



August 2015

Gender and Capital Punishment: The Case of Gaile Owens

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Recommended Citation

Brashear, Jenna (2009) "Gender and Capital Punishment: The Case of Gaile Owens," *Kaleidoscope*: Vol. 8, Article 4.
Available at: <https://uknowledge.uky.edu/kaleidoscope/vol8/iss1/4>

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I am a junior majoring in International Studies and German with a minor in Music Performance. I am a Singletary Scholar, a Chellgren Fellow, and a Gaines Fellow, as well as a student Vice President of the recently inaugurated UK chapter of Phi Kappa Phi. I serve as an executive board member for SPUR, the Society for the Promotion of Undergraduate Research. Before writing this paper on capital punishment and women, I conducted research on the death penalty and international norms, which I presented at the

Showcase of Undergraduate Scholars at UK, Posters-at-the-Capitol in Frankfort, the Southern Regional Honors Conference in St. Petersburg, Florida, and at the National Conference on Undergraduate Research in La Crosse, Wisconsin. After graduating in 2010, I hope to attend law school, one reason for my interest in the death penalty. The following paper was written for Prof. Srimati Basu's GWS 600 course on law and women. I am particularly grateful to Prof. Basu for introducing me to women's issues and providing constant support throughout the class and the paper.



**Faculty Mentor: Professor Srimati Basu
Department of Gender and Women's Studies**

Jenna Brashear's paper "Gender and Capital Punishment: The Case of Gaile Owens" carries my highest recommendation for consideration to be published in Kaleidoscope. The paper raises provocative questions for jurisprudence and feminist theory; draws substantively on research in Political Science, Women's Studies, and Law; and includes original, close analysis of a legal case. As a paper that is strong on research as well as argument, structure, and analysis, it is an excellent candidate for inclusion in an undergraduate research journal. Jenna wrote this paper as the one undergraduate student in a graduate seminar focused on feminist jurisprudence, heavy on legal and cultural theory, and was among the most keen analytical and diligent readers in the class. The paper reflects her depth of understanding in these issues and her attempt to leave her own mark within this body of work, and thus also exemplifies undergraduate academic engagement and excellence.

Gender and Capital Punishment: The Case of Gaile Owens

Abstract:

The United States' use of capital punishment is a practice oft-debated in many disciplines, but the gender imbalance of the death penalty in favor of women makes feminists one group hesitant to discuss the practice. Although females account for one in ten murder arrests, they are only one percent of the criminals actually executed. This paper examines the implications of capital punishment for women, and attempts to explain why women are executed at a disproportionately low rate. Trends that emerge include institutional structures, such as aggravating or mitigating factors, which are constructed in a manner that dictates the severest punishments for male crimes. Additionally, social ideologies and stereotypes are often reinforced during trials and sentencing, when judges and juries tell us directly and implicitly that women are simply too good, fair, and delicate to commit such heinous crimes. All of these elements contribute to the low rates of capital sentences and executions for female criminals. This paper includes analysis of feminist thought on capital punishment and the state, namely the works of Elizabeth Rapaport, Renee Heberle, Wendy Brown, and Wendy Williams. Finally, these theories are applied to the case of *Owens v. Guida*, which illustrates how far a woman must reach outside of societal norms to be sentenced to death and executed.

Introduction:

In traditional feminist discourse, common issues include marriage, reproduction and pregnancy, equality in the workplace, and the position of such social institutions with regard to masculine

systems of law. For the great majority of these instances, the women studied are disadvantaged — held in limiting roles such as housewives, underpaid in comparison to their male counterparts, and discriminated against either directly or subtly by policies created for the societal “norm,” who is most often a man.

There are, however, a few rare instances in which women can be seen as benefitting from the stereotypical traits from which they often attempt to break free. The classic example of this is the military draft, a process that defies gender equality. What is the state saying when drafting men to war and leaving women at home? It would be hard to argue that traditional gender roles were not reinforced by the draft. Another lesser-known practice that is gender imbalanced is that of capital punishment, and the practice brings many of the same questions to the surface. What does it say about law and culture in the United States that we execute men at a much higher rate than women? The statistical disparities in capital punishment between men and women and the issues of state and societal complicity with the imbalance are not often placed within the feminist framework and, therefore, that is what I will attempt to do.

