VICTIM OR VAMP? IMAGES OF VIOLENT WOMEN IN THE CRIMINAL JUSTICE SYSTEM

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> Why are our bodies soft and weak and smooth,
> Unapt to toil and trouble in the world,
> But that our soft conditions and our hearts
> Should well agree with our external parts?
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> –Kate, The Taming of the Shrew, Act V. Sc. II

> The feminist agenda is not about equal rights for women. It is about a socialist, anti-family political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism and become lesbians.
>
> –Pat Robertson, 1992 Christian Coalition fundraising letter

I. INTRODUCTION

The uncritical resort to sex-role stereotypes pervades the trials, sentencings, and media reactions to women who receive the death penalty. Although ideas of sex-appropriate behavior influence innumerable aspects of social relations, their influence in the criminal justice setting can be particularly invidious. In a given trial, a woman defendant's failure to conform to traditional notions of womanhood may lead judges and juries to believe that she is more likely to have committed the offense with which she is charged, to impute a higher degree of *mens rea* to her criminal action, or to condemn her more harshly for criminal behavior. On a general level, the condemnation of women who, in addition to committing criminal acts, also transgress other sex-role stereotypes, reinforces ideas of deviance and normalcy that can confine women to traditional roles of passivity and helplessness.

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While sex discrimination is increasingly recognized as a pervasive feature of many societal institutions and practices, its full range and implications have yet to be charted. The critique of sexism in the criminal justice system tends to be localized to certain arenas, such as the law of rape and domestic violence. Other features of the system, such as the gender segregation of prisons and the widely disparate incarceration rates for men and women, draw relatively little critical attention by comparison. The widespread association of criminality—and especially violence—with men facilitates this oversight, as the naturalization of "male" and "female" insulates certain gender-related disparities from scrutiny. With this in mind, it is important to investigate the ways in which sex stereotyping and gender bias affect the indictment, conviction, and sentencing of women.[1]

This article focuses on one aspect of this too-often hidden story: the elements of gender bias in capital punishment, and how these play themselves out in broader societal understandings and practices surrounding the use of violence by women. The symbolic embodiment of justice in a female figure belies the fact that the majority of law-makers, law-enforcers, law-interpreters, and law-breakers are male.[2] The masculinist assumptions embedded in our criminal justice system[3] mirror and reinforce paradigms of social normalcy and deviance. While more men are convicted and incarcerated than women, this phenomenon itself reinforces the image of the "criminal woman" as "doubly deviant," and even "doubly damned."[4] The answer is not to incarcerate more women just for statistical equality, but rather to discourage the destructive perpetuation of sex-role stereotypes by the organs through which criminal justice norms are articulated and promulgated, including the, the bar, bench, and media.

This Article looks at the portrayal of women on death row by lawyers, judges, and journalists. More specifically, it examines the

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[1] Two recent contributions to this area of study are Elizabeth Rapaport, Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases, 4 Buff. Crim. L. Rev. 967 (2001) and Elizabeth Schneider, Battered Women & Feminist Lawmaking (2000).

[2] Bureau of Justice Statistics indicate that, in 1991, 5% of state prison inmates and 8% of federal prison inmates were women. The life chances of going to prison are 9% for men, compared to 1.1% for women. Women accounted for 22% of all arrests in 1998, and women accounted for 14% of violent offenders, based on self-reports of victims of violence. U.S. Department of Justice, Bureau of Justice Statistics, Criminal Offenders Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last modified Nov. 29, 2000).

[3] *See generally* Stephen J. Schulhofer, The Feminist Challenge in Criminal Law, 143 U. Pa. L. Rev. 2151, 2151 (1995) ("[C]riminal law is, from top to bottom, preoccupied with male concerns and male perspectives.").

[4] Ann Lloyd, Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women 36 (1995); *see* Frances Heidensohn, Women and Crime 112 (2d ed. 1995) (citing C. Lombroso & W. Ferrero, The Female Offender 152 (1895) (referring to a female offender as a "double exception")).

representation of the four women who were on Florida's death row in August 2000: Ana Maria Cardona, Andrea Hicks Jackson, Virginia Larzelere, and Aileen Wuornos. The documents indicate a widespread condemnation of female violent offenders from a range of ethnic backgrounds (Latina, African-American, and Caucasian) as emblems of the disruptive potential of all women who challenge sex-role boundaries. In this fashion, the "othering" of convicted women, and especially of women sentenced to death, exhibits a narrative feature not available in justifications for executing men. Experience indicates that all criminals sentenced to death are "othered" in certain respects, and even demonized and dehumanized as part of a ritual of social retribution and purification. However, violent women have committed a double transgression. Their violation of sex-role boundaries provides an additional, and often central, focus for condemnation in the courtroom and the media. This emphasis, in turn, supports a familiar normative framework in which society prohibits the use of violence by women in a range of ordinary and extraordinary situations.

On the one hand, the association of non-violence with women may be constructive in some areas, for example in the efforts of women at various points in history to promote national and international peace movements.[5] On the other hand, these entrenched assumptions socialize women such that they are less likely to use violence in confrontations with intimates or strangers and exacerbate women's feelings of vulnerability and fear. Anecdotal evidence suggests that women in countries whose armed forces provide combat training to both men and women are less likely to be targets of assault by male compatriots, who know that women are physically and psychologically prepared to respond in kind.[6]

The demonization of violent women in American society illustrates one way in which a country's criminal justice system, including both its formal and informal components, constructs and reinforces norms of appropriate behavior—norms that encompass more than the proscribed acts at issue in a given trial.[7] In this article, I argue that the social coding of criminal violence by women as *deviant*, rather than simply blameworthy or even reprehensible, goes hand in hand with normative restrictions on appropriate female aggression, especially physical aggression, in other spheres, ranging from defense of the country in military combat to self-defense in situations of assault.

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[5] *See, e.g.*, Michael Henderson, All Her Paths are Peace: Women Pioneers in Peacemaking (1994); Mercedes Randall, Improper Bostonian: Emily Greene Balch, Nobel Peace Laureate (1964). For current efforts, see the website of the Women's International League for Peace and Freedom (WILPF), *at* http://www.wilpf.int.ch/~wilpf/.

[6] Author's conversations with Israeli and Eritrean colleagues.

[7] *See* Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 Yale L.J. 1579, 1594 (1989) (describing a trial as a "boundary-maintaining device that broadcasts and reinforces social norms").

The article proceeds in three parts. Part I sets out the factual predicate for the subsequent analysis, describing the violent acts and criminal trials of four women sentenced to death in Florida courts. These women's crimes represent a cross-section of crimes for which women have received the death penalty in the United States.[8] Ana Maria Cardona was sentenced to death for beating and murdering her three-year-old son; Andrea Hicks Jackson was sentenced to death for shooting and killing a police officer; Virginia Larzelere was sentenced to death for arranging her husband's murder; and Aileen Wuornos was sentenced to death for the murders of six men, each of whom had picked her up as a prostitute. A survey of the trial transcripts, appellate opinions, and media reports in these cases[9] illustrates the ways in which stereotypes of appropriate female behavior are used by lawyers, judges, and journalists to portray violence by women as particularly threatening to the social order, and thus particularly deserving of censure.

Part II draws out the implications of these observations, exploring the uses and abuses of sex-role stereotypes in the condemnation or legitimation of violence by women. First, it addresses the contention that women receive more lenient treatment at the hands of the criminal justice system than men, and suggests that this so-called "chivalry thesis" exemplifies a societal preoccupation with controlling women. Second, it examines the battered woman's defense as a contemporary manifestation of

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[8] Available statistics show that the fifty-two women on death row in the United States as of Jan. 2001 were there for the following crimes:

murder of a non-relative female	13
murder of a non-relative male	04
murder of multiple adult non-relatives	07
murder of non-relative child(ren)	05
murder of own child(ren)	08
murder of husband and children	02
murder of husband by hired killer	08
murder of husband directly	04

Information available from Death Penalty Information Center, Case Summaries for Current Female Death Row Inmates (last visited May 27, 2001), *at* http://www.deathpenaltyinfo.org/womencases.html; *see* Victor L. Streib, Death Penalty for Female Offenders: January 1, 1973 to December 31, 2000, *at* http://www.law.onu.edu/faculty/streib/femdeath.htm (last modified Feb. 2001).

[9] The trial transcripts for the Cardona, Jackson, and Larzelere cases are not readily available, but the appellate opinions contain much of the basic information, as do the surrounding media reports and interviews. These sources offer a sufficient basis to construct an analytic framework that can provide a foundation for further study. The author consulted the transcripts from the first Wuornos trial during a trip to Volusia County, Florida.

chivalry, exploring the broader societal implications of excusing women by denying their moral agency. Following the case studies of women sentenced to death for acts of violence in Part I, Part II seeks to evaluate narratives of female victimization and narratives of female agency from a feminist perspective, that is, one that requires the incorporation of women's perceptions and experiences into the behavioral norms and value judgments of society as a whole.

Part III takes this inquiry one step further, hypothesizing a connection between social attitudes towards violence by women and the subordination of women through the internalization of fear. The refusal to empower women as equal participants in the legitimate use of force to protect the state, the construction of self-defense laws that fail to recognize the circumstances and types of force that women are likely to use to protect themselves, and the persistent and pervasive contrast between female helplessness and male aggression in popular imagery and rhetoric, all have profound and disturbing implications for a society that envisages itself as moving towards gender equality. The temptation for defense lawyers to deploy stereotypes of female victimization in defending women who use violence should be weighed against the broader social consequences of denying women moral agency in the use of physical force. Demonizing violent women in criminal prosecutions is no more empowering than victimizing them, and also contributes to subordinating women through fear. In the longer term, normalizing some uses of violence by women, i.e., combating the double standard in the use of violence by women and men, might be one way to help reduce the incidence of violence against them. We, as legal scholars, practitioners, and advocates, must continue promoting awareness of and sensitivity to the detrimental effects of resort to sex-role stereotypes in the administration of criminal justice, and to the ways in which these interfere with the goals of ensuring individual justice and creating a society less burdened by gender inequalities perpetuated by inflexible ideas about sex-appropriate behavior.

II. WOMEN ON FLORIDA'S DEATH ROW

Focusing on the cases of women sentenced to death for committing violent crimes provides a controlled setting in which to examine the use of sex-role stereotypes by lawyers, judges, and journalists in narratives of female violence. The cases of the four women on Florida's death row offer a particularly relevant focus for several reasons. First, as noted above, their crimes illustrate the range of crimes for which women have been sentenced to death in the United States. These women all used violence, but each did so in different situations and against different targets. What unites these cases is the fact that the defendants are women, a common feature not lost on commentators who have referred to this group as Florida's "exclusive

sorority."[10] Finally, examining cases from a single state keeps constant certain background variables, including the laws on aggravating and mitigating factors in sentencing, the appellate structure of the courts, and a range of intangibles (such as historical memory of notorious cases, political culture, etc.). This allows a more concentrated focus on the deployment of sex-role stereotypes in judicial and journalistic narratives. At the same time, looking at reports of cases from other states and the treatment of the Florida cases in the national media helps ensure that the implications of this qualitative analysis are not confined exclusively to Florida—in other words, there is no reason to believe that the cases discussed here are outliers.

Fifteen women have been sentenced to death in Florida since its 1924 introduction of the electric chair.[11] Of the fifteen women, ten had their sentences commuted to life in prison,[12] one was executed,[13] and four remained on death row in August 2000.[14] In addition to the sex-role stereotypes deployed in the trials of these four women, the media reactions to their crimes and convictions have been infused with gendered imagery and editorialization. In March 1998, Florida executed Judy Buenoano, a woman referred to by prosecutors and the media as the "Black Widow."[15] This execution, the first of a Florida woman since its introduction of the electric chair, followed the widely publicized execution of Karla Faye Tucker in Texas. The Florida press was quick to contrast Tucker's beauty, religious conversion, penitence, and celebrity support with Buenoano's non-

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[10] Sabrina L. Miller, In The Shadow of Death: Life Goes on for Four Women Condemned to Die in Florida, Hous. Chron., Nov. 7, 1999, at 11, *available at* 1999 WL 24263615.

[11] For an overview of the death penalty in Florida and women on Florida's death row, see Kathleen O'Shea, Women and the Death Penalty in the United States, 1900-1998 111-43 (1999).

[12] Margaret Talev, Black Widow at End of Web, Tampa Trib., Mar. 29, 1998, at 1, *available at* 1998 WL 2770104.

[13] Judy Buenoano was executed on March 30, 1998.

[14] Andrea Hicks Jackson had her sentence commuted to life imprisonment on June 16, 2000; *see infra* note 47. By comparison, 196 men were executed in Florida between 1924 and 1964. There were no executions in Florida between May 1964 and May 1979. Since 1979, 51 men have been executed, and 370 men are currently on Florida's death row. Florida Department of Corrections, Death Row Fact Sheet, *at* http://www.dc.state.fl. us/oth/ deathrow/index.html (last modified Mar. 2001); Florida Department of Corrections, Death Row Roster, *at* http://www.dc.state.fl.us/activeinmates/ deathrowroster.asp (last modified May 27, 2001).

[15] *See, e.g.*, Alan Judd, Buenoano Death Raises Execution Issue, Sarasota Herald-Trib., Mar. 31, 1998, at 4B, *available at* 1998 WL 27453834; Kathleen Sweeney, First Woman Faces Electrocution, Fla. Times Union (Jacksonville), Mar. 29, 1998, at A1, *available at* 1998 WL 6188503.

descriptness, reluctance to court the press, and stubborn protestation of innocence.[16]

The following sections explore reactions to and representations of the four women who were on Florida's death row at the time of Buenoano's execution.[17] These reactions and representations offer insights into societal attitudes towards the use of violence by and against women. Each of the women whose story is told below used violence in a way that confirmed a negative sex-role stereotype or, conversely, violated a particular image of appropriate female behavior. In each of these cases, combinations of the woman's race, class, and perceived or actual sexual orientation intensified her marginalization and alienation from the protections afforded by conforming to community norms and expectations. The following descriptions illustrate how these characteristics interact as society, embodied here in the media and the courts, brands violent women as deviant, threatening, and deserving of the most extreme social sanction—the penalty of death.

A. Ana Cardona

The common-law crime of infanticide,[18] which, as defined by statute, can be committed only by women, institutionalizes the belief that postpartum depression may drive women to murder. On a broader level, the crime of infanticide provides a legal label for female hysteria (literally, craziness coming from the womb). It at once carves out a space in the law that ostensibly responds to women's experiences, and concretizes the notion that new mothers may be incapable of controlling their behavior. The specific crime of infanticide invokes a more general societal fear of

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[16] *See, e.g.*, Julie Hauserman, State's Will to Execute Women Is Put to Test, St. Petersburg Times, Mar. 28, 1998, at 1A, *available at* 1998 WL 4253910; Judd, *supra* note 15; Talev, *supra* note 12.

[17] It seems somewhat artificial to refer to these women by their last names, but as this is the common practice, it is followed here.

