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Joan W. Howarth

University of Nevada, Las Vegas -- William S. Boyd School of Law

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REVIEW ESSAY: FEMINISM, LAWYERING, AND DEATH ROW

JOAN W. HOWARTH*

CROSSED OVER: A MURDER, A MEMOIR. BY BEVERLY LOWRY.
NEW YORK: ALFRED A. KNOPF, 1992.

I. INTRODUCTION

Representing men on death row is confounding, but not without reward. This lawyering work has taught me at least two lessons, which are the subjects of this essay. First, capital punishment—our attempt to use legal procedures to kill people fairly—is a feminist issue, or should be. Second, death row representation is too big a job for lawyers; we need to recruit poets. To develop these ideas, and perhaps to convince you without requiring you to undertake the same path to these conclusions, I am appropriating novelist Beverly Lowry's stunning new book, *Crossed Over: A Murder, A Memoir*.¹ *Crossed Over* is the story of Lowry's friendship with Karla Faye Tucker, a woman on death row in Texas.² Lowry is the poet on Tucker's team. The publisher instructs booksellers to place *Crossed Over* on the "Memoir" or "True Crime" shelf. If shelves were built for "Insights into Death Row Representation," or even "Illustrations of Relational Feminism," *Crossed Over* would belong there as well.

* Associate Professor of Law, Golden Gate University.

I currently represent two men in their appeals of death judgments. My ideas about feminism and the death penalty have been strengthened through conversations with many people, especially Pat Clark, Kendall Goh, Martha Kegel, and Barry Williams. Leslie DiMario, Eric Ferraro, and Asha Khosla provided excellent research assistance. Beverly Lowry presented portions of *CROSSED OVER* at "Feminist Practice: Representation in Law and Literature," the Orgain Lectureship at the University of Texas School of Law, March 2, 1991, which I attended by means of generous support for faculty development from Golden Gate University. I am especially grateful to Isabelle Gunning, Susan Rutberg, and Carol Sanger for their comments on an earlier draft of this essay.

1. BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992).

2. See *Tucker v. State*, 771 S.W.2d 523 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 912 (1989).

II. KARLA FAYE TUCKER AND BEVERLY LOWRY

My focus on a book about a woman on death row is a bit of a trick to catch your attention. The apparent contradiction in my claim that the death penalty deserves feminist attention is that we execute men, but very few women.³ In fact, executions of women are becoming more and more rare.⁴

This gets trickier. The reason Karla Faye Tucker is on death row is not that she killed, but that she killed like a man. In fact, that is how most women on death row make their way there.⁵ Is this the sameness/difference debate in an evil setting?⁶ What can a feminist say about a

3. For example, of the 2636 people on death row in the fall of 1992, 41 (or 1.56%) are women. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Fall 1992). Of the 184 people executed since January 1, 1973, only one (Velma Barfield, executed by North Carolina on November 2, 1984) has been a woman. *Id.* Of the 341 people on California's death row, three are women. *Id.* See also Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 504-05 (1990) ("One in eight persons arrested for murder is a woman, but only one death row inmate in a hundred is a woman. Male murderers are twenty times more likely to be death sentenced than female murderers.") (citations omitted) [hereinafter Rapaport, *Some Questions*]; Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367 (1991) (arguing that though there are few women on death row, the numbers are "commensurate with the infrequency of female commission" of capital punishment crimes) [hereinafter Rapaport, *Death Penalty*]; Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845 (1990) (presenting exhaustive historical and current data on women who have been sentenced to die).

Our constraints against executing women are informal and largely unspoken. By contrast, India's laws explicitly provide that a woman's gender weighs against her being executed, and a proposed 1988 amendment to the Soviet Union death penalty law would have codified a prohibition of the death penalty for female offenders. *Id.* at 880 & n.105.

4. Professor Streib notes that:

The practice [of executing] women grew steadily with the increase in population, from forty-six executions in the seventeenth century to 110 executions in the eighteenth century to 198 executions in the nineteenth century. The startling fact is that this practice plummeted to only thirty-nine cases thus far in the twentieth century.

Streib, *supra* note 3, at 855. In another article, Professor Streib concludes that "[t]he death penalty for female offenders has always been rare and is becoming rarer." Victor L. Streib, *Death Penalty for Battered Women*, 20 FLA. ST. U.L. REV. 163, 184 (1992).

5. While some of the recently sentenced females committed their crimes with accomplices, the females typically were proven to be the dominant actor in the group. . . . Their crimes tended to be horribly violent felony-murders. Indeed, their crimes and behavior could be characterized as more like those of male killers than female killers. . . .

Streib, *supra* note 3, at 879. See Rapaport, *Some Questions*, *supra* note 3, at 513 (stating that, "women who commit high severity offenses are treated more harshly than similarly situated men: they are punished for violating sex role expectations in addition to being punished for their crimes").

6. The core debate amongst feminists about the extent to which women are the same as, or different from, men rarely includes discussion on the capacity of women to achieve "male" brutality. See generally CAROLYN G. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY (1973); THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990) [hereinafter THEORETICAL PERSPECTIVES]; Lori S. Kornblum, *Women Warriors in a Men's World: The Combat Exclusion*, 2 LAW & INEQ. 351 (1984) (all focusing on women's capacity for "male" strengths); Sara

young woman who fantasized—"dreamed" is too innocent—about becoming the first female hit man in the Mafia?

As told by Beverly Lowry, Karla Faye Tucker's story is about these "tough-guy" dreams of a white Texas girl.⁷ As a child, Karla⁸ dreamt of being the first female quarterback in the NFL. She could fight with her fists. She started taking drugs at age eight. Her first injection of heroin was offered by her older sister's boyfriend, who imagined that sex with ten-year-old Karla would be his reward for shooting her up.⁹

Karla's world was an outlaw biker world of drugs, rock and roll, and sex. Like her mother, Karla got what she wanted—money, independence, drugs—from selling sex. Her men were real men—men who drove Harleys. Lowry describes Karla as a "badass enforcer who lived by the tough-guy code and saw to it nobody, but nobody, harmed the people she loved."¹⁰

Karla met the love of her life, Danny, "in the waiting room of their prescription doctor, who for twenty dollars and a feel would write you any prescription you wanted."¹¹ Danny promised Karla he could train her to be the first woman hit man in the Mafia. Lowry describes how Danny trained Karla: "Teaching her until she made the switch. Became no longer prey. Became predator."¹²

Together, Danny and Karla committed an excruciatingly brutal double murder. Using a pickax and a hammer, they killed an acquaintance who had wronged them and the woman who happened to be

Ruddick, *Maternal Thinking*, 6 FEMINIST STUDIES 342 (1980); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (both discussing the existence and value, if any, of female virtue).

7. Given the prevalence of people of color on death row and the centrality of issues of race to any understanding of capital punishment, an essay by a white law professor reviewing a book by a white author about her friendship with a white woman on death row is a bit of a trick as well. See *All Condemned Prisoners Don't Get Same Help*, ATLANTA J. & CONST., May 18, 1992, at A3 (discussing concern that media paid attention to death row prisoner Roger Coleman because he was white and articulate); Tony Mauro, 'Time is Running' Out: Many Troubled By Ultimate Penalty, USA TODAY, May 20, 1992, at 1 (suggesting that Roger Coleman received such media attention as a TIME cover story in part because he was white). For an Afrocentric study of a Black man's execution, see WILLIAM M. KING, GOING TO MEET A MAN: DENVER'S LAST LEGAL PUBLIC EXECUTION, 27 JULY 1886 (1990).