Although capital punishment is not illegal, meaning it does not exclude women totally as the draft does, courts in the United States are much less willing to sentence women to death and, through the appellate and death row processes, women are disproportionately removed from the figurative guillotine as compared to men. Victor Streib provides the following statistics in his report “The Death Penalty for Female Offenders, January 1, 1973 Through December 31, 2007:” though one in ten murder arrests are women, they comprise only one in 50 capital sentences, only one in 67 death row prisoners, and only 1 in 100 of those “actually executed in the modern era” (2008, p. 3).

In the following essay, I will examine the use of the death penalty for women in the United States in a general context as well as from a feminist viewpoint. I will examine gender discrepancies in greater depth and attempt to explain why the state does not wish to execute women in the United States. In addition to attempting to make sense of alarming statistics, I have chosen a 2008 case to analyze involving capital punishment for a woman, *Owens v. Guida*. The language the three judges choose to articulate their opinions in this case is just as relevant as the statistics. With this paper I hope to extend common feminist issues and questions, such as how women’s social identities carry over into the legal realm. Are women simply viewed to be too delicate to be put in the electric chair or injected with the lethal three-drug cocktail? Do we believe them incapable of acts of such violence and aggression? These are the types of questions I will try to answer.

Why Capital Punishment Is Structured in Favor of Women: The Work of Victor Streib

Not only does capital punishment for women lie outside of the usual feminist discussions, it is also something of an anomaly within mainstream death penalty discourse. One of the strongest arguments against capital punishment as a whole is the effectual discrimination that occurs. Only 57% of those executed since 1976 have been white, while 34% were black and 7% were Hispanic (Death Penalty Information Center Race, 2009). Moreover, black men who allegedly killed white victims comprise 235 of the executions in the same time period, although only 15 white defendants with black victims were executed. Within the population of women executed, the racial element is basically erased. Of the 11 women executed since 1976, only two have been black (DPIC Women, 2009). The remaining nine were white.

Perhaps somewhat due to the attention given to race, gender and capital punishment is almost ignored. Writings on the subject are largely legal, statistical, or anecdotal. There are essays on whether or not women’s support for the death penalty is different from men’s (Durham, et al., 1996; and Whitehead, et al., 2000); analyses of how men and women are victimized differently (Gartner, et al., 1990); and stories of executed women (Gillespie, 2000). There are statistical analyses such as O’Shea’s *Women and the Death Penalty in the United States, 1900-1998* (1999), and regional accounts such as Streib’s *The Fairer Death: Executing Women in Ohio* (2006) and Reza’s “Gender Bias in North Carolina’s Death Penalty” (2005). Despite all of this, feminists have been relatively unwilling to tackle this subject. Rapaport (1991), whose analysis I will include later, says that this reluctance is due to a hesitance to campaign to kill more women. I will return to these issues later, but start now with more on the background of gender and capital punishment itself.

The aforementioned large racial disparity is but one reason to which Streib (2002) is referring in the introduction of his analysis, when he says that the “death penalty system” in America is one that “continues to carry the heavy burdens of intense political agendas” (p. 1). He argues quite rightly that the questions regarding capital punishment are not ones of justice, but “whether we can trust this hodgepodge of local, state, and federal government” methods to ensure procedural justice (p. 1).

With regard to women, Streib says that jury selection processes do not ask questions about biases in favor of women, and research has indicated that juries are slanted toward female defendants (p. 1). The death penalty arena itself is what Streib calls a “masculine sanctuary” because “typical macho posturing over the



Figure 1: Karla Faye Tucker, executed 2/3/98.

death penalty is disrupted and confused when the murderer is a murderess” (p. 2). Capital crimes are, when viewed as norms, distinctly male norms, and Streib argues this is true of the behavior regardless of the sex of the perpetrator (p. 2).

In order to find patterns, Streib examined capital sentences from 1973 forward, the significance of the date being that it was the first time when the information about them became normalized. I gave earlier statistics on the rate of incidence, but it is interesting to look more closely at the 138 women sentenced to death from 1973 to 2001. A paltry 5% (seven women) were actually executed, while 79 sentences were commuted or reversed, leaving only 52 on death row (Streib, 2002, p. 2). Geographically, the sentences came from 23 states, with the largest numbers coming from North Carolina (16), Florida (15), California, (14), and, of course, Texas (13) (Streib, 2002, p. 3). Harries and Cheatwood (1997) note that for those actually executed, the geographical distribution for males and females is basically the same (pp. 78-93). Streib describes the historical trajectory

of two states, Virginia and Ohio, which executed many female offenders until 1912 and 1954 respectively, but notes that as a whole, the pattern is unchanged and even in the Colonial period, female executions were less than 3% (2002, pp. 3, 6).

