

Women on Death Row:A Tribute to Dean Victor Streib

Lorraine Schmall

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review



Part of the [Law Commons](#)

Recommended Citation

Schmall, Lorraine () "Women on Death Row:A Tribute to Dean Victor Streib," *Ohio Northern University Law Review*. Vol. 38: Iss. 2, Article 8.

Available at: https://digitalcommons.onu.edu/onu_law_review/vol38/iss2/8

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Women on Death Row: A Tribute to Dean Victor Streib

LORRAINE SCHMALL*

Over 1,100 persons—only a dozen of them female—have been executed in the United States since the death penalty’s reinstatement in 1976¹ in *Gregg v. Georgia*.² As of the end of 2010, “36 states and the Federal Bureau of Prisons held 3,158 inmates under sentence of death.”³ Sixty-three of them are women.⁴ Rather than representing the worst among us, the condemned are a serendipitous lot: nearly all are murderers; many are former drug addicts or people with serious mental health problems.⁵ Some are serial killers, but many have a bad history with law enforcement and a life of conviction and incarceration that aggravate their crimes and make them death-eligible. Some of each gender were found to be guilty of unquestionably heinous crimes. The women on the row are overwhelmingly guilty of domestic violence.⁶ “One-quarter . . . killed their husbands or boyfriends; and another one-fifth . . . killed their children.”⁷ “One other woman killed both her husband and her children, and three other women

* Professor of Law at Northern Illinois College of Law; B.A., University of Illinois – Chicago; M.A., Columbia University; J.D., George Washington University.

1. Tracy L. Snell, *Capital Punishment, 2010 – Statistical Tables*, BUREAU OF JUSTICE STATISTICS, U.S. Dep’t of Justice, 1 (Dec. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf>; Victor Streib, *Death Penalty for Female Offenders, January 1, 1973, through October 31, 2010*, DEATH PENALTY INFO. CENTER, no. 65, 2010 at 10, <http://www.deathpenaltyinfo.org/document/s/femaledeathrow.pdf>.

2. 428 U.S. 153 (1976).

[T]he Supreme Court held that the punishment of death did not invariably violate the United States Constitution; that the death penalty was not a form of punishment that could never be imposed, regardless of the circumstances of the offense, the character of the offender, and the procedure followed in reaching the decision to impose it; and that the concerns that the penalty of death not be imposed in an arbitrary or capricious manner were met by a carefully drafted statute that ensured that the sentencing authority was given adequate information and guidance.

Id. (LexisNexis Case Summary). The Court upheld the newly-written Georgia statute and re-introduced the death penalty in the United States. *Id.* at 207.

3. Snell, *supra* note 1.

4. *Id.*

5. *See* Streib, *supra* note 1, at 18-24.

6. *See id.* at 10.

7. *Id.*

killed a young niece, nephew, or child in their care.”⁸ Forty-five percent of their victims were children or teens.⁹

The death penalty is rarely visited upon a criminal, even those whose deeds might make us shudder. In 2010, there were 14,748 people murdered in the United States,¹⁰ 112 men and two women sentenced to death,¹¹ and forty-six executions.¹² Only one of those executed, Teresa Lewis, was a woman.¹³ Dean Victor Streib, as the nation’s foremost historian of the death penalty, recorded Lewis’s punishment, and has recorded the crimes and punishments for the other 166 women and girls he lists on his annual survey of death penalties for female offenders.¹⁴

Trial lawyer, law professor, scholar, Dean Victor Streib is likely the most widely-cited and prolific death penalty scholar. He has committed to and endeavored many important things of a generous and noble nature, including his avant garde research on juvenile criminal offenders. But chief among his accomplishments, for me at least, is Victor Streib’s meticulous, dispassionate, and objective reporting of every woman sentenced to death in the United States since 1984.¹⁵ This has been no easy task. He has told how old they were at the time of their crimes, identified them by race, and described their victims and the crimes they were found to have committed.¹⁶ Disciplined and scientific, these data have a Progressive-era feel, offering measures for assessment. Victor Streib has protested, quite consistently, that he has no axe to grind.¹⁷ His objectivity is never in doubt. But his

8. *Id.*

9. *See id.*

10. *United States Crime Rates 1960-2010*, THE DISASTER CENTER, <http://www.disastercenter.com/crime/uscrime.htm> (last visited Dec. 19, 2011).