[18] Unlike England and Canada, the United States does not have a statute that distinguishes infanticide from other forms of murder; *see, e.g.*, Christine A. Fazio & Jennifer L. Comito, Note, Rethinking the Tough Sentencing of Teenage Neonaticide Offenders, 67 Fordham L. Rev. 3109, 3110 n.9 (1999); *see generally* Janet Ford, Note, Susan Smith and Other Homicidal Mothers—In Search of the Punishment that Fits the Crime, 3 Cardozo Women's L.J. 521 (1996); Michelle Oberman, Mothers Who Kill: Coming To Terms With Modern American Infanticide, 34 Am. Crim. L. Rev. 1 (1996). Helen Boritch cites section 233 of the Criminal Code of Canada (1996): "A female person commits infanticide when by a willful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed." However, she notes that "most women who kill their children are charged with other types of homicide." Helen Boritch, Fallen Women: Female Crime and Criminal Justice in Canada 35 (1997); *see also* Infanticide Act of 1938, 1 & 2 Geo. 6, ch. 36 (Eng.).

"unnatural" and violent mothers: One of the most evil and least comprehensible acts a woman can commit in the eyes of society is to kill her child.

Ana Maria Cardona was sentenced to death in Florida on April 1, 1992 for beating and murdering her three-year-old son, Lazaro Figueroa. The Florida press nicknamed the toddler "Baby Lollipops" because of the shirt he was wearing when the police discovered his body.[19] Cardona's conviction was secured largely through the testimony of her former live-in partner, Olivia Gonzalez-Mendoza, who pleaded guilty to second-degree murder and was sentenced to forty years' imprisonment.[20]

In reviewing the Dade County Circuit Court's imposition of the death penalty, the Florida Supreme Court narrated Cardona's story as follows in an opinion *per curiam*: In the late 1980s, Cardona lived with Lazaro's father, "a well-off drug dealer" named Fidel Figueroa, in "an upscale apartment [where they] maintained a lavish existence."[21] The month before Lazaro's birth, Figueroa was murdered, leaving Cardona a $100,000 estate that she "exhausted in ten months" while Lazaro and his sister lived with friends and relatives.[22] The children, after having been "turned over" briefly to the Department of Health and Rehabilitative Services, were returned to Cardona's custody.[23] Cardona and her children lived with Cardona's romantic partner, Olivia Gonzalez-Mendoza, in "a series of cheap hotels,"[24] and their only sources of income were "Gonzalez-Mendoza's various jobs and shoplifting."[25] The situation is described in the supreme court's opinion as follows:

> During an eighteen-month period that began after the children were returned to her, Cardona beat, choked, starved, confined, emotionally abused and systematically tortured Lazaro. The child spent much of the time tied to a bed, left in a bathtub with the hot or cold water running, or locked in a closet. To avoid changing Lazaro's diaper for as long as possible, Cardona would wrap duct tape around the child's diaper to hold in the excrement. Cardona

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[19] *See* Cardona v. State, 641 So. 2d 361, 361 (Fla. 1994) , *proh. denied* 725 So. 2d 1107 (Fla. 1998), *cert. denied* 513 U.S. 1160 (1995); Miller, *supra* note 10.

[20] Craig Pittman, Interest Points to Death Row's Lack of Equality, St. Petersburg Times, Jan. 18, 1998, at 1A, *available at* 1998 WL 4241171. For Cardona's side of the story, *see* Kathleen A. O'Shea, Women on the Row: Revelations from Both Sides of the Bars 99, 105, 107 (2000).

[21] 641 So. 2d at 362.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

> blamed Lazaro for her descent "from riches to rags," and referred to him as "bad birth."
>
> Gonzalez-Mendoza was aware of the abuse and began to participate in the abuse because it pleased Cardona.[26]

Based on testimony from Gonzalez-Mendoza obtained as part of a plea deal,[27] a jury found Cardona guilty of aggravated child abuse and first-degree murder for having beaten Lazaro with a baseball bat on October 31, 1990 and having abandoned his body in the bushes near Miami Beach.[28] The jury[29] recommended death by a vote of eight to four, and the trial court followed the jury's recommendation.[30]

In accordance with Florida sentencing procedures, the trial court considered aggravating and mitigating factors in Cardona's case. It found that the murder was especially heinous, atrocious or cruel,[31] but that at the time of the murder Cardona had been under the influence of extreme mental or emotional disturbance due to her "fall from riches to rags" and her daily use of cocaine.[32] The defense strategy designed to elicit compassion provoked cynicism among certain observers; one newspaper reported that "even as she was being hustled out the [courtroom] door, Cardona tried to paint herself as a victim."[33] According to the Florida Supreme Court, the trial court also considered that 1) Cardona did not meet her father until she was twelve; 2) she claimed that she was raped when she was eleven but her mother and father did not believe her; and 3) a guardian *ad litem* for

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[26] 641 So. 2d at 363.

[27] *Id.*

[28] According to Cardona and Gonzalez, the child was "'alive but injured'" when they left him in Miami Beach, four days before he was found by a utility crew working in the area; an autopsy determined he had been dead less than a day at the time he was found. Florida Judge Faults State Workers, Self in Beaten Boy's Death, Ariz. Republic, Dec. 9, 1990, at B13, *available at* 1990 WL 3742977. "'In [Cardona's and Gonzalez's] minds, someone rich would find him. They'd clothe and feed him,' said Miami Beach Detective Gary Schiaffo. They thought 'no one was going to question the rich,' so those people wouldn't have to worry about Lazaro's scarred body." Donna Gehrke, Injured Tot Lived for Days, Hous. Chron., Dec. 8, 1990, at 17, *available at* 1990 WL 2977111.

[29] "Baby Lollipops" Mom Goes on Trial, Orlando Sentinel, Mar. 13, 1992, at B6, *available at* 1992 WL 4673299.

[30] *Id.*

[31] Fla. Stat. § 921.141(5)(h) (1991).

[32] 641 So. 2d at 363; Fla. Stat. § 921.141(6)(b) (1991).

[33] Patrick May, Fla. Woman Sentenced to Die for Torture-Murder of Son, Baltimore Sun, Apr. 2, 1992, at 3A, *available at* 1992 WL 9501433.

Cardona's other two children recommended that a life sentence would be in the surviving children's best interest.[34]

Andrew Kassier, Cardona's defense attorney, reflected that, during the course of the trial, "'it became clear that Ana Cardona was going to be held up to our community as a monster—that the ultimate goal of this prosecution was to put a mother in the electric chair.'"[35] This sentence captures the dichotomy between "monster" and "mother" that structured both sides' narratives of the case. At the end of the Supreme Court proceedings, prosecutor Catherine Vogel said Cardona "deserved the sentence because she took pleasure in torturing the toddler."[36] Had a man been charged with this murder, the two attorneys could not have drawn on the culturally-ingrained ideal of benevolent motherhood to structure their respective propositions: namely, the defense's argument that community condemnation of a mother is antithetical to the treatment that "mothers" deserve, and the prosecution's contention that the disjunction between Cardona's alleged acts and the community ideal of motherhood required imposing the death penalty.[37] Each side attempted to show that its victory would better protect the cultural ideal of motherhood—a narrative strategy not available when defendants are men. In this case, the court upheld the death penalty, comparing Cardona's actions to those of other defendants convicted of aggravated child abuse leading to murder, and concluding that

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[34] 641 So. 2d at 363. The trial court refused to admit the guardian's recommendation into evidence; the guardian stated that the two children should never see Cardona again, but that a life sentence would be in their best interest "because of the guilt the children likely would feel if their mother was executed." 641 So. 2d at 365.

[35] May, *supra* note 33.

[36] David Cazares, Mother's Conviction Upheld, Appeal Rejected in Boy's Murder, Sun-Sentinel (Ft. Lauderdale), June 3, 1994, at 1B, *available at* 1994 WL 6818033. Vogel had earlier insisted in her closing argument to the trial jury that "There is no word to describe to you what (Cardona) had done to her own flesh and blood. . . . There is no word horrible enough to tell you what she is . . . ." Mom Killed Her Baby, Jury Decides, Orlando Sentinel, Mar. 21, 1992, at D1, *available at* 1992 WL 4675383.

[37] This is not to say that men who murder children are socially accepted; clearly they are not, as the death penalty statistics for men convicted of homicide show; *see supra* note 14. However, it seems logical that men's criminal behavior could be contrasted with humane norms of conduct expected of members of society generally, rather than with specific, culturally-ingrained ideals of benevolent motherhood that are, by their very nature, sex-specific. This intuition is borne out by the narration of facts in Florida cases of men sentenced to death for aggravated child abuse: the defendant's behavior is portrayed as abhorrent and unacceptable, but not specifically as sex-inappropriate or deviant *for a man*; *see, e.g.*, Stephens v. State, 787 So. 2d 747 (Fla. 2001); Lukehart v. State, 776 So. 2d 906 (Fla. 2000); James v. State, 695 So. 2d 1229 (Fla. 1997); *but c.f.* Rivera v. State, 561 So. 2d 536 (Fla. 1990) (death penalty upheld for defendant convicted of sexually abusing and killing 11-year-old girl; similar crimes evidence properly admitted; doctor's diagnosis of exhibitionism, voyeurism, and transvestism not sufficient to outweigh aggravating factors including that murder was "especially heinous, atrocious, or cruel" and committed in a "cold, calculated, and premeditated manner").

"in light of the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case."[38]

The purpose of this analysis is not to challenge the Supreme Court's decision, but to highlight certain features of its discussion of the case. For example, why did it matter that Cardona allegedly squandered her inheritance from Lazaro's father? Why did the trial court readily accept Gonzalez-Mendoza's self-serving portrayal of Cardona as a dominant and even abusive partner? Why was Cardona's "extreme emotional disturbance" attributed solely to her economic impoverishment and drug use, rather than to her traumatic childhood (perhaps thereby making it less compelling as a mitigating factor in sentencing)? What effects did Cardona's inability to understand or speak English[39] have on the fairness of her trial, and on the jury's perception of her as marginal and deviant: a Latina lesbian taken in by the Miami drug culture,[40] unable to conform to society's expectations of her as a woman and mother?[41] Had Cardona not been a pariah in so many other respects, it is arguably unlikely that eight members of the jury and the trial judge would have viewed her so readily as the embodiment of evil and sentenced her to death.[42]

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[38] 641 So. 2d at 365-66, *referring to* Dobert v. State, 328 So. 2d 433 (Fla. 1976) (death warranted where defendant murdered his nine-year-old daughter by continuous beatings, kicking, hitting, choking, and other torture and depriving her of medical care), *aff'd* 432 U.S. 282 (1977).

[39] *See* Miller, *supra* note 10 ("Cardona, 37, a native of Cuba, spoke little English when she came to death row.").

[40] *See* Mother of Dead Baby Linked to Murder Plot, St. Petersburg Times, Dec. 19, 1990, at 4B, *available at* 1990 WL 8094408 (talking about Cardona's "shady past," including previous arrests and four other children).

[41] For example, Gonzalez had said that Cardona "resented having to take care of" Lazaro, Mother Gets Death in Tot's Fatal Torture, Chi. Trib., Apr. 2, 1992, at 13, *available at* 1992 WL 4468893. In his closing argument, defense attorney Ron Gainor admitted that "Ana Cardona was a rotten mother," but he insisted that "there is a difference between a murderer and a criminally negligent person." Mom Killed Her Baby, Jury Decides *supra* note 37. Interestingly, a Florida appeals court overturned a trial court's radical upwards departure from the sentencing guidelines in the killing by a mother of her 17-day old infant, noting that "[i]n the instant case, the trial court combined the age-related vulnerability of the infant with what it considered an extraordinary and egregious criminal act, a mother killing her own infant." Robinson v. State, 589 So. 2d 1372, 1373 (Fla. 1992), following Lettman v. State, 526 So. 2d 207 (Fla. 1988) (murder of three-year-old child by father); *see also* Small v. State, 667 So. 2d 299 (Fla. 1995) (overturning upward departure from guidelines in case of mother who killed thirty-five-month-old child).

[42] The failure of the state's child protection system was also evident in this case. Chief Dade Juvenile Judge William Gladstone admitted: "This case is my failure too. . . . We all failed. Somehow, this child was killed, and he was killed by every person in this state." Dan Sewell, Gruesome Child-Abuse Case Brings New Criticism of Florida System, Assoc. Press, Dec. 11, 1990, *available at* 1990 WL 6035510. Lazaro and his sister had been placed under state supervision two years earlier, after Cardona left them with a babysitter and didn't

Cardona told the trial jury (in Spanish) in response to its guilty verdict: "'You don't know what I've gone through in my life. You don't know anything about me.'"[43] The "othering" of a mother who kills can occur along many dimensions, from the view of women as naturally inclined to hysteria and erratic behavior, to the inability to understand how a woman could reject a heterosexual, family-oriented social universe. It has been argued that women enjoy more lenient treatment by juries, such as fewer convictions and lighter sentences, because jurors identify and empathize with women more easily than they do with men.[44] However, despite this perception, the stories related here suggest that women on death row seem particularly likely to have experienced the criminal justice system as alienating and uncomprehending: in other words, that only certain women, namely, those who conform to sex-role stereotypes, enjoy the potential for sex-based leniency. The experience of alienation is compounded for women who are otherwise marginalized because of their race or ethnicity, sexual orientation, socioeconomic status, and other characteristics—precisely the women who are most likely to end up being imprisoned or sentenced to death.[45] In this fashion, the death penalty serves both to "rid" society of individuals perceived as violent and dangerous, and to identify and condemn forms of deviance that are not criminal by statute, but that are nonetheless experienced as serious threats to society's preferred self-understandings and to social order.

B. Andrea Hicks Jackson

Relatively few women convicted for murder in the United States have killed strangers.[46] Perhaps for this reason, the normative and legal

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return for three months. They were returned to their mother because there was no evidence of abuse, and the state Health and Rehabilitative Services agency lost track of them. *Id.*

[43] May, *supra* note 34; *see also* Mother Gets Death in Tot's Fatal Torture, *supra* note 41 ("Ana Cardona shouted hysterically in Spanish at [Circuit Judge David L.] Tobin after he announced the sentence.").

[44] *See infra* Part II.A.

[45] For state-by-state data on women on death row current through June 30, 2000, see Death Penalty Information Center, State Breakdown of Death Sentences for Females, at http://www.deathpenaltyinfo.org/womenstats.html# State Breakdown; for additional statistics on race and the death penalty, *see* Death Penalty Information Center, Race of Defendants Executed Since 1976, *at* http://www.deathpenaltyinfo.org/ dpicrace.html (last modified May 25, 2001); *see also infra* notes 62, 145. On the relationship between poverty and capital punishment, *see* Stephen B. Bright, Counsel for the Poor: The Death Penalty not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994).