In detailing some of the executions that have taken place during the period, Streib notes in particular Karla Faye Tucker (Figure 1), the woman who is arguably the face associated with women and execution. Streib writes that even though she had a history of violent behavior and her crime was aggressive and masculine, her status as an “attractive, photogenic, articulate white woman undoubtedly contributed to both the extensive media coverage and to the reluctance of the system to carry through to the end: (2002, p. 9). Then Texas Governor George W. Bush had executed more than 130 people, but none of those subjected him to so much turmoil as the case of Tucker (2002, p. 9). The rate of executions from 1990 to 1997 had dropped to 0.5% but the Tucker case seemed to revitalize the punishment for women (2002, p. 9). Tucker’s execution in 1998 was the first of a woman in Texas since 1863 and the first in the United States since 1984. Tucker’s crime was a violation of society’s norms and expectations, due to her (born again) Christian persona, her physical beauty, and her femininity, but her execution was controversial and debated throughout the world.

More important than the statistics are what Streib identifies as institutional means of sex bias. The first of those is the crimes selected for capital punishment. Domestic homicide, for example, is considered less serious and punishments are not as harsh (2002, p. 11). One of the most common death row crimes is felony murder, meaning homicide performed during the commission of a felony such as rape, and women’s murders are less likely to be in such a category. Streib returns to domestic murder with infanticide as a further example of women’s position; women are rarely executed for killing their children (2002, p. 11). In his studied time frame, only one of seven women sentenced to die for

killing her children was actually executed; Streib is particularly uncomfortable with this idea, because “the broad negative impact of infanticide upon an entire community typically is more severe than for most other homicides” (2002, p. 11).

In addition to sentencing, Streib looks at how aggravating and mitigating circumstances impact women:

This final choice between the death sentence and life in prison focuses both upon the nature and circumstances of the crime and upon the character and background of the person who committed that crime. Regardless of the seriousness of the crime, it cannot automatically result in the death penalty. The personal characteristics of the convicted murderer also must be weighed in the balance. This is where the sex of the offender can come into play, probably unintentionally, but nonetheless with important consequences. As is explained below, this sex-specific impact may either favor or disfavor female capital defendants (STREIB, 2002, pp. 11-12).

One typical aggravating circumstance is murder for hire, and women more often hire killers; Gaile Owens is one example, and I will discuss her case in more depth later (Streib, 2002, p. 12).

Another is a criminal record of violence, including violent felonies, and in this category women are less likely than men to have committed aggravating crimes. Felony murder is a third usual aggravating circumstance, and it is more likely to affect men. Mitigating circumstances have the opposite effect of aggravating and are more likely to prevent a capital sentence. They include emotional distress or domination by another, elements that judges and jurors are more likely to detect in the histories of women (Streib, 2002, p.13).

The last method of institutional inequity is jury selection, especially

important because juries are normally involved in sentencing in capital cases. Though federal capital cases take sex bias into account, state processes are less likely to do so, giving yet another advantage to women (Streib, 2002, p. 14).

Feminism, the State, and Capital Punishment: Rapaport, Heberle, Brown, and Williams

Feminism is uncomfortable with the idea of capital punishment and, as I mentioned in the introduction, this is probably because, when viewing capital punishment as a negative consequence of behavior outside the norms of society, women are spared from this punishment as compared to men. This fact is not justification for the lack of willingness on the part of feminists to address this subject. Without advocating for a change in the rules or for the execution of more women, we should examine why the death penalty is structured to benefit women. We should also determine if these practices are discriminatory in intent and whether or not the advantageous position of women can be replicated elsewhere without undue discrimination against men. Through a feminist lens, I am seeking to discover whether institutional framework exists to say something negative or positive about women, though anyone familiar with feminism could probably guess which result is most likely.