11. *Women and the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/women-and-death-penalty> (estimates as of Dec. 31, 2011).

12. *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, [http://www.deathpenaltyinfo.org/viewexecutions?exec_name_1=&exec_year\[\]=2010&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All](http://www.deathpenaltyinfo.org/viewexecutions?exec_name_1=&exec_year[]=2010&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All) (last visited Jan. 9, 2012).

13. Streib, *supra* note 1, at 3.

14. *See id.* Some of the women originally listed have been removed from death row, but each had received a death sentence. *See id.* at 2. This accounts for a slight difference in the numbers of women sentenced to, rather than living on, death row. *See id.* Additionally, two death sentences were entered against women in 2010, whose names are not on Dean Streib’s latest survey, published October 2011. *See Women and the Death Penalty*, *supra* note 11; Streib, *supra* note 1, at 4.

15. Streib, *supra* note 1, at 2 (“This report, now available primarily in electronic format, supersedes the written report, ‘Capital Punishment of Female Offenders,’ generated quarterly by this author from 1984 through early 1998.”).

16. *See id.* at 6-8, 10, 18-24.

17. Victor L. Streib, *Death Penalty For Female Offenders*, 58 U. CIN. L. REV. 845, 845 n.5 (1990).

The methodology of the research preliminarily reported in this article is to reveal all of the empirical evidence, even when the data dash original hopes of verifying the political views

research is like a vigil; it shines a light on the names and faces of women sentenced to death by the state for their crimes. Interest in the death penalty wanes and waxes, often with the notoriety of the crime, the criminal, or the prosecutor. Research about women on death row is limited; there are only a handful of legal scholars who have dedicated much of their work to informing and challenging the rest of us.¹⁸ Victor Streib has spent decades keeping track of the legal system's every imposition of a sentence of death on a woman.¹⁹ Diligent scholars like him assist the community in remaining aware that the machine of death continues, and that women are among those on whom it is used. Victor Streib refuses to let us hide the condemned: he puts their names and stories on a list that is cited by me and likely every other person who has studied, written about, or practiced death penalty law. As Streib chronicled the population of women on death row, Michel Foucault, a contemporary French philosopher, noted that "[i]t is ugly to be punishable, but there is no glory in punishing Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the punishment itself."²⁰ Condemnation and execution of women in the United States continues as "governments increasingly hid[e] the death penalty behind prison walls, legislators minimize[] its use and lessen[] the reach of capital crimes, and reformers s[seek] newer, more 'humane' means of death from the guillotine, the electric chair, the gas chamber, and the lethal injection."²¹ Little-noted executions cause little discomfort: *Ojos que no ven, corazón que no siente*—Out of sight, out of mind (what the eyes cannot see, the heart cannot feel).

Supreme Court Justice Brennan, concurring, wrote in *Furman v. Georgia*,²² that

concern for decency and human dignity, . . . has compelled changes in the circumstances surrounding the execution itself. No longer

held by the author. Having first gotten through the topic by studying and reporting all known cases of the death penalty for female offenders, I and others should then, and only then, begin to get at what it all means.

Id. at 845 n.5.

18. See, e.g., *1000+ Death Penalty Links*, THE CLARK COUNTY PROSECUTING ATTORNEY, <http://www.clarkprosecutor.org/html/links/dplinks.htm> (last updated May 1, 2008).

19. Streib, *supra* note 1, at 2.

20. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 10 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

21. Michael Meranze, *The Death Penalty: Between Law, Sovereignty, and Biopolitics*, in *AMERICA'S DEATH PENALTY: BETWEEN PAST AND PRESENT* 72, 82 (David Garland, Randall McGowen, & Michael Meranze eds., 2011).

22. 408 U.S. 238 (1972).

does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.²³

But not all his colleagues agree with that notion. U.S. Supreme Court Justice Lewis F. Powell argued, not speciously, that “[w]hat this country needs is for public executions to be reinstated[.]”²⁴

A pair of scholars have recently proposed a constitutional amendment to make executions public, which

would offer a profound affirmation of democratic transparency and accountability. . . .

. . . .

. . . [B]ecause the ultimate punishment occurs behind closed doors, it is all too easy for citizens to overlook the issue entirely. Returning executions to the public sphere would force Americans either to openly endorse or firmly reject a sanction that many find all too easy to ignore.²⁵

Their point—that “[v]eiling capital punishment from the general citizenry has reduced it to a mere abstraction”—bears repetition.²⁶ The lifework of Victor Streib is a bulwark against the forgetfulness and anonymity that might otherwise perpetuate the tragedy of capital punishment.