8. I use "Karla" and "Beverly" when describing their stories, but "Tucker" and "Lowry" when discussing their roles as criminal defendant and author, respectively.

9. Although the drug-free Karla Tucker who emerges is the central character of this book, Lowry is too subtle to press the point that Texas executes by lethal injection.

10. LOWRY, *supra* note 1, at 127.

11. *Id.* at 37.

12. *Id.* at 50.

spending the night with him. The legal motive was robbery; after killing their victims, Karla and Danny carried off the Harley motorcycle for Karla to use in rebuilding her bike.

Lowry's words leave no escape: the brutality of Karla Tucker's crime was astonishing. But according to the trial judge, a woman, the pickax was not what riveted Houston and made this crime sufficiently sensational for the prosecutor to successfully seek death against a woman. It was also Karla's cold, outrageous, astounding claim that killing the victims gave her an orgasm.¹³ Audio tapes of Karla's boasts are part of the trial record¹⁴ and of Lowry's story. Lowry tells us that Karla "sounds chillingly hard and tough, with a bone-hard Texas accent. She is cold and unfeeling, nothing at all like the girl she is today. Listening, you have to wonder, so where *were* her feelings in those days—lost, buried, or what?"¹⁵

To murder with hammer and pickax for Harley parts, and then to gloat about deriving sexual satisfaction from the murder, sounds evil. More than that, it sounds like *male* evil. Here is the blatant connection between brutality and sex that many feminists maintain is part of being a man.¹⁶ This is the ugly flip-side of gender break-through.

Through her murders, Karla Faye Tucker transcended her gender. Her deed was incomprehensible and sufficiently inhuman to strip away her identity as a person who deserves to live; as a woman. Karla's jury needed only three hours of deliberation to reach a death verdict. Karla's awful crime transformed her into an object of horror, a symbol of evil who had lost her claim to humanity.

13. Karla used slang, stating that the killing caused her to "get a nut." *Id.* at 155.

14. The chief prosecution evidence was a tape secretly recorded by Danny's brother, after he and his then-girlfriend, Karla's sister, decided to turn in Danny and Karla. On the tape, the brother asked Karla whether she actually derived sexual pleasure from the killing. She answered, "Well, hell yes." At the end of his argument, the prosecutor asked rhetorically whether Karla deserved death, and then played what Lowry describes as her "brash, drug-husky" answer from the tape. *Id.* at 180.

15. *Id.* at 92.

16. See, e.g., ANDREA DWORKIN, *INTERCOURSE* (1987); BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 122 (1984) ("The fate of many young black men in this society, whose lives are characterized by cycles of violence that usually climax in the death of others or their own deaths, epitomizes the peril of trying to actualize the fantasy of masculinity that is socially constructed. . . ."); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-47 (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127 (1989) ("The male sexual role . . . centers on aggressive intrusion on those with less power. Such acts of dominance are experienced as sexually arousing, as sex itself.") [hereinafter MACKINNON, *TOWARD*]; see also JOHN STOLTENBERG, *REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE* (1989); cf. MYRIAM MIEDZIAN, *BOYS WILL BE BOYS* (1991) (presenting strategies to break link between masculinity and violence); JUNE STEPHENSON, *MEN ARE NOT COST-EFFECTIVE: MALE CRIME IN AMERICA* (1991) (discussing crime as male phenomenon).

At first, novelist Beverly Lowry,¹⁷ too, was grabbed by Karla Tucker as a symbol. Beverly could not put aside a photograph of Karla from a Houston newspaper. The reporter's account of Karla's evil crime, juxtaposed with the newspaper image of Karla in jail, in which she appeared as an image of goodness, captivated Beverly. Although Lowry uses the ungendered labels of evil and good, the transformation also follows well-entrenched gender roles. Karla in prison is sweet, affectionate, and loving. In short, she is exactly how most people think a girl should be.

The photo stayed with Beverly at a time when she was reeling, almost overcome, by the pain of her teenaged son's death in a hit and run incident. "The state I was in at the time, I envied her. I wondered if you had to go to jail to get calm again."¹⁸

Beverly wanted to meet the girl whose life swung from darkness to hope. Beverly's son's death was a sudden blow that hadn't stopped. "Dead is dead. I had to figure out a way to swallow that."¹⁹ When Beverly first noticed Karla's picture, Karla was already condemned, legally near death, although that was never how she acted. Beverly found Karla at a time when Beverly was struggling with questions about death and redemption. For Beverly, choosing to meet and befriend Karla meant taking some control, being willing to risk losing someone else, and perhaps simply being willing to risk.

Crossed Over is stunning not simply because Karla Faye Tucker's life—her bone-chilling past and her loving, decent present—is described so powerfully. Lowry faces herself, too, and this odd friendship. *Crossed Over* is about Beverly and Karla and what they mean to each other.

The story was Karla's voice. Her gestures, emphases, choices; which information she considered crucial and which beside the point; the order in which she brought some things up and avoided some others. The story was what I was doing on Death Row, what questions I asked and avoided and what her story did to and for me.²⁰

Karla's and Beverly's stories weave back and forth until the boundaries wear away.

17. Lowry's novels are *COME BACK*, *LOLLY RAY*, *EMMA BLUE*, *DADDY'S GIRL*, *THE PERFECT SONYA*, and *BREAKING GENTLE*.

18. LOWRY, *supra* note 1, at 13.

19. *Id.* at 186.

20. *Id.* at 143.

III. CARING ABOUT DEATH ROW

Legal theorists unaccustomed to valuing memoirs on their own terms might approach this book as an illustration of the ethic of care promoted by relational feminists.²¹ Do women care more? Robin West has described women's deep grounding in our capacity for connection: "Women's concept of value revolves not around the axis of autonomy, individuality, justice and rights, as does men's, but instead around the axis of intimacy, nurturance, community, responsibility and care."²² Similarly, moral philosopher Nel Noddings has built her philosophy of caring on values and methods inherent in what she also identifies as a female capacity for connection.²³ Noddings has applied her concept of caring specifically to the problem of punishing crime:

Suppose, for example, that we are considering appropriate punishment for one who has committed a particular crime. 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?"²⁴

21. Much of relational feminism is grounded in some way on the work of psychologists Nancy Chodorow and Carol Gilligan. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Legal scholarship building on relational feminist concepts includes: Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988); Sherry, *supra* note 6. For commentary adopting the label "relational feminism" to describe these ideas about women's differences, see, for example, Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS 119, 135 (1988), and Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-13 (1989) (critical of relational feminism).

The ethic of care is also 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 also Sandra Harding, *The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory*, in *WOMEN AND MORAL THEORY* 296 (Eva Feder Kittay & Diana T. Meyers eds., 1987).

22. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1988).

23. NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

24. *Id.* at 36-37. Noddings claims that the "feminine" approach that she identifies with the mother is neither accepted by all women or rejected by all men, or even necessarily more typical of women than men. *Id.* at 2. She has elaborated on how the traditional ethic of justice differs from her concept of an ethic of caring:

... The first 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 second 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.

Crossed Over is a literary (and almost literal) exhibit of Noddings' moral philosophy of caring. Beverly's identity as a mother informs her entire account.²⁵ Her passion to tell Karla's story is the passion to understand Karla's mother and cannot be separated from Beverly's need to tell the story of her son's life and death. Beverly writes as a mother who sometimes relates to Karla as if Karla was her child, sometimes as if Beverly was Karla's mother, which is different, and sometimes as if Karla was the one who killed Beverly's own child, which is very different.

