

## Chapter 6

# Womanhood Unsexed on the Gallows

"I say gender should not play any role in this at all" (Karla Faye Tucker, quoted in Pederson 1998, 66). With all due respect for the dead, this chapter is predicated on the belief that Tucker was wrong. To disregard the question of gender in making sense of her execution on February 3, 1998, the second state-sponsored killing of a woman since the Supreme Court cleared the way for reimposition of the death penalty twenty-two years earlier, is to fail to understand why this media extravaganza elicited such barely concealed glee from feminism's detractors. When George W. Bush, then governor of Texas, denied Tucker's plea for clemency, insisting that his paramount "responsibility is to insure our laws are enforced fairly and evenly without preference or special treatment" (*New York Times*, February 4, 1998, A17), he gave respectable voice to the rancor of those who contended that feminists had at last been shown the ultimate import of their quest for full equality.<sup>1</sup>

With very few exceptions, feminists have failed to explore the relationship between gender and the death penalty; and in that limited sense, perhaps, they have helped to sustain the conditions of Tucker's mistake. While there is now a voluminous body of scholarship on women in the criminal justice system, and while there is a rapidly growing literature on capital punishment, there is precious little that pulls these two together from a distinctively feminist standpoint. From one point of view, this is not surprising given that the number of women sentenced to death and executed in the United States is so small in comparison to that of men. From another, that disparity should itself be a provocation to critical inquiry.

In order to establish a context for the primary argument of this chapter, in the section that follows, I offer a very brief history of the

relationship between gender and capital punishment in the United States as well as an equally abbreviated account of the principal academic controversy concerning how best to explain the relative paucity of women who have been sentenced to death. In the second section, in an effort to step beyond the confines of this controversy, I indicate why I am convinced that the late liberal state is damned if it does and damned if it doesn't execute women. How that state can be expected to negotiate this tension is the subject of my closing remarks.

### *Capital Punishment of Women in the United States*

Sentenced to death for the crime of murder in 1632, Jane Champion of Virginia was the first woman to be lawfully executed in the American colonies. When Karla Faye Tucker is included among the other 41 women executed during the twentieth century, and 4 more are added since the turn of the new millennium, the documented total over more than three and a half centuries comes to 537. By way of comparison, there have been over nineteen thousand confirmed executions of men during this same span. In sum, less than 3 percent of the persons executed since 1608 have been women; and it is on the basis of this figure that Victor Streib and Lynn Sametz conclude that "the strong support for the death penalty in our society may be limited to the death penalty for adult male offenders" (1989, 58; see also Streib 1990, 1998).

Of these 537 women, virtually all were executed under local or state authority, and more than 9 out of 10 were put to death prior to 1866. Approximately two-thirds of the overall total were African-American, a fact that would appear to mandate a qualification of the contention that America's enthusiasm for capital punishment is confined to men. More specifically, close to one-half consisted of slaves who were put to death in the South during the Civil War and the decades immediately preceding it. The crimes for which these women were executed, committed as a rule against their owners or some member of his family, included attempted homicide, homicide, attempted arson, arson, assault, and conduct unbecoming of a slave (classified either as rebellion or as petty treason). By way of contrast, almost all executed white women have been found guilty of homicide, with the noteworthy exception of the late seventeenth century when 27 women were killed in New England for the crime of witchcraft. In the twenti-

eth century, the racial identity of executed women reversed the pattern established during the nineteenth; 1 out of 3 was black, with whites accounting for the bulk of the remainder.

As of April 2001, there are fifty-six women awaiting execution, about 1.5 percent of the total death row population. Virtually all, not surprisingly, are poor; and close to half, estimates Kathleen O'Shea, have a history of abuse and have been sentenced to death for the murder of an abusive spouse or lover (1993, 81). Indeed, throughout U.S. history, the typical victims of women given capital sentences have been persons well known to them. This pattern contrasts sharply with that of death-sentenced men, who, as a rule, are convicted of killing strangers in conjunction with some other felony; the convenience store robbery gone awry is the paradigmatic example. Put differently, over three-quarters of the death sentences pronounced in this country are imposed on felony murderers animated by some predatory purpose, that is, the prospect of some gain, whether material, sexual, or otherwise. Only a very small fraction of the murders committed by women, however, fall into this category.