Esteemed law professor Charles L. Black, long an abolitionist, wrote in 1971 that “I should suppose that any person favoring capital punishment owes it to his own conscience to inquire fully into the physical facts about that which is being done with his approval.”²⁷ But secrecy is inherent in executions, and only a few people can witness the death, including the condemned and victims’ families, prison personnel, and the media.²⁸ A judge in Georgia recently granted a teen inmate’s request that his execution for the murders of his parents and his brother be videotaped to preserve his

23. *Id.* at 297 (Brennan, J., concurring).

24. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 516 (1979).

25. DAVID LAT & ZACHARY SHERMAN, *Proposed Amendment: The Execution Should Be Televised: An Amendment Making Executions Public*, 78 TENN. L. REV. 859, 859 (2011).

26. *Id.* at 862.

27. Charles L. Black, Jr., *The Crisis in Capital Punishment*, in *A CAPITAL PUNISHMENT ANTHOLOGY* 23 (Victor L. Streib ed., 1993).

28. See generally JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1998) (discussing the various laws and policies that keep executions private).

claim, post-mortem, that the method of killing him was cruel and unusual.²⁹ But that decision, and the public notice of execution, is rare.³⁰

Justice Stevens, concurring in a decision that rejected a capital defendant's arguments that Kentucky's lethal injections were cruel and unusual, expressed his own frustration at how little the public examines the death penalty despite its frequent consideration by the Supreme Court of the United States:

[C]urrent decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.³¹

In an October 2011 Gallup poll, 61% of respondents favored the death penalty, 41% thought it was applied unfairly, and an overwhelming number—64%—thought it neither deterred criminals nor lowered the murder rate.³² Information, of the type so painstakingly gathered by the likes of Victor Streib, might help Americans reach rational decisions that would obviate such inconsistent opinions. Justice Stevens also observed that his countrymen's support of the death penalty weakens when they discover other alternatives to executions:

[A] recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.³³

The death penalty is rarely newsworthy. Murder trials get coverage; occasionally, sentencing hearings—and discussions of the propriety, efficacy, or morality of capital punishment—command public attention.

29. Rhonda Cook, *DeYoung executed with videographer documenting his death*, THE ATLANTA JOURNAL-CONSTITUTION, July 21, 2011, <http://www.ajc.com/news/deyoung-executed-with-videographer-1033787.html>.

30. *Id.* The court agreed with defense lawyers who argued such video was essential to their claims that the method of execution used by the state—a 3-drug “cocktail”—caused unnecessary pain and suffering. See Rhonda Cook & Bill Rankin, *Metro*, THE ATLANTA JOURNAL-CONSTITUTION, July 21, 2011, at B2, available at 2011 WLNR 14422475.

31. *Baze v. Rees*, 553 U.S. 35, 71, 78 (2008) (Stevens, J., concurring).

32. Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Crime*, GALLUP NEWS SERVICE, 2011, www.gallup.com/file/poll/150113/Death_Penalty_111013.pdf.

33. *Baze*, 553 U.S. at 78-79.

But after the appeals are exhausted, scant newsprint or pixels are spent on the condemned. Gender, race, existence, all go unnoted.³⁴ Teresa Lewis, the last woman executed in the United States in 2010,³⁵ garnered a bit of attention when she was being sentenced, but died with little fanfare.³⁶ Lewis was found guilty of being an accomplice to the shooting deaths of her husband and stepson.³⁷ Lawyers and critics of her penalty claimed Lewis was intellectually limited, and argued that testimony from the man who actually fired the weapons that he chose her because she was not too bright, easily influenced and seduced, with a husband with money should reduce her culpability.³⁸ Courts disagreed, and she died for her role in the crime.³⁹ Despite a story one would consider newsworthy and fascinating, Teresa Lewis's execution on September 23, 2010—the first of a woman in five years⁴⁰—was barely and briefly noted in seventy-four very short printed news articles, almost half of which were in the foreign press.⁴¹

Brooke Marie Rossiers, the last woman sentenced to death on October 22, 2011, barely got a paragraph of notice or notoriety either at the time of