Elizabeth Rapaport addresses this issue when she admits that discovery of the roots of gender imbalance in capital punishment could be viewed as an attempt “to exterminate a few more wretched sisters” (1991, p. 368). She takes issue with this, however, and says that the disparities in death penalty sentencing are more related to our differing societal standards of responsibility for men and women, meaning men are considered to be capable of being more responsible (1991, p. 368). Rapaport uses similar statistics to Streib to show the characteristics of male and female murderers, including the types of crimes given capital punishment and mitigating and aggravating factors (1991, pp. 369-374). She remarks almost happily that rather than “chivalrous regard for the female sex,” the disparities can be attributed to who the victims are and how background information is presented at trial (1991, p. 374). Afterwards Rapaport sets out to discover how men and women arrive at death row. One variable that she examines is “the pattern among murder suspects,” using North Carolina as her base (1991, p. 375). Twelve percent of death row males in North Carolina had killed intimates, whereas 49 percent of females had (Rapaport, 1991, p. 375). As a society, we appear to perceive women to be killing other criminals when their victims are abusive husbands or fellow inmates.

Lastly, Rapaport studies what she calls “gender interpretation of the conception of offense seriousness,” beginning with categories of murder (1991, p. 376). The three categories eligible for the death penalty include predatory murder, i.e., murder for some type of gain; murder that impedes law enforcement or other government; and murders of excessive violence. Thus, categories singled out for capital punishment do not include the aforementioned intimate murder necessarily. She says eloquently:

But the paradigmatic domestic killing, arising out of hot anger at someone who is capable, as it were by definition, of calling out painful and sudden emotion in his or her killer, is virtually the antithesis of capital murder (1991, p. 378).

She argues along Streib’s lines that some of these crimes are the most alarming and undermine the value of the home (1991, p. 378). Her departure from Streib is when she inserts this into the feminist framework. Though she does not argue for the death penalty as a whole, she does enter the controversial territory of advocating harsher punishment for domestic crimes, i.e., female crimes. Women are more likely to kill and be killed by intimates, and familial crimes such as these, especially when a child enters the picture, are the ones for which Rapaport argues changes in policy.

One suggestion is to raise severe and routine abuse of a husband, wife, or child to felony status in order to make those perpetrators eligible for felony murder (Rapaport, 1991, p. 379). This suggestion only tangentially affects the sentencing of women, but the elevation of domestic non-capital crimes could move the capital punishment practices as well. It is at this point that Rapaport addresses three anticipated feminist criticisms. The first, that domestic violence is often “victim-precipitated” and that we should view victims as worthy of part of the blame, is discounted by Rapaport for being unable to account for the killing of a child (1991, p. 380). The second is that the planning and calculating murderer is more worthy of scorn than the passionate killer, another distinction that does not adequately prioritize responses to spousal or child abuse (1991, p. 381). Lastly, she says that the feminist viewpoint does not recognize the susceptibility of passion crimes to death penalty due to the deterrence argument (1991, p. 381). Rapaport ends by reiterating that her primary goal is “to expose the ideological biases of the status quo in which domestic homicide is treated, invidiously, as almost always less reprehensible than predatory murder” (1991, p. 381). She says, moreover, “we have no credible evidence that women are spared the death penalty in circumstances where it would be pronounced on men;” rather, it is “a

question of social ideology” (1991, p. 382).

Renee Heberle agrees that it is social ideology, and she writes that it is society that “wonders whether women, as women, need to be rendered more commonly subject to the disciplinary sanctions of the state, not in the name of equality but in the name of managing the disorder engendered by unequal relations of power” (Heberle, 1999, p. 1104). She suggests that the focus should not be on the statistics but instead on gender expectations and norms (1999, p. 1104). The question she poses is whether or not, as others have asked, femininity and the traits we associate with such an abstract concept are themselves enough to protect women from harsh criminal punishment.

Heberle departs from Rapaport at the point of deciding where the significance lies in the gendering of intimate murder, arguing that the imbalance is instead between civil and domestic spheres, causing asymmetry with respect to the sexes. As an example, she says that men acting violently in the home are only acting according to societal expectations, whereas women behaving similarly have to be punished or “re-feminized” (1999, p. 1105). Thus, contrary to Rapaport, Heberle believes death row is home not to the most deserving and despicable criminals, but rather a population that is reconstructing social hierarchies. Most importantly, Heberle believes that women are the ones exempt from death row because they “have a kind of escape route in appropriately feminine behavior” (199, p. 1108). Karla Faye Tucker is mentioned again, this time as an example of someone outside feminine norms. Even though she was converted by religion, she could not overcome her former comment that she had orgasms when she hit her victims. This, Heberle observes, is a dramatic action that inverted expectations of gender.