This difference becomes important when we ask why, as all agree, women are roughly twenty times less likely to be death sentenced than are men. "It is difficult to understand why women have received such favored treatment," wrote Justice Thurgood Marshall in *Furman v. Georgia* (408 U.S. 238, 365 [1972]), "since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes" (365). Streib has suggested that gender bias accounts for the legal order's aversion to killing women (1990, 874-78) and, by implication, for the superficial plausibility of Marshall's representation of condemned men as victims of the law's partiality. Specifically, Streib has argued that women are less likely to be sentenced to death because they are more often seen as viable candidates for rehabilitation, whereas men are more likely to be deemed incorrigibly violent. Moreover, gendered cultural stereotypes encourage judges and juries to wonder whether women defendants are in fact able to muster the autonomy necessary to demonstrate full criminal intent. Consequently, women can more readily contend that they killed while subject to the domination of another, that they were emotionally or mentally disturbed at the time they committed their crimes, or that they acted without premeditation.

While an explanation in terms of gender bias may indicate why women are so rarely sentenced to die, it must be supplemented in some fashion if we are to explain why some in fact are. "[W]omen who are sentenced to death," argues Jenny Carroll, "are women who exist furthest from the collective center of traditional social and female roles. Their racial or socio-economic status preclude[s] them from the protection of their sex long before they engage in crime because their poverty, race, or social situation makes it impossible for them to conform to the social ideal of womanhood" (1997, 1436–37). If the norms constitutive of "true" womanhood are derived from our stereotypical conception of middle-class white women, then it would seem to follow that African-American women and poor women more generally will prove unable to derive from their gendered identity the same protection afforded to those who better enact these norms. Victoria Brownworth offered still more striking evidence in support of Carroll's argument when, in 1992, she estimated that seventeen of the forty-one women then on death row were lesbians (62). When a woman who violates the norms of compulsory heterosexuality also proves capable of homicide, especially should that violence be directed against an intimate, her transgression renders her a prime subject for the demonization that is a necessary condition of the death sentence's imposition. To execute that sentence is to rearticulate and reaffirm traditional understandings of femininity subverted by, among other things, the rise of contemporary feminism.

The gender bias explanation advanced by Streib and others is not without its detractors (see, e.g., Rapaport 1990). The small number of women on death row and in the death chamber may be explained, perhaps with equal plausibility, by pointing to the fact that women only commit about one-eighth of this nation's murders, that they are much less likely to have established criminal records, and, as already noted, that they are unlikely to commit felony murders and so to be sentenced to die on the basis of this aggravating circumstance. While these factors may call into question Streib's claim that juries and judges, motivated by chivalry, refuse to impose the death penalty on women whose crimes are identical to those of condemned men, their citation should not be taken to imply that a gender neutral analysis can adequately explain capital sentencing patterns. For example, when we ask why it is that women so infrequently kill, when we ask why women who do kill typically do so out of passion rather than for gain, when we ask how

jurors and judges interpret and deploy various statutorily defined aggravating factors (e.g., future dangerousness, the likelihood of rehabilitation, the cold-bloodedness of any given murder), we soon find cause to suspect that these ostensibly nongendered factors are deeply bound up with the reproduction of normative constructions of gender-appropriate conduct.

In addition, it is at least arguable that feminist inquiry should be directed toward the content of homicide law itself. Why is it, asks Elizabeth Rapaport (1990), that the homicide statutes of most states, in listing aggravating factors, implicitly declare that the sort of felony murder typically committed by men and of strangers is more deserving of death than is the sort of intrafamilial or intimate homicide typically committed by women?

Women's traditional interest in the sanctity of the home, its peace and safety, is not supported by the prestige that would be symbolically conveyed by the attachment of the capital sanction to the most egregious family homicides. . . . Current law holds it to be more heinous to kill for gain than to kill a spouse or child in anger. From a feminist point of view, the privileging of robbery murder but not domestic murder as among the most serious homicides expresses the male orientation of the law of homicide. (558–60)

On this account, the question to be asked is not how gender-based stereotypes taint the decisions of prosecutors, judges, and juries, but rather how the hierarchy of evils articulated by contemporary homicide law reflects a patriarchal culture that, until just recently, deemed domestic violence beyond the law's purview; and, at the same time, effectively discredits women by failing to find the sort of murder they most often commit worthy of the law's supreme penalty. The reactionary prescription that might appear to follow, as Rapaport recognizes, is legal codification of a new aggravating factor (the murder of intimates), one whose application would almost certainly generate a larger number of death-sentenced and executed women.