34. In 2005, for example, a young black woman who killed her husband and her two young children was executed with only one official notice: a few sentences in the Grand Rapids Press. *Woman executed*, THE GRAND RAPIDS PRESS, Sept. 15, 2005, at A3, available at 2005 WLNR 14748536. In August 2011, Jerry Jackson, who was black and found guilty of the sexual assault and murder of an elderly white woman, died after being given a lethal injection; he was briefly mentioned in a single news account in Queensland, Australia. *Murderer executed in U.S.*, SUNSHINE COAST DAILY (Queensland), Aug. 20, 2011, at 30, available at <http://www.lexisnexis.com>. The above articles were found as search results of major newspapers in a two-year period, including the execution dates, using the name of the condemned as terms, dated December 19, 2011 at 2:17 pm CST. The fact that so few results appear demonstrates that executions take place with very little notice from the public.

35. See Streib, *supra* note 1, at 3.

36. Although in another context, Harvard Law Dean Martha Minow's conclusion rings true here: "Today's hot social problem is tomorrow's old news, less worthy of public attention, public support, and social resources -- yet all the while just as common and just as harmful as it was when the public paid attention." Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1683 n.107 (1990).

37. Steve Szkotak Jarratt, *Anger after US woman is executed for murder plot*, THE HERALD (Glasgow), Sept. 25, 2010, at 16, available at <http://www.lexisnexis.com>.

38. Nick Allen, *Grandmother to be executed in Virginia as appeal denied*, THE DAILY TELEGRAPH (London), Sept. 23, 2010, at 18, available at <http://www.lexisnexis.com>.

39. Jarratt, *supra* note 37.

40. Allen, *supra* note 38 (noting "[t]he last execution of a woman in America was in 2005 when Frances Newton, 40, died by lethal injection in Texas for the murder of her family.")

41. A Lexis search of major newspapers since December 19, 2009 about "Teresa Lewis" on 12-19-2011 at 2:52 pm CST revealed that the majority of results were international articles. See Nick Allen, *Executed woman's last act is to apologise*, THE DAILY TELEGRAPH (London), Sept. 25, 2010 at 21, available at <http://www.lexisnexis.com>; Andy Ho, *Is chivalry alive in capital punishment?*, THE STRAITS TIMES (Sing.), Sept. 30, 2010, available at <http://www.lexisnexis.com>; Jarratt, *supra* note 37; Richard Mellows, *Vital to keep vigilant on punishments*, THE ADVERTISER (Australia), Oct. 4, 2010, at 18, available at <http://www.lexisnexis.com>.

the crime or contemporaneous with her trial or sentencing.⁴² There is no reported criminal case in California, where she was convicted of being the “mastermind” in a double murder and robbery.⁴³ Rossiers, described as a sex worker in a news story, was sent to death row while her two male co-defendants were given life sentences.⁴⁴ Her lawyer’s pleas for mercy, based upon Rossiers’ history of drug addiction and out of concern for her four small children, were rejected.⁴⁵ The only mitigation testimony reported was that of the grandmother of one of the defendant’s four children, who said Rossiers always fed her children and was not capable of doing such a crime.⁴⁶ The two victims were johns, who followed the defendant to a motel room where she lived with one of the co-defendants (a small-time drug dealer).⁴⁷ The trio stripped, robbed, and beat the men to death, then dumped their bodies nearby, wrapped in sheets.⁴⁸

Foreign newspapers often carry more stories about American women condemned to death than domestic news agencies. The international community is keenly interested in America’s unique place in having more women on death row than any other nation.⁴⁹ Execution also expose the United States to international criticism: it is banned by the United Nations Charter and the European Union espouses abolition.⁵⁰ Sadly, in the United States, there are more news stories about the infrequent (though appalling) stories about stoning young women for committing adultery and premarital sex in Third World countries than features about battered women or prostitutes or junkies who end up killing and being condemned.

42. See Yazmin Alvarez, *Ex-Corona prostitute sentenced to death for torturing, murdering two men*, SOUTHWEST RIVERSIDE NEWS NETWORK, Oct. 22, 2010, <http://www.swrnn.com/2010/10/22/ex-corona-prostitute-sentenced-to-death-for-torturing-murdering-two-men>.

43. *See id.*

44. *See id.*

45. *Id.*

46. See *Jury recommends death sentence for prostitute who robbed, beat and suffocated two men*, VALLEY NEWS (Ca.), July 15, 2010, <http://www.myvalleynews.com/story/49351>.

