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Recommended Citation

Jenny E. Carroll, *Images of Women and Capital Sentencing among Female Offenders: Exploring the Outer Limits of the Eight Amendment and Articulated Theories of Justice Notes*, 75 *Tex. L. Rev.* 1413 (1996).
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Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice[†]

Introduction

[I]f I needed a cause, there were plenty of far more deserving people out there to feel sorry for.¹

And even within our concern for imprisoned women, why focus on capital punishment when death row is roughly as open to women as the United States Senate?²

In 1972, the United States Supreme Court declared the death penalty unconstitutional in its landmark case, *Furman v. Georgia*.³ The Court cited concern over the death penalty's disparate and unpredictable application as the grounds for its decision.⁴ Historians looking back on this period note that the Court, like the rest of the country, was affected by a sense of awareness of those who had been traditionally underrepresented

† Special thanks to Professors Lynn Blais and Raoul Schonemann for their guidance and encouragement in preparing this Note. Thanks also to Professor Jordan Steiker, Jeff Kubin, and Marc Vockell for their comments on various drafts. Finally, a very special thanks to Michael Muskat, Frederick Solt, Tamara Serwer, and Madeline Vela Dvorocik for their support and editing skills.

1. BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* 10 (1992).

2. Joan W. Howarth, *Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN'S STUD. 401, 411 (1992) (book review).

3. 408 U.S. 238, 239-40 (1972) (per curiam).

4. *Id.* at 255 (Douglas, J., concurring) (stating that the death penalty is "selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"); *id.* at 293 (Brennan, J., concurring) (concluding that the death penalty "smacks of little more than a lottery system" in which punishment is inflicted arbitrarily); *id.* at 309-10 (Stewart, J., concurring) (calling the death penalty as cruel and unusual as being "struck by lightning" and concluding that even if race is not a factor in the administration of the penalty, the death penalty is still constitutionally intolerable because it is imposed "so wantonly and so freakishly"); *id.* at 313 (White, J., concurring) (condemning the death penalty because it is imposed so infrequently and with no meaningful basis of distinguishing who gets it and who does not); *id.* at 365-66 (Marshall, J., concurring) (finding that "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society").

in the political process.⁵ As the Civil Rights movement surged around the walls of the Court, knocking down race- and sex-based barriers, how could the Court not also attempt to make the ultimate punishment equitable? In this context, *Furman* appears to be a logical extension of *Brown v. Board of Education*,⁶ *Sweatt v. Painter*,⁷ and *Frontiero v. Richardson*.⁸ Four years after *Furman*, the Court, perhaps mellowing in its judicial zeal as it watched the tides of the Civil Rights movement divide and diminish, retraced some of its *Furman* steps and upheld a series of post-*Furman* death penalty schemes.⁹ While the Court still clung to the ideals of equality espoused in *Furman*, it was more willing to trust that states could be fair in how they administered their capital sentencing schemes.

In 1984, twelve years after *Furman*, North Carolina executed Velma Barfield, the only woman to meet this fate in the post-*Furman* era.¹⁰

5. See WILLIAM H. CHAFÉ, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 150-55 (1991) (noting that Supreme Court decisions during the Civil Rights movement were not revolutions themselves, but were merely an acceptance of the changing sentiment of the society).

6. 347 U.S. 483, 495 (1954) (overturning legal segregation of public schools on the ground that the "separate but equal" doctrine violates the Equal Protection Clause).

7. 339 U.S. 629, 633-34 (1950) (finding that a legal education equivalent to that offered to white students was not available to black students required to attend a segregated law school).

8. 411 U.S. 677, 688 (1973) (holding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny," and overturning a federal law that placed procedural hurdles in the way of female uniformed armed services members who wanted to claim their spouses as dependents for purposes of receiving federal benefits).

9. See *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) (finding that a study indicating racial disparity in Georgia's imposition of the death penalty did not present a constitutionally significant risk of racial bias and thus failed to establish an Eighth Amendment claim); *Barclay v. Florida*, 463 U.S. 939, 948-49 (1983) (upholding a death penalty conviction despite the fact that the court had considered an improper aggravating circumstance); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding Georgia's first post-*Furman* death penalty statute, which provided statutorily defined aggravators). This is not to imply that the Court upheld all post-*Furman* death penalty schemes. See *Maynard v. Cartwright*, 486 U.S. 356, 359-60 (1988) (holding that having "especially heinous, atrocious, or cruel" as a statutory aggravator did not provide sufficient guidance to a jury in deciding whether to impose the death penalty); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986) (holding that the court had improperly limited the mitigating evidence the defendant was allowed to present); *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (holding that the broad and vague terms in the statute at issue failed to sufficiently narrow and channel sentencer discretion to avoid arbitrary and capricious application of the death penalty); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (concluding that the statute at issue did not provide for the individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments); *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (holding that limiting the range of offenses for which the death penalty could be imposed did not adequately respond to the harshness and inflexibility of mandatory sentences); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (striking down North Carolina's mandatory death sentence as "unduly harsh and unworkably rigid").

10. See James Reston, Jr., *Invitation to a Poisoning*, VANITY FAIR, Feb. 1985, at 82 (describing the controversy in North Carolina created by the Barfield execution); Kathy Sawyer, *Woman Executed for Murder; "Death Row Granny" Dies in North Carolina*, WASH. POST, Nov. 2, 1984, at A1, available in LEXIS, News Library, Wpost File (reporting the execution by lethal injection of Barfield, the first woman since the 1962 execution of Elizabeth Duncan in California to be put to death in a U.S. correctional institution); see also Sam Howe Verhovek, *Dallas Woman Is Sentenced to Death in Murder*

Barfield's execution brought the death penalty for women into the headlines, but only briefly. Recently, this topic has re-emerged. Women such as Susan Smith,¹¹ Darlie Routier,¹² and Guinevere Garcia¹³ have thrust the question of women and the death penalty back into the spotlight of the collective conscience, and yet a relatively small body of literature exists discussing this intersection of women and the ultimate sentence. Feminist scholars rarely write about women and the death penalty. They do write about issues and phenomena that might affect or even explain women on death row,¹⁴ but these scholars generally do not choose women on death row as their "cause." While the most superficial of Westlaw searches produces a steady stream of literature on the death penalty,¹⁵ limiting this search to female offenders produces only four articles.¹⁶ It seems that the emerging bodies of literature on women and on the death penalty do not often converge. This is unfortunate because the union of women and the capital system provides a unique laboratory in which to examine feminist theories of power and justice.

If capital punishment represents the extreme of the criminal justice system, where society collectively defines the outer limits of unacceptable

of Son, N.Y. TIMES, Feb. 5, 1997, at A7, available in LEXIS, News Library, Nyt File (noting that although there were 49 women on death row in the U.S., only Barfield had been executed since 1976).

11. See Rick Bragg, *Susan Smith Verdict Brings Relief to Town*, N.Y. TIMES, July 30, 1995, § 1, at 16, available in LEXIS, News Library, Nyt File (chronicling the conversion of a single juror supporting the death penalty by the other 11 jurors, who favored a life sentence for Susan Smith, convicted of the drowning deaths of her two young sons).

12. See Verhovek, *supra* note 10, at A7 (detailing the death sentence received by Darlie Routier, who prosecutors alleged slashed to death two of her three sons and then injured herself in an attempt to disguise the incident as the work of outside intruders).

13. See Don Terry, *Hours Before Execution She Sought, Illinois Woman Is Given Clemency*, N.Y. TIMES, Jan. 17, 1996, at A10, available in LEXIS, News Library, Nyt File (reporting Governor Jim Edgar's grant of clemency to Guinevere Garcia only hours before her scheduled execution for the 1991 shooting of her estranged husband).

14. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTY CENTURY TRAGEDIES* (1995); RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992); CAROL SMART, *LAW, CRIME, AND SEXUALITY: ESSAYS IN FEMINISM* (1995).

15. For example, 411 articles mention "death penalty" or "capital punishment" in their titles alone. Search of WESTLAW, JLR database (Apr. 1, 1997) (search for records containing "death penalty" or "capital punishment" in Title (TI) field).

16. Search of WESTLAW, JLR database (Apr. 1, 1997) (search for records containing the terms "female" or "woman" in addition to either the term "death penalty" or "capital" in the Title (TI) field). See Thad Rueter, *Why Women Aren't Executed: Gender Bias and the Death Penalty*, 23 HUM. RTS., Fall 1996, at 10; Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN'S L.J. 283 (1996); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845 (1990); Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. 3 (1989); see also Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345; Howarth, *supra* note 2; Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990).

behavior, then trends among female capital offenders should be expected to point to the outer limits of socially unacceptable female behavior. This Note explores the effect on women of this process of demarcating boundaries of unacceptable behavior within the context of a capital punishment system. Additionally, this Note explores the Eighth Amendment implications of these boundaries within capital jurisprudence. Part I examines the two most prominent theories put forth by feminist scholars to explain sentencing patterns among female capital offenders—the “chivalry theory” and the “evil woman” theory. These theories attempt to account for both the limited use of the death penalty for women and the presence of certain women on death row. In Part II, this Note considers the limited empirical data available from women’s capital punishment trials and attempts to ground the theories discussed in Part I in the practical realities of these cases. This Part considers the characteristics of death-sentenced offenders with an eye towards the constitutional restrictions on the imposition of the death penalty. It considers traits used in sentencing women and examines the extent to which they are “gendered” in women’s trials.

In Part III, the Note considers current death penalty jurisprudence, focusing on the theory of justice articulated in Eighth Amendment jurisprudence and the constitutional restrictions on mitigating and aggravating circumstances this jurisprudence utilizes in reaching its goal of a nonarbitrarily applied capital system. It then applies those theories of justice to women’s cases and draws three conclusions. First, many of the characteristics that are recurrent in “death eligible” women, such as a lack of femininity, aggression, poor mothering skills, or sexual promiscuity, are, under current Eighth Amendment doctrine, at best questionable and at worst inappropriate considerations that contribute to the death penalty’s arbitrary application towards women. Second, women may have trouble finding relief for this arbitrary application of the death penalty under the current burdens of proof. Third, while relatively few women are sentenced to death, the effect of such sentences are far-reaching, serving to set outer limits for all women’s behavior.

The Note concludes by questioning whether the death penalty can be constitutionally applied to women in light of constitutional and larger sociological questions surrounding the application of the death penalty to women. The Note’s focus on the sentencing patterns apparent in women’s capital trials is not intended to imply that only women suffer under the capital system, or even that women suffer under this system to a greater extent than men. Rather, it highlights the differences between women’s and men’s experiences in the capital punishment system and the constitutional implications of these differences.

I. Feminist Explanations of Women's Capital Sentencing Patterns

Literature examining capital punishment sentencing among female offenders has produced two interrelated theories to explain sentencing trends. Dubbed the "chivalry" and the "evil woman" theories,¹⁷ these explanations focus on how prosecutorial discretion in capital trials and jury reluctance (or willingness) to sentence women to death are affected by society's perceptions of women.¹⁸ While these theories cannot boast the extensive statistical and historical support that theories explaining race- and class-based sentencing enjoy, they do raise critical and interesting questions about the capital sentencing of women.

Subpart A of this Part explores the chivalry theory as a possible explanation for the relatively small number of women on death row. Subpart B examines the evil woman theory as a possible explanation for the women who do receive death sentences. Subpart C critically examines both theories in an effort to test their usefulness in accounting for women's experiences in the capital punishment system. Finally, subpart D considers the ramifications of these theories in the context of post-*Furman* constitutional reform of the capital punishment system.

A. *The Chivalry Theory*

The following excerpt from a petition delivered to the warden of the San Quentin penitentiary provides an excellent example of the chivalry theory. The petition was signed by thirty male inmates, who offered to draw straws to go to the gas chamber in Eithel Spinelli's place if the Governor of California refused to commute her sentence.¹⁹

[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

17. Rapaport, *supra* note 16, at 508, 513 (discussing both the chivalry and evil woman theories); see also ANN JONES, *WOMEN WHO KILL* 63-128 (1996) (discussing the general historical emergence of the chivalry theory); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 189 (discussing the chivalry theory); Irene H. Nagel & John Hagen, *Gender & Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91, 112-15 (Michael Tonry & Norval Morris eds., 1983) (discussing the chivalry theory as a possible explanation for the female sentencing trends). The chivalry theory is sometimes also referred to as the "paternalism" theory, and both terms are used interchangeably throughout the literature. See, e.g., Elizabeth F. Moulds, *Chivalry & Paternalism: Disparities of Treatment in the Criminal Justice System*, in *WOMEN, CRIME, AND JUSTICE* 277, 283 (Susan Datesman & Frank R. Scarpitti eds., 1980); Rapaport, *supra* note 16, at 512.

18. Rapaport, *supra* note 16, at 506 (noting that although capital punishment statutes do not classify by gender, the chivalry and evil woman theories contend that "gender bias infects the administration of capital punishment" including the "discretion of prosecutors, juries and judges").