[46] *See supra* note 5. By contrast, women are often victims of violent crimes committed by attackers known to them: "On average each year from 1993-1998, 22 percent of all female victims of violence in the United States were attacked by an intimate partner, compared to 3 percent of all male violence victims." Intimate Partner Violence Against Women Declined from 1993 through 1998: One-third of all murdered females were killed by

framework for such killings remains ill-developed. Murders of acquaintances or family members fall more readily into pre-fabricated narratives of interpersonal antagonism, greed, or revenge. Strangers, on the other hand, fall outside of these narrative constructs. Juries, when confronted with the unusual event of a woman killing a stranger, may be particularly susceptible to filling in the gaps of the story with preconceived notions about female psychology and behavior. The case of Andrea Hicks Jackson offers a particularly striking example of this kind of narrative elaboration. In the end, the case came down to a competition between two very distinct psychological and behavioral narratives, with correspondingly different legal consequences.[47] The competing characterizations of Jackson's frame of mind and behavior both relied, to a certain extent, on sex-role stereotypes: the calculating, scheming, and deceitful woman, and the irrational, irrepressible hysteric. The law allows some mitigation for the latter type of defendant in the form of provocation and extreme emotional disturbance defenses to a first-degree murder charge.[48] But the jury in Jackson's case accepted the former characterization. On February 10, 1984, a jury recommended that she be sentenced to death for the first-degree murder of a police officer, a recommendation followed by the trial judge.[49]

The events, as narrated in an opinion by Justice Boyd in the Florida Supreme Court's first review of Jackson's case, occurred as follows:[50] Late

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partner, Bureau of Justice Press Release, May 17, 2000, *available at* http://www.ojp.usdoj.gov/bjs/pub/press/ipv.pr (last visited Sept. 14, 2001). Overall, men were almost nine times more likely than women to commit murder in 1999. U.S. Department of Justice, Bureau of Justice Statistics, Homicide trends in the U.S.: Trends by gender, http://www.ojp.usdoj.gov/bjs/homicide/gender.htm (last modified Jan. 4, 2001). *See generally* Domestic Violence Statistics—Battered Women Who Kill (presenting statistics compiled by the National Clearinghouse for the Defense of Battered Women) *at* http://www.cybergrrl.com/views/dv/stat/statbwkill.html (last visited Jan. 28, 2001).

[47] *See, e.g.*, Kimberlé Crenshaw, Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill, *in* Race-ing Justice, En-gendering Power : Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality 402, 403-04 (Toni Morrison ed., 1992) ("[A] t least one important way social power is mediated in American society is through the contestation between the many narrative structures through which reality might be perceived and talked about. . . . [T]he central disadvantage that [Anita] Hill faced was the lack of available and widely comprehended narratives to communicate the reality of her experience as a black woman to the world.").

[48] These defenses are also embedded within a male-oriented framework; *see generally* Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 Yale L.J. 1331 (1997).

[49] *See* Jackson v. State, 498 So. 2d 406, 409 (Fla. 1986), *cert. denied* 483 U.S. 1010 (1987).

[50] *Id.* at 408-09. The Florida Supreme Court vacated Jackson's death sentence three times in response to habeas appeals, and each time the Duval County Circuit Court resentenced her to death. Jackson v. State, 704 So. 2d 500 (Fla. 1997) (trial court resentencing order's summary disposition of mitigating factors precluded meaningful appellate review); Jackson v. State, 648 So. 2d 85 (Fla. 1994) (unconstitutionally vague

in the evening of May 16, 1983, Jackson reportedly vandalized her own car, breaking out the windows and removing the car's battery, spare tire, and license plate. Depending on which characterization one accepts, she either did this in a fit of rage or as part of a premeditated scheme. When police officers Burton Griffin and Gary Bevel arrived on the scene, Jackson told them that someone else had destroyed the windows of her car. At the officers' request, she went into an apartment to fetch the car's bill of sale. Griffin left Bevel to write a criminal mischief report. With Jackson's permission, Bevel had the car towed. Bevel was then told by witnesses that Jackson had in fact destroyed her own car. He arrested her for filing a false report. Justice Boyd recounts:

> Appellant's response was to kick, scream and strike the officer as he restrained her and placed her in the back of his patrol car. Once in the back seat appellant said, "Wait a minute. You made me drop my damned keys." As officer Bevel stepped back and bent down, apparently looking for the keys, appellant shot him six times, four times in the head, once in the shoulder and once in the back. Bevel fell into her lap and she pushed him aside and ran from the area.[51]

Following the shooting, Jackson went to Shirley Ann Freeman's home and washed her clothes.[52] Jackson told Freeman that "she had shot a cop because she 'wasn't going back to jail' and she didn't like men touching her."[53] Freeman also noticed scratches and welts on Jackson's back that could have led the jury to infer the excuse of self-defense.[54]

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instruction on CCP aggravating factor); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (victim impact evidence impermissibly presented to jury over defendant's objection). The fourth remand for resentencing was issued by the Florida supreme court on Jan. 27, 2000. 767 So. 2d 1156 (Fla. 2000) (sentence vacated because defendant not present at resentencing). On June 16, 2000, the trial judge resentenced Jackson to life imprisonment: "Yesterday, Chief Circuit Judge Donald R. Moran—who maintained for more than 15 years that Jackson should die for killing Officer Gary Bevel—stunned a Jacksonville courtroom when he changed his sentence and ordered that she instead spend the rest of her life in prison." Vivian Wakefield, Death sentence switched to life, Fla. Times-Union, June 17, 2000, at A1; *see* Vivian Wakefield, Jackson: God moved me from Death Row Judge's ruling a miracle, police officer's killer says, Fla. Times-Union, June 23, 2000, at A1 ("While Jackson credits her faith in God for changing the sentence handed down by Chief Circuit Judge Donald R. Moran, the judge sounded exasperated in court last week when he changed Jackson's sentence from death to life."); *see also* Jim Saunders, Killer's fourth death sentence lifted, Fla. Times-Union, Jan. 28, 2000, at A1; Teresa Stepzinski, Death penalty draws fire, Fla. Times-Union, June 24, 2000, at A1.

[51] 498 So. 2d at 409.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 410.

A central issue in Jackson's appeals was whether the jury properly found the aggravating factor of CCP, that is, that the crime "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."[55] The prosecution sought to prove that the killing "was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage."[56] Although a number of witnesses to the incident testified at Jackson's third resentencing hearing that Jackson did not appear drunk or high, Jackson presented three mental health experts to establish that she was mentally impaired at the time of the shooting.[57] The mental mitigation that she sought to establish included that she was under the influence of drugs and alcohol at the time of the murder; that she was suffering from post-traumatic stress disorder as a result of extended sexual abuse by her stepfather; that she had a flashback of a prior sexual assault when the police officer struggled with her; and that her "capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired and that she was under the influence of extreme mental or emotional disturbance at the time of the crime."[58] Nevertheless, the trial judge in the third resentencing found that these factors did not rise to the level of mitigation.[59]

The trial judge and repeated juries did not accept a story of self-defense or of emotional rage, either of which would have precluded a finding of CCP. The Florida Supreme Court upheld this determination, holding that there was "competent, substantial evidence" in the record contradicting Jackson's claim that she lost emotional control at the time of the shooting.[60] In particular, the Supreme Court's *per curiam* opinion in Jackson's third habeas appeal noted that "Jackson was able to devise a plan to catch Officer Bevel off guard (i.e. dropping her keys)[, which] is not the

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[55] 704 So. 2d at 503; Fla. Stat. § 921.141(5)(i) (1995).

[56] 704 So. 2d at 504. This corroborated the trial court's finding that "[t]his record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to escape and then acted accordingly." 498 So. 2d at 412.

[57] 704 So. 2d at 503. On Jackson's habeas appeals, *see supra* note 42.

[58] *Id.*; *see also* 648 So. 2d at 87 (noting that Jackson presented expert testimony at her first resentencing that she suffered from post-traumatic stress disorder and battered woman syndrome as a result of extended sexual abuse).

[59] 704 So. 2d at 503; a unanimous jury recommended the death sentence in Jackson's third resentencing hearing. In her first resentencing hearing, a different jury had recommended death by a vote of seven to five. 648 So. 2d at 87. The trial judge followed the jury's recommendation of a death sentence in each of Jackson's first three resentencing hearings.

[60] 704 So. 2d at 504. Nevertheless, the supreme court remanded the case for a third resentencing hearing because Jackson had not been present at the second resentencing; *see supra* note 52.

type of activity performed by a person in a frightened or panicked state."[61] This statement illustrates the ways in which stereotypes shape, and may distort, interpretations of violence by women.[62] The standard narrative framework forces parties in a confrontation into the mutually exclusive categories of victim and attacker; in this story, the role of victim was assigned to the police officer. This simplified model dictated the interpretation of all the surrounding details, as the justices endeavored to create what was, for them, a logically cohesive account of the incident in accordance with their understandings of human behavior. The assumptions underlying these understandings remained essentially unexamined. Accordingly, a majority of the justices hearing Jackson's third habeas appeal concluded that all of Jackson's actions formed "part of a careful plan to kill the officer and avoid arrest."[63] The justices dismissed evidence that Jackson believed she was about to be raped as "purely subjective,"[64] and therefore irrelevant to the question of whether the shooting was justified. They neglected the role of this evidence in establishing mental mitigation. This is a separate question from that of justification, and one that would argue against the imposition of the death penalty.

Chief Justice Kogan, concurring in part and dissenting in part in Jackson's third habeas appeal, disagreed with the majority's handling of the CCP analysis. The Chief Justice wrote:

> It is just as likely that Jackson, who did not live with her husband, returned to the apartment the third time to get her personal belongings so she could leave, as it is that she returned to get her gun so she could shoot the officer. There is no evidence that Jackson became aware of her impending arrest until she left the apartment the third time and was informed that she was under arrest and the struggle ensued.[65]

He continued: "[Jackson's] actions support the finding that the shooting was a spur-of-the-moment reaction and the culmination of built up anger and rage rather than the fruition of a cool and calmly reflected plan."[66] Justice

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[61] *Id.*

[62] Kathy Dobie, Woman on Death Row Relies on the Bible for Strength, Philadelphia Trib., Jan. 5, 1996, at 6A, *available at* 1996 WL 15818696 ("Psychiatrists testified that Hicks Jackson had suffered a traumatic flashback from the countless rapes and beating and shot the officer thinking he was trying to hurt her, too. The prosecution told the jury that Hicks Jackson had fooled these shrinks, and wanted only to escape arrest when she killed the officer in cold blood.").

[63] 704 So. 2d at 505.

[64] *Id.* The court also dismissed this as a possible mitigating factor. *Id.* at 506.

[65] 704 So. 2d at 508 (Kogan, C.J., concurring in part and dissenting in part).

[66] *Id.* at 509 (Kogan, C.J., concurring in part and dissenting in part).

Anstead, concurring with the Chief Justice, characterized the killing as "tragic and emotionally charged,"[67] a far cry from the majority's image of a cold-blooded execution.[68]

The media's reaction to this case, and to the cases of other women on death row, corroborates the centrality of sex-role stereotypes in the narratives people tell themselves about women who kill.[69] While this impulse to rely on familiar categories and embedded assumptions may be understandable, its reinforcement through judicial institutions exacerbates its hold on the popular psyche, obstructing the possibility for social attitudes and interactions to approach a more egalitarian model. Unlike men, women who use violence commit the additional transgression of doing something "unwomanly." Vanessa Thorpe cites statistics from the documentary *Perverted Justice* that "an amazing 40 per cent of women awaiting execution on death row in the United States are either lesbian or have had the suggestion that they were a masculine man-hater made against them during trial."[70] This certainly occurred during Jackson's trial.[71] One newspaper tellingly recounted the crime as follows:

> Officer Gary Bevel responded to a call from Miss Jackson that her car had been vandalized. When he arrived, he determined that she was drunk and spoke to neighbors, who said she had vandalized the car herself. When Bevel tried to arrest her for filing a false police report, she shot him six times with a .22 caliber pistol. She said she "hated men."[72]

Valentine Schmidt, the producer of *Perverted Justice*, notes that "[d]uring [Jackson's] trial the jury was told she hated to be touched by men."[73] Schmidt emphasizes that, in trials against women who use violence, "[t]he

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[67] *Id.* at 510 (Anstead, J., concurring in part and dissenting in part).

[68] Justice Anstead also reiterated the Chief Justice's point that "the majority has the defendant going back to her estranged husband's apartment to get a gun . . . before the alleged motive for the murder, her arrest, even took place." *Id.* at 511 (Anstead, J., concurring in part and dissenting in part).

[69] *See infra* Part II.

[70] Vanessa Thorpe, Being Gay Is Fatal in the US Courts, Independent (London), July 13, 1997, at 3, *available at* 1997 WL 12333261. Thorpe adds: "A woman who plans to commit murder in the southern states of America should be certain to wear frilly dresses. It could turn out to be the best way for her to avoid the electric chair." *Id.*

[71] "'Lesbianism is not often actually stated in court by the prosecution, but it is implied all the time,' says Valentine Schmidt, producer of the documentary [*Perverted Justice*]." *Id.*

[72] 17 Murderers Now Facing Execution, Omaha World-Herald, Nov. 11, 1984, *available at* 1984 WL 2543821.

[73] Thorpe, *supra* note 73.

idea is repeatedly put over that the defendant is not normal."[74] For women, being "normal" means conforming to traditional notions of femininity. Those who do not conform are inherently suspect; their crimes only confirm their deviance,[75] and the threat they pose to a social order built on heterosexuality, romantic love, and the observance of sex-role boundaries.[76]

In an interview with Schmidt, Jackson stated: "You go on death row, you're gonna find most people have been abused in their lives and are poor."[77] In another interview, she explained: "I am not some raving vicious animal. . . . I did not mean to hurt that man. I thought he was raping me."[78] The fact that Jackson committed this shooting remains undisputed. However, the unwillingness of four juries to believe that she did so out of rage or panic, rather than as part of a calculated and premeditated scheme, led them to recommend the death penalty over life imprisonment, although a series of successive habeas appeals finally led the trial judge to commute Jackson's sentence to life in prison. A woman who reportedly hated men proved unable to convince a jury that she had felt threatened by one.

C. Virginia Larzelere

Eight of the fifty-two women on death row as of January 2001 received the death sentence for hiring someone else to commit murder.[79]

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[74] *Id.*

[75] It is interesting to note the etymological relationship between the words "deviant," meaning different, and "devious," meaning underhanded and potentially dangerous.

[76] On the tendency for black women in particular to be perceived as "tough, domineering, emasculating, strident, and shrill," and thus incapable of being victims, *see* Regina Austin, Sapphire Bound, 1989 Wis. L. Rev. 539, 539 (1989); on race bias in the criminal justice system generally, *see*, for example, Paula C. Johnson, At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 Am. U.J. Gender & L. 1 (1995); Bryan A. Stevenson and Ruth E. Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice, 51 Wash. & Lee L. Rev. 509 (1994); *see also supra* note 49, *infra* note 149. The Bureau of Justice Statistics reports that "an estimated 28% of black males will enter State or Federal prison during their lifetime, compared to 16% of Hispanic males and 4.4% of white males." Criminal Offenders Statistics, *supra* note 2.