47. Alvarez, *supra* note 42.

48. *Id.*; see Stephen Blackmoore, *Bodies In A Trunk – The Sequel*, L.A. NOIR: THE DARKER SIDE OF THE CITY OF THE ANGELS. BOOKS. MOVIES. REAL LIFE. (Sept. 8, 2006, 7:29 AM), <http://la-noir.blogspot.com/2006/09/bodies-in-trunk-sequel.html>.

49. See e.g., Ho, *supra* note 41 (referencing Streib’s book, *DEATH PENALTY IN A NUTSHELL* (2003)).

50. *EU Guidelines on the Death Penalty: revised and updated version*, EUROPEAN UNION, <http://www.eurunion.org/eu/images/stories/dpguidelines.pdf> (last visited Mar. 14, 2012). See also *Death Sentences and Executions 2010, Annex II: Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, 44 (Mar. 2011), <http://www.amnesty.org/en/library/asset/ACT50/001/2011/en/ea1b6b25-a62a-4074-927d-ba51e88df2e9/act500012011en.pdf>; *Charter of Fundamental Rights of the European Union: Art. 2, Art. 19*, EUROPEAN UNION (Dec. 18, 2000), http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

A WOMAN'S PLACE

Pundits allege the death penalty is itself sexist, because women commit twelve percent of the crimes eligible for death (typically, aggravated murder) and only get about 1.2% of the death sentences.⁵¹ A myriad of factors enter sentencing deliberations; some are statutory, others are emotional, political, or prejudicial. Consequently, numerical comparisons do not accurately capture the difference. But concerns that women get a break pervade the discussion of the death penalty. Even as strong an abolitionist as Justice Thurgood Marshall concluded “[i]t 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.”⁵² It has been argued that “Justice Marshall’s blunt observation still rings true. Nationwide, between the years 1973 and 2002 of the 859 individuals executed, only ten—or 1.2%—were women. And as of 2002, of the 3,557 total prisoners on death row around the nation, only fifty-one—or 1.4%—are women.”⁵³

This supposed gender disparity has even led some to call for equal treatment, with potentially singularly-horrific results:

“[i]f capital jurors were asked to avoid sex bias in their deliberations, they might be more likely to treat female defendants as if they were male than to treat male defendants as if they were female.” Thus, such proposed avenues for combating the gender disparity on death row could actually lead to a harsher imposition of the death penalty on women and in-turn an increased female occupancy on death row rather than reducing the overall number of persons sentenced to death.⁵⁴

Like Justice Marshall, Dean Streib has been quoted as saying that gender bias influences death penalty impositions.⁵⁵ But one could argue that both men, renowned for their fairness and their representation of those with little financial or political currency, use the statistical disparity to establish the arbitrariness of the penalty itself. Streib has noted that when

51. Elizabeth Marie Reza, Note, *Gender Bias in North Carolina's Death Penalty*, 12 DUKE J. GENDER L. & POL'Y 179, 180 (2005).

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

53. Reza, *supra* note 51, at 180.

54. Christine Nader & Trisha J. Pasdach (eds.), *Eleventh Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Correctional Facilities*, GEO. J. GENDER & L. 77, 80 (2010) (quoting Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 628 (2006)).

55. Streib, *supra* note 17, at 887-88.

states and prosecutors can no longer stomach capital punishment, it may “fade away”⁵⁶ When observing how many more men than women are condemned to die for their crimes, and simultaneously recognizing our country’s commitment to gender equality, Streib has mused that our

leaders may express alarm at the trend and seek means to reverse it. While this political position has the advantages of being tough on crime and of being opposed to gender bias, calling for the death of girls and women may not provide the same macho image as calling for the death of adult men.⁵⁷

Statistical differences between the number of men and women on death row, however and whatever their relevance, are probably appropriate. Some decry “a system-wide apparent bias based on the gender of the offender.” Simply put, throughout the history of the American capital punishment system, there have been significantly fewer women both sentenced and executed for capital crimes than their male counterparts.⁵⁸ But the number of women who commit death-eligible crimes, and are ultimately sentenced for them, are too small to reach any conclusion. Beyond that, and in any case, only a very small percentage of men get the death penalty.⁵⁹ There is no data for actual numbers of crimes that make defendants eligible for death; one can only count the number of murders⁶⁰ and number of people living on death row⁶¹

The result is that a very small percentage of men and women get the death penalty—each under two percent.⁶² These may not be fair

56. *Id.* at 880.