19. See *id.* at 501.

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.²⁰

The chivalry theory seeks to explain the most striking characteristic of women in the capital punishment system: their relative scarcity.²¹ It identifies as one explanation the gender stereotype of women as the weaker, more passive sex, both submissive to and dependent on men.²² This stereotype has multiple effects. Generally, it creates a more protective attitude toward women.²³ In the context of the criminal justice system, women's weak and passive nature makes them less attractive, if not less eligible, candidates for imprisonment.²⁴ The relative dependence of women on men translates into a diminished culpability and an increased possibility of rehabilitation.²⁵ Placed in the context of capital sentencing, this chivalrous attitude towards women manifests itself in a cultural reluctance to sentence women to death.²⁶ Viewed in its theoretical context, if

20. *See id.* (quoting CLINTON T. DUFFY, 88 MEN AND 2 WOMEN 135-36 (1962)).

21. *See id.* at 504 (noting that the chivalry theory explains the relatively scarce number of women on death row as a by-product of the American society's "chivalrous disinclination to sentence women to die").

22. *See id.* at 516 (explaining that women are seen as "less responsible" for their actions than men, and therefore less culpable for their crimes).

23. One need not look far for examples of this protectiveness. It is readily apparent in everything from social attitudes that do not allow women to fight on the front line during wars to penal statutes that codify male protection of female "virtue" in the form of statutory rape laws. *See, e.g.*, CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161-62 (1989).

24. These effects of protective stereotypes on female sentencing trends, both inside and outside the context of capital punishment cases, were examined by Angela Musolino. *See* RITA J. SIMON & JEAN LANDIS, THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE 62 (1991); Nagel & Johnson, *supra* note 17, at 187-88 (both citing Angela Musolino, Judges' Attitudes Toward Female Offenders 16 (1988) (unpublished manuscript)).

In her interviews with judges, Musolino noted an underlying chivalrous attitude toward women voiced by many judges. *See* SIMON & LANDIS, *supra*, at 62; Nagel & Johnson, *supra* note 17, at 187 (both citing Musolino, *supra*, at 15). One of the manifestations of this chivalry was that the judges expressed a reluctance to incarcerate women. *See id.* at 188 (citing Musolino, *supra*, at 16). An observation from one judge epitomizes this reluctance: "I don't think there's any rational or objective thought about it, but there's a feeling that incarceration for a woman is far more degrading than for a man, and you'll never see them (women) back because they'll do everything they can to keep from going back." *Id.* (citing Musolino, *supra*, at 16).

25. *See* Nagel & Johnson, *supra* note 17, at 188 (suggesting that judges view women as being less responsible for their crimes, as better subjects for rehabilitation, and as less acceptable subjects for incarceration).

26. *See* Streib, *supra* note 16, at 877-78. Streib wrote:

Even when all of the specific aggravating and mitigating factors are the same for male and female defendants, females still tend to receive significantly lighter sentences in criminal cases generally. Judges admit that they tend to be more lenient toward female offenders in general. Also, juries generally tend to be more lenient toward female offenders, particularly in serious crimes, for a variety of ingrained, cultural reasons . . . This tendency

the death penalty serves as the ultimate sanction to vindicate violations of the values and rights society chooses to protect, a scarcity of women on death row would seem to indicate the tradeoff women make between full moral, social, and legal stature and certain social protections.²⁷ Elizabeth Rapaport defines the end result of this tradeoff as "deep cultural inhibitions against the deliberate killing of women, even women who have been convicted of heinous murders."²⁸

A statistical examination of individuals on death row would seem to substantiate a reluctance to execute women, as the chivalry theory predicts.²⁹ Of the approximately 19,000 documented executions in the United States since 1608, only about 520 have been of women.³⁰ While executions of men continue at a steady pace,³¹ trends in women's executions indicate a decline both in sentencing and execution, with only one woman executed since 1973.³² One commentator estimates that one in eight persons arrested for murder is a woman, but only one death row inmate in eighty is a woman.³³ Accordingly, male murderers are over twenty times more likely to receive a death sentence than female murderers.³⁴ Considering similar evidence in *Furman v. Georgia*, Justice

is consistent with the extraordinarily low number of death sentences and executions of adult female offenders in our history.

Id.

27. See Rapaport, *supra* note 16, at 508 (noting that "[t]he 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. *Id.* at 503.

29. See Victor L. Streib, *American Executions of Female Offenders: A Preliminary Inventory of Names, Dates and Other Information* (3d ed. Apr. 6, 1988) (unpublished manuscript, on file with the *Texas Law Review*) (providing statistical information and analysis about individuals on death row and noting the relative scarcity of women in comparison to men); see also Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders, January 1, 1973, to June 30, 1995* (July 17, 1995) (unpublished manuscript, on file with the *Texas Law Review*) [hereinafter Streib, *Inmates and Executions*] (providing demographics about females on death row and stating that the number of death-sentenced females and their execution rate is small in comparison to men).

30. See Streib, *Inmates and Executions, supra* note 29, at 2.

31. NAACP LEGAL DEFENSE AND EDUC. FUND, INC., *DEATH ROW U.S.A. 2* (Summer 1996) [hereinafter *DEATH ROW U.S.A.*] (stating that since 1976, 334 men have been executed with that rate steadily climbing).

32. See Streib, *Inmates and Executions, supra* note 29, at 2 (noting that while the post-*Furman* annual rate for death sentences among female offenders has remained constant at around five per year, of the nearly 300 post-*Furman* executions, only Velma Barfield, a serial arsenic poisoner executed in 1984, has been female). Currently, 49 women are awaiting execution in the United States. See *DEATH ROW U.S.A., supra* note 31, at 1.

33. See Rapaport, *supra* note 16, at 503 (noting that of 2,347 death row inmates in the U.S., only 30 are women).

34. See *id.* at 505; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *REPORT TO THE NATION ON CRIME & JUSTICE 46* (2d ed. 1988) (providing reports from the FBI Uniform Crime

Marshall acknowledged the gendered disparity in the risks of the death sentence.³⁵ He went so far as to rank gender discrimination with race and class discrimination as reasons that the death penalty is offensive to the American society.³⁶ Marshall wrote:

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 favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.³⁷

In short, the chivalry theory accounts for the scarcity of women on death row in terms of traditional, protective notions of femininity, which make it difficult for juries to view most female offenders as "death eligible" despite the fact that these women may be committing admittedly heinous crimes.

B. *The Evil Woman Theory*

Despite a general reluctance to sentence women to death, forty-nine women are currently on death row in the United States.³⁸ The mere presence of these women on death row indicates that under certain circumstances—or with certain individuals—prosecutors, juries, and judges will sentence women to death. While it is difficult to draw meaningful conclusions from the limited statistical pool of executed and sentenced women, it is possible to engage in informed speculation based on the evidence that is available. The evil woman theory draws on this evidence to suggest what combinations of facts will subject women to capital punishment.

Examining the histories of women executed since colonial times, Victor Streib concluded that executed women, not unlike other candidates for execution

tended to be very poor, uneducated, and of the lowest social class in the community. Their victims tended to be white and of particularly protected classes, either children or socially prominent adults. . . . Most of the executed females manifested an attitude of violence, either from past behavior or present acts, that countered any presumption of nonviolence.³⁹

Reports which show that 12% of persons arrested for murder or nonnegligent manslaughter in 1988 were female, and that men were suspected of felony murder 16 times as often as women).

35. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

36. *Id.* at 364-66 (Marshall, J., concurring).

37. *Id.* at 365 (Marshall, J., concurring) (citations omitted).

38. See DEATH ROW U.S.A., *supra* note 31, at 1.

39. Streib, *supra* note 16, at 878.

In this description, Streib could have been describing nearly any population on death row. The question for feminist scholars is whether these traits assume any gender connotations outside of their applicability to women. Streib himself concluded that these traits do appear different when displayed by female defendants: "[P]erhaps most fatally for [female defendants], they committed shockingly 'unladylike' behavior, allowing the sentencing judges and juries to put aside any image of them as 'the gentler sex' and to treat them as 'crazed monsters' deserving nothing more than extermination."⁴⁰ Arguably, this process of dehumanization must occur for any defendant to receive the death penalty. But by his comments, Streib raised larger questions of the process through which women are dehumanized. He suggested that political and social forces require women to be set outside of their protected status, or defeminized, before they can be executed.⁴¹

The evil woman theory seeks to explain the execution of women in the context of this larger sociopolitical grounding. The theory is premised on the recognition that the death penalty serves as a tool of social cleansing, allowing citizens to collectively punish and vindicate violations of the rights and values society protects.⁴² Women who commit crimes heinous enough to become eligible for the death penalty violate two socially protected value systems. First, like their male counterparts, they offend the collective sense of humanity with their crimes. Second, they offend the collective sense of femininity with their "unladylike" behavior.⁴³ Having committed these social taboos, they relinquish the benefits and protections afforded their sex and become "evil incarnate."⁴⁴ In this new role such

40. *Id.* (footnote omitted). Streib went on to state, "Indeed, their crimes and behavior could be characterized as more like those of male killers than female killers, perhaps removing them from the normally protective constructs for female offenders." *Id.* at 879.

41. *See id.* at 879-80. Joan Howarth also suggested that this process of dehumanization is necessary in order to justify execution. *See* Howarth, *supra* note 2, at 416. She stated that because women are traditionally characterized as "care givers," it is more difficult to separate women from their humanity than it is to separate men from their humanity. *See id.* at 414-15. As a result, Howarth predicts that fewer women will be executed, with only those women who completely defy traditional images meeting a capital fate. *See id.*

42. *See* Howarth, *supra* note 2, at 412, 414 (referring to execution as a "powerful symbolic act" in which the society reclaims power from those who violate the social order).

43. *See* Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 86 (1994) (stating that violent female offenders are considered "doubly deviant" by society—"defying both the law and their gender role").

44. *See* Rapaport, *supra* note 16, at 512-13 (stating that, under the evil woman theory, when a woman is perceived as guilty of a severe or "male" offense, she loses the advantages of her gender and is more harshly punished because of her violation of gender stereotypical expectations); *see also* Denno, *supra* note 43, at 157 (stating that women may be more severely punished for unstereotypical behavior); Schmall, *supra* note 16, at 287 (concluding that Guinevere Garcia was more harshly punished for killing her child than a man would have been because Garcia violated the gender expectations of motherhood).

women are not only eligible for the death sentence, but there is social pressure to execute them.⁴⁵

Fundamentally, the evil woman theory claims that women who act so violently or in such gender-defying or forbidden ways are denied the sanctuary of their sex and are eligible for execution.⁴⁶ In this sense, women must transcend notions of femininity, either through their actions or reactions to their crime, in order to become death eligible.⁴⁷ Joan Howarth explains the existence of an inherent conflict between social images of womanhood and images of the "death eligible" defendant: "[There] is [a] bad fit between commonly understood images of what it means to be a woman and the symbolic role of the person being put to death. . . . [W]hat it means to be a woman does not match what it means to be a person deserving of execution."⁴⁸

Further, the evil woman theory suggests that when women cease to behave in a manner warranting protection, their execution serves multiple social goals.⁴⁹ First, it provides a mechanism for keeping not only society members in check generally, but also for keeping women who stray from gender expectations in check. In explaining this principle, Howarth defines capital punishment as a control of social power:

The execution is a ritual by which law-abiding people reclaim power from criminals. . . . Capital punishment converts persons who have (usually) committed terrible crimes into symbolic, ritualized objects of sacrifice. This symbol of evil is eradicated to make us feel as though we are doing something powerful in the face of overwhelming, frightening acts of violence. The victimizer becomes the victim.⁵⁰

45. See Denno, *supra* note 43, at 157 (concluding that female offenders in general may be more harshly punished than their male peers because judges and juries see them as "defying" their traditional gender roles); *id.* at 92 (stating that "because society places stricter cultural constraints on female behavior, females who become delinquent or violent appear to deviate more significantly from the norm," thereby "travers[ing] a greater moral and psychological distance than males" (citations omitted)); Rapaport, *supra* note 16, at 512-13 (stating that adherents to the evil woman theory contend that women who violate gender norms by committing highly severe offenses are treated more harshly than men). In this sense, women may be more harshly punished for less severe crimes if those crimes appear especially contrary to traditional gender expectations.

46. See Howarth, *supra* note 2, at 415 (noting that women who are executed must first be stripped of their gender identities because of their violence); see also Rapaport, *supra* note 16, at 503 (stating that the execution of women is not only rare, but that it also challenges traditional notions of female sanctity).

47. See Sheila M. Brennan, *Popular Images of American Women in the 1950's and Their Impact on Ethel Rosenberg's Trial and Conviction*, 14 WOMEN'S RTS. L. REP. 43, 43-44 (1992) (claiming that Ethel Rosenberg was easy to execute not only because of the nature of the crime she committed, but also because she failed to react to the charges against her in the expected manner).

48. Howarth, *supra* note 2, at 414.

49. See *id.* The concept that the death sentence carries sociological as well as constitutional implications for women will be discussed at greater length in subpart III(D).

50. *Id.* at 414 (citations omitted).