[77] Thorpe, *supra* note 73. Some newspapers did report Jackson's allegations of prior abuse: "[A]ttorneys learned that as Officer Gary Francis Bevel was arresting her for disorderly conduct, Jackson's mind flashed back to her childhood when she was raped in the back seat of a car by a male family member when she was 10. She thought it was going to happen again." Kathryn Kahler, Penalty: Death, Greensboro News & Rec. (N.C.), May 2, 1993, at F1, *available at* 1993 WL 7535364. However, sympathetic readings can also objectify and even trivialize the women involved. The same journalist who reported this prior abuse described Jackson as "a plump and perky 35-year-old mother of two." *Id.*

[78] *Id.*

[79] *See supra* note 8.

This perhaps surprising statistic is a result, in part, of the way in which aggravating factors are defined in the sentencing phase of murder trials. In Florida, and in other states with similar guidelines, the aggravating factor of CCP is particularly likely to be found in the case of a murder performed by a hired killer and motivated by the prospect of financial gain.[80] In accordance with these guidelines, Virginia Larzelere was sentenced to death for "masterminding"[81] her husband's murder in order to collect money from his life insurance policy.

Norman Larzelere, a dentist, was shot in his office by a masked gunman on March 8, 1991.[82] Virginia Larzelere's son Jason was accused but acquitted of being the triggerman.[83] Even though no other gunman was or has been identified, Virginia Larzelere was found guilty of first-degree murder and sentenced to death by the Volusia County Circuit Court. She continues to maintain her innocence in planning or committing the crime.[84]

The media's portrayal of Larzelere has been that of a scheming harpy whom the courts rightfully prevented from having the last laugh.[85] Prosecutors and the media painted Larzelere as a domineering, greedy woman who intimidated and overpowered those around her: "One possible witness, a handwriting expert, said in a deposition that Jason Larzelere appeared to be more tense writing letters to his mother than to the judge presiding over his case."[86] Steve Heidle, the prosecution's prime witness, "testified that he didn't go to the police because he was 'scared to death of Virginia and her family.'"[87] Norman Larzelere's mother said that Virginia Larzelere "had left 'a path of destruction,'"[88] and Edgewater detective David Gamell, commenting on the verdict, affirmed: "'I feel we've proven

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[80] *See* Fla. Stat. § 921.141 (2000) (listing aggravating and mitigating factors and sentencing procedures for capital felonies).

[81] The mitigating factor that Larzelere was not the shooter was given "insignificant weight" due to the fact that she was "the mastermind behind the killing." Larzelere v. State, 676 So. 2d 394, 399 (Fla. 1996), *reh'g denied* 679 So. 2d 756 (Fla. 1996), *cert. denied* 519 U.S. 1043 (1996).

[82] 676 So. 2d at 398.

[83] *See id.* at 407.

[84] *See* Pat LaMee, Larzelere's Appeal: Teen Unreliable, Orlando Sentinel, Aug. 29, 1995, at C1, *available at* 1995 WL 9707898; Woman Is Given Death Sentence, St. Petersburg Times, May 12, 1993, at 7B, *available at* 1993 WL 3852025.

[85] *See*, e.g., Sean Somerville, Larzelere Found Guilty of Murder, Orlando Sentinel, Feb. 25, 1992, at A1, available at 1992 WL 4660119.

[86] Sean Somerville, Larzelere Son Now in Forefront of Murder Saga, Orlando Sentinel, Aug. 18, 1992, at B1, *available at* 1992 WL 10622674.

[87] LaMee, *supra* note 87.

[88] Sean Somerville, Larzelere Should Die, Jurors Say, Orlando Sentinel, Mar. 5, 1992, at D1, *available at* 1992 WL 4662389.

Virginia to be a greedy, manipulative, evil woman.'"[89] The prosecution's strategy, and the publicity surrounding the trial, tended to focus more on the kind of woman Larzelere was than on her alleged actions.

The theme of greed was pervasive throughout the trial, both as a motive for the crime and as a core aspect of Larzelere's culpable and morally defective character: "Juror Raymond Clay said Larzelere's purchase of more than $2 million in life insurance for her husband was incriminating. 'The biggest thing was her lifestyle, her spending and her money . . . .'"[90] One journalist reported: "Once known for her elegant dress, Larzelere had been divorced twice and had one marriage annulled before she married Norman Larzelere."[91] She was portrayed as having pressured her husband to take out life insurance policies,[92] and then orchestrating his murder.[93] The fact that the alleged gunman was Larzelere's teenage son contributed to the jury's condemnation of Larzelere: "A jury recommended the death penalty after prosecutors told them Virginia hired her 'own flesh and blood,' to kill her husband."[94] Yet even though her son was subsequently acquitted based on a lack of evidence, and no other gunman has been identified or convicted, Larzelere was unsuccessful in appealing the sentence of death. In the phenomenon of courtroom storytelling, the cohesiveness and plausibility of a particular version of events may be reinforced as much, if not more, by the audience's perception of the characters than by evidence supporting conflicting accounts of the plot.

D. Aileen Wuornos

Aileen Wuornos, known as Florida's "Damsel of Death," received multiple death sentences for the separate shooting murders of six men (the body of a seventh alleged victim has never been found). Variously referred to in the press as "a hitchhiking prostitute,"[95] "an admitted prostitute,"[96] and

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[89] *Id.*

[90] *Id.* (omission in original).

[91] Somerville, *supra* note 90.

[92] 676 So. 2d at 399.

[93] *Id.* at 400.

[94] Sean Somerville, Jason Larzelere's Case Was Challenge, Orlando Sentinel, Sept. 22, 1992, at A1, *available at* 1992 WL 10631199.

[95] *E.g.*, Purvette A. Bryant, Judge Postpones Wuornos Appeal, Orlando Sentinel, Aug. 28, 1998, at D3, *available at* 1998 WL 18545276; Wuornos Loses Last Direct Appeal, Fla. Today, May 10, 1996, at 6B, *available at* 1996 WL 10102328; Wuornos Loses Appeal in 6th Death Sentence, Orlando Sentinel, May 10, 1996, at D5, *available at* 1996 WL 2604210.

[96] Jim Tunstall, Serial Killer Loses Appeal for 6th Time, Tampa Trib. (Fla.), May 10, 1996, at 4, *available at* 1996 WL 10226025.

a "onetime prostitute who lured men to their deaths by posing as a hitchhiker,"[97] Wuornos has been the subject of newspaper articles, television shows, and at least two docudramas. One commentator observed: "The press, and especially the television tabloid shows, had a field day with the story about what they called 'the man-hating murderer,' apparently because Wuornos was an admitted lesbian."[98] The themes of lesbianism, man-hating, deceitfulness, greed, deviance, and manipulativeness that frame the stories society tells itself about women who use violence pervade the transcripts and media reports of the Wuornos trials.

In 1989 and 1990, Florida law enforcement officials were confronted with a series of homicides. In December 1989, the body of Richard Mallory was found in a wooded area in Volusia County. He had been shot several times.[99] In June 1990, the body of Charles E. Carskaddon was found in a secluded area in Pasco County. Eight small caliber bullets were recovered from the body.[100] Also in June 1990, the badly decomposed body of David Spears was found. Spears had died of six gunshot wounds.[101] In July 1990, law officers found the car of Peter Siems in Orange Springs. They never found Siems's body.[102] In August 1990, the body of Troy Burress was found eight miles from a highway intersection. An autopsy showed he had died of two gunshot wounds.[103] In September 1990, the body of Charles Humphreys was discovered in an isolated area. He had died of seven gunshot wounds.[104] In November 1990, the body of Walter Antonio was found in a wooded area north of Cross City. He had been shot four times with a .22 caliber gun.[105] Many of the bodies were found nude, with the men's possessions and vehicles stolen or abandoned nearby. A joint

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[97] Channing Gray, In Concert: Darkness Becomes Diamanda Galas, Providence J.-Bull. (R.I.), May 15, 1996, at F1, *available at* 1996 WL 10325938.

[98] Vincent Canby, Director Cuts Sad Slice of Americana, Plain Dealer (Clev.), June 24, 1994, at 4, *available at* 1994 WL 7191556; *see also* P.C. Smith, Millie Wilson at Jose Freire, 82 Art in America 119 (1994), *available at* 1994 WL 13086481 ("The trial of Wuornos . . . was marked by attacks branding her as a man-hating 'demon-dyke.'").

[99] Wuornos v. State, 644 So. 2d 1000, 1003 (Fla. 1994), *cert. denied* 514 U.S. 1069 (1995).

[100] Wuornos v. State, 676 So. 2d 966, 967 (Fla. 1995), *cert. denied* 519 U.S. 968 (1996).

[101] Wuornos v. State, 644 So. 2d 1012, 1015 (Fla. 1994), *cert. denied* 514 U.S. 1070 (1995).

[102] 644 So. 2d at 1005. A palm print on the interior door handle matched that of Wuornos. *Id.*

[103] 644 So. 2d at 1015.

[104] *Id.*

[105] Wuornos v. State, 676 So. 2d 972, 973 (Fla. 1996), *cert. denied* 519 U.S. 997 (1996).

investigation into these homicides led law enforcement officers to Aileen Wuornos in January 1991. Tyra Moore, Wuornos's romantic partner and another suspect in the killings, allowed Florida police secretly to tape numerous conversations between her and Wuornos, which ultimately led to Wuornos's confession and conviction.[106]

The transcript from Wuornos's first trial, for the shooting of Richard Mallory, vividly depicts the deployment of sex-role stereotypes by attorneys on both sides of the case. The key insight gleaned from reading these transcripts is not that advocates use familiar categories and hyperbolic rhetoric to secure victory in criminal trials, as is the case for both male and female defendants, and for a range of crimes.[107] What is particularly noteworthy is the way in which these stereotypes are deployed—namely, to draw on and reinforce societal norms that equate the use of violence by women with an impermissible attempt to subvert their subordinate position in a deeply hierarchical, and deeply gendered, social order. As John Tanner, the attorney for the State, impressed upon the jury in his opening statement: "She now wanted the ultimate control. She wanted all that Mr. Mallory had; his car, his property, and his life."[108] The prosecution presented this as the case of a predatory prostitute whose insatiable appetite for sex and money led her on a savage and irrepressible killing spree in her quest for "the ultimate control."[109]

The defense, by contrast, portrayed Mallory as the predator and Wuornos as his prey. Public defender Trish Jenkins explained to the jury: "During the period of time that she was being subjected to the abuse that Mr. Mallory was inflicting, he told her, 'I've done this to other women.' He wanted to see her pain."[110] Jenkins continued: "You'll hear testimony that

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[106] *See* State v. Wuornos, No. 91-0257CFAES, 1991 WL 352757, at *1-2 (Fla. Cir. Ct. Dec. 13, 1991) (order denying defendant's motion to suppress videotaped confession). "The police were obviously aware of the relationship and the feelings that Defendant Wuornos had for [Tyra] Moore, but to characterize such knowledge as exploitation or abuse, is unsubstantiated by the facts." *Id.* at *3. "The use of the relationship between the Defendant and Ms. Moore . . . did not reach a point where the Defendant Wuornos was capable of making a rational decision. She obviously had an opportunity to reflect on her conduct and her choices and, because of her concern for her friend, chose to confess. This choice was a result of her exercising her free will . . . ." *Id.* at *5.

[107] For example, during the first day of testimony in a sentencing hearing for convicted killer Daniel Conahan, "prosecutors portrayed him as a cold-blooded predator who murdered for pleasure. Defense attorneys countered with a portrait of Conahan as a dutiful son who moved to Florida to help his ailing parents." Rodney Crouther, 2 Sides of Same Man; "Gentle" son or predator?, Sarasota Herald-Trib., Nov. 3, 1999, at 1A.

[108] John W. Tanner, State's Opening Statement at 676, *in* 4 Transcript of Proceedings, State v. Wuornos, Seventh Judicial Circuit of Florida, Deland, Fla., Jan. 13-17, 1992 (No. 91-0257-CFAES).

[109] *Id.*

[110] Tricia Jenkins, Defense's Opening Statement at 686-87, *in id.*

she was terrified. She didn't know what to do."[111] The very social hierarchy that the prosecution argued Wuornos was trying to subvert made her feel trapped and helpless: "She knew she couldn't tell anybody [what had happened]. Who was going to believe her. She's a prostitute. Mr. Mallory was a business man."[112] The narrative of power constructed by the defense was the mirror image of the prosecution's: In the defense's version, Mallory, not Wuornos, was the powerful one. The defense painted Wuornos (whom they referred to by her nickname, Lee) as a frightened victim trapped by Mallory's domination, and by the societal injustices that pushed her into leading the dangerous life of a prostitute.[113]

Both the defense and the prosecution in this trial deployed sex-role stereotypes in their attempt to construct intelligible narratives of the events leading up to the killing. The use of stereotypes is itself a type of shorthand, enabling an audience with limited time and information (the jury) to receive and process data in an organized fashion. By casting the key actors in familiar roles, the attorneys on either side of a case facilitate their task of convincing a jury that their version of events is the accurate one. In a criminal trial, this process of typecasting is embedded in a larger narrative of right and wrong, good and evil. Choosing the prosecution's or the defense's version of the story itself entails an answer to the ultimate question of guilt.

The supporting characters in a criminal trial may also be typecast to enhance a particular storyline. For example, while the defense endeavored to portray Wuornos as a frightened victim, they painted a picture of Tyra Moore, Wuornos's partner and the police informant, as greedy and opportunistic; Moore became the "Virginia Larzelere" of the defense's narrative. In attacking Moore's credibility, the defense attorney described how "[l]aw enforcement put her in a motel, paid for all of her expenses. Basically said, gave her whatever she wanted, beer, food, shopping at the mall."[114] Like the other familiar themes deployed by both the defense and the prosecution during Wuornos's trial, the typecasting of Moore was highly sex-specific: it is difficult to envisage a defense attorney attempting to discredit the incriminating testimony of a male co-conspirator by telling the jury that the FBI paid for him to go "shopping at the mall."

The theme of female greed was also deployed by the prosecution against Wuornos: "This is a murder out of greed. This is a woman that could make, according to her own testimony, I don't care how you figure it,

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[111] *Id.* at 687.

[112] *Id.*

[113] *Id.* at 683, 686; *see also* William A. Miller, Defense's Closing Statement at 2154-55, *in* 14 Transcript of Proceedings, Jan. 27, 1992.

[114] Jenkins, *supra* note 111, at 687.

thirty to fifty thousand a year and squander it just as quickly."[115] The use of greed as a psychological trope in courtroom story-telling is driven partly by the shape of the law: one criterion for determining whether a murder is "cold, calculated, and premeditated" under Florida law is whether or not it was motivated by a desire for financial gain. The law itself tracks and reinforces social determinations about what kinds of actions are particularly abhorrent. The prosecution has every incentive to tell a story that fits the model of personal-greed-deserving-of-societal-condemnation. It is natural to create a convincing account of an action motivated by greed by presenting greediness as the protagonist's dominant character trait. The legal definition of a "cold, calculated, and premeditated murder" both permits and fosters this strategy.