Karla says I remind her of her mother sometimes. . . . "Your hands," she once said. "You have small hands like Mother." My hands are not small at all; I laid one hand against the plexiglas to show her. Karla placed hers against mine, through the plastic. "I thought they were small," she said.

We are locked together, she and I, in this odd union of forgiveness, guilt, and a rock-bottom faith in impulse and mystery.²⁶

Crossed Over illustrates not only the ethic of care, but a "methodology of care" as well. Lowry addressed herself to Karla's situation by talking with everyone who had anything to do with Karla's crimes, her case, and her life on death row. Lowry talked with all of these people and reported their mannerisms and words, searching to discover what Karla's situation meant to them and what each of them meant to Beverly herself. Lowry's personal searching models Noddings' caring approach to the issue of capital punishment:

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.²⁷

Noddings' ethic of caring rejects the overarching, neutral principles of conventional moral reasoning:

I do not begin by saying, "Capital punishment is wrong." Thus I do not fall into the trap of having to supply reasons for its wrongness that will be endlessly disputed at a logical level. . . . I may point to the irrevocability of the decision, but this is not in itself decisive, even for me, because in many cases the decision would be just and I could not

25. Noddings suggests that "[t]he father might sacrifice his own child in fulfilling a principle; the mother might sacrifice any principle to preserve her child." *Id.* at 37.

26. LOWRY, *supra* note 1, at 219.

27. NODDINGS, *supra* note 23, at 101.

regret the demise of the condemned. . . . [But] I should be able to respond to the condemned man's entreaty, "Help me."²⁸

Beverly Lowry responded to Karla Faye Tucker with help in the form of friendship but asserts no position on capital punishment.²⁹ *Crossed Over* is her story of responding to a newspaper photo of a woman on death row, becoming her loving friend, and writing about it.

Of course, connectedness has its risks. Perhaps the celebration of a mother's capacity to nurture is a not-so-new and still-dangerous trap for women.³⁰ The female values and methods that West and Noddings identify and celebrate are also used to justify our powerlessness.³¹ Nobody confuses willy-nilly emotional connectedness with strength.³² Even relational feminists acknowledge the potential ambush in exploiting women's capacity for connectedness. Carol Gilligan has conceded the trap of over-reliance on women's different voice:

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

28. *Id.* Similarly, Noddings argues that "[caring] does not say, 'Thou shalt not kill,' and then seek other principles under which killing is, after all, justified." *Id.*

29. Karla Faye Tucker also takes no position on capital punishment. Karla wants to be viewed as a person; she leaves to others the just response to her crimes. "We are not just these horrible things in here, we're normal people. We may have done a terrible thing, but we're humans. I don't mind dying for what I've done, but I would like that to be known." LOWRY, *supra* note 1, at 221.

30. Drucilla Cornell presents the dilemma this way:

If there is to be feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine "reality" that can be identified as such and correlated with the lives of actual women. Yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of color), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire.

Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 644-45 (1990).

31. See, e.g., SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD: VOLUME XIX, THE EGO AND THE ID AND OTHER WORKS 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"); Arthur Schopenhauer, *On Women*, in PHILOSOPHY OF WOMAN 228 (Mary Briody Mahowald ed., 1978):

The weakness of their [women's] reasoning faculty also explains why is it 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 honorable and conscientious. For it is just because their reasoning power is weak and 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.

32. For a discussion of the limitations of empathy itself, without grounding in principles to distinguish between objects of empathy, see Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

daughter, or friend. But the liability of women's development is . . . that women, possessed by the spirits of others, also are more likely to be caught in a chain of false attachments.³³

The risk of false attachment is nothing less than loss of one's self. Lowry's friends advised against visiting Karla Faye Tucker, the death row killer whose newspaper photograph somehow captured Lowry's imagination. Beverly herself sensed danger.

I did not want to go soft on this girl, I did not want to get *attached*, I wanted to keep Karla Faye Tucker at a safe remove.³⁴

Beverly's entanglement came at some risk; she did go soft. Is *Crossed Over* the diary of a false attachment?

Crossed Over answers the question. Karla's friendship helps Beverly to construct a new version of her own life after her son's death. Karla helps Beverly to be in the world again, and to understand the world more clearly. "We bring each other news, stories. Life."³⁵ Beverly's son's death was victimization; choosing to become friends with Karla was living again. Beverly did not lose her identity in this intense connection. Beverly did not disappear.

By describing *Crossed Over* as the ethic of caring in action, I do not mean to align Beverly Lowry, Karla Tucker, or myself to that particular strain of feminism. What Alison Jagger calls "valorizing women's differences"³⁶ is a noble and enabling reclamation project, with the thrill and excesses of any well-chosen romance. The thrill is the excitement of seeing our lives in a new light, the justice in putting women first. The excesses, however, include romanticizing motherhood,³⁷ replicating overly simplistic gender dichotomies,³⁸ universalizing as "female" the limited experiences of privileged women,³⁹ and ignoring broad social justice in favor of a narrow, isolated focus on personal traits or decisions.⁴⁰

33. Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY*, *supra* note 21, at 19, 32.

34. LOWRY, *supra* note 1, at 23.

35. *Id.* at 219.

36. Alison M. Jagger, *Sexual Difference and Sexual Equality*, in *THEORETICAL PERSPECTIVES*, *supra* note 6, at 239, 247.

37. See ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (10th anniversary ed. 1986).

38. See, e.g., Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453, 458 (David Kairys ed., 1990).

39. See, e.g., Celina Romany, *Ain't I a Feminist?*, 4 *YALE J.L. & FEMINISM* 23, 25-28 (1991).

40. See Marilyn Friedman, *Care and Context in Moral Reasoning*, in *WOMEN AND MORAL THEORY*, *supra* note 21, at 190, 202.

In fact, *Crossed Over's* excruciating details of life in the women's community of death row powerfully illustrate the risk of converting female culture into escapism within a hideous cage of powerlessness. Much of the life that Karla is making with her friends on death row is an almost infantilized⁴¹ parody of compelled feminine culture: cooking, sewing, and service to others. That the cooking includes a myriad of made-up recipes using cream cheese and Wyler's Cool-off drink mix (available from the commissary), that much of the sewing is a prison industry of "parole pal" cloth dolls made to customer specification, and that the service to others includes preparing outfits for each other's court appearances, could illustrate the radical feminist indictment that the women's culture celebrated by relational feminists is nothing more than accommodation to subordination.⁴²

Crossed Over is a manifestation of caring, not a manifesto. Lowry has created an important book about the political and legal controversy over capital punishment without a word about the policy principles that usually frame this debate. Instead, Lowry threw herself into Tucker's story and became not simply connected, but committed and devoted as well. By lovingly painting a picture of the young friend who is Karla Faye Tucker, Lowry chooses life for Karla Faye.⁴³ Lowry's readers will, too.⁴⁴

IV. EXECUTIONS AND FEMINISM

What of my insistence that feminists should spend precious resources—including these pages—considering death row? As Lowry acknowledged early on, "[I]f I needed a cause, there were plenty of far more deserving people out there to feel sorry for."⁴⁵ We live in a world

41. When Beverly met Karla in March of 1989, Karla was 29 but seemed more like a thirteen-year-old. LOWRY, *supra* note 1, at 25.

42. See, e.g., MACKINNON, TOWARD, *supra* note 16, at 51 ("[F]or women to affirm differences is to affirm the qualities and characteristics of powerlessness."); Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985); Williams, *supra* note 21, at 801 (criticizing relational feminism as "inaccurate and potentially destructive").