In this context, the execution becomes a means to ensure that citizens of society, both men and women, adhere to certain expectations. Howarth argues that, in the context of female offenders, these expectations take on gender connotations so that even seemingly nongendered traits become redefined in terms of womanhood.⁵¹ The presence of a capital system that punishes "evil women" forces all women to adhere to traditional gender expectations because the system appears to have a vested interest in harshly punishing deviant women in an effort to "cure them of their deviance."⁵² Furthermore, the execution of socially deviant women provides a means for society to further define gender roles by setting an outer limits of its expectations in the rubric of the criminal justice system.⁵³

The use of the death penalty to eradicate deviant women carries with it race and class implications. In United States history, two thirds of executed female offenders have been African American.⁵⁴ Executed females also "tend to be poor, undereducated, and of the lowest social class in the community."⁵⁵ Under the evil woman theory, if part of what it means to be a woman is to be protected from the death penalty, the womanhood of those executed must be "invisible before the law."⁵⁶ Considering the disproportionate number of executed women over history who have been women of color⁵⁷ and underclass women,⁵⁸ it seems that images of "appropriate women," or at least those deserving the protection of their gender, are actually images of white, privileged womanhood.⁵⁹

51. See *id.* at 414, 413-14 (arguing that the relative lack of women on death row is partly because of the "bad fit between commonly understood images of what it means to be a woman and the symbolic role of the person being put to death").

52. See Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 561 (1988) (concluding that women who commit crimes are viewed as maladjusted, and therefore there is a general social benefit to harsh punishments as a means to correct not only individual deviance, but to prevent the risk of widespread social deviance).

53. In criminal law theory, "[t]he concept of general prevention . . . includes the moral or socio-pedagogical influence of punishment." Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 950, 949-51 (1966) (emphasis omitted). Andenaes suggests that the power of a punishment system is its ability to define acceptable social behavior and then to force citizens to adhere to that standard of behavior regardless of whether they agree with the moral message suggested by the sanction. See *id.* at 967, 982-83.

54. See Streib, *supra* note 16, at 866 (noting that, in the past 350 years, two-thirds of executed females were black). But see *id.* (noting that the percentage of black women executed in the twentieth century is lower than it was in the past).

55. *Id.* at 878.

56. Howarth, *supra* note 2, at 417.

57. See Streib, *supra* note 16, at 857 (finding that 230 black women have been executed out of 398 confirmed female executions in American history).

58. See Howarth, *supra* note 2, at 417.

59. See *id.* It is possible that the phenomenon of race and class bias against female offenders in capital punishment cases carries with it a secondary issue of whether the very term "woman" implies someone who is white and a part of the middle or upper class. Is it easier for our society to execute

In this sense, women of color suffer an additional bias because they are viewed first through the lens of their racial or ethnic identity and then through the lens of "perfect womanhood" they can never achieve.

Trends in sentence commutation also suggest that the death penalty is used to define the outer limits of womanhood. Women are more likely than men to have their death sentences commuted or reversed.⁶⁰ It can be argued that these trends in commutation both reflect gender stereotypes surrounding the potential for rehabilitation and influence the goals of rehabilitation to be more consistent with these stereotypes. Women are viewed as more susceptible to rehabilitation than men.⁶¹ Informed by this perspective, prison rehabilitation programs seek to remold the female offender toward traditional womanhood.⁶² Looking at prison rehabilitation programs in one state, Joan Howarth commented that "[m]uch of the life [of a woman on death row] is an almost infantilized parody of compelled feminine culture: cooking, sewing and service to others."⁶³

women of color or poor women because they are considered somehow from the outset to be individuals less deserving of the protection traditionally afforded to their sex because they do not fall within the neat stereotypes of their gender? This argument seems especially compelling in the case of African-American women executed as slaves, and later African-American women sentenced to die in Southern states. *See id.* at 414-17.

Death penalty sentencing may also carry with it significant sexual orientation implications. Victoria Brownworth points out that 17 of the 41 female death row inmates are lesbians, and three were sentenced in 1992 alone. *See* Victoria A. Brownworth, *Dykes on Death Row*, *ADVOCATE* (Los Angeles, Cal.), June 16, 1992, at 62. Victor Streib also suggests that sexual orientation may serve as a factor to encourage execution. He states that prosecutors try to "defeminize" defendants by portraying them as lesbians—even when they are not. *See* Rueter, *supra* note 16, at 11.

It is unclear that a willingness to dehumanize based on sexual orientation is limited to women. Arguably homosexual men run the same risk of execution as women for their violation of sexual orientation expectations. For a discussion of this possibility, see David R. Dow, Teague and Death: *The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 *HASTINGS CONST. L.Q.* 23, 60 (1991) (citing *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987)). Dow tells of a Texas prosecutor who used the defendant's homosexuality as the reason to sentence him to death. The prosecutor told the jury that they should give the defendant the death penalty because the defendant was gay. He stated: "Don't just send him to prison for life. The defendant is homosexual, and we all know what goes on inside of prisons, so sending him there would be like sending him to a party." *Id.*

60. *See* Rapaport, *supra* note 16, at 515-16 (noting the trend in sentence reduction among female capital offenders due to commutation or reversal); Streib, *Inmates and Executions*, *supra* note 29, at 4 (stating that of the 107 death sentences for female offenders since 1973, 64 of these sentences have been reversed or commuted to life imprisonment, one has ended in execution, and the remaining 42 sentences are still pending appeal).

61. *See* Streib, *supra* note 16, at 875 (commenting that there is a "perception among sentencing judges that women are better candidates for rehabilitation than are men").

62. *See* Denno, *supra* note 43, at 158 (noting that many prison rehabilitation programs are designed to re-teach femininity to women who have failed to fulfill their feminine role); Howarth, *supra* note 2, at 410.

63. Howarth, *supra* note 2, at 410 (citations omitted) (examining Texas's rehabilitation programs, which are relatively typical of other states' programs, in which women on death row are encouraged to write to their families, plant flower gardens, arrange the flowers grown, sew various items of clothing and "parole pal" dolls, and attend regular religious meetings).

These rehabilitation programs reward female offenders with sentence commutations when they cease to appear as deviants deserving of social condemnation in the form of execution and re-emerge as weaker, less culpable, and more traditional women who are deserving of social protection and sympathy.⁶⁴

C. *Turning a Critical Eye to Feminist Theories*

Taken together, the evil woman and chivalry theories seem to neatly explain women's experiences in the capital punishment system. These gender-based explanations, however, are not flawless. Arguably, the chivalry and evil woman theories "gender" too much. "Gender-neutral" factors can account for women's experiences as readily as gender-based factors. First, consider that the very nature of women's crimes tends to make them less likely to receive the death penalty.⁶⁵ While one in eight alleged murderers may be female, only six percent of suspected perpetrators of felony or capital murders are female.⁶⁶ In light of the fact that eighty percent of offenders on death row have been convicted of felony murder,⁶⁷ the fact that so few women commit felony murders becomes significant in assessing any trend among female capital offenders.

Second, the nature of the felony murders that women do commit also appears to preclude them from death eligibility. While women were suspected of killing nearly the same number of their spouses and children as men,⁶⁸ regardless of the sex of the defendant, intrafamilial homicides usually do not give rise to capital sentences unless the killing was for monetary gain or involved additional aggravating circumstances.⁶⁹ Intrafamilial homicides can be viewed as less "death eligible" under two dis-

64. *See id.*

65. *See* Rapaport, *supra* note 16, at 509 (stating that "[t]he 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"); *cf.* Darrel J. Steffensmeir, *Assessing the Impact of the Women's Movement on Sex-Based Differences in the Handling of Adult Criminal Defendants*, 26 *CRIME & DELINQ.* 344, 346 (1980) (noting that "most female arrests for serious crimes are for petty larceny, usually shoplifting, for which offense neither male nor female defendants are apt to be sent to prison").

66. *See* Rapaport, *supra* note 16, at 509 (citing FBI SUPPLEMENTARY HOMICIDE REPORTS).

67. *See id.*

68. *See id.* (noting that, from 1976 to 1987, 11,690 women and 16,793 men were suspected of killing spouses, lovers, and ex-spouses while 2,524 mothers and 3,265 fathers were suspected of killing their children). It should be noted, however, that although nearly the same number of women kill spouses and children, nearly half of the women sent to death row were placed there for killing intimates, and this percentage is much higher than the percentage of men placed on death row for killing their intimates. *See* Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 *SMU L. REV.* 1507, 1516-17 (1996).

69. *See* Rapaport, *supra* note 68, at 1514 (noting that there must be additional aggravating circumstances in order to place domestic killers at risk of a capital sentence); *see also id.* at 1518 (theorizing that women on death row for murdering intimates are not really convicted for domestic murders, but for economic murders with intimate victims).

tinct, gender-neutral theories of the death penalty. Under a model of the death penalty as a means to punish the most egregious of murderers, while some intrafamilial murders cross the line of atrocity because of their violation of familial trust, most intrafamilial murders are viewed as less blameworthy because they often lack the qualities of cold-bloodedness or predatoriness.⁷⁰ Alternatively, under a view of the death penalty as a means to remove the most dangerous members of society, because most intrafamilial murders occur as a result of passion and in response to some specific provocation, the threat posed by those who commit these murders is limited.⁷¹

Third, in addition to the less death-eligible nature of their crimes, women also tend to have less extensive criminal records than their male counterparts, again diminishing their eligibility for the death penalty on nongender grounds.⁷² These factors—the nature of women’s crimes coupled with women’s relatively sparse criminal history—certainly suggest that traits beyond gender play into the probability that women will receive the death sentence.⁷³ In fact, they suggest that society’s need or will to control and punish deviants does not stem from gender notions of justice or vindication, but from the general premises of humanity and the value of sanctions, including the death penalty, to serve as a deterrent. The implications of this evidence have led some feminist scholars to suggest that an “equality” theory is perhaps a more accurate model than the chivalry and evil woman theories.⁷⁴

The equality theory argues that women are not “spared” death because of chivalrous attitudes in society, but rather are only sentenced to death

70. See *id.* at 1518-19 (arguing that all domestic murders are crimes of passion, a traditional mitigator in death cases); Schmall, *supra* note 16, at 287 (noting that intrafamilial homicides are considered less heinous than murders of strangers).

71. See Rapaport, *supra* note 68, at 1518-19.

72. See Denno, *supra* note 43, at 83 (stating that men are more likely than women to engage in violent crime and to have more extensive criminal records in general); Rapaport, *supra* note 16, at 506, 510 (noting that a woman’s lack of a criminal record would serve as a mitigator, possibly allowing her to escape a death sentence); Streib, *supra* note 16, at 874-75 (noting that a previous criminal record can be used as an aggravator or a mitigator during the sentencing phase of a trial).

73. It should be noted in this discussion of gender-neutral traits that many feminist theorists would argue that such factors are not gender-neutral at all, but are direct manifestations of differences in the ways men and women are socialized and stereotyped. See, e.g., Rapaport, *supra* note 68, at 1518-19 (arguing that women’s crimes are “‘common’ crimes made spectacular by the sex of their perpetrators” who violate their traditional role of nurturer and supporter). The fact that women are taught to be less violent and less confrontational in their everyday lives in turn leads them to commit less violent crimes. In this sense, these factors are simply manifestations of the protection and encouragement of women’s traditional roles and social demeanor. For a more complete discussion of behavioral effects of different socialization models, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

74. See Rapaport, *supra* note 16, at 512-13 (“[T]he ‘gender equality’ theory . . . is that women who, perhaps contrary to gender norm expectations, commit high severity offenses, are treated no differently than men.”).

when they commit especially heinous or atrocious crimes.⁷⁵ This theory accounts for the scarcity of women on death row by pointing to the fact that women are less likely to commit such egregious offenses.⁷⁶ It concludes that those women who pose, or are perceived as posing, a threat tantamount to other death row inmates are sentenced to death. This parity in sentencing demonstrates an absence of gender bias in the sentencing system.⁷⁷ At least one researcher, Elizabeth Rapaport, suggests that the equality theory is the most accurate given the limited trend information available. She notes that the stories of the women currently on death row actually mirror those stories of men in similar positions, suggesting that women are equally, not more harshly, punished for violent transgressions.⁷⁸ In addition, the theory points to the fact that gender-neutral traits serve as aggravators in capital statutes, further suggesting a lack of gender bias in the construction and application of the death penalty.⁷⁹

Although the equality theory may appear gender neutral, it is not immune from bias, either. Rapaport suggests that "when a woman is perceived as guilty of a severe or 'male' offense she loses the advantage of her gender and is more harshly punished because of her violation of stereotypical gender expectations."⁸⁰ Thus, the equality theory may represent the worst of both worlds for women, subjecting them to both the "rigors of equality and the detriments of the widespread suspicion of privilege."⁸¹ In this sense, the equality theory appears less as a gender-neutral counter to the chivalry and evil woman theories and more as a potential middle ground.