For these reasons, the trial of Wuornos for Mallory's murder was framed largely as a competition between two narratives about Wuornos's character.[116] Implicit in both sides' arguments was the premise that whether or not Wuornos had the requisite *mens rea* for the crime of premeditated murder could be determined through a character assessment.[117] While the defense also tried to argue that Wuornos was mentally incapable of forming a criminal intent, their basic argument on her behalf was one of self-defense. As one of the defense attorneys insisted during closing argument: "Lee Wuornos is not guilty of First Degree Premeditated Murder or Armed Robbery. She defended herself. She had had enough."[118]

The defense walked a fine line between choosing a narrative that people could identify with, making Wuornos's actions comprehensible and perhaps even excusable, and explaining the killing as a product of Wuornos's uniquely dysfunctional psychology and background. The narrative of unique dysfunctionality figured much more prominently in the defense's arguments during the sentencing phase of the trial, after Wuornos had already been found guilty of first-degree murder. As one of the defense attorneys insisted at the sentencing hearing:

> This is a person who is not well. This is a person who needs help. She never got that help. . . . She doesn't see the world the way you and I see it. She doesn't understand the world the way you

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[115] John W. Tanner, State's Closing Statement at 2186, *in* 14 Transcript of Proceedings, Jan. 27, 1992.

[116] The theater aspect of the trial was highlighted by Judge Uriel Blount during the sentencing hearing: "Miss Wuornos, when I have completed my task here today, you will begin the first day of the rest of your life. The curtain will fall on the tragic drama of the trial of Aileen Wuornos." Blount, J., Sentencing at 493, *in* 3 Transcript of Proceedings, Jan. 28-31, 1992.

[117] This kind of reasoning recalls the chain of character inferences prohibited under Federal Rule of Evidence 404.

[118] Jenkins, *supra* note 111, at 689.

> and I understand it. She cannot function in it the way you and I function in it.[119]

Defense attorney Trish Jenkins asked the jury: "How do I make you understand that everything that Lee feels, does and says is filtered through that disorder, through that impairment? Everything must go through that filter. She is not like the rest of us."[120] Jenkins continued: "She has no control. Everything happens to her. She is a person who thinks that pain and unhappiness is inevitable. She doesn't understand, she doesn't know, she doesn't have the ability to control that."[121] In the defense's narrative, Wuornos was a woman who "ha[d] no control." For the prosecution, by contrast, she was a woman who would do anything to get it.

The prosecution flatly rejected the defense's narrative of a woman from a troubled background doing her best to fend for herself in a hostile world:

> Aileen Wuornos has been portrayed as a victim by the Defense.
>
> She is not a victim in any sense of the word.
>
> She's not a victim because she's a prostitute. She has chosen to be a prostitute. Her reasons ultimately given was [sic] when she first started out, apparently a pretty young, young woman, was that she only made about seventy-five cents an hour working but she could make sixty to a hundred dollars at a time for sex.
>
> And she learned very quickly that that was, for her, the preferred way to make a living and that preference, that choice carried on throughout her lifetime.
>
> . . .
>
> She indicated she likes sex. There's nothing wrong with that. But that's one of the reasons she was out there. She tried to push it off on the men, something to the effect, well, if they would keep their pants on, keep their wallets in their pocket, we wouldn't be out here.

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[119] Billy H. Nolas, Defense's Opening at 14, 16, *in* 1 Transcript of Proceedings, Jan. 28-31, 1992.

[120] Tricia Jenkins, Defense's Closing at 449, *in* 3 Transcript of Proceedings, Jan. 28-31, 1992.

[121] *Id.* at 454.

> I guess drug dealers could say the same thing. . . .[122]

The role of choice and agency in these respective narratives is mixed. The prosecution's portrayal of Wuornos's character and situation was in some ways more empowering than that of the defense: "Now, what was she afraid of? This is what she did for a living. This is where she chose to work, she chose to work the highways and she wanted people to pick her up."[123] However, this was not a narrative of healthy choice, but rather of an insatiable appetite for domination and control. For Wuornos's character to fit the prosecution's script, there could be no happy medium:

> To take all the man has physically, some say spiritually, this tremendous and almost absolute control. There's only one thing left. There is only one thing left and that's to kill. You can't have much more than all the person except their life. And that's what she wanted and that's what she took.[124]
>
> . . .
>
> This is a woman moving out of power in control into a new, a new and unfathomable for you, and area of domination to the extent of snuffing out a life. It became obscenely simple to have it all.[125]

The prosecution teams in Wuornos' trials used this image of a woman bent on subverting the gender hierarchy—to "take all the man has physically [and] spiritually" in her quest to achieve "absolute control"—to impress upon the jury that Wuornos was a menace to society and deserving of the ultimate condemnation.

In the penalty phase of the Mallory case, three defense psychologists concluded that Wuornos suffered from borderline personality disorder, resulting in extreme mental or emotional disturbance at the time of the crime.[126] The defense also presented evidence about Wuornos' background: her parents were divorced when she was born; her father hung himself in prison, where he was serving time for rape and kidnapping; her mother abandoned her, and Wuornos was adopted by her grandparents; her grandfather, an alcoholic, later committed suicide, and her grandmother

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[122] Tanner, *supra* note 116, at 2163.

[123] *Id.* at 2164.

[124] *Id.* at 2173-74.

[125] *Id.* at 2186.

[126] 644 So. 2d at 1005.

died of a liver disorder; her brother died of cancer at age twenty-one; at age fourteen, Wuornos was raped by a family friend, and her grandparents, who were also allegedly physically and verbally abusive, forced her to give up the child for adoption; and Wuornos turned to prostitution when her grandfather refused to take her back into his home.[127] Despite this evidence for potential mental mitigation, the jury in the Mallory case recommended death by a vote of twelve to zero.[128]

The juries in Wuornos' trials, like the juries that sentenced Andrea Hicks Jackson, were willing to accept the portrayal of Wuornos as deliberately deceitful, even though this was not necessarily dictated by the evidence. For example, in its sentencing order against Wuornos for the murder of Charles Carskaddon, the trial court asserted that "[t]he theft of Carskaddon's property did not occur spontaneously following the killing. Miss Wuornos carefully and calculatingly selected this victim, stalked him and lured him to a secluded area with the intent of killing and robbing him."[129] On appeal, however, it was noted that this interpretation of events contradicted Wuornos' confessions, and that there were no other witnesses to the crime to support the trial court's depiction of the events.[130] In the Mallory case, the court's task was complicated by the fact that Wuornos gave different versions of events in successive confessions.[131] However, it was well established that Wuornos began working as a prostitute at age sixteen, and that she started working as a "highway prostitute" in Florida at age twenty: "Her job was dangerous, she said. On some occasions she had been maced, beaten and raped by customers."[132] She began carrying a gun "for protection,"[133] not because she was planning to commit robbery or murder.

The Florida Supreme Court in the appeal from the decision in the Mallory case allowed the State's use of evidence of similar crimes to rebut Wuornos' claim that she was "the actual victim"[134] and had acted in self-defense. The court affirmed that "[t]he State's theory of the case here,

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[127] *Id.*

[128] *Id.*

[129] 676 So. 2d at 971 (citing sentencing order).

[130] *Id.*

[131] 644 So. 2d at 1004.

[132] *Id.*

[133] *Id.* at 1003.

[134] *Id.* at 1006. Despite this characterization, one article in support of Wuornos alleges that Wuornos "said more than 60 times that she acted in self-defense" in her videotaped confession to the Mallory murder, but that "[n]one of these references was included in the version of that tape which was shown to the jury." The Story of Aileen Wuornos, *at* http://staff.washington.edu/maggiej/wuornos.htm (visited Oct. 1, 2000).

which was supported by the similar crimes evidence, was that Wuornos coldly and calmly planned this killing and did not act out of emotional frenzy, panic, or a fit of rage."[135] The Supreme Court upheld the trial court's rejection of the claim of self-defense and its finding of the aggravating factor of CCP, based on the similar crimes evidence and the fact that Wuornos had stolen property from some of her victims.[136] Justice Kogan explained in a special concurrence:

> The facts here present two quite different pictures of Aileen Wuornos. One of these pictures is of a woman who has lived a horrible life of victimization, violence, and little help from anyone, who later lashed out at one of her victimizers. The other is of a cold-blooded killer who lured men to their deaths to steal their property. . . .
>
> In too many ways our society has yet to confront a serious problem arising from women who are forced into prostitution at a young age. . . . And once the girl becomes an adult prostitute, she is labeled a criminal and often is forced into even more crime, as the only means of supporting herself. Few escape the vicious cycle.[137]

Nevertheless, Justice Kogan agreed that "[w]hether Wuornos were male or female, the facts remain that the State's theory of this case is sufficiently supported by the record."[138] Juries in four separate murder trials were persuaded by the State's theory, and sentenced Wuornos to death in each.

Despite her confessions to the killings, Wuornos maintains that she shot the men in self-defense when they attempted to rape her:

> I'm supposed to die because I'm a prostitute? No, I don't think so. I was out prostituting. And I was dealing with hundreds and

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[135] 644 So. 2d at 1008. The State argued that "Wuornos had armed herself in advance, lured her victim to an isolated location, and proceeded to kill him so she could steal his belongings." *Id.*

[136] *Id. But cf.* Craig Pittman, Death Row Volunteers Don't Always Get Wish, St. Petersburg Times, Jan. 4, 1998, at 1B, *available at* 1998 WL 4238955 ([W]hen he admitted the killing, Knox said later, he crafted his confession to guarantee a death sentence–or so he believed. Knox told police he choked Barbara Jean Faulkner to death after she bit him during oral sex. To merit a death sentence, though, Knox should have killed in a calculating manner, or in a way that was heinous and cruel. . . . "Unless there's some aggravating circumstance that would lend itself to the state seeking the death penalty, then we have to seek life," said Assistant State Attorney Glenn Martin, who prosecuted Knox. "He just doesn't meet any of them.").

[137] 644 So. 2d at 1012 (Kogan, J., concurring specially) (citing to Report of the Florida Supreme Court Gender Bias Study Comm'n, 42 Fla. L. Rev. 803, 892-908 (1990)).

[138] 644 So. 2d at 1012 (Kogan, J., concurring specially).

> hundreds of guys. You got a jerk that's going to come along and try to rape me? I'm going to fight. I believe that everybody has a right to self-defend themselves.[139]

The Florida Supreme Court in the appeal from the decision in the Antonio case commented on Wuornos' claim of self-defense: "We recognize that defendants unschooled in legal niceties may well misuse legal terms of art such as 'self-defense,' as Wuornos did here . . . ."[140] Rather than indicating Wuornos' lack of schooling in "legal niceties," the disjunction between such "terms of art" and the lived experience of women like Aileen Wuornos challenges the fairness and adequacy of these legal categories.[141] One journalist pointed out that Wuornos' working conditions as a prostitute "became far more dangerous when many of her regular clients were mobilized for the Gulf War, leaving her to rely heavily on roadside solicitation."[142] Another reported:

> For Wuornos, her days as a hitchhiking prostitute were like a battle. Survival was all that mattered.
>
> Brutally raped by some men who paid her for sex, she vowed to stop anyone else who tried, she said.
>
> "They almost killed me," she said of her seven victims, all middle-aged, white men killed along Florida highways in 1989-1990.
>
> "Who's supposed to die? It's a battle. That's the way it is. That's life. It's that you got a battle between life and death. Whoever wins, more power to you."[143]

Wuornos insisted repeatedly: "'What I did is what anyone would do . . . I defended myself.'"[144] Multiple juries' condemnations of Wuornos, and their

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[139] Aileen Wuornos, "America's First Female Serial Killer", Transcript of Interview for Dateline NBC, Aug. 25, 1992, *cited in* Miriam Basilio, Corporal Evidence: Representations of Aileen Wuornos, 55 Art J. 56 (1996), *available at* 1996 WL 13004923.

[140] 676 So. 2d at 969.

[141] *See infra* Part II.A.

[142] Basilio, *supra* note 140; *see* Jenkins, *supra* note 110, at 683.

[143] Cory Jo Lancaster, Irate Wuornos Displays Little Remorse on TV, Orlando Sentinel, Aug. 27, 1992, at B1, *available at* 1992 WL 10624610 (reporting Wuornos's appearance on Dateline NBC).

[144] Chris Lavin, Judge Agrees Wuornos Must Die, St. Petersburg Times, Feb. 2, 1992, at 1B, *available at* 1992 WL 11010039.

refusal to mitigate her sentence in light of the totality of circumstances, reflect not only their rejection of her version of events, but also a reluctance to empower certain women to defend themselves when those women feel threatened.[145]

Like Ana Cardona, Aileen Wuornos expressed her frustration that the jury could not understand her situation and was therefore incapable of judging her fairly.[146] Wuornos made clear at various points that she preferred to waive her rights of appeal and get everything over with:

> "I understand everything, and as far as I'm concerned, I'm tired of the re-electorial scandals of trying to take these cases to court. And I've got three death sentences already that I'm not going to get appealed. I got one that may be appealed, very good appeal, and this one is silly, and I just don't—I know everything. Guilty."[147]

This apparent futility of meaningful communication with courts perceived as uncomprehending and even hostile, experienced in an extreme form by Wuornos, may color the experiences of women—especially minority, lesbian, or poor women—in the criminal justice system more generally.[148]

After Wuornos' trial in the Mallory case, but before her appeal, a television journalist discovered evidence in easily accessible FBI computer records that

> Mallory had served 10 years in prison for a violent sex crime—a fact that escaped both Wuornos' prosecutors and defense team. Instead, prosecutors had told [Dateline NBC correspondent Michele] Gillen that Mallory was an upstanding citizen without a criminal past.

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[145] "The policy and media stress on the singularity of Wuornos as a female serial killer veils both the routine incidence of violence against women and the potential threat embodied in women defending themselves." Basilio, *supra* note 140.

[146] Hugh Davies, America "to end ban on executing women", Daily Telegraph (London), Feb. 7, 1997, *available at* 1997 WL 2282739) (recounting that Wuornos told jurors she hoped they would be raped; elsewhere, she was reported as saying that she hoped their daughters would be raped).

[147] 676 So. 2d at 970.

[148] *See supra* notes 42, 62; on gender and sentencing *see*, for example, Christopher S. Alexander, Crushing Equality: Gender Equal Sentencing in America, 6 Am. U.J. Gender & L. 199 (1997); Kathleen Daly & Michael Tonry, Gender, Race, and Sentencing, 22 Crime & Just. 201 (1997); Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepperdine L. Rev. 905 (1993); Dorothy E. Roberts, The Meaning of Gender Equality in Criminal Law, 85 J. Crim. L. & Criminology 1 (1994); Andrea Shapiro, Unequal Before the Law: Men, Women, and the Death Penalty, 8 Am. U.J. Gender Soc. Pol'y & L. 427 (2000).

> "From the moment this woman was arrested there was this passion about finding the 'first female serial killer' because she had confessed to killing men. There was this outrage that this woman could do this," [said] Gillen . . . .
>
> Psychologists say Mallory's death—the only one for which Wuornos stood trial—may have started her killing spree.[149]

This neglected evidence, and Gillen's description of the typecasting that made investigators blind to Mallory's own criminal past, shows how preconceived notions about female normalcy and deviance can overshadow the potentially significant nuances of a particular case. The use of stereotypes and typecasting illustrated in the above discussion of the Wuornos case involves an attempt by attorneys to fit legal arguments into familiar narrative structures that juries can recognize and comprehend. Such courtroom shorthands can be destructive when, instead of illuminating characters and events, they obscure and even distort them.