43. *CROSSED OVER* is dedicated "For Karla: long life."

44. The greatest benefit we owe to the artist, whether painter, poet, or novelist, is the extension of our sympathies. Appeals founded on generalizations and statistics require a sympathy ready-made, a moral sentiment already in activity; but a picture of life such a great artist can give, surprises even the trivial and the selfish into that attention to what is apart from themselves, which may be called the raw material of moral sentiment.

GEORGE ELIOT, *THE NATURAL HISTORY OF GERMAN LIFE* (1856) (quoted in JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 240 (1985)).

45. LOWRY, *supra* note 1, at 10.

in which women who have committed no crimes suffer unendurable violence. And even within our concern for imprisoned women, why focus on capital punishment when death row is roughly as open to women as the United States Senate? Why is the death penalty abolitionist community filled with so many strong feminists who might otherwise be engaged in projects benefitting women more directly?⁴⁶ I have come to believe that our choice of this work signals an authentic connection between feminism and opposition to executions,⁴⁷ not a false attachment.⁴⁸

My argument is *not* that feminists should oppose executions because violence is male, or because women's nature is nonviolent. Such claims obscure the more complicated and perhaps distressing reality.⁴⁹ Capital punishment is the kind of sanitized, institutionalized violence in which modern women and men participate from a safe distance.⁵⁰ As Robert Cover has reminded us, maintaining capital punishment requires that distance.⁵¹ Feminists should work against the death penalty not because women are nonviolent, but because the opposite is true. Opposition to executions is a political choice of women and men, all of whom have the capacity for violence and destruction.⁵²

46. Feminist legal academics also have contributed their share of death penalty commentary. See, e.g., Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973 (1985); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) [hereinafter Radin, *Cruel Punishment*]; Margaret Jane Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165 (1985) [hereinafter Radin, *Proportionality*]; Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases From the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990).

47. Conversely, the successful campaign to unseat former California Chief Justice Rose E. Bird was a powerful marriage between enthusiasm for executions and misogyny. See also DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 34 (1992) (recounting that then-law clerk William Rehnquist complained in a note to Justice Jackson that the "highest court of the nation . . . behave[s] like a bunch of old women" when addressing capital cases).

48. But see Radin, *Proportionality*, *supra* note 46, at 1175 (suggesting that energy given to death penalty concerns may "distract[] us from the real tragedy of everyday suffering").

49. See, e.g., Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L. J. 249, 256 (1992) (recounting that West's belief that "[w]omen aren't aggressive" or "violent by nature" clouded her ability to understand a lesbian battering). For a discussion of the risks of romanticizing women's differences, see *supra* notes 36-40 and accompanying text.

50. "[A]lmost all people are fascinated and attracted by violence, even though they are at the same time repelled by it." Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1613 (1986).

51. *Id.* at 1623-25.

52. bell hooks has made a similar point about militarism:

We who are concerned about feminism and militarism must insist that women (even those who are bearers of children) are not inherently non-violent or life-affirming. . . . We must insist that women who do choose (even if they are inspired by motherhood) to denounce

A variety of policy and theoretical reasons justify this political choice for feminists. The death penalty is a key aspect of current crime policy in the United States and feminists are actively engaged in policy debates about crime, especially as related to violence against women.⁵³ Yet, relatively little feminist work has focused on punishment for those crimes, except to reflect an uncritical attachment to incarceration by educating about the seriousness of crimes against women and promoting lengthier periods of incarceration for those convicted of such crimes.⁵⁴ Willingness to support executions (however reluctantly) has become such a powerful signifier for caring about crime victims that, to the extent that feminists decry violent crime without addressing feminist punishment or prevention issues, executions are done for us.⁵⁵

Yet, executions impede the feminist goal of reducing violent crime. Executions do not make the streets safer,⁵⁶ but they stand in for programs that could. Effective anti-crime programs—paid work leaves, more accessible child care, and community dispute-resolution programs⁵⁷—sound remarkably like feminist programs, irrespective of their impact on crime. The ritual execution of a person is such a powerful symbolic act that it has become a substitute for, and thus an impediment to, implementation of these more effective policies. In other words, even

violence and domination and its ultimate expression, war, are political thinkers making political decisions and choices.

HOOKS, *supra* note 16, at 128. See also CLAUDIA KOONZ, *MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS* (1987) (discussing participation of women in Nazi Germany); ADRIENNE RICH, *For Ethel Rosenberg, in A WILD PATIENCE HAS TAKEN ME THIS FAR: POEMS 1978-1981*, 26, 29-30 (1981):

since if I imagine her at all
I have to imagine first
the pain inflicted on her by women
her mother testifies against her
her sister-in-law testifies against her
and how she sees it[.]

53. The most influential work includes SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); SUSAN ESTRICH, *REAL RAPE* (1987); DEL MARTIN, *BATTERED WIVES* (1976); *FEMICIDE: THE POLITICS OF WOMAN KILLING* (Jill Radford & Diana E.H. Russell eds., 1992) [hereinafter *FEMICIDE*].

54. E.g., BROWNMILLER, *supra* note 53, at 426.

55. Similarly, bell hooks has reminded us that much male violence is exerted "for" women: "Often a male hero has to exert harsher violence to subdue a villain. . . . His acts of violence in the interest of protection are seen as a gesture of care, of his 'love' for women and his concern for humanity." HOOKS, *supra* note 16, at 123.

56. Most proponents of the death penalty justify it on moral grounds. Some studies suggest that executions provoke homicides rather than deter them. See WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* 271-336 (1984) (evaluating data related to deterrence or brutalization from executions).

57. See, e.g., ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 276 (1985).

if feminists are solely concerned with slowing violence against women, dislodging the death penalty would help.⁵⁸ Perhaps this is merely another illustration of bell hooks' admonition that "efforts to end male violence against women will succeed only if they are part of an overall struggle to end violence."⁵⁹

Not only are executions powerful symbolic rituals that distract from feminist programs, but the ritual itself is deeply gendered. Capital punishment, using law to kill people, is gendered even though—or perhaps because—death penalty laws are overwhelmingly used to kill men.

Feminism is a theory for understanding the gender of law, even when it is not directly pointed at women.⁶⁰ Ngaire Naffine has explained why feminist critiques of the law are not limited to a narrow class of issues:

[The problem for women] is that law presents itself in a way which is specifically designed to demonstrate its essential neutrality in relation to the sexes (and other social categories) while in fact the very mode of its self-presentation is deeply gendered. . . . In other words, the concepts invoked by law to demonstrate its essential justness—concepts such as 'impartiality,' 'objectivity,' and 'rationality,' are gender-biased in their very construction.⁶¹

The looming questions of power and morality in capital punishment make it a prime candidate for the feminist project of revealing the gender in avowedly gender-neutral legal doctrines and procedures. Robert Cover wrote about the death penalty in part because he understood that

58. In addition, feminists might offer better ways to spend the money currently expended trying to kill people. See Stephenson, *supra* note 16, at 20 (suggesting that male crime costs taxpayers too much money and pointing out that abolishing the death penalty would save millions). See also Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985) (assessing the financial cost of capital punishment).

59. HOOKS, *supra* note 16, at 123. In the same chapter, "Feminist Movement to End Violence," bell hooks credits feminists with successfully calling attention to the need to end male violence against women, but suggests that "[b]y concentrating solely on ending male violence against women, feminist activists may overlook the severity of the problem." *Id.* at 119.