Finally, critics of the chivalry and evil woman theories' underlying premise that the death penalty is a means of behavioral control argue that any larger social implication of tendencies to execute "evil women" is limited as a means to control women's behavior because so few women are executed, and those that are do not possess significantly more heinous character traits than their male peers.⁸² In this sense, the execution of

75. See *id.* at 502, 510-11.

76. See *id.* at 509-10.

77. See *id.*

78. See *id.* at 510-11 (noting that women appeared to receive equal treatment in sentencing, but cautioning that only tenuous conclusions should be drawn from such a limited pool of cases).

79. For an analysis of the nongendered language of statutory aggravators, see Marianne Popiel, Note, *Sentencing Women: Equal Protection in the Context of Discretionary Decisionmaking*, 6 WOMEN'S RTS. L. REP. 85, 103 (1979-1980). Popiel suggests that despite the apparent gender neutrality of sentencing schemes, factors used in such schemes may affect men and women differently in their application. *Id.*

80. Rapaport, *supra* note 16, at 512-13.

81. *Id.* at 509.

82. See, e.g., *id.* at 510-11; Streib, *supra* note 16, at 878 (both noting that conclusions about the reasons women are sentenced to death are beyond the capabilities of current research, in part, because of the small statistical pool).

women serves no more a social role as the foil for women's behavior than the execution of any citizen, male or female. Indeed, the rarity of women's executions would tend to indicate that they are not useful, or used, as a means to control female behavior or to enforce gender expectations.

This critique, however, ignores the basic phenomenon that the chivalry and evil woman theories seek to address: although both men and women are sentenced to death for heinous and atrocious crimes, it is impossible to separate the gender implications from the women's sentencing.⁸³ Even considerations that seem gender neutral on their face take on gender significance in their application to female offenders. Although statutorily defined aggravating factors may not expressly mention gender as an appropriate consideration, they do include considerations that may carry different weight in the trials of men and women.⁸⁴ The weight of such factors as the future dangerousness, the impossibility of future rehabilitation, or the cold-bloodedness of the act may hinge on the prosecutor's and sentencer's preconceived social perceptions of the individual they are to sentence.⁸⁵

In addition, the relatively small number of women executed does not diminish the force of capital punishment as a social enforcer of values. An execution represents more than a single act or criminal sanction. It is a social process whereby limits on unacceptable behavior are demarcated.⁸⁶ Its power is drawn from its symbolism.⁸⁷ This process of designating certain behavior acceptable and other behavior as punishable by death may well punish men and women for the same violation, but the very nature of

83. See Schmall, *supra* note 16, at 286-87 (concluding that a capital defendant's fate is shaped by gender expectations that are so intrinsically linked to the defendant that it is impossible for him or her to avoid them).

84. See Streib, *supra* note 16, at 874 (noting that although none of the death penalty statutes expressly lists the gender of the defendant as a factor to be considered in sentencing, they include considerations "which may tend to apply with different weight to male and female offenders").

85. See *id.* at 874-78. It should be noted that much the same argument could be made of race or class bias. The probability that a jury will consider a defendant dangerous in the future, capable of rehabilitation, or otherwise deserving of death may well hinge on each juror's perception of that defendant in the context of any or all of the juror's social biases and prejudices. See *id.*

86. The criminal justice system defines behavior that is unacceptable to society on a continuum. At one extreme is the boundary between acceptable and unacceptable behavior, where minimal punishments, fines, or even warnings are administered. This Note focuses on the other end of the spectrum, which involves the outer limits of unacceptable behavior—behavior that is so unacceptable that the individual will not even be permitted to continue to exist.

87. See Howarth, *supra* note 2, at 412-14 (stating that execution is powerful for its symbolism as a reclamation of power from criminals); Rapaport, *supra* note 16, at 517-18 (suggesting that the fact that we continue to cling to the death penalty, realizing its flaws, suggests that its power rests in its symbolism as a final means to silence offenders); Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 760, 760-61 (1996) (concluding that support of the death penalty can be explained, in part, because of the symbolic role it plays "to create order in a world filled with chaos").

women's execution is to set the outer limits for acceptable behavior of those like the executed women.⁸⁸ The infrequency of execution may well limit its usefulness as an active means to control behavior, but it does not limit the social perceptions that it feeds on and perpetuates.⁸⁹

D. *Ramifications of the Theories*

Acceptance of the evil woman and chivalry theories carries with it implications for every woman's life. The death penalty, under the chivalry and evil woman theories, becomes more than a means of punishment; it becomes a means to enforce and dictate women's roles and images within society. In this sense, the punishment carries with it serious power implications. Although women may enjoy a type of sanctuary from the death sentence, these theories raise the question: at what price?

The chivalry and evil woman theories carry subtle constitutional implications for capital sentencing as well. These theories call into question the ability of the judicial system to turn a gender-blind eye on female offenders in capital cases. They question whether it is possible to separate a woman's gender identity from her criminal identity. If gender stereotypes that inform both social notions of the punishment process and the individual to be sentenced are so pervasive that even in nongendered forms they carry different implications for men and women, is it realistic to ask a jury to separate an unfeminine woman from an unfeminine crime? Or is the reality of certain immutable traits such as sex and race that they cannot be separated from the criminal for questions of guilt or sentencing? Even if these traits are separable for the guilt-innocence phase of the trial, is it possible to consider gender-neutral aggravators in the sentencing phase of women's trials? These questions carry Eighth Amendment concerns, particularly in light of post-*Furman* constitutional requirements of enumerated, limited aggravating circumstances and post-*McGuatha* trends towards bifurcated adjudication in capital cases in an effort to eliminate, or at least reduce, bias and arbitrary application in the capital system.⁹⁰ Before beginning a discussion of the collision of death penalty juris-

88. To some extent, the execution of any offender—male or female—carries with it implications for all members of the society. In addition to these general, nongendered lessons, the execution of women carries explicit, gender-specific implications, defining what it is to be both a good citizen in general, but also what it is to be a good woman. For a general discussion of theories of punishment as a means to dictate social lessons, see Andenaes, *supra* note 53, at 949-51 (arguing that criminal law is an institution that inflicts punishment and creates propaganda in order to create conformity and develop respect for certain societal values).

89. This is not to imply that every "evil woman" is executed or even that it is the goal of the criminal justice system to curb female nefariousness with execution, but the implications of a penalty designed to deter by harsh example must include its effect on gender expectations and roles.

90. See *McGuatha v. California*, 402 U.S. 183, 221 (1971) (holding that there is no constitutional requirement of a bifurcated trial).

prudence and these feminist theories, it will be helpful to consider the historical examples of women who have received the death penalty in an effort to examine how the two theories presented come into play in the practice of capital sentencing.

II. The Theories in Play: Cases of Women

The evil woman and chivalry theories predict that "death eligible" women possess certain characteristics that allow them to be placed outside the normally protective boundaries of womanhood. Several theorists have attempted to draw conclusions about sentencing trends among female offenders based on the sparse empirical data available. Victor Streib provided a statistical breakdown of women executed in America.⁹¹ Elizabeth Rapaport attempted to provide more depth to her sentencing trend analysis by providing brief character sketches of American women executed in the twentieth century.⁹² Authors such as Sheila Brennan and Lorraine Schmall provided the most complete picture of an executed woman by focusing solely on one woman's experience in the capital system and attempting to draw conclusions from her anecdotal experience.⁹³ This Part of the Note examines their general conclusions and places them in the context of the chivalry and evil woman theories as a means of testing the theories' predictions about the characteristics of death-eligible women and the power implications that can be drawn from their sentencing.

A. Death-Eligible Women

By Victor Streib's tally, 398 women had been executed in the history of American capital punishment.⁹⁴ Of these women, 274 (76%) were executed for their role in a homicide.⁹⁵ The next closest group is composed of the 27 women (7%) executed for witchcraft, with crimes ranging from arson to petty treason completing the statistics.⁹⁶ Of the 398 women

91. See Streib, *supra* note 16 (offering statistical analysis of executions of women in the United States from 1632 to 1989 and focusing on specific characteristics of the offender and the victim such as age, race, socio-economic background, and geographical region of the crime).

92. See Rapaport, *supra* note 16, at 516-54 (analyzing female executions in two groups: pre- and post-*Furman*).

93. See Brennan, *supra* note 47, at 43 (drawing conclusions regarding women's images in the 1950s from Ethel Rosenberg's execution); Schmall, *supra* note 16 (examining the capital experience of Guinevere Garcia).

94. See Streib, *supra* note 16, at 848. Currently, 3,104 men and 49 women are on death row. See DEATH ROW U.S.A., *supra* note 31, at 1.

95. See Streib, *supra* note 16, at 852 tbl.2 (setting forth the number and percent of women executed for each known category of criminal conviction as of December 31, 1989).

96. See *id.* (listing attempted homicide at 21 (6%); arson at 20 (6%); theft at 5 (1%); burglary at 3 (1%); rebellion at 3 (1%); conspiracy at 2 (1%); and adultery, assault, attempted arson, banishment, espionage, and petty treason each at 1 (less than 1%)). Streib also lists 37 executions for which the crime is unknown, bringing the grand total to 398. See *id.*

executed, 189 (47%) were slaves.⁹⁷ Like the larger pool of women, these women were executed primarily for homicide.⁹⁸ Of these homicides, 67 (61%) were committed against a member of a slave-owner's family and 6% were committed against the offender's own child.⁹⁹ Of the 39 executions that have occurred in the twentieth century, white women compose the largest racial group at 66%, followed by black women at 34%.¹⁰⁰ This trend toward executing white women is relatively recent, with black women composing 66% of the total executions and white women only 31%.¹⁰¹ Of all the decades examined, the 1930s was the high-water mark for executions of both men and women in the United States, with 1,667 persons executed.¹⁰² Of this rather amazing number, only 11 were female.¹⁰³

Only one woman has been executed in the post-*Furman* era, but some 67 different women have been sentenced to death.¹⁰⁴ White women compose the majority of this group of sentenced, though not necessarily executed, women at 45; black women follow at 16. The remaining women are either Native American or of unknown racial origin.¹⁰⁵ All 70 of the post-*Furman* death penalty sentences are for murder.¹⁰⁶

Despite these ranges in the demographic characteristics of the offenders and the types of crimes they committed, there are points of commonality. Women have been executed from coast to coast in a total of thirty-four states and three federal jurisdictions.¹⁰⁷ As individuals, these women tend to be poor, uneducated, and of a low (if not the lowest) social class.¹⁰⁸ They tend to display dominant personalities and are often portrayed (where records exist) as "aggressive, self-willed killer[s]."¹⁰⁹

97. *See id.* at 853 tbl.3.

98. *See id.* (listing homicide as the underlying offense for 72% of female slave executions).

99. *See id.* at 854 tbl.4 (setting forth the number and percentage of women executed for each category defined by the offender's relationship to the victim); *see also id.* (demonstrating that other unrelated victims or unknown victims constituted the other 44 deaths).

100. *See id.* at 856 tbl.6.

101. *See id.* Women were executed in the greatest number in the 19th century, particularly toward the end of the century, with 198 women executed, 157 (83%) of whom were black. *See id.*

102. *See id.* at 857.

103. *See id.*

104. *See id.* at 867. Streib points out that three women were actually sentenced to death twice, bringing the grand total of female death sentences to 70. *See id.* It should be noted that these numbers do not include Darlie Routier, a white woman from Texas who was sentenced to death for the murder of her son on February 4, 1997. *See Verhovek, supra* note 10, at A7.

105. *See Streib, supra* note 16, at 870 tbl.15.

106. *See id.* at 868.

107. *See id.* at 866 (noting that although women have been executed across the country, the executions are concentrated in the Northeast and Southeast, with Virginia emerging as the leader, executing 93 women).

108. *See id.* at 878.

109. Rapaport, *supra* note 16, at 516; *see also Streib, supra* note 16, at 879 (noting the dominant roles these women assumed in their crimes and characterizing their crimes and behavior "as more like those of male killers").

They were all active participants in the crimes that brought about their sentences, even if they were not the principal actors themselves.¹¹⁰ A high percentage of these women killed family members or lovers, and almost all killed someone who was well known to them.¹¹¹ Exceptions to this trend include Ethel Rosenberg, who was executed for espionage,¹¹² and the twenty-seven women executed for witchcraft.¹¹³

These statistics are for the most part in keeping with what adherents to the evil woman and chivalry theories would predict. All of the crimes described could certainly be categorized as unladylike behavior. In addition, the women's role both as propagator of violence and as a dominant figure counters traditional images of passive womanhood. At first glance, the frequency with which women are sentenced to death for murdering an intimate may seem surprising. If one of the goals of the death penalty is to punish those who may pose a future danger, arguably women's violence against intimates should spare them the death penalty because their crimes appear victim specific and, therefore, the women pose a slight risk for recidivism. This initial surprise may be overcome, however, when one considers that the act of murdering someone lulled into trust by a false image of womanhood may well seem more disturbing and deceitful than a random act against a stranger or even an acquaintance.¹¹⁴

Despite the apparent support these statistics provide, they supply a sparse picture of the type of woman who is death eligible. Indeed, they offer the observer only limited insight into the underlying question of the chivalry and evil woman theories: under what circumstances will women

110. See Brennan, *supra* note 47, at 46, 52 (observing that Ethel Rosenberg was only accused of typing notes to assist in the espionage ring of her husband Julius, although media accounts claimed that she was a mastermind of espionage); Rapaport, *supra* note 16, at 516 (noting that the women executed either did the killing or, if acting in concert, were "at least fully the peer[s] of [their] collaborator").

