

ARTICLES

DECIDING TO KILL: REVEALING THE GENDER IN THE TASK HANDED TO CAPITAL JURORS

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I. INTRODUCTION

Day after day, across this country, ordinary people are summoned to court for a selection process that ultimately leaves them in a room deciding, with other jurors, whether a criminal defendant should be killed. The task handed to these jurors is an awesome, personal, moral decision, encased within the complex legal standards and procedures that constitute modern capital jurisprudence.¹ The doctrine that created and

1. See, e.g., *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed . . . should reflect a reasoned *moral* response to the defendant's background, character, and crime.") (emphasis in original). Justice Scalia, for one, profoundly mistrusts the morality at the core of capital decisionmaking. See,

sustains this moment of conscience reflects an ongoing struggle of rule against uncertainty, reason against emotion, justice against mercy, and thus, at one level, male against female. Capital jurisprudence—the law for deciding whether to kill—is also a hidden battleground of gender.²

We all know what it means to use masculine or feminine to describe a person's behavior³ or a piece of clothing; we know what it means to describe a piece of furniture in those terms, or a job,⁴ or even a poem. But what about legal doctrine and method? Masculine and feminine are modifiers that have meaning not only in our choices as individuals, struggling to come to terms with personal identity,⁵ but also in our institutions⁶ and intellectual systems,⁷ which in their construction embody concepts of gender, of a perceived fundamental, hierarchical dichotomy between masculine and feminine, or male and female. Frances Olsen explains:

e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Scalia, J., dissenting). The moral decision at the heart of capital punishment law implicates a fundamental dichotomy between morality and law. See generally DAVID LYONS, *ETHICS AND THE RULE OF LAW* (1984); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1984).

2. I use "gender" to refer to the social and cultural interpretation of what it means to be male or female. See, *e.g.*, KATHERINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY*, at xxviii (1993); ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* 2 (1988); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 n.1 (1983).

3. See, *e.g.*, Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 565 n.191 (1992) (describing criticism of Professor Anita Hill as "unfeminine").

4. See, *e.g.*, Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1750 (1990) (discussing gendered constructions of jobs on both sides in *EEOC v. Sears*, 24 Fair Empl. Prac. Cas. (BNA) 937 (N.D. Ga. 1980)).

5. See, *e.g.*, Kenneth Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957 (1988) ("Boys must not be feminine, girls must not be masculine.").

6. For examples of legal commentary describing constructions of masculinity and femininity in institutions, see Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (describing the masculine construction of several institutions, including the military); Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991) (describing the masculinity of the military).

7. See, *e.g.*, ANNE FAUSTO-STERLING, *MYTHS OF GENDER* 12 (1985) ("Scientists who do deny their politics—who claim to be objective and unemotional about gender while living in a world where even boats and automobiles are identified by sex—are fooling both themselves and the public at large."); Nancy Jay, *Gender and Dichotomy*, in *A READER IN FEMINIST KNOWLEDGE* 89 (Sneja Gunew ed., 1991) (discussing gendered nature of apparently neutral binary polarizations).

[M]ost of us have structured our thinking around a complex series of dualisms, or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextualized; principled/personalized

. . . In each pair, the term identified as "masculine" is privileged as superior, while the other is considered negative, corrupt, or inferior.⁸

As participants in an entrenched system of legal thought, we organize our thinking about law within this series of dichotomies, which include reason versus emotion,⁹ distance versus connection, and rule versus context. The dichotomous choices are not complementary, but rather conflict with and challenge each other.¹⁰ Those dualisms have a hierarchy; maleness is associated with the top end of the hierarchy,

8. Frances Olson, *Feminism and Critical Legal Theory: An American Perspective*, 18 INT'L J. SOC. L. 199 (1990); see also ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 28 (1983) (describing "normative dualism" of liberal thought); Donna Wilshire, *The Uses of Myth, Image, and the Female Body in Re-visioning Knowledge*, in GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING 92, 95-96 (Alison M. Jaggar & Susan R. Bordo eds., 1989) (charting core dualisms associated with male and female); Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 894 (1989) ("Men have had the power to privilege . . . the side of the dichotomies that they associate with themselves."); Susan Williams, *Feminist Legal Epistemology*, 1993 BERKELEY WOMEN'S L.J. 63, 73 ("[C]haracteristics associated with the knower—objectivity, reason, universality, intellect—are associated with men. . . . [P]articularity, emotion, physicality—are associated with women.").

9. See, e.g., Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in GENDER/BODY/KNOWLEDGE, *supra* note 8, at 145, 145 ("Not only has reason been contrasted with emotion, but it has also been associated with the mental, the cultural, the universal, the public, and the male, whereas emotion has been associated with the irrational, the physical, the natural, the particular, the private, and, of course, the female."); Finley, *supra* note 8, at 899 ("[L]aw adopts the values of the privileged side of the dualisms, such as . . . the shunning of emotion.").

10. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1576 (1983) ("[T]he inferior half . . . is often seen to pose a constant danger to the stronger half."); Williams, *supra* note 8, at 74 ("[T]he feminine halves of the dichotomies are seen not only as different, but also as threatening.").

female with the bottom.¹¹ Thus law is a gendered structure of power and meaning.¹²

These hierarchical gendered dichotomies have hurt women, who have been characterized as too emotional,¹³ too close,¹⁴ or too unstructured¹⁵ to perform in worlds that require reason, distance, and certainty. Similar gendered associations are made today in a different way by relational feminists seeking to reclaim the authority and power of what they identify as a female capacity for emotion, connection, and contextual thinking.¹⁶ These gendered dichotomies are all too real in legal thought. But they are also fundamentally false, for they oversimplify our world. Reasoned, principled, distanced, and thus objective, decisionmaking is masculine in the same way that constructing steel buildings or fighting wars is masculine; the fact that women build

11. See, e.g., Finley, *supra* note 8, at 899 ("Law is associated with the male and higher valued side of each of these dualisms."); see also EISENSTEIN, *supra* note 2, at 42 ("[L]aw is engendered, that is, structured through the multiple oppositional layerings embedded in the dualism of man/woman, . . ."); *id.* at 53 ("Law does not exist alongside the privilege but inside it. It establishes a gendered series of hierarchical differences."); CAROL SMART, FEMINISM AND THE POWER OF LAW 85-87 (1989) (discussing how law is infused with masculinity; that is, the masculine side of the dualities); David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQUALITY 33, 45 (1984) ("Law privileges objectivity, individualism, and rights over their binary opposites, subjectivity, collectivity, and responsibility, and this privilege is identified with the more general male privilege over females."); cf. ARISTOTLE, POLITICS (Benjamin Jowett trans., Oxford, Clarendon Press 1885).

12. See, e.g., NGAIRE NAFFINE, LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE 3 (1990) ("[T]he concepts invoked by law to demonstrate its essential justness—concepts such as 'impartiality,' 'objectivity,' and 'rationality,' are gender-biased in their very construction."); Finley, *supra* note 8, at 892 ("Thus, legal language and reasoning is gendered, and that gender matches the male gender of its linguistic architects.").

13. E.g., MATTHEW ARNOLD, MEROPE 21 (n.p., 1858) ("With women the heart argues, not the mind."); William M. Thackeray, *The Virginians*, in THE WORKS OF WILLIAM MAKEPEACE THACKERAY 1, 49 (Kensington ed. 1904) ("The book of female logic is blotted all over with tears, and Justice in their courts is for ever in a passion."); see also THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 57 (1993) (reporting criticisms of women lawyers said to be too emotional); *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 921-22 (1990) (same).

14. E.g., HENRI-FREDERIC AMIEL, JOURNAL 59 (Mrs. Humphrey Ward trans., n.p., MacMillan 1887) ("To men belong law, science and philosophy, all that is disinterested, universal and rational. Women, on the other hand, introduce into everything favour, exception, and personal prejudice."); 4 RALPH WALDO EMERSON, JOURNAL OF RALPH WALDO EMERSON 1820-1832, at 81 (Houghton-Mifflin Co. 1910) (1836) ("How rarely can a female mind be impersonal.").

15. E.g., WILLIAM SHAKESPEARE, *The Rape of Lucrece*, in THE RIVERSIDE SHAKESPEARE 1720, 1736 (1974) ("[M]en have marble, women waxen minds.").

16. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

steel skyscrapers, fight wars, and make principled, distanced, reasoned judgments has not yet dislodged the masculinity from these activities.¹⁷ Masculinity or maleness is a social construction, to which some women have access and from which some men are excluded. Similarly, both men and women can and do exhibit “female” qualities of emotionality, intense interrelatedness, and contextual reasoning.¹⁸ But just as countless businessmen can wear pink button-down shirts without eradicating the gender from pink and blue, women who are unemotional, hard-driving, and distant are described as masculine.

A serious feminist project for the theory of law is not simply to embrace the “female” side of these dualisms, the task undertaken by relational feminists, but further to strip away the false male cover to reveal the messier reality—that is, to reject the basic dichotomies.¹⁹ Our intellectual systems in fact incorporate both sides of the dichotomies, and much in between, but the “female” side is hidden.²⁰ Thus the law embodies reason and emotion, but is said to be reasonable. It moves between distance and connection, but is called disinterested. It embodies principles and context, but masquerades as the rule of law. The legal system is “male” in that it privileges the male side of the dichotomies in its descriptions of itself and its aspirations, and hides the feminine side. In moments great and small, legal decisionmaking uses both sides, in fact requires both sides, but aspires to the masculine virtues of certainty, objectivity, and reason.

I test these premises by examining one awesome moment in law, the decision of a jury to punish someone by death. The power of the law is manifest in this moment. If gendered structures in fact operate within apparently neutral legal principles and procedures, they will be deeply at work in the legal procedures that give the ultimate task—deciding life or death—to a person, a juror.²¹ In addition, under current doctrine, the

17. Thus my claim is not that men are in fact more reasonable than women, but rather that the social construction of masculine includes principled, reasoned decisionmaking and the social construction of feminine means, among other things, emotionality, attention to details, and profound connection with others.

18. See GILLIGAN, *supra* note 16, at 2 (different voice describes theme, not gender); NODDINGS, *supra* note 16, at 44; West, *supra* note 16.

19. See EISENSTEIN, *supra* note 2, at 4-5; see also Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

20. See, e.g., NAFFINE, *supra* note 12, at 13 (“The various epithets conventionally used to describe law, such as ‘rational,’ ‘autonomous’ and ‘principled,’ are in fact male legal ideals. They describe a set of qualities to which men might aspire but they are not, and could not be, the truth of law because nothing in life is ever organized in this way. Vital dimensions of human existence, dimensions conventionally associated with women, are missing from law’s depiction of itself.”); see also Olson, *supra* note 8, at 208 (law in fact is “as irrational, subjective, concrete and contextualized as it is rational, objective, abstract and principled”).

21. MacKinnon suggests that “law will most reinforce existing distributions of power when it most closely adheres to its own highest ideals of fairness.” MacKinnon, *supra* note 2, at 645; cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601,

capital penalty decision is a moment when jurors step out of their normal fact-finding roles and become moral agents. The jury's decision to impose death "rests on not a legal but an ethical judgment,"²² giving it unusually direct lines to the study of moral decisionmaking conducted by psychologist Carol Gilligan and philosopher Nel Noddings, the sources of much relational feminist legal theory. Finally, capital sentencing has no apparent connection to the more limited understanding of women's issues that a narrower version of feminism would address. Using feminist theory to address a type of legal violence overwhelmingly directed at men²³ tests my claims for the breadth of feminist theory.²⁴

I focus on three aspects of the task of capital jurors. Part II addresses the death qualification voir dire procedure, through which potential jurors who indicate unwillingness or unreadiness to impose a death sentence are removed from the panel of prospective capital jurors. I assess death qualification in light of feminist commentary on moral decisionmaking that contrasts a (male) ethic of justice with a (female) ethic of care.²⁵ Death qualification is a moral inquiry that reveals aspects of both modes of decisionmaking. This supports my conclusion that the prime benefit of the relational feminist identification of the ethic of care is to highlight an important aspect of moral decisionmaking that is present in the law, but kept hidden because it is too identified with women, too feminine.

Part III addresses the death penalty decision, the highly discretionary conclusion that a certain defendant should be executed. The Eighth Amendment squeezes the capital sentencing task from two opposite directions. On one hand, any automatic death sentence is impermissible; the decision to kill must be individualized, taking into account the unique, particular circumstances of each capital defendant.²⁶ On the other hand,

1623 (1986) ("Capital cases . . . disclose far more of the structure of judicial interpretation than do other cases.")

22. *Spaziano v. Florida*, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part & dissenting in part).

23. My argument elsewhere that feminists should oppose executions includes a discussion of why relatively few women are sentenced to be executed. See Joan W. Howarth, *Review Essay: Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN'S STUD. 401 (1992).

24. See Robin West, *Feminism, Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 62 ("[F]eminist legal theorists should keep our focus on patriarchal violence . . ."); Howarth, *supra* note 23.

25. See generally GILLIGAN, *supra* note 16; NODDINGS, *supra* note 16.

26. "States must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case.'" *Graham v. Collins*, 113 S. Ct. 892, 898 (1993) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.)). In *Woodson*, the Court struck down North Carolina's mandatory provision for the death penalty for all first degree murderers because of its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson*, 428 U.S. at 303.

the required discretion must be exercised without arbitrariness, which means that clear limits and standards must frame the sentencer's discretion.²⁷ Gendered dualisms are central to this core tension in constitutionally-required guided discretion. Capital sentencing is a conflicting amalgam of rules and context, deemed rules. It is a whiplashed process that bounces between distance and connection, but is said to be removed. It is a confused mixture of emotion and reason, passing as reason. The rule-based, removed, reasoned decision is applauded as reliable. The legal doctrine describes a struggle and victory of "male" over "female" values: reason over emotion, reliability over confusion, objectivity over context. The language hides the troublesome feminine side, giving it a masculine cover.²⁸

Part IV considers the gender in the peculiar choice of a jury, rather than a judge, for the capital sentencing decision.²⁹ Jurors are given this moral task so that it will be a personal, human decision made by people who reflect the emotions and values of the community. In many ways, these explanations reinforce the suggestion that the jury represents female decisionmaking, a judge, male.³⁰ Capital jurors are locked within a feminine institution, allowed to be emotional, unpredictable, and mysterious, but required to be passive, hidden, and subservient. Once the gendered nature of the romance and condescension surrounding the jury is acknowledged, multiple benefits from allowing the jury more authority and control—that is, allowing it to be more masculine—are possible.

Mandatory death penalty statutes are unconstitutional because they consider "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304.

27. "States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly.'" *Graham*, 113 S. Ct. at 898 (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). *Gregg v. Georgia*, 428 U.S. 153 (1976), decided the same day as *Woodson*, 428 U.S. 280, held that a state could impose capital punishment if the sentencer's discretion was directed and limited so as to minimize the risk that the death penalty would be applied arbitrarily. *Id.* at 198. Of the vast commentary on capital jurisprudence, especially helpful discussions of guided discretion are found in WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987), and Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

28. *Cf. NAFFINE*, *supra* note 12, at 13; *see also Olson*, *supra* note 8, at 208 ("[L]aw is as irrational, subjective, concrete and contextualized as it is rational, objective, abstract and principled.").

29. Of the 37 states with capital punishment statutes, only Arizona, Idaho, Montana, and Nebraska give the jury no role in capital sentencing. *See* ARIZ. REV. STAT. ANN. § 13-703 (1989 & Supp. 1993) (pre-sentence hearing before the court alone); IDAHO CODE § 19-2515 (1987) (court conducts pre-sentence hearing); MONT. CODE ANN. § 46-18-301 (1993) (hearing conducted before court alone); NEB. REV. STAT. § 29-2520 (1989) (determination made by judge or panel of judges). *See generally Spaziano v. Florida*, 468 U.S. 447, 463-64 n.9 (1984).

30. *See Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49 (1985).

Finally, I have attempted in this Article to use what I understand to be feminist methodology.³¹ For example, my research has included interviews with a dozen actual capital jurors³² in order to ground my theories in experience.³³ My choice to examine this moment in law is based in part on the feminist choice to examine a particular setting of power.³⁴ Yet using these dichotomies as my organizing structure risks reinforcing rather than weakening the grip of these dichotomies.³⁵

As a law clerk, William Rehnquist wrote to Justice Clark that the "highest court of the nation" was handling death penalty cases "like a bunch of old women."³⁶ The fact that we have a good idea what he meant, and that we know for certain that it was not praise, reminds us of

31. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 AUSTL. J. L. & SOC'Y 30 (1986).

32. I interviewed 12 people who had participated in California death penalty juries, nine of whom sat on juries that resulted in death verdicts, and three of whom sat on juries that resulted in life without possibility of parole. I selected jurors from six different cases. I conducted these interviews, not unaware of potential problems, including bias, self-enhancing memory distortions, and inability to report complex processes. See, e.g., Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 190 (1992). In order to eliminate any possibility of impacting ongoing litigation, I interviewed jurors only in closed cases. Since capital litigation generally continues until the death of the condemned, my interviews of jurors who sat on juries that rendered verdicts of death were confined to cases where the defendant had died in prison, during the pendency of his appeal or habeas litigation. In every case, I was the first person to tell the juror that the person he or she had sentenced to death had died prior to execution.

33. See NODDINGS, *supra* note 16, at 101.

We must ask, then, after the effects of capital punishment on jurors, on judges, on jailers, on wardens, on newsmen "covering" the execution, on ministers visiting the condemned, on citizens affirming the sentence, on doctors certifying first that the condemned is well enough to be executed and second that he is dead.

Id.

34. See, e.g., EISENSTEIN, *supra* note 2, at 18-19 ("[T]he male body takes its engendered privilege with it to particular sites; the privilege is not uniquely and independently constituted in each instance."); SMART, *supra* note 11, at 68 ("Feminist work has a growing affinity with the idea of analyzing the micro-politics of power . . .").

35. Cf. EISENSTEIN, *supra* note 2, at 9 ("The challenge to duality is still (historically) structured by duality."); Sara Ruddick, *Remarks on the Sexual Politics of Reason*, in WOMEN AND MORAL THEORY 237, 239 (Eva Feder Kittay & Diana T. Meyers eds., 1987) ("[I]t is difficult even to state women's difference without adopting the dichotomies that male reason has invented. To say that women are intuitive, personal, emotional, particularistic is not a critique of male reason, but an endorsement of its categories."); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 308 (1992) (most important "limitation bounding feminist discourse" is that "criticism of existing practices must issue from within those very practices"). My hope is to explode the categories. But see AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER 100 (1984).

36. DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 34 (1992).

the grip of gender. We know that Rehnquist did not choose the metaphor of old women to suggest that the Court's handling of capital cases was marked by wisdom, endurance, and strength. More likely he meant that the Court was too nervous about executions, perhaps too fussy, and certainly too weak. Rehnquist wanted the capital doctrine produced by the most authoritative court to be clear, forceful, and more—well, manly. That today Chief Justice Rehnquist would choose a gender-neutral metaphor does not mean that the aspirations to address the death penalty in a masculine way have disappeared; they are simply more hidden. Although the work of revealing the gender in a legal doctrine is more difficult than separating the lace and frills from the tool belts and leather, those of us trying to understand the law must not allow the myth of gender blindness to continue to obscure our vision. Law is gendered; we need only to look carefully.³⁷ This Article is such a look at one especially forceful moment in law; the moment—which actually stretches into days, weeks, and even months—that ordinary people must decide whether some other person, usually not ordinary, will be killed.

II. DEATH QUALIFICATION: TOO MUCH CARING, OR NOT ENOUGH?

A capital juror confronts conscience twice: ultimately, the moral engagement occurs during deliberations on penalty, at the very end of the proceedings; but penalty deliberations are foreshadowed at the outset of the trial during death qualification, the part of voir dire in which the conscience of an individual juror is probed on his or her willingness to impose death. Under well-established doctrine,³⁸ people who are conscientiously opposed to the death penalty in all cases are not qualified to sit on juries in cases in which the prosecutor seeks death.³⁹ A

37. For such careful looks, see NAFFINE, *supra* note 12, at 26-27 (reviewing feminist critiques of "the dichotomous view of the world advanced by liberal philosophy," including legal reasoning); EISENSTEIN, *supra* note 2, at 20; Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433, 447 (1986).

The discourse regarding law—its objectivity, its neutrality, its fairness—is constructed through political discourse concerning sex and gender premised on the duality of man/woman. Therefore, the usual politics of liberal law(s) is presented as though it were neutral, and thinking about the law as though it were objective and fair allows this presentation.

Id.

38. See *Wainwright v. Witt*, 469 U.S. 412 (1985) (no constitutional violation in excusing jurors whose attitudes against death penalty would substantially impair performance of their duty); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (created death qualification, excluding jurors who would invariably or "automatically" vote against the death penalty, but not if they simply "voiced general objections" or "expressed conscientious or religious scruples").

39. Similarly, jurors who insist on imposing a death sentence in every case are excludable for cause. See *Morgan v. Illinois*, 112 S. Ct. 2222 (1992). The Court has consistently upheld death qualification in spite of data that suggest death qualification

principled, conscientious objection to killing is officially a disqualification from service.⁴⁰ The inquiry requires a person to search her conscience regarding her own participation in capital punishment;⁴¹ as such, it implicates the relational feminist theories of contrasting modes of moral decisionmaking: the female ethic of care and the male ethic of justice.

A. Care or Justice

Drawing on the work of developmental psychologist Carol Gilligan,⁴² relational feminists posit two modes of moral decisionmaking: the dominant ethic of justice and the devalued ethic of care.⁴³ As described by Gilligan, the ethic of care is a "different voice" in moral decisionmaking that "requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract."⁴⁴ Unlike the autonomous individuals who inhabit the world of justice, deeply interrelated and connected people inhabit the world of caring.⁴⁵ Justice is associated with rules, hierarchy, and disinterested decisionmaking, as undertaken by autonomous individuals; care is associated with contextual, connected, and relational modes of solving moral problems.⁴⁶

creates a conviction-prone jury. See, e.g., *Lockhart v. McCree*, 476 U.S. 162 (1986).

40. For a thoughtful discussion of the Supreme Court's diminished respect for conscientious objection to the death penalty, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1746-48, 1788 (1987).

41. I interviewed two jurors who had rendered a death verdict against a defendant who served as his own attorney. Some of their strongest memories of the trial involved his questioning them about their willingness to sentence him to death. The foreman recounted: "The defendant said, 'would you like to see me fry?' I looked him in the eye and said 'yes.'" Interview with Gilbert W. Hofeller, Foreman in *People v. Fuller*, No. A085235 (Los Angeles Cty. Super. Ct. 1982), in *Pacific Palisades, Cal.* (Aug. 2, 1991) [hereinafter Hofeller Interview]. Another juror remembered: "He asked me and I looked him in the eye and I said '[you'll] never do it again.'" Interview with Florence K. Stark in *Beverly Hills, Cal.* (Oct. 18, 1991) [hereinafter Stark Interview].

42. Gilligan's work, IN A DIFFERENT VOICE, *supra* note 16, has been especially influential.

43. See NAFFINE, *supra* note 12, at 11-12 (describing "second-phase" feminists who draw on Gilligan's work); Eva Feder Kittay & Diana T. Meyers, *Introduction to WOMEN AND MORAL THEORY*, *supra* note 35, at 3 (describing ethics of care and justice); Joan M. Shaughnessey, *Gilligan's Travels*, 7 LAW AND INEQUALITY 1 (1988) (assessing limited application of ethic of care to reform legal system).

44. GILLIGAN, *supra* note 16, at 19.

45. Gilligan explains:

As a framework for moral decision, care is grounded in the assumption that self and other are interdependent, an assumption reflected in a view of action as responsive and, therefore, as arising in relationship rather than the view of action as emanating from within the self and, therefore, "self-governed."

GILLIGAN, *supra* note 16, at 31; see also West, *supra* note 16.

46. Robin West, *Feminism and Social Theory*, 1989 U. CHI. LEGAL F. 59. "We might conclude that moral ideals and moral inclinations derive from the quiet love of the mother, rather than from the discursive guidance of the father." *Id.* at 82. "[O]ur moral

The ethic of justice is associated with men; the ethic of care with women.⁴⁷ The ethic of care shifts the moral question from “‘What is just?’ to ‘How to respond?’”⁴⁸ Gilligan has suggested:

The strength of women’s moral perceptions lies in the refusal of detachment and depersonalization, and insistence on making connections that can lead to seeing the person killed in war or living in poverty as someone’s son or father or brother or sister, or mother, or daughter, or friend.⁴⁹

Feminist legal scholars have drawn upon these concepts of the ethics of care and justice to critique conventional legal methodology, which is said to reflect the ethic of justice,⁵⁰ and to suggest specific legal reforms that could come from incorporating caring into law.⁵¹ The unusually stark, nonhypothetical⁵² confrontation with conscience at the heart of death qualification invites assessment, using these contrasting modes of moral decisionmaking.

inclinations are rooted not in our uttered “principles” of any sort, but rather, in distinctively life-giving and entirely non-verbal feelings and actions.” *Id.* at 83; *see also* Judith Resnick, *On the Bias*, 61 S. CAL. L. REV. 1877, 1911 (1988) (describing Gilligan’s ethic of care).

47. Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY*, *supra* note 35, at 25-26; GILLIGAN, *supra* note 16, at 2.

48. Gilligan, *supra* note 47, at 23.

49. *Id.* at 32.

50. *E.g.*, Ellen Dubois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 47 (1985) [hereinafter *Conversation*]; *see also* Deborah Rhode, *Feminist Perspectives on Legal Ideology*, in *WHAT IS FEMINISM?* (Juliet Mitchell & Ann Oakley eds., 1986) (calling to “build on broader feminist values that transcend the legal individualist legacy”); Ann Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1986) (drawing on Gilligan to contrast female ethic of care with male rights-based approach).