Like the Cardona case, the Wuornos case demonstrates a lack of social support and the potential complicity of a lesbian partner with the police and prosecution; like the Jackson case, it demonstrates the tendency to view violence by women as the product of deliberate deception rather than emotional fury or self-defense; and like the Larzelere case, it evidences the association of greed and female dominance with enhanced culpability. In all of these cases, the jury was confronted with a reversal of the conventional dichotomy of man as perpetrator and woman as victim. The failure of the defendants to argue successfully against the CCP aggravating factor turned in large part on their inability to portray themselves as fitting the conventional image of female victimhood.

The Wuornos cases highlight the potentially destabilizing impact of this role reversal and suggest the broader implications of society's reluctance to legitimize the use of violence by women. As Wuornos herself pointed out in a statement she read in 1992, her treatment in the criminal justice system was "sending society a message that a woman who defends herself is likely to end up on Death Row . . . [T]hey're saying that male dominance is OK and woe be to the woman who takes action against a violent man."[150] Building on this observation, Parts II and III of this Article explore the potential connection between the societal condemnation of violence by women and the continued pervasiveness of violence against us.

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[149] Peter Johnson, "Dateline NBC" Finds Flaw in Serial Killer Case, USA Today, Nov. 10, 1992, at 3D, *available at* 1992 WL 8417417.

[150] Highway Hooker Sentenced to Death, Courier-J. (Louisville, Ky.), May 16, 1992, at 6A, *available at* 1992 WL 7836045.

III. VICTIM OR VAMP?

A. The Double-Edged Sword of Chivalry

The ability to translate the idea of a societal entitlement to execute the most violent offenders into the actual imposition and carrying out of this penalty depends largely on a process of "othering" that allows society to justify taking the life of a convicted criminal. This is true for the state-sanctioned execution of both men and women. The capacity to identify a death row inmate as "not one of us" seems intuitively central to the ability to execute another human being. However, although both women and men may be the objects of such "othering" techniques, including the use of stereotypes, there are important differences. The normalization of the killing of men in war (as opposed to the protection of women and children) and the broad tendency to identify women, as opposed to men, with nurturing relationships (and centrally the mother-child bond) contribute to a greater willingness to execute men than women. The emphasis on the singularity of violent women suggests a greater, or at least different, role for condemnatory stereotypes in developing societal justifications for executing women.[151]

Paradoxically, the pathologization and even demonization of violent women has emerged alongside a general inability to believe in women's capacity to commit violent acts. The famous case of Lizzie Borden, a young woman from Fall River, Massachusetts who was charged and acquitted in the 1892 axe murders of her father and stepmother, highlighted the reluctance of a community to convict and punish a woman for such a brutal crime.[152] Proponents of the "chivalry thesis" argue that "women's weak and passive nature makes them less attractive, if not less eligible, candidates for imprisonment. . . . Placed in the context of capital sentencing, this chivalrous attitude towards women manifests itself in a cultural reluctance to sentence women to death."[153] Both men and women

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[151] One news article acknowledges that "[o]bviously, the very rarity of women's executions makes them newsworthy," but argues that "this is only the statistical manifestation of the stubborn gender discrimination that taints our attitude about capital punishment in this country." Cathy Young, Sexism and the death chamber: Chivalry lives when a woman must die, May 4, 2000 (visited Jan,. 28, 2001) http://www.salon.com/mwt/feature. For a concise and useful overview of research on women and crime, *see* Dana M. Britton, Feminism in Criminology: Engendering the Outlaw, 571 Annals Am. Acad. Pol. & Soc. Sci. (2000). For a challenge to the constitutionality of the death penalty on Equal Protection grounds that focuses on gender disparities in its application attributed largely to chivalrous attitudes, *see* Andrea Shapiro, Unequal Before the Law: Men, Women, and the Death Penalty, 8 Am. U.J. Gender Soc. Pol'y & L. 427 (2000).

[152] Heidensohn, *supra* note 4 at 87, *discussing* R. Sullivan, Goodbye, Lizzie Borden 193 (1975).

[153] Jenny E. Carroll, Note, Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated

defendants are "othered" to a certain extent in order for society to justify executing them; however, the forms this othering takes and the broader societal implications it carries seem to be qualitatively different for women. The corollary of the chivalry thesis is that, when women are condemned rather than exonerated, they are portrayed as not only cunning and even demonic, but also—and perhaps above all—unwomanly.

The classic statement of the idea that women enjoy a misguided and unjustifiable presumption of innocence is Otto Pollack's 1951 *The Criminality of Women*, in which he argued:

> [W]omen's crimes are underreported .. . . [because] women tend to be inherently more deceitful and cunning than men, thus making them more effective at concealing their crimes . . . . [E]mbarrassment may cause victims of female offenders to be less likely than victims of male offenders to report their crimes to the police . . . [, and] the police and other law-enforcement personnel, acting out of protectiveness or a misguided notion that women do not commit crimes, are likely to be more reluctant to arrest female offenders.[154]

The idea that women are incapable of committing violent crimes is just as distorting as the notion that their supposedly inherent deceitfulness predisposes them to certain forms of criminality. When sex-role stereotypes prevail over context-specific reasoning, the application of justice is likely to be skewed.

The chivalry thesis colors societal attitudes towards and interpretations of violence by women, as evidenced by numerous commentaries on the subject.[155] The ability of women to commit serial

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Theories of Justice, 75 Tex. L. Rev. 1413, 1418-19 (1997). *See also* Julie Hauserman, State's will to execute women is put to test, St. Petersburg Times, March 28, 1998, at 1A, *available at* 1998 WL 4253910; Laura Mansnerus, When women commit crimes, might sexism come in handy?, Austin Am.-Statesman, Nov. 21, 1997, at H7, *available at* 1997 WL 2847445 ("'There's a tendency to believe in female innocence,' sa[ys] Cathy Young, a researcher at the Cato Institute and vice president of the conservative Women's Freedom Network, who argues that offenders who are women are treated more leniently than men."); Tina Rosenberg, Dead woman walking, Harper's Bazaar, Feb. 1, 1996, at 110, *available at* 1996 WL 9826895.

[154] Boritch, *supra* note 19, at 31. For a more recent version of the second argument, *see* Coramae Mann, When Women Kill 5 (1996), citing A. Rosenfeld, When Women Rape Men: The Body, 28 Omni 194 (1983); Rosenfeld writes: "[How reluctant] would be the man who is the victim of sexual assault by gunslinging or knife-wielding women? Would such a man choose to test the credulity of the police or even his closest friends? 'I was raped by two women last night' may not fall in the same category as 'I was taken aboard a UFO by little green men,' but the inherent implausibility of the claim might restrain even a braggart."

[155] *See, e.g.*, Kahler, *supra* note 80, at F1 ("People have always been reluctant to execute women because everyone could see their wife or mother or daughter. Men have been protective of the female gender," said Watt Espy, a death penalty historian in Montgomery, Ala. "But that is changing. Feminists and women who want to take charge and control are

murders as a "ramification of feminism"[156] appears both subtly and more explicitly in discussions of women and crime. For example, two commentators note in a preface to one criminological study that "[w]omen have moved out of traditional roles and have become a major force in the workplace. This change has *resulted in* the growth in female participation in crime . . . ."[157] Another study notes that "[b]oth the national distributions and the rankings of female arrests for assault in California, Florida, and New York State suggest not only that women are committing an *impressive* number of assaultive crimes, but also that such *arrests* are increasing at a faster rate than those of men."[158] The adjective "impressive" suggests a certain fascination with and even qualified admiration for women who are powerful and assertive enough to commit this kind of crime. In addition, the slippage between statistics on the actual commission of crimes (which can of course never be measured completely) and arrest rates (which are already filtered through the exercise of police discretion) demonstrates the mutually reinforcing link between the public perception of the growing capacity of women to commit assaultive crimes and the statistical corroboration of this perception of change.

The interrelationship between rising perceptions of women's capacity for violence and the increase in female arrest rates suggests a link between the normalization of violence by women and the feminist agenda of empowering women across all spheres of public and private activity.[159] The potentially disruptive social consequences of a feminist agenda that includes the liberation of women to commit violence, and the corresponding willingness of society to use increasingly violent means of social control, has contributed to an "equality argument" to justify executing women. Elements of this argument surface in references to familiar imperatives of the women's movement. For example, one journalist reports that "[d]eath penalty historian Watt Epsy is certain death sentences for women will increase as it becomes an 'equal opportunity employer.' . . . [I]f women

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rapidly eroding the protective spirit men have felt for women."); *see also* Kathryn Kahler, Women on Death Row: A Chilling Sign of the Times, The Plain Dealer (Cleveland), May 26, 1993, at 1A, *available at* 1993 WL 4293406 ("The cases that are clear, [Cleveland State University professor Victor] Streib said, are those in which a woman commits a particularly heinous crime, 'one that is truly shocking, bloody, gory–*a crime like a man might commit.*'") (emphasis added).

[156] Janet Warren, a professor at the University of Virginia in Charlottesville, quoted in Experts tag convicted California landlady as unusual serial killer, Las Vegas Rev.-J., Aug. 29, 1993, at 4B, *available at* 1993 WL 4501413.

[157] Leslie W. Kennedy & Vincent F. Sacco, Preface to Boritch, *supra* note 19, at xi (emphasis added); *see infra* Part III.

[158] Mann, *supra* note 156, at 7 (emphasis added).

[159] *See infra* Part III.

want to be treated like men, then let's treat them like men in all respects."[160] Ironically and unselfconsciously embedded in this plea for gender neutrality is the persistent assumption that those who make, apply, and enforce the law—the "we" behind the "let's" in Epsy's statement—are and will continue to be men.

B. The Battered Women's Syndrome and the Feminist Catch-22

The narratives of violence constructed during criminal trials reflect and reinforce societal understandings about appropriate behavior. Societal interpretations of and attitudes towards the use of violence by women in one context may carry over into other situations. For example, the acceptance of a provocation defense to first-degree murder harkens back to the male ritual of organized duels. Men are expected, if not encouraged, to defend their honor and express their rage through violence. This expectation and understanding of certain uses of physical violence by men, even if it does have limits, rarely if ever extends to the use of physical violence by women. If the use of violence is only excusable given a particular story about the defendant, then it follows that whatever story is told about a given use of violence will reflect on the defendant more broadly, and also on the social group to which he or she belongs. The implications of these connections may argue against automatically embracing any theory of criminal (ir)responsibility that excuses the use of violence by women, even in limited situations. Anne Coughlin articulates this dilemma:

> [I]f . . . the reigning theory of responsibility declares that an excused offender is less than a full human being, we must consider whether the practice of excusing women is bringing to law a feminist theory of responsibility or whether it is exploiting

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[160] Kahler, *supra* note 80, at F1; *see also* Last Dance (Touchstone Pictures 1996) (dialogue between two men driving to prison):

RICK: But I mean, her crimes, you don't think of a—woman committing a crime like that, I mean I don't anyway—that, that brutal.

SAM: Most of the time a woman kills, it's a crime of passion. Usually her husband or her boyfriend.

. . . .

SAM: A lot more women are going to be executed now.

RICK: Why's that?

SAM: Women's lobby. (*Taking out a cigarette.*) They all want equal treatment in the eyes of the law. (*Chuckles.*)

> and, thereby, reproducing norms that support the conditions of our subjugation.[161]

Lenore Walker, one of the leading developers and exponents of the battered woman syndrome defense, faces the accusation that she "accepts as given the patriarchal categories dictated by the criminal law and then uses her expert training to explain that women really are what law always has constructed them to be: passive, helpless, childlike, and irrational."[162] More generally, it has been observed that, for the battered woman syndrome defense to succeed, "the woman herself must be presented as a passive victim of her own dysfunctional personality."[163] Instead of empowering women to use violence to defend themselves, excuses based on syndrome evidence that emphasizes the loss of control or capacity for rational perception may intensify, rather than counter, the victimization and *dis*empowerment of women: "In the newly constructed popular stereotypes, female victims of rape, harassment, and domestic violence are depicted as totally consumed by male domination, the antithesis of autonomous human beings."[164] The lack of effective moral agency is the hook to which the battered woman syndrome defense attaches itself.

Societal expectations and understandings of the use of violence play a key role in the structure and outcomes of criminal trials. In the first instance, the ability of a jury to empathize or identify with an individual's conduct also affects the perception of which players occupy the roles of aggressor and victim in a given confrontation. This phenomenon has been analyzed most extensively in relation to the use of violence by battered women in both confrontational and non-confrontational situations. In the 1990 case *R v. Lavallee*, the Canadian Supreme Court wrote:

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[161] For an analysis of a similar problem in relation to the marital coercion defense, *see* Anne M. Coughlin, Excusing Women, 82 Calif. L. Rev. 1, 32, 44 (1994);, Excusing Women, 82 Calif. L. Rev. 1, 32, 44 (1994); *see also* Mansnerus, *supra* note 150, at H7.

[162] Coughlin, *supra* note 164, at 56 n.276; *see also* Lloyd, *infra* note 172, at 102-03 ("To be content with women pleading diminished responsibility is to be content with women continuing to be defined in terms of their inherent instability and not in terms of rational adults responsible for their actions. The defence of diminished responsibility fits neatly within the old biological determinist explanation of strange female behaviour.") For a list of the range of crimes for which the battered woman's syndrome has been offered as a defense, *see* Coughlin, *supra*, at 55 n.274.

[163] Elizabeth Comack, Women in Trouble 151 (1996).

[164] Martha Chamallas, Introduction to Feminist Legal Theory 102 (1999); *see also id.* at 105 ("The paradox for feminists, however, has been the tendency of some courts and attorneys to interpret this syndrome evidence in a highly conservative fashion, that is, as evidence reinforcing women's incapacitation and passivity in the face of male violence. . . . The challenge is to find a way to express the agency of a battered woman without blaming her for not extricating herself from the abusive situation."); *id. at* 250-64.

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."[165]

This statement amplifies the intuition articulated thirteen years earlier in the American case, *State v. Wanrow*, which identified a gender-blind reasonableness standard in the context of a violent confrontation as a potential equal protection violation:

> The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.[166]

In justifying self-defense by battered women, the crucial distinction is generally not that between the perceptions of the "reasonable large person" and the "reasonable small person," but rather that between the "reasonable man" and the "reasonable (battered) woman." In these cases, differences in physical strength, psychological attitudes towards the use of violence, and prior life experiences are generally viewed as "sex-categorical"—that is, intrinsic to sex, regardless of the particular individual in question—when they are used as the basis for a defense to criminal charges.

The idea of violent self-defense by abused women as a rational response to an extreme situation is of relatively recent vintage. According to one author, up until the late 1970s, most women charged with homicide after killing their abusers either pleaded guilty, or pleaded not guilty by reason of insanity.[167] The battered woman syndrome defense differs from the defense of insanity in that it involves placing the trier of fact in the defendant woman's shoes and asking the question: Was this woman's conduct reasonable in light of the totality of circumstances, and, most importantly, given her history of abuse? The battered woman syndrome posits a psychological response to abuse that alters a woman's calculus of the possibility of escape or retreat, the imminence of danger, and the degree of force necessary to eliminate effectively the perceived threat (crucial

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[165] Boritch, *supra* note 19, at 245, citing R. v. Lavallee, 1 S.C.R. 852 (1990).