111. See Rapaport, *supra* note 16, at 559; Streib, *supra* note 16, at 851. Despite this tendency to execute women for the murder of intimates, it should be noted that women who kill their own children rarely get sentenced to death. See Verhovek, *supra* note 10, at A7. Currently, only five women are on death row for the deaths of their own children. See *id.* (quoting statistics from the Death Penalty Information Center).

112. See Brennan, *supra* note 47, at 46; Rapaport, *supra* note 16, at 525.

113. See Streib, *supra* note 16, at 851 tbl.2 (pointing out that the majority of people executed for witchcraft were women, with 20 executions occurring in Massachusetts, six in Connecticut, and one in Maryland). More historical exceptions would include the women convicted of nonfatal crimes such as arson or theft and a woman who was executed in Massachusetts on June 1, 1660 for refusing to obey an order banishing all Quakers from the Massachusetts Bay Colony. See *id.* at 852.

114. A perfect example of this phenomenon comes in the case of Darlie Routier, who was sentenced to die for the murder of her five-year-old son, Damon. See Verhovek, *supra* note 10, at A7. Despite Routier's protestations of her innocence and her family members' pleas for her life, the jury was apparently persuaded by the prosecutor, who characterized Routier's act as cold blooded and warned that "anyone who could brutally slash her two young children and then repeatedly lie about the crime was capable of committing further violence" and therefore posed a continuing, significant risk to the community. *Id.*

be executed? Every day poor, undereducated, and marginalized women commit crimes. A limited number commit death-eligible crimes. A more limited number still commit especially horrendous crimes likely to shock social sensibilities with their raw violence and unrepentance. And yet, only sixty-seven women in the last twenty years have received the ultimate sentence. Given the fact that the death penalty does not execute all women who commit horrendous crimes, it does not seem unreasonable to assume that the penalty is more selective than the statutes would indicate.

Elizabeth Rapaport attempts to provide better insight into the selectivity of the death penalty by providing anecdotal accounts of women sentenced to death since the turn of the century.¹¹⁵ Looking only to Rapaport's post-*Furman* analysis, nine women were sentenced to death for committing murder in the course of armed robbery;¹¹⁶ fifteen women were sentenced to death for killing family members or other intimates, with twelve of these women killing for pecuniary gain;¹¹⁷ two women were sentenced to death for killing policemen or corrections employees;¹¹⁸ five women were sentenced to death for murders committed with male accomplices on other women or children that involved rape, sexual abuse, or torture of the victim;¹¹⁹ two women were sentenced to death for committing crimes at the behest of dominant husbands;¹²⁰ and two women were sentenced to death for "mass murders."¹²¹ Each of these women committed the unquestionably horrendous crime of taking another's life. The larger question, however, remains whether these women display some uniquely unfeminine quality that made them more death eligible than other men or women who committed the same crime.

Without looking at each of Rapaport's examples in complete detail, it is helpful to consider four cases as relatively representative samples of the types of factors considered in sentencing women. The first case involves Karla Faye Tucker, a white woman who was sentenced to death in Texas in 1984 for her participation in the murder of two Houston residents.¹²² Tucker and her boyfriend Danny Garrett had decided to rob a man named Jerry Dean.¹²³ Upon arriving at Dean's apartment, Tucker and Garrett found Dean and his romantic companion for the evening, Deborah

115. See Rapaport, *supra* note 16, at 516-26, 531-51.

116. See *id.* at 531.

117. See *id.* at 537. Again, it should be noted that these numbers do not include Darlie Routier.

118. See *id.* at 546.

119. See *id.* at 547.

120. See *id.* at 549.

121. See *id.* at 551.

122. See *Tucker v. State*, 771 S.W.2d 523, 525-27 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 912 (1989).

123. See *id.* at 526.

Thornton, asleep.¹²⁴ Tucker and Garrett proceeded to use a hammer and a pickax to murder both Dean and Thornton as they begged for their lives.¹²⁵ While these murders are certainly horrendous enough, it was Tucker's description of the sexuality of the murders that seemed to seal her sentence: Tucker explained that she got a "thrill" while "picking" Jerry and that "every time she picked Jerry, she looked up and she grinned and got a nut [orgasm] and hit him again."¹²⁶

The jury had little trouble concluding that Tucker would continue to pose a risk to society. In denying Tucker's appeal, the Texas Court of Criminal Appeals stated that it found ample evidence to support this finding, citing evidence of Tucker's "turbulent past," her aggression,¹²⁷ and what Rapaport characterized as "her even more disturbingly unfeminine manner of owning to the propensity with equanimity and satisfaction."¹²⁸ Rapaport observed that to the sentencing jury and Court of Appeals, Tucker embraced a "two-fisted bad girl portrait of herself" in defiance of every notion of femininity.¹²⁹ Rapaport speculates that it is this image that put Tucker on death row, where she remains today.¹³⁰

In the second case, Lois Thacker, a white woman from Indiana, was sentenced to death in 1985 for hiring a man to kill her husband.¹³¹ According to the court record, Thacker did not actually kill her husband, but persuaded three men to shoot him.¹³² In considering Thacker's appeal, the Supreme Court of Indiana focused its review of the facts on Thacker's complete control of the three men in question, particularly Matthew Music, who did the actual shooting.¹³³ Thacker's sentence was ultimately vacated when the Supreme Court of Indiana concluded that there was insufficient evidence to support finding aggravating factors.¹³⁴

The third death-sentenced woman, Velma Barfield, was a white woman who was sentenced to death in 1978 in North Carolina for the arsenic poisoning of her fiancé, Stewart Taylor.¹³⁵ Barfield was executed for

124. *See id.*

125. *See id.* at 527.

126. *Id.* at 526, 527.

127. *See id.* at 527.

128. Rapaport, *supra* note 16, at 535.

129. *Id.* at 553.

130. *See id.*

131. *See Thacker v. State*, 556 N.E.2d 1315, 1317-18 (Ind. 1990).

132. *See id.* at 1317; *see also id.* at 1323-24, 1326 (relating that Thacker lured Matthew Music into shooting her husband by telling him that her husband had killed Music's best friend and was pursuing Music's girlfriend).

133. *See id.* at 1317.

134. *See id.* at 1318, 1327.

135. *See State v. Barfield*, 259 S.E.2d 510, 518-19 (N.C. 1979), *cert. denied*, 448 U.S. 907 (1980).

this crime in 1984 at the age of fifty-two.¹³⁶ Barfield murdered Taylor in an effort to avoid detection for having forged his signature on checks she had written to support her prescription-drug habit.¹³⁷ Barfield's case is unique on the surface because despite her apparently miraculous rehabilitation while on death row, she was still executed.¹³⁸ Rapaport theorizes that Barfield fell victim to North Carolina politics more than her own bad traits.¹³⁹ Barfield's execution was scheduled just four days before the election day on which Jim Hunt, a Democrat, was attempting to win a senate seat from Republican Jesse Helms.¹⁴⁰ In a state where seventy percent of the electorate was in favor of capital punishment and nearly eighty percent favored executing Barfield, granting clemency was a political risk Hunt was unwilling to take.¹⁴¹ The media intimated at the time that given Barfield's miraculous rehabilitation, she might have been spared execution but for Hunt's political ambition.¹⁴²

The fourth case involved Shirley Tyler, a black woman sentenced to death in Georgia in 1979 for poisoning her abusive husband.¹⁴³ Tyler's case is significant not because of information raised in her actual trial, but because in reversing her sentence, the Eleventh Circuit held that Tyler's counsel should have introduced evidence that her husband had knocked out her teeth and engaged in other abuse.¹⁴⁴ In addition, the court held that Tyler should have been allowed to introduce critical evidence of her ability to provide for her family and of her good reputation as a wife and mother.¹⁴⁵

Certainly these women all committed horrendous crimes, and like all horrendous acts, these women's crimes were "unladylike." Just because these crimes can generally be classified does not, however, divorce them

136. See William E. Schmidt, *First Woman Is Executed in U.S. Since 1962*, N.Y. TIMES, Nov. 3, 1984, at A46 [hereinafter Schmidt, *First Woman*]; William E. Schmidt, *Woman Executed in North Carolina*, N.Y. TIMES, Nov. 2, 1984, at A1 [hereinafter Schmidt, *Woman Executed*].

137. See *Barfield*, 259 S.E.2d at 522.

138. See Schmidt, *First Woman*, *supra* note 136, at A46 (characterizing Mrs. Barfield as "a deeply religious person" who many advocates considered to exemplify a meaningful life in prison).

139. See Rapaport, *supra* note 16, at 540; see also Schmidt, *Woman Executed*, *supra* note 136, at A1 (noting that Barfield's family suspected that North Carolina Governor Hunt's political ambitions kept him from commuting Barfield's sentence).

140. See Schmidt, *First Woman*, *supra* note 136, at A46 (noting that Hunt's election bid was heated and that Hunt's reluctance to grant Barfield clemency may well have been politically motivated).

141. See Rapaport, *supra* note 16, at 540.

142. See, e.g., *Clemency Plea Weighed in Carolina*, N.Y. TIMES, Sept. 19, 1984, at A18; see also Reston, *supra* note 10, at 82 (describing the Barfield's Christian beliefs which captured the affections of her fellow prisoners).

143. See *Tyler v. State*, 274 S.E.2d 549, 551 (Ga.), *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.), *cert. denied*, 474 U.S. 1026 (1985).

144. See *Tyler*, 755 F.2d at 744-45.

145. See *id.*

from gender implications. The courts considered these women's ability to conform to gender expectations in either initially sentencing them or making decisions to commute or reverse their sentences.¹⁴⁶ Karla Faye Tucker performed a shocking murder, but apparently more disturbing to the Texas Court of Criminal Appeals was the sadistic, sexual pleasure she seemed to take from her murders as well as her unrepentant image as a "bad girl."¹⁴⁷ In contrast, Shirley Tyler also committed murder, but she was able to find relief in her weakened role as a survivor of domestic violence.¹⁴⁸ These women suffer or benefit from their ability to conform to anticipated gender roles. Although it may be impossible to separate these gender expectations and roles from the crimes these women committed, the chivalry and evil woman theories would argue that these women's death eligibility is based on a combination of traits not limited to the type of crime committed or even the gender characteristics of the offender, but more broadly considering her ability to conform to socio-gendered norms.¹⁴⁹ In order to understand why 398 women have been selected for death, their lives must be examined in the context of the power implications of the penalty.

B. *Conclusions About Power and Penalties*

Placing the statistics and empirical data outlined above within the context of traditional power structures indicates that women who are sentenced to death are women who exist furthest from the collective center of traditional social and female roles.¹⁵⁰ Their racial or socio-economic status preclude them from the protection of their sex long before they

146. This consideration of a defendant's womanhood is evident in the courts' opinions from each of the four cases just discussed. In the case of Karla Faye Tucker, the court emphasized Tucker's sexual deviance and her self-image as a "bad girl" in defiance of traditional gender norms. *See supra* notes 122-30 and accompanying text. In the case of Lois Thacker, the court emphasized Thacker's dominance and manipulation of the men she contracted to kill her husband. Again this image of a dominant woman controlling men runs directly counter to gender expectations of women as the "gentler sex." *See supra* notes 131-33 and accompanying text. In the case of Velma Barfield, the Court focused on Barfield's torture by poison of her fiancé in an effort to avoid detection for forged checks. The judiciary expressed shock that Barfield would torture and kill the man who loved her. Again, the notion that a woman would do this runs directly counter to traditional images of women as care givers. *See State v. Barfield*, 259 S.E.2d 510, 518-19, 544 (N.C. 1979); *supra* notes 135-37 and accompanying text. Finally, in the case of Shirley Tyler, it was Tyler's adherence to traditional female roles, both as victim and good wife and mother that ultimately led to her sentence commutation. *See supra* notes 143-45 and accompanying text. In this sense, in each of these women's cases, though traits of their crimes which were not gendered made them death eligible, the courts considered their ability to conform to traditional female traits in deciding their fates.

147. *See supra* notes 128-30 and accompanying text.

148. *See supra* note 144 and accompanying text.

149. *See supra* notes 44-54 and accompanying text.

150. *See* Howarth, *supra* note 2, at 419 (noting that execution is a process of purging those least like the rest of society).

engage in crime because their poverty, race, or social situation makes it impossible for them to conform to the social ideal of womanhood. These women are the "margins" discussed by bell hooks,¹⁵¹ marginalized long before they are criminals.¹⁵² They probably neither vote nor wield power in any traditional sense. Their power to influence springs from their marginalization coupled with their acts of violence or rebellion.¹⁵³ It is in their ability to stand outside of the boundaries of polite society that they become truly death eligible. It is their existence on the fringe that is sufficiently socially threatening such that, when they display outward signs of nefariousness, they must be eliminated.¹⁵⁴ They are a risk not just because they are poor or uneducated, or even because they are of a low social class, but because they defy society's traditional image of womanhood with a combination of their violence and their marginality.¹⁵⁵ Their death sentences are a means to define the boundaries which they have overstepped and to require all other citizens to stay within the same boundaries lest they risk a similar fate.