57. *Id.*

58. Reza, *supra* note 51, at 180 (quoting Victor Streib, *Gendering the Death Penalty: Countering Sex Bias in Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 433 (2002)).

59. See Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CENTER (June, 1998), <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides>.

60. *United States Crime Rates 1960-2010*, *supra* note 10, <http://www.disastercenter.com/crime/uscrime.htm>.

61. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last updated Oct. 1, 2011).

62. I know all these comparisons are phony, and that death sentences might actually be imposed one or two years after the murder is committed, may I legitimately say something like, only 1.2% of all murderers end up on death row. For example, in 1976: with a population of 214,659,000, there were 18,780 murders and 60 death sentences. In 1991, population 252,177,000, there were 24,700 murders and 126 death sentences. In 2000, population of 281,421,906 there were 15,586 murders and 76 people put on the row. In 2010, population 308,745,538, there were 14,748 murders and 69 death sentences. See THE DISASTER CENTER, *United States Crime Rates 1960-2010*, <http://www.disastercenter.com/crime/uscrime.htm>; DEATH PENALTY INFO. CENTER, *Death Row Inmates*

generalizations (because of the panoply of complex considerations that lead juries and judges to impose capital punishment) but it is just as valid to compare the number of murderers to the number of condemned as to contrast the number of female murders who are sentenced to death with the nearly ten-times larger number of men condemned for their killings. In finding three death penalties too capricious to be fair, Justice Stewart opined, “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁶³ The Supreme Court of the United States has reiterated that capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes[,]” and whose extreme culpability makes them “the most deserving of execution”⁶⁴ If only that were so.

Instead, all the data should reflect that the death penalty is unusual, arbitrary, and possibly random. Dean Streib’s work is integral in reaching that conclusion. A recent empirical study of capital punishment in Connecticut illustrates and supports this position.⁶⁵ “The extreme infrequency with which the death penalty is administered in Connecticut raises a serious question as to whether the state’s death penalty regime is serving *any* legitimate social purpose.”⁶⁶

The modern jurisprudence of the death penalty began in 1972, when the Supreme Court in *Furman* struck down state death-penalty laws that lacked guidelines on how the penalty should be applied.⁶⁷ In a per curiam opinion expressing the view of five members of the Court, it was held that the imposition and carrying out of the death sentence in the present cases involving three black men (who, separately, committed two rapes and one killing) constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁶⁸ Some of the Justices opined that the fact that the death penalty was imposed so infrequently—only fifteen percent of

by *State and Size of Death Row by Year*, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

63. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

64. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

65. The author studied “the application of the death penalty in Connecticut from 1973 until 2007, a period during which 4686 murders were committed in the state[.]” gathering background information on the overall numbers of murders, death sentences, and executions in Connecticut. John J. Donohue, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4686 Murders to One Execution*, 1 (2011), available at http://works.bepress.com/john_donohue/87 (last visited Jan. 9, 2012). “Specifically, of the 4686 murders committed during the sample period, 205 are death-eligible cases that resulted in a homicide conviction, and 138 of these were charged with a capital felony.” *Id.* “Of the 66 [convicted of a capital felony,] 29 then went to a death penalty sentencing hearing, resulting in 9 sustained death sentences, and one execution (in 2005).” *Id.*

66. *Id.*

67. *Furman*, 408 U.S. 238.

68. *Id.*

death-eligible murder convictions in Georgia lead to a death sentence⁶⁹—made it “freakishly” rare, and therefore arbitrary and unconstitutional.⁷⁰ The *Furman* Court was not asked to find all death penalty laws unconstitutional.⁷¹ It was asked only whether, in that instant case, the imposition of the death penalty violated the prohibition against cruel and unusual punishment.⁷² But data over the past fifty years, and studies like the newest one in Connecticut, raise the alarm that capital punishment is indeed, rare, random, and likely contrary to every tenet of the U.S. Constitution.⁷³

Dean Streib has been careful to avoid the conclusion that being a woman gives a capital defendant an advantage. His data shows that for whatever reason, women are less likely than men to be sentenced to death and he does find a “gender-bias away from imposing death sentences and executions,” but he neither judges nor exhorts about the results.⁷⁴ Instead, he has summarized his research in ways that highlight the arbitrariness of the death penalty:

The executed females 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. . . . [P]erhaps most fatally for them, 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 of nothing more than extermination.⁷⁵

Critics of capital punishment, like Albert Camus, argue that it is the state, and not the criminal, who is the monster:

But what then is capital punishment but the most premeditated of murders, to which no criminal’s deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and

69. *Id.* at 387, n.11 (Burger, J. dissenting).