60. See, e.g., MACKINNON, TOWARD, *supra* note 16, at 238 ("In the liberal state, the rule of law—neutral, abstract, elevated, pervasive—both institutionalizes the power of men over women and institutionalizes power in its male form."); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 892 (1989) ("Thus, legal language and reasoning is gendered, and that gender matches the male gender of its linguistic architects.")

61. NGAIRE NAFFINE, *LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* 3 (1990).

"[c]apital cases . . . disclose far more of the structure of judicial interpretation than do other cases."⁶² The raw power of law is most extreme when it is used to kill people.⁶³

The execution is a ritual by which law-abiding people reclaim power from criminals.⁶⁴ Capital punishment objectifies in two directions. It idealizes the legal system as powerful and just, and it transforms the person being executed from a flesh and blood human being into a symbol of evil.⁶⁵ Capital punishment converts persons who have (usually) committed terrible crimes into symbolic, ritualized objects of sacrifice. This symbol of evil⁶⁶ is eradicated to make us feel as though we are doing something powerful in the face of overwhelming, frightening acts of violence. The victimizer becomes the victim. Why do so few women fill this particular victim role?

Efforts to discover why women are rarely sentenced to death are just beginning.⁶⁷ My partial explanation for the relative lack of women on death rows is the bad fit between commonly understood images of what it means to be a woman and the symbolic role of the person being put to death. In other words, what it means to be a woman does not match what it means to be a person deserving of execution.

The person to be executed becomes an objectified symbol of powerful, inhuman evil. Although women are often identified with evil,⁶⁸ women are infrequently given the particular symbolic role of condemned prisoner for two interrelated reasons: (1) unlike men, we rarely have the power to frighten; and (2) we are not as easily separated from our

62. See Cover, *supra* note 50, at 1623.

63. Robin West suggests that "feminist legal theorists should keep our focus on patriarchal violence. . . ." Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 62. I am arguing that executions are a form of patriarchal violence.

64. The indictment against Karla Tucker charged that her crime offended "the peace and dignity of the state."

65. See KING, *supra* note 7, at 155 (stating that "capital punishment is the ultimate form of dehumanization").

66. See, e.g., *id.*, at xiii (suggesting that the "a priori assignation of evil to black in Western culture and society" influenced the Black defendant's fate).

67. Professor Streib suggests that the infrequency with which women are condemned to die suggests inherent gender bias in favor of women, in addition to the fact that women tend to commit fewer and less heinous crimes. Streib, *supra* note 4, at 193; Streib, *supra* note 3, at 874-77. Professor Rapaport presents a more explicitly feminist interpretation of the data, suggesting that capital sentencing for a woman is "rare" and "anomalous" not because of some gender discrimination that disadvantages men, but because "women rarely commit the kinds of murders that are subject to capital punishment." Rapaport, *Some Questions*, *supra* note 3, at 509. She concludes that the "limited information available suggests that women may be reaping both the rigors of equality and the detriments of the widespread suspicion of privilege." *Id.*

68. E.g., NEL NODDINGS, *WOMEN AND EVIL* 35-58 (1989).

humanity as are men. The potential for a particular woman to break through this symbolic gender incompatibility is bound up with her crime, race, and economic status, and perhaps her sexual orientation as well.⁶⁹

The first issue is power. Because executions are public rituals by which the law-abiding population reclaims power from criminals, the person to be executed must embody some kind of power. Executing a woman does not feel sufficiently powerful for it to relieve us of much anxiety about personal safety.⁷⁰

Which women have embodied sufficient power to frighten, thereby breaking through the gender barrier? Since death sentences resumed following *Furman v. Georgia*⁷¹ in 1972, seventy death sentences have been imposed on sixty-seven girls and women, one of whom has been executed.⁷² As discussed above,⁷³ most of these women were convicted of murders that seemed more characteristic of men than of women. Karla Tucker is typical of the pattern. Karla's evil was stereotypically male. Karla's transformation has confused the picture. Now that she is good, has somehow reverted to being a regular girl, support for her execution has diminished.⁷⁴ Karla's power to frighten was wrapped up with her cloak of male bravado. Karla's current state of sweet girlishness makes many people squeamish about executing her. Men who find religion and lead decent lives on death row still carry with them the implicit threat of their maleness.

The historical record suggests a different kind of frightening power. Many of the women who were executed committed crimes that are more easily understood as women's crimes. Almost half of the 400 or so

69. See Victoria A. Brownworth, *Dykes on Death Row*, THE ADVOCATE, June 19, 1992, at 82, 84 (reporting that "[o]ut of the nation's 41 female death-row inmates, at least 17 are lesbians, and three of these women were sentenced this year"); Ruthann Robson, *Legal Lesbicide*, in FEMICIDE, *supra* note 53, at 40 (discussing "legal murder of women because of their lesbianism" within European and Anglo-American legal history).

70. In other words, in my vision, the Senate and death rows are both filled with men because few women have the power to command leadership or the power to command fear.

71. 408 U.S. 238 (1972).

72. See Streib, *supra* note 3, at 867. Of "the sixty-four cases in which race is known, 70% were white and only 25% were black. One American Indian, Doris Foster in Maryland, received two death sentences (1982 and 1984) but in 1986 her sentence was commuted to life in prison." *Id.* at 869.

73. See *supra* note 5.

74. The brother of one of Karla's victims is now opposed to her execution: "What I saw when I spoke to her . . . was something totally different from what I saw eight or nine years ago when the trial was going on." *Texas Set to Execute First Woman Since 1863*, N.Y. TIMES, June 21, 1992, at 17.

women executed in this country since 1632 were slaves.⁷⁵ The majority of these were executed for killing their master, mistress, or a member of their owner's family, usually by poisoning them.⁷⁶ The kitchen slave's ability to poison her owner—silently, slowly, with no signs of anger or violence—gave her what appeared to the law as truly frightening power.⁷⁷ What other crime embodied frightening power in women? After homicide, the crime for which most American women have been executed is witchcraft.⁷⁸

The second crucial symbolic requirement for a person to be fairly executed is potential for dehumanization. An execution has legitimacy if the person being executed is easily perceived as inhuman.⁷⁹ Not only are few women sufficiently frightening to make executing us an exercise of real power, but many women are less easily dehumanized than men because of our more readily recognized relational bonds.⁸⁰ Consider the petition to the Governor signed by thirty men on California's death row volunteering to draw straws to be executed in the place of Eithel Spinelli, who was executed by California in 1941. The condemned men argued that "the execution of a woman would hurt California in the eyes of the world."⁸¹ The men on death row volunteered to take Eithel Spinelli's place in the gas chamber in part because she was a mother.⁸² The likelihood that many of the signators were fathers reveals the gendered way in which parenthood signifies human bonds.

75. "Of the 398 executed female offenders, at least 189 (47%) are known to have been slaves. All but one were blacks, the other being an American Indian (Ms. Clapham, 1763, Michigan)." Streib, *supra* note 3, at 853 (footnote omitted). Most of these slaves were executed for conduct unbecoming a slave, classified variously as rebellion or petty treason. "Female slaves account for all of the female executions for the crimes of arson, assault, attempted arson, and petty treason." *Id.*

76. Of the female slaves executed for homicide, 61% were killed for killing their owner or a member of his or her family, 32% for killing an unrelated victim, and 6% for killing their own newborn baby. *Id.* at 853-54.