The chivalry and evil woman theories explain that executed women lose the benefit of their sex, which was poorly connected to them in the first place. The severity of their crimes, coupled with their social status, places them farthest from the protected center of traditional womanhood.¹⁵⁶ In this disjointed identity of womanhood, these women rise defiant, violent, and unprotected, making them easy targets for execution both because they seem almost inhuman in their lack of traditional femininity and because their very existence threatens to open the boundaries for all women.¹⁵⁷

Adherents to the two theories suggest that white society easily executed black women and slaves for less than fatal crimes because these women were more easily seen as nonwomen.¹⁵⁸ Beyond this, the contin-

151. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984) (defining marginalized women as women of low economic and social classes, often minorities, who exist outside of traditional political spheres).

152. See *supra* note 39 and accompanying text.

153. See Howarth, *supra* note 2, at 418.

154. See *id.* at 418 (reminding the reader that execution is merely the legal process through which members of society "absorb and assume the power rendered by the execution").

155. See Brennan, *supra* note 47, at 62 (arguing that Ethel Rosenberg was executed not for her role in the spy ring, which consisted of typing for her husband, but for "overstepping traditional female boundaries").

156. See Howarth, *supra* note 2, at 417 (observing that feminists "are using as [their] reference for 'women' white women who stay within defined class boundaries, act like ladies, and injure only people poorer than themselves").

157. See *id.* at 414-16 (stating that women are seldom executed because, as compared to men, they lack the ability to frighten and, therefore, are less easily disconnected from their humanity; when this does occur, however, women fall outside of social protection and are easy targets for execution).

158. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 37 (1988). Addressing the ease of executing black women, Barbara Smith stated that

ued existence of these women was threatening. How could a master guarantee loyalty, or even the safety of his family, if he allowed a rebellious slave to continue to live? In a more modern setting, how can a polite society enjoy peace and order if even its apparently most gentle members cease to be gentle and commit unspeakable acts of violence? After all, there is no incentive to execute women who can be explained away as one-time actors or women who appear to return to more socially acceptable female roles soon after they complete their crimes, thereby posing no risk of future dangerousness. The crimes of these women, while certainly lapses that warrant punishment, are brief. Their isolation and their singularity threaten neither society nor its expectations of women.

Even an examination of these women in the context of the power dynamics of the death penalty may still lead to the unanswerable question of what makes these particular women the unfortunate recipients of the death penalty? And does their gender make a difference? After all, men and women are both sentenced to death for committing atrocious acts. This is the point of the death penalty. Are there really characteristics of "womanhood" that define and separate female offenders from their male counterparts? In the empirical examples of Tucker, Thacker, Barfield, and Tyler, these women clearly shared many traits with their male peers on death row.¹⁵⁹ They were poor, uneducated, and from a marginalized social class. Yet, the evil woman and chivalry theories would argue that these traits become gendered in the context of defining "womanhood." They become defined in terms of poor women, uneducated women, and marginalized women. Each of these traits help form their womanhood and manifest themselves in particularly obvious ways in women's cases, as opposed to men's cases. In order to explore the significance of these manifestations, it is necessary to place these feminist theories in the context of emerging death penalty jurisprudence, which flows from the Eighth Amendment's standards and articulated goal of nonarbitrary application of the death penalty, and the larger sociological issues these theories raise regarding the sociopedagogical role of the death penalty.

III. Constitutional and Sociological Implications of Feminist Theories

Applications of the chivalry and evil woman theories to the capital system raise two distinct sets of issues. First, these theories call into question whether it is constitutionally permissible for judges and juries to consider the defendant's feminine traits, or lack thereof, in deciding her

"[w]hen you read about Black women being lynched, they aren't thinking of us as females. The horrors that we have experienced have absolutely everything to do with them *not even viewing us as women.*" *Id.* at 37 (emphasis in original) (quoting Barbara Smith).

159. See *supra* notes 122-49 and accompanying text.

death eligibility. Second, these theories raise larger sociological questions regarding the state's articulated goals for the death penalty in light of its role as a demarcator of social values. This Part of the Note seeks first to explore the constitutional implications of women's images in the context of the emerging body of Eighth Amendment capital jurisprudence. Second, it seeks to examine the accuracy of the fit between the state's articulated goals of justice and the realities of a capital system that may be unable to separate constitutionally permissible and impermissible considerations of female defendants in capital sentencing trials.¹⁶⁰ Finally, this Part explores these constitutional questions in the context of the larger sociological influence of the death penalty on women's lives.

A. *Writing an Eighth Amendment Legacy*

Prior to the Court's decision in 1972 in *Furman v. Georgia*, the death penalty in the United States was applied on the unbridled whim of juries.¹⁶¹ The results of this near standardless system of sentencing are well documented in the disparate sentencing of people of color and the economically underprivileged.¹⁶²

Although the *Furman* Court was unable to reach a consensus, each member of the plurality concluded that, under the system in place at the time, the death penalty was rendered unconstitutional by its arbitrary and capricious administration.¹⁶³ Justice Douglas, in his concurrence, observed that as long as sentencers were able to base their decisions on

160. An argument can also be made that impermissible factors may enter into the jury's consideration of guilt in women's capital trials; however, this argument is beyond the scope of this Note.

161. See *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (stating that "[p]eople live or die, dependent on the whim of one man or of 12").

162. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 82 (1987) (concluding that pre-*Furman* studies of the administration of the death penalty reveal that in the South, nonwhite defendants were most likely to receive the death penalty; outside the South, white defendants were more likely to have the death penalty imposed on them; and defendants convicted of killing whites were more likely to be executed than those convicted of killing nonwhites).

163. See *Furman*, 408 U.S. at 251 (Douglas, J., concurring) ("It is the poor, the sick, the ignorant, the powerless and the hated who are executed." (quoting RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 335 (1970)); *id.* at 293 (Brennan, J., concurring) (finding that "[w]hen the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily . . . [and that] it smacks of little more than a lottery system."); *id.* at 309-10 (Stewart, J., concurring) (comparing the death penalty to "being struck by lightning" and concluding that even beyond questions of race, the death penalty should not be imposed as "freakishly" and "wantonly" as it was under pre-*Furman* statutes); *id.* at 313 (White, J., concurring) (stating that the problem with the death penalty is that it is imposed so infrequently and with "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *id.* at 350, 365-66 (Marshall, J., concurring) (finding that there was "no correlation between the murder rate and the presence or absence of capital sanctions" and that "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society").

whatever information they wished, there was no way for the judicial system to control or monitor the criteria they used to hand down the penalty.¹⁶⁴ Different juries could weigh different circumstances and evidence as they saw fit, free of judicial control or consistency.¹⁶⁵ While the Court did not suggest particular considerations that would appropriately reduce arbitrariness, Justice Douglas did suggest that states should attempt to focus or channel the sentencer's consideration around the theories of punishment articulated by the state.¹⁶⁶ In an effort to achieve this focus, the states developed statutorily enumerated aggravating and mitigating circumstances.¹⁶⁷ In an effort to positively identify the requirements of a constitutional death sentencing procedure in the wake of *Furman*, the Court considered a series of five companion cases.¹⁶⁸ These cases provided a sampling of the twenty-eight post-*Furman* sentencing schemes¹⁶⁹ and broke them down into basic categories: those statutes known as "guided-discretion statutes," which required the sentencing authority to weigh aggravating and mitigating circumstances,¹⁷⁰ and those statutes that employed mandatory sentences for defendants convicted of certain enumerated capital crimes.¹⁷¹

164. See *id.* at 254-57 (Douglas, J., concurring) (holding that valid capital sentences may not result from unguided discretion, which spare the socially protected and impose death on the poor and despised); *cf. id.* at 293-95 (Brennan, J., concurring) (suggesting that, absent clear standards, the low incidence of the death penalty's imposition relative to its availability indicates that it is imposed arbitrarily).

165. See *id.* at 255 (Douglas, J., concurring) (asserting that jury discretion leads to selective and inconsistent application of the death penalty).

166. See *id.* at 255-56.

167. See Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 852-55 (1992) (book review).

168. The five cases decided on July 2, 1976, were *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Gregg v. Georgia*, 428 U.S. 153 (1976).

169. See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1691 & n.6 (1974) [hereinafter *Death Penalty Statutes*]. The five statutes reviewed in the 1976 cases were FLA. STAT. ANN. § 921.131 (West Supp. 1977); GA. CODE ANN. § 27-2534.1 (Supp. 1975); LA. REV. STAT. ANN. § 14:30 (West 1974); N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975); and TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1975-1976).

170. See *Death Penalty Statutes*, *supra* note 169, at 1700-09. *Gregg*, 428 U.S. at 164, and *Proffitt*, 428 U.S. at 248, involved guided sentencing statutes.

171. See *Death Penalty Statutes*, *supra* note 169, at 1710-12. The enumerated capital crimes included murder of a peace officer, murder of more than one person, felony murder, and contract murder. See *id.* *Roberts*, 428 U.S. at 329, and *Woodson*, 428 U.S. at 286, followed the mandatory sentencing scheme. Texas's scheme is unique. The Texas statute requires a sentencer to return a special verdict as to whether the defendant would be a "continuing threat" to the community if not executed, whether the crime was committed "deliberately and with a reasonable expectation that death would result," and whether the crime was "unreasonable in response to provocation." TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1973). Death is required only when the sentencer finds all three conditions exist. *Id.*

The Court struck down the mandatory sentencing schemes, concluding that the constitution required consideration of individual culpability.¹⁷² In *Woodson v. North Carolina*,¹⁷³ the Court explained that mandatory sentencing failed the *Furman* standard because it excluded "relevant facets of the character and record of the individual offender or the circumstances of the particular offense [and] . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁷⁴ In the guided-discretion cases and in *Jurek v. Texas*,¹⁷⁵ while relying on multiple rationales, the Court concluded that guided-discretion statutes sufficiently channeled the sentencer's discretion to reduce the arbitrariness of the death penalty within acceptable *Furman* levels.¹⁷⁶

With these five decisions in 1976, the Court raised the practice of individualized sentencing from enlightened policy to constitutional imperative, stating: "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."¹⁷⁷ The Court stressed the importance of juries maintaining links between contemporary community values and the penal system,¹⁷⁸ and it established the constitutional right of capital defendants to receive consideration of mitigating circumstances.¹⁷⁹

Two years later, in a plurality opinion in *Lockett v. Ohio*,¹⁸⁰ the Court expanded this right to present mitigating circumstances, holding that capital defendants must be allowed to present unlimited evidence pertaining to mitigating circumstances and that sentencers must not be restricted in the weight they can assign such circumstances.¹⁸¹ Quoting *Williams v. New York*,¹⁸² the Court noted that

where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information

172. See *Roberts*, 428 U.S. at 333-37; *Woodson*, 428 U.S. at 303-05.

173. 428 U.S. 280 (1976).

174. *Id.* at 304.

175. 428 U.S. 262 (1976).

176. See *id.* at 268-77; *Proffitt v. Florida*, 428 U.S. 242, 247-58 (1976); *Gregg v. Georgia*, 428 U.S. 153, 196-207 (1976).

177. *Woodson*, 428 U.S. at 304 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

178. See *id.* at 295.

179. See *id.* at 304.

180. 438 U.S. 586 (1978).

181. *Id.* at 604-05. The Court concluded that the Eighth and Fourteenth Amendments required that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original).

182. 337 U.S. 241 (1949).

possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if *not essential*—[to the] selection of an appropriate sentence"¹⁸³

Initially, in considering aggravating circumstances, the Court pursued its nonarbitrary application goals of the Eighth Amendment by attempting to strictly limit aggravating factors considered.¹⁸⁴ While in general the Court achieved this limitation of aggravators by requiring that such factors be statutorily enumerated, in two landmark cases, *Barclay v. Florida*¹⁸⁵ and *Dawson v. Delaware*,¹⁸⁶ the Court set up specific exceptions to this enumeration requirement both of which expanded the scope of available aggravators. In *Barclay*, the Court held that the use of accurate and reliable facts that were relevant to "the character of the individual and the circumstances of the crime" was constitutionally permissible regardless of whether they were enumerated in the state statute.¹⁸⁷ In *Dawson*, Justice Rehnquist, this time writing for the majority, held that there was no per se constitutional barrier to allowing juries to consider a defendant's associations as an aggravating characteristic, provided such information was relevant to the crime the sentencer was considering.¹⁸⁸ In both cases, the Court justified its expansion of aggravating circumstances beyond statutorily enumerated factors by claiming that these unenumerated factors provided a more complete picture of the defendant to the sentencer.¹⁸⁹

183. *Lockett*, 438 U.S. at 603 (quoting *Williams*, 337 U.S. at 247).