Heberle believes that the dichotomies she explored were examples of the liberal state; Wendy Brown is one feminist who has explored theories of the state and norms that the resultant institutions have constructed. There are four specific models that she analyzes: liberal, capitalist, prerogative, and bureaucratic. She argues

that the state is a male power in subtle and overt ways. For the sake of brevity, I will limit this discussion to the liberal modality, in which I believe capital punishment and its strange relationship with women fall. Liberal thinking divides society into domestic, economic, and governmental sections. Women fall into the domestic sphere and, once there, can scarcely escape.

The private domain of the home is neither private nor safe for women (Brown, 1992, p. 18). Brown posits that rights do not really exist there, but instead the area is “governed by norms of duty, love, and custom, and until quite recently, has been largely shielded from the reach of law” (1992, p. 18). This is, in theory, the gap of which Rapaport speaks, the realm that contains both individual and privacy rights, a juxtaposition that the state has difficulty reconciling. For women, the group disproportionately affected by domestic crimes, this liberal posturing is problematic.

Another general feminist approach that could be applied is that of Wendy Williams, who critiques women’s positions with regard to the courts. In an era when

women are guaranteed equal rights, the equality is equal to men, so the rights afforded to women by the government are at best male rights (1997, p. 71). Williams looks at equality issues such as the military draft, and writes on the inherent troubles with associating men with war and sex and women with whatever is opposite, namely as “[mothers] of humanity” (1997, p. 78). Much of Williams’ article is a debate between special rights and equality treatment, and she sides with equality treatment. The true issue is characterizations of males and females, and she argues that gender roles should be complementary in light of all of these problems, rather than explicitly equal (1997, p. 84). With these arguments and perspectives in mind, it is time to look at how the law affected one woman.

Owens v. Guida Background

Of the eleven women currently on death row, six killed a boyfriend, significant other, or husband, a statistic worthy of its own research (DPIC Women, 2009). For the time being, however, we will focus on one of those women. Gaile K. Owens (Figure 2) was sentenced to death in Tennessee after hiring Sidney Porterfield to kill her husband. All of the following information and quotes are taken from the text of the appellate decision; the case was heard in the United States Court of Appeals for the 6th Circuit, which includes Kentucky, Tennessee, Ohio, and Michigan. I chose Gaile Owens’ case because of her interesting story, its relative obscurity, especially compared to the case of Karla Faye Tucker, and for its illustration of the arguments noted above. Owens’ case shows many of the unique situations that lead women to death row, and thus helps to answer the question, “What does it take for a woman to be sentenced to death?”

In 1985, Owens interviewed several hit men with the purpose of hiring one to kill Ronald Owens. Trial evidence showed that she met with the eventual hit man, Sidney Porterfield, on a minimum of three occasions. On February 17, 1985, Ronald Owens was found in the Owens’ den with his skull crushed from what the coroner determined was a minimum of 21 blows



Figure 2: A recent mugshot of Gaile Owens, whose lawyers were still in the appeals process in February 2010, attempting to have her sentence commuted from the death penalty to life imprisonment.

of a tire iron. The beating was so forceful that bone chips from his skull had been lodged in his brain “and his face had been driven into the floor.” There was blood on the walls and floor, and the condition of his hands, according to pathology, suggested he had been trying to shield his face from the blows of the tire iron.

Upon the discovery of Owens’ body and the public revelation of the crime, one of the other men solicited by Gaile Owens, George James, went to the police out of anxiety that he might be suspected in the murder. He agreed to meet with Owens and wear a wire. In this meeting, she “explained that she had her husband killed because of ‘bad marital problems’ and paid James \$60 to keep quiet.” Owens and Porterfield eventually confessed to their respective crimes, and Porterfield stated that Owens volunteered \$17,000 for the job. He also gave more details on how he beat Mr. Owens to death, from an initial confrontation in the backyard that continued into the house. Gaile Owens said that “that she had Ronald killed because ‘we’ve just had a bad marriage over the years, and I just felt like he had been cruel to me. There was little physical violence.’”