77. According to Professor Streib, "[w]hile many were cases of clear intent to poison by mixing lethal substances with the food being prepared, many of the cases probably involved food poisoning from lack of available refrigeration and other methods of preserving food." *Id.* at 854.

78. See *id.* at 852, Table 2 (27 women were executed for witchcraft, constituting 7% of total). Adrienne Rich evoked these witches in her poem about the most famous woman executed in the United States, "For Ethel Rosenberg" ("she feels no pain at all she finally burned to death like so many"). RICH, *supra* note 52, at 29.

79. For a powerful call for greater judicial use of narrative to reveal the ties of the capital defendant and his crimes to the rest of us, see West, *supra* note 46.

80. Women's relational bonds are reflected in our crimes. See CAROL SMART, WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE 16-17 (1986); see also Streib, *supra* note 3, at 851.

81. Rapaport, *Some Questions*, *supra* note 3, at 501.

82. *Id.*

Of course, the question of who embodies frightening power and who embodies relational bonds are related to each other and to race and class, either in addition to or as part of gender. For example, the prevalence of Black men on death row who have been convicted of murdering white people⁸³ reflects (for predominantly white legal decisionmakers) a paradigm of frightening power and unrecognized relational bonds. The historic prevalence of Black women slaves being executed for poisoning their masters' food suggests a congruence between extremely frightening power and no perception of those women's relational bonds.

Thus, even the scarcity of women on death row reveals an important and ominous message for feminists. If part of what it means to be a woman is not to be sentenced to death, the womanhood of those who were executed was invisible before the law. That the majority of women who have been executed were Black⁸⁴ reveals that the protection of womanhood was really the protection of white womanhood. Barbara Smith explains that "[w]hen you read about Black women being lynched, they aren't thinking of us as females. The horrors that we have experienced have absolutely everything to do with them *not even viewing us as women*."⁸⁵

Although the racial imbalance of women sentenced to die is lessening somewhat,⁸⁶ the fact that we currently sentence to death exclusively poor women suggests that the construction of womanhood is class-bound, too. In other words, if feminists distance ourselves from concern about the death penalty because women are not executed, we are using as our reference for "women" white women who stay within defined class boundaries, act like ladies, and injure only people poorer than themselves.

83. For example, an exhaustive study of Georgia's capital sentencing practices revealed that prosecutors sought the death penalty in 70% of the cases involving Black defendants and white victims, 15% of the cases involving Black defendants and Black victims, and 19% of the cases involving white defendants and Black victims. *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987). See *infra* pp. 419-21 (discussing racial bias in capital punishment).

84. Two-thirds of all executed female offenders were Black, although the percentage is "only 34%" for this century's executions so far. "Blacks constituted 5% of those executed females for whom race is known in the seventeenth century. . . . However, only 34% of the females executed so far in the twentieth century were black." Streib, *supra* note 3, at 856-57. See also KING, *supra* note 7, at 148 ("And in America, black people have often been used to symbolize (as illustrated by the portrayal of Andrew Green in contemporary newspapers) everything white people are not.").

85. Barbara Smith, *quoted in* ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 37 (1988).

86. Black women are sentenced to death in greater proportion to their population, although modern percentages are much less than they were in earlier centuries and much less than Black men are today. See Streib, *supra* note 3, at 868-69.

The symbolic impact of executions on the law also deserves feminist attention. As the person on death row is objectified/destroyed, the legal process that carries out the execution is objectified/glorified. The death penalty ritual is a symbolic power surge that reflects and builds the power of law. Each execution sends an arrogant message, boasting that the legal system is capable of using its own rules to convert killing a person into something lawful. The legal process and its participants absorb and assume the power rendered by the execution.

The legitimacy of the killing is provided by the fact that the procedures in place are relentlessly neutral: clean, distant, and equally available to every death row inmate. Consider *Hamilton v. Texas*,⁸⁷ another capital case from Houston, in which a successful petition for a writ of certiorari was brought on behalf of James Edward Smith. Although the petition received the requisite four votes to be placed on the Supreme Court's calendar, Smith failed to get the required fifth vote on the accompanying request for a stay of his execution pending resolution of his case before the Court. Thus, shortly after the Court took Smith's case, that action was rendered moot by Smith's execution in Texas. Killing Smith was lawful and fair because it was done by these well-established, brutally mechanistic rules.⁸⁸ According to the Texas authorities who pressed forward with Smith's execution, waiting for the Supreme Court to decide Smith's still-pending cases would have been lawlessness. How do you explain that to a client, or to his children, or to his mother?

Smith's execution is an unusually dramatic example of the power of capital procedures, but even ordinary death penalty cases reveal the awesome power of the legal process and its decisionmakers. I wonder about explaining a five to four appellate decision for death to a client. A margin of one is not sufficient to declare the winner in a game of ping-pong, but we routinely execute on a one-vote margin.⁸⁹ Supporting executions

87. 110 S. Ct. 3262 (1990) (Brennan, J., dissenting from denial of application for stay). Smith had abandoned the appeals of his conviction for a 1984 felony murder and volunteered to be executed. The petition for certiorari was brought on his behalf by his mother, Alexzene Hamilton, who argued that Smith's long history of mental illness rendered him incompetent to volunteer to be executed. Smith had alternated between representing himself and abandoning his claims.

88. "Law from the male point of view combines coercion with authority, policing society where its edges are exposed: at points of social resistance, conflict, and breakdown." MACKINNON, TOWARD, *supra* note 16, at 239. "[T]he state appears most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it is most male. . . ." *Id.* at 248.

89. Judaic law prohibited executions where the differential between sides was less than two judges. EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS VOLUME 1 36 (1980). Other procedural safeguards were in place as well. For example,

requires believing that these legal procedures are capable of killing fairly.⁹⁰

In answer to my question about any connections between feminism and capital punishment, one of my clients suggested that feminists—like other outsiders with little political power—are hurt by allowing any government that does not include them to exercise so much raw power—the power to kill. Executions should concern feminists in the law precisely because part of the jurisprudential project of many feminists—and others disempowered by our relentlessly neutral laws—is to delegitimize the law. Executions do the opposite.

But we do not need to oppose capital punishment simply because of an impulse against providing too much power to a legal system that does us wrong in other ways. Feminists should oppose capital punishment because of the meaning that executions give to our concept of justice. Nel Noddings suggests that capital punishment must be opposed because it sacrifices a person's life for a principle.⁹¹ Executions represent the triumph of an idealized version of justice that hides the racist, classist, messy, freakish, and imperfect reality.

The imperfections are many. Few people are surprised to learn that capital punishment as practiced today selects people to be executed in part on the basis of race⁹² and class.⁹³ In addition, a huge proportion of

Non-capital cases are decided by three and capital cases are decided by twenty-three judges. Non-capital cases may begin either with reasons for acquittal or for conviction, but capital cases must begin with reasons for acquittal. . . . In non-capital cases they may reach a verdict either of acquittal or of conviction by the decision of a majority of one; but in capital cases they may reach a verdict of acquittal by the decision of a majority of one, but a verdict of conviction only by the decision of a majority of two.

ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 262 (1988).

90. "[T]he fact that capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters." Cover, *supra* note 50, at 1622.

91. "I cannot kill in the name of principle or justice." NODDINGS, *supra* note 23, at 101.

92. See, e.g., SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989). See also Michael L. Radelet & Margaret Vandiver, *Race and Capital Punishment: An Overview of the Issues*, *CRIME & SOC. JUST.*, No. 25, 1986, at 94.