184. See *Godfrey v. Georgia*, 446 U.S. 420 (1980) (reversing a death sentence where the state failed to adequately circumscribe its definition of aggravating circumstances).

185. 463 U.S. 939 (1983) (plurality opinion).

186. 503 U.S. 159 (1992).

187. *Barclay*, 463 U.S. at 958 (plurality opinion) (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)); see also *id.* at 956-58 (plurality opinion) (holding that it was permissible for the trial court to consider the defendant's criminal record even though it was an improper aggravator under state law); *id.* at 966-67 (Stevens, J., concurring) (arguing that the Constitution allows consideration of nonstatutory aggravators, in addition to statutory aggravators, so long as they are related to the character of the defendant or the circumstances of the crime). In requiring this link between the character of the defendant and the circumstances of the crime, the Court requires that the facts considered be "constitutionally relevant." The Court returned to this issue in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Clemons v. Mississippi*, 494 U.S. 738 (1990). In *Clemons*, like *Barclay*, the Court required that the state base sentencing determinations on "reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Clemons*, 494 U.S. at 749. In *Walton*, the Court noted that while aggravators did not have to be mathematically precise, they did have to provide meaningful guidance to the sentencer. See *Walton*, 497 U.S. at 652-54.

188. *Dawson*, 503 U.S. at 164-66.

189. In *Barclay*, the Court couched this "complete picture" notion in terms of establishing a link between the sentencer and the community. See *Barclay*, 463 U.S. at 950 (plurality opinion). The Court stated, "It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences." *Id.* In *Dawson*, the Court couched this in the importance of providing the sentencer with as much information as necessary to make an informed judgment about the defendant. See *Dawson*, 503 U.S. at 164.

The final case that warrants consideration for its potential effect on female capital defendants is *McCleskey v. Kemp*.¹⁹⁰ The *McCleskey* Court, in denying a discriminatory application claim based on statistical evidence, held that the "Constitution does not 'plac[e] totally unrealistic conditions on . . . [death penalty] use.'"¹⁹¹ In many ways this conclusion was foreseeable. Justice Marshall had warned in *Barclay* that the Court could not long sustain the tense balance it had created between its judicial goals as articulated in *Furman* and the realities of administering the death penalty in cases following *Furman*.¹⁹² Still, the Court contended that just because the application of the penalty was not perfectly equitable, as long as it met a standard of "fairness," it could pass constitutional muster.¹⁹³ Despite Warren McCleskey's extensive evidence that Georgia's death sentence was applied disproportionately to black men, the Court upheld the statute, concluding that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."¹⁹⁴ *McCleskey* further required a defendant to demonstrate that evidence of disparate application of the death penalty under the *Furman* standard must be demonstrated through facts specific to the defendant's case.¹⁹⁵

These lines of cases establish modern Eighth Amendment jurisprudence with regard to the death penalty. *Furman* articulates the goal of nonarbitrary application.¹⁹⁶ The pentalogy and *Lockett* define this goal of nonarbitrariness in terms of virtually unrestricted mitigating circumstances, holding that defendants should be allowed to present whatever evidence available to them to mitigate the effects of their crime.¹⁹⁷ *Gregg* further refines the *Furman* ideal by requiring statutorily enumerated aggravating factors that force the state to channel and guide the sentencer's discretion in an effort "to ensure that death sentences are not imposed capriciously or in a freakish manner."¹⁹⁸ *Dawson* and *Barclay* expand this aggravating factor standard, holding that accurate and reliable facts, as well as evidence of the defendant's associations that are linked either to the character of the defendant or to the circumstances of the crime are constitutionally permissible aggravators even if they are not statutorily enumerated.¹⁹⁹ Finally, in *McCleskey*, the Court stepped the furthest away from the *Furman* ideal of nonarbitrary application, holding that imperfections in

190. 481 U.S. 279 (1987).

191. *Id.* at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)).

192. *See Barclay*, 463 U.S. at 990-91 (Marshall, J., dissenting).

193. *McCleskey*, 481 U.S. at 313.

194. *Id.* at 312.

195. *Id.* at 292-93.

196. *See supra* notes 161-66 and accompanying text.

197. *See supra* notes 167-79 and accompanying text.

198. *Gregg v. Georgia*, 428 U.S. 153, 195, 192-93 (1976).

199. *See supra* notes 185-89 and accompanying text.

the administration of the death penalty were constitutionally permissible as long as a vague standard of "fairness" could be achieved.²⁰⁰ In addition, the *McCleskey* Court held that defendants must demonstrate factual links between their own case and the alleged disparate application of the penalty.²⁰¹

B. *Furman, the Eighth Amendment, and Women*

Despite the almost continuous process of expansion and contraction that the *Furman* ideal has experienced over the last twenty-five years, the Court has stuck firm to its position that nonarbitrary application of the death penalty remains the articulated goal of Eighth Amendment jurisprudence.²⁰² The Court's articulation of the evolving *Furman* ideal affects every person entering the capital system, but it has additional and unique implications for women's trials. The lesson to be drawn from *Furman* and *McCleskey* collectively is that the death penalty affects different people differently. While both cases focus primarily on the sentence's disparate impact on people of color and the indigent, their basic premise is applicable to any group that possesses unmaskable social traits: judges and jurors mete out punishment influenced in part by their social preconceptions of the person they are sentencing.²⁰³ In the case of female defendants, gender traits may carry specific implications both in the context of the unrestricted mitigating circumstances standard and in the context of *Barclay* and *Dawson's* interpretation of the aggravating circumstances standard. Finally, female defendants may find themselves hard pressed to bring claims of discriminatory application under the *McCleskey* standard despite the appearance of the disparate application under both the mitigating and aggravating factors standards.

200. See *supra* notes 190-94 and accompanying text.

201. See *supra* note 195 and accompanying text.

202. See *Roberts v. Louisiana*, 428 U.S. 325, 327-36 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 285-305 (1976) (both striking down mandatory sentencing schemes for their failure to avoid arbitrary application of the death penalty by failing to consider relevant character evidence); *Jurek v. Texas*, 428 U.S. 262, 268-77 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247-60 (1976); *Gregg*, 428 U.S. at 196-207 (all upholding guided-discretion statutes as sufficiently channeling a sentencer's consideration to avoid arbitrary application of the death penalty); *Lockett v. Ohio*, 438 U.S. 586, 605-08 (1978) (requiring that sentencers be allowed to consider a wide range of mitigating evidence in an effort to reduce arbitrary application of the death penalty); *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983); *Dawson v. Delaware*, 503 U.S. 159, 164-66 (1992) (both requiring that nonstatutory aggravators demonstrate some link between the crime and the trait to avoid arbitrary application of the death penalty).

203. See *supra* notes 163-65, 190-95 and accompanying text. See generally DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990) (examining sentencing and prosecution trends among capital offenders).

1. *Mitigating Circumstances*.—On one level, the goal of mitigating circumstances case law is to answer the questions of how the legal system, which claims a degree of objectivity, should take into account the background, character, and experiences of those on whom it wishes to impose the ultimate sentence.²⁰⁴ Is it possible for the law to systematically confront what is personal? Is there legal relevance to troubled lives or exemplary ones when deciding whether or not someone is sentenced to die?²⁰⁵

Furman presents a mixed challenge to mitigating circumstances. While proposing a goal of nonarbitrary application of the death penalty made possible by “individualized” sentencing, the *Furman* Court did not require a channeling of mitigating evidence in an effort to achieve “individualization.”²⁰⁶ Indeed, to the contrary, post-*Furman* cases such as *Woodson* and *Lockett* suggest “no substantive limitation [on the] defendant’s ability to present mitigating evidence.”²⁰⁷

This open standard has typically allowed mitigation evidence to range from the defendant’s age,²⁰⁸ to any history of mental illness or retardation,²⁰⁹ to physical or sexual abuse,²¹⁰ to substance addiction,²¹¹ to evidence of an otherwise exemplary or terrible life,²¹² to the defendant’s adjustment to life in prison.²¹³ For women, these character traits necessarily include gender traits such as the woman’s exceptional mothering

204. See Steiker & Steiker, *supra* note 167, at 838-39.

205. See *id.*

206. See *id.* at 840 (arguing that *Furman* and its progeny require states to channel aggravation evidence to reduce arbitrariness, but place no such restrictions on mitigation evidence).

207. *Id.* at 853.

208. See *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (holding that a defendant’s youth is a relevant mitigating circumstance under both *Lockett* and *Eddings*); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (finding that the trial judge correctly recognized the defendant’s youth as a mitigating factor).

209. See *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (holding that evidence of the defendant’s mental retardation was a relevant mitigating factor); *Mills v. Maryland*, 486 U.S. 367, 370, 384 (1988) (finding that evidence of the defendant’s mental infirmity was a valid mitigating factor); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (presenting evidence of petitioner’s wandering mind as mitigating evidence).

210. See *Eddings*, 455 U.S. at 115 (holding that evidence of a turbulent family history and physical abuse is an appropriate mitigator); *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir. 1985) (affirming a finding of ineffective assistance of counsel during the sentencing phase of trial for the attorney’s failure to present mitigating evidence of physical and sexual abuse).

211. See *Hitchcock*, 481 U.S. at 397 (presenting evidence of petitioner’s substance abuse as a mitigating factor).

212. See *id.* (presenting evidence of petitioner’s poverty as a child and his good relationship with his brother’s children as mitigating factors).

213. *Evans v. Muncy*, 498 U.S. 927, 928-30 (1990) (Marshall, J., dissenting from the denial of certiorari in an application for a stay of execution) (finding that the petitioner’s good behavior while on death row should have been considered in deciding whether or not to commute his sentence); *Skipper v. South Carolina*, 476 U.S. 1, 4, 8 (1986) (holding that a defendant should have been allowed to introduce evidence of good behavior while in jail as a mitigating factor).

skills, her nurturing traits, or her devotion to her husband.²¹⁴ An excellent example of the use of such traits can be drawn from the recent case of Darlie Routier. Routier's mitigation evidence relied primarily on the testimony of her husband, her mother, and herself that she was a good mother who loved her children and was a good wife.²¹⁵ Returning to the four sentenced women considered in Part II of this Note, these traits are also evident. For example, in the case of Karla Faye Tucker, in order to offset an impressive list of aggravators, Tucker's defense team presented evidence of her loving care for her dying mother and her virtual adoption of an abandoned child.²¹⁶ In the case of Shirley Tyler, to offset her brutal murder of her husband, the defense presented evidence of her own abuse and forced submission to him.²¹⁷

While under the 1976 cases and *Lockett* such traits are constitutionally permissible,²¹⁸ critics of this line of cases have argued that they in fact are not true to the *Furman* ideal and open capital trials up to constitutionally irrelevant factors by allowing defendants to flood the sentencing phase of the trial with whatever character information they deem relevant regardless of whether or not there is a nexus between the evidence presented and a reduction of individual culpability.²¹⁹ Indeed, the Court itself seems to have begun to raise similar questions. In *Boyd v. California*,²²⁰ Chief Justice Rehnquist seemed to draw a distinction between indispensable aspects of individual sentencing and those that are constitutionally irrelevant.²²¹ In *Skipper v. North Carolina*,²²² the Court also suggested that there may be limitations as to what is constitutionally relevant in providing individualized sentencing.²²³

214. Arguably, men's mitigating evidence also has gender connotations, but it may not seem as attractive because traditionally masculine traits such as aggressiveness or strength may be viewed as indications of future dangerousness.

215. See Verhovek, *supra* note 10, at A7 (recounting testimony from the Routier trial).

216. See Steiker & Steiker, *supra* note 167, at 837.

217. See Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985).

218. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

219. See Steiker & Steiker, *supra* note 167, at 840 (questioning how the failure to limit aggravating evidence can produce arbitrary sentencing, but the unfettered introduction of mitigating evidence has no such effect).

220. 494 U.S. 370 (1990).

221. See *id.* at 382 n.5 (distinguishing evidence of the defendant's artistic ability as it bears on the defendant's future dangerousness, which Justice Rehnquist found constitutionally relevant, and evidence of the defendant's artistic ability as an indicator of the defendant's intrinsic worth, which may have no constitutional relevance).

222. 476 U.S. 1 (1986).

223. See *id.* at 7 n.2 (noting that there must be some limit on what is constitutionally relevant, stating that "how often [the defendant] will take a shower" may be considered constitutionally irrelevant (quoting *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984))).

In order to avoid this open market of mitigators, the Court should ground its notion of individualized sentencing through mitigation evidence in some substantive theory.²²⁴ If no such grounding occurs, the sentencer remains in a position of discretion to use impermissible factors such as race, gender, or the lack of a defendant's adherence to a social stereotype as a means to sentence. If states are forced to channel appropriate mitigating factors, they will also be forced to articulate theories as to who is deserving of the death penalty.²²⁵ This process of articulation will help prevent sentencers from arbitrarily applying their own theories to the sentencing process.