The jury found Owens guilty of murder and murder-for-hire and “a murder that was ‘especially heinous, atrocious, or cruel.’” She and Porterfield were both sentenced to death. They appealed to the Tennessee Supreme Court and lost, and then continued appeals through various channels. The following majority and dissenting opinions illuminate the factors that Streib and Rapaport elucidated, including mitigating and aggravating factors. The technical functions of these judicial particularities often serve to shield women from capital punishment. In the case of Owens, however, she and/or her counsel did almost everything wrong if their aim was to avoid the death penalty.

Majority Opinion

On the first claim, that her attorneys had not properly investigated or presented mitigating evidence, the court ruled that the performance of Owens’ attorneys was not deficient. One of the bases of their argument was that her unwillingness to cooperate had complicated the mitigation process, because she would not testify or allow family or mental health examiners to do so. “A defendant cannot be permitted to manufacture a winning IAC [inadequate assistance of counsel] claim by sabotaging her own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal.” The court supported this ruling with evidence from the same circuit, using male clients.

The court wrote that the whole of her COA (Court of Appeals) claim was in essence a claim that she should have had battered-wife defense. This was refuted by the fact that her attorneys had considered both that

defense and an insanity plea. The implausibility of an insanity plea was refuted by the testimony of two jail employees, who testified “that she was a model prisoner.” Another inefficiency component of Owens’ appeal was regarding the inability of her defense to surmount the prosecution’s hearsay objection to Dr. Max West’s testimony. Though West had spent an hour with Owens, he was not allowed to testify about her family history. During sentencing, Dr. Max West, a psychiatrist testified for Owens, saying that he, a psychiatrist, had seen her in 1978 for behavioral issues.

In the end, West’s only basic testimony was that Owens had “some kind of severe problem.” The appellate court found that a statute existed that could have allowed this testimony, but it was not cited by the counsel, and because this “decision was a legitimate strategic” one, the appellate court ruled it was not harmful to Owens. Owens argument was that, had West been allowed to testify:

He would have said that Owens told him that: 1) her parents were too hard on her; 2) she was forced to care for a mentally retarded brother; 3) her parents habitually lied to each other and to the children; 4) she never felt like she was needed; and 5) she had a ‘fairly severe characterological [sic] or personality disorder.’

Her counsel argued that they were afraid that West would have testified to, among other things, the reason why she had seen him, which was that she embezzled money. Lastly, the court determined that *Brady v. Maryland*, 373 U.S. 83 (1963) was not violated in refusing to turn over cards and love notes between Ronald Owens and his lover Gala Scott. *Brady* found that “suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” (pp. 86-88) However, the appeals court decision argued that Mrs. Owens could have introduced other evidence about the affair, an example being that she could have subpoenaed Scott. All of these issues are ones of mitigation and illustrate the need for Owens to establish a motive and illustrate the types of problems she had faced that would have led her to kill her husband.

Also at issue was Owens’s willingness to accept the initial plea deal of life imprisonment. The condition was that she and Porterfield must both accept, and she wanted her prior cooperation to be presented in court. The appellate court upheld the Tennessee Supreme Court’s determination that a prior decision, *Lockett v. Ohio*, 438 U.S. 586 (1978), made her plea-bargaining irrelevant to her sentencing. In reference to *Lockett*, the court stated “no court, let alone the Supreme Court, has held that

failed plea negotiations may be admitted at a penalty-phase hearing.” On the subject, the court wrote further that Owens’s “best argument is that the evidence is relevant to the positive character trait of ‘acceptance of responsibility.’” Even here, she is deemed a failure by the court because she did not offer an unconditional guilty plea in its place. They wrote, “Thus, she was less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor.” The court determined that it was not a violation of federal law to prohibit the introduction of her willingness to accept the plea bargain.

In summation, the court wrote:

First, the entire premise of the dissenter’s rhetoric is that counsel were obviously incompetent for not relying on what is called, in parts of both my state and that of the dissenter, the ‘he just needed killing’ defense. While it could be true that a counsel of the dissenter’s skill could have sold a jury on that defense, there are many reasons that counsel making such a choice is the essence of a ‘strategic’ choice.

Here, the court asserted that she calculatedly interviewed hit men possibilities, and gave Porterfield the necessary information that enabled him to violently kill Ronald Owens. Thus, the majority (Chief Justice Boggs and Justice Siler) affirmed the decision of the district court to deny Owens’s habeas corpus petition.

