous offense on the part of the victim . . . a walkout, a demand, a threat of separation were taken by the men to represent intolerable desertion, rejection, and abandonment." *Id.* at 278.

have also revealed that a major risk factor for child abuse resulting in fatality is the presence of a man in the home. The beleaguered single parent mother may be the most common perpetrator of nonfatal abuse and neglect, but abusive homes become more deadly if a man is present.²⁰⁷

There are at least three possible rejoinders to this feminist proposal, each one in effect an effort to explain (away) the apparent male bias of the current law:

1) The harshness of the current statutes towards predatory murder relative to domestic murder is legitimate; it is grounded in the fact that stranger killings provoke more fear of enduring propensity to violence towards the whole community. The person who kills, e.g., his or her spouse in anger, does not thereby evince a propensity to violence which is likely to pose a threat to others in the future. The spousal killer's rage has but one potential object; unlike the person who uses violence for pecuniary gain, the killer's dangerousness probably dies with his or her victim.

The above argument has plausibility but evinces a lack of appreciation of the nature of at least the most common types of family killings, i.e., typical spousal murders and parental child abuse murders.²⁰⁸ Although typical family murders are the products of sudden and transitory anger, there are two senses in which family violence portends future dangerousness. First,

207. Alfaro, *Studying Child Maltreatment Fatalities: A Synthesis of Nine Projects*, in *PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE* 219 (D. Besharov ed. 1988).

Alfaro surveys the results of studies in disparate parts of the country in the 1980s; seven of the nine studies found that men are involved in a majority of fatality cases. He concludes in part, "The image of a beleaguered single-parent mother is a prominent feature in the child maltreatment literature, but this type of family is in the minority among the families in most of the fatality studies These studies tend to point to a greater role for men (fathers of the child or boyfriends of the mother) in fatality cases, in contrast to non-fatal cases in which the mother alone is often found responsible for the abuse and neglect." *Id.* at 231-32. See also C. JACQUOT & D. ROBERTS, *FATAL CHILD ABUSE AND NEGLECT IN OREGON 1985 AND 1986* (FEB. 1988) (report published by Child Protective Services Section, Oregon Children's Services Division).

208. According to 1988 UCR data, 15% of murder victims were killed by relatives. See UCR, *supra* note 202, at 11. But see Straus, *Domestic Violence and Homicide Antecedents*, 62 *BULL. N.Y. ACAD. MED.* 446 (1986) (arguing percentage of family murders is closer to 25%). Approximately half the family murders are spousal. *Id.* at 447. Child abuse fatalities are estimated to have exceeded one thousand per year in 1986, 1987 and

most family murders are preceded, if not prefigured, "by a long history of assaults."²⁰⁹ Second, it is inaccurate to distinguish between family and stranger murder on the basis that family murder victims are, as it were, nonfungible while stranger victims are fungible. Sometimes it is true that no one else in the world is at risk from a particular offender once her victim is dead, e.g., the defensive killing of a wife beater. But often fatal family abuse does raise the specter of further serious injury or fatality. Abusive family members can present a continuing danger to other family members, e.g., the siblings of a child fatality. Both sides in the current debate between those who would use criminal prosecution more liberally in child abuse cases and those who argue for more therapeutic approaches acknowledge that protection of a child from further abuse or the protection of siblings from a fatal child abuser must be the primary consideration in determining how to design the societal response in severe cases.²¹⁰

2) There is a more plausible theory which purports to explain why we are most frightened by and punitive towards predatory murder: If two acquaintances engage in a quarrel which turns homicidal, if two family members do the same, we are disposed to regard the victim as sharing responsibility through provocation — whether or not the provocation is legally sufficient to reduce the charge from murder to manslaughter. We also regard the victim as having assumed at least a measure of the risk of victimization, by remaining in an intimate relationship with someone who has evinced a propensity to violence. To the extent that we imagine the victim to have possessed a degree of control over the circumstances of his demise, the homicide is rendered less frightening, and, to the same extent, the appropriate degree of punitive response is curtailed.²¹¹

1988. See D. DARO & L. MITCHEL, CHILD ABUSE FATALITIES CONTINUE TO RISE: THE RESULTS OF THE 1988 ANNUAL FIFTY STATE SURVEY 13 (Mar. 1989) (report prepared by the National Center on Child Abuse Prevention Research).

209. Straus, *supra* note 208, at 454.

210. See Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315 (1987); Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1985-86).

211. This theory is in effect a generalization of Wolfgang's concept of victim-precipitated homicide. See M. WOLFGANG, *supra* note 204.

The insurmountable difficulty faced by this theory is that its plausibility requires that we imagine the victim to be the peer of the killer. The theory is utterly unable to account for the lesser heinousness that attaches to killing a young child. Nor can it account for the relative lack of heinousness ascribed to the murder of someone who is objectively or psychologically dependent upon the killer, e.g., a battered spouse.

3) It may also be said that the feminist critique fails to respect the theory of relative culpability embedded in our law of homicide. We deploy the distinction between hotblooded and coldblooded killing to determine relative culpability. The typical family murder is hotblooded. Hotblood mitigates blame; coldblood enhances culpability. However, since the introduction of degrees of murder, first degree murder has always embraced, in addition to deliberate and premeditated murder, murder perpetrated in the course of certain felonies, regardless of whether the murder was intentional. Without deviating from established legal principles, the law could offer children the same status and protection that it now offers to hapless 7-Eleven clerks. In addition to felony murder, some jurisdictions continue to treat depraved heart, or depraved mind, murder, as murder in the first degree capable of sustaining a death penalty.²¹²

I do not write to endorse the hypothetical spartan feminist proposal to elevate egregious cases of family abuse murder to the level of capital crimes. I would be more inclined to respond to the lack of parity between stranger and family murder by fashioning a less invidious regime from which the death penalty was eliminated. However, the feminist proposal does call attention to distortions in our capital punishment regime, and more generally in our law of homicide, that reveal gender bias. Although family abuse murders originate in anger rather than in a predatory motive, the conceptual and moral distinctions which inform our law of homicide pose no barriers to treating some family

212. A depraved heart murder is committed without intent to kill but with disregard of the high degree of unjustifiable risk of serious injury or death to another. W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 7.4 (2d ed. 1986).

murders as among the most heinous forms of killing. Neither deliberateness nor premeditation, nor even intent to kill, is required to convict or capitally sentence for felony murder. To resist the elevation of some family abuse murders to first degree crimes on the grounds merely that they are hotblooded, i.e., lack predatory motive, is to reveal the very bias about which the feminist complains, that of regarding predatory stranger murder as inherently more reprehensible than domestic tyranny. If society is to use the death penalty to symbolize its most profound disapprobation, a better reason is needed for attaching this symbol to the violation of the security of strangers while denying it to the violation of the security of intimates. Surely the reason our law has developed as it has in this regard is that men, whose perspective has shaped the law, have had far less reason to fear their intimates than have women and children, and, at the same time, have had an investment in supporting the privileged separateness of the domestic sphere under male authority. It may well be, then, that the egregious source of gender discrimination in the capital punishment system lies not in the privileged treatment of women murderers but in the subordination of domestic murder to stranger murder in our society's hierarchy of heinousness.