While this problem of unbridled mitigators certainly raises questions for all death penalty defendants, for women it raises additional and distinct questions. Women's trials rely heavily not only on gender-neutral traits such as adherence to religion and self-sufficiency, but are also heavily laden with gendered traits. If one believes that the mitigation phase of a sentencing trial should be used to justify why a defendant should not be executed, the use of traditional female stereotypes as a mitigating factor justifies the life of the female defendant in terms of her ability to conform to social standards. While this may be acceptable under *Woodson*,²²⁶ it is unclear whether it is acceptable under the *Furman* goal, which might argue that being a good woman (or even being a good mother or wife) has little to do with the capital crime considered, and in fact only increases the risk that the sentence will be applied arbitrarily based on the sentencer's preconceived notions of womanhood which may be inherently exclusive of some capital defendants.

On a larger level, the use of such mitigators provides an indication that what it means to be female and have a life worth saving requires at least a semblance of conformity to traditional gender traits. In this sense, the use of unrestricted mitigators may present a problem not dissimilar to that which *Furman* sought to correct in the first place: those who are able to appear most like the sentencer are likely to escape death, while those in a less protected class—the poor, people of color, the uneducated, and the socially deviant—are more likely to risk being sentenced to death not only because their crimes are horrendous, but because they are not viewed as falling within the curtilage of social protection.

224. See Steiker & Steiker, *supra* note 167, at 853.

225. See *id.* at 865-66. Steiker and Steiker suggest that the appropriate theoretical basis would be to require a nexus between the mitigating evidence and the reduction of individual culpability. See *id.* at 845.

226. *Woodson* requires that the statute allow room for consideration of individualized circumstances. See *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

2. *Aggravating Circumstances*.—Unlike the trend with mitigating circumstances, the Court initially required states to enumerate aggravating circumstances in their statutes under the *Furman* goal of nonarbitrary application of the death penalty.²²⁷ Aggravators focus on the severity of the offense and not the bad character of the person committing the offense.²²⁸ In this sense, they serve to answer the question of whether the punishment is proportional to the crime committed.²²⁹ They do not serve an individualizing function; rather, they connect the punishment to the harm and the social costs.²³⁰ They do not seek to distinguish offenders, but rather crimes.²³¹

With the development of the *Barclay* and *Dawson* exceptions, aggravators were expanded to include reliable and accurate facts and information about the defendant, such as his voluntary associations, that either had some connection to the character of the defendant or provided insight into the circumstances of the crime.²³² With this standard, the Court opened a floodgate to the previous restrictions on aggravating circumstances.

The *Barclay* and *Dawson* standards of accurate and reliable facts and voluntary associations would seem to suggest that general character traits, including gender expectations, are constitutionally appropriate and relevant aggravators both because they provide insight into the defendant's individual character and because they provide a connection between the sentencers and community expectations and values. In fact, the *Barclay* Court stated:

We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. . . . It is entirely fitting for the moral, factual, and legal judgement of judges and juries to play a meaningful role in sentencing. . . . [A]s long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.²³³

The dilemma of this expanded aggravators standard is twofold. One such dilemma was articulated by Justice Marshall in his dissent in *Barclay*. He warned that in allowing nonstatutory aggravators to enter into a sentencer's consideration, the Court created a greater risk that the defendant will suffer under an arbitrary and capricious application of the death penalty.²³⁴ This concern was expanded by Justice Blackmun in his dissent in *Tuilaepa*

227. See Steiker & Steiker, *supra* note 167, at 846-47.

228. See *id.*

229. See *id.*

230. See *id.*

231. See *id.*

232. See *supra* text accompanying notes 185-89.

233. *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983) (Rehnquist, J., plurality opinion).

234. See *id.* at 985-87 (Marshall, J., dissenting).

v. *California*.²³⁵ Blackmun warned that under the *Barclay* and *Dawson* standards of demonstrating a link to the circumstances of the crime, any factor that would be a mitigator if present becomes an aggravator if absent.²³⁶ In effect, nearly any factor raised in a defendant's trial can be used to prove aggravation under the *Barclay* and *Dawson* standards.²³⁷ Blackmun warned that the failure to focus the sentencer's discretion around guided aggravators leaves the sentencer free to "evaluate evidence in accordance with his or her own subjective values."²³⁸ This freedom, Blackmun feared, would lead the sentencer to apply improper stereotypes to defendants, returning the capital system to a pre-*Furman* capricious application state.²³⁹

Under the *Barclay* and *Dawson* standards, particularly as accepted by the *Tuilaepa* majority, social perceptions of women's roles and the sentencer's opinion as to whether the defendant adheres to these roles are appropriate considerations because they help ground both the defendant and her crime against a backdrop of social expectation. The problem is that the defendant's general character should not be the subject of aggravating considerations under the *Furman* ideal.²⁴⁰

Again, in women's cases, this dilemma arises both on a general level and on a gender-specific level. While women suffer the risks that every death penalty defendant suffers of a nonchanneled system of aggravating circumstances that may allow both general character traits and the lack of a mitigator to serve as an aggravating circumstance, they also suffer a gender-specific risk that their failure to be traditional women will make them death eligible, when they might not be if they had appeared more traditional. This gender-specific risk is made especially precarious by both the prevalence of gender expectations and the immutable quality of being female. Women do not have to present evidence that they could have been nurturing or a good mother or wife for the sentencer to conjure up such images of women. Such images are already so saturated in society that they are the very definition of womanhood.²⁴¹ In this sense, women enjoy only limited *Furman* protections under a system that may allow accurate facts and associations such as the woman's abandonment of her children, her failure to marry, or her sexual orientation into the aggravating

235. 512 U.S. 967, 984 (1994) (Blackmun, J., dissenting).

236. *Id.* at 990 (Blackmun, J., dissenting).

237. *Id.* at 986-91 (Blackmun, J., dissenting).

238. *Id.* at 993 (Blackmun, J., dissenting).

239. *Id.* (Blackmun, J., dissenting) (expressing concern that improper racial stereotypes would enter into the sentencer's decisionmaking process).

240. See *supra* notes 227-31 and accompanying text.

241. See Howarth, *supra* note 2, at 417 (stating that notions of "womanhood" are inherently linked to gender stereotypes regarding women's characteristics).

portion of the trial. In a capital system that bases punishment on the existence of aggravators, such women's lives may well hinge on their ability to conform and to present a ladylike image.

3. *The McCleskey Dilemma*.—Despite the risk that women may face constitutionally impermissible traits coming into consideration either as mitigators or as aggravators, women may still have trouble proving their claims under the *McCleskey* standard of proof.²⁴² While women may be able to show that they risk disparate application of the death penalty as a member of a group, the *McCleskey* rule is that proof of discriminatory impact is not sufficient and that the defendant must show specific evidence of discrimination that occurred during her trial.²⁴³ In light of the fact that Warren McCleskey was unable to demonstrate this factual link despite his well-documented evidence of discrimination in the very court and system under which he had been sentenced, women may not fare better.²⁴⁴ Women, however, are in a slightly better position than Warren McCleskey. Unlike McCleskey, who did not have any specific evidence of racism from his own trial, women may be able to present evidence such as the prosecutor's use of the absence of gender-specific mitigators as aggravators and the introduction of gender-specific mitigators in an effort to meet the *McCleskey* standard of proof.

C. *Larger Sociological Questions*

These constitutional questions surrounding the use of gender-specific mitigators, gender-specific aggravators, and the *McCleskey* burden of proof carry with them implications for all women in the capital system. However, such capital defendants and offenders are not the only women affected by the capital system's reliance on gendered traits to determine death eligibility.

Proponents of the evil woman and chivalry theories have argued that the death penalty serves to define the outer limits of unacceptable behavior for all women through its power to define social boundaries.²⁴⁵ Execution, they argue, is more than a single act, just as the death penalty is more than a punishment. Each is evidence of what Joan Howarth refers to as "the raw power of the law" to force conformity on the citizenry.²⁴⁶

242. See *supra* notes 190-95 and accompanying text.

243. See *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987).

244. See *id.* at 297 (refusing to infer from a study indicating racial disparities in the state's administration of the death penalty that "any of the decisionmakers in McCleskey's case acted with discriminatory purpose").

245. See *supra* text accompanying notes 49-50.

246. Howarth, *supra* note 2, at 414.

In order to be executed, the person must become an "objectified symbol of powerful, inhuman evil."²⁴⁷ Women are rarely able to achieve this objectification of inhumanity, however, even when committing bad acts.²⁴⁸ The very nature of being feminine is in opposition to this complete separation from humanity and descent into unmitigated evil.²⁴⁹ As long as women—even female criminals—maintain some sense of their female identity, they are capable of receiving varying degrees of the protection their gender promises. There is little, if any, incentive to execute such women. Howarth writes: "Because executions are public rituals by which the law-abiding population reclaims power from criminals, the person to be executed must embody some kind of power. Executing a woman does not feel sufficiently powerful for it to relieve us of much anxiety about personal safety."²⁵⁰

For women to achieve this power to frighten, they must first transcend both their humanity and their womanhood, breaking through their traditional gender expectations.²⁵¹ They must become the Karla Faye Tuckers and Darlie Routiers, women who appear either more like men or completely in opposition to womanly ideals. If these women show any sign of returning to the female norm, push for their executions diminishes, often to the point of commutation.²⁵²

The question these theories raise is how powerful the death penalty is in curbing behavior. If so few women are executed, and the vast majority of women will never be placed in a position where execution is a possibility, how powerful are the boundaries that the death penalty draws, if most of us never even come close to them? Perhaps the power of the death penalty stems from this scarcity, and its implications that to be a woman is to be immune from the death penalty—to cease to act like a woman is to fall outside of all protections.

247. *Id.*

248. *See id.* at 414-15 (stating that women are rarely executed because they are rarely seen as a symbol of evil since (1) they do not have as much power to frighten as men do and (2) they are not as easily separated from their humanity as their male counterparts).

249. *See id.*

250. *Id.* at 415.

251. *See supra* notes 45-48 and accompanying text. The tide to execute Karla Faye Tucker has diminished significantly since her placement on death row. Moved by her apparent transformation, even the brother of one her victims recently stated that she should not be executed. *See Texas Set to Execute First Woman Since 1863*, N.Y. TIMES, June 21, 1992, § 1, at 17.

Howarth argues that only women enjoy these unique benefits of the rehabilitation process. She writes: "Men who find religion and lead decent lives on death row still carry with them the implicit threat of their maleness." Howarth, *supra* note 2, at 415. It is because the very nature of womanhood is in opposition to the executable that women can more readily receive commutation of their sentences.

252. *See supra* notes 60-64 and accompanying text.

IV. Conclusions

Images of women affect the administration of the death penalty on several levels. First, the use of gender-specific traits as mitigators or aggravators during the sentencing phase of the trial runs counter to the *Furman* goal of nonarbitrary application of the death penalty by introducing constitutionally impermissible factors to the sentencer. In addition, the pervasiveness of gender expectations may well moot the necessity that they ever be raised explicitly in order to influence the sentencer's decision. In this sense, the presence of women within the capital system raises significant questions about the possibility of administering the death penalty and still maintaining the *Furman* ideal. Indeed, given the Court's claim that the Constitution simultaneously requires nonarbitrary application of the ultimate penalty and community standards to influence the death penalty, it may be impossible to achieve both goals. The question becomes, is there a level of arbitrariness in the application of the death penalty that we are willing to accept?

In the lives of women, this arbitrariness revolves around questions of their ability to conform to gender expectations. In the sentencing phase of their trials, they are spared or sentenced based on their ability to fall within the designated protective sphere of womanhood. For women who will never face the risk of the death penalty, the sentencing system carries two implications. The first, based on the scarcity of the penalty, is that they may well enjoy some immunity because they are women. The second, based on the execution of some women, is that the penalty is drawing boundaries, even for those most likely never to be executed. In order to enjoy the protection womanhood provides, women must not step over these lines. Such restrictions are more specific than the general boundaries the penalty draws around humanity. The reliance by the sentencer on gender-specific characteristics suggests that traits such as motherliness, nurturing, and weakness may protect even horrendous criminals from execution.

In many senses, these conclusions feel dissatisfying. The question seems to repeat: even with the acceptance of the evil woman and chivalry theories, what does it take to be executed as a woman? Unlike questions of race, no single factor emerges from each case, but rather a conglomeration of factors, which together indicate that women who are executed have crossed gender boundaries, and those who are not, have not. A particular woman's ability to cross a gender boundary may well hinge on her crime, race, economic status, or sexual orientation, but these factors taken by themselves are not enough. It is their combination that brings about death sentences.

For feminists, these factors demand greater attention than they have received to date. The death penalty is a system of raw power. For political outsiders like women and minorities, it carries with it a ripple effect that

expands through their whole experience. They walk a boundary that they have no power to draw, or even to know when it will be drawn. In this sense, feminists who claim concern over marginalization cannot afford not to study women on death row. Despite their sparse number, women on death row are powerful prisoners of the state and social expectations of womanhood, and their very existence defines us all.

—*Jenny E. Carroll*