[166] State v. Wanrow, 88 Wash. 2d at 221 (1977).

[167] Cathryn Jo Rosen, The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill, 36 Am. U. L. Rev. 11, 37 n.150 (1986).

elements in the traditional self-defense framework). However, the description of this altered calculus as a "syndrome" carries somewhat paradoxical implications: "There is an inherent inconsistency in arguing that a person whose perceptions are altered by a psychologically identifiable syndrome is nonetheless reasonable with respect to conduct related to the syndrome."[168] Even with an increased awareness of and sensitivity to the experiences and perceptions of women, the requirement of reasonableness imposes certain limitations on society's characterization and comprehension of particular uses of violence.[169]

Feminist advocates of the battered woman defense focus on its utility in providing women with a choice, rather than on its implicit (and even explicit) negation of the defendant's decision-making capacity: "[T]he emerging battered women's defense would give women the right (one men have had for centuries) to choose self-protection as an alternative to tolerating severe physical abuse or facing homicide charges."[170] However, the perception of this alternative as a legitimate choice is not universally shared. Elements of the chivalry thesis resurface in popular reactions to the battered woman syndrome defense: "No one thinks abusive backgrounds should excuse men's criminal acts—whether such men are wife-batterers or Charles Manson. But for women, the 'poor little me' defense is almost as good as a get-out-of-jail-free card."[171] Does this reaction express a valid concern, or is it symptomatic of an exaggerated fear of sanctioning the use of violence by women?[172]

As with the "othering" process noted above, the claim here is not that men with abusive backgrounds are not also done a disservice by the lack of adequate social protection and support. Nor is it that women should

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[168] *Id.* at 15.

[169] For an analysis of a similar problem in relation to the marital coercion defense, *see* Coughlin, *supra* note 164; for an explicit analogy between the marital coercion defense and the battered woman's syndrome defense, *see id.* at 49. *See also* Ann Lloyd, Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women 94 (1995) ("As the law of self-defence evolved, it stressed that the attack must make one fear for one's life, and that the force used to repel the attack must be proportionate, i.e. comparable, not excessive, which fits with a scenario of two grown men fighting each other. . . . Although some do, in general women do not meet force with force. We're brought up to please and placate, to avoid confrontation, anger and certainly fighting, not to react with a similar show of instant aggression.")

[170] Nicole Hahn Rafter & Frances Heidensohn, Introduction to International Feminist Perspectives in Criminology: Engendering a Discipline 8 (Rafter & Heidensohn eds., 1995); *see* Coughlin, *supra* note 164, at 8 n.20 for a list of cases in which male offenders have been able to raise the "battered person syndrome" defense.

[171] Donna Laframboise, Sugar and spice not so nice, Globe & Mail (Toronto Can.), Oct. 11, 1997, at D18, *reviewing* Patricia Pearson, When She Was Bad: Violent Women and the Myth of Innocence (1997).

[172] For references on gender and sentencing, *see supra* note 145.

be indiscriminately encouraged to engage in violent self-help. However, there seems to be a qualitative difference between the reactions to violence by women and that by men, stemming both from the relative infrequency of the former, and from a seemingly widespread perception of the disproportionate social disruptiveness of violence by women: "[Y]ou don't hear judges agonizing over whether *men* acquitted of killing wives are being given a licence to kill, whereas they do express such doubts in the far fewer cases involving women who kill men."[173] By portraying certain women who commit violent acts as victims, the law may be more accurately capturing these women's life experiences. But there is also a darker underside to this defense strategy: namely, the concurrent downplaying and even denial of women's moral agency and capacity for rational choice, even if those choices do not conform to social expectations.

Because judges and juries seem understandably reluctant to sanction too many variations on the self-defense justification,[174] defenses including the partial defense of provocation and the excuse of the battered woman syndrome depend on the successful portrayal of the defendant as incapable of exercising the faculty of moral choice. This narrative may be difficult to construct in situations involving domestic abuse, where women exhibit a combination of coping behavior on the one hand, and lack of control on the other; moreover, in such situations, the supposed loss of control (in committing an act of defensive, preemptive, or retributive violence) may in fact be part of a more complex coping strategy: "Feminist litigators in harassment suits, like those in domestic violence litigation, face the difficulty of breaking through the dichotomy [between female agency and female helplessness] and persuading judges and juries that coping behavior is not inconsistent with victimization."[175] Unless and until women receive a legal sanction to engage in self-help practices involving the use of violence (a radical idea, but one that is not completely without foundation given the absence of effective state responses to many situations of abuse),

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[173] Lloyd, *supra* note 172, at 75.

[174] On justification and excuse in the context of heat-of-passion killings, *see* Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 7 J. Crim. L. & Criminology 421 (1982).

[175] Chamallas, *supra* note 168, at 106. For possible alternative solutions, *see* Lloyd, *supra* note 172, at 107 ("Perhaps the most comprehensive attempt to capture women's experiences within the law is contained in the proposal by the Rights of Women (ROW): that a new partial defence to murder, that of self-preservation, be created. It would be of comparable standing to the partial defences of provocation and diminished responsibility."); *see also id.* at 108. Lloyd suggests that the pathologization of women's behavior is a direct result of a social hierarchy dominated by men: "It is women's reproductive biology which defines them as other than men. If women constituted the ruling powers that be in our society there'd probably be no hormonal theory of women's behaviour, only an easily accepted and widely acknowledged explanation of male behaviour based on fluctuating levels of testosterone, and psychic wounds caused by not having vaginas and depth and internal power, only penises and scrotal sacs." *Id.* at xvii.

defendants will have to portray themselves as victims in order to avoid condemnation and punishment. Whether a defendant in this situation is exonerated or condemned depends largely on whether she is perceived predominantly as a victim or a vamp.[176]

IV. FEMALE AGENCY AND THE USE OF PUNISHMENT AS A MEANS OF SOCIAL CONTROL

The criminal justice system serves not only to define and punish specific criminal acts, but also to establish more general parameters for acceptable and deviant behavior in a given society.[177] Control and condemnation track each other closely, as the stigmatization of criminal conduct is meant to reinforce and to enhance the deterrent value of the law.[178] As a corollary, defenses to criminal charges that portray the defendant's conduct as either excused or justified carry with them an imprimatur of societal toleration, if not endorsement.[179] As suggested in the above discussion of the battered woman syndrome, the societal implications of accepting a particular criminal defense can go far beyond the question of what penalty is appropriate for a particular individual's behavior. The implicit social stereotypes underlying the condemnation or exoneration of criminal defendants have a cumulative effect in reinforcing and propagating images of normalcy and deviance. The outer limits of the latter category are, in part, defined by the imposition of the death penalty.[180]

The perceived connection between an individual's capacity for criminal responsibility and her degree of moral agency, highlighted in feminist criticisms of the battered woman syndrome defense, resurfaces in discussions of the death penalty:

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[176] *See* Lloyd, *supra* note 172, at 93, *citing* Helena Kennedy, Eve was Framed 215 (1992) ("Justice is likely to remain a lottery while so much depends on the woman's fulfillment of society's expectations. One of the factors which undoubtedly affects the outcome of murder trials is, as always, the persona of the woman in the dock. . . . Women who conform to the conventional image of the cowed victim fare better than those who come to trial angry that they are being blamed for what ultimately took place.")

[177] For a discussion of trials as a boundary-maintaining device that broadcasts and reinforces social norms, *see* Lawrence M. Friedman, Law, Lawyers, and Popular Culture, 98 Yale L.J. 1579, 1594 (1989).

[178] *See, e.g.*, Nathaniel Hawthorne, The Scarlet Letter (1850); Marina Angel, Susan Glaspell's Trifles and A Jury of Her Peers: Woman Abuse in a Literary and Legal Context, 45 Buffalo L. Rev. 779 (1997).

[179] *See supra* note 173.

[180] *See* Carroll, *supra* note 150, at 1415-16 (describing capital punishment as "the extreme of the criminal justice system, where society collectively defines the outer limits of unacceptable behavior").

> Viewed in its theoretical context, if 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.[181]

As suggested in Part II, the chivalry thesis and the battered woman syndrome can both be seen as predicating judicial lenience on a certain conception of female helplessness. The sensationalist stereotyping of women who commit particularly violent crimes illustrated in Part I compounds the dissociation between "normal" womanhood and the use of violence. This, in turn, reinforces a more general tendency to exclude women from the socially acceptable use of physical force. Such exclusion cannot help but shape women's self-understandings and feelings of physical security, and potential attackers' expectations of resistance or retaliation by women in the context of an assault.

This line of reasoning follows the concerns articulated by feminist criminologists: "Traditional criminology has mainly asked how to achieve crime control. Feminists have asked how crime control achieves gender—how control systems have tended to view criminology itself as a tool for reinforcing inequality."[182] The operation of the criminal justice system as "a tool for reinforcing inequality" can occur formally: first, through the ability or inability of a particular legal paradigm (such as self-defense) to accommodate the lived experience of those whose behavior it sanctions or condemns; and second, through the receptiveness and responsiveness of law enforcement mechanisms to the needs and experiences of the people. Hence the observation that "female criminality cannot be conceptually or practically separated from the issue of female victimization. . . . For many, if not most, female offenders, criminality and victimization are not discrete phenomena, but rather constitute a continuum of experience."[183] This phenomenon was evident in the cases of Aileen Wuornos and Andrea Hicks Jackson described above. The argument here is not that past experiences of abuse should in any way create a license to kill, or even the presumption of an attacker's moral superiority over the object of her violent act. But it does suggest that snapshots that lead us to label one individual the "victim" and the other the "aggressor" may, by virtue of being confined to a very limited time frame, convey an oversimplified picture that fails to take into account the ways in which the aggressor has experienced victimization, either by

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[181] *Id.* at 1418-19.

[182] Rafter & Heidensohn, *supra* note 169, at 11.

[183] Boritch, *supra* note 16, at 6; *see also id.* at 75-76. Prior experiences of abuse are common among women in prison; Comack, *supra* note 167, at 39.

private individuals, or through the action, or more often inaction, of the state.

The criminal justice system also entails a more informal norm-enforcing component, namely, the operation of and interplay between popular images and public opinion. The intense media reactions to women on death row because they are women illustrates that, within the general societal abhorrence for murderous acts of violence, there seems to be a particularly strong reaction against (often manifested in a peculiar fascination with) the commission of violence by women: "Amongst . . . all [of these images of violent women], there is no conception of the 'normal' exuberant delinquency characteristic of males."[184] As suggested above, this phenomenon seems related to, and in part responsible for, the general tendency for violent aggression to be associated with men, while physical vulnerability is considered more characteristic of women. Lived experience suggests that one implication of viewing violence by women as particularly deviant or exceptional is that many women live with the everyday fear of being attacked by a man, from being afraid of walking alone at night, to not wanting to work late shifts, to feeling uncomfortable in isolated public places where attacks could occur, to feeling insecure at home where the state remains loath to intervene to protect women from violence by male intimates.[185]

This background condition, highlighted in the legislative hearings leading to the passage of the Violence Against Women Act,[186] manifests

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[184] Heidensohn, *supra* note 3, at 95; *see* Coughlin, *supra* note 164, at 3 n.5 (listing appellate opinions whose language emphasizes that violent women are especially transgressive and dangerous to society).

[185] *See* Boritch, *supra* note 16, at 8 ("Victimization research has consistently shown an apparent paradox: while women are less often victims of crime than men, they express greater fear of crime than men. Women's fear of crime has the obvious consequence of restricting their freedom and activities and, more generally, of adversely affecting the quality of their lives. . . . It is becoming increasingly apparent that past victimization research has greatly underestimated women's vulnerability to these forms of male violence [sexual assault and spousal assault], and that women's fear of crime is more objectively based than previously imagined.") *See also* Katherine Dunn, Just as fierce, 19 Mother Jones 34 (1994), *available at* 1994 WL 12802206 ("Women believe they are helpless against male aggression; criminals see women as vulnerable."). Heidensohn, *supra* note 3, at 182 cites Susan Brownmiller Against Our Will 15 (1973): "[Rape and the fear of it] is nothing more or less than a conscious process of intimidation by, which all men keep all women in a state of fear."

[186] *See, e.g.,* Violence Against Women Act: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rts. of the House Comm. on the Judiciary, Nov. 16, 1993 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Educational Fund); *see also* Boritch, *supra* note 16, at 218, *citing* Canadian Panel on Violence, Final Report of the Canadian Panel on Violence Against Women 5 (1993) ("Women live in a social milieu textured by inequality, a reality that leaves them vulnerable to violence. As long as women have unequal access to choice and freedom, as long as women live with the fear of violence, their options will be restricted, their movement curtailed and their lives vitally affected.'").

itself in a variety of subtle but telling ways. For instance, the author of a book on feminist criminology recalls her reaction to hearing about an upcoming conference entitled "Perspectives on Female Violence":

> Only when Louise [Chunn, editor of *The Guardian*'s women's page] rang me to say she was interested in a story about female violence did I realize that we were talking about women who committed violent acts, *not* women who had violence done to them. I had been so conditioned by my unconscious assumption that women are never violent that I had completely failed to comprehend the conference's title.[187]

Feminist criminologists offer a critique of "traditional" criminology, focusing on the frequent marginalization and even exclusion of women from studies of both criminals and victims.[188] This is clearly more than just a methodological issue: How we measure, study, and understand criminals and their victims is inextricably bound up with the normative and ideological framework within which we comprehend societal interactions as a whole.

Criminal convictions are one mechanism through which the state establishes the limits of acceptable behavior and asserts its control over those who violate societal norms. In a democratic system, "the people" are the legislators, but they charge the criminal justice system (composed of prosecutors, judges, the police, etc.) with interpreting and enforcing these behavioral limits. Defenses to crimes transfer some of the prerogatives for defining behavioral standards back to the individual in certain exceptional circumstances. While some defenses, such as self-defense, permit individuals to protect themselves in limited situations where the state is unable to do so,[189] others, such as the provocation defense, empower individuals to override the normative framework constructed by the state in favor of their own subjective, and even fleeting, conceptions of what is right and wrong in a given situation. Victoria Nourse writes:

> Precisely because [the provoked killer] asks us to embrace [his] emotional judgments [of blame], he asks us to embrace him as a legislator, as one who rightly sets the emotional terms of blame and wrongdoing vis-a-vis his victim. . . . [W]hen a defendant responds with outrage to conduct society protects, he seeks to supplant the State's normative judgment, to impose his individual

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[187] Lloyd, *supra* note 172, at x.

[188] *See* Heidensohn, *supra* note 3, at 124, 152.

[189] As noted above, the state being "unable or *unwilling*" to protect an individual might be a more appropriate predicate for self-help in certain situations.