70. *Id.* at 293.

71. *Id.* at 308.

72. *Furman*, 408 U.S. at 239.

73. See Donohue, *supra* note 65.

74. Streib, *supra* note 17, at 878.

75. *Id.* In 2002, a movie was made by that name, see *Monster*, INTERNATIONAL MOVIE DATABASE, 2003, www.imdb.com/title/tt0340855/ (fictionalizing the life of Aileen Wuornos, a prostitute who killed and robbed seven clients. Her claims of self-defense were rejected.)

who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.⁷⁶

There are objective reasons for statistical differences.⁷⁷ Women are less likely to be involved in capital crimes.⁷⁸ Women have fewer criminal convictions, yet many of their murders are committed during the course of another violent felony,⁷⁹ and a large number of convicted women have killed intimates.⁸⁰ For good or ill, it is the murder of strangers that tends to elicit the hue and cry for severe punishment; we can choose our mates, but cannot escape the vagaries of random street crime.⁸¹ Ironically, most of the women on death row are there for killing their families⁸²

There is also the argument that women are more likely to be given an individual assessment of culpability than men.⁸³ Dean Streib once said that it is “easier to convince a jury that women suffer emotional distress or other emotional problems more than men.”⁸⁴ More likely, a woman—because of her uniqueness as a killer—might capture the focus of those who, when choosing a sentence, are commanded to consider the aggravating and mitigating factors of a person’s life and history that would make condemnation a just punishment.⁸⁵ A court or jury that considers the

76. ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION & DEATH, 173, 199 (Justin O’Brien trans., 1961).

77. See generally Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT’L J. SEXUAL ORIENTATION L., 104, 110-11 (1995) (providing a well-written description of how the death penalty functions regarding the interplay of aggravating and mitigating factors).

78. “[F]emales are not only much less criminal than males, they are so much less criminal that whereas convictions are, statistically at least, ‘normal for males’ they are very unusual for females.” FRANCES HEIDENSOHN, *WOMEN AND CRIME* 2 (2d ed. 1985).

79. See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1128, n.64 (1990). “Out of the total number of felony murders committed in any given year, only about six percent are committed by women.” Christine Nader & Trisha J. Pasdach *supra* note 54, at 78.

80. See Lawrence A. Greenfeld & Tracy L. Snell, *Bureau of Justice Statistics, Special Report: Women Offenders*, U.S. DEPARTMENT OF JUSTICE, 4, <http://www.bjs.gov/content/pub/pdf/wo.pdf> (revised Mar. 3, 2000).

81. See Christine Nader & Trisha J. Pasdach, *supra* note 54, at 79 (“the seriousness of domestic homicides are generally discounted in comparison to felony murder, which men overwhelmingly commit, because the murder of a family member or sexual partner is typically read by the law to be mitigated by the stresses of domestic life. Because the victims of women killers are substantially more likely than those of men to be family members or other intimates, the tendency to exclude domestic homicides from capital murder tends to also exclude women’s homicides as compared to men’s homicides” (footnotes omitted)).

82. Streib, *supra* note 1, at 10.

83. Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN’S L.J. 283, 288 (1996).

84. Carol J. Williams, Woman’s execution could lead to more Virginia case might end reluctance to put females to death, THE STAR-LEDGER (Newark, New Jersey), Sept. 26, 2010, *available at* 2010 WLNR 19154318.

85. Schmall, *supra* note 83, at 311.

mitigation of horrific histories of personal abuse in the case of women may be moving more closely toward nondiscriminatory consideration in every defendant's case.⁸⁶

86. As I have argued before:

We need to check our impulse to find sex discrimination in capital sentencing and punishment when it is clearly not the only reason for disparity. We must applaud the inclusion— for women, at least—of personal stories as an element of just desert, and we must try to extend that inclusion to men whose lives hang in the balance.

Id. at 326.