Dissent

Of the three-judge panel, Judge Merritt dissented, writing that “the majority opinion slants and misconceives relevant facts and law in this case on the three major issues in order to uphold the death penalty.” He wrote that his dissent “[tries] to straighten out the case for the reader by introducing the actual facts and the correct legal principles to be applied.”

The facts about [Ronald]

Owens’s cruel and sadistic behavior toward his wife now make an overwhelming case of domestic violence and psychological abuse in mitigation of the murder case against Gaile Owens. From the beginning, Mrs. Owens’ counsel knew that this was her best—indeed, her only—defense. Before trial, her counsel told the trial court that in his opinion: “This case has a meritorious defense in the battered-wife syndrome.”... The Memphis district attorneys obviously knew that this was the defense theory. But this defense was never developed or even mentioned to the jury during the trial because of the cover-up of exculpatory evidence by the Memphis prosecutor and the complete failure of defense counsel to conduct a proper investigation of [Ronald] Owens’ sadistic behavior toward his wife.

Judge Merritt wrote that Mrs. Owens asked prior to trial for the prosecutor to give her attorneys everything he had that illustrated the fact of her husband’s adulterous activities, including evidence of his many mistresses and the affairs that entailed sexual details such as fetishes or perversions. Merritt’s opinion argues that the routine and continual flaunting of these acts to Mrs. Owens was enough to contribute to her mindset. There were two specific, sexually graphic letters between Mr. Owens and Gayla Scott that were repressed, with nicknames alluding to oral sexual encounters. Merritt takes the most offense to the prosecution’s “lying to the trial court” by saying they had given all of their evidence. They went so far as to specify that they had given “any piece of paper, any notebook—anything along those lines, letters, and etc. that we have.”

Merritt accuses the majority of using the logic that Mrs. Owens could have presented this information herself, despite the fact that a murder defendant is naturally lacking in credibility and also that the ruling of the majority is contrary to *Brady v. Maryland*. “It is certainly true

that the blatant prosecutorial misconduct suppressing the love letters was highly material and prejudicial at the mitigation phase of the trial,” he wrote.

Regarding ineffective assistance of counsel, Merritt argues that the majority’s opinion was biased toward the State “both as to the facts and the law.” Merritt’s basic argument is that the defense counsel failed in researching and developing a defense. Not only did it strip the defense of a better argument to abandon the battered-wife strategy, it severely weakened Owens’s motive. If it were not a battered-wife or self defense argument, the only remaining motive put forth for her crime was “insurance money.”

Merritt argues that the decision fails to comply with the Sixth Amendment and the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Under those requirements, “counsel must fully investigate all mitigating circumstances, even when the defendant does not want to take the stand or is not forthcoming.” He accused the majority’s use of the *Schiro v. Landrigan*, 127 S. Ct. 1933, 1939 case as inadequate because “[Owens] did not even refuse to cooperate, much less instruct counsel not to put on mitigating evidence.” Also, while the majority attributed counsel’s measly hours of investigation in preparation for mitigation to under-billing, Merritt argues that “counsel abandoned the investigation of the defense,” because the attorney “had no incentive to falsify his investigation.”

Merritt goes so far as to present the evidence that the “counsel would have found” had they properly investigated the background. This section is worth quoting in its entirety:

Ron Owens was abusive toward Ms. Owens. He subjected her to physical, emotional, and sexual abuse beginning with their wedding night when he was forceful and impatient, demanding sex immediately upon entering their hotel room. When Ms. Owens revealed to her new husband that she was in great pain and bleeding

profusely, he called her frigid, and angrily left the hotel room stating that “If you won’t, I know where I can find someone who will.”

There are many further horrors. Mr. Owens inserted and broke a wine bottle inside Mrs. Owens’s vagina, and also penetrated her with a “penis-shaped marijuana pipe...which caused her pain and humiliation.” Moreover, Mr. Owens forced his wife to have sex the night before she gave birth, and the “brutal sexual intercourse” caused the placenta to “partially [detach].” An emergency C-section was required for the safety of mother and child.

Mrs. Owens endured verbal and emotional abuse as well. When their children were born, “Mr. Owens accused Ms. Owens of not taking properly her birth control pills and complained that the children would be an unbearable financial burden.” He berated her with comments such as, “she did not sweat much for a fat person.” He was not only physically unfaithful, but “also deceitful;” he lied to his wife as well as other people about volunteering for service in Vietnam, as well as being shot there [twice] and contracting Malaria. He also falsified his educational background, claiming to have a Bachelor’s degree. All of these factors led, Merritt writes, to the sentence Owens received.

Gaile Owens and Feminist Theory

Before delving too deeply into the intricacies of this case, it is interesting but probably not surprising to note that it falls along political lines. The two judges in the majority were appointed by conservative Presidents; Boggs was appointed by Ronald Reagan and Siler by George H.W. Bush. Justice Merritt, however, was nominated by Carter, and it cannot be coincidence that they wrote opinions that fit neatly with those conflicting ideologies.

As noted above, Gaile Owens managed to fit her crime into the narrow guidelines that actually execute women. She was immediately disadvantaged by the aggravating circumstance of murder-for-hire. What she was forced to argue after her conviction and sentencing, then, was that mitigating factors should have been enough to save her, and that her counsel had not researched or presented that information in an effective way. Thus, her case is really comprised of a push and pull between mitigating and aggravating factors.

Though it would be too generous to argue that Owens was unworthy of punishment, the majority’s simple characterization of every claim against her counsel as their choice of “strategy” seems a dubious path to choose when a human life is what hangs in the figurative balance of justice. At what point can courts agree that it is possible for bad strategy to be ineffective counsel? Rapaport’s vehemence that domestic crimes

be elevated somewhat ignores the frequent and severe domestic abuse that often leads women to retaliate and seek revenge against their husbands. The majority opinion does not give credence to Owens’s claims of such violence, but I would argue that if even half of her claims were true, it would warrant the reduction from a death sentence to life without parole.

Moreover, my own personal argument is that Mrs. Owens was punished because she simply does not fit the female murderer stereotype, similar to arguments by Heberle. She is outside conceptions of traditional femininity, and instead fits the mold of the aggressive murderer. The norm is a male killer, but Owens’s unwillingness to cooperate is too stark a contrast with the societal expectations of a female killer, if they even exist — a weeping, terrified, and apologetic female who loved her husband despite the frequent beatings he gave her, and who shot him to keep him from shooting her or their children.

The majority opinion places blame on Mrs. Owens for taking control of her defense, something a woman would not usually be expected to do, and also says that she impeded her defense. While this might be true, much of Owens’s problem seems to be that she, like many other subjects of feminist theory, did not know the proper course of action with respect to the law. Her initial statement that a bad marriage was her motive was soon supplemented with the instances in which she suffered intense verbal and sexual abuse.

In a broad sense, this case is not only an implication of two individuals whose relationship had gone sour, but also the culture that allowed a situation to escalate to the point of violence and murder. For Mrs. Owens, she felt trapped by an empty marriage, but felt that the only means of escape was to kill her husband. Is it because the Owens lived in rural Tennessee that she felt divorce was not an acceptable decision? Would her husband have allowed it? Did she have a means of income if she were to be granted a divorce? What sort of person kills her husband because of a bad marriage? The majority decided that such a person is one worthy of execution, but I would argue that there could have been a more gender-equal culture that provided options for Gaile Owens before she was compelled to hire a hit man.

Conclusion

Victor Streib alluded to the fact that today, in the current tangled climate of courts and endless appeals and overworked attorneys, capital punishment is a questionable practice at best. It is likely that many of the people interested in the relationship between women and the death penalty, such as myself, are critical of the death penalty in general, and thus would avoid calls for equality that might lead to more executions. This fact

has probably kept a considerable number of feminist writers away from the subject in favor of topics on which they can speak to inspire positive social change, for example the difference in prosecution of crack versus white powder cocaine.

Nonetheless, women on death row provide, as I hope I have shown, another thread of inequality. Though many women are protected through this inequality, the assumptions that put it in place—the devaluing of domestic crime, for example—are not necessarily results of positive views of women. A long-ago acquaintance of my stepmother killed her husband after years of abuse and received only 18 months in prison. It is hard, even for feminists, to reverse this situation in their minds. It is still a persistent belief that a woman cannot abuse her husband, at least physically, and if he committed murder in self-defense, he would be laughed out of court, as well as much more likely to receive a capital sentence. It is my hope that capital punishment and gender will come more into the mainstream in the future as a key example of the difficulty in establishing and defining rights and also the struggle to develop a system of rules or a singular theory that will explain everything. If one such theory existed, more feminists would be writing about capital punishment.

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