> vision of blame and wrongdoing not only on the victim, but also on the rest of us.[190]

Building on this idea, one could suggest that the reluctance of the existing criminal justice system to embrace certain gender-specific defenses to the use of violence by women reflects, at least in part, a broader societal discomfort with the idea of women as "legislators"—as the arbiters of moral blameworthiness *in loco governmentis*. (Women may also be perceived as the "standard-bearers of morality, but it is a morality that has historically been created and controlled by men.) The problem is that many aspects of the criminal justice system as it stands are not sufficiently sensitive to the complex interaction between societal attitudes about sex-appropriate behavior and the allocation of criminal responsibility. We need to engage in consistent and sustained attempts to evaluate critically our embedded assumptions and to challenge the ways in which these become enshrined in and perpetuated by judicial and other institutions. As it stands, and as many have observed, important aspects of the administration of criminal justice operate within, and contribute to, a gender-biased status quo.[191]

Why might violence by women be considered more threatening to or subversive of the social fabric than violence by men? Of course, the huge number of men in America's prisons shows that violence by men is also considered dangerous, but it is rarely viewed as unseemly and shocking, the way violence by women tends to be portrayed by prosecutors and the media. One possible explanation is that "[s]ocial relationships are the basis of normative order in society and it seems to be agreed that women do much of the work of succouring and sustaining those relationships;"[192] in other words, women are perceived as integral to creating and preserving the social fabric, leading to fears that if women start subverting social order there will not be much order left. Another view considers women inherently subversive and dangerous: "witches are women; all women are potential witches. . . . Women are feared as a source of disorder in patriarchal

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[190] Nourse, *supra* note 45, at 1393.

[191] These entrenched disparities may not be as explicit as they once were, but their implications remain insidious. A particularly blatant example of explicit gender bias can be found in a nineteenth-century statement by the Royal Commission on the Contagious Diseases Acts: "We may at once dispose of [any recommendation] founded on the principle of putting both parties to the sin of fornication on the same footing by the obvious but not less conclusive reply that there is no comparison to be made between prostitutes and the men who consort with them. With the one sex the offence is committed as a matter of gain; with the other it is an irregular indulgence of a natural impulse." Heidensohn, *supra* note 3, at 35, *citing* K. Thomas, The Double Standard, 20 J. Hist. Ideas (1959). Self-awareness is all the more important as such attitudes, though persistent, tend to be trumpeted less loudly, such that one is more likely to encounter their effects than their enunciation.

[192] Heidensohn, *supra* note 3, at 168.

society."[193] In the contemporary United States, one need only think of public uneasiness about Hillary Rodham Clinton's perceived overreaching as a dynamic and self-assured First Lady actually interested in shaping public policy; her adoption of her husband's last name during his Presidential campaign was only one concession to the public demand for conformity to traditional sex roles that continue to place restraints on women's participation in the public sphere, notable exceptions such as Madeleine Albright notwithstanding.[194]

The image of women as soft, nurturing, and in need of protection is the flip-side of the potential for social destabilization once this illusion is broken. Employing norms of passive femininity in order to restrict women's ability to use physical force reinforces a gender hierarchy dominated by men.[195] One journalist recounts an inspector's reaction to the charging of two teenage girls with manslaughter in Canada:

> [Inspector John McFadden, commander of the major-crimes section of the Calgary police] said that when adults see a girl flagging them down on the side of the road, they feel they ought to pick her up to protect her. When society sees that same girl charged with killing the man who set out to save her, the effect is crushing. "It's a *loss of innocence* for Calgary," Insp. McFadden said.[196]

A similar reaction of disbelief, dismay, and even nostalgia, which is accompanied by a sense of foreboding and apprehension, could be detected in other responses to violent crime:

> [Psychologist Fred Mathews, director of research and program development at Central Toronto Youth Services says that] "if we're going to get serious about the study of violence, we have to come to the conclusion that girls can be just as violent and in some cases even more *vicious* than boys." Metro Police Detective Constable Brian Keown agrees . . . "They're women of the

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[193] *Id.* At 92, *citing* C. Larner, Enemies of God 92-93 (1981); *see generally* Carol F. Karlsen, The Devil in Shape of a Woman: Witchcraft in Colonial New England (1987).

[194] For an editorial comment on this phenomenon, *see* Chimène Keitner, Seduced by stereotypes, we put strong women on trial, Providence Journal-Bulletin, June 27, 1996, (Hers) at 15. Interestingly, the editors of this newspaper decided to print this article, which criticizes the uncritical resort to sex-role stereotypes in a local murder trial, in the "women's section" of the paper.

[195] *Id.* The association of women with destructive power is embedded in popular imagery and mythology, from Circe and Medea to Delilah and Eve.

[196] Boritch, *supra* note 16, at 40, citing Alanna Mitchell, Stabbing Death of Janitor Galvanizes Calgary: Three Teen Girls Arrested, Two Charged with Manslaughter, The Globe and Mail (Toronto Ca.), July 12, 1995, at A1 (emphasis added).

> nineties and they're asserting themselves in a very violent way."'[197]

The articulation of perceived connections between female aggression and viciousness, and between women's empowerment and violence, suggests a deeper sense of unease about the changing role of women, and about the subversive potential of this transformation as women prove themselves capable of being just as violent as men.

The figure of the *femme fatale*, a recurring image in mythology, literature, and other forms of art and popular culture, captures the simultaneous fascination with and fear of powerful, and potentially violent, women.[198] The sexualization of female dominance is built into this system of imagery.[199] For example, the 1961 paperback edition of Otto Pollack's treatise on *The Criminality of Women* has "a binding with a crudely-coloured illustration of a witch beating a kneeling man."[200] In the late nineteenth century, Lombroso and Ferrero, authors of *The Female Offender*, asserted that, "[a]s a double exception, the criminal women is *consequently* a monster—her wickedness must have been enormous."[201] The perceived exceptionality of violence by women may serve as a partial buffer to criminal convictions, but it also amplifies and exacerbates the societal condemnation and demonization of violent offenders who are women.

Implicit sex-based differences in societal norms and expectations become explicit in discussions of violence by women. For example, Aileen Wuornos's case elicited the following observations:

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[197] Boritch, *supra* note 16, at 40-41, *citing* Isabel Vincent, Girl-Gang Violence Alarms Experts, The Globe and Mail (Toronto Ca.), Sept. 12, 1995, at A9 (emphasis added); on the perceived link between feminism, the empowerment of women, and violence, *see infra* text accompanying note 156.

[198] *See, e.g.*, Bram Dijkstra, Idols of Perversity: Fantasies of Feminine Evil in Fin-de-Siècle Culture (1986); Mary Ann Doane, Femmes Fatales: Feminism, Film Theory, Psychoanalysis (1991).

[199] *See generally* Camille Paglia, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson (1990).

[200] Heidensohn, *supra* note 3, at 118. As mentioned above, Pollack developed the idea that women were in fact grossly underrepresented among convicted criminals because of the deceitful and subversive natures of their crimes. "'[F]or women deceit . . . (is) . . . a socially prescribed form of behaviour.' This is because women can fake an orgasm and still have sex whereas 'man must achieve an erection in order to perform the sex act and will not be able to hide his failure.'" *Id.* at 120, *citing* Otto Pollack, The Criminality of Women 11 (1961); *see supra* note 156 and accompanying text.

[201] *Id.* at 112, *citing* C. Lombroso & W. Ferrero, The Female Offender 152 (1895) (emphasis added). *See* the comment by Ana Cardona's defense attorney cited in O'Shea, *supra* note 8, at 128, that "As the case unfolded, it became clear that Ana was going to be held up to our community as a monster."

> In many respects, Wuornos, a bisexual prostitute whose alleged victims had picked her up for sex, fits the profile of a male killer.
>
> "She has the characteristics we see with our male killers," said John Douglas, unit chief of behavioral sciences for the FBI at Quantico, Va. "Like many of our male killers, she comes from a very dysfunctional background where she was abused, physically and sexually. But usually women from that kind of background internalize the abuse and their feelings. While the men turn to aggression, the women turn to alcohol, drugs, prostitution and suicide."[202]

Society punishes the externalization of trauma created by abuse as part of a system of deterrence and retribution that proscribes inflicting harm. However, it is unclear that internalizing abuse is ultimately preferable, either for the individual or for society as a whole. Identifying who is the victim and who the aggressor in a given confrontation enables us to determine who should be protected, and who should be punished. Complications arise when, by tracing events back in time to get a fuller picture of individuals' backgrounds and prior interactions, the bright-line distinction between these two positions may become blurred, or even reversed.

As noted above, the chivalry thesis assumes that, in a confrontation between a man and a woman, the woman is likely to be the victim. On a literal level, the chivalry metaphor suggests that a woman cannot, and perhaps even should not, defend herself: she must wait for a man to come to her aid or rescue.[203] The family is one site for the indoctrination and perpetuation of this norm of non-resistance;[204] the courts may be another. Criminal trials can be viewed as boundary-maintaining devices in which society establishes and enforces general patterns of behavior, not only by sanctioning particular violations, but also by sending implicit and explicit signals about the social acceptability of certain types of conduct. If "for women to defend themselves is still perceived as inherently

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[202] Alison Bass, Women as serial killers, Strangers usually not the victims, News & Observer (Raleigh, NC), June 14, 1992, at E4, *available at* 1992 WL 8017320; *see also* Neva Chonin, Making Art From a Blighted Life, S.F. Chron., June 13, 1999, at 35, *available at* 1999 WL 2688949.

[203] Some have considered the possible origins and implications of this restriction on self-help: "[T]he mythology of females as essentially non-violent grew out of a profound impulse to give special protection to the bearers of future generations—a sort of gender version of the non-combatant status of medics and Red Cross workers. But the problem is the same for all non-combatants, whether in wartime or danger-ridden peace: You can still get hurt, but you're not allowed to fight back." Kahler, *supra* note 80, at F1.

[204] *See, e.g.*, Bass, *supra* note 201, at E4.

transgressive,"[205] then we need to ask ourselves what assumptions underlie this value judgment, and what costs a tendency to label women as either victims or vamps might have on the general ability of women citizens to project an image of self-confidence and a readiness to protect themselves in daily life.

One could argue about whether the more viable and socially desirable way to redress this power imbalance is by de-stigmatizing the use of violence by women, or by more seriously and effectively condemning the use of violence by men. Either way, the sex-based discrepancy in the ability legitimately to threaten and use force has broader societal implications that should be more systematically examined and addressed.

In the final analysis, the best way to remedy the problem of violence is to eliminate its structural predicates.[206] A variety of factors contribute to the legitimacy and frequency of the use of violence by, and against, women. The crucial task is to remember the multifaceted quality of human interactions and confrontations, and to refrain as much as possible from forcing any particular individual or situation into a pre-conceived model. This requires resisting the temptation to classify women who use violence either as victims or as vamps and the tendency to distribute the social good of judicial clemency (in the form of acquittals or reduced sentences) on the basis of these popular stereotypes. Part of viewing women as fully human is viewing them as capable of "normal" uses of violence, some of which may be desirable (such as the use of violence for self-protection), and others which may be destructive (including violence against property and people motivated by rage or frustration, rather than by deception and premeditation). Whatever the outcome, judicial determinations of whether given acts of violence by women are permissible or criminal should be made with a sensitivity to pre-existing power imbalances that may exist between men and women, as well as to the failure of state institutions to redress these imbalances in satisfactory ways. Lawyers and judges should be encouraged to realize that empowering women to use physical aggression as a survival tool in certain situations where they do not enjoy or cannot access the protection of the state does not require portraying women as helpless victims, and that condemning the unjustified or excessive use of violence by women need not entail branding women who resort to violence as viragos or vamps.

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[205] Anne Herrmann, Fatal Women: Lesbian Sexuality and the Mark of Aggression, 37 Criticism 641 (1995), *available at* 1995 WL 15015098 (reviewing Lynda Hart, Fatal Women (1994) and Karen McPherson, Incriminations (1994)).

[206] *See* Comack, *supra* note 167, at 82: "Gender-based violence is a structural issue; it reflects and reinforces women's inequality in society. To this extent, abuse is one manifestation of the existing power imbalanaces. While abusive relationships take different forms and occur in different contexts, they ultimately boil down to issues of power and control." State responsiveness to violence against women is thus crucial, both practically and symbolically; *see also* Kahler, *supra* note 74, at F1.

V. CONCLUSION

It has been said that "[b]ehind each offence is a set of events from which Law [sic] makes its scripted account."[207] In creating the "scripted account" of the use of violence by women, "Law," which can appear in the official form of judges, jurors, prosecutors, and public defenders, and the unofficial form of the media and public opinion, tends to rely upon the identification of women defendants as either victims or vamps. This may be a natural and even largely inevitable result of human psychology's desire to fit new experiences into pre-existing categories and frameworks and of a strategic litigation incentive to paint extreme pictures to persuade a judge or jury through an appeal to emotions. However, the effect of this tendency in trials involving violence by women is to reinforce societal images of women as either helpless or deviant.

There is no doubt that violent men are also demonized to a certain extent, particularly when they face execution.[208] However, the above exploration of the portrayals of the four women on Florida's death row suggests that women are demonized in a particular fashion in order for society to justify killing them, namely, by contrasting their transgressions with a culturally ingrained ideal of femininity that underpins a social order based on sex-specific roles and hierarchies. The tremendous discrepancy in the number of women and men on death row reinforces the idea that women who are sentenced to death are exceptionally deviant, and even monstrous. Conversely, in order for a prosecutor to succeed in convincing a judge or jury to execute a woman—the ultimate form of condemnation and retribution—he or she must portray the woman as particularly harmful to society, both concretely through potential recidivism, and symbolically for having transgressed sex-role stereotypes and criminal prohibitions against violence. The narrative strategies explored in Part I illustrate certain common themes deployed in demonizing women, suggesting that there is a limited vocabulary for discussing women's evilness. Sex-role stereotypes have figured prominently in the public perception and portrayal of the four women in Florida, and arguably of violent women more generally.

As noted above, while the impulse to rely on familiar categories and embedded assumptions may be understandable, it should be identified and resisted to the greatest possible extent. The reinforcement of sexist attitudes through judicial institutions exacerbates their hold on the popular psyche, obstructing the possibility for social attitudes and interactions to approach a more egalitarian model. For women accused of having

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[207] Comack, *supra* note 167, at 27.

[208] As Justice Brennan wrote, "[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

committed violent crimes, the available options seem deeply unsatisfactory: either take on the mantle of victim and renounce the capacity for moral agency, or accept criminal culpability and face societal condemnation. If any human beings deserve the death penalty, this group doubtless includes both women and men. In each case, there should be a contextual evaluation of the circumstances of the particular attack or confrontation, and a concerted effort to be aware of, and to curb, the strong influence of pernicious and potentially distorting sex-role stereotypes. In the case of women defendants, this heightened awareness must also include an acknowledgement of society's complicity in limiting the choices that women have, for example, through state unresponsiveness to violence against women. Normalizing female aggression may compound the problem by increasing the general social acceptability of the use of violence (although perhaps there would be fewer attacks if there were greater fear of violent responses), but it would likely also foster greater equality in both public and private interactions between men and women. Navigating these tensions and accommodating these diverse imperatives constitutes a central challenge—and a central responsibility—for formal and informal actors in the criminal justice system.