51. *See, e.g.*, Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601 (1991); Kenneth Karst, *Women’s Constitution*, 1984 DUKE L.J. 447 (using Gilligan’s dichotomy of rights and care-based systems of moral development to imagine and describe a reconstituted and feminized constitutional doctrine); Menkel-Meadow, *supra* note 30; Resnik, *supra* note 46; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

52. Marilyn Friedman has criticized Gilligan’s reliance on answers to merely hypothetical moral questions:

Nobility of moral concern is especially easy to affect when one is merely responding to a test interviewer or, for some other reason, when real commitment is not measured and deeds need not follow upon words. Of course, some individuals in our world really do steal to save the lives of strangers. But most people who judge that “one” should do so are not in fact displaying a genuine readiness to act. Most such judgments are cut off from any link with practice.

Marilyn Friedman, *Care and Context in Moral Reasoning*, in *WOMEN AND MORAL THEORY*, *supra* note 35, at 199-200.

B. Death Qualification: Triumph of Justice

Death qualification could be explained as a classic (and predictable) victory of the ethic of justice over the ethic of caring. Jurors are disqualified if they are unable to set aside their own personal, conscientious squeamishness about voting to execute. In order to serve, they must have the ability to follow the law, rather than conscience, as to killing another person. The disqualified, former potential jurors are responding to the individual circumstances of their own personalized morality, rather than the ruled system that they confront. The disqualified are unwilling to subjugate conscience to the principle of law that permits an execution; such people are excluded because adherence to principle—a hallmark of the ethic of justice⁵³—is required. The person who adamantly insists that death is never justified, or that she would never vote to impose death, is lawless, and must be expelled.⁵⁴ Thus, the death qualification doctrine appears very much in the justice mode, where hard and fast obedience to principle is validated and required.

This apparent “justice” mode of death qualification suggests that disqualified jurors could be operating from the alternative caring perspective. This claim is not simply that “caring” people are less likely to support the death penalty. Two people with similar positions on the policy or legality of capital punishment will reach different results on death qualification if they have different reactions to personal participation.⁵⁵ Perhaps the potential jurors excluded are people who more easily see the defendant in question as some mother’s son,⁵⁶ or

53. See NODDINGS, *supra* note 16, at 44.

54. In *Lockhart v. McCree*, 476 U.S. 162, 176 (1986), Justice Rehnquist, speaking for the Court, characterized those with conscientious scruples against the death penalty as neither “willing to temporarily set aside their own beliefs in deference to the rule of law,” nor to “conscientiously obey the law with respect to one of the issues in a capital case.” *Id.* at 176.

55. For example, one juror described this tension in two fellow jurors: “[T]hese two women were torn. They thought he should get the death penalty but they didn’t want to be responsible for giving him the penalty.” Hofeller Interview, *supra* note 41; see Kenneth C. Hass & James A. Inciardi, *Lingering Doubts About a Popular Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 11 (1988) (“This great reluctance to impose the death penalty in particular cases provides strong evidence that people’s willingness to endorse capital punishment in the abstract is not necessarily an accurate measure of their willingness to put it into practice.”); see also Valerie P. Hans, *Death by Jury*, in CHALLENGING CAPITAL PUNISHMENT, *supra*, at 153-54 (“It is one matter to tell friends or an interviewer that one is for or against capital punishment, and another affair entirely to speculate in the formal setting of the courtroom about whether or not one could render a death sentence.”) (endnote omitted). Of course, for many people the realization that one would not want to impose a death sentence is one reason not to support the death penalty as public policy.

56. For one female juror, the “one thing that probably bothered me the most . . . [was] when I heard how old [the defendant] was. I have a son the same age, and I’m sitting there thinking, oh my god, my son is the same age as him and look what has happened to him. Oh god, that would be awful to happen to your son. It would be

believe that voting to execute is voting to end that person's web of connection.⁵⁷ Demographic data appears to support the claim that death qualification excludes people who use the female ethic of caring; women of all races are disproportionately disqualified.⁵⁸ (Thus, the feminist insistence on noticing where women are excluded from law⁵⁹ supports scrutiny of death qualification.)

This disparate disqualification of women based on their refusal to kill implicates controversies raging on several fronts engendered by or related to Gilligan's work. Although the caring voice is certainly feminine, in that it is associated with women, any claim that it accurately describes or distinguishes women is problematic. Indeed, the apparent association between exclusion of a "female" mode of moral decisionmaking and the exclusion of women means less than it seems; women are not the only ones disproportionately disqualified through this process. Black men are as well.⁶⁰ In fact, death qualification also knocks out the poor, non-

terrible. I mean I could identify with the age [My son] is the same age and so [I] can look at it a little more personally than somebody else might." Stark Interview, *supra* note 41.

57. Cf. Deborah Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1749 (1991) (issue of women in the military raises questions about women's greater willingness to see targets as people and men's greater willingness to kill impersonally).

58. See, e.g., *Grigsby v. Mabry*, 758 F.2d 226, 231 n.9 (8th Cir. 1985) (not reaching claim raised pursuant to district court finding that death qualification resulted in "systematic disproportionate removal" of women), *overruled sub nom.* *Lockhart v. McCree*, 474 U.S. 162 (1986); *People v. Fields*, 673 P.2d 680, 690 n.7 (Cal. 1983) (recognizing that death qualification causes disproportionate exclusion of women but finding that potential problem alleviated by practice of also excluding automatic voters for the death penalty, assumed to be more male and white), *cert. denied*, 469 U.S. 892 (1984); *Hovey v. Superior Court*, 616 P.2d 1301, 1337-39 (Cal. 1980) (describing data showing that more women than men are excludable through death qualification); Michael Finch & Mark Ferraro, *The Empirical Challenge to Death Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 44-49 (1986) (summarizing five studies, each of which showed that more women than men were excluded pursuant to death qualification); Bruce Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and Constitutional Analysis*, 81 MICH. L. REV. 1, 32-33 (1982) (finding that women venirepersons were slightly more likely than men to have voiced opposition to the death penalty).

59. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 227-39 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595-601 (1990); Abbe Smith, *Rosie O'Neill Goes to Law School*, 28 HARV. C.R.-C.L. L. REV. 1, 8-9 (1993); Heather Wishnik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 68 (1985); West, *supra* note 46, at 66. "Patriarchy has mostly produced silence from women We ought instead [of discourse to] study the production of silence." *Id.*

60. See, e.g., *Grigsby*, 758 F.2d at 231 n.9 (Blacks subject to "systematic disproportionate removal"); *Fields*, 673 P.2d at 692 n.7 (same); *Hovey*, 616 P.2d at 1338-39 (same); Finch & Ferraro, *supra* note 58, at 44-49 (Blacks disproportionately excluded).

Christians, and Democrats.⁶¹ Identifying death disqualification as caring and the caring mode as female erases a variety of other factors, especially including race, that are also operating to change the face of the capital juries through death disqualification.⁶² Is the different voice of caring used by all women, as well as men who are poor, Black, non-Christian, or registered Democrats?

Assuming that death qualification expels those using the ethic of caring, these demographic data seem to support the charge that the ethic of caring is not so much a female mode of moral decisionmaking as it is a mode of powerlessness.⁶³ Many of the categories of people disproportionately excluded consist of people with relatively little power in society. Death qualification compounds whatever powerlessness they bring to the selection process, in that they are disproportionately excluded from the most powerful role given to jurors, the choice to kill or not. Is death qualification a telling example of men of color and all women using the caring voice, acting out of powerlessness to give up more power?

61. "Jews, agnostics, atheists, the poor, and Democrats are also disproportionately eliminated. Jurors who survive death qualification are demographically distinctive: They are more likely to be male, to be white, to be well-off financially, to be Republican, and to be Protestant or Catholic." Hans, *supra* note 55, at 151 (endnote omitted).

Morgan v. Illinois, 112 S. Ct. 2222 (1992), upheld the exclusion of potential jurors who acknowledge that they will automatically vote for death, which might serve to exclude disproportionate numbers of white men. See *Fields*, 673 P.2d at 690 n.7 (potential disproportionate exclusion of women and Blacks alleviated by practice of also excluding automatic voters for the death penalty, assumed to be more male and white). Perhaps this explains the vehemence of Justice Scalia's dissent in *Morgan*. Scalia offers the author of Exodus and Immanuel Kant as examples of the kind of people who would be (unfairly) excluded under *Morgan*, but makes no explicit reference to the silencing of white men implicit in the decision. See *supra* text accompanying notes 58-59.

62. Caring has been associated with an Afrocentric standpoint. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 215-19 (1990). "The convergence of Afrocentric and feminist values in the ethic of caring seems particularly acute." *Id.* at 217; see Sandra Harding, *The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory*, in *WOMEN AND MORAL THEORY*, *supra* note 35, at 296; see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993). Ascribing a set of qualities to women ignores differences among women and reinforces dominant, unstated and unexamined assumptions that womanhood is the same thing as white womanhood. See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Dominant constructions of masculine and feminine, male and female, and men and women embody class and race bias. I have written elsewhere, for example, that the assertion "women are not executed" mistakenly uses white, middle-class women to (mis)represent all women. See Howarth, *supra* note 23. My fundamental premise here is that dominant, dichotomous constructions of "masculine," "feminine," "female," "male," "man," and "woman" are not accurate reflections of the diverse lives of real women and men. See *supra* text accompanying notes 16-19.

63. See, e.g., Joan Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 649 (1987); *Conversation*, *supra* note 50, at 25-30. The ethic of care has also been associated with Afrocentric and Asian moral theories. See *supra* note 62.

Gilligan acknowledges that the ethic of care includes a reluctance to judge, but she identifies that reluctance with moral maturity, not political powerlessness: "The reluctance to judge remains a reluctance to hurt, but one that stems not from a sense of personal vulnerability but rather from a recognition of the limitation of judgment itself."⁶⁴ Does death qualification remove those with a caring-based general reluctance to make any moral judgment?⁶⁵ If so, death qualification—and the ethic of care—is as much a failure of agency or autonomy as a triumph of conscience.

The disproportionate disqualification of women in death qualification also implicates other problems related to valorizing women's distinct virtue.⁶⁶ Is there (female) virtue in refusing to participate in a capital case? Is this an example of a "higher" feminine morality?⁶⁷ The relational feminist valorizing of a (woman's) caring voice echoes early arguments for bringing women onto juries in order to civilize the juries, and make them more humane,⁶⁸ which in turn sound very much like traditional arguments for keeping women *off* all juries. Is refusing to consider killing a convicted murderer caring for the wrong person, the main error within the ethic of care acknowledged by Gilligan?⁶⁹

64. GILLIGAN, *supra* note 16, at 102.

65. See, e.g., Friedman, *supra* note 52, at 191-203.

66. Moral philosophers Kittay and Meyers describe the "insidious" potential "trap in the assignment of distinct and positive virtues to women: the altruism considered more characteristic of women conflicted with the possibility of autonomy." Kittay & Meyers, *supra* note 43, at 8-9 (citing Larry Blum et al., *Altruism and Women's Oppression*, in 5 THE PHILOSOPHICAL FORUM: WOMEN AND PHILOSOPHY 222 (1974) (special issue)); see MARGARET ADAMS, *The Compassion Trap*, in WOMEN IN SEXIST SOCIETY (Vivian Gornick & Barbara Morgan eds., 1972). But see CAROL McMILLAN, WOMAN, REASON, AND NATURE: SOME PHILOSOPHICAL PROBLEMS WITH FEMINISM (1982) (arguing that "it is their failure to accept the human condition that moves feminists to want to suppress sex difference, and that women have distinct virtues that are not self-victimizing and do not destroy agency").

67. See, e.g., Rhode, *supra* note 57, at 1739 ("Female jurors' elevating and refining influence" might similarly enhance the quality of justice available to all citizens) (citing WOMEN IN AMERICAN LAW 330 (Marlene Wortman ed., 1984)); see also Garfinkle et al., *Women's Servitude Under Law*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 105 (Robert Lefcourt ed., 1971). "Given women's moral sensibilities and nurturing values, their involvement could 'purify' politics." Rhode, *supra* note 57, at 1739 (citation omitted). For historical references related to the special morality that women might bring to the jury, see generally Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 62, 64, 70, 71 (1986).

68. Carol Weisbrod quotes a 1891 suffragist: "[T]he feminine heart, the maternal influence, are needed in the court-room as well as in the home." Weisbrod, *supra* note 67, at 71. Weisbrod quotes from a 1936 article written by a judge: "The presence of women jurors . . . has stopped the sneering of the unfeeling and the kindly motherly sympathy of women in the jury box has drawn from witnesses the necessary details of testimony which made conviction possible." *Id.* at 72 n.43.

69. See Gilligan, *supra* note 47, at 19, 32.

C. Death Qualification: Victory for Caring

These many questions raised by associating the excluded with the ethic of caring are eclipsed by the larger question of whether the excluded should be linked to the ethic of care at all. Death qualification may be fairly characterized as bringing the different voice of caring *into* the capital trial, rather than expelling it. Death qualification requires a person to place herself *into* the moral dilemma, just as does the caring mode. The juror is not asked whether the death penalty is ever appropriate, but instead is asked whether she could ever impose a death sentence. This question reflects personalized responsibility. The question is not simply “do you support the death penalty?” or “is the death penalty just?”; the questioning places the potential juror within the problem, asking her the core question of caring, “How will *you* respond?”⁷⁰

Beyond that, the disqualified jurors might be cast away precisely because of their justice mode of moral decisionmaking. We can fairly characterize the person who refuses to bend her conscience to the capital punishment law as a person who rests on a hard and fast principle of refusal to even consider whether an execution would be correct in a particular situation. The person who refuses to impose a death sentence, no matter what the circumstances, adheres to an overreaching principle that negates the need to examine (at all, let alone carefully) the individual circumstances of the particular crime and defendant. In the caring mode, of course, much depends on the particular circumstances. The caring mode would not permit a juror to refuse to impose an execution in all cases, as a matter of principle: “While I must not kill in obedience to law or principle, I may not, either, refuse to kill in obedience to principle. To remain one-caring, I might have to kill.”⁷¹ If voting to execute would indeed save someone else, voting to execute could be a caring decision. Thus, death qualification arguably represents a moment of caring in the law, in that it requires the triumph of contextualization over rule or principle. Death qualification allows into the group of decisionmakers only people who are able to make a determination based on the individualized context surrounding the defendant and his crime. Death qualification protects the caring, individualized, contextual deliberations that will follow.⁷² What then do we make of the disproportionate exclusion of women?

70. *Id.* at 23 (suggesting that the ethic of care asks “How to respond?”).

71. NODDINGS, *supra* note 16, at 102.

72. See *infra* text accompanying notes 116-25 (discussing discretionary nature of capital decision).

D. Care, Justice, and Gender in Death Qualification

This inquiry leads to three related conclusions: at first glance, death qualification appears to exclude the caring and reward the just; closer scrutiny reveals aspects of both caring and justice on both sides of death qualification; thus, the female, caring side is present in death qualification, but somewhat hidden.

My conclusion that aspects of justice and care are found on both sides of death qualification invites a larger criticism, namely, that the ethic of care and ethic of justice posed by relational feminists merely replicate an overly simplistic dichotomy, reinforcing dualistic thinking and the reassuringly uncomplicated female/male dichotomy.⁷³ Gilligan attempts to sidestep this criticism by claiming that the ethics of care and justice are not opposites, but rather like the "figure ground shift in an ambiguous figure perception."⁷⁴ Indeed, the metaphor of a figure ground shift fits the death qualification analysis quite well; depending on one's focus, either the caring or justice mode can be found in those who are kicked off the jury, as well as those who survive.

Perhaps the ethics of caring and justice do not accurately describe men and women, but more accurately reveal one aspect of conventional aspirations to masculinity and femininity.⁷⁵ Thus, death qualification can be deeply gendered in a way that is not closely related to either the caring

73. See, e.g., Elizabeth A. Bartlett, *Beyond Either/Or: Justice and Care in the Ethics of Albert Camus*, in *EXPLORATIONS IN FEMINIST ETHICS: THEORY AND PRACTICE* 82 (Eve B. Cole & Susan Coultrap-McQuin eds., 1992) (using the work of Camus to show the interrelatedness of justice and care perspectives); Eve B. Cole & Susan Coultrap-McQuin, *Toward a Feminist Conception of Moral Life*, in *EXPLORATIONS IN FEMINIST ETHICS: THEORY AND PRACTICE*, *supra*, at 1, 6; Berenice Fisher & Joan Tronto, *Toward a Feminist Theory of Caring*, in *CIRCLES OF CARE: WORK AND IDENTITY IN WOMEN'S LIVES* 35, 39 (Emily K. Abel & Margaret K. Nelson eds., 1990) ("[O]ur experience of caring is not reflected in the related moral claim that 'justice' and 'caring' constitute different perspectives on human life."); Friedman, *supra* note 52, at 203 ("Thus, contextual detail matters overridingly to matters of justice as well as to matters of care and relationships."); Patricia Ward Scaltsas, *Do Feminist Ethics Counter Feminist Aims?*, in *EXPLORATIONS IN FEMINIST ETHICS*, *supra*, at 15, 23 ("The danger is that these female values, ways of thinking, and experiences will degenerate into the traditional dichotomies between male and female capacities and characteristics which have been used to try to justify excluding women from educational, professional, and political opportunities and locking them into roles of irrational love-givers or love-giving simpletons.").

74. Gilligan explains that justice and caring are not opposites or mirror-images of one another, with justice uncaring and care unjust. From a justice perspective, the self as moral agent stands as the figure against a ground of social relationships, judging the conflicting claims of self and others against a standard of equality or equal respect (the Categorical Imperative, the Golden Rule). From a care perspective, the relationship becomes the figure, defining self and others.

Gilligan, *supra* note 47, at 22-23; see also *id.* at 30-31.

75. These constructions are powerful, although they also reflect racial and class exclusions. See, e.g., Howarth, *supra* note 23, at 417 (describing construction of womanhood that excludes women of color).

or justice modes of moral decisionmaking. For example, one explanation for women's disparate exclusion from death penalty juries is that the concept of "feminine" to which many women aspire does not include readiness to do violence.⁷⁶ Many jurors described voting to execute as tough, difficult, fearsome work. "I think [a juror who voted for life] took the easy way out It is a very difficult thing."⁷⁷ One juror vehemently discounted people who claimed to be too sensitive for such a task: "[I]t isn't that you're too tender-hearted; you're chicken shit."⁷⁸ Willingness to publicly back away from such an experience would be inevitably impacted by personal identities or aspirations of femininity and masculinity. The fact that women are disproportionately disqualified could reflect a feminine reluctance to dirty oneself with the nasty aspects of violence, contrasted to the perceived masculinity in the readiness to kill.⁷⁹ The disqualified may simply be more willing to publicly acknowledge what can be perceived to be a feminine discomfort with violence; the disqualified may be simply more willing to publicly appear soft. Death qualification is the first way that the capital juror's experience differs from other jurors; it foreshadows the moral work that follows during penalty deliberations.

III. THE DECISION

The law used to determine whether a criminal defendant should be killed operates within three central, gendered dualisms: rules against context; distance against connection; and reason against emotion. All of these are at work in the decision to kill. Capital jurisprudence, like other areas of law, aspires to a masculine version of itself, which consists of rule-based, distanced, and reasoned decisionmaking. The ever-present contextual, proximate, and emotional aspects of the decision to kill are vehemently hidden and disowned within the doctrine.

76. See Karst, *supra* note 6 (ascribing readiness to use violence as part of masculine (aspirational) gender).

77. "[S]ome people, even though they said one thing [in death qualification], were not able to do it." Interview with Rich Neider, Juror in *People v. Jackson*, No. 074222 (Alameda County Super. Ct. 1983), in San Francisco, Cal. (Apr. 2, 1991) [hereinafter Neider Interview]. Not all jurors experienced the task as difficult; one reported: "We knew that we were right and we had no discussion or argument whatsoever. All we wanted to do was get rid of the guy." She evaluated the experience: "It was quite nice, good food, we just really enjoyed ourselves." Interview with Eleanor Manchester, Juror in *People v. Guzman*, No. 38466 (El Dorado Cty. Super. Ct. 1981), in S. Lake Tahoe, Cal. (Aug. 5, 1992) [hereinafter Manchester Interview].

78. Interview with Carole Anne Boisvert, Foreperson in *People v. Craine*, No. A645780 (Los Angeles Cty. Super. Ct. 1989), in Carson, Cal. (Aug. 1, 1991) [hereinafter Boisvert Interview]. She continued, "You don't believe [in] the system in which you live. I think if you were really tough then you would figure that they should *all* hang." *Id.*

79. "Capital punishment is warfare writ small." Burt, *supra* note 40, at 1764.

A. Rules vs. Discretion

1. THE CHAOS OF DISCRETION AS FEMALE

Misogynist thinkers have long blamed women for being incapable of making decisions on the basis of neutral, overarching principles.⁸⁰ Similarly, the (female) ethic of care identified and promoted by relational feminists⁸¹ addresses moral decisions by using the specific factual context of the situation, rather than by applying neutral principles or rules.⁸² Nel Noddings claims that women reject the rule-based decisionmaking of traditional moral reasoning: "Instead of proceeding deductively from principles superimposed on situations, women seek to 'fill out' hypothetical situations in a defensible move toward concretization."⁸³ Recognition of the ethic of caring as a neglected (female) mode of moral decisionmaking has led many feminist legal scholars to call for increased attention to contextual reasoning⁸⁴ in addressing a variety of legal dilemmas:⁸⁵ "Is the search for facts a

80. Consider Schopenhauer:

The weakness of [women's] reasoning faculty also explains why it is that women show more sympathy for the unfortunate than men do, and so treat them with more kindness and interest; and why it is that, on the contrary, they are inferior to men in point of justice, and less honourable and conscientious. For it is just because their reasoning power is weak that present circumstances have such a hold over them, and those concrete things which lie directly before their eyes exercise a power which is seldom counteracted to any extent by abstract principles of thought, by fixed rules of conduct, firm resolutions, or, in general, by consideration for the past and the future, or in regard of what is absent or remote.

Kittay & Meyers, *supra* note 43, at 14 (quoting ARTHUR SCHOPENHAUER, *On Women*, in *PHILOSOPHY OF WOMAN* 146 (Mary B. Mahowald ed., 1978)).

81. See generally GILLIGAN, *supra* note 16; NODDINGS, *supra* note 16.

82. See Cole & Coultrap-McQuin, *supra* note 73, at 2 ("In feminist ethics, thinkers emphasize that the particular context, not abstract principles of right and wrong, must shape and inform morally appropriate choices."); *supra* text accompanying notes 42-48.

83. NODDINGS, *supra* note 16, at 36. The attributes which Noddings ascribes to women, I would describe as feminine; that is, a false, over-simplified social construction of what it is to be female.

84. See, e.g., Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849-63 (1990); Emily Calhoun, *The Breadth of Context and the Depth of Myth: Completing the Feminist Paradigm*, 4 HASTINGS WOMEN'S L.J. 87 (1993); see Grillo, *supra* note 51, at 1557 (principles versus context as basis for decisionmaking); Menkel-Meadow, *supra* note 30, at 57-58; Smith, *supra* note 59, at 9; Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 255-61 (1988); Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728 (1990).

85. E.g., Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1051 (1989) (discussing importance of judicial attention to the individual facts of plaintiffs' lives in the context of abortion); Ruth Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363, 1377-79 (1989) (same); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the*

feminine search for context and the search for legal principles a masculine search for certainty and abstract rules?"⁸⁶ Thus traditionally and within relational feminism, masculine rules bring order to female contextuality.⁸⁷

The caring mode provides a different approach to punishment: "The traditional approach, that of the father, is to ask under what principle the case falls. But the mother may wish to ask more about the culprit and his victims. She may begin by thinking, What if this were my child?"⁸⁸ Noddings retells the story of Manlius to illustrate how female caring differs from what she calls the "devotion to principle" of "traditional masculine ethics." Manlius ordered the execution of his own son, who happened to be one of the first to disobey Manlius' prior warning that anyone who left camp to engage in individual combat would be executed. Manlius' ethic of justice required obedience to the principle he had set, rather than attention to context or individualized circumstances, however dramatic.⁸⁹ Such complex factual circumstances merely distract within

Women's Movement, 61 N.Y.U. L. REV. 589, 606-10 (1986) (describing efforts in *State v. Wanrow*, 559 P.2d 548 (Wash. 1977), to include a Native American woman's perspective into the instructions by which the jurors were asked to determine her culpability).

86. Menkel-Meadow, *supra* note 30, at 49. "When we value 'objectivity,' or a 'right' answer, or a single winner, are we valuing male goals of victory, exclusion, clarity, predictability?" *Id.* at 49.

87. See, e.g., Williams, *supra* note 8, at 66.

Nature represents all that is physical, moved by emotion or instinct rather than by reason, sunk in subjectivity and particularity. Culture is the triumph of mind and reason, imposing objective and universal constraints (perhaps most clearly, although not exclusively, in the form of law) over these forces of chaos, danger and ignorance.

Id. at 66-67.

88. NODDINGS, *supra* note 16, at 36-37; see West, *supra* note 46, at 82; *supra* note 56 (juror Stark's comments about sentencing to death a young man the same age as her son).

We might conclude that morality is grounded in the experience of being cared for in symbiosis with a protective and nurturant other, rather than in our later experiences of disciplined, disciplining and verbose authority. We might conclude that moral ideals and moral inclinations derive from the quiet love of the mother, rather than from the discursive guidance of the father. . . . In other words, we need to understand the possibility that our moral inclinations are rooted not in our uttered "principles" of any sort, but rather, in distinctively life-giving and entirely non-verbal feelings and actions.

West, *supra* note 46, at 83; see also Resnik, *supra* note 46, at 1911 (describing Gilligan's ethic of care).

89. Nodding asks:

Why, then, did [Manlius] not think concretely before establishing the rule? . . . For [a woman, by contrast,] the hypothetical is filled with real persons, and thus, her rules are tempered a priori with thoughts of those in her inner circle. A stranger might, then, be spared death because she would not visit death upon her own child. She does not, in whatever personal agony, inflict death upon her child in devotion to either principle or abstract entity.

the justice mode, but they are necessary for caring.⁹⁰ This feminist “call to context”⁹¹ implicates the central tension in capital jurisprudence: how to eliminate arbitrariness from the discretion to impose or refrain from imposing death, without imposing rules or mandatory sentences. If individualized capital sentencing is an example of (feminine) contextual adjudication, then the central theme of modern capital jurisprudence is how to tame the wild female side of capital decisionmaking.⁹²

2. CAPITAL DOCTRINE: CONTAINING THE CHAOS OF DISCRETION

Historically, death sentences were imposed in this country by juries granted absolute discretion. Such discretion was probably built into the death penalty law in part to permit racist use of the death penalty.⁹³ In 1971, in *McGautha v. California*,⁹⁴ the Supreme Court rejected a Due Process challenge to untamed discretion in the imposition of death sentences. Although *McGautha* upheld the constitutionality of unbridled discretion,⁹⁵ the decision was based on Justice Harlan’s deep skepticism that any alternative was possible:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.⁹⁶

NODDINGS, *supra* note 16, at 44.

90. Noddings notes:

The [traditional approach] moves immediately to abstraction where its thinking can take place clearly and logically in isolation from the complicating factors of particular persons, places, and circumstances; the [approach of the mother] moves to concretization where its feeling can be modified by the introduction of facts, the feelings of others, and personal histories.

Id. at 36-37 (contrasting male and female decisionmaking modes).

91. Toni M. Massaro, *Empathy, Legal Story-Telling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2099 (1989) (“The rebellion against abstraction has, of late, been characterized by a ‘call to context.’”). Professor Massaro attributes the phrase to Professor Frederick Schauer. *Id.*

92. See Menkel-Meadow, *supra* note 30, at 58 n.97.

93. HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* 11 (3d ed. 1982); see *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring).

94. 402 U.S. 183 (1971).

95. Justice Harlan’s opinion for the Court in *McGautha* held that neither substantive standards to control juror discretion nor a bifurcated trial was constitutionally mandated.

96. 402 U.S. at 204.

Justice Harlan was not endorsing discretion; he simply despaired that the rule of law was attainable.⁹⁷ Even in upholding discretion, *McGautha* substantiates the preference in the law for the certainty of rules and principles, rather than the chaos of details and context.

The following year, the Court returned to the problem of discretion in capital sentencing, this time holding in *Furman v. Georgia*⁹⁸ that the unbridled discretion then allowed violated the Eighth Amendment because of the freakish and arbitrary way it was imposed. The discretion led, according to Justice Stewart's famous metaphor, to a pattern whereby being sentenced to death was as cruel and unusual as being struck by lightning.⁹⁹ Four years later, the Court purported to solve the problem identified in *Furman* with a series of decisions that included *Woodson v. North Carolina*¹⁰⁰ and *Gregg v. Georgia*.¹⁰¹ The solution became the modern theme of guided discretion, by which the chaos of individualized discretion mandated by *Woodson* was bounded and channelled as required by *Gregg*. These "two competing commandments of the Eighth Amendment"¹⁰² are now accommodated through a bifurcated process in which a trial on guilt of a capital crime, which narrows the group of death-eligible defendants, is followed by a separate and more discretionary penalty trial, in which individualized considerations are recognized.¹⁰³

The requirement that death be imposed only on a person who has been considered as an individual, in all her uniqueness, reached its zenith in *Lockett v. Ohio*.¹⁰⁴ *Lockett* recognized the Eighth Amendment right of a capital defendant to have the decisionmaker hear individualized

97. Justice Harlan complained that "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need." *Id.* at 208. Justice Brennan's dissent in *McGautha* forecast his subsequent conclusion that the death penalty is inconsistent with our Constitution: "[E]ven if I shared the Court's view that the rule of law and the power of the States to kill are in irreconcilable conflict, I would have no hesitation in concluding that the rule of law must prevail." *Id.* at 249-50 (Brennan, J., dissenting). Brennan recognized unguided juror discretion to kill as an "unbridled, unreviewable exercise of naked power." *Id.* at 252. Excellent discussions of *McGautha* are found in Burt, *supra* note 40, at 1751-55, and Weisberg, *supra* note 27, at 308-13.

98. 408 U.S. 238 (1972).

99. *Id.* at 309 (Stewart, J., concurring).

100. 428 U.S. 280 (1976).

101. 428 U.S. 153 (1976).

102. *Graham v. Collins*, 113 S. Ct. 892, 898 (1993).

103. *Gregg*, 428 U.S. at 195 (Stewart, Powell, and Stevens, JJ., plurality opinion).

For an excellent description of the penalty trial, what the author calls the "most visible by-product of the modern era of capital punishment," see WHITE, *supra* note 27, at 51-74.

104. 438 U.S. 586, 604 (1978). My usual use of masculine pronouns for capital defendants reflects that they are generally men. See Howarth, *supra* note 23. The defendant in *Lockett* was Sandra Lockett, a woman.

circumstances of the defendant's life and crime that might provide a reason to let her live.¹⁰⁵

Although the *Woodson-Lockett* requirement of individualized discretion has not been overruled,¹⁰⁶ the current Court has relaxed the requirement of individualized consideration, and become less vigilant against mandatory aspects of capital sentencing. The Court's willingness to shrink the discretion requirement can be seen most clearly in its rejection of challenges to Texas' special issue scheme. Texas' statute is extremely focused, imposing death if the penalty phase jurors simply answer in the affirmative to specific questions, one of which concerns future dangerousness.¹⁰⁷ In *Penry v. Lynaugh*¹⁰⁸ the Court overturned a death sentence because the narrow focus of the Texas special issues provided no genuine opportunity for the jury to give mitigating effect to evidence of the defendant's mental retardation and abuse during childhood.¹⁰⁹ Constrained by the special questions, the jurors could have justified executing Penry by using the evidence of retardation to support a finding of future dangerousness.¹¹⁰ Retrial was required, along with the addition of an instruction clarifying that the evidence of Penry's mental retardation could support a decision for life.

In subsequent cases, however, the Court has refused to require a similar instruction regarding the mitigating potential of evidence of the defendant's youth at the time of the capital crime. In *Graham v. Collins*,¹¹¹ the Court used a cramped interpretation of its habeas jurisdiction to refuse to reach the claim of a man sentenced to death for a crime committed when he was seventeen; the petitioner argued that the Texas special questions prevented adequate consideration of his youth as

105. Death penalty schemes must enable consideration of "any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604.

106. *See, e.g.,* *Sumner v. Schuman*, 483 U.S. 66 (1987) (holding unconstitutional a mandatory death penalty for prison inmates convicted of murder while serving a life sentence without possibility of parole).

107. In five states the jury determines whether to impose a death sentence by answering special verdict questions. *See* CONN. GEN. STAT. ANN. § 53a-46a (West 1987); N.J. STAT. ANN. § 2C:11-3 (West 1991 & Supp. 1994); OR. REV. STAT. § 163.150 (1993); TEX. CRIM. PROC. CODE ANN. art. 37.071 (West 1981 & Supp. 1994); WASH. REV. CODE ANN. § 10.95.060 (West 1991).

108. 492 U.S. 302 (1989).

109. The Court determined that Penry was constitutionally entitled to further instructions "informing the jury that it could consider and give effect to [Penry's] evidence . . . by declining to impose the death penalty." *Id.* at 328. The Texas statute has since been amended to include a more open-ended question to address *Lockett* concerns.

110. *Penry* is an eloquent statement of the Court's capital jurisprudence. Abolitionists considered it a major defeat, since their goal was a decision that execution of mental retarded people categorically violates the Eighth Amendment. The *Penry* result was much more modest, simply deciding that the jury had to have a way to consider mental retardation prior to sentencing Penry to death. Yet Justices Scalia and Thomas complain bitterly that *Penry* went too far. *See* sources cited *infra* note 127.

111. 113 S. Ct. 892 (1993).

a mitigating factor.¹¹² A few months later the Court ruled in *Johnson v. Texas*¹¹³ that the Texas special issues did allow adequate consideration of the defendant's youth at the time of his offense. Because allowing consideration of individualized mitigation is not the same thing as ensuring such consideration, the *Johnson* Court's insistence that it "ha[s] not altered [*Lockett's*] central requirement"¹¹⁴ is strained, at best.¹¹⁵

Although the Court has rendered the *Lockett*-required discretion largely illusory in the five jurisdictions that use Texas-style special questions, contextualized discretion remains central in the majority of states with capital punishment. Twenty-four states responded to *Furman* by adopting statutes that require capital jurors to weigh aggravating and mitigating factors to determine whether death is the appropriate punishment for any particular capital defendant.¹¹⁶

112. Four justices in dissent reached the merits and would have reversed. 113 S. Ct. at 926 (Souter, J., dissenting).

[E]ven if the future dangerousness issue allowed the jury to recognize Graham's evanescent youth as tending to mitigate any danger if he were imprisoned for life, it would still fail the test of the Eighth Amendment because the jury could not give effect to youth as reducing Graham's moral culpability.

Id. at 925 (Souter, J., dissenting).

113. 113 S. Ct. 2658 (1993).

114. *Id.* at 2666. The *Graham* dissenters insisted that "*Lockett* and *Eddings* meant what they said." *Id.* at 2676 (O'Connor, J., dissenting). The Court's cramped interpretation of *Lockett* is evident:

Lockett and its progeny stand *only* for the proposition that a State may not cut off in an *absolute* manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could *never* be part of the sentencing decision *at all*.

Id. at 2666 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 465 (1990) (Kennedy, J., concurring)) (emphasis added).

115. The assertion shows only that the Court is not willing to openly abolish the *Lockett* promise of individualized discretion. The promised stability of at least formal *stare decisis* is undoubtedly especially comforting in the arena of capital jurisprudence, where "the Court has tried to dignify the once lawless death penalty with the reassuring symbolism of legal doctrine." Weisberg, *supra* note 27, at 307. *But see Payne v. Tennessee*, 501 U.S. 808 (1991) (Marshall, J., dissenting) (decriing willingness to discard precedent with change in Court's personnel).

116. Such weighing statutes are the most prevalent type of capital punishment statute. See ARK. CODE ANN. § 5-4-603 (Michie 1987); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. ANN. § 16-11-103 (West 1990 & Supp. 1994); GA. CODE ANN. § 17-10-31 (Michie 1990); ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd 1979); KY. REV. STAT. ANN. § 532.025 (Baldwin 1988); LA. CODE CRIM. PROC. ANN. art. 905.3 (West 1991); MD. ANN. CODE art. 27, § 413 (1957); MASS. GEN. L. ch. 279, § 68 (1992); MISS. CODE ANN. § 99-19-101 (1977); MO. ANN. STAT. § 565.030 (Vernon 1983); NEV. REV. STAT. § 175.554 (1991); N.H. REV. STAT. ANN. § 630:5 (1986); N.M. STAT. ANN. § 14-7010 (Michie 1978); N.C. GEN. STAT. § 15A-2000 (1991); OHIO REV. CODE ANN. § 2929.03 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1991); 42 PA. CONS. STAT. § 9711 (1990); S.C. CODE ANN. § 16-3-20 (Law. Co-op.

Even after recent decisions rejecting *Lockett* challenges to certain features of weighing statutes,¹¹⁷ the weighing process remains extremely contextual. In weighing states, the rules bind the edges of the process, and undoubtedly circumscribe certain bases for death sentences,¹¹⁸ but the decision to impose death remains largely discretionary. Careful consideration of information presented will not necessarily result in any particular conclusion, because the conscience, not any external rule or standard, is the foundation for the determination.¹¹⁹ For that reason, the penalty decision is wildly indeterminate at its core.¹²⁰ Unlike virtually all other legal tasks handed to jurors,¹²¹ the decision whether to impose death is made in the absence of even a theoretical right answer.¹²² Under the law, a terrifying serial killer might be given life even without any defense presented during the penalty trial, on the basis of some factor evoking mercy from jurors. Thus, current doctrine still requires a discretionary, individualized determination for which there is

1976); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1991); TENN. CODE ANN. § 39-13-204 (1989); VA. CODE ANN. § 19.2-264.2 (1991); UTAH CODE ANN. § 76-3-207 (1992); WYO. STAT. § 6-2-102 (1988).

The death penalty enacted by Congress for "drug kingpins" in 1988 (21 U.S.C. § 848(e)) also provides for a death verdict imposed by members of a jury after weighing mitigating and aggravating factors. *See* 21 U.S.C.A. § 848(i)-(k) (1988). The special maritime and territorial jurisdiction of the United States provides for the death penalty for certain first degree murders, at the determination of a jury. 18 U.S.C. § 1111(b) (1988).

117. *See, e.g.,* *Boyde v. California*, 494 U.S. 370, 377 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). In *Blystone* the Court upheld the Pennsylvania statute mandating a death sentence if the jury finds at least one aggravating circumstance and no mitigating circumstance, against the challenge (agreed to by the four dissenters) that the mandatory aspect prevented the required individualized assessment.

118. For example, a death sentence intentionally imposed because of the race of the defendant would be unreliable. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

119. Social scientists Mark and Sally Costanzo have studied the different task handed to penalty jurors: "The penalty decision is essentially a moral one, which is argument poor. Thus deliberation at this phase is more sensitive to normative pressures [T]he fact-finding dimensions of a typical penalty decision are minor." Costanzo & Costanzo, *supra* note 32, at 190.

120. Jury nullification does not exist in this context, because no theoretical right answer exists. *But see infra* text accompanying notes 377-78 (describing prevalence of reverse nullification in jurors voting for death in order to get life without parole).

121. The normal role of the jury is to determine facts. *See, e.g.,* JOHN GUINTEHER, *THE JURY IN AMERICA*, at xv (1988) (study attempting to describe "what we know about the jury as a fact-finding body"); REID HASTIE ET AL., *INSIDE THE JURY* 230 (1983) (assessing "jury performance of the fact-finding task" as "remarkably competent"); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 120 (1988) (describing jury as "a fact-finding machine").

122. Justice Powell described the difference between the roles as follows: "Underlying the questions of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them." *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting).

no right answer, no perfect case.¹²³ Professor Radelet has described this adjudication process: “[J]ury decisions are made by vibrations that defy objectification into precise reason. The list of aggravators and mitigators thus becomes parallel to an attempt to list precisely the reason why people love their mothers.”¹²⁴ Whether made by vibrations or a “gut-level hunch as to what is just,”¹²⁵ a discretionary decision to impose death runs fundamentally against the promised certainty of the rule of law.

The “guided discretion” of capital decisionmaking is a battleground of context versus principle. If contextual reasoning is associated with a feminine mode of decisionmaking, the decision to impose death is a startlingly feminine moment at the heart of capital punishment jurisprudence. Indeed, the capital decision stands today as an island of indeterminacy in an ocean of determinate sentencing. If “man is to woman as fact is to value,”¹²⁶ the discretionary decision whether to impose death appears uniquely on the female side of the gendered dualisms by which law is constructed. Acknowledging the gender in the hierarchy helps to explain the battleground between context and rules in capital decisionmaking, as well as the vehemence of the fight about the proper role, if any, of individualized discretion.

3. THE PASSIONATE ATTACK ON DISCRETION

Even as the Court constrains individualized discretion, whatever discretion remains is under full-scale attack by Justice Scalia, now joined by Justice Thomas.¹²⁷ Justice Scalia’s capital jurisprudence is an angry single-minded attempt to eliminate the discretion from the process.¹²⁸

123. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 460 (1990). “[T]he categorization decision remains essentially discretionary; it is a ‘legal’ one, that is, bound by rules capable of rigorous review in name only.” *Id.* According to Justice Stevens, a death sentence “cannot be prescribed by a rule of law as judges normally understand such rules.” *Spaziano*, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part & dissenting in part).

124. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Cases*, 15 AM. J. CRIM. L. 1, 51 (1988); see also Weisberg, *supra* note 27, at 308 (“[T]he decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.”).

125. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1049 (1991).

126. EISENSTEIN, *supra* note 2, at 52.

127. See *Johnson v. Texas*, 113 S. Ct. 2658, 2672 (1993) (Scalia, J., concurring); *id.* at 2672 (Thomas, J., concurring); *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part & concurring in the judgment).

128. Commentators have noted that Scalia’s claim that discretion is inconsistent with *Furman* suggests not only that individualized discretionary sentencing be deconstitutionalized, but that it be eradicated. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Review Essay: Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 860 (1992); Scott E. Sundby, *The*

With characteristic boldness, Justice Scalia identifies the individualized discretion at the heart of capital sentencing with nothing less than evil and Nazi Germany:

To acknowledge that "there is perhaps an inherent tension" [between the two poles of guided discretion] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives" . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled.¹²⁹

Although Scalia's dualities are not themselves overtly gendered, the fierceness of his insistence that the spheres be kept separate suggests the passion which maintains masculine and feminine as polar opposites. Scalia complains that unbridled discretion to consider mitigation "quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve."¹³⁰ Similarly, in his dissent in *Richmond v. Lewis*,¹³¹ Justice Scalia sneered at the requirement of individualized, or contextual, capital sentencing: "As this and other cases upon our docket amply show, that recently invented requirement has introduced not only a mandated arbitrariness quite inconsistent with *Furman*, but also an impenetrable complexity and hence a propensity to error that make a scandal and a mockery of the capital sentencing process."¹³²

Justice Scalia's passion to eliminate the discretion in capital sentencing takes him beyond simply decrying the discretion that remains; occasionally Justice Scalia indulges the conceit that he has already succeeded in wiping it out. A prime example is Justice Scalia's dissent from the unremarkable holding of *Morgan v. Illinois*¹³³ that jurors who insist during voir dire that they will impose a death sentence in every case are excludable for cause. *Morgan* was decided in light of well-established doctrine that people who are conscientiously opposed to the death penalty in all cases are not qualified to sit on capital juries.¹³⁴ In *Morgan*, the

Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing, 38 UCLA L. REV. 1147, 1189 (1991).

129. *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part & concurring in judgment) (citations omitted). Justice Scalia apparently imagines that good and evil are isolated and separate.

130. *Id.* at 664-65. Justice Scalia also uses evidence of slowness to bolster this argument in favor of finality. *Id.* at 668-69.

131. 113 S. Ct. 528 (1992). In *Richmond v. Lewis*, the majority determined that the Arizona Supreme Court had improperly affirmed a death sentence based on the prisoner's clear eligibility without the required weighing of individualized mitigation. *Id.* at 537.

132. *Id.* at 538 (Scalia, J., dissenting).

133. 112 S. Ct. 2222 (1992).

134. See *supra* text accompanying notes 38-41 (discussing death qualification).

Court addressed the opposite problem, and reaffirmed that a capital defendant's right to an impartial jury would be violated by the presence of any juror who would automatically vote *for* death for all death-eligible defendants.¹³⁵ Justice Scalia's startling dissent expunges all individualized moral judgment. According to Scalia, "[t]he fact that a particular juror thinks the death penalty proper *whenever* capital murder is established does not disqualify him."¹³⁶ Justice Scalia describes the penalty determination as if it were proof of elements of a crime¹³⁷ and denounces a decision for life for *any* reason as tantamount to improper jury nullification.¹³⁸

In *Morgan*, Scalia elevates the simple mandatory vote to execute à la Exodus ("He that smiteth a man, so that he dies, shall be surely put to death"¹³⁹) over the murky, merciful discretion that he disdainfully dismisses as a "fog of confusion":

Today, obscured within the fog of confusion that is our annually improvised Eighth-Amendment, "death-is-different" jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. Those who agree with the author of Exodus, or with Immanuel Kant, must be banished from American juries
¹⁴⁰

135. Justice White's opinion for six Justices is an unremarkable explanation of fundamental principles, based on the premise that a juror who is unable to consider the individual circumstances of a particular defendant is unable to follow the law.

136. 112 S. Ct. at 2236 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined the dissent.

137. Justice Scalia confuses moral determination with proof of elements:

Assume . . . a criminal prosecution in which the State plans to prove only elements of circumstantial evidence *x*, *y*, and *z*. Surely counsel for the defendant cannot establish unconstitutional partiality (and hence obtain mandatory recusal) of a juror by getting him to state, on *voir dire*, that if, in a prosecution for this crime, element *x*, *y*, and *z* were shown, he would always vote to convict.

Id. Justice Scalia's principle and even his rhetorical choices were echoed by juror Stark, who told me that she would remove all discretion from the death penalty determination: "I think it should be based on what the penalty is for X and what the penalty is for Y and what the penalty is for Z and just leave it at that. Nobody is going to be happy anyway." Stark Interview, *supra* note 41.

138. *Morgan*, 112 S. Ct. at 2236 (Scalia, J., dissenting). "[T]he law governing sentencing verdicts says that a jury *may* give less than the death penalty in such circumstances, just as, in the hypothetical case I have propounded, the law governing guilt verdicts says that a jury *may* acquit despite proof of elements *x*, *y*, and *z*."

139. *Id.* at 2242 n.6 (Scalia, J., dissenting) (quoting *Exodus* 21:12).

140. *Id.* at 2242 (Scalia, J., dissenting) (footnote omitted). One suspects that the author of Exodus and Immanuel Kant might be banished from juries on a number of additional grounds. See, e.g., Annette C. Baier, *Moralism and Cruelty: Reflections on Hume and Kant*, 103 ETHICS 436, 445 (1993) (discussing the fact that Kant's support for the death penalty excepted murders committed for honor, such as the killing of an infant

Thus Scalia cloaks the person who would automatically vote for death in Biblical authority, and casts that juror with Kantian morality. The judge who *always* upholds death is similarly valorized.¹⁴¹ Justice Scalia cannot reconcile the male authority of the rule of law with female discretion, so discretion must disappear. For Scalia, any case where death is possible is another perfect case for death.

Justice Scalia's cold and relentless contempt for context easily invites the epithet "male" hurled by relational feminists. Justice Thomas has also weighed in on the side of certainty rather than discretion, but his analysis challenges the feminist valorization of contextual reasoning, in that Thomas has set his argument in the context of racial justice. Thomas correctly suggests that the Court moved away from uncontrolled discretion after realizing the role race played in discretionary capital punishment schemes.¹⁴² In assessing *Furman*, Thomas concludes that "behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."¹⁴³ Thus, for his own reasons Thomas shares Scalia's desire to return to a mandatory sentencing scheme.¹⁴⁴ Thomas equates discretion with bias, certainty with equality.¹⁴⁵ Justice Thomas' analysis challenges the equation of discretion with female; if discretion is female,

born outside of marriage); Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 *ETHICS* 229, 253 (1989) ("[Kant] makes it clear that women are not sufficiently rational and autonomous to be moral subjects.").

141. Justice Scalia incorrectly describes jurors who refuse to consider not imposing death as "jurors who favor the death penalty" and suggests:

A State in which the jury does the sentencing no more violates the due process requirement of impartiality by allowing the seating of jurors who favor the death penalty than does a State with judge-imposed sentencing by permitting the people to elect (or the executive to appoint) judges who favor the death penalty.

112 S. Ct. at 2236 (Scalia, J., dissenting) (citations omitted). Thus, Scalia invites the conclusion that judges such as himself, who favor the death penalty, should be expected to vote to uphold death sentences in virtually all cases, automatically, without regard to the specific facts at issue, in defiance of the constitutionally required individualized discretion. (A similar perspective was held by a juror who voted for death, who explained, "I also felt if I had voted [for the death penalty initiative], I had an obligation to society to follow through." Neider Interview, *supra* note 77. *Morgan* arguably renders Justice Scalia ineligible for capital jury service.

142. *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring).

143. *Id.* at 906. "Such unbridled discretion, it was argued, practically invited sentencers to vent their personal prejudices in deciding the fate of the accused." *Id.* (citing Brief for Petitioner, *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003)).

144. "One would think, however, that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman*." 113 S. Ct. at 908 (Thomas, J., concurring).

145. Justice Thomas thus urges that such discretion leads to arbitrariness and capriciousness. "It is manifest that 'the power to be lenient [also] is the power to discriminate.'" *Id.* at 912 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987)).

rather than male, then informal bias, including racism, is female, rather than male.¹⁴⁶

To the extent that the caring mode embodies contextual moral reasoning, Thomas' criticism implicates the serious charge that the caring voice invites differential treatment.¹⁴⁷ For example, Noddings' presentation of Manlius' dilemma seems to provide moral validation for differential treatment of Manlius' son.¹⁴⁸ Thomas unwittingly leads us to the most cogent caution to the ethic of caring: an ethic whose paradigm is that of mother and child invites differential treatment based on proximity.

The potential for bias in discretionary, contextual decisionmaking is real, although Justice Thomas' solution is not. Thomas' error is not in seeing potential bias in discretion; it is in offering the illusory solution of mandatory sentencing. Thomas' skepticism toward jurors is equally well-earned by the decisionmakers who implement mandatory schemes, including legislators,¹⁴⁹ police officers,¹⁵⁰ and prosecutors.¹⁵¹

Eliminating the discretion from guided discretion makes less sense than changing the guidance; explicit instructions about and against racial bias are not currently even attempted.¹⁵² Formalizing and demystifying jury deliberations also offers the hope of preventing, or at least correcting, racial bias in deliberations.¹⁵³ Justice Stevens was correct to challenge Thomas' insistence in *Collins* that allowing a jury to give weight to a defendant's mental retardation or youth invites racial discrimination.¹⁵⁴ In the absence of other proposals for addressing racism in capital sentencing,¹⁵⁵ Thomas' sweeping condemnation of

146. See generally Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988).

147. See, e.g., Shaughnessey, *supra* note 43.

148. Noddings' answer is that the caring person in Manlius' position would treat each soldier as a son. See NODDINGS, *supra* note 16, at 44.

149. See, e.g., United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (holding that unconscious congressional racism motivated sentencing disparities between crack and powder cocaine), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

150. See, e.g., Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, THE CHAMPION, July 1991, at 7, 10-13.

151. See, e.g., *id.* at 8-10; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988).

152. Justice Kennedy's recent admonishment that "[a] juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath," *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1434 (1994) (Kennedy, J., concurring), is not likely to be heard by jurors unless included in a trial court's instructions.

153. See *infra* text accompanying notes 379-81.

154. 113 S. Ct. at 915 (Stevens, J., dissenting).

155. Justice Thomas' concern about widespread racism in capital punishment would appear more genuine if it included some critique of *McCleskey v. Kemp*, 481 U.S. 279 (1987), the decision that insulated and protected systemic racism in capital sentencing

discretion suggests the confluence of anti-racism passion with the conventional distrust of feminine discretion.

4. KEEPING DISCRETION HIDDEN

The well-entrenched preference for principle over discretion does not fuel the only fierce attack on the doctrine of individualized discretion; even participants in and proponents of individualized discretion actively hide the indeterminacy. Jurors given awesome discretion report that they had no choice but to impose death; judges hide the messiness of discretion behind the soothing rhetoric of accuracy and reliability.

a. Jurors: The False Experience of Applying Rules

Many jurors who use their discretion to impose death do not recognize that they had a choice to do otherwise. Jurors want the instructions to tell them whether to sentence to life or death, so that is how they understand the instructions.¹⁵⁶ But when the law requires jurors to use their own discretion, the law refuses to provide the right answer.¹⁵⁷ Although each had participated in a relatively open-ended weighing process, juror after juror told me that the judge's instructions *required* them to impose death. "The instructions that we received . . . didn't leave any room for choices."¹⁵⁸ The forewoman of a jury that returned a death verdict told me almost defiantly that "we were trying desperately to find something in his favor."¹⁵⁹ Another told me three

by rejecting all claims of racial bias except those which can prove a particular death sentence the product of intentional racism. For commentary on *McCleskey*, see Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 999-1001 (1991); see also M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 52-61 (1991).

156. Cf. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 782 (1987) ("It is the text as read, and not the text as written, that becomes the law."); Cover, *supra* note 21, at 1622 ("Because in capital punishment the action or *deed* is extreme and irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act.") (emphasis in original).

157. Higginbotham, *supra* note 125, at 1065 ("Instructions to juries, such as to consider all mitigating circumstances and weigh them against aggravating circumstances, are important as ritualistic reminders of the jury's responsibility, but I would not overload their mission.")

158. Stark Interview, *supra* note 41; see Weisberg, *supra* note 27, at 393 ("In the case of the death penalty, the law has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual."). The foreperson of a jury that rendered a death verdict after a few hours of deliberation recounted that two women on the jury were troubled: "They thought by the rules . . . that he should get the death penalty but they did not want to give the death penalty." Hofeller Interview, *supra* note 41.

159. Boisvert Interview, *supra* note 78; see also Interview with John P. DeMasi, Juror in *People v. Guzman*, in S. Lake Tahoe, Cal. (Aug. 4, 1992) [hereinafter DeMasi

times that the death penalty was a “requirement” in the case in which he was the foreman.¹⁶⁰ Professors William S. Geimer and Jonathan Amsterdam have described the way that Florida jurors improperly used the statutory list of mitigating circumstances as a check-off to reduce discretion.¹⁶¹ Geimer and Amsterdam explained one juror’s continuing pain and misunderstanding that the law required the defendant’s death fourteen years after her verdict: “[C]rying, she said, ‘I searched my heart and tried to find something to vote to save him, but the evidence was so clear that he was guilty—there was no way to find something to save his life.’”¹⁶²

One juror reported, “I didn’t want to do it, but I had to.”¹⁶³ Another explained, “You can feel sorry and sadness for what you have to do but you still have to do it. That is part of discipline.”¹⁶⁴ These accounts confirm the hypothesis of social scientists that jurors who had imposed death would readily characterize the decision as one required by the applicable law in order to minimize their sense of personal responsibility.¹⁶⁵

Interview] (many of the jurors were “trying to find some way to give him life without the possibility of parole”). Another juror reported disappointment that a life sentence was not possible: “We kind of hoped . . . [to be able to give him life] but under the terms of what it was, we really couldn’t.” Interview with Ellen Smith (pseudonym), Juror in *People v. Guzman*, in S. Lake Tahoe, Cal. (Aug. 4, 1992) [hereinafter Smith Interview].

160. Hofeller Interview, *supra* note 41.

161. The explanations included:

“We were all ready to hang him, but we went over the list so we would be within the law . . . to get it right.”

“It seemed that the State of Florida called for the death penalty. There didn’t seem to be any choice.”

Geimer & Amsterdam, *supra* note 124, at 25 (footnotes omitted).

162. *Id.* at 46.

163. Hans, *supra* note 55, at 49-50. One juror explained, “Sentencing someone to death is something none of us wanted to do. It will take a very long time to get over this for all of us.” *Id.* Robert Weisberg describes the prosecutorial tactic of arguing that voting to impose the death penalty is part of the jurors’ legal duty, as opposed to a moral choice. Weisberg, *supra* note 27, at 375-76.

164. Neider Interview, *supra* note 77.

165. Costanzo and Costanzo hypothesize that

the postverdict accounts of jurors who voted for death will emphasize their lack of choice in the verdict. That is, to cope with the burden of rendering death they will claim less discretion—that no other decision was possible given the legal requirements. . . . In contrast, members of juries that rendered a verdict of life will emphasize their discretion.

Costanzo & Costanzo, *supra* note 32, at 196; *see also* Weisberg, *supra* note 27, at 393 (“[I]t seems fairly plausible that a lay jury exposed to the mystifying language of legal formality may indeed allow its moral sense to be distorted.”) (footnote omitted).

The search for rules to follow is also very conspicuous in juries’ normal fact-finding role of determining guilt. “Systematic empirical research suggests that jurors’ decisions in [non-penalty] criminal trials are dominated by the relevant evidence and the ‘official’ fact-finding task as defined by the court” rather than “the dictates of conscience” or “sense of fair play.” HASTIE ET AL., *supra* note 121, at 29.

Thus, jurors approach open-ended weighing as if rules provided answers; as if the task were finding facts, not supplying a moral response. This false experience of applying rules is directly contradicted by the Court's fictional description of how jurors operate. The Court reverses the reality, insisting, for example, that Texas' narrowly focused Special Issues questions invite the jurors to engage in the required "reasoned moral response" rather than to undertake a "narrow factual inquiry."¹⁶⁶ The Court upheld the special questions in the Texas scheme in part on the theory that Texan jurors approached these specific questions as if they were broad invitations to balance:

This view accords with a "common sense understanding" of how the jurors were likely to view their instructions Indeed, we cannot forget that "a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in 'pure balancing' States."¹⁶⁷

The Court's insistence that jurors faced with the specific questions used in Texas' sentencing scheme in fact consider mitigating factors—even without any instruction to do so—is a rhetorical reversal, cloaking a determinate reality in a pretend costume of discretion.¹⁶⁸

b. Judges: The False Rhetoric of Precision

The preference for certainty and principled decisionmaking is so well-entrenched that even the members of the Court who recognize that contextualized discretion is necessary choose language to describe capital decisionmaking that hides the uncertainty of discretion behind the soothing language of certainty and predictability. The Court indulges in the comforting words of legal determinacy, calling the decisions made through individualized discretion nothing less than "reliable" and "accurate,"¹⁶⁹ as if capital sentences were somehow comparable to brand name appliances. The very concept of an "accurate death sentence" is awkward, as the Court has come close to acknowledging.¹⁷⁰

166. 113 S. Ct. at 2670.

167. *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality opinion)).

168. The Court's claim to having a "common-sense understanding" of the jurors' process is not supported by applicable research. Social scientists Costanzo and Costanzo point out that "[t]he available data suggest that the Supreme Court and penalty jurors may have fundamentally different conceptions of the sentencing task." Costanzo & Costanzo, *supra* note 32, at 190.

169. See Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037 (1985).

170. See generally *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (suggesting that a possibly inaccurate death sentence is a broader category than "innocent of the death

Further, the shining certainty of "reliable" is belied by the meaning given to it by the Court. Although the origin of the requirement of "reliability" in capital sentencing was the *Woodson* recognition that "death is different" in seriousness and finality,¹⁷¹ a diluted goal of accurate or reliable death sentences has displaced the aspiration to fairness.¹⁷² In *Lockhart v. Fretwell*,¹⁷³ the Court considered the reliability of a death sentence that would *not* have been rendered, except for the failure of defense counsel to notice that a death sentence was impermissible under the law controlling at the time of trial.¹⁷⁴ To the Court, Fretwell's death sentence was "reliable": "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."¹⁷⁵

The very concept of "accuracy" is poorly adapted to a purely moral question. "Accuracy" is a term that fits within the traditional fact-finding role of jurors.¹⁷⁶ But science, and even facts, are not without value and context.¹⁷⁷ If even science is not objective reality,¹⁷⁸ where is the "accuracy" in a moral determination?¹⁷⁹ How can a moral

penalty"). *Id.* at 2519. "The phrase 'innocent of death' is not a natural usage of those words" *Id.* at 2520.

171. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

172. Justice Blackmun is critical: "I continue to believe, however, that the Court's 'exaltation of accuracy as the only characteristic of 'fundamental fairness' is deeply flawed.'" *Sawyer v. Whitley*, 112 S. Ct. at 2527 (Blackmun, J., concurring) (quoting *Smith v. Murray*, 477 U.S. 572, 545 (1986) (Stevens, J., dissenting)).

173. 113 S. Ct. 838 (1993).

174. At the time of Fretwell's capital trial, controlling Eighth Circuit precedent prohibited double-counting the fact that a murder was committed in the course of a felony both as aggravation to form the basis for death eligibility and for imposition of the death penalty. Had the correct law been followed, Fretwell could not have been sentenced to death. The Eighth Circuit doctrine was subsequently reversed to allow this type of double-counting.

175. 113 S. Ct. at 843 (citation omitted). "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 842 (footnote omitted).

176. But even in a fact-finding context, where a correct and therefore accurate answer is at least theoretically possible, the assertion that knowing that such a verdict is in fact accurate is problematic. *See, e.g., HASTIE ET AL., supra* note 121, at 62 ("[T]he issue of the correctness of the final verdict cannot be resolved in absolute terms, for there are not ideal rational or empirical criteria for accuracy in jury decisions.").

Justice Blackmun mounted an extensive attack on the Court's misguided emphasis on "actual innocence" in the guilt phase as a method of assessing error in the penalty phase, in *Sawyer v. Whitley*, 112 S. Ct. at 2525 (Blackmun, J., concurring); *see also id.* at 2530 ("Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence. Nowhere is this more true than in capital sentencing proceedings.").

177. *See, e.g., Donna J. Haraway, In the Beginning Was the Word: The Genesis of Biological Theory*, 6 *SIGNS* 469, 477 (1981) ("Facts are theory laden; theories are value laden; values are history laden.").

178. Zillah Eisenstein makes this point clearly. *See EISENSTEIN, supra* note 2, at 24-31.

179. *See also Weisberg, supra* note 27, at 346, 353.

determination—for which no correct answer exists—ever be accurate? The Supreme Court's insistent repetition of the requirement (and finding) of "reliability" reflects the same impulse to embrace a false certainty that moves jurors to find answers in the instructions. Both are cases of rhetorical certainty masking wildly uncontrolled decisionmaking.¹⁸⁰ In short, "accuracy" and "reliability" connote the masculine goals of objectivity, certainty, and precision, all of which are missing from the feminine "gut-level" hunches and vibrations of capital decisionmaking.

The language of capital cases reveals judicial unease with individualized discretion not merely in the choice of falsely determinate descriptors such as "reliable" and "accurate", but also in the rhetorical reluctance of the members of the Court who support individualized discretion. As Robin West has demonstrated, even the proponents of individualized decisionmaking describe their judgments in terms of broad-based principles, eschewing the rhetoric of individualized circumstances which they purport to embrace.¹⁸¹ In other words, the liberals use the rhetoric of broad-based principles to propound the principle that individualized attention is required, without undertaking the individualized attention in question.

Of course, the reality of capital decisionmaking, as with all other decisionmaking, is that both theoretical principles and detailed contextual analysis are required.¹⁸² Inevitably, of course, all decisionmaking requires some consideration of context, with concomitant choices, in order to apply more generalized rules. Unbridled discretion is ubiquitous in death penalty practice; prosecutorial charging and police investigative practices are largely unconstrained, for example. Those areas are justified not by the feminine goal of discretion, however, but rather by the masculine virtue of independence. Discretion itself is neither lawless nor frightening; rules in themselves are neither fair nor neutral. Thus the

180. *Id.* at 307 ("[T]he Court has tried to dignify the once lawless death penalty with the reassuring symbolism of legal doctrine."); *cf.* JUDITH SHKLAR, *LEGALISM* 12 (1964) (stating that analytical positivism "allow[s] judges to believe that there always is a rule somewhere for them to follow").

181. West suggests that the capital doctrine which entitles each capital defendant to be considered in his particularity clashes with the liberal premise that each person is entitled to the same right, whatever his circumstance:

A capital defendant's right to a sentence mitigated by evidence of his personal circumstances is . . . the right to be treated in one's particularity rather than a right to generality. . . . On the other hand, the liberal legalist insistence on the insularity of the rightholder means that the subjectivity of the defendant, his worthiness, and indeed his individual life history should all be simply irrelevant to his possession of rights.

Robin West, *Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43, 89 (1990) (footnote omitted).

182. *See, e.g.,* Scaltsas, *supra* note 73, at 15, 17 (criticizing call to context in part because "[t]he concrete, contextual aspect of moral thinking is a necessary stage in applying any principle, whether by women or men"); Catherine Wells, *Situated Decisionmaking*, 63 *S. CAL. L. REV.* 1728, 1741 (1990) (asserting that structured and contextual decisionmaking is not an "either/or proposition").

context versus rule dichotomy oversimplifies and denies the connection between the two. The primary value of the feminist reclamation of contextual thinking is to reveal and explain the way that contextual reasoning is often denied, hidden behind the reassuring rhetoric of certainty and principle. A more honest description of both would prevent indulgent one-sided modifiers such as "reliable" from so easily obscuring a far messier reality. Acknowledging the connotations of gender helps to explain the deep willingness to choose misleading descriptions that reflect masculine aspirations.

B. Distance vs. Connection

1. CONNECTION RECLAIMED

Relational feminists are suspicious of traditional liberal thought which values separation between the decisionmaker and the object of his decision, in service of the conventional goal of detachment or distanced decisionmaking.¹⁸³ Gilligan explains, "Detachment is considered the hallmark of mature moral thinking within a justice perspective, signifying the ability to judge dispassionately, to weigh evidence in an even-handed manner, balancing the claims of others and self. From a care perspective, detachment is *the* moral problem."¹⁸⁴ Feminists have reclaimed the value of connection between the legal decisionmaker and the subject of her decision.¹⁸⁵ Rather than distance, the caring judge or juror needs the benefit of closeness to the subject of the decision: "Within this framework, detachment, whether from self or from others, is morally problematic, since it breeds moral blindness or indifference—a failure to discern or respond to need."¹⁸⁶

Law claims to be distanced, but is so only selectively. The male value of distance is aspirational, and is certainly present in judges' rhetoric in capital cases; but, in fact, a great deal of connectedness already exists. The three main subjects considered by a capital penalty juror are the defendant, the execution itself, and the victim. Current doctrine imposes a growing distance between the decisionmaker and the

183. E.g., Williams, *supra* note 8, at 74. "The relation between knower and known is one of separation, a relation of objectivity. Such separation is required for the autonomy of the knowing subject. And masculinity is, of course, defined importantly in terms of autonomy and separation." *Id.* (footnote omitted).

184. Gilligan, *supra* note 47, at 30-31.

185. See, e.g., NAFFINE, *supra* note 12, at 7 (to "feminists, detachment may not be the best approach to resolving disputes: involvement and close proximity to the subject may be better"); *id.* at 37 (judging is supposed to be done by distanced, neutral decisionmakers); Grillo, *supra* note 51, at 1587 (referring to "dispassionate, bloodless neutrality that can give that word a bad name . . ."); Resnik, *supra* note 46, at 1922 (discussing tension between the traditional rule of disinterested judges and connectedness); cf. Williams, *supra* note 8, at 72 (discussing critique of distance between knower and known).

186. Gilligan, *supra* note 47, at 24.

defendant, an immense distance between the decisionmaker and the execution, but a shrinking space between the decisionmaker and the victim.¹⁸⁷

2. THE DISAPPEARING DEFENDANT

Twenty-five years ago the Supreme Court in *Witherspoon v. Illinois*¹⁸⁸ turned to Arthur Koestler's *Reflections on Hanging* to suggest in favorable terms that those who opposed the death penalty reflect "'the shuddering recognition of a kinship' with the accused."¹⁸⁹ In that way the Court recognized the obvious correlation between a decisionmaker's perceived connection to the defendant and reluctance to impose death. Many capital jurors experience a significant distinction between a theoretical willingness to impose a death sentence, assured during death qualification, and actually voting for death for a particular individual.¹⁹⁰ Professors Geimer and Amsterdam found "intense internal conflicts that can arise when an abstract proposition is reduced to a decision about the life or death of a particular human being."¹⁹¹ The task becomes more difficult when it is connected to a real person.

In contrast, the current Court's enthusiasm for death sentences has resulted in both substantive and procedural moves to increase the distance between the decisionmaker and the accused. Through doctrinal shifts such as limitations on mitigating evidence and new openness to appellate sentencing, as well as through casual rhetorical choices, the Court is sending the capital defendant further and further into the distance.

187. Cf. Mark G. Yudof, *Tea at the Palace of Hoon: The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 604-05 (1988) (discussing *Booth* as example where all Justices listened to voices; the only difference being which voices the Justices thought should be heard). "No Justice was inattentive to human voices, but their disparate views of the appropriate legal standards caused them to attend to different voices." *Id.* at 605.

188. 391 U.S. 510 (1968).

189. *Id.* at 520 n.17 (quoting ARTHUR KOESTLER, *REFLECTIONS ON HANGING* 166-67 (1956)). The full quotation used by the Court was as follows:

The division [between supporters and opponents of hanging] is not between rich and poor, highbrow and lowbrow, Christians and atheists: it is between those who have charity and those who have not The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I.

Id.

190. One capital juror had the insight that "the difference between objective death and real death made the difference." Geimer & Amsterdam, *supra* note 124, at 35.

191. *Id.*

a. The Defendant's Right to Tell His Story

Jurors are alert to whatever clues can be gleaned about the defendant as a person. A juror who held out for life on a hung penalty jury told me that he never got much sense of the defendant, who never testified. Instead, the juror remembered that his entire impression of the defendant

was formed by a single interchange between him and his defense attorney. One came in and started the day walking behind him and said "good morning." Then the man turned and looked at his attorney, saying "good morning" in return. That was the only time I heard the man speak during the entire trial.¹⁹²

The best way to draw the decisionmakers closer to the defendant is to tell them his story.¹⁹³ Defense attorneys attempt to present to the penalty jurors a portrait of their client that humanizes him: that is, makes connections between the client and the jurors. Often the defendant's mother testifies, for example, to show that the defendant is cared for.¹⁹⁴ Presenting a humanizing story of the defendant's life is especially important in light of social science research that suggests that all jurors

192. Interview with Michael Quinlan, Juror in *People v. Jackson*, No. 074222 (Alameda Cty. Super. Ct. 1983), in Berkeley, Cal. (June 11, 1991) [hereinafter Quinlan Interview].

193. The power of storytelling to remove distance between the decisionmaker and the object of her decision is one reason that narrative is understood to be a feminist method. See, e.g., Calhoun, *supra* note 84, at 88-90; Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & LAW 277 (1993); Phyllis Goldfarb, *The Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1630 (1991) (same); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Smith, *supra* note 59, at 8 (identifying storytelling as feature of feminist method); Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988).

194. Two male jurors from two cases in which the verdict was for life denied that the mother's testimony had any impact on their deliberations. One claimed that it "didn't cut any ice at all." Interview with James Dalrymple, Juror in *People v. Calderon*, No. 077450 (Alameda Cty. Super. Ct. 1986), in San Francisco, Cal. (Mar. 22, 1991) [hereinafter Dalrymple Interview]. The other juror said that "anybody's mother would come and say the same thing. It's almost part of the job [of being a mother]." Quinlan Interview, *supra* note 192. One juror voting for death reported that "[the defendant's] mother obviously seemed biased in her testimony so that did not make me feel that he was less deserving of the death penalty but at the same time I always had compassion for him." Neider Interview, *supra* note 77. A female juror who voted for death speculated that women jurors would be more vulnerable to family testimony: "The mothers and the wives and all, it certainly would increase the emotional strain, because you'd have to put yourself in their position; I suppose men wouldn't be as vulnerable But when it comes down to the bottom line that isn't what we were there for." Smith Interview, *supra* note 159.

deliberate by creating a story to make sense out of the evidence presented.¹⁹⁵

The *Lockett*¹⁹⁶ doctrine, which requires the admission of all mitigating evidence offered by the defendant, represents the triumph of connectedness between the decisionmakers and the defendant. In *Lockett* the Court recognized that the opportunity to humanize the defendant by telling his story is constitutionally required prior to imposition of a death sentence.¹⁹⁷ As discussed above, the *Lockett* doctrine has lost some of its reach, and a continuing, concerted, angry attack on the fundamental values of the doctrine is being led by Justice Scalia, joined by Justice Thomas.¹⁹⁸

A more subtle deemphasis of the *Lockett* requirement of individuation can be seen in *Sawyer v. Whitley*,¹⁹⁹ a recent case in which the Court decided the standard by which a federal court should address certain claims of actual innocence raised on habeas corpus. Six members of the Court held that to show "actual innocence" one must show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner *eligible* for the death penalty" under the applicable state law.²⁰⁰ In other words, actual innocence is determined solely by the rules that define the class of death eligibility; according to *Whitley*, any errors related to the individualized portrait are simply irrelevant to the inquiry.

The Court eliminated any consideration of incorrect mitigating evidence, in part because considering the impact of those errors on the jury would be too difficult for a federal judge: "It is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider."²⁰¹ Thus, Chief Justice Rehnquist used the breadth of the *Lockett* requirement as a good excuse to ignore it completely.

The value of the requirement for individualized sentencing lies precisely in its ability to require the jurors to acknowledge the humanity of the defendant. Thus, arguments to limit the reach of *Lockett* to some more narrow aspect of the defendant, such as, for instance, whatever

195. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE & JUDGMENT IN AMERICAN CULTURE* (1981); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decisionmaking: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991). But see BERNARD S. JACKSON, *LAW, FACT, AND NARRATIVE COHERENCE* 61-88 (1988) (criticizing Bennett's and Feldman's conclusions about storytelling).

196. *Lockett v. Ohio*, 438 U.S. 586 (1978).

197. One juror suggested that the people who voted for life "may have connected more with this guy because he was there in front of us than with the victim because she was dead." Neider Interview, *supra* note 77.

198. See *supra* text accompanying notes 127-48.

199. 112 S. Ct. 2514 (1992).

200. *Id.* at 2523 (emphasis added).

201. *Id.* at 2522.

information lessens his culpability for the crime,²⁰² miss the point, which is to permit the jury to hear about humanizing aspects of the defendant simply in order to be sure that the jury may see him as a human being. Personalization becomes precisely the purpose, once connection is valued.

b. Appellate Sentencing

Beyond shrinking the role of the defendant's own story, the Court has put distance between the capital defendant and the sentencer quite literally by—for the first time—permitting an appellate court to salvage a death sentence by resentencing the defendant. In *Clemons v. Mississippi*²⁰³ the Court authorized state appellate courts to affirm death judgments in spite of constitutional errors made at the trial, by reweighing the aggravating and mitigating factors. In effect, members of the reviewing court may save a tainted death verdict by becoming appellate sentencers.²⁰⁴

Aside from questions of institutional competency,²⁰⁵ the *Clemons* claim that appellate judges are capable of providing reliable individualized death sentences rests fundamentally on a willingness to impose great distance between the defendant and the sentencers. Appellate judges who

202. See, e.g., Steiker & Steiker, *supra* note 128 (suggesting the reach of *Lockett* be limited to those facts which reduce the defendant's culpability). Steiker and Steiker discuss Beverly Lowry's book *Crossed Over*, about her friendship with Karla Faye Tucker, a woman on death row in Texas. The authors acknowledge that they were moved by Lowry's portrait of Tucker, but they would not want a jury sentencing Tucker to be given the full portrait: "[T]he more of Lowry's individualizing portrait of Tucker we permit a sentencer to consider, the greater the opportunity for arbitrariness and bias. Opened discretion in capital sentencing risks unprincipled dispensations of mercy." *Id.* at 870.

203. 494 U.S. 738 (1990).

204. *Id.* at 747-50. Prior to *Clemons*, the Court had repeatedly recognized that appellate courts are seriously limited in the fact-finding and sentencing arenas. See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985) (appellate courts have different sentencing obligations); *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (speculative appellate findings not sufficient due process protection when substituted for specifically required jury findings).

The Court's insistence that appellate resentencing can be accomplished without the taint of whatever illegal evidence or unlawful legal standard invalidated the jury's original sentence contradicts social science data. A researcher into capital sentencing has concluded that once a decision is made, "it is usually impossible to 'subtract' an element" because the weight of that factor cannot be accurately assessed by the decisionmaker or an observer and "hindsight bias could convince the observer that the same result would have been obtained." Hans, *supra* note 55, at 167.

Substituting the appellate court for the jury has the potential benefit of relieving the jurors' responsibility for a death verdict made under error. See *infra* text accompanying notes 297-305, 387-403.

205. In his *Clemons* dissent, Justice Blackmun characterized capital sentencing by a state appellate court as "a radically different conception of its institutional role." 494 U.S. at 768 (Blackmun, J., concurring in part & dissenting in part).

sentence a defendant to death do not know what the condemned even looks like. In his dissent in *Clemons*, Justice Blackmun charged that the error in appellate sentencing lies precisely in allowing too great a distance to come between the decisionmaker and the subject of the decision to condemn:

[A]n adequate assessment of the defendant . . . surely requires a sentencer who confronts him in the flesh I also believe that, if a sentence of death is to be imposed, it should be pronounced by a decisionmaker who will look upon the face of the defendant as he renders judgment. The bloodless alternative approved by the majority conveniently may streamline the process of capital sentencing, but at a cost that seems to me to be intolerable.²⁰⁶

Justice Blackmun's claim that sentencing from a cold appellate record was not "a procedure which recognizes the 'need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual'"²⁰⁷ echoes Nel Noddings' description that the caring person receives even a stranger "not by formula but as individual."²⁰⁸ The appellate judges who determine that a defendant deserves death are the epitome of distanced, clean, bureaucratic, executioners.²⁰⁹ This is sentencing as paperwork. The real-life defendant never makes an appearance.

c. *Rhetorical Distance*

The rhetoric of the Court pushes the flesh and blood defendant into the distance in several ways, from the general willingness to transform a death penalty trial into a metaphor for fighting crime,²¹⁰ to the failure

206. *Id.* at 771-72. Similarly, in *Caldwell v. Mississippi*, 472 U.S. 320 (1986), Justice Marshall, writing for the Court, found that one of the reasons advising the capital jury that its work will be reviewed on appeal impermissibly undermines the reliability of the jurors' sentence lies in the unsuitability of an appellate court undertaking sentencing.

207. 494 U.S. at 771 (quoting *Lockett*, 438 U.S. 586).

208. See NODDINGS, *supra* note 16, at 47:

[T]he caring person . . . dreads the proximate stranger, for she cannot easily reject the claim he has on her. She would prefer that the stray cat not appear at the back door—or the stray teenager at the front. But if either presents himself, he must be received not by formula but as individual.

Id.

209. Cf. Martha Minow & Elizabeth Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 58 (1988) ("[S]urely it is not in keeping with such dignity for the judge who has sentenced the defendant to death actually to incarcerate the defendant, guard him in prison, and pull the switch that electrocutes him.").

210. See Austin Sarat, *Speaking of Death: On Narratives of Violence in Capital Trials*, 27 LAW & SOC. REV. 19, 54-55 (1993).

to include the defendant's story in the opinion, and even to the choice to hide actual connection behind rhetorical distance.

On occasion, the Court chooses the language of distance even where connection to the capital defendant prevails. For example, *Morgan v. Illinois*²¹¹ closed the distance between the jurors and the defendant by preventing people who would refuse to consider the defendant's own circumstances from becoming capital jurors. But the Court described itself as achieving the opposite. The Court claims that these jurors who are willing to consider the individual circumstances of the defendant are "dispassionate"; jurors who would make up their minds to impose death without any consideration of the particular defendant are rejected by the majority as not sufficiently "indifferent."²¹² The Court's misleading rhetorical choice reflects its aspirations to distanced decisionmaking.

More significant distancing occurs when a capital case is allowed to become a metaphor for fighting crime: the flesh and blood defendant disappears behind the metaphor. Professors Geimer and Amsterdam rightfully decry the Court's apparent willingness to view death cases as an absolute choice between order and anarchy, sacrificing the person for the symbol:

[T]he life/death decision is not an all-or-nothing Holmesian choice whether an individual must be sacrificed for the greater good of society. That conflict is often portrayed, to the detriment of individuals, in absolute terms—as one between order and anarchy. It is not. These jurors in favor of life understood that the foundations of public order would not crumble, or even tremble, if the life of a murderer was spared.²¹³

The symbolic power of executions is irrefutable.²¹⁴ But once a sentencing decision becomes a choice between good and evil, or a statement against crime (or violence),²¹⁵ the real-life person being sentenced has disappeared.

211. 112 S. Ct. 2222 (1992).

212. *Id.* at 2228 ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

213. Geimer & Amsterdam, *supra* note 124, at 38 n.171; *cf.* Cover, *supra* note 21, at 1608 ("Beginning with broad interpretive categories such as "blame" or "punishment," meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence.").

214. I have written elsewhere that one explanation for the low number of women sentenced to death is the symbolic unsuitability of executing women. Howarth, *supra* note 23 (few women are sufficiently frightening and many women are too easily humanized to be satisfying candidates for execution).

215. See Angela Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (discussing the Court's view of a death penalty case as a contest between defendant and victim).

Finally, as revealed by Robin West, even the dissenters writing on behalf of the rights of capital defendants have distanced themselves from those defendants by failing to include the defendant's own story. West shows that the dissenters' failure to include the story of the defendants' circumstances obscures the legal determination at issue in each case²¹⁶ and allows the majority to isolate the defendant as essentially aberrational, symbolic, inhuman, and foreign.²¹⁷ The narrative or description (if explanation is impossible) of what led to the crimes is the link between the audience and the condemned. When the defendant disappears from capital punishment, the moral gravity leaves as well.

3. THE EXECUTION IS FAR, FAR AWAY

The other crucial aspect of the decision whether to execute is the punishment itself, the execution. The premise of distance between the jurors and the execution is so basic that a lapse is funny:

- COUNSEL: Can you participate in an endeavor in which the ultimate result might be death by lethal injection?
- JUROR: They do that up in Huntsville, don't they? Yeah, I guess I could do it if it was on a weekend.²¹⁸

Although aspects of the Court's capital jurisprudence could be interpreted to require closeness or connection between the decisionmakers and the execution itself, the main theme is to push the execution far, far away.

a. Responsibility from Afar

The line of authority that promises the most closeness between the jurors and the execution they are contemplating begins with *Caldwell v. Mississippi*.²¹⁹ *Caldwell* counselled that reliable death sentences require

216. "The effect is a peculiar and disorienting disjunction between the legal issue on which the cases turn—the jury's duty and entitlement to hear and consider all aspects of the defendant's life history that might, in the jury's mind, mitigate the crime and hence the harshness of the sentence, and the defendant's correlative right to a jury so informed—and what is learned about the defendant's circumstances or the social world, from either the majority or the dissent, which is absolutely nothing." Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, MD. J. CONTEMP. LEGAL ISSUES, Fall 1990, at 161, 174.

217. "The liberal's narrative silence validates our societal self delusion that the capital defendant's fate is not inextricably linked, through chains of causation, responsibility, commonality and community, with our own." West, *supra* note 216, at 175.

218. RODNEY R. JONES & GERALD F. UELMEN, SUPREME FOLLY (1990) (transcript of voir dire in Texas capital trial included in humor compendium).

219. 472 U.S. 320 (1985).

the sentencers to understand the decision as an “awesome responsibility” and that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”²²⁰ In other words, the Constitution forbids the jurors from distancing themselves from responsibility for the execution itself.²²¹ The specific problem in *Caldwell* was the prosecutor’s argument to the jury: “[T]hey would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.”²²²

Although the *Caldwell* line has focused on the error in letting the jury off the hook by telling them about appellate review, the prosecutor’s reassurance that the jurors were not “going to kill this man” was also problematic. How is it consistent with pressing upon jurors their awesome responsibility to assure them that they are not the ones actually executing the defendant?

Yet such distancing comments are widespread. One juror was adamant:

One of the things that certainly bothered me was people saying, “how can you put someone to death?” I mean, this is ridiculous. I didn’t. All I did was sift through the facts with the other people and this is what we came up with and what we suggested to the judge. Now that goes through various processes. They don’t lead them off and hang’em.²²³

In *Saffle v. Parks*,²²⁴ in addition to telling the jurors to approach their task in a mechanical fashion, without sympathy (the focus of the Court’s decision affirming the sentence), the prosecutor told the jurors, “[Y]ou’re not yourself putting Robyn Parks to death.”²²⁵ One judge in Florida, who has the statutory authority to override jurors’ recommendations for

220. *Id.* at 328-29.

221. The authority of *Caldwell* (written by Justice Marshall) has been diminished considerably by the current Court. *See, e.g., Sawyer v. Smith*, 497 U.S. 227 (1990) (upholding a death sentence although the jury had been told explicitly that it was not ultimately responsible for the sentence it pronounced; finding the law forbidding such instructions a “new rule” and therefore not reviewable on habeas); *see West, supra* note 181, at 86 (suggesting that this and other decisions reduced the “sphere of jurors’ responsibility” in addition to shrinking judicial responsibility).

222. 472 U.S. at 325.

223. Boisvert Interview, *supra* note 78.

224. 494 U.S. 484 (1990).

225. The prosecutor continued, “You just have become a part of the criminal justice system that says when anyone does this, that he *must* suffer death.” *Id.* at 512 n.13 (Brennan, J., dissenting).

life,²²⁶ explained his practice of not polling the jurors about the vote breakdown of their sentencing recommendation on the grounds that "he does not think that jurors should be put on the spot."²²⁷ But there is a tension between wanting to make the jurors' role more comfortable²²⁸ and wanting to make their power more apparent. Noteworthy simply because of its difference from others, the first line of Professor Pillsbury's proposed penalty phase jury instruction reads, "The sentencing decision which lies before you is one of the most important you will ever make"²²⁹ Certainly connectedness to the pain of the execution would also involve heightened sense of importance of decision.²³⁰ Juror Boisvert objected to my question about what could be done to make the process more comfortable by insisting that the experience should not be comfortable, because it was too important.²³¹ The impulse to protect the jurors is widespread.

b. Execution Evidence Excluded

One of the ways that jurors are made more comfortable is through courts' routine and steadfast exclusion of evidence of how the death penalty is carried out.²³² Austin Sarat noticed that the violence of the

226. Four states provide that the jury return an advisory verdict to the court after the sentencing hearing. See ALA. CODE § 13A-5-46 (1975); DEL. CODE ANN. tit. 11, § 4209 (1974); FLA. STAT. ANN. § 921.141 (West 1984); IND. CODE ANN. § 35-50-2-9 (Burns 1991). For a description of the Florida statute, see Geimer & Amsterdam, *supra* note 124, at 8-9.

227. Geimer & Amsterdam, *supra* note 124, at 14 n.59.

228. Cf. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990).

229. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passion of Criminal Punishment*, 74 CORNELL L.REV. 655, 703 (1989).

230. For a description of a death sentence upheld even after a capital juror "fell to the floor in the hallway outside the courtroom and . . . repeatedly cried, 'I can't do it,'" see WHITE, *supra* note 27, at 120-28; see also Sarat, *supra* note 210, at 47-51.

231. "I remember feeling shocked when we got through one phase and some of the jurors said 'let's celebrate.' I went outside and I started crying and I thought 'this is nothing to celebrate. We haven't won anything.'" Boisvert Interview, *supra* note 78.

232. See, e.g., *Shriner v. Wainwright*, 715 F.2d 1452 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984); *People v. Daniels*, 802 P.2d 906, 939 (Cal.) (excluding evidence of what paraplegic defendant's life in prison would be or evidence about gruesome nature of execution in gas chamber), *cert. denied*, 112 S. Ct. 145 (1991); *People v. Whitt*, 798 P.2d 849, 862 (Cal. 1990) (defendant's request that jurors be allowed to view gas chamber properly denied as irrelevant, as was offer of testimony from artist/journalist Howard Brodie regarding 1967 execution that he witnessed), *cert. denied*, 501 U.S. 1213 (1991); *People v. Gordon*, 792 P.2d 251, 277 (Cal. 1990) (evidence of how execution would be carried out is not relevant to individualized sentencing decision), *cert. denied*, 499 U.S. 913 (1991); *People v. Grant*, 755 P.2d 894, 913 (Cal. 1988), *cert. denied*, 488 U.S. 1050 (1989); *Horton v. State*, 295 S.E.2d 281 (Ga. 1982), *cert. denied*, 459 U.S. 1188 (1983); *State v. Boyd*, 319 S.E.2d 189 (N.C. 1984), *cert. denied*, 471 U.S. 1030 (1985); *State v. Johnson*, 259 S.E.2d 752 (N.C. 1979). One juror who simply dismissed information about executions, deterrence, or other aspects of death penalty

execution was glaringly absent from the capital trial he studied: "While the other kinds of violence are presented as weapons and wounds and described in vivid, concrete, gory detail, law's violence is hardly presented at all. It is named, when it is named, in the most general, abstract, and impersonal ways."²³³ The evidentiary exclusion and rhetorical silence remove context and isolate the jurors from the actual execution they are contemplating.

The jurors I interviewed were divided on the subject of permitting information about the execution. One juror suggested that evidence of the reality would erase more gruesome conjecture.²³⁴ Another juror first called such information a "cheap trick," but after noting that he had never seen an execution added that "one-hundred percent of the pain should be brought home to the jurors. How can we decide on the capital case if we don't know what [an execution] looks like?"²³⁵

Information about the actual execution would strengthen the sense of jurors' responsibility for the decision they are making. This evidence is relevant, not to the defendant, but to the decision. Evidence suggests that decisions to execute are fewer in jurisdictions with especially gruesome methods of execution.²³⁶ But the *Lockett* doctrine is based on the defendant's right to have the jurors hear mitigating evidence related to him or his crime; evidence related to the penalty is not swept within it.²³⁷

policy as "a waste of time" perfectly reflected this doctrine. Smith Interview, *supra* note 159.

233. Sarat, *supra* note 210, at 52.

In the penalty phase of a capital trial, law's own violence is put, as it always must be, precariously into discourse [T]he legitimization of that power is the most pressing because law enlists ordinary citizens and asks them to exercise its power over life and death. In so doing law seeks to make its violence our violence.

Yet even at this moment it is striking that so little is actually said about the nature of that violence.

Id. at 47.

234. He posited that evidence of the execution method "would be relevant to me because it would [make it] much easier. I don't want to see people drawn and quartered." Hofeller Interview, *supra* note 41.

235. Quinlan Interview, *supra* note 192.

236. See *No Nice Face for Death*, N.Y. TIMES, July 15, 1983, at A23; see also *Not Carried Out For Fifty Years*, BOSTON GLOBE, July 9, 1989, at 1 (state attorney general's view that execution rate will increase now that lethal injection has replaced hanging). One juror told me that she was opposed to information about executions being given to jurors because it might make them squeamish: "If you made it gory enough you might frighten some people into not permitting it." Stark Interview, *supra* note 41.

237. Writing in 1983, Weisberg assumed that evidence about the usefulness of the death penalty as policy would be admissible under *Lockett*. Weisberg, *supra* note 27, at 325. That has turned out not to be true. The California Supreme Court steadfastly rejects the claim that the defendant should be entitled to present as mitigating evidence information on the lack of deterrent effect of the death penalty or of the costs of the death penalty. See, e.g., *People v. Benson*, 802 P.2d 330 (Cal. 1990) (evidence of deterrence properly excluded); Barry Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69

Several courts have rejected evidence of the views of philosophers or clergy that the death penalty is morally offensive,²³⁸ and evidence that the death penalty is not a deterrent to crime.²³⁹ Professor Billionis suggests that such evidence is excludable because “[s]uch general policy decisions should be made in political forums.”²⁴⁰ But the juror who is seriously addressing the moral question before her may well be interested in such evidence. To the individual juror, evidence about the death penalty or executions is not about the policy in a vacuum; it is relevant to the specific decision to be faced. Beyond that, allowing the juror to know about the execution, and to learn about policy issues related to capital punishment, enables her to face her task with the clarity that comes from proximity.

4. PULLING THE VICTIM CLOSER

Even as the Court pushes the defendant and the execution further and further into the distance, the victim is being pulled closer. The clearest example of the Court’s willingness to remove the distance between the jurors and the victim is the recent acceptance of victim-impact evidence and argument in support of a death sentence. *Booth v. Maryland*²⁴¹ and

(1978) (describes financial burden of capital adjudication); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245-73 (1985) (describes financial burden of capital sentencing); see also Stephen Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988 (n.p.) (article on the millions that capital punishment costs Californians). The California Supreme Court also rejected proffered testimony as to the percentage of California death-eligible cases in which a death sentence was actually rendered. See *People v. Wright*, 802 P.2d 221 (Cal. 1990) (trial court properly excluded defendant’s proffered testimony regarding the number of special circumstance cases where death penalty is imposed compared to all such cases).

For a claim that the *Lockett* doctrine should not reach this type of evidence, see Louis Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIM. 283, 306 (1991) (such evidence is excludable because it “[does] not suggest a moral basis for a sentence less than death in one particular case as opposed to any other.”). “Thus, society’s traditional commitment to discretionary capital sentencing does not argue in favor of making the morality of capital punishment per se a litigable question in individual cases.” *Id.* at 307 n.87.

238. See, e.g., *Hill v. State*, 628 S.W.2d 284 (Ark.), cert. denied, 459 U.S. 882 (1982); *People v. Yates*, 456 N.E.2d 1369 (Ill. 1983), cert. denied, 466 U.S. 981 (1984); *State v. Watson*, 449 So. 2d 1321 (La. 1984), cert. denied, 469 U.S. 1181 (1985); *State v. Huffstetler*, 322 S.E.2d 110 (N.C. 1984), cert. denied, 471 U.S. 1009 (1985); *State v. Taylor*, 283 S.E.2d 761 (N.C. 1981), cert. denied, 463 U.S. 1213 (1983).

239. See, e.g., *People v. Benson*, 802 P.2d 330, 362 (Cal. 1990), cert. denied, 112 S. Ct. 336 (1991); *State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984), cert. denied, 472 U.S. 1032 (1985); *State v. Williams*, 292 S.E.2d 243 (N.C.), cert. denied, 459 U.S. 1056 (1982); *State v. Cherry*, 257 S.E.2d 551 (N.C. 1979), cert. denied, 446 U.S. 941 (1980); *State v. Woomer*, 299 S.E.2d 317 (S.C. 1982), cert. denied, 463 U.S. 1229 (1983).

240. Billionis, *supra* note 237, at 308.

241. 482 U.S. 496 (1987).

*South Carolina v. Gathers*²⁴² held that the Eighth Amendment bars the admission of victim-impact evidence (*Booth*) or argument (*Gathers*) during the penalty phase of a capital trial. The victim-impact evidence was held to taint the trial with too much emotionality, at the expense of reliability and reason. *Booth* and *Gathers* were overruled in 1991 in *Payne v. Tennessee*.²⁴³ *Payne* reveals what Angela Harris has called the Court's "jurisprudence of victimhood,"²⁴⁴ which "reduces the penalty trial to a contest between the innocent and the guilty."²⁴³ Indeed, writing for the Court in *Payne*, Chief Justice Rehnquist consciously set out to balance the scales between the defendant (whose individualized mitigating evidence is protected under *Lockett*) and the victim.²⁴⁶

The error in *Payne* is not in allowing jurors to receive evidence of the impact of the defendant's crime on the survivors. As commentators have suggested, the impact of the crime is highly relevant to common notions of blameworthiness.²⁴⁷ The problem is that the Court is pulling the victim closer while pushing the defendant and the execution away. *Payne* justifies admission of victim-impact evidence in part because "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."²⁴⁸ Yet, when directly addressing the defendant's rights, the Court simultaneously offers a much more cramped version of what a defendant is entitled to present.²⁴⁹

The Court has lessened the distance between victim and decisionmaker not only by bringing more evidence of victim impact into the capital trial, but also by bringing the rhetoric of victims' rights into its opinions.²⁵⁰ Robin West has demonstrated that the opinions affirming death sentences highlight the ghastly crime of which the defendant stands convicted,²⁵¹ which also serves to bring the victim closer to the decisionmaking, even as the defendant's story disappears.

242. 490 U.S. 805 (1989).

243. 501 U.S. 808 (1991).

244. Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (discussing *Payne*, *Booth*, and *Gathers*).

245. Harris, *supra* note 244, at 87; see also *Callins v. Collins*, 114 S. Ct. 1127 (1994) (Scalia, J., concurring in denial of cert.) (noting that death-by-injection for defendant "looks pretty desirable" compared to shooting death suffered by victim).

246. 501 U.S. at 822-23.

247. See, e.g., Harris, *supra* note 244.

248. 501 U.S. at 822-23.

249. See Justice Kennedy's formulation in *Johnson v. Texas*, 113 S. Ct. 2658, 2666 (1993), which quotes *McKoy v. North Carolina*, 494 U.S. 433, 465 (1990) (Kennedy, J., concurring).

250. E.g., *Johnson*, 113 S. Ct. at 2668 ("The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court.").

251. See West, *supra* note 216.

5. CONNECTION ACKNOWLEDGED

Those who fear that the feminist call for connectedness could result in longer and harsher sentences for defendants²⁵² are describing a condition that already exists.²⁵³ Several jurors told me that they felt closest to victims of the defendant who testified during the penalty phase. One juror characterized his reaction to the victims' testimony as establishing a "strong connection."²⁵⁴ Another explained that the most moving portion of the trial was the penalty testimony of a rape victim of the defendant: "Whatever doubts we had about the guilt phase went away. We went back to that jury room [with] a sigh of relief."²⁵⁵

Comparison of the positions of the defendant, the execution, and the victim reveals that connection already exists, at least with victims, but that it is camouflaged, and called distanced neutrality. Proximity can enhance responsibility. The pain of the victims should be brought home to a juror asked to make a moral determination as to appropriate punishment; so should the pain of the defendant, and the violence of the execution being contemplated. The false front of masculine, distanced decisionmaking prevents honest decisionmaking, and thereby makes fair decisions much more difficult to attain.

C. Reason vs. Emotion

1. EMOTION RECLAIMED

Feminist philosophers, historians, scientists, and others have revealed, examined and condemned the false, gendered dichotomy of reason and emotion that has misshapen Western thought.²⁵⁶ Just as

252. See, e.g., Resnik, *supra* note 46:

For those of us who might applaud a possible reduction in criminal penalties which such intimacy and empathy might foster, we must recognize that our empathic judges would not simply experience connection with defendants, but also with victims. Might such judges respond with too harsh condemnations? Or with paralysis from being torn in many directions?

Id. at 1924.

253. See West, *supra* note 216.

254. DeMasi Interview, *supra* note 159.

255. Close connection between the jurors and the victims undoubtedly occurs in many criminal trials. One researcher suggests that his findings that jurors in criminal cases in fact apply a standard of guilt "substantially below the meaning of 'beyond a reasonable doubt'" can be explained by jurors' greater connection to the victim: "Perhaps their personal experiences or fears are such that they have more dread of being the victim of a guilty defendant than being wrongly accused of a crime." Stuart Nagel, *Bringing the Values of Jurors in Line with the Law* (n.p., n.d.).

256. See, e.g., EISENSTEIN, *supra* note 2, at 28-29; JEAN BETHKE ELSHTAIN, MEDITATIONS ON MODERN POLITICAL THOUGHT: MASCULINE/FEMININE THEMES FROM LUTHER TO ARENDT (1986); ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983); GENEVIEVE LLOYD, THE MAN OF REASON, at ix (1984); Iris M. Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and*

women have been identified with unreasonable emotionality,²⁵⁷ emotion has been tainted as feminine:²⁵⁸ "The *reason* of man suppresses the passion of woman."²⁵⁹ Emotions are conventionally understood to be unintentional, instinctual, and somehow base.²⁶⁰ The false, gendered separation of reason from emotion has misshapen legal thought as well.²⁶¹

The fallacy is not only the normative assumption that judgment *should* be made by reason alone, without emotion, but also the descriptive assumption that judgment *can* be made without emotion.²⁶² Reason

Political Theory, in FEMINISM AS CRITIQUE 57 (Sevla Benhabib & Drucilla Cornell eds., 1987); see also Jaggard, *supra* note 9, at 146 ("Because values and emotions had been defined as variable and idiosyncratic, positivism stipulated that trustworthy knowledge could be established only by methods that neutralized the values and emotions of individual scientists.").

257. The traditional assessment of women as emotional and unreasonable is pervasive and well-known. See, e.g., SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 257-58 (James Strachey trans. & ed., 1968) (claiming that women "show less sense of justice than men . . . [and] are more often influenced in their judgments by feelings of affection or hostility"); A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 13 (1928) ("humorous" reference to difficulty of finding a reasonable woman quoted widely in Torts texts). This stereotype of women continues today in more subtle ways. See, e.g., Schneider, *supra* note 3, at 559-60 (noting feminist work combatting woman-abuse that addresses the assumption that women are inherently irrational).

258. Men of color have also been associated with emotions. See, e.g., Jaggard, *supra* note 9, at 157 ("Women appear more emotional than men because they, along with some groups of people of color, are permitted and even required to express emotion more openly.").

259. EISENSTEIN, *supra* note 2, at 51 (emphasis added).

260. See, e.g., Jaggard, *supra* note 9, at 145 (criticizing conventional understanding of emotions as unintended, base, and passively experienced).

261. According to Lucinda Finley, "One of the other languages that the law does not easily hear is that associated with the emotions Law is a language firmly committed to the "reason" side of the reason/emotion dichotomy." Finley, *supra* note 8, at 903; see also Minow & Spelman, *supra* note 209, at 38-39 ("'Emotion,' on the other hand, most likely is thought to refer to something potentially dangerous, unreliable, and unjustifiable."). Minow and Spelman describe Robert M. Cover's landmark book about the role of law in upholding slavery, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975), as an explication of the danger of attempting to banish emotion from law: "[Judges'] adherence to a conception of law as distinct from emotion and as something found, outside of themselves, helped them to rationalize their enforcement of slavery as beyond their power." *Id.* at 48.

262. See, e.g., Jaggard, *supra* note 9, at 147 (criticizing ordinary ways of understanding emotion, including reference to anthropologist who argues that "dichotomous categories of 'cognition' and 'affect' are themselves Euroamerican cultural constructions"). For an extended refutation of the dichotomy of emotion and justice, see ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT (1990); *id.* at 30 ("Justice . . . consists first of all of a constellation of feelings."); *id.* at 44 ("Rationality is not opposed to emotions but is rather an intrinsic part of them. Emotions are not opposed to judgment; they invoke and require judgment."); Emily K. Abel & Margaret K. Nelson, *Circles of Care: An Introductory Essay, in CIRCLES OF CARE, supra* note 73, at 5 ("Caregiving also challenges the division

alone cannot choose between conflicting principles: "The choice about what to value, the choice about whose plight to find moving, and indeed, the choice about how to act in the face of uncertainty calls for more than what reason in the narrow sense can supply. You need passion."²⁶³

Like other powerful systems of thought, law aspires to rationality, and describes itself as rational, without the taint of emotion.²⁶⁴ The capital sentencing task is awash in confusion about how to make a moral decision without "succumbing" to emotions.²⁶⁵

2. EMOTION EVERYWHERE

We insist upon public trials because "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."²⁶⁶ Emotions offer particular fuel to capital cases. Prosecutors and defense attorneys inevitably attempt to reach the jurors with emotional claims; in fact, social science data reveal that prosecutors' arguments for death focus primarily on the emotional component of the decision.²⁶⁷

Emotions operate throughout capital litigation. Several jurors acknowledged the emotion in their experience.²⁶⁸ They reported

between reason and emotion.").

263. Minow & Spelman, *supra* note 209, at 37. "This treatment of reason and passion as abstract entities simultaneously personifies as distinct persons the traits of reason and emotion, and makes it all the more difficult to articulate and understand their interconnections." *Id.* But see Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 77 (1987) (distinguishing "[s]ympathy, the human emotion, . . . from equal respect, the legal command").

264. Jaggard, *supra* note 9, at 156. "[L]ike the ideal of disinterested enquiry, the ideal of dispassionate enquiry is an impossible dream but a dream nonetheless or perhaps a myth that has exerted enormous influence on western epistemology. Like all myths, it is a form of ideology that fulfills certain social and political functions." *Id.*

265. See Joan Shaughnessy, *Booth v. Maryland, Insights into the Contemporary Challenges to Judging*, 49 WASH. & LEE L. REV. 279 (1992) ("Nevertheless, the capital cases may be seen in part as the Court's struggle to deal with an issue for which modern law has left the Court utterly unequipped—the uses and dangers of emotion in judging.").

266. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (Burger, C.J., plurality opinion).

267. See Hans, *supra* note 55, at 167 ("[T]he overall pattern of [prosecutors'] arguments in the penalty phase suggested that they perceived the emotional dimensions of the decision to be paramount.").

268. "[I]t's an emotionally gripping thing and I don't think you can get away from that." Smith Interview, *supra* note 159. "[I]t was an emotional experience for me. It got tense during the deliberation section. Frustration in the process of coming to a decision. Anger at the man himself, for what he did Compassion during the penalty phase. He is still a human being. He is not an insect." Quinlan Interview, *supra* note 192. Another juror doubted that the emotion could be eliminated: "You're not dealing with twelve profound people there." "[T]he most mild looking person in there was a gal who was [so] gung ho she wanted to do him in. I was amazed. She was emotional; she said an eye for an eye about forty thousand times." Dalrymple Interview, *supra* note 194.

crying,²⁶⁹ weight loss,²⁷⁰ or lost sleep.²⁷¹ The Chief Justice of the Florida Supreme Court at the time of John Spenkelnik's final (unsuccessful) petitions described his participation as "emotionally devastating."²⁷² Justice Blackmun prefaced his vote in *Furman* to uphold capital punishment by acknowledging "excruciating agony of the spirit."²⁷³ The desire to punish is steeped in emotions, especially anger.²⁷⁴ Proponents of speeding up executions, including members of the Court, are animated by anger, pride, frustration, and other emotions²⁷⁵ that do not seem to count in the rhetorical banning of emotion. The impatience of the members of the current Court is not

Not all jurors agreed. One characterized the experience as sometimes "embarrassing" but not emotional: "[We had] no emotion because we were told ahead of time [what to expect]. The only thing gruesome about it is that he had stabbed her 22 times and the coat that had been wrapped around her was all full of stab marks." Manchester Interview, *supra* note 77.

269. Boisvert Interview, *supra* note 78 ("I went outside and started crying."); Neider Interview, *supra* note 77 (noting one woman who changed her vote was practically crying).

270. "[I]t was a very painful experience. I grew from it. I lost weight." Boisvert Interview, *supra* note 78.

271. "I might have lost at most one or two hours sleep but it probably is the biggest decision I ever made in life." Neider Interview, *supra* note 77.

272. Arthur England has recounted: "[I]t was emotionally devastating to be a part of this process. And I can't even capture it in words. I can't even give you a sense of what it was like." Burt, *supra* note 40, at 1807; see also Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 336-37 (1992) (California Governor Pete Wilson's legal affairs secretary ends her discussion of governor's decision to deny clemency to Robert Harris by recounting how surprisingly hard the (pro-execution) governor's staff found the actual execution to be).

273. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

274. See, e.g., Joseph M. Giarratano, *To the Best of Our Knowledge We Have Never Been Wrong*, 100 YALE L.J. 1005, 1006 (1991) (judiciary responding to the "anger, frustration, or fear" causing clamor for faster executions); Samuel H. Pillsbury, *Evil & the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 443 & n.16 (1990); Pillsbury, *supra* note 229, at 689.

275. See, for instance, Justice Rehnquist's angry and impatient opinion in *Coleman v. Balkcom*, 451 U.S. 949, 956-64 (1981) (Rehnquist, J., dissenting from denial of cert.), in which he proposed accepting *all* death penalty cases on appeal for review for quick resolution of all constitutional issues in order to end the federal court jurisdiction which he clearly saw as simply an impediment to executions:

I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system

. . . .

When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery. . . . In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.

Id. at 958, 962; cf. Minow & Spelman, *supra* note 209, at 42 ("But systems of bureaucratic rationality in fact embody other emotions, such as contempt for or fear of litigants or clients.").

unlike the frustration of the jurors who "were anxious to go home."²⁷⁶ But the false gendered dichotomy that separates male reason from female emotion prevents "strong" (and therefore male) emotions such as anger, frustration, or vengeance²⁷⁷ from even being recognized as emotion at all.²⁷⁸

3. EMOTION DENIED

Capital jurisprudence denies its emotional component.²⁷⁹ Jurors learn to fight authentic emotional response,²⁸⁰ and therefore distrust open appeals to emotion.²⁸¹ One juror believed that one "of the most important and one of the most difficult things to do was to separate myself from an emotional response." When asked which emotions were "troublesome" she responded, "Pity, or compassion Anger. Sorrow. But when you go in to deliberate you have to let that go [or] it is not justice."²⁸² Although appeals to emotions are the most prevalent type of argument, "transparent" appeals to the emotions of jurors

276. Dalrymple Interview, *supra* note 194. Jurors from two cases reported frustration at other jurors who delayed reaching a verdict in order to obtain free meals and delay their return to work.

[The jurors] got steamed up after all the time, days, even weeks, . . . because one guy . . . made a game of it. He worked for the government, [and] was paid all that time but there were a lot of people including the foreman who didn't get any pay at all . . . so finally I blew my stack and I told the guy I think that's a lousy trick your holding out and horsing around like this all the time. [T]hat guy got angry back but came in the next morning and said "Ok, let's go home," but even then he loved to eat those free lunches.

Id.

277. See HARRIET G. LERNER, *THE DANCE OF ANGER 1* (1985) (women have been discouraged from expressing their anger); Audre Lorde, *The Uses of Anger: Women Responding to Racism*, in *SISTER OUTSIDER*, *supra* note 35, at 124; Grillo, *supra* note 51, at 1572-81.

278. See *People v. Kaurish*, 802 P.2d 278, 315 (Cal. 1990) (prosecutor's argument to "show courage" was not improper), *cert.denied*, 112 S. Ct. 121 (1991).

279. See Shaughnessy, *supra* note 265, at 280 (pointing out that "the law has not completely ignored the presence of emotion in criminal litigation; rather, the law has sought to disguise the role and importance of emotion"). *But see* Spaziano v. Florida, 468 U.S. 447, 469 (1984) (Stevens, J., concurring in part & dissenting in part) (arguing that capital sentencing must be done by juries because a death judgment is "ultimately understood only as an expression of the community's outrage").

280. Juror DeMasi described two parts of the trial as especially emotional; the first was the testimony during the penalty phase of women who were rape victims of the defendant. "I was able to kind of divorce myself from any emotional involvement until those ladies testified . . . that was hard." After their testimony, "we would have provided the rope, the tree and hanged that guy." DeMasi Interview, *supra* note 159. The second was during deliberations, when he had to pick up the victim's bloodied coat with bullet holes in order to reach another exhibit. "I told myself about looking at the evidence, 'Alright, I'm looking at all these things, but I'm not involved; I'm able to sit back and weigh this thing with a clear mind and without prejudice.'" *Id.*

281. See generally Weisberg, *supra* note 27, at 379.

282. Boisvert Interview, *supra* note 78.

constitute misconduct, which can lead to reversal of a resultant death sentence.²⁸³ The Court consistently describes capital punishment law as unsullied by the taint of emotion. This rhetorical stance is most evident in the Court's treatment of no-sympathy instructions, its use of the reasonable juror for appellate review of penalty determinations, and its assessment of victim-impact evidence.

a. *The Question of Sympathy*

The feminist call to revalue and reincorporate compassion or mercy into law²⁸⁴ implicates a core concern of penalty adjudication.²⁸⁵ The Court's view of emotion as an enemy to be rooted out and eliminated is clear in its cases dealing with so-called "no-sympathy" instructions. In *California v. Brown* the Court upheld a death sentence imposed by a jury that had been instructed not to be swayed by "mere sympathy."²⁸⁶ The defense argued that the no-sympathy command prevented the jury from effectively considering the evidence of mitigation, as required under *Lockett*. Justice O'Connor provided a majority to affirm the death sentence with a concurrence that upheld the no-sympathy instruction because it enabled the jurors to make their moral decision based on reason, not emotion: "[T]he sentence imposed . . . should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."²⁸⁷ *Brown* counsels that forbidding the capital jury to rely on sentiment or sympathy increases the reliability of the sentence that results.²⁸⁸

According to Carol Gilligan, "Within a justice construction, care becomes the mercy that tempers justice."²⁸⁹ In his dissent in *Brown*,

283. See, e.g., *Griffin v. State*, 557 So. 2d 542, 552-53 (Miss. 1990) (requiring reversal because of prosecutorial misconduct consisting of recurring and transparent appeals to the emotions of jurors).

284. See, e.g., Ruth Colker, *Feminism, Theology, and Abortion*, 77 CAL. L. REV. 1011, 1025-26, 1042 (1989) (calling for compassion and arguing that constitutional principles of due process and equal protection embody compassion); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (describing need for empathy).

285. See, e.g., Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989). Indeed, much of the feminist commentary on capital decisionmaking that does exist has addressed the need for emotion. E.g., Shaughnessy, *supra* note 265 (calling for recognition of emotion as vital part of legal decisionmaking); West, *supra* note 181, at 91 ("[T]he juror's capacity for empathy and sympathy, far from being distractions from principled, rational, objective moral decision-making . . . is precisely what enables morality."); see also Pillsbury, *supra* note 229 (suggesting that certain emotions, namely moral outrage and empathy, encourage moral decisionmaking, and should be encouraged by jury instructions).

286. 479 U.S. 538, 542-43 (1987).

287. *Id.* at 544 (O'Connor, J., concurring) (emphasis in original).

288. For criticism of *Brown* suggesting that the contention that jurors would be able to differentiate between legitimate and illegitimate sources of sympathy was "far-fetched," see Hans, *supra* note 55, at 164-65.

289. Gilligan, *supra* note 47, at 24.

Justice Blackmun took Portia's role of urging justice tempered by mercy: "In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value."²⁹⁰ Thus, the debate in *Brown* was not between Gilligan's ethic of justice and ethic of care; the debate was merely whether capital justice survives the optional addition of the corrective emotion of mercy.

The Court revisited the no-sympathy issue in *Saffle v. Parks*,²⁹¹ and reaffirmed its conception of emotion as dangerous, untrustworthy, and fundamentally at odds with the goal of reliable death sentences:

Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.²⁹²

Speaking for the Court, Justice Kennedy condemned emotion as based on whims and caprice of the jurors,²⁹³ and destructive of the "fairness and accuracy" of the death sentence.²⁹⁴ The no-sympathy decisions²⁹⁵

290. 479 U.S. at 562-63 (Blackmun, J., dissenting). The feminist impulse to retrieve emotion has been captured by the use of the image of Shakespeare's Portia. See, e.g., Menkel-Meadow, *supra* note 30, at 39, 42 & n.23.

291. 494 U.S. 484 (1990). *Brown* had raised the issue on direct appeal from a death judgment; *Saffle* concerned the no-sympathy instruction in the context of the Court's complex doctrine limiting availability of federal habeas corpus jurisdiction.

292. *Id.* at 493 (citations omitted). The jury that voted to impose a death sentence upon Parks was instructed as follows: "You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." *Id.* at 487. In *Johnson v. Texas*, 113 S. Ct. 2658 (1993), which upheld the Texas sentencing scheme, the Court brushed aside any concern that "[t]here might have been a juror who, on the basis solely of sympathy or mercy, would have opted against the death penalty had there been a vehicle to do so under the Texas special issues scheme." *Id.* at 2671. See generally Note, *supra* note 285, at 389, 396-98 (proposing revival of mercy in capital questions; discussing *Brown* and *Parks*).

293. 494 U.S. at 493.

294. *Id.* at 495. The dissent in *Parks* criticizes the majority's distinction between morality and emotion. *Id.* at 513 (Brennan, J., dissenting).

295. The no-sympathy message of *Brown* and *Parks* has led state courts to invite prosecutorial arguments against sympathy, see, e.g., *People v. (Jesse) Gonzales*, 800 P.2d 1159, 1181-82 (1990), *cert. denied*, 112 S. Ct. 117 (1991) (no error in prosecutor's argument to not consider sympathy), and to attempt to eliminate "mercy" from instructions to jurors, see, e.g., *People v. Benson*, 802 P.2d 330, 363 (Cal. 1990) (no error in refusing "mercy" instruction). "Neither statute nor Constitution gives the jury the right to exercise what is essentially godlike power." *Id.*

reflect the Court's official position of attempting at all turns to banish emotion from the moral decision at the heart of capital sentencing. The especially feminine emotions of sympathy and mercy are especially condemned.²⁹⁶

b. No Reasonable Juror

A more subtle manifestation of the Court's routine erasure of emotionality from the jury's decision to impose death is its use of the "reasonable juror" standard for appellate review of trial court error that may have contributed to a jury verdict for death.²⁹⁷ In *Sawyer v. Whitley*,²⁹⁸ the Court held that a capital defendant who claims actual innocence in a successive habeas petition must show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable state law.

The hypothetical "reasonable juror" is, of course, a staple of appellate oversight of jurors' factfinding abilities throughout civil and criminal procedure; a directed verdict is proper, for example, if no reasonable juror could find facts to support an opposite verdict. The fictional "reasonable jurist" has a recurring leading role in the Court's intricate habeas corpus doctrine.²⁹⁹ The use of the fictional "reasonable juror" makes the most sense when the part of the penalty jury's task that relates to factfinding is at issue.³⁰⁰

The capital sentence, however, is fundamentally about values and conscience, not merely facts. The weight of the decision itself imposes

296. Justice Scalia remains the most passionate opponent of female emotion; for him, "merciful" serves as an almost contemptuous epithet. *E.g.*, *Morgan v. Illinois*, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting).

297. In *Boyde v. California*, 494 U.S. 370, 380 (1990), the Court determined that the use of potentially misleading instructions to penalty phase jurors would require reversal of the judgment upon a showing of "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* Although the *Boyde* Court rejected a variety of formulations that the Court has used related to a "single hypothetical 'reasonable' juror," it continues to use hypothetical "reasonable jurors" to apply the *Boyde* standard of reasonable likelihood. *Id.* at 380-81; *cf.* *Proffitt v. Florida*, 428 U.S. 242, 249 (1976) (plurality opinion) (upholding the Florida statute allowing a judge to override a jury recommendation for life in part on the basis of the Florida Supreme Court's limitation of such overrides for death to situations where "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ").

298. 112 S. Ct. 2514, 2517 (1992).

299. *See, e.g.*, *Graham v. Collins*, 113 S. Ct. 892, 898 (1993) (quoting *Saffle*, 494 U.S. at 488) (ruling sought by a habeas corpus petitioner is barred "unless reasonable jurists hearing petitioner's claim . . . 'would have felt compelled by existing precedent' to rule in his favor"); *Richmond v. Lewis*, 113 S. Ct. 528, 537 (1992) (Thomas, J., concurring) (using "reasonable jurist" test).

300. *See, e.g.*, *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (using "rational fact finder" standard to test whether aggravating circumstance was established).

emotion on the determination.³⁰¹ But the Court's choice of the "reasonable juror" standard for appellate review of death verdicts removes the emotion, conscience, and mercy from the determination.³⁰² By narrowing the "gut-level hunch" to a matter of reason, the Court cleans the emotion out of the process, and moves further and further away from the realities of capital decisionmaking.³⁰³

Even without going so far as to substitute a "compassionate juror" for the reasonable one,³⁰⁴ we would recognize the moral question at the heart of the decision to impose death by assessing the impact of a penalty phase error on a hypothetical "conscientious juror." The fact that the actions of a "conscientious" juror would be much harder to predict could render harmless error review in capital cases somewhat more honest.³⁰⁵

c. *Victim Impact*

The denial of emotion in capital jurisprudence is also evident in the series of recent decisions related to victim-impact evidence.³⁰⁶ As discussed above, *Booth v. Maryland*³⁰⁷ and *South Carolina v. Gathers*,³⁰⁸ which barred the admission of victim-impact evidence (*Booth*) or argument (*Gathers*), were both decided in part on the principle that the decision to sentence to death must be based on reason, rather than emotion. The victim-impact evidence corrupted the trial with too much emotionality, at the expense of reliability and reason. *Booth* and *Gathers* were overruled in 1991 by *Payne v. Tennessee*.³⁰⁹ But *Payne* contains not a hint about any positive virtues emotion may contribute to achieving

301. Costanzo and Costanzo note that "[a] mechanical, dispassionate weighing may be incompatible with the emotionally charged atmosphere of the jury room." Costanzo & Costanzo, *supra* note 32, at 198.

302. Tellingly, in evaluating late claims of "actual innocence" the Court's fictional "reasonable juror" is concerned only with whether the new evidence takes the petitioner outside the rules that permit a death sentence, not whether it offers new mitigating evidence that could militate against an execution. *Sawyer*, 112 S. Ct. at 2522. Individualized mitigating evidence is much more difficult to assess. *Id.*; see *supra* text accompanying notes 199-201 (discussing removal of individualized discretion from *Sawyer v. Whitley* analysis).

303. Costanzo & Costanzo, *supra* note 32, at 188 ("This 'reasonable juror' standard is a legal notion founded on untested (and often unstated) assumptions about the process of jury decision making. Indeed, the available empirical findings impugn the Court's confidence in the fairness and rationality of the process.").

304. Cf. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1989) (critiquing use of reasonable person in tort).

305. See Weisberg, *supra* note 27, at 346 (conceptual difficulty in applying harmless error analysis to such an ineffable determination).

306. See *supra* text accompanying notes 241-49 (discussing role of victim-impact cases in diminishing distance between decisionmaker and jurors).

307. 482 U.S. 496 (1987).

308. 490 U.S. 805 (1989).

309. 501 U.S. 808 (1991).

a moral decision.³¹⁰ The single reference to the role of emotion is made in Justice O'Connor's concurrence, which suggests that the emotionally moving nature of the grandmother's testimony about her grandson's cries for his dead mother and worries for his dead sister was harmlessly cumulative: that evidence "did not inflame [the jurors'] passions more than did the facts of the crime"³¹¹

The dissenters in *Payne* rework their (previously winning) argument against emotion,³¹² but the majority is essentially silent. In fact, the logic of the Court's stated distrust of emotion requires exclusion of the victim-impact evidence. The Court wants the emotional evidence to be included, but, constrained by its anti-emotion principles, cannot claim any benefit from the emotionality; instead, to the extent that Justice O'Connor addresses the subject, she falsely minimizes the emotional impact of the survivors' testimony.³¹³ Once emotions—including feminine emotions such as pity and sympathy and masculine emotions such as anger—are recognized as a valuable part of moral judging, victim-impact evidence can be permitted within the sentencing process. But this feminist argument in favor of this evidence, in favor of emotions, is completely absent. In this and countless smaller ways,³¹⁴ the Court vilifies and hides the emotion that is present and necessary.

4. EMOTION ACKNOWLEDGED

Capital rhetoric denounces and extinguishes emotion, assumed to be weak, and said to be contrary to reliability. Thus capital doctrine pretends to rest on reason, not emotion, while in fact emotions are holding forth on all sides. Just as elevating emotion from its present

310. Indeed, the majority opinion is exceedingly businesslike, especially in its justification of overruling such recent precedent. While "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Id.* at 2610 (citations omitted).

311. *Id.* at 2612 (O'Connor, concurring). Justice O'Connor continues: "'Murder is the ultimate act of depersonalization.' It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back." *Id.* (quoting Brief of Justice for All Political Committee et al., as *amici curiae* at 3, *Payne* (No. 90-5721)).

312. "Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible." 501 U.S. at 856-57 (Stevens, J., dissenting).

313. When asked whether victim-impact evidence should be admitted, Juror Stark said "I don't think you should mix in all these emotional things." Stark Interview, *supra* note 41.

314. For example, in *Graham v. Collins*, 113 S. Ct. 892 (1993), Justice Thomas condemns the mitigation principles, quoting from Scalia's *Perry* dissent. "It is an unguided, emotional 'moral response' that the Court demands be allowed—an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy." *Id.* at 912.

position as a hidden, shameful secret in the law promises increased honesty and integrity, failure to acknowledge the inevitable emotionality in capital cases undermines the possibility of justice in innumerable ways. Hiding the inevitable emotion of the jurors' experience allows judges to ignore the hidden influence of fear, frustration, or deep sadness on the task of jurors and judges.³¹⁵ Pretending emotion is absent does not make it so; acknowledging that emotion is already deeply at work in moral decisionmaking can lead to seeing its value in capital sentencing. None of that is possible until heretofore feminine emotions such as pity and sadness can be seen as legitimate sources of authority and strength.

D. The Non-Gendered Decision

In all of these ways, the awesome task of conscience that confronts capital jurors is currently hidden behind a masculine veneer of rules, distance, and reason. Yet the moral task that we demand of capital jurors itself demands all of their faculties: their hearts as well as their minds, closeness to the defendant as well as to the victims, attention to doctrine as well as acceptance of discretion. Stripping away the falsely gendered nature of capital decisionmaking promises a deeper moral response.

IV. THE DECISIONMAKERS

Capital jurors receive extraordinary power.³¹⁶ Not only is capital sentencing generally the only sentencing task handed to jurors, but this role is strikingly and fundamentally different from fact-finding, the work traditionally done by jurors. In all other criminal contexts, jurors determine guilt and judges sentence. Why use a jury here, for this especially difficult sentencing decision?³¹⁷ The choice of a jury severely undermines at least one purported goal and Eighth Amendment

315. Trina Grillo notes about mediation that "a party may agree to something because he is nervous, intimidated, exhausted, or frightened." Grillo, *supra* note 51, at 1598. Surely that is true for jurors, as well. See Victoria Slind-Flor, *In Gristly Trials Counties Begin to Help Jurors Cope Afterward*, NAT'L L.J., Jan. 20, 1992, at 3 (describing counselling now being offered to some jurors).

316. For a description of the uniqueness of allowing juries to sentence and the suggestion that "[j]awmakers may have decided that only a defendant's peers should make a choice so grave as life or death," see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 15-16 (1980). The powerful role of the capital jury is especially noteworthy in light of the historic reduction in authority granted to juries described in Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994), and Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 39-49 (1994).

317. See, e.g., Cover, *supra* note 21, at 1622 ("The questions of whether the death sentence is constitutionally permissible and, if it is, whether to impose it, are among the most difficult problems a judge encounters.").

requirement, that of proportionality between the crime and the sentence.³¹⁸ Lay jurors confront only one heinous case, which prevents them from assessing relative blameworthiness within the group of possible candidates for death.³¹⁹ The choice of a jury for capital sentencing is especially intriguing in light of the variety of ways that the jury can be understood as a feminine institution.

A. The Feminine Jury

Of the key roles in the capital adjudication drama—defendant, judge, prosecutor, defense attorney, juror—the role of juror is the most inclusive of women, by percentage and raw numbers.³²⁰ In fact, although women are kept off capital juries in a variety of ways,³²¹ jury service is still the

318. See *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (upholding appellate reweighing in part because “state supreme courts in States authorizing the death penalty may well review many death sentences and . . . typical jurors, in contrast, will serve only one such case during their life-times”); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) (“[J]udicial sentencing should lead, if anything, to even greater consistency . . . since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases”); see also *California Supreme Court Conference*, 28 SANTA CLARA L. REV. 243, 281 (1988) (discussion by Edward Panelli, Assoc. Justice on the Cal. Sup. Ct., noting that the disadvantage of moving capital appeals to various courts of appeal is loss of proportionality from current practice of single (Supreme) Court reviewing all the cases); Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 248-57 (1989) (current capital punishment doctrine requires cardinal and ordinal proportionality).

319. On the other hand, the uniqueness of the experience might enhance the jurors’ sense of the “awesome responsibility” of the task. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985). One juror told me that a jury was “a far better approach” because “judges, like . . . doctors, like anyone in any field that incurs a certain amount of trauma, they will eventually become inured to it. Whereas a lay jury . . . it’s one time or twice in their lives that they have to do this and they approach it with a fresher approach.” Smith Interview, *supra* note 159.

320. The access of women to juries is a relatively recent phenomenon. In *Hoyt v. Florida*, 368 U.S. 57 (1961), the Supreme Court held that excluding women from jury service was neither a due process nor an equal protection violation because there was a sufficient rational basis for it—that women are “still regarded as the center of home and family life.” *Id.* at 62. In 1975 the Supreme Court recognized that systematically excluding women from juries violated defendants’ Sixth Amendment rights. See *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975). For a description of the relatively recent reform that allows women to serve on juries, including the facts that 21 states prohibited women jurors at the time of World War II and that three states still excluded women from juries in 1962, see Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN’S L.J. 59, 60-61 (1986). For a discussion of the importance of jury service to those who fought for women’s suffrage, see Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CINN. L. REV. 1139, 1165-72 (1993).

321. In addition to the disproportionate exclusion of women through death qualification, some are struck from juries simply because they are women. See, e.g., Babcock, *supra* note 320 (discussing constitutionality of gender-based peremptories). *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), the recent decision holding sex-based peremptory challenges impermissible, is likely to eliminate the blatant, avowed challenges to women. For references to misogynous comments about women jurors in

only role in capital adjudication that is not overwhelmingly male.³²² Focusing on the jurors' experience is paying attention to women.³²³

Not only are women found on juries, but deeply imbedded conventional views of judges and juries replicate the familiar male/female dichotomy. Carrie Menkel-Meadow asks, "Is the judge 'male,' and the jury 'female'?"³²⁴ Like women, juries are approached with a combination of condescension and romance.³²⁵ Certainly the judge/jury duality reflects a hierarchy; the real law is imposed by judges, whereas the jurors are measured by how well they conform to the rule of law established by the officials.³²⁶ The jury is "particularistic," in Virginia

trial practice manuals, see Anne Rankin Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, in *WOMEN IN THE COURTS* 118-21 (Winifred L. Hepperle & Laura Crites eds., 1978); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 182 n.113 (1989). Even when on juries, women may participate less than men. See *infra* notes 352-55 and accompanying text (discussing gender and racial bias on juries).

Although the constitutional requirement that juries not exclude women had been recognized in 1975, the first person executed in Georgia after the resumption of capital punishment was sentenced to death by a jury panel from which women had been improperly excluded. That defendant's attorney failed to object to the exclusion, however, so the federal court refused to address the error. *Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir.) (Hatchett, J., dissenting), *cert. denied*, 464 U.S. 1003 (1983). The correct objection made by the co-defendant's attorney resulted in a reversal of his death sentence on appeal, and subsequent life sentence upon resentencing with a jury panel that included women. Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 861 (1992).

322. The vast majority of capital defendants are male. See Victor Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 880 (1990) (death penalty for female offenders is "extremely rare"). In fact, of the 2848 people on death rows in the Spring of 1994, 44 (or 1.54%) were women. DEATH ROW, U.S.A. (NAACP Legal Defense and Education Fund, Inc., New York, N.Y.), Spring 1994, at 1.

323. The choice to focus on the jury can be arrived at by following the women, or by locating the site of "experiential understanding." Massaro, *supra* note 91, at 2109 n.50 (noting that experiential understanding may turn attention "to the jury, rather than the judge").

324. Menkel-Meadow, *supra* note 30, at 49.

325. See Alschuler, *supra* note 321, at 161. Alschuler describes the condescension toward jurors, who are often asked whether they are bigots and otherwise lose privacy and dignity during voir dire, *id.* at 155, and are seated "at the side of the courtroom in an area vaguely resembling the Peanut Gallery on the Howdy Doody Show." *Id.* Alschuler's wonderful description of the mixture of condescension and romance with which juries are described does not explicitly associate juries with women.

326. For a provocative discussion of the way that the jury is evaluated by how well it conforms to a standard of "the law of the officials," or judges, assuming that jurors are somehow outside of and different from the real law, see Marianne Constable, *What Books About Juries Reveal About Social Science and Law*, 16 LAW AND SOC. INQUIRY 353 (1991). "Discussions of 'jury nullification' especially point to researchers' presuppositions that 'law' means the law of the officials, a law that contrasts to the 'beliefs,' 'sentiments,' and 'attitudes,' expressed in jury verdicts." *Id.* at 359. A clear example of Constable's point is expressed in Nagel, *supra* note 255.

Held's terms, rather than universal.³²⁷ In fact, the choice of the jury for capital sentencing is justified in part because the jury embodies discretionary, personal, and emotional decisionmaking.

1. MYSTERIOUS DECISIONMAKING

Choosing a jury for capital sentencing seems to belie the purported heightened scrutiny for capital cases, because juror functioning is not well-understood.³²⁸ Perhaps surprisingly, the use of the jury to impose death sentences has been justified in part because the very inscrutability of the jury fits well with the discretionary, moral judgment of capital sentencing:

[T]he ultimate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gut-level hunch as to what is just. The collective lay view of the jury, then, is understandably attractive. By nature the jury's decision is inscrutable. Indeed, the jury is the blackbox of the judicial system.³²⁹

Thus the jury is valued and chosen in large part because it is not accountable. Rather, it is inscrutable, like a black-box, neither explained nor understood.³³⁰ The jury is mysterious and unpredictable. In this way, the jury is feminine.

2. PERSONAL, EMOTIONAL, COMPASSIONATE DECISIONMAKING

Judges are expected to be distanced decisionmakers,³³¹ the jury offers close, connected, personal decisionmaking. The very reason for having a jury is to bring personal values and experiences into decisionmaking. Handing off the task of capital sentencing to juries is justified by the benefit from giving this task to people for whom it will

327. Virginia Held, *Birth and Death*, 99 ETHICS 362 (1988-1989):

The claim that the family is particularistic while the polis deals with what is universal is questionable even in terms of existing institutions
[C]onsider a paradigm of the "public" sphere: a court of law. Here, typically, a single defendant is judged by a few individuals, and no case is quite like any other.

Id. at 397-98.

328. See, e.g., HASTIE, *supra* note 121, at 4 (suggesting that the law is based on untested and probably unsound intuitions about juror decisionmaking).

329. Higginbotham, *supra* note 125, at 1048-49.

330. See Weisberg, *supra* note 27, at 346 n.174 (citing *People v. Hines*, 390 P.2d 398, 402 (Cal. 1964)) (jury's decisionmaking process is an unknowable "dark ignorance").

331. See NAFFINE, *supra* note 12, at 37; Resnik, *supra* note 46, at 191.

be a personal, not a professional decision.³³² Part of personalizing a decision is bringing emotion to it; using jurors for capital sentencing is explained in part because jurors are better suited to the emotion of the task.³³³ Similarly, jurors are said to bring an appropriate moral leavening to the law of capital sentencing.³³⁴

The personal decisionmaking of the jury promises connection to the community that may elude the distanced, rule-bound judge. The Court has found that "the jury . . . is a significant and reliable objective index of contemporary values",³³⁵ the jury is honored as "the authentic voice

332. *E.g.*, *United States v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (Judge Learned Hand points out that "no one is likely to suffer of whose conduct [the jury does] not morally disapprove.").

333. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part & dissenting in part) (jury is best able to express community outrage); *id.* at 488 n.34 (quoting from HERMAN MELVILLE, *BILLY BUDD* (1972) regarding judge's ability to conquer compassion, to bolster his argument that a jury is required for capital sentencing because the jury will be more open to compassion, and is required to be consistent with community values); *see also* Higginbotham, *supra* note 125, at 1048-49 (jury is well-suited for capital determination because the choice "is uniquely laden with expressions of anger and retribution").

334. *See* *Spaziano*, 468 U.S. at 468-70 (Stevens, J., concurring in part & dissenting in part) (jury's assessment of moral question less likely to lead to excessive punishment).

A judge trained to distinguish proof of guilt from questions concerning sentencing might react quite differently to this case than would a jury. *See* [HERMAN MELVILLE, *BILLY BUDD* 72 (1972)] ("For the compassion how can I otherwise than share it. But, mindful of paramount obligations I strive against scruples that may tend to enervate decision.").

Id. at 488 n.34; *see also* *United States v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942) (Judge Learned Hand) (jury "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions").

335. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). The jury "maintain[s] a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

However, the Court has rejected the claim that the Constitution *requires* jury sentencing in capital cases, *see Spaziano*, 468 U.S. 447, while acknowledging that the jury serves as "a link between the community and the penal system." *Id.* at 462. In dissent in *Spaziano*, Justice Stevens argued (on behalf of himself and Justices Marshall and Brennan) that jury sentencing is required to ensure that the death judgment is justified. *Id.* at 468-70 (Stevens, J., concurring in part & dissenting in part).

Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.

Id. at 468-69; *see also* Higginbotham, *supra* note 125, at 1048-49 (the jury "better represents community values").

of the community.”³³⁶ One adamant pro-death penalty juror reflected a commonplace, dichotomized understanding of judges and jurors in his explanation of his preference that a jury rather than a judge make the death penalty decision: “After all, we are the ones who are going to be subjected to whatever [the defendant] does.”³³⁷ The actual person who is a juror is perhaps at no greater risk than the actual person who is a judge; but the judge is perceived less as an actual person. This perfectly reflects the dichotomized construction of the judge and jury, revealing the widespread assumption that jurors are closer to the experience of victimization than judges. In all of these ways, the jury is feminine.³³⁸

3. COLLECTIVE DECISIONMAKING

Jury deliberations require individual judgments to be negotiated and modified to conform to a group decision. Collective decisionmaking is often described as an important aspect of feminist methodology.³³⁹ Although the feminist analysis has focused on the benefit of listening and shared voices for improved decisionmaking, another potential result is a loss of individual integrity or responsibility. For a jury to function, each juror has to be willing to give up a little bit of her own perspective. Indeed, the premise of accommodation is another way in which the institution of the jury is feminine. But too much accommodation destroys autonomy and eliminates responsibility. As Gilligan acknowledges, and

336. Justice Stevens’ argument that the Constitution requires a jury in capital cases was based in part on “a strong community feeling that it is only decent and fair to leave the life-or-death decision to the authentic voice of the community—the jury—rather than to a single governmental official.” 468 U.S. at 473 (Stevens, J., concurring in part & dissenting in part). Juror rescarcher Valerie P. Hans suggests that jurors are used to impose death sentences “to speak as the authentic voice of the community.” Hans, *supra* note 55, at 149.

337. The juror continued, “[A] judge may not be as reflective of society as the jury so, I would rather have a jury because you get society more involved.” Neider Interview, *supra* note 77. Another former capital juror preferred juror sentencing “because it boils down to whether you want this man in your community . . .” Quinlan Interview, *supra* note 192.

338. See M.E. Lewyn, *Men, Women and Crime*, 1 SAN DIEGO JUST. J. 57 (1993) (providing data that men are more at risk from violent crime although women are perceived to be more at risk).

339. See, e.g., Cain, *supra* note 146, at 1949 (arguing against leaving power in the hands of a single judge); Elizabeth Kingdom, *Legal Recognition of a Woman’s Right to Choose*, in BROPHY AND SMART, *WOMEN IN LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY* (1985) (promoting “ideology of solidarity and collective decisionmaking”); Menkel-Meadow, *supra* note 30, at 53 (describing Portia as favoring collectivity over hierarchy); Resnik, *supra* note 46, at 1952-43 (work improved by collaboration). One juror told me he preferred a jury determination over a judge’s because “I think when you make a decision like that you need to talk about it.” Quinlan Interview, *supra* note 192.

critics of relational feminism remind us, too much relatedness leads to nothing less than loss of self.³⁴⁰

The problem of jurors abandoning conscience³⁴¹ is quite real in the context of a capital jury. One juror from a hung jury described how two other jurors had changed their votes *after* the jury had given up trying to reach a unanimous verdict. Once the possibility of unanimity was gone, two women changed their votes—for the record—from death to life.³⁴² After having gone along with the majority for the benefit of the group (in achieving its task of reaching a verdict), each reverted to a vote for herself, against death, once it was clear that no consequences would flow.³⁴³ Submerging individual conscience for the perceived good of the collective might be feminine,³⁴⁴ but it is certainly not feminist process. Surely the practice of using multiple shooters (each of whom is likely to be shooting blanks) in a firing squad is not a paradigm of feminist collective process. The prevalent explanation for the need for collective decisionmaking in the capital context is that the burden would be too great for any one person to shoulder.³⁴⁵ Does that suggest that the burden is too great to be shouldered?

The potential loss of individual responsibility and accountability with use of the jury is multilayered: first, individual jurors are relieved to share the decision with other jurors; second, judges may use the jury to justify the death sentence and distance themselves from the moral

340. Gilligan, *supra* note 47, at 19, 32.

341. A major study of jury decisionmaking asserts that jury deliberation may be "characterized by the use of heavy-handed social pressure that leads dissenters to publicly support the jury's verdict, while privately harboring reservations [T]he jury completes its task unanimous in vote but not in conscience." KASSIN & WRIGHTSMAN, *supra* note 121, at 175.

342. "When we realized that we were going to be a hung jury two people actually changed their votes away from the death penalty to have it be life in prison without possibility of parole." The juror interviewed cast a consistent vote for death, and described the two women who changed their vote to life when they saw that the jury was hung as "not able to emotionally handle" being on record for death in the hung jury. Neider Interview, *supra* note 77.

343. Perhaps similarly, Justice Blackmun's opinion announcing that he would no longer vote to affirm death sentences came after his decision to retire.

344. See Grillo, *supra* note 51, at 602-03 (those using the caring mode are more willing to compromise).

345. Justice Stevens argued that the burden of death sentencing would be too great for a judge:

[T]he responsibility of deciding whether a person convicted of murder should be sentenced to death or to a lesser punishment is too heavy a burden to impose on any single individual [I]t would be wholly inconsistent with our traditional approach to such issues to lay on the shoulders of the Judge a responsibility so grave and invidious.

Spaziano, 468 U.S. at 473 (Stevens, J., concurring in part & dissenting in part) (quoting REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, at 193-94 (1953); see also Higginbotham, *supra* note 125, at 1048-49 ("[R]esponsibility for such a decision is best shared.")).

questions.³⁴⁶ Indeed, the jury is used to explain away and insulate the judges from responsibility for injustice—such as racial bias—in the imposition of the death penalty.³⁴⁷ Thus jury capital sentencing could be seen as a paradigm of collectivity as diffusion of and thus escape from responsibility. Surely feminist collectivity should not mean eliminating individual responsibility?

This problem of lost accountability in collective decisionmaking can be clarified by contrasting the jury with the feminist model of collective process, the consciousness-raising group. “[Consciousness-raising] . . . is a methodology that creates knowledge from shared, collective experience. Communication occurs in a leaderless circle There is a devaluation of expertise; everyone has life experience from which something might be worth learning.”³⁴⁸ Although jury decisionmaking is analogous in some ways to feminist consciousness-raising,³⁴⁹ the differences between the two are even more significant.

Consciousness-raising means much more than people talking collectively; the exchange is undertaken by people with certain shared political values, within the structure of careful process. The premise of consciousness-raising, that women’s voices are to be taken seriously, means, for example, that process develops to ensure equal time,³⁵⁰ and that the quiet voices are not overwhelmed by the others. Neither this premise nor this process is reflected in the jury room, where, for example, gender and race-based stereotypes may thrive. I interviewed jurors from two cases where women served as forepersons; jurors from both trials reported male resentment about female forepersons.³⁵¹

346. “Through the *Lockett* doctrine, reviewing courts can distance themselves from the hard substantive moral choices that must be made in any death penalty case by leaving those choices to the sentencer.” Louis D. Bilonis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 287 (1991). Bilonis cites this as a strength of the *Lockett* doctrine.

347. See *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (“[I]t is the jury’s function to make the difficult and uniquely human judgments that defy codification and ‘buil[d] discretion, equity, and flexibility into a legal system.’”) (quoting HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 498 (1966)). Thus the democracy of the jury is used to justify racial imbalance in death sentences.

348. Menkel-Meadow, *supra* note 30, at 55. Menkel-Meadow asks, “Does the use of a jury provide a useful framework for a kind of judging where no single perception of the truth must prevail, but where a verdict is the product of a mediated consensus?” *Id.* For discussion of consciousness-raising groups as feminist method, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989); Bartlett, *supra* note 31, at 863-67; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 601-04 (1986).

349. Menkel-Meadow, *supra* note 30, at 53.

350. See *id.* at 53 (noting “attention is paid to equality of presentation time and rotation of . . . tasks” in consciousness-raising groups).

351. “There was some resentment that I sensed from a couple of the guys that I (a woman) was elected to be the foreman.” Boisvert Interview, *supra* note 78. Another reported that a “hot shot guy wanted to be foreman but they got a woman to do it who was much better, but it pissed the guy off” Dalrymple Interview, *supra* note 194.

Women jurors speak much less than men, even today.³⁵² One reason for the racial imbalances in capital sentencing arises from the racism of the decisionmakers, including, we must assume, jurors.³⁵³ The deliberations of the jury are utterly informal and without structure, in marked contrast to the care and formality of the courtroom portion of the case.³⁵⁴ We know that bias flourishes in informal settings,³⁵⁵ so the choice to keep jury deliberations completely without structure invites bias. Even around a kitchen table or in somebody's living room, feminist consciousness-raising has far more formal procedures than any jury deliberations, including those in capital sentencing.

Beyond the lack of formal process, juries are very different from consciousness-raising groups in their relative power. Consciousness-raising groups increase the power of the participants, in large part because the participants maintain complete control over the values, procedures, and purposes of the groups. By comparison, even those jurors deciding whether someone should live or die are astonishingly powerless.

4. POWERLESSNESS

At first glance, using the jury for this powerful task seems to comport with the feminist goal of redistributing power to the relatively powerless, which in legal decisionmaking can mean the jury.³⁵⁶

352. Evidence from the 1950s and from 1988 suggests that men talk more than women at a differential of one and one half to one. See Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR* 59 (Reid Hastie ed., 1993). Male jurors speak more than female jurors, and the foreperson, often an active participant, is usually male. VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 108 (1986). This research data was not reflected in a recent study of juror self-appraisals in which both men and women reported that women jurors were more thoughtful and vocal. *Women Do Not Fit Stereotype*, NAT'L L.J., Feb. 22, 1993, at S14; cf. IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 184 (1990) (discussing fact that white middle-class professionals and men participate the most in New England town meetings).

353. See, e.g., *Hance v. Zant*, 114 S. Ct. 1392 (1994) (Blackmun, J., dissenting) (discussing racist comments of white jurors about defendant and sole Black juror); see also *Cain*, *supra* note 146; *Minow*, *supra* note 263, at 26-29 (discussing *McCleskey*, noting that discretion leads to race-based decisions); *Pillsbury*, *supra* note 229, at 708 (discussing "otherness" question in relation to race and *McCleskey*). "[D]iscretion makes decisionmaking vulnerable to amoral, here racial, influence." *Id.* See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987) (presenting evidence of unconscious racism).

354. See *Quinlan* Interview, *supra* note 192. The normal extreme formality of a capital case is not present during deliberations. See, e.g., *Sarat*, *supra* note 210.

355. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; *Grillo*, *supra* note 51, at 1589-90 (informal nature of mediation setting may make it an environment in which prejudices thrive).

356. See *Alschuler*, *supra* note 321.

Redirection to “the use of legal sources ‘from below’”³⁵⁷ suggests choosing jurors over judges.³⁵⁸ In fact, the major traditional argument *against* allowing jurors to sentence in capital cases is the elitist³⁵⁹ suggestion that ordinary people cannot be trusted,³⁶⁰ leading to the proposal that a panel of experts be convened to do the job.³⁶¹ Not surprisingly, then, scrutiny of the power given to penalty jurors reveals it to be extraordinarily constrained. Even though given the ultimate responsibility, capital juries operate within an institution on the feminine side of a gendered dichotomy, and thus are prevented from having even the most basic control over how they exercise their life or death responsibility.

a. *The Either/Or of Life or Death*

Jurors sentencing in capital cases are given only two choices, generally death or life without the possibility of parole.³⁶² Like all “either/or” choices,³⁶³ this one removes much of the authority of the

357. SMART, *supra* note 11, at 23 (quoting Norwegian feminist T. Stang Dahl’s WOMEN’S LAW (1987)).

358. *Id.* Dahl’s call for “greater reliance . . . on custom and public opinion of what law ought to be” supports the choice of jurors over judges. *Id.*

359. Feminists attempt goals of nonhierarchism. *E.g.*, Resnik, *supra* note 46, at 1927. To the extent that lowly jurors are given the most ultimate task, there is some reversal of the normal hierarchy, especially since the jurors are no longer in their fact-finding role. But perhaps the devaluation of fact-finding is more privileging of the wrong thing. *See, e.g.*, Friedman, *supra* note 52, at 200-04 (discussing Gilligan’s concern for contextual detail). *But see* West, *supra* note 46, at 79-80 (arguing that mothering is proof that Unger et al., are wrong in their assertion that oppressive power is a necessary consequence of inequality and hierarchy, “and that the end of hierarchy is therefore the necessary root of morality”). West’s answer is to infuse hierarchies with care. *Id.* at 81.

360. *See, e.g.*, 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 86 (London, MacMillan 1883) (“There is no subject on which the impression of a knot of unknown and irresponsible persons . . . is less to be trusted than the question whether or not the punishment of death should be inflicted in a given case.”); Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PENN. L. REV. 1099, 1131, 1135 (1953) (citing the exemptions of professionals from jury service as “eliminat[ing] those people most likely to be aware of the basic considerations necessary to an intelligent choice of punishment” and characterizing the jury as “an inefficient and arbitrary agency with respect to that issue”).

361. Knowlton, *supra* note 360, at 1133-34. It has been suggested that the board be composed of “a psychiatrist or psychologist, a socialist and a lawyer.” *Id.* at 1133 n.195 (citation omitted).

362. One juror expressly complained about the narrowing down to two choices: “The whole thing seemed to be so pointed that there was really no latitude to do much at all.” Dalrymple Interview, *supra* note 194; *cf.* Beck v. Alabama, 447 U.S. 625 (1980) (guilt phase jury must be given option of convicting capital defendant on lesser included offense).

363. Resnik argues that feminist analysis critiques the false goal of “victory or defeat” as either/or. Resnik, *supra* note 46, at 1926. What about the middle? Menkel-Meadow identifies binary results (“win/lose?”) as a basic concept underlying our model of litigation but also suggests that the “notion that the adversary system requires binary

decisionmakers. The limitation is deliberate; jurors are not expected to be able to handle the usual sentencing task of choosing among a range of options.³⁶⁴

By eliminating the possibility of compromise or nuanced response to the capital defendant and his crime, the either/or choice eliminates much of the benefit of group decisionmaking. Just as empathy or compassion can help decisionmakers to move beyond either/or choices, the either/or choice here is probably in place in part to eliminate emotion from the penalty determination.³⁶⁵ Federal judges are rebelling against the limitations imposed by federal sentencing guidelines,³⁶⁶ yet they still have more than two options. Arguably, more options would increase both the sense of responsibility of those entrusted with the capital decision and the vaunted reliability of the result.

b. Jurors Are Silent and Hidden Behind the Verdict

The statement of reasons given by a sentencing judge provides accountability and accessibility.³⁶⁷ Everything about a capital case is documented meticulously, except for the work of the jury; the only record of the deliberations is an often one-word verdict.³⁶⁸ As with more

results might be somewhat exaggerated given the possibility of compromise in verdicts." Menkel-Meadow, *supra* note 30, at 52 n.74.

364. The Court made this point in *Spaziano v. Florida*, 468 U.S. 447 (1984), rejecting the claim that juror sentencing is required in capital cases: "We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case." *Id.* at 463 n.8 (citing ABA STANDARDS FOR CRIMINAL JUSTICE 18:1.1, 18:21-18:22 commentary (2d ed. 1980)).

365. See Shaughnessy, *supra* note 265, at 288. Shaughnessy suggests that the reason *Booth* was correctly decided to recognize that victim-impact statements should not be admissible is that capital jurors are given only two choices. "However, the law offers the jury only one way to compensate the victim's survivors for the pain that is so graphically demonstrated before the jury. That way, in the context of a capital sentencing proceeding, is to choose the death of the defendant over the life of the defendant. It is not the least bit clear that, if given a full range of remedial power, the jury would be moved to respond in that way to survivors' emotions." *Id.* at 288. See generally Ruth Colker, *Feminism, Theology, and Abortion*, 77 CAL. L. REV. 1011, 1028 (1989); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1653 (1987).

366. See, e.g., Jim Newton, *Judges Voice Anger Over Mandatory U.S. Sentences*, L.A. TIMES, Aug. 21, 1993, at 1.

367. See, e.g., Minow & Spelman, *supra* note 209 (arguing in favor of including statement of reasons for decision). Several jurors told me that a statement of reasons for the death verdict would have been possible and beneficial. E.g., Boisvert Interview, *supra* note 78; Smith Interview, *supra* note 159.

368. See Weisberg, *supra* note 27, at 314. When Robert Weisberg attempted to use "a perspective rarely noted in the literature—the actual conduct of penalty trials, as revealed in such texts as instructions and closing arguments," the texts available told the story of the judge's instructions and the attorneys' arguments, but no record remained from the jurors except the bare (often one-word) verdict. *Id.* The only documents not preserved for the appeal are notes taken by the jurors.

commonplace jury determinations,³⁶⁹ the verdict forms used by most death penalty juries ask for simply the conclusion, without any opportunity for explanation.³⁷⁰

The jury is not inevitably inscrutable; a statement of reasons from the sentencing jury could eliminate much of the intellectual bog and corruption in the appellate second-guessing which occurs in the context of applying the current harmless error doctrine.³⁷¹ Allowing the jury to explain itself would provide to the jury some of the authority that current appellate doctrine falsely ascribes to it. Given the benefit of such a reform to the purported goal of reliable and accurate death sentences, the fact that courts have not required any statement of reasons from capital juries³⁷² suggests a preference for a more manipulable paper tiger.³⁷³

The silencing of the jury is enforced in a number of ways beyond the absence of a statement of reasons. For example, a juror's own impeachment of the verdict, including a juror's sworn declaration related to impropriety in the decisionmaking process, is often inadmissible to

369. See, e.g., Alschuler, *supra* note 321, at 162 (“[W]e do not permit [jurors] to explain their rulings.”).

370. By contrast, the Louisiana statutory scheme provides for a list of statutory factors found to be true by the jury. The North Carolina capital statute is unusual in that it requires the jury foreman to list aggravating factors found beyond a reasonable doubt. See N.C. GEN. STAT. § 15A-2000(c)(1) (1977). Geimer and Amsterdam have pointed out that this requirement to “[c]heck[] the appropriate boxes” can be understood as a necessary afterthought, rather than a necessarily accurate explanation of the verdict. Geimer & Amsterdam, *supra* note 124, at 10. Whatever the accuracy of North Carolina's check-off device, it at least provides more information about the jury's decisionmaking than the one-word verdict used in most other capital sentencing schemes. Cf. Paul W. Cobb, Jr., *supra* note 285, at 406 (suggesting that “[t]he clemency boards should be required to report the basis for their invoking or disdaining mercy in each case”).

371. For a discussion of the disparity between the appellate version of a capital case and the jurors' actual reasoning, see Geimer & Amsterdam, *supra* note 124, at 19-21; see also Proffitt v. Florida, 428 U.S. 242, 251 (1976) (upholding Florida provision allowing judge to override jury recommendation for life in part on grounds that because the “trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible”); cf. Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 335 (1992) (noting that Governor Wilson's detailed statements of reasons for denying clemency to Robert Harris “permitted the people to judge the quality of his decision”).

372. See, e.g., *Hildwin v. Florida*, 490 U.S. 638 (1989) (Sixth Amendment does not require that jury specify aggravating factors that permit death sentence); see also *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990) (asserting without authority that appellate court reweighing does not require written jury findings); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt*, 428 U.S. 242 (upholding jury override in Florida even without written findings); *People v. Benson*, 802 P.2d 330 (Cal. 1990) (California Constitution does not require written statement in support of death verdict).

373. Ironically, one repeated explanation for giving this task to jurors is precisely that they are not expected to supply a statement of reasons. See Higginbotham, *supra* note 125.

impeach the verdict.³⁷⁴ This preference for the romance of the jury rather than the reality³⁷⁵ is especially egregious in the context of a capital case, in which a juror has made an individualized moral determination with mortal stakes.

The evidentiary exclusion of actual information about juror deliberations allows misinformation to flourish.³⁷⁶ Every juror interviewed who voted for death incorrectly interpreted the alternative (life without the possibility of parole) as allowing for release.³⁷⁷ The

374. For a powerful critique of this evidentiary exclusion, which the author designates "see-no-evil evidentiary doctrines," see Alschuler, *supra* note 321, at 157, 218-29. Alschuler criticizes *Tanner v. United States*, 483 U.S. 107 (1987), in which the Court interpreted Federal Rule of Evidence 606(b) very broadly in holding that no hearing was required to investigate juror allegations that other jurors were intoxicated during jury deliberations from alcohol abuse and illicit drug use. States similarly limit impeachment with juror statements. See, e.g., CAL. EVID. CODE § 1150 (West 1994). The California Supreme Court has determined that § 1150 may be violated "not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations." *People v. Hedgecock*, 759 P.2d 1260, 1274-75 (Cal. 1990); see also *People v. Hutchinson*, 455 P.2d 132 (Cal. 1990).

375. See, e.g., *Tanner v. United States*, 483 U.S. 107, 120 (1987) ("There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it.").

376. Psychologists Mark and Sally Costanzo conducted a case study of a California capital jury in a case that resulted in a verdict of life without possibility of parole. They found that

[t]he jurors interviewed did not frame the decision in terms of its moral implications or the appropriateness of a particular penalty. Instead, they emphasized the importance of reaching consensus and tended to discuss the deliberation in terms of interpersonal dynamics. Little attempt was made to weigh aggravating factors against mitigating factors and jurors were uncertain about how to use the testimony presented. Information considered crucial by attorneys was not mentioned at all or considered trivial by the jurors.

Costanzo & Costanzo, *supra* note 32, at 189.

377. All jurors I interviewed made significant substantive errors in their descriptions of controlling doctrine, particularly about the alternative sentence of life without possibility of parole. "There is always a possibility that his sentence might be reduced." Neider Interview, *supra* note 77. "We had our minds made up what we wanted (before penalty phase) . . . We didn't want to give him life because they keep letting them out. We did not want him let out. So we were all agreeable on that." Manchester Interview, *supra* note 77. "[The judge] was very careful [about life without possibility of parole]; it gave us the impression that this may not be real but this is what we had to be told precisely." Quinlan Interview, *supra* note 192. "We just figured that he would appeal it and appeal it and appeal it and that he would spend God knows how many years appealing and nothing would come of [a death verdict] anyway." Stark Interview, *supra* note 41. One juror specifically explained that the deliberations finished as soon as everyone understood that life without possibility of parole meant parole and that death meant life without parole. Interview with David Marona, Juror in *People v. Poggi*, No. A450781 (Cal. Sup. Ct. 1982), in *Huntington Beach, Cal.* (Aug. 2, 1991) [hereinafter *Marona Interview*].

following explanation is typical: “[We voted for death because we] wanted to ensure that this person is never on the streets again. It wasn’t that important to us whether he was put to death. That really wasn’t what was important.”³⁷⁸

Any serious efforts to eliminate bias and fundamental error from jury sentencing require reconsideration of the isolation and privacy of the jury room.³⁷⁹ Although most jurors with whom I spoke reported having taken their task extremely seriously, several described frustration at others on their panels who were less than serious. After some initial hesitation about making a disclosure that could undermine the perceived integrity of the death verdict that had been reached, the foreperson of one jury told me, “One of the biggest problems was the drinking. . . . Because some people look at this as a party. They [do not have to go] to work. This is the truth and it is sad.”³⁸⁰ The romantic mystery that surrounds the jury protects all sorts of terrors.³⁸¹

c. Enforced Passivity: Jurors as Audience

Jurors are rarely allowed to ask questions during trial, whatever the type of adjudication. As Albert Alschuler points out, “Like good children, good jurors are to be seen and not heard.”³⁸² This enforced

378. Boisvert Interview, *supra* note 78.

379. See Delgado et al., *supra* note 355, at 1388-89, 1402 (risk of prejudice is greatest when “there are few rules to constrain conduct” and “the setting is closed and does not make clear that ‘public’ values are to preponderate”).

380. Boisvert Interview, *supra* note 78. She explained that the drinking “got ugly, abusive,” and that there were hours during deliberations when jurors were asleep (after heavy drinking at the free lunch). *Id.* A university research scientist was aghast at his jury room experience: “I can’t believe anyone knows what goes on once we go up. There are no guidelines, there is no supervision. Only bad things can happen up there There is a show on the lower floor then there is the real game upstairs. I have seen the nuts and bolts of how the decision was made and I don’t think it is good I would take a jury trial immediately if I was guilty—without question. I would be scared to death if I were an innocent person and would not hesitate if I was guilty. . . . We are monitored in the courtroom. We [deliberate] by ourselves, cut off from the rest of the world.” The juror provided an example of what he considered to be one of the foolish discussions: “I don’t understand talking for an hour about whether your left or right-handed person can put an Egg McMuffin in your left or right pocket.” Quinlan Interview, *supra* note 192.

Although there are many strong reasons to remove some of the privacy from jury deliberations, there are equally good reasons to provide some additional privacy to the flesh and blood jurors. See Babcock, *supra* note 320, at 1177 n.127 (calling for confidentiality of juror questionnaires).

381. See Shaughnessy, *supra* note 265, at 280 (noting that the law’s “cloak of secrecy” around the actual deliberations of the jury allows “the relatively free reign of emotion in the jury room and perpetrates the illusion that jurors proceed by reasoning syllogistically from a finding of a particular fact . . .”).

382. Alschuler, *supra* note 321, at 162; *cf.* Constable, *supra* note 326, at 371 (criticizing studies of jurors for perpetuating a version where “who the juror really is remains unknown (since one is not what one does). The juror is an actor whose

passivity is especially constraining when the jurors have been told to make the moral decision whether a person should be killed. Jurors are asked to make a monumental, conscientious decision, but given no *control* over what information they receive with which to make it.³⁸³

Information received controls the decision reached.³⁸⁴ The Court's willingness to cut back on the amount of individualized mitigation evidence that the capital defendant has a right to present to the sentencer³⁸⁵ also means further restrictions on the information to which the jurors are entitled prior to exercising their moral choice. Robin West has suggested that these decisions "implicitly shrank the sphere of jurors' responsibility."³⁸⁶ Rather than lessen the responsibility, which exists regardless of constraints on evidence, these restrictions diminish the control that the jurors might have over what evidence to take to heart in their "reasoned moral decision."

agreement with others is of the greatest importance, yet whose speech is not to be trusted nor taken on its own terms.").

383. Several jurors expressed frustration at not being allowed to ask questions. *E.g.*, Boisvert Interview, *supra* note 78; DeMasi Interview, *supra* note 159; Dalrymple Interview, *supra* note 194; *see* *People v. Anderson*, 801 P.2d 1107, 1123 (Cal. 1990) (under proper control by trial court, "there may be a real benefit from allowing jurors to submit questions" to witnesses). For an excellent discussion of "our patronizing rules of evidence, that bespeak limited faith in juries," *see* Alschuler, *supra* note 321, at 154, 162.

384. Minow and Spelman have noted, for instance, that a "judge who faces a controversial issue—such as whether a reporter should be forced to disclose to the prosecutor his source for a story about a murder—may want all the facts first. But what facts are relevant? . . . The decisions about what information should be secured before reaching judgment will influence what judgments remain to be reached." Minow & Spelman, *supra* note 209, at 47 (footnote omitted). Further, relational feminists see that additional information is often needed to respond in a caring mode. *E.g.*, Menkel-Meadow, *supra* note 30, at 51 ("Amy sees no reason why she must act as a neutral arbiter of a dispute and make a decision based only on the information she has.").

385. *E.g.*, *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Boyde v. California*, 494 U.S. 370 (1990); *Walton v. Arizona*, 497 U.S. 639 (1990). On occasion the Court's rhetoric obscures the passive role of the jurors, by inappropriately equating the jurors' access to information with that of a judge. *See, e.g.*, *Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992) (upholding the right of a capital jury to receive some information about First Amendment protected activity with authority related to a judge's authority to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

386. West, *supra* note 181, at 86. "Just as the curtailment of habeas rights shrank the sphere of judicial responsibility, the restriction on rights in the death penalty cases implicitly shrank the sphere of jurors' responsibility." *Id.*

d. No Regrets Allowed

Much of the power and seriousness of a death sentence comes from its finality.³⁸⁷ Although many stages of appellate and post-conviction review follow, the jurors' determination is final, for them. But the jurors do not stop pondering, wondering, and even praying about their decision after they are sent home: "I have never forgotten."³⁸⁸

In the summer of 1990, an Alameda County death penalty juror made news by contacting the district attorney to say that she had changed her mind. The prosecutor dismissed this as a simple case of "buyer's remorse." The vast machinery of capital appellate and habeas review allows virtually no room for capital juror doubts or changed perspectives. Yet juror doubts are widespread.³⁸⁹ "More than fourteen years after the trial, another juror who had switched her vote wept openly during the interview and prayed that she had done the right thing."³⁹⁰ In a case that received national attention, Warren McCleskey was executed over the objections of two of the jurors who sentenced him to die. Both jurors told the clemency board that they never would have sentenced McCleskey to death if they had known that the chief prosecution witness was a paid

387. See Giarratano, *supra* note 274, at 1005. For a feminist account of the need for opportunities for revision, see Resnik, *supra* note 46, at 1937: "[W]hile it must be noted that feminism is not an essential prerequisite to a sensitivity about the demands for reconsideration, feminist approaches might be a useful antidote in an era when pressures for closure are mounting." *Id.*

388. Stark Interview, *supra* note 41. "It was very important. I have since that time become a Christian which I was not at the time and I have even in retrospect prayed over it and hoped that I made the right decision." Smith Interview, *supra* note 159. "[I]t stays with you for a long time even though you've been dismissed, you mull over it and you think about the whole thing for months and months." *Id.* "[I]f he did die of natural causes, a heart attack, I'm glad because I do feel executions are very horrible things" *Id.*

389. Geimer and Amsterdam described one capital juror who remained conflicted about her role:

At first, she stated that, although she voted for life, she was glad the judge overrode the verdict because Johnson deserved death. Then she said: "But thinking back, I think everyone should be given a chance to repent and be forgiven. We should not kill them." The juror was still unsure about a decision she had made [nine years before the interview]. Was she "wishy-washy"? Marvin Johnson remains on death row, nearing the end of his available appeals.

Geimer & Amsterdam, *supra* note 124, at 36. Similarly, a juror in the Spengelink trial regretted having been convinced to change his vote to death: "He concluded, after thinking about the trial over the years, that he had done the wrong thing and should have stuck with his vote for life. He said he was sorry Spengelink had been executed when so many others who deserved it more escaped death." *Id.* at 46 n.199. I interviewed only one juror who acknowledged serious doubts about the sentence imposed; in his case the sentence was life without possibility of parole, but the juror continued to have serious doubts about the defendant's guilt. He described the defense as "the poorest show I have ever seen." Dalrymple Interview, *supra* note 194.

390. Geimer & Amsterdam, *supra* note 124, at 46.

informant.³⁹¹ Capital defense attorney Stephen Bright describes the case of a mentally retarded man, Horace Dunkins, who was executed in 1989 in Alabama over the objections of one of his jurors: "A person who had served as a juror at his trial, upon reading about Dunkins' retardation immediately before he was to be executed, attempted to contact the governor of Alabama, saying she would never have voted for the death penalty if she had known of his mental limitations."³⁹²

A judge, of course, loses authority upon leaving the bench.³⁹³ The situation of the capital juror is different; she has rendered a moral judgment, the authority for which comes from her conscience, not her employment. As the case winds its way through appellate and post-conviction procedures, the actual flesh and blood juror is forgotten. The prime motivation of jurors who answered my inquiry was intense curiosity to find out whatever had happened: "You feel as if you have done something, you've been told 'thank you, you're now excused,' and then you never know what happens. It's like baking a cake and putting it in the oven and walking out and never knowing It's sort of a half-done job."³⁹⁴ The actual juror is forgotten and replaced by a symbolic representation, a fictional reasonable juror, who speaks for the juror in responding to changed circumstances.³⁹⁵

The actual jurors continue to provide moral grounding for the sentence, even when the facts or the law on which the juror rested her decision have been proven erroneous. *Herrera v. Collins*,³⁹⁶ the Court's recent opinion on whether the Constitution forbids the execution of an innocent person, reveals that any sense of the continuing moral weight on the jurors who have rendered a death verdict is absent from judicial consideration. The Court avoided a direct holding by assuming, "for the sake of argument, . . . [that] a truly persuasive demonstration of

391. Stefanie McArdle, *Ruling on McCleskey Sent a Chilling Message to Death Row*, STAR TRIBUNE, Nov. 1, 1991, at 21A.

392. Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 858-59 (1992) (citing Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6).

393. Two significant examples of the regrets of judges after leaving the bench are former Justice Lewis Powell's widely reported regrets about his vote in *Bowers v. Hardwick* and former California Supreme Court Justice Frank Newman's unsuccessful public efforts for clemency to Robert Alton Harris based on mitigating evidence not available to the California court (including Newman) when it affirmed Harris' death sentence. Of course, a sitting judge retains the authority to reach new conclusions. *See, e.g., Callins v. Collins*, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").

394. Stark Interview, *supra* note 41.

395. An unintended positive consequence of the *Clemons* appellate sentencing doctrine, *see supra* text accompanying notes 203-09, is that it shifts the moral responsibility away from the jurors once errors are discovered in the grounds on which the jurors had reached a decision for death. In a sense, the jurors' moral determination is erased and appellate responsibility substituted.

396. 113 S. Ct. 853 (1993).

'actual innocence' made after trial would render the execution of a defendant unconstitutional,"³⁹⁷ but determined that Herrera would not meet such a burden. Herrera was not legally innocent because the jury's verdict against him converted him from "presumed innocent to . . . guilty beyond a reasonable doubt."³⁹⁸ Herrera was not factually innocent because the "extraordinarily high"³⁹⁹ factual showing necessary to overturn the jury's verdict was not met by newly discovered evidence that the wrong brother had been convicted.⁴⁰⁰

Given that the facts presented at trial are the moral anchor for a juror's decision to impose death, the Court is remarkably breezy about the problem of changed facts: "[F]ederal habeas courts exist to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."⁴⁰¹ A capital juror might be taken aback at the Court's preference for finality over certainty of guilt: "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."⁴⁰² Justice Scalia's certainty of what he characterizes as the "embarrassing" conclusion that the Constitution does not protect an innocent man from execution⁴⁰³ would be even more disconcerting to the capital juror. Such judicial insouciance is utterly out of step with the continuing moral weight expressed by conscientious capital jurors. The sense of moral responsibility lingers, but once the verdict is rendered, the jurors' power to impact the execution has disappeared.

These manifestations of limited power are the most tellingly feminine aspects of the gendered capital jury. The promise of reform comes from allowing the jury a more authoritative role, thus uncaging the jury from the limits of its current feminine construction.

B. The Non-Gendered Jury

Martha Minow and Elizabeth Spelman have called upon us to make judges human.⁴⁰⁴ Certainly judges kept to the male side of the multi-layered male/female dichotomies have been rendered less than fully human. Associating the feminine virtues of emotionality, moral leavening, and personal relatedness with juries prevents us from acknowledging and indeed insisting that emotionality and moral leavening

397. *Id.* at 869.

398. *Id.* at 860.

399. *Id.* at 869.

400. The newly discovered evidence of Herrera's innocence that the Court found insufficient included affidavits from an attorney and from a former cellmate that Herrera's brother had confessed to the murder, and an affidavit from the brother's son that he had seen his father, not Herrera, commit the murder. *Id.* at 658.

401. *Id.* at 860.

402. *Id.* at 861.

403. *Id.* at 876 (Scalia, J., concurring).

404. Minow & Spelman, *supra* note 209.

are inevitable and valuable aspects of judging as well.⁴⁰⁵ Judges have emotions too, and are no more disabled from using them than lay people.

The gendered constructions of judge and jury also prevent jurors—from the female, personal side of the dichotomy—from being fully human.⁴⁰⁶ The multiple female sides of the jury are interrelated and reinforcing. Inscrutability is assumed to flow inevitably from visceral, or emotional, determinations. But the premise that emotional moral reasoning cannot be explained, controlled, or trusted is not true. Increased authority for a juror could replace mystery and romance, without eliminating the power of emotions or the freedom in discretion that the jurors now enjoy. If we can trust jurors to choose life or death for a defendant, we can trust them to exercise some control about how they make that determination. Jurors do not speak in court at all, and never explain themselves. Jurors are never allowed to talk directly with the defendant or with the survivors of the crime.⁴⁰⁷ If ordinary people are to be trusted to make an awesome moral decision, then perhaps they should be allowed to ask their own questions, to seek their own information. Show them respect by bringing some order to the process by which they deliberate.⁴⁰⁸ Let them render a statement of decision. Consider permitting them to change their minds.⁴⁰⁹ Breaking down the dichotomy of gender allows the jury to become more human, and makes the jury determination more worthy of respect.

Breaking down the dichotomy of gender requires challenging the surprising claim that benefit is derived from handing capital sentencing to people who are not accountable for the result.⁴¹⁰ We trust the powerful

405. See David Margolick, *Is It OK for a Judge to Weep in Court for the Victim?* (n.p., n.d.) (describing affirmation of judgment where the sentencing judge, a woman, wept in court in response to the victim's rejection of vengeance).

406. Dichotomized thinking makes the jury less than fully human by assigning to the judge the human qualities of distance, authority, and reason. Just as importantly, if more subtly, dualistic categories prevent the jury from being fully emotional, personal, and contextual because the jury is understood to already embody those qualities simply by comparison to the judge.

407. See NODDINGS, *supra* note 16, at 2-3 ("Faced with a hypothetical moral dilemma, women often ask for more information. We want to know more, I think, in order to form a picture more nearly resembling real moral situations. Ideally, we need to talk to the participants, to see their eyes and facial expressions, to receive what they are feeling.").

408. One juror summarized his frustrations with the chaotic and often nonsensical deliberations: "It is not simply the decision that is important, it is the decision-making process." Quinlan Interview, *supra* note 192.

409. That could be accomplished by allowing jurors standing to challenge death sentences by way of habeas corpus.

410. Judge Learned Hand on jury trials:

The institution of trial by jury . . . has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously into the community from which they came.

who acknowledge their power, rather than hide it.⁴¹¹ Many capital jurors experience very little power or authority. “[I]t was like you almost did not need us.”⁴¹² Giving this decision to such disempowered decisionmakers insulates and hides the power and violence of the decision, diffusing the responsibility.⁴¹³ Providing more authority to jurors offers the promise of making a death penalty jury in fact the bulwark of democracy that it is already said to be.⁴¹⁴

United States v. Adams, 126 F.2d 774, 775-76 (2nd Cir. 1942); cf. JAMES G. COZZENS, *THE JUST AND THE UNJUST* (1942) (novel in which character Judge Philander Coates explains that judges would not be allowed to render the unpopular decisions that juries can render).

411. Minow and Spelman suggest as one of their guidelines for judges that the judge should recognize and acknowledge that power he or she has over the lives of others in the act of judgment, and, if the judge does not experience such power, the judge should reflect on why not, despite the actual effects of the decision he or she will make.

Minow & Spelman, *supra* note 209, at 57-58.

412. Stark Interview, *supra* note 41. Some jurors denied that they experienced much power because the appropriateness of a death verdict was so clear-cut to them: “[The experience] wasn’t powerful to me. This man did it. He should be eliminated. He deserves it.” Hofeller Interview, *supra* note 41. “It was a minor experience.” *Id.*

413. See Cover, *supra* note 21, at 1626-27 (noting that if judges had to persuade wardens of the correctness of the execution, “the warden and his men would lose their capacity to shift to the judge primary moral responsibility for the violence which they themselves carry out”); see also *id.* at 1627-28 (asserting that no judge acts alone).

One juror preferred a jury to a judge imposing the sentence in capital cases because the use of the jury forces members of the public to confront their support for capital punishment: “[I]f the judge does it then [the people are] off the hook.” Stark Interview, *supra* note 41; see also *People v. Silva*, 754 P.2d 1070, 1091 (Cal. 1988) (trial judge refused to answer juror question about appeal of death sentence on grounds that it would “suggest . . . an easy way out to the jury and allow . . . them to think in terms of the Pontius Pilate theory, ‘I wash my hands of it.’”).

414. The Supreme Court called jury determination of capital penalty a “bulwark between the accused and the State,” *Spaziano v. Florida*, 468 U.S. 447, 462 (1984), while refusing to hold that such a bulwark was constitutionally required. In dissent, Justice Stevens argued “that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.” *Id.* at 468-69 (Stevens, J., dissenting); see also Hans, *supra* note 55, at 149 (use of jury for capital sentencing is “important limit on state power”); cf. *THE FEDERALIST* No. 83 (Alexander Hamilton) (jury trial as protection against corrupt and arbitrary governmental power); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (rev. ed. 1986) (“[E]nthusiasts of the jury have tended to lapse into sentimentality and to equate literally the jury with democracy.”); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 849 (1984) (“Giving power to jurors is a decision to democratize the decisionmaking process, to provide an alternative to the perceived autocracy of judges.”); *id.* at 850 (“Vesting power and authority in identifiable decisionmakers enables the state to personify its authority, thus making the state more readily understood, accepted and obeyed. The grant of power to the jury gives meaning to a promise of democracy: the people are the state.”).

V. CONCLUSION

Capital jurors are ordinary people called upon to decide whether another person should be killed. Gayle Daniels is one such ordinary person; Patricia LeMay another. They served together on a capital jury in Georgia in 1984. Ten years later William Henry Hance was executed over their objections.⁴¹⁵ Daniels, the lone Black on Hance's jury, said that she had never voted to execute Hance because of his multiple mental disabilities. Ms. Daniels insisted that she had been a holdout for life, under pressure to end deliberations before Mothers' Day. Ms. LeMay, a white woman, corroborated Ms. Daniels' account, and added her own report of repeated racist comments made by other members of the jury about both Ms. Daniels and Mr. Hance, also Black. Three members of the Court voted to stay Hance's execution on the basis of these jurors' account, but failed to find the requisite fourth.⁴¹⁶ The execution proceeded, for, as the prosecutor reminded the international press, by law jurors cannot challenge their own verdict.⁴¹⁷

Although scholarly attention to capital punishment is vast, and seemingly multiplying almost as rapidly as the number of people on death row,⁴¹⁸ little of that commentary pays attention to the capital juror. Feminist method redirects the focus to capital jurors, including Ms. Daniels and Ms. LeMay, and partially explains why they are overlooked in death penalty commentary and peripheral to post-conviction proceedings. Recognition of the hidden grip of gender helps to explain why jurors such as Gayle Daniels and Patricia LeMay are used to make this moral decision, and how they might be allowed to do a better job. Feminist theories of gender provide a structure for acknowledging strength in the discretion, connection, and emotion within jurors' reasoned moral responses to life or death. Liberating legal doctrine and method from dichotomies of gender⁴¹⁹ promises reform for virtually every area of legal doctrine, even one as well-scrutinized and apparently far-removed from feminist concerns as death penalty law, the law for deciding to kill.

415. See generally Peter Applebome, *Georgia Executes Murderer After Brief Stay from Court*, N.Y. TIMES, Apr. 1, 1994, at A14; Bob Herbert, *In America: Judicial Coin Toss*, N.Y. TIMES, Apr. 3, 1994, at D11; Bob Herbert, *In America: Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

416. *Hance v. Zant*, 114 S. Ct. 1392 (1994) (Blackmun, J., dissenting). Justices Stevens and Ginsburg also dissented from the denial of a stay of execution.

417. Peter Applebome, *Stay Lifted; Execution Proceeds*, N.Y. TIMES, Apr. 2, 1994, at A6.

418. The comparable increase often seems the main connection between the two worlds.

419. Cf. Cole & Coultrap-McQuin, *supra* note 73, at 8 ("We envision an ethic based on a conception of the person that embraces emotion alongside rationality, intersubjectivity as well as autonomy, and particularity in addition to abstract human value.").