93. Karla Tucker is typical of women sentenced to death in the modern era and of women executed in this country, who tend to be "poor, undereducated, and of the lowest social class in the community." Streib, *supra* note 3, at 878. Karla's victims were white, which is typical for women and men sentenced to death, but were perhaps of lower social standing than would be typical. *Id.*

Support for the death penalty flourishes in spite of the widespread understanding of its economic bias. A 1985 Gallup poll revealed 72% support for the death penalty, even though 64% of those polled felt that for the same crime the death penalty was more likely for a poor person than for someone with average or above average income. Faye A. Silas, *The Death Penalty: The Comeback Picks Up Speed*, *A.B.A.J.*, April 1985, at 48, 51.

people on death row suffered horrifying abuse as children.⁹⁴ Some of the people who are executed are innocent.⁹⁵ What does it mean to cede that much power—the power of life or death—to a system of capital punishment with such fundamental flaws? It suggests that those flaws do not count for much. It means that we have adapted to a notion of justice and fairness that tolerates racial and economic bias.⁹⁶

In the telling, tragic case of *McCleskey v. Kemp*,⁹⁷ our Supreme Court acknowledged the existence of racial bias but suggested that trying to fix it, trying too hard to eliminate it, would mean dismantling our system of criminal justice. Warren McCleskey produced sophisticated statistical evidence of gross racial bias in Georgia's capital sentencing, including that defendants charged with killing a white were 4.3 times more likely to be sentenced to die than defendants charged with killing a Black.⁹⁸ In dissent, Justice Brennan acknowledged "a significant chance that race would play a prominent role in determining if [a defendant] lived or died."⁹⁹

The majority assumed the statistical validity of the study¹⁰⁰ but refused to find that the evidence of racial bias justified reversing Mr. McCleskey's sentence. Justice Powell warned that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."¹⁰¹ As Mumia Abu-Jamal, an African-American man on death row in Pennsylvania, has pointed out, McCleskey's charge of racial bias "was not disproved by the *McCleskey* Court; rather, it was rejected out of fear."¹⁰² In other words, faced with the choice of having the racism in the death penalty mean

94. When invited to speak on impressions from his first months on the Supreme Court, Justice Anthony Kennedy discussed his almost daily exposure to capital cases, stressing that a review of 15 such cases revealed that all 15 defendants were the victims of serious abuse as infants. *In Speech, Kennedy Links Child Abuse and Violent Crime*, L.A. DAILY J., June 13, 1988, at 1.

95. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

96. For example, a recent fax poll of California lawyers indicated that support for the death penalty (57%) coexists with acknowledgement that "there is racial or class bias in the imposition of the death penalty" (54%). *Fax Poll — The Results from May*, CAL. LAW., July 1992, at 104. See generally Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55 (1990) (applying Herbert Marcuse's theory of repressive tolerance to capital punishment).

97. 481 U.S. 279 (1987).

98. *Id.* at 321 (Brennan, J., dissenting).

99. *Id.*

100. *Id.* at 291 n.7.

101. *Id.* at 314-15.

102. Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 1000 (1991).

stopping many executions or having it mean nothing, the Court chose to protect capital punishment.¹⁰³

Understanding capital punishment to be a legal institution that embodies racism and classism and reveals enormous violent repercussions of child abuse, but that has little to do with feminism, would reinforce a narrow, weak, exclusionary brand of feminism.¹⁰⁴ For feminists to ignore the death penalty because men like Warren McCleskey, James Edward Smith, and Mumia Abu-Jamal are more typical of death row than Karla Faye Tucker would make as much sense as ignoring wars because women are not drafted.¹⁰⁵ Feminists should pay attention to the men and women on death row, and to the way that the law is used as the weapon to kill them. Feminists should listen to death row stories.

V. STORYTELLING: POETS, FRIENDS, AND LAWYERS

Lowry's descriptions of prison visits are achingly familiar to me. Her account of the middle-class encounter with the ceremony of visiting rooms, including, for example, the rituals with the vending machines, describes many attorney-client visits, as well. I, too, am overly nice to the guards. Although Lowry and I relate to the institution in similar ways, the relief I feel when I get out (after just a few hours in the visiting room) is missing from her account. In fact, my only moments of deep dissatisfaction with being a lawyer have come when I am back out in the sunshine, walking away, trying to keep relief from showing in my step. I see the world too sharply and long for a poet's vision.

We are like persons who have come out of a cave or cellar into the open air. This is the effect on us of tropes, fables, oracles, and all poetic forms. Poets are thus liberating gods. . . .¹⁰⁶

My death row visits suggest that death row representation is too big a task for lawyers alone; poets and friends are needed. Lowry's account of her relationship with Karla Faye Tucker helped me to understand

103. For commentaries on *McCleskey*, see *id.* at 999-1001. 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 (1990-91), and authority cited there.

104. See Romany, *supra* note 39, at 23-24 (calling for a feminism "which launches a multifaceted attack on legal institutions that perpetuate substantial injustice").

105. See generally Stephanie A. Levin, *Women and Violence: Reflections on Ending the Combat Exclusion*, 26 NEW ENG. L. REV. 805 (1992); Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989); Susan Sherwin, *Feminism and Theoretical Perspectives on Peace*, 12 ATLANTIS 136 (1986).

106. RALPH WALDO EMERSON, *The Poet*, in *ESSAYS* (2nd ser. 1844) (quoted in WHITE, *supra* note 44, at 212).

this. *Crossed Over* helped me to understand the difference between being a lawyer and being a poet, and between being a lawyer and being a friend.

Beverly Lowry is biographer and friend of Karla; she brings brutal honesty to both roles. Lowry writes because "if you get the story right, you will have made it into a kind of monument to the event itself."¹⁰⁷ Lowry brings her talent for ironic detail to the task of writing honestly about what she and Karla mean to each other. Lowry describes her work as "like a clerk doing grunt work—the listening, the studying, the shuffling and assembling . . . trying to make connections."¹⁰⁸

It's Karla Faye's life at stake. I am the other one, her friend, her biographer, listening, attending, trying to figure out—for her, for me, for the record history and time will make of all this—what it is Karla actually *has* done.¹⁰⁹

Lowry's gifts as a writer and her gifts as a friend to Karla seem based on the same strengths: attention to detail and brutal honesty. Near the end of their first visit, after Beverly had described her son's death, Karla posed a big question. Karla asked how Beverly would feel if the person who killed Beverly's son was found and tried, and at the time for punishment people said, "oh, but he's changed, he's a new person now. See how good he is?"¹¹⁰ Beverly refused to offer the comforting lie. As Lowry says, everything happened during that first visit. Lowry made the "daredevil leap into friendship fast and on the spot and without restrictions."¹¹¹

Lowry's words for us are as honest as her friendship. One of the dramas-within-the-drama was the betrayal of Karla and Danny by her sister and his brother, who were lovers. Karla does not blame them for going to the police. However, in describing Karla's trial, Lowry dismisses Karla's sister, Kari, as a prostitute for the prosecution ("a girl accustomed to short-term work"¹¹²) not because she testified against Karla, but because she tried to shape her words to help the prosecution instead of using her own truth as her anchor.¹¹³ Lowry's commitment to

107. LOWRY, *supra* note 1, at 68.

108. *Id.* at 4.

109. *Id.* at 5.

110. *Id.* at 232.

111. *Id.* at 67.

112. *Id.* at 172.