As this discussion suggests, to the extent that the question of women and the death penalty has emerged as a subject of academic discourse, that inquiry has generally taken shape as a more specific version of the controversy concerning the presence of gender bias in the

criminal justice system; and, for the most part, that discussion has been conducted in the vernaculars of law, history, and statistics. Without denying the validity of this question or these idioms, my purpose in the remainder of this chapter is to situate this issue within a broader context, one that concerns the liberal state's perennial quest to legitimate the exercise of its authority. That quest becomes especially strained, I suggest, when the state's most dramatic expression of its self-proclaimed monopoly over the means of legitimate violence is brought to bear on women.

### *The Death Sentence in an Age of Gender Trouble*

In 1859, an unsigned article in the *New York Times* included the contention from which this chapter's title is taken: "The same feelings which make civilized men shrink from the spectacle of womanhood unsexed by woman herself on the platform or in the field, make them shudder at the thought of womanhood unsexed by man at the whipping-post, or on the gallows" (April 15, 4). One year later, Wendell Phillips offered a fitting rejoinder: "You have granted that woman may be hung, therefore you must grant that woman may vote" (quoted in Stanton, Anthony, and Gage 1881, 701). The second of these claims presupposes liberalism's aspiration to universal formal equality, while the first assumes that some are not altogether fit to shoulder the burdens and benefits that accompany realization of this ideal. That this tension still disturbs our thinking about the relationship between gender and capital punishment is suggested by two public opinion polls conducted over the course of the past decade. In 1994, approximately 85 percent of Texans endorsed the death penalty. In 1998, six weeks after the execution of Karla Faye Tucker, a second poll indicated that support for capital punishment in the Lone Star State had taken a nosedive, falling to 68 percent. While it is perhaps true, as the *New York Times* speculated, that the execution of Tucker demonstrated that the nation "had passed some psychological threshold that augured an increase in executions of women" (Verhovek 1998b, 1), it seems equally clear that our collective psyche is troubled by this dubious accomplishment. That such uneasiness is accompanied by a certain titillation, a thrill at violating an engrained taboo, was also intimated when CNN announced that its

documentary on Tucker's death was the network's most-watched program in the month of February.

The brouhaha generated by the execution of Tucker invites us to explore some of the paradoxes posed by the late liberal state's half-hearted incorporation of women within the public sphere. With respect to those paradoxes, in this section, I argue that the authority of the late liberal state is now unsettled; that one way to reaffirm its authority is to demonstrate its sovereign capacity to exact from subjects the sacrifice of life; that some dead bodies are better suited to fulfill this function than are others; that the question of whether or not to execute women poses an insoluble dilemma for the liberal state; and, finally, that this state, as a way of muddling through this predicament, is likely to sentence an ever larger number of women to death, but to execute relatively few.

I begin from the premise, made familiar to us by Jürgen Habermas (1973) and William Connolly (1991), that the late liberal state is beset by what Habermas calls a chronic "legitimacy deficit." The causes of this deficit, which in the context of the United States afflict the individual states as well as the federal government, are many. To cite but one, a capitalist economy requires various forms of costly state support, including investment subsidies, tax incentives, the enforcement of contracts, external defense and internal security, the construction and maintenance of infrastructure, and so forth. At the same time, for reasons ranging from the electoral prospects of its officeholders to its competitiveness in international markets, the liberal state depends on the successful pursuit of profit by private investors. As a result, that state cannot readily extract from a corporate economy the financial resources it must have if it is to respond effectively to the mounting burdens and expectations imposed upon it; the most egregious indicator of this bind is the chronic impoverishment of the politically powerless, but many others might be cited as well. The problematic consequences generated by the state's incompetence on this and other fronts intensifies, of course, in an ever more globalized political economy, one that mocks its pretensions to sovereign autonomy and hence its self-representation as the singular agency through which our collective will is emphatically done.

In order to prop up its troubled authority, the state must cultivate

the appearance of institutional efficacy. Toward that end, as Murray Edelman (1967) noted decades ago, governing bodies are forever tempted to engage in symbolic politics. The debacle dubbed the war on drugs is a conspicuous example; and in much the same terms, I suggest, can we make sense of the generally uninterrupted increase in the annual number of executions since the Supreme Court authorized their resumption in 1976. If the state cannot readily occlude its ineptitude on the home front, and if at the same time it cannot tame what Connolly calls “the globalization of contingency” (1991, 25), whether assuming the form of nonstate terrorism, the greenhouse effect, illegal aliens, the transcontinental transmission of disease, and so on, it can nonetheless substantiate its mythical claim to sovereign authority via the carefully orchestrated drama of political power that is an execution. That the American citizenry is fully complicitous in the cultivation of this myth—that we too wish to be reassured of the state’s