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DEATH PENALTY FOR BATTERED WOMEN

Victor L. Streib

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DEATH PENALTY FOR BATTERED WOMEN*

VICTOR L. STREIB**

WOMEN who have been battered by their husbands, lovers, and companions understandably have received an outpouring of concern.¹ The criminal justice system has been encouraged to protect these women more completely² and to punish their batterers more aggressively.³ When the system fails and these women kill their batterers or others, law is asked to stretch and bend to allow expanded defense

* This Article is based substantially on a paper, entitled "Battered Women's Syndrome as a Defense and Mitigating Factor in Capital Cases," presented by the author at the Capital Punishment Symposium sponsored by the *Florida State University Law Review* in Tallahassee, Florida, on February 7, 1992. To a less substantial degree the Article is also based on a paper, entitled "Gender-Specific Issues in the Cases of Death-Sentenced and Executed Female Offenders," presented by the author and Dr. Lynn Sametz at the 50th anniversary meeting of the American Society of Criminology in San Francisco, California, on November 23, 1991. Copies of both papers are available from the author.

** Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. As an attorney, the author has represented women on death row. See, e.g., *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989).

1. See, e.g., Julie Blackman & Ellen Brickman, *The Impact of Expert Testimony on Trials of Battered Women Who Kill Their Husbands*, 2 BEHAV. SCI. & L. 413 (1984); Rick Brown, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665 (1990); Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 LAW & HUM. BEHAV. 253 (1989); Cynthia L. Coffee, Comment, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373 (1986-87); Meridith B. Cross, Note, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741 (1982); Sara E. Hauptfuehrer, Note, *Battered Women and Self-Defense: Admissibility of Expert Testimony on the Battered Woman Syndrome in Virginia*, 10 GEO. MASON U. L. REV. 171 (1987); Rebecca A. Kultgen, Note, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense*, 47 MO. L. REV. 835 (1982); M. Julianne Leary, Note, *A Woman, a Horse, and a Hickory Tree: The Development of Expert Testimony on the Battered Woman Syndrome in Homicide Cases*, 53 UMKC L. REV. 386 (1985); Annie E. Thar, Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U. L. REV. 348 (1982); Thomas B. Waltrip, Note, *Evidence—The Battered Woman Syndrome in Illinois: Admissibility of Expert Testimony*, 11 S. ILL. U. L.J. 137 (1986).

2. See, e.g., Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Back-door Assault on Domestic Violence*, 23 J. FAM. L. 359 (1984-85); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705 (1989).

3. See, e.g., Margaret Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 LAW & CONTEMP. PROBS. 63 (1986); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985).

theories ranging in effect from reducing the seriousness of the crime to complete exoneration.⁴

This Article asks much less. The proposition here is to require the capital sentencing process to consider battering as a mitigating factor and, in the most severe cases, to exclude battered women from eligibility for the death sentence altogether. Even if they should be convictable for their homicides, the spectacle of executing battered women seems particularly difficult to justify.

Before exploring special treatment for battered women in capital sentencing, this Article sketches the background of the death penalty for female offenders. Brief empirical evidence as to executions, recent death sentences, and women now on death row is considered first to provide a context for the narrow thesis on battered women. This context reflects the modest number of offenders involved and therefore the greatly circumscribed sweep of the proposed statutory amendments as to battered women. Finally, specific means are suggested to

4. For discussions on reducing the seriousness of the crime, see, e.g., Susannah M. Bennett, Comment, *Ending the Continuous Reign of Terror: Sleeping Husbands, Battered Wives, and the Right of Self-Defense*, 24 WAKE FOREST L. REV. 959 (1989); Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427 (1987); Thomas G. Kieviet, Comment, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPP. L. REV. 213 (1978); Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253 (1987); Marilyn H. Mitchell, Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705 (1978); Doris Del Tosto, Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 VILL. L. REV. 105 (1980). Discussions urging the use of complete or partial self-defense theory can be found in Jacqueline R. Castel, *Discerning Justice for Battered Women Who Kill*, 48 U. TORONTO FAC. L. REV. 229 (1990); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988); Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986); Mary A. Baumann, Comment, *Expert Testimony on the Battered Wife Syndrome: A Question of Admissibility in the Prosecution of the Battered Wife for the Killing of Her Husband*, 27 ST. LOUIS U. L.J. 407 (1983); Clement Brown, Note, *Expert Testimony on Battered Woman Syndrome: Its Admissibility in Spousal Homicide Cases*, 19 SUFFOLK U. L. REV. 877 (1985); Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982); Loraine P. Eber, Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895 (1981); Carolyn W. Kaas, Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 CONN. L. REV. 121 (1982); Jill S. Talbot, Note, *Is "Psychological Self-Defense" a Solution to the Problem of Defending Battered Women Who Kill?*, 45 WASH. & LEE L. REV. 1527 (1988); Roberta K. Thyfault, Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W. L. REV. 485 (1984). Far less of the literature challenges the appropriateness of this type of evidence. See, e.g., David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986); Note, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?*, 38 KAN. L. REV. 169 (1989).

insure that (1) all battered women capitally charged receive the benefits of express mitigating factors on battering and (2) the most extenuated battered women cases are excused from capital punishment altogether.

I. DATA SOURCES

This analysis requires briefly considering three data sets, each having a different source. First are the total number of lawful executions in American history as documented by Watt Espy.⁵ Espy's research has become well-known among capital punishment researchers as he has worked since 1970 to document lawful executions occurring throughout American history.⁶ An attempt was made to reduce his files to a computer-readable data file in the mid-1980s,⁷ but Espy has since repudiated that effort as not resulting in an accurate compilation and as not continuing to add cases recently documented. The numbers reported in that effort and other earlier compilations of female executions⁸ now should be considered as superseded by Espy's continuously updated listings.

Espy's current report⁹ lists a total of 18,309 confirmed executions by the fifty states and the federal government. Espy also separately identifies 501 executions of females. It is this list of 501 female executions from Espy's current report that constitutes the first data set analyzed in this Article.

The second data set consists of the ninety-two death sentences imposed on female offenders from January 1, 1973, through May 15,

5. The leading effort nationally to document each and every lawful execution in the United States and its predecessor colonies and territories has been conducted for nearly a quarter of a century by Watt Espy, Director of the Capital Punishment Research Project, Headland, Alabama 36345. His most recent report is Watt Espy, *List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992* (unpublished report available from Capital Punishment Research Project).

6. Watt Espy, *Capital Punishment and Deterrence: What the Statistics Cannot Show*, 26 *CRIME & DELINQ.* 537 (1980).

7. See Victoria Schneider & John O. Smykla, *A Summary of Executions in the United States, 1608-1987: The Espy File*, in *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH I* (Robert M. Bohm ed. 1991); Watt Espy & John O. Smykla, *Executions in the United States, 1608-1987: The Espy File (1987)* (computer-readable file produced by John Smykla, Tuscaloosa, Ala., and distributed by the Inter-University Consortium for Political and Social Research, Ann Arbor, Mich.).

8. Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 *LAW & Soc'y REV.* 367 (1991) (hereinafter Rapaport (1991)); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 *GOLDEN GATE U. L. REV.* 501 (1990) (hereinafter Rapaport (1990)); Victor L. Streib, *Death Penalty for Female Offenders*, 58 *U. CIN. L. REV.* 845 (1990); Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 *CONN. L. REV.* 3 (1989).

9. Watt Espy's May 20, 1992, report, *supra* note 5, provides the data on which the analysis in this Article is based. New reports are issued regularly by Espy as events dictate.

1992.¹⁰ These ninety-two death sentences were identified by checking each annual volume of the federal reports,¹¹ particularly for the older cases. The more recent cases were also identified by checking the periodic issues of *Death Row, U.S.A.*¹² Also helpful was the network of contacts among death penalty groups around the country who readily share information when a female receives the death sentence.¹³ This information about the cases was then augmented and verified from newspaper clippings and from attorneys involved in the cases. These evolving data are regularly reported in a periodic newsletter on capital punishment for female offenders.¹⁴

The third data set consists of the forty-three death sentences in force as of May 15, 1992.¹⁵ Files on each of these cases have been compiled beginning with the sentencing dates for the women involved. Data for each of the cases comes from newspaper clippings, attorneys' records, court opinions, and other data collection efforts such as *Death Row, U.S.A.*

II. EXECUTIONS

Espy has documented 501 lawful executions of female offenders—less than 3% of the total of 18,309 executions occurring within the United States.¹⁶ These executions of female offenders have occurred in thirty-four states and the District of Columbia. Espy's data compilation does not separately identify executions under federal jurisdictions but lists them under the geographical jurisdiction in which the executions actually took place. While these jurisdictions cover every census region within the United States, they are distributed quite unevenly among those regions.

Table 1 shows female executions as a percentage of all executions for the nine states of the Northeast Region. While New England Division totals almost as many female executions as the Mid-Atlantic Divi-

10. Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders* (Jan. 1, 1973, to May 1, 1992) (unpublished quarterly report available from author). To the 89 sentences listed in this report should be added the three additional death sentences imposed upon Aileen Wuornos on May 15, 1992, in Ocala, Florida. See *Roadside Killer Handed 3 More Death Sentences*, MIAMI HERALD, May 16, 1992, at 5B.

11. BUREAU OF JUST. STAT., DEP'T OF JUST., CAPITAL PUNISHMENT, 19—(1973-90).

12. DEATH ROW, U.S.A. (NAACP Legal Def. & Educ. Fund, New York, N.Y.), 1983-91 [hereinafter NAACP].

13. See, e.g., NAT'L COALITION TO ABOLISH THE DEATH PENALTY, THE 1992 ABOLITIONIST'S DIRECTORY (1991).

14. Streib, *supra* note 10.

15. Streib, *supra* note 10.

16. Espy, *supra* note 5.

sion, New England's female executions constitute more than 10% of all executions in that division while the Mid-Atlantic Division's female executions constitute only 3% of all executions there. Another major difference is that the vast bulk of the New England cases are from the seventeenth and eighteenth centuries while the Mid-Atlantic cases range well into the twentieth century.¹⁷

Female executions in the North Central Region are arrayed in Table 2. While Missouri and Ohio are the leaders, it generally can be said that executions of female offenders in this region are quite rare, as are executions of male offenders. One oddity is Michigan, normally thought of as a leading abolitionist state. However, Michigan executed thirteen persons in earlier centuries and two of them were female offenders. The small numbers involved give Michigan the dubious honor of having the highest percentage (15%) of its executions being those of female offenders, highest not only in this region but in the entire United States.

Table 3 verifies, predictably, that the South Region leads the nation in sheer numbers of total executions and of female executions (see Ta-

TABLE 1
TOTAL EXECUTIONS AND EXECUTIONS OF FEMALE
OFFENDERS IN THE NORTHEAST CENSUS REGION

<i>Division State</i>	<i>Total Executions</i>	<i>Female Executions</i>	<i>Percentage of Total</i>
<i>New England Division:</i>			
Connecticut	159	15	9%
Maine	29	2	7%
Massachusetts	408	48	12%
New Hampshire	24	3	13%
Rhode Island	71	3	4%
Vermont	27	2	7%
Division Totals:	718	73	10%
<i>Mid-Atlantic Division:</i>			
New Jersey	460	14	3%
New York	1,307	36	3%
Pennsylvania	1,073	27	3%
Division Totals:	2,840	77	3%
Regional Totals:	3,558	150	4%

Source: Watt Espy, List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992 (unpublished report available from Capital Punishment Research Project).

17. See Streib, *supra* note 8, at 855-59.

TABLE 2
TOTAL EXECUTIONS AND EXECUTIONS OF FEMALE
OFFENDERS IN THE NORTH CENTRAL CENSUS REGION

<i>Division State</i>	<i>Total Executions</i>	<i>Female Executions</i>	<i>Percentage of Total</i>
<i>East North Central Division:</i>			
Illinois	374	2	1%
Indiana	142	—	—
Michigan	13	2	15%
Ohio	458	4	1%
Wisconsin	5	—	—
Division Totals:	992	8	1%
<i>West North Central Division:</i>			
Iowa	47	—	—
Kansas	75	—	—
Minnesota	68	1	1%
Missouri	362	6	2%
Nebraska	37	—	—
North Dakota	8	—	—
South Dakota	15	—	—
Division Totals:	612	7	1%
Regional Totals:	1,604	15	1%

Source: Watt Espy, List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992 (unpublished report available from Capital Punishment Research Project).

ble 5 below for a comparative analysis of the regions). Within this region, the South Atlantic Division accounts for 75% (243 of 325) of the region's executions and 49% (243 of 501) of female executions in the entire nation. Virginia is the unchallenged leader with 112 female executions, but this extraordinarily high number still constitutes less than 6% of Virginia's total of 2,033 executions (also the highest nationally). Well behind Virginia but still exceptional is Maryland, with forty-nine (6%) of its 757 executions being of female offenders.

States within the South Region that are exceptional at the other end of the spectrum are Florida and Texas. These two states are leaders among death penalty states today¹⁸ but are generally in the middle of the pack in total executions historically. As for female executions, Florida has executed only one female and Texas has executed only three females. Florida is in striking contrast to its neighboring states

18. See NAACP, *supra* note 12, at 4 (Winter 1991); *Execution Pace Climbs as Appeals Run Course*, N.Y. TIMES, Mar. 27, 1992, at B9.

TABLE 3
TOTAL EXECUTIONS AND EXECUTIONS OF FEMALE
OFFENDERS IN THE SOUTH CENSUS REGION

<i>Division State</i>	<i>Total Executions</i>	<i>Female Executions</i>	<i>Percentage of Total</i>
<i>South Atlantic Division:</i>			
Delaware	89	8	1%
District Columbia	121	1	1%
Florida	525	1	—
Georgia	1,145	20	2%
Maryland	757	49	6%
North Carolina	1,019	21	2%
South Carolina	888	27	3%
Virginia	2,033	112	6%
West Virginia	168	4	2%
Division Totals:	6,745	243	4%
<i>East South Central Division:</i>			
Alabama	768	17	2%
Kentucky	513	16	3%
Mississippi	536	8	1%
Tennessee	406	5	1%
Division Totals:	2,223	46	2%
<i>West South Central Division:</i>			
Arkansas	554	4	1%
Louisiana	995	28	3%
Oklahoma	168	1	1%
Texas	894	3	—
Division Totals:	2,611	36	1%
Regional Totals:	11,579	325	3%

Source: Watt Espy, List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992 (unpublished report available from Capital Punishment Research Project).

of Alabama, Georgia, and South Carolina, all with 2% to 3% of their total executions being those of female offenders. The Texas experience may be explained more by comparing it to its neighbors in the southwest, all of which seem extremely reluctant to execute female offenders. For example, Oklahoma,¹⁹ Colorado, and New Mexico²⁰ total only two executed females among their 361 executions.

19. See tbl. 3.

20. See *infra* tbl. 4.

Table 4 indicates that the West Region appears to be the most reluctant to execute female offenders. Only eleven such executions have occurred, and California accounts for seven of them. In many of the states steeped most deeply in the mystique of the old west, such as Colorado, Idaho, Montana, and Wyoming, no females have ever been executed. California's 729 total executions and seven female executions dominate the figures from the entire region. If California is removed from consideration in this region, then only four (0.5%) of the 838 total executions have been of female offenders. By any measure, this indicates that execution of female offenders has been almost unheard of in the western states.

Table 5 brings together all four census regions. Comparison of the gross numbers of female executions suggests that the North Central Region and the West Region can be ignored, because together they have accounted for only 5% (26 of 501) of all female executions. However, viewed from the opposite perspective, why have less than 1% (26 of 3,172) of the executions in these areas of the country been of female offenders?

TABLE 4
TOTAL EXECUTIONS AND EXECUTIONS OF FEMALE
OFFENDERS IN THE WEST CENSUS REGION

<i>Division State</i>	<i>Total Executions</i>	<i>Female Executions</i>	<i>Percentage of Total</i>
<i>Mountain Division:</i>			
Arizona	111	2	2%
Colorado	103	—	—
Idaho	26	—	—
Montana	72	—	—
Nevada	69	1	1%
New Mexico	92	1	1%
Utah	47	—	—
Wyoming	23	—	—
Division Totals:	543	4	1%
<i>Pacific Division:</i>			
Alaska	12	—	—
California	729	7	1%
Hawaii	49	—	—
Oregon	128	—	—
Washington	107	—	—
Division Totals:	1,025	7	1%
Regional Totals:	1,568	11	1%

Source: Watt Espy, List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992 (unpublished report available from Capital Punishment Research Project).

TABLE 5
TOTAL EXECUTIONS AND EXECUTIONS OF FEMALE
OFFENDERS BY CENSUS REGION AND DIVISION

<i>Division State</i>	<i>Total Executions</i>	<i>Female Executions</i>	<i>Percentage of Total</i>
<i>Northeast Region:</i>			
New England	718	73	10%
Mid-Atlantic	2,840	77	3%
Regional Totals:	3,558	150	4%
<i>North Central Region:</i>			
E. No. Central	992	8	1%
W. No. Central	612	7	1%
Regional Totals:	1,604	15	1%
<i>South Region:</i>			
So. Atlantic	6,745	243	4%
E. So. Atlantic	2,223	46	2%
W. So. Atlantic	2,611	36	1%
Regional Totals:	11,579	325	3%
<i>West Region:</i>			
Mountain	543	4	1%
Pacific	1,025	7	1%
Regional Totals:	1,568	11	1%
National Totals:	18,309	501	3%

Source: Watt Espy, *List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992* (unpublished report available from Capital Punishment Research Project).

Similarly, the Northeastern Region might be ignored in analyses of current trends, as almost all of the 150 female executions there were in centuries past. At least a large portion of these 150 executions may be attributed to the bizarre fear of witches in the late-seventeenth and early-eighteenth centuries.²¹ Almost all states in this region today either have no death penalty at all or only a minimally active death penalty system as compared to those of the southeastern states.

Clearly the South is the major contributor to female executions. The South accounts for 65% (325 of 501) of female cases as compared to 63% (11,579 of 18,309) of all executions. And as is documented in the section below on recent death sentences for female offenders, the South continues its leadership position in this practice.

21. See Streib, *supra* note 8, at 857.

Table 6 displays the number of female executions for all thirty-five jurisdictions and ranks them as to quantity of female executions. Virginia's 112 female executions is astounding, more than double that of any other jurisdiction and nearly a quarter of the entire national total. However, this runaway leadership position apparently has been abandoned by Virginia. No female offenders have been sentenced to death there during the current era of the death penalty,²² preventing any chance of additional female executions in Virginia at least for the near future.

Maryland ranks second in the number of female executions. While Maryland continues to have a death penalty and occasionally still sentences female offenders to death,²³ Maryland's Governor commuted the sentences of all of the women on Maryland's death row in December 1987.²⁴ At least for the time being, this has prevented any possibility of additional female executions there.

TABLE 6
JURISDICTIONS THAT HAVE EXECUTED FEMALE
OFFENDERS BY RANK AND NUMBER OF EXECUTIONS

Rank	Jurisdiction	Number	Rank	Jurisdiction	Number
1.	Virginia	112	19.	Arkansas	4
2.	Maryland	49		Ohio	4
3.	Massachusetts	48		West Virginia	4
4.	New York	36	22.	New Hampshire	3
5.	Louisiana	28		Rhode Island	3
6.	Pennsylvania	27		Texas	3
	South Carolina	27	25.	Arizona	2
8.	North Carolina	21		Illinois	2
9.	Georgia	20		Maine	2
10.	Alabama	17		Michigan	2
11.	Kentucky	16		Vermont	2
12.	Connecticut	15	30.	Dist. of Columbia	1
13.	New Jersey	14		Florida	1
14.	Delaware	8		Minnesota	1
	Mississippi	8		New Mexico	1
16.	California	7		Nevada	1
17.	Missouri	6		Oklahoma	1
18.	Tennessee	5			—

TOTAL: 501

Source: *Watt Espy, List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992* (unpublished report available from Capital Punishment Research Project).

22. See *infra* tbl. 10.

23. See *infra* tbl. 10.

24. Rapaport (1990), *supra* note 8, at 534 n.114.

Also high on the list of female executions are New York and Massachusetts, neither of which currently has any death penalty at all and so are not adding to their totals. North Carolina ranks eighth on the list and is the only jurisdiction with a recent female execution.²⁵ North Carolina is now sentencing female offenders at a rapid pace in the current era,²⁶ and thus is more likely than other jurisdictions to increase its total female executions.

Some of the states very low on the list, such as Florida, Oklahoma, and Texas, have largely avoided the execution of female offenders in the past. However, these states now are sentencing women to death at a comparatively strong pace and thus appear to be changing their practice in that regard.²⁷

Table 7 names those states that have never made the female executions list at all. These states constitute a solid block of the northwestern quarter of the United States. This block begins with Washington and Oregon and sweeps eastward, down through Colorado and up through the Dakotas, ending in the upper midwest. Along the borders of this solid block are states such as Minnesota, Nevada, New Mexico, and Oklahoma with only one female execution each, and Arizona, Illinois, and Michigan with two each.

Even though the sixteen states listed in Table 7 have executed 894 people over several centuries, none have been female offenders. No doubt some of this can be explained in part by the scarcity of women during the settlement period of the old west and by other factors, but

TABLE 7
JURISDICTIONS THAT HAVE
NEVER EXECUTED FEMALE OFFENDERS

<i>State</i>	<i>Total Executions</i>	<i>State</i>	<i>Total Executions</i>	<i>State</i>	<i>Total Executions</i>
Alaska	12	Kansas	75	Utah	47
Colorado	103	Montana	72	Washington	107
Hawaii	49	Nebraska	37	Wisconsin	5
Idaho	26	North Dakota	8	Wyoming	23
Indiana	142	Oregon	128		
Iowa	47	South Dakota	15	TOTAL:	894

Source: Watt Espy, *List of Confirmations, State-by-State, of Legal Executions as of May 20, 1992* (unpublished report available from Capital Punishment Research Project).

25. North Carolina executed Velma Barfield on November 2, 1984. See Joseph Ingle, *Final Hours: The Execution of Velma Barfield*, 23 LOY. L.A. L. REV. 221 (1989); *Woman Executed in North Carolina*, N.Y. TIMES, Nov. 3, 1984, at 1.

26. See *infra* tbl. 10.

27. See *infra* tbl. 10.

it remains surprising that the death penalty in this quarter of the United States always has been reserved in practice solely for male offenders.

Another surprising discovery about the executions of female offenders is the remarkable decline in this practice during this century. While an incomplete data set compared to Espy's current data list, an earlier compilation revealed that only thirty-nine females have been executed in this century, less than any century in our past.²⁸ In addition to the precipitous fall in total female executions in this century, consider the change in the race of offenders executed over time. Blacks constituted 5% of those executed females for whom race is known in the seventeenth century, 70% in the eighteenth century, and 83% in the nineteenth century.²⁹ However, only 34% of the females executed so far in the twentieth century were black.³⁰ Correspondingly, the percentage of whites among these executed females dropped dramatically during the first three centuries, from 95% in the seventeenth century to only 15% in the nineteenth century, but rose to 66% of those females executed in the twentieth century.³¹

Actual execution of female offenders continues to be a very rare phenomenon. The last female offender executed was Velma Barfield in North Carolina on November 2, 1984,³² the only female among 175 offenders executed thus far in the current era. Given the low rate of death sentences for females, their actual execution is likely to remain rare in the future.

III. FEMALE DEATH SENTENCES, JANUARY 1, 1973, TO MAY 15, 1992

The current American death penalty era began when new capital punishment statutes were passed following the Supreme Court's decision in *Furman v. Georgia*,³³ which in effect struck down all then-existing death penalty statutes. Sentencing began under the new statutes in late 1972, although most 1972 death sentences were based on pre-*Furman* statutes and thus were destined to be invalidated when the state appellate courts implemented *Furman*. By January 1, 1973, death sentences being handed down in the various jurisdictions were only under post-*Furman* statutes and thus this date provides a fairly

28. See Streib, *supra* note 8, at 855-59.

29. See Streib, *supra* note 8, at 856-57.

30. See Streib, *supra* note 8, at 856-57.

31. See Streib, *supra* note 8, at 856-57.

32. Ingle, *supra* note 25; *Woman Executed in North Carolina*, *supra* note 25.

33. 408 U.S. 238 (1972).

clear beginning point for this analysis. Sentencing under these post-*Furman* statutes continues through the present.³⁴

From 1973 to 1992, ninety-two death sentences have been imposed on eighty-five female offenders.³⁵ Four women received two death sentences each: Andrea Jackson in Florida, Doris Foster in Maryland, Pamela Perillo in Texas, and Debra Brown in Indiana and Ohio.³⁶ The cases of Jackson, Foster, and Perillo involved subsequent death sentences after a first death sentence had been reversed. Brown's case involved two separate death sentences for separate crimes in different states. Aileen Wuornos received four death sentences in Florida for the four murders for which she was convicted. Because the focus of this Article is the death sentencing phenomenon, all ninety-two sentences are included and analyzed even though they affect only eighty-five persons.

Table 8 includes the data for the Northeast Region for this time period. Almost no female death sentencing activity occurred here except in New Jersey and Pennsylvania, with one such sentence each. Because this region accounts for 30% (150 of 501) of all female executions,³⁷ it might have been expected to have a more substantial female death sentencing rate. Massachusetts and New York are third and fourth respectively on the list of most frequent executors of female offenders throughout American history and now they have no death penalties at all. Even though a few of these states retain the penalty at some minimal level, it seems apparent that no state in the Northeast Region will become a leader in female death sentencing or executions in the foreseeable future.

Table 9 covers the North Central Region. It suggests that this region is continuing its use of capital punishment for female offenders, at least in imposing such sentences on them. The clear leader is Ohio with nine such sentences, accounting for nearly half of the sentences in this twelve-state region. In the East North Central Division, Michigan and Wisconsin have no death penalty at all and the death penalty states (Illinois, Indiana, and Ohio) in this division are all sentencing females as well as males. Interestingly, Indiana has never executed any females in its entire history,³⁸ but is sentencing them to death at a fairly steady pace during the current era.

34. May 15, 1992, is the cutoff date for purposes of the analyses in this Article.

35. Streib, *supra* note 10.

36. Streib, *supra* note 10.

37. See *supra* tbl. 5.

38. See *supra* tbl. 2.

TABLE 8

DEATH SENTENCES FOR FEMALE OFFENDERS IN THE
NORTHEAST CENSUS REGION BY RACE OF OFFENDER AND
PERIOD SENTENCED, 1973-92

Division State	Race		Period Sentenced					Totals
	B	W	'73-75	'76-80	'81-85	'86-90	'91-92	
<i>New England Division:</i>								
Connecticut	—	—	—	—	—	—	—	—
Maine	—	—	—	—	—	—	—	—
Massachusetts	—	—	—	—	—	—	—	—
New Hampshire	—	—	—	—	—	—	—	—
Rhode Island	—	—	—	—	—	—	—	—
Vermont	—	—	—	—	—	—	—	—
<hr/>								
Div. Totals	—	—	—	—	—	—	—	—
<hr/>								
<i>Mid-Atlantic Division:</i>								
New Jersey	—	1	—	—	1	—	—	1
New York	—	—	—	—	—	—	—	—
Pennsylvania	2	—	—	—	—	1	1	2
<hr/>								
Div. Totals	2	1	—	—	1	1	1	3
<hr/>								
Reg. Totals	2	1	—	—	1	1	1	3

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

In the West North Central Division of the North Central Region, only Missouri is sentencing female offenders to death.³⁹ The other states in this region either have no death penalty at all or sentence very few offenders of either gender to death under their capital punishment systems.⁴⁰ Missouri leads this division with six female executions throughout its history⁴¹ and continues to lead in death-sentencing women in the current era.

Table 10 reveals the geographical location of the heaviest female death-sentencing activity, the South Region. While this regional leadership is not surprising, the activity levels within individual states would not have been predicted either from their history of female executions⁴² or their present involvement in the death penalty in general.⁴³

39. See *infra* tbl. 9.

40. See *infra* tbl. 9.

41. See *supra* tbl. 2.

42. See *supra* tbl. 3.

43. See generally sources cited *supra* note 18.

TABLE 9
DEATH SENTENCES FOR FEMALE OFFENDERS IN THE
NORTH CENTRAL CENSUS REGION BY RACE OF OFFENDER
AND PERIOD SENTENCED, 1973-92

Division State	Race			Period Sentenced					Totals
	B	W	H	'73-75	'76-80	'81-85	'86-90	'91-92	
<i>East North Central</i>									
<i>Division:</i>									
Illinois	2	—	—	—	—	—	—	2	2
Indiana	2	2	—	—	—	1	3	—	4
Michigan	—	—	—	—	—	—	—	—	—
Ohio	6	3	—	2	2	3	2	—	9
Wisconsin	—	—	—	—	—	—	—	—	—
Div. Totals	10	5	—	2	2	4	5	2	15
<i>West North Central Division:</i>									
Iowa	—	—	—	—	—	—	—	—	—
Kansas	—	—	—	—	—	—	—	—	—
Minnesota	—	—	—	—	—	—	—	—	—
Missouri	—	4	1	—	—	—	2	3	5
Nebraska	—	—	—	—	—	—	—	—	—
No. Dakota	—	—	—	—	—	—	—	—	—
So. Dakota	—	—	—	—	—	—	—	—	—
Div. Totals	—	4	1	—	—	—	2	3	5
Reg. Totals	10	9	1	2	2	4	7	5	20

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

Female death-sentencing activity is spread over almost the entire region, with twelve of seventeen jurisdictions participating. The District of Columbia and West Virginia have no death penalty at all, so can't be expected to participate. The surprise may be Louisiana, which ranks fifth among all jurisdictions with its twenty-eight female executions⁴⁴ and which is heavily involved in sentencing and executing males during the current era. In striking contrast to this record, Louisiana has not sentenced any female offenders to death at all during this current era.

And what is happening in Florida and North Carolina? These states have sentenced a total of twenty-five females to death in the current era; they are by far the leaders in this region and in the entire United

44. See *supra* tbl. 6.

TABLE 10
DEATH SENTENCES FOR FEMALE OFFENDERS IN THE
SOUTH CENSUS REGION BY RACE OF OFFENDER AND
PERIOD SENTENCED, 1973-92

Division State	Race				Period Sentenced					Totals
	B	W	AI	H	'73-75	'76-80	'81-85	'86-90	'91-92	
<i>South Atlantic</i>										
<i>Division:</i>										
Delaware	—	—	—	—	—	—	—	—	—	—
Dist. Col.	—	—	—	—	—	—	—	—	—	—
Florida	2	10	—	1	—	1	2	4	6	13
Georgia	1	4	—	—	1	2	2	—	—	5
Maryland	—	1	2	—	—	—	3	—	—	3
N. Carolina	2	9	1	—	3	3	—	5	1	12
S. Carolina	—	1	—	—	—	—	—	1	—	1
Virginia	—	—	—	—	—	—	—	—	—	—
West Virg.	—	—	—	—	—	—	—	—	—	—
Div. Totals	5	25	3	1	4	6	7	10	7	34
<i>East South Central</i>										
<i>Division:</i>										
Alabama	2	4	—	—	—	1	2	3	—	6
Kentucky	—	2	—	—	—	1	—	1	—	2
Mississippi	2	3	—	—	—	—	3	2	—	5
Tennessee	—	1	—	—	—	—	—	1	—	1
Div. Totals	4	10	—	—	—	2	5	7	—	14
<i>West South Central</i>										
<i>Division:</i>										
Arkansas	—	1	—	—	—	—	1	—	—	1
Louisiana	—	—	—	—	—	—	—	—	—	—
Oklahoma	1	5	—	—	1	1	1	3	—	6
Texas	1	6	—	—	—	3	3	1	—	7
Div. Totals	2	12	—	—	1	4	5	4	—	14
Reg. Totals	11	47	3	1	5	12	17	21	7	62

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

States. Even more strikingly, Florida's and North Carolina's combined female death sentences since 1987 account for 39% (sixteen of forty-one)⁴⁵ of all female death sentences nationwide. In 1990, North Carolina sentenced three (43%) of the total of seven females sen-

45. See *infra* tbls. 13-14.

tenced to death in the entire country that year. In the first four-and-one-half months of 1992 (as of May 15, 1992), Florida imposed six (75%) of the eight death sentences for females imposed nationally.⁴⁶

Other surprises may be Oklahoma and Texas, which both have very few actual executions of female offenders but now sentence female offenders to death at a steady pace. Their thirteen such recent sentences are more than three times their four actual executions.⁴⁷ In the other vein, Virginia has executed a total of 112 female offenders but has no female death sentences at all in this era.

The West Region persists in its almost total non-use of the death penalty for female offenders, as is displayed in Table 11. California continues its leadership with three recent sentences, two in the past three years. Nevada has two sentences but has actually executed only one female in its entire history.⁴⁸ Idaho sentenced one woman to death in 1984 but reversed that sentence in 1985⁴⁹ and has not sentenced any more.

Table 12 compares the census regions and divisions. Predictably, the South Region leads with 67% (sixty-two of ninety-two) of all female death sentences. This same Region accounted for 65%⁵⁰ of all female executions and appears to be continuing its sentencing practice at a remarkably similar level. Perhaps the major difference is with the South Atlantic Division. It has accounted for 49%⁵¹ of all female executions but only 37% (thirty-four of ninety-two) of all recent female death sentences.

The North Central Region, particularly within the East North Central Division, has also been quite active in sentencing female offenders to death. This Division is second only to the South Region's South Atlantic Division in total number of female death sentences. Much of the credit goes to Ohio, only third among all states in recent sentences for females.⁵² Ohio is tied for nineteenth in total actual executions of female offenders.⁵³

Table 13 lists the twenty-two states that have sentenced females to death during the current era. The leading states are all fairly predicta-

46. Streib, *supra* note 10.

47. Streib, *supra* note 10.

48. See *supra* tbl. 4.

49. *State v. Windsor*, 716 P.2d 1182 (Idaho 1986).

50. The South Region has executed 325 females out of the national total of 501 females executed. See *supra* tbl. 5.

51. The South Atlantic Division has executed 243 females out of the national total of 501 females executed. *Id.*

52. See *infra* tbl. 13.

53. See *supra* tbl. 6.

TABLE 11
DEATH SENTENCES FOR FEMALE OFFENDERS IN THE
WEST CENSUS REGION BY RACE OF OFFENDER AND
PERIOD SENTENCED, 1973-92

Division State	Race		Period Sentenced					Totals
	B	W	'73-75	'76-80	'81-85	'86-90	'91-92	
<i>Mountain Division:</i>								
Arizona	—	1	—	—	—	—	1	1
Colorado	—	—	—	—	—	—	—	—
Idaho	—	1	—	—	1	—	—	1
Montana	—	—	—	—	—	—	—	—
Nevada	1	1	—	—	2	—	—	2
New Mexico	—	—	—	—	—	—	—	—
Utah	—	—	—	—	—	—	—	—
Wyoming	—	—	—	—	—	—	—	—
Div. Totals	1	3	—	—	3	—	1	4
<i>Pacific Division:</i>								
Alaska	—	—	—	—	—	—	—	—
California	1	2	1	—	—	2	—	3
Hawaii	—	—	—	—	—	—	—	—
Oregon	—	—	—	—	—	—	—	—
Washington	—	—	—	—	—	—	—	—
Div. Totals	1	2	1	—	—	2	—	3
Reg. Totals	2	5	1	—	3	2	1	7

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

ble except for Ohio, third in this list but far behind most other states in sentencing male offenders to death. The most striking pattern is that two-thirds of the death penalty states have sentenced female offenders to death.⁵⁴

Florida and Texas would be expected to rank high because they are leading death penalty states in the current era. Another general leader, California, is far back in the pack, and Louisiana (another general leader) has not even made the list. Otherwise, the Deep South states are all well-represented.

Viewed from another perspective, Table 14 lists the number of female and total death sentences imposed each year.⁵⁵ A total of ninety-

54. See *supra* tbl. 6.

55. The primary source of the data in Table 14 for total death sentences per year is U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1990, at 677 (1991).

TABLE 12

DEATH SENTENCES FOR FEMALE OFFENDERS BY RACE OF
OFFENDER, PERIOD SENTENCED, AND CENSUS DIVISION
AND REGION, 1973-92

Division	Race				Period Sentenced					Totals
	B	W	AI	H	'73-75	'76-80	'81-85	'86-90	'91-92	
<i>Northeast Region:</i>										
New England	—	—	—	—	—	—	—	—	—	—
Mid-Atlantic	2	1	—	—	—	—	1	1	1	3
Reg. Totals	2	1	—	—	—	—	1	1	1	3
<i>North Central Region:</i>										
E. N. Cent.	10	5	—	—	2	2	4	5	2	15
W. N. Cent.	—	4	—	1	—	—	—	2	3	5
Reg. Totals	10	9	—	1	2	2	4	7	5	20
<i>South Region:</i>										
S. Atlantic	5	25	3	1	4	6	7	10	7	34
E. S. Atl.	4	10	—	—	—	2	5	7	—	14
W. S. Atl.	2	12	—	—	1	4	5	4	—	14
Reg. Totals	11	47	3	1	5	12	17	21	7	62
<i>West Region:</i>										
Mountain	1	3	—	—	—	—	3	—	1	4
Pacific	1	2	—	—	—	1	—	2	—	3
Reg. Totals	2	5	—	—	—	1	3	2	1	7
Natl. Tots.	25	62	3	2	7	15	25	31	14	92

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

two female death sentences have been imposed, only 2% of the total of about 4,570 death sentences for all offenders. Despite some fluctuations, particularly in the early years of this period, the death sentencing rate for female offenders was typically about five per year beginning in the 1980s. However, in 1989 this annual death sentencing rate doubled for reasons unknown. Since 1990, the female death sentencing rate seemed to have settled into a rate of about six or seven per year, but accelerated noticeably in early 1992.

In summary, females have accounted for only 2.7% (501 of 18,309) of all known executions. Since 1973 they have accounted for only 2% of all death sentences, and the actual execution rate for female death sentences is only 2% compared to 8% for male death sentences. Of

TABLE 13

DEATH SENTENCES UNDER POST-FURMAN STATUTES FOR
FEMALE OFFENDERS BY JURISDICTION SINCE 1973

Florida	13	Mississippi	5	Kentucky	2
North Carolina	12	Missouri	5	Pennsylvania	2
Ohio	9	Indiana	4	Arizona	1
Texas	7	California	3	Arkansas	1
Alabama	6	Maryland	3	Idaho	1
Oklahoma	6	Nevada	2	New Jersey	1
Georgia	5	Illinois	2	South Carolina	1
				Tennessee	1
					TOTAL: 92

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

the 175 executions in the current era, only one (0.6%) has been of a female offender. This tends to support the observation that although the death penalty for female offenders has always been rare it is now declining in use even more.

IV. CURRENT FEMALE DEATH ROW INMATES

Of the ninety-two death sentences for females, only forty-three (47%), imposed on thirty-nine different women, remain in effect (see Table 15). One (1%) resulted in an execution;⁵⁶ the other forty-eight (52%) have been reversed or commuted to life imprisonment. Thus, for the forty-nine female death sentences finally resolved (excluding the forty-three sentences still in effect and being litigated), the reversal rate for female death sentences is 98%.

Only thirty-nine female offenders remain on the death rows of sixteen states. Well over half of the offenders are white. Half were age thirty or younger at the time of their crimes, with the total age range from eighteen to sixty-seven. Two-thirds of their victims were white and three-quarters were adult males (where these data are known). Nearly one-half of these cases involved the murder of the offender's husband or lover, surprisingly high at least compared to what we know about the victims of males on death row.

As of May 15, 1992, the present ages of these thirty-nine female death row inmates ranged from twenty-two to seventy-two years of

56. Velma Barfield, 1984. See *supra* note 25.

TABLE 14
DEATH SENTENCES IMPOSED UPON FEMALE OFFENDERS,
1973-1992

Year	Total Death Sentences	Female Death Sentences	Portion of Total
1973	42	1	2.4%
1974	167	1	0.6%
1975	322	6	1.9%
1976	249	3	1.2%
1977	159	1	0.6%
1978	209	4	1.9%
1979	172	4	2.3%
1980	198	2	1.0%
1981	245	3	1.2%
1982	264	5	1.9%
1983	259	4	1.5%
1984	280	8	2.9%
1985	273	5	1.8%
1986	297	3	1.0%
1987	299	5	1.7%
1988	296	5	1.7%
1989	251	11	4.4%
1990	244	7	2.8%
1991	250*	6	2.4%
1992**	94*	8	8.5%
Totals:	4,570*	92	2.0%

*Estimates

**As of May 15, 1992

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

age. They had been on death row from one day⁵⁷ to ten years.⁵⁸ Despite the statistically high probability that death-sentenced female offenders will never be executed, some of these women have nearly exhausted their appeals and would appear to be nearing execution.⁵⁹

57. Aileen Wuornos was sentenced to death in Ocala, Florida, on May 15, 1992. See *supra* note 10. Ms. Wuornos was first given the death penalty some three months earlier. *Prostitute Sentenced to Death*, N.Y. TIMES, Feb. 1, 1992, at 9.

58. Priscilla Ford was sentenced to death in Nevada on April 29, 1982. See generally *Ford v. State*, 717 P.2d 27 (Nev. 1986); Streib, *supra* note 10, at 11.

59. An example is the case of Judi Buenoano who had been scheduled for execution in Florida on June 21, 1990, but then won stays of execution due to a malfunctioning electric chair. *Electric-Chair Dispute Brings Another Stay*, N.Y. TIMES, June 24, 1990, at 11; *Electric-Chair Dispute Brings Execution Stay*, N.Y. TIMES, June 22, 1990, at A9.

TABLE 15
 CHARACTERISTICS OF OFFENDERS AND VICTIMS IN
 FEMALE DEATH PENALTY CASES CURRENTLY IN FORCE,
 MAY 15, 1992

<i>Offenders</i>			
<i>Age at Crime</i>		<i>Race</i>	
Under 21	= 2 (5%)	B	= 14 (36%)
21-30	= 18 (46%)	H	= 2 (5%)
31-40	= 11 (28%)	W	= 23 (59%)
41-50	= 4 (10%)	39 (100%)	
51-60	= 3 (8%)		
61-70	= 1 (3%)		
	39 (100%)		
<i>Victims</i>			
<i>Age</i>		<i>Race</i>	
		<i>Sex</i>	
Under 18	= 13 (24%)	A	= 1 (2%)
18 & over	= 41 (76%)	B	= 16 (28%)
	54 (100%)	H	= 2 (3%)
		W	= 39 (67%)
Unknown	= $\frac{7}{61}$	58 (100%)	
		Unknown	= $\frac{3}{61}$
		Unknown	= $\frac{1}{61}$

Source: Victor L. Streib, *Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders (Jan. 1, 1973, to May 1, 1992)* (unpublished quarterly report available from author).

V. CONCLUSIONS AND PROJECTIONS FROM THE DATA

The death penalty for female offenders has always been rare and is becoming rarer. Executions of females have accounted for only 2.7% of all executions, and recent death sentences for females have accounted for only 2% of all death sentences. Actual executions of females have been only 0.6% of all executions in the current era. Of the last 144 executions, none have been females. While thirty-nine women remain on death row, recent history suggests they have an extremely small chance of actually being executed.

Roughly 10% to 15% of arrestees for homicide are females. Why are only 2% of the people sentenced to death for homicide females? Why do 98% of female death sentences get reversed or commuted? Why do female offenders constitute less than 1% of those actually executed? While some attention has been given these issues by researchers,⁶⁰ it is only beginning and much more needs to be done.

60. See, *inter alia*, Rapaport (1991), *supra* note 8; Rapaport (1990), *supra* note 8; Streib, *supra* note 8; Streib & Sametz, *supra* note 8.

In the midst of the declining use of the death penalty for female offenders, a few jurisdictions such as North Carolina and Ohio seem to be increasing its use. States such as Florida, Oklahoma, and Texas, which have almost never executed female offenders, are now beginning to sentence them to death. Thus, the death penalty for female offenders may not be disappearing but simply changing its address. These and related topics need serious attention by death penalty researchers.

VI. APPLYING THE BATTERED WOMEN'S SYNDROME

Are the cases of death-sentenced female offenders fertile ground for exploring the application of the Battered Women's Syndrome (BWS)⁶¹ and less serious levels of abuse against women? While the available information is sketchy at best, some intriguing characteristics of many of these cases invite digging further for evidence of battering among these women.

In some cases, considerable evidence has been developed to show serious abuse of the female offender by the husband/lover victim or the husband/lover co-felon.⁶² In other cases, the female offender is described simplistically as only interested in the victim's life insurance, but a few threads of evidence suggest her situation may have been more complicated.⁶³ A third category seems to be cases in which the female offender has made much of some relatively minor abuse by the husband/lover victim or co-felon,⁶⁴ appearing to be grasping at the straw of the latest fad for excusing her homicide.

For the purposes of this Article, no in-depth analysis will be made of the BWS. It suffices simply to refer to Lenore Walker's leading works on BWS.⁶⁵ Walker generally describes a battered woman as one "who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse."⁶⁶ Through a learned helplessness, the abused woman is

61. See *infra* notes 65-86 and accompanying text.

62. As an example, see the case of Betty Beets in Texas, described *infra* notes 98-108 and accompanying text.

63. An example is the case of Barbara Stager in North Carolina. See generally *State v. Stager*, 406 S.E.2d 876 (N.C. 1991).

64. An example is the case of Gaille Owens in Tennessee. See generally *State v. Porterfield*, 746 S.W.2d 441, 444 (Tenn. 1988).

65. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984) [hereinafter WALKER (1984)]; and LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER (1979)]. For a wide variety of law review articles analyzing the applicability of BWS in various legal situations, see *supra* notes 1-4.

66. WALKER (1984), *supra* note 65, at 203.

unable to leave the relationship despite apparent opportunities to do so. She continually is aware that the batterer presents a threat of imminent harm even during periods of relative calm in their relationship. Battered women tend to have common characteristics:

1. Possessing low self-esteem;
2. Accepting responsibility for the batterer's actions;
3. Suffering from guilt yet denying the terror and anger they feel;
4. Presenting passive faces to the world;
5. Having severe stress reactions with psychophysiological complaints;
6. Having traditional values about home and family; and
7. Believing that no one can help resolve the predicament but herself.⁶⁷

A rough survey of the ocean of approximately 2,000 cases per year of women arrested for murder or non-negligent homicide indicates that where evidence of BWS or less serious battering not placing the women into BWS is available, it is quite rare for the female offender to be convicted of capital murder. If not an acceptable form of self-defense justifying the homicide altogether, it is an incomplete defense or a confused, impassioned state reducing the crime to some form of manslaughter.

Approximately one-third of the thirty-nine women now on death row involve victims who were either the offender's husband or lover.⁶⁸ At least another third involve women killing other victims in concert with or at the direction of their husbands or lovers.⁶⁹ Roughly the same proportions are true of the ninety-two death sentences for female offenders imposed since 1973.⁷⁰ This suggests two broad categories of battered women who may face the death penalty—women who kill their batterers and women who kill others to please or in concert with their batterers.

VII. BATTERING AS AN EXPRESS MITIGATING FACTOR

If it can be assumed for the purposes of this analysis that few battered women or victims of BWS ever get prosecuted for capital murder, we can turn to an investigation of how evidence might be important in those few cases in which they do face capital punishment. Two approaches suggest themselves—express language in capi-

67. WALKER (1979), *supra* note 65, at 31.

68. Streib, *supra* note 10.

69. Streib, *supra* note 10.

70. Streib, *supra* note 10.

tal punishment statutes and focused argument at the penalty phase by trial counsel.

One use of evidence of battering or the BWS is already commonplace and need only be mentioned here. This is the use of such sympathetic evidence under mitigating factors dealing with the defendant being under extreme mental or emotional distress, under duress, or under the substantial domination of another person. While typically not expressly listed as a manifestation of these common mitigating factors, such evidence when discovered and available to trial counsel would easily be admissible.⁷¹ Just to avoid any confusion at the trial level, legislatures should consider expressly listing evidence of battering or of the BWS as a separate and distinct mitigating factor in their capital punishment statutes.

The problem, of course, is that trial counsel may not have discovered such evidence, either because of the defendant's reluctance to admit it, her outright denial of the battering, or because of one of a thousand reasons why defense counsel seldom get around to a thorough harvesting of all mitigating evidence. While most common in noncapital cases, such omissions by trial counsel also happen in capital cases and then appellate counsel scramble to do what they can after the prime opportunity is gone. Expressly listing battering as a separate mitigating factor might both trigger in trial counsel's mind the need to seek such specific evidence and require the prosecutor to be sensitive to evidence on this issue particularly.

Express inclusion of evidence of battering or of BWS as a mitigating factor in capital sentencing should be applicable to all capital defendants, regardless of whom their victims may have been. While obviously those battered women who kill their batterers garner the most sympathy and can argue most persuasively the mitigated seriousness of their homicides, battered women who kill third-party, completely "innocent" victims nonetheless have a unique partial explanation for their otherwise unfathomable acts.

Consider two examples of battered women sentenced to death for killing third-party victims. Judith Neelley presently is on death row in Alabama for the kidnapping and murder of a thirteen-year-old girl in

71. The Eighth Amendment to the *United States Constitution* guarantees the admissibility of wide-ranging evidence of mitigating factors at capital sentencing hearings. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 536 (1978). An excellent analysis of the more general applicability of battering and BWS in sentencing women can be found in Susan L. Podebradsky & Mary E. Triggiano-Hunt, Comment, *An Overview of Defense of Battered Women From a Postconviction Perspective*, 4 *Wis. WOMEN'S L.J.* 95 (1988).

1982.⁷² Neelley and her husband concocted a ruse by which Neelley picked up young girls, delivered them to her husband for his sexual pleasures, and then got rid of them for him.⁷³ In this case, Neelley and her husband brutalized and sexually abused the girl for several days.⁷⁴ Neelley then handcuffed the girl to a tree and gave her six injections of caustic drain cleaner.⁷⁵ Failing to get a fatal result, Neelley shot the girl in the back and threw her body off a cliff.⁷⁶

Neelley admitted all of this at trial and testified that she would have killed others if her husband "had told her to."⁷⁷ According to Neelley, all of her criminal acts had been ordered by her husband on pain of severe beatings unless she did exactly as she was told. Neelley's claims of repeated beatings and abuse led the defense psychologist to conclude that Neelley suffered from BWS.⁷⁸ The state psychiatrist, however, rejected the diagnosis and expressed considerable doubt as to the extent of her abuse.⁷⁹

By any measure, the facts of this crime are shocking and could be described as "demonic and savagely inhuman,"⁸⁰ tending to push a sentencer toward the death penalty. However, in Neelley's case the jury voted ten-to-two for life imprisonment without parole instead of for the death penalty.⁸¹ The trial judge nonetheless ordered the death penalty.⁸²

In Neelley's case, her attorney admitted all of the accusations and more, leaving as the only contested issues Neelley's mental state and legal culpability.⁸³ The primary defense theme was that Neelley was programmed by her husband to kidnap and kill at his direction.⁸⁴ When this strategy failed at trial and Neelley was convicted of capital murder, reorienting this defense claim to address Alabama's standard mitigating categories was not a simple matter.⁸⁵

72. *Neelley v. State*, 494 So. 2d 669, 670-71 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986), *cert. denied*, 480 U.S. 926 (1987).

73. *Id.* at 675. See also THOMAS KNUNCL & PAUL EINSTEIN, *LADIES WHO KILL* 49-69 (1985).

74. Sentencing Order, Circuit Court of DeKalb County, included as appendix III in *Neelley*, 494 So. 2d at 689, 690.

75. *Id.*

76. *Id.*

77. *Id.* at 678.

78. *Id.* at 681.

79. *Id.*

80. *Id.* at 682.

81. *Id.* at 671, 680.

82. *Id.* at 671.

83. *Id.* at 675.

84. *Id.* at 676.

85. *Id.* at 682.

Given the jury's rejection of the death penalty despite the shocking nature of the crime, it seems reasonable to assume that Neelley's mental state was considered by the jury as "extreme mental or emotional disturbance," as being "under the substantial domination of another person," and/or as a lesser form of insanity not reaching the Alabama level for a not guilty verdict.⁸⁶ The trial judge, however, greatly downplayed the weight to be given this evidence. His reasoning reflected a common ignorance of a basic tenet of BWS: "There were numerous opportunities for the defendant to break with her husband and seek help had she felt the need or been so inclined. These opportunities were enhanced by the fact that the defendant was armed and traveling in a separate vehicle during most of their exploits."⁸⁷ In other words, Neelley appeared to have had the chance to escape her batterer and the fact that she did not escape indicates not BWS but a rational and willing choice to endure the battering and to do her batterer's bidding.

If the Alabama death penalty statute had included an express mitigating circumstance dealing with battering and BWS, perhaps the jurors would have had an easier time fitting their community sense of proportion for retributive punishment into rigid statutory categories and the trial judge might have been confronted with the classic conditions to look for in BWS cases, including a learned helplessness preventing BWS victims from leaving the relationship despite apparent opportunities to do so.⁸⁸

While many other cases exist, only one other illustration will be mentioned. Debra Brown is under sentences of death in Indiana and in Ohio for a series of kidnappings, rapes, and murders committed along with her lover, Alton Coleman, in 1984.⁸⁹ Brown is mildly retarded and learning disabled and reportedly "grew up in an extremely abusive home with a father who was mentally ill and alcoholic."⁹⁰ Suffering from "child-like emotional development, excessive reliance on others and proneness to manipulation by others,"⁹¹ Brown claims

86. *Id.*

87. Sentencing Order, Circuit Court of DeKalb County, included as appendix III in *Neelley*, 494 So. 2d at 689, 693.

88. See *supra* note 65 and accompanying text.

89. See *Brown v. State*, 528 N.E.2d 523 (Ohio 1988); *Brown v. State*, 532 N.E.2d 608 (Ind. 1989); *Brown Gets Another Sentence of Death*, POST TRIB. (Gary, Ind.), June 24, 1986, at B1; *Extradition Decision is Up to Ohio*, PLAIN DEALER (Cleveland), Jan. 14, 1991, at D12.

90. RANDALL DANA, SUMMARY REPORT ON SENTENCE COMMUTATIONS 7 (Jan. 10, 1991); 8 *Death Sentences Commuted in Ohio*, N.Y. TIMES, Jan. 12, 1991, at 11.

91. DANA, *supra* note 90, at 7.

hers was a master-slave relationship with Coleman and that she participated in the crimes solely out of fear of him.⁹²

Brown was convicted and sentenced to death first in Ohio and then in Indiana under death penalty statutes with broad provisions for mitigating evidence but with no express provisions for evidence of battering or BWS.⁹³ Either a separate mitigating factor for such consideration or at least express mention of it under more general categories might have insured that Brown's dilemma came to the direct attention of those who sentenced her to die.

IIX. PRECLUDING BWS VICTIMS FROM THE DEATH PENALTY

Perhaps the law should consider going the next mile in the most extenuated cases of victims of BWS who kill their batterers. Legislatures could amend their capital punishment statutes to preclude in all cases the imposition of the death penalty on these women. Capital punishment law has continually stressed the need to narrow the category of homicides to select only the very worst crimes and the most reprehensible defendants for the ultimate punishment.⁹⁴ In the rare category of cases to be excluded here, the crime is not quite so heinous given the past behavior of the victim and the defendant is not quite so condemnable given the circumstances under which she functioned.⁹⁵

Remember that only 2% to 3% of all females arrested for murder or non-negligent homicide are ever sentenced to death, and only a tiny fraction of those sentenced will ever actually be executed. That is, at least 97% of all women who kill are already screened out of the capital punishment process. Legislators could say categorically that BWS women who kill their batterers, while not necessarily excused or given special access to claims of self-defense, are nonetheless in the bottom 97% in seriousness of their offenses. Similar categorical exclusions by legislatures have been made commonly for juveniles⁹⁶ and more rarely

92. 8 *Death Sentences Commuted*, *supra* note 90.

93. See IND. CODE § 35-41-1-1 (1991); OHIO REV. CODE ANN. § 2929.04 (Baldwin 1991).

94. The United States Supreme Court has held repeatedly that capital punishment systems must screen and narrow the cases they consider to reach the residue deserving the death penalty. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976).

95. The United States Supreme Court has established two primary criteria in choosing between life imprisonment and the death penalty: (1) the nature and seriousness of the crime and (2) the character and background of the defendant. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg*, 428 U.S. 153; *Woodson v. North Carolina*, 428 U.S. 280 (1976).

96. See, e.g., statutes collectively cited in *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989) (Scalia, J., plurality opinion); *Thompson v. Oklahoma*, 487 U.S. 815, 829-30 n.30 (1988) (Stevens, J., plurality opinion).

for the mentally retarded,⁹⁷ not excusing their behavior but not permitting the whims of local prosecutors to place such offenders' very lives in peril.

Again consider recent examples of such cases. Betty Beets was sentenced to death directly for the 1983 murder of her husband and indirectly for the 1981 murder of her former husband, their bodies having been found buried in her yard.⁹⁸ While Beets' original trial counsel presented no defense or mitigation based on battering, Beets' extraordinary history as a victim of repeated battering by a succession of five husbands over a period of thirty years was uncovered only later by her appellate attorneys.⁹⁹

A classic example of a BWS victim, Beets progressed from an abused childhood with hearing and learning disabilities¹⁰⁰ to a nightmarish adulthood with severe alcoholism and organic brain damage.¹⁰¹ Having been abandoned and divorced by her first battering husband,¹⁰² Beets divorced her second battering husband but that didn't end the abuse.¹⁰³ He continued to search her out and inflict severe beatings, ending only when she shot him (nonfatally).¹⁰⁴ Following a short marriage to her third battering husband,¹⁰⁵ in 1979 Beets entered

97. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989).

98. *Beets v. State*, 767 S.W.2d 711, 714, 718-19 (Tex. Crim. App. 1987), cert. denied, 492 U.S. 912 (1989).

99. See Pet'r Br. at 46-88, *Ex Parte Betty Lou Beets* (Cause No. A-3144-A), relief denied, Findings of Fact and Conclusions of Law on Post Conviction Writ of Habeas Corpus Procedural Statement, Writ No. 20,582-02 (Dist. Ct. Henderson County, Tx. Apr. 3, 1990).

100. *Id.* at 46-52. Citing the report by Dr. Lenore Walker on Beets, the Petitioner's Brief summarized Beets' childhood predicament in discouraging terms:

She failed the fourth grade. Her hearing impairment was further exacerbated by her learning disabilities. Betty was unable to comprehend speech and language related subjects the way normal children did. Her brain—injured by encephalitis, malnutrition, fever, or birth trauma—did not allow her to learn, despite her desperate efforts to keep up with the other children. She was a hearing-impaired, learning disabled child, confused, humiliated and isolated by her inability to be like other children.

Id. at 49.

101. Again relying on Dr. Walker's analysis, Petitioner's Brief characterized Beets' life at the time she murdered her fifth husband as follows:

By the time Betty met and married Jimmy Don Beets in 1982, her mind and body had been ravaged by maltreatment, chronic illness and neglect as a child, constant threats of annihilation by those who swore their love, repeated head injuries, and alcohol and drug dependency. Nightmares plagued her, and she was unable to prevent intrusive thoughts of the physical violence and emotional abuse she endured. She bought five cases of beer weekly and ate five or six diet pills a day. An alcoholic haze help block her deep seeded fears and insecurities.

Id. at 67.

102. *Id.* at 52-54.

103. *Id.* at 56-59.

104. *Id.* at 59-60.

105. *Id.* at 62-63.

yet a fourth marriage to an alcoholic, abusive husband.¹⁰⁶ When a divorce in 1980 didn't end the battering, Beets shot and killed him as he slept, her crime being discovered only many years later.¹⁰⁷ Her fifth husband turned out to be the same as his predecessors, and Beets shot him also, this time resulting in a conviction of murder and a sentence of death.¹⁰⁸

In such a clear case of BWS, assuming it is established by the defense, a capital punishment statute might expressly exclude the BWS victim from the death penalty regardless of her crime. Texas, for example, has excluded all persons under age seventeen from death penalty consideration since the last century¹⁰⁹ and could enact comparable provisions for the similarly extenuating situation of a BWS victim such as Betty Beets.

One last example is the case of Shirley Tyler in Georgia, sentenced to death for poisoning her husband in 1979.¹¹⁰ Her death sentence was vacated six years later because of ineffective assistance of counsel at her sentencing hearing.¹¹¹ The Eleventh Circuit noted that a variety of mitigating evidence could have been submitted, including evidence of battering:

[T]hat her husband was drunk and abusive at times and had knocked out some of her teeth when drunk; that she and her children moved away at one time because he drank and beat her; that on one occasion he put her out of the house in her night clothes.¹¹²

Add to this Tyler's statement that she killed her husband to prevent him from continuing to beat her son.¹¹³

Tyler's attorneys on appeal argued among other things that the death penalty for a domestic murder was disproportionately severe and thus cruel and unusual punishment in violation of the Eighth Amendment.¹¹⁴ This argument was dismissed out of hand by both the Georgia Supreme Court¹¹⁵ and the United States Court of Appeals for the Eleventh Circuit,¹¹⁶ with the former observing, "[s]ome of the

106. *Id.* at 63.

107. *Id.* at 65.

108. *Beets*, 767 S.W.2d 711.

109. TEX. PENAL CODE ANN. § 8.07(d) (West 1991).

110. *Tyler v. State*, 274 S.E.2d 549 (Ga. 1981).

111. *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985).

112. *Id.* at 745.

113. *Tyler*, 274 S.E.2d at 552.

114. *Kemp*, 755 F.2d at 747-48; *Tyler*, 274 S.E.2d at 555.

115. *Tyler*, 274 S.E.2d at 555.

116. *Kemp*, 755 F.2d at 747-48.

more vile, horrible or inhuman homicides have been perpetrated by family members against one another."¹¹⁷

Without challenging either the Georgia Supreme Court's observation or the Eleventh Circuit's refusal to give blanket Eighth Amendment death penalty exemption to all domestic murders, the much narrower argument can be made that domestic murders involving BWS victims killing their batterers should receive a statutory exemption. Presumably, a substantial number of enactments of such statutory exemptions might ultimately add up to a new standard of decency upon which could be based a new Eighth Amendment ruling,¹¹⁸ but this Article proposes only a modest legislative beginning.

IX. CONCLUSIONS

The death penalty for female offenders continues to be a very rare thread through the current American practice of imposing the death penalty for murder. It always has been so. While reluctant to be cast in the role of urging states to terminate the lives of several more wretched sisters in order to achieve gender parity,¹¹⁹ one must be suspicious of the extraordinarily low rate of death sentences and executions for female offenders. More would have been expected, absent some inherent gender bias in the capital punishment system.¹²⁰

While perhaps adding to the apparent gender disparity even more, special treatment for battered women does seem warranted. Two levels of special treatment in death penalty statutes are recommended: (1) an express mitigating factor on battering and BWS regardless of whom the victim was, and (2) an express preclusion of the death penalty in the most extreme cases, BWS women who kill their batterers.

117. *Tyler*, 274 S.E.2d at 555.

118. The Supreme Court has made clear that the Eighth Amendment prohibition against cruel and unusual punishments is to be interpreted "in a flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion by Stewart, Powell, and Stevens, JJ.). Defendants attempt to characterize their punishments as contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion). Even if permitted when the Eighth Amendment was adopted, a particular application of capital punishment could come to be considered unconstitutional should societal standards change significantly over time. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (prohibiting capital punishment for crimes committed while under age sixteen); see also *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting capital punishment for crimes of rape).

119. I am indebted to Elizabeth Rapaport for first spinning this dramatic phrase. RAPAPORT (1991), *supra* note 8, at 368 ("At worst, it suggests a campaign to exterminate a few more wretched sisters."). Professor Rapaport has similarly rejected this path to equality. See, e.g., RAPAPORT (1991), *supra* note 8, at 381; RAPAPORT (1990), *supra* note 8, at 564.

120. Professor Rapaport does not share this suspicion of gender-bias. See RAPAPORT (1991), *supra* note 8, at 382; RAPAPORT (1990), *supra* note 8, at 510-11.

Such a policy would affect very few cases because such small numbers are involved, presumably deflecting any argument as to any significant negative effect on a supposed general deterrence of the death penalty or make its proponents appear to be soft on crime. Indeed, a proposal for special treatment of battered women within death penalty law might bring participants in the victims' rights movement into the death penalty debate. If they begin to discuss this narrow issue and to work together to gain its acceptance, perhaps it might facilitate further dialogue and discourse toward understanding the involvement of women in violent crime both as perpetrators and as victims.