113. By contrast, Lowry finds honor in the testimony of the other key prosecution witness, co-defendant Danny's brother, because he was testifying to tell the truth, not to benefit one side or the other. According to Lowry, he "is not turning a trick for either side . . . he's digging, searching, trying to figure it out." *Id.* at 174.

honesty makes her condemn Kari and then describe her—her friend's own sister—in the harshest terms. I winced for Karla at Lowry's words. Out of loyalty to Karla, I would have protected Kari. But that's not what their friendship is about.

Beverly's honesty is more than matched by Karla, who insists on facing the horrors of her crimes. Karla used her trial as a time to create her own moment of truth: "I wanted to tell the truth. I wanted the real story to be told. I had to do something about how sick-minded we must have been to think about something like this."¹¹⁴ In her friendship with Beverly, Karla requires breathtaking honesty. Karla always refers to "my victims."¹¹⁵ She does not allow Beverly to forget: "It is Karla herself who reminds me: *What I did was horrible. Horrible.* It is a fact of her life; the reason I know her."¹¹⁶ Beverly and Karla share each other's horror stories. The friends enter each other's stories, and each other's dreams. The poet brings us into their circle.

Lawyering is also about telling stories,¹¹⁷ but with crucial differences. The revelations of lawyers and clients are not mutual; the lawyer tries to discover and reveal her client's story without exposing too much of herself.¹¹⁸ This revelation imbalance is especially great in death row lawyering, where discovering and revealing the client's story is the most important goal, yet the dangers to the lawyer of self-exposure and attachment loom very large.

The one-sidedness of the disclosures is not the most important difference. Lawyerly storytelling is essentially instrumentalist. The law, as Lowry points out, is about winning and losing. The lawyer looks for the story that could win and tells it. Karla testified in order for the truth to be heard but her lawyers put her on the stand in order to win the case. "Our only chance to save her life . . . was to try to humanize her. And

114. *Id.* at 141.

115. *Id.* at 233.

116. *Id.* at 173.

117. *E.g.*, Patricia A. Cain, Comment, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1954 (1988) ("What we want . . . are lawyers who can tell their clients' stories, lawyers who can help judges to see the parties as human beings, and who can help remove the separation between judge and litigant.").

118. What of the ultimate imbalance in a relationship in which the client is told to tell everything to the lawyer (and it will of course be kept confidential) but the lawyer may not be telling everything to the client? This suggests that another form of the Golden Rule might be: *The lawyer should be as truthful to the client as she expects the client to be with her.*

Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 780 (1990) (footnote omitted).

the only way we could do that was to let her tell her story."¹¹⁹ As the legal doctrine accommodates political goals of more and quicker executions, the death penalty lawyer must become less of a legal technician and more of an instrumentalist storyteller.¹²⁰ As a capital defense attorney, I cannot help reading *Crossed Over* as a tactic in the case of *State v. Tucker*.¹²¹ So, at some level, we need poets on the team to help us tell winning stories.

But needing the skill of a poet to win the case is the least of it. We need poets to help our clients and ourselves understand ourselves as separate from and larger than the law.¹²² The lawyer represents the law to the client, and the client to the law. If people on death row die to legitimate the power of the law, no wonder the role of their lawyers is so confounding. At some level, even the most wonderful death row lawyer—*especially* the most wonderful death row lawyer—embodies the principles of fairness which justify the execution. No wonder the task is too big for lawyers. Lawyers need poets to help us understand ourselves as something other than the representatives of the legal system. We need to understand something other than winning and losing. We need the poets.

Lawyers' disappearance into the law is metaphorical, but the law threatens to destroy our clients quite literally. Our death penalty laws are designed to (fairly) eliminate a person, leaving only the legal principles which the case embodies. For example, Warren McCleskey was killed by the State of Georgia. He is survived by *McCleskey I*,¹²³ in which the Court rejected the sufficiency of evidence of systemic racial bias, and *McCleskey II*,¹²⁴ in which the Court imposed stringent new restrictions on the availability of federal habeas corpus. For many people, being on death row is literally about one's self becoming a legal

119. LOWRY, *supra* note 1, at 98.

120. The increasingly prevalent device of acknowledging legal errors in the record of capital cases but finding them harmless requires appellate attorneys not merely to locate legal error, but to marshal enough favorable information about the client to convince the members of the court that the legal error mattered. See, e.g., John W. Poulos, *Capital Punishment, The Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. DAVIS L. REV. 157, 277-78 (1990).

121. Can it really be that the State of Texas will execute this young woman, friend and subject of a serious novelist, subject of a hardcover book from Knopf? I imagine setting up a meeting between my client and Alice Walker, or even Norman Mailer. See Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177, 1196 (1991) (especially note 82, in which Althouse discusses reservations about Norman Mailer's book about Gary Gilmore, *THE EXECUTIONER'S SONG*).

122. "Law that does not dominate life is as difficult to envision as a society in which men do not dominate women, and for the same reasons." MACKINNON, *TOWARD*, *supra* note 16, at 249.

123. *McCleskey v. Kemp*, 481 U.S. 279 (1987). See pp. 19-20 *supra*.

124. *McCleskey v. Zant*, — U.S. —, 111 S. Ct. 1454 (1991).

case.¹²⁵ My clients need a poet—someone disinterested in the law who wonders about and represents life—to help them be something other than a case, to help them live. My hope for a poet is a wish to slow the process of people I care about being overtaken by the law, even as the cases lurch forward toward finality, toward winning or losing.

Lowry treats the law in Karla's story much as she treats Houston; it is a place that matters in parts of the story, but only as background.¹²⁶ Lowry understands that the law is about winning and losing, but *Crossed Over* has little to do with that. To Beverly, Karla is never a case.

The deep passion and agitation that animates the current drive to expedite executions¹²⁷ is no longer as puzzling to me. Perhaps proponents of speeding up executions understand that a person under a death sentence who is truly alive challenges the power of the law that ordered her killed. To those proponents, Karla Faye Tucker and the others on death row are simply unfinished cases, affronts to the goals of certainty and finality, waiting to be sacrificed to principles of justice. Indeed, for the *New York Times*, the story is Karla's case, that she is edging closer to becoming the first woman executed by Texas since the Civil War.

Karla is alive. She is neither waiting nor disappearing. Lowry's work confirms Karla's own assessment of her life: "Instead of being at a standstill, I'm moving ahead."¹²⁸ *Crossed Over* is the story of the loving life that Karla is making on death row with her friends, including at least one poet. "Karla is not lonely, does not feel abandoned or set aside; her life is exactly where she is: in Mountain View, on Death Row, with the other women."¹²⁹

125. Lawyers appropriate the names of individuals to become the names of legal principles. (E.g., "Miranda" became *Miranda*, which became "to Miranda" which means to disclose certain rights to a criminal suspect.) The names of the individuals on death row are also the names of the cases in the state's capital punishment jurisprudence. One of my clients suggested deleting from a brief a citation to a California Supreme Court opinion because my client preferred not to be associated with that man. Lawyers know that the case stands for something other than the man. But at some level, my client was right, which I understood even before the court used the case in question as authority to reject one of our claims.

126. Lowry describes the law with accuracy. Her accounts of the lawyers, the courtroom, and the evidence ring true. She notices, for example, that the financial resources available for prosecuting Karla were not matched by the funds allotted to her defense. But the law is not prominent in Lowry's account. Cf. Althouse, *supra* note 121, at 1181 (noting that in *THE EXECUTIONER'S SONG* "[t]he law is notable for its distance and its extreme smallness in relation to everything else in the story").

127. See Gilbert, *supra* note 103, at 70-80.

128. LOWRY, *supra* note 1, at 181.

129. *Id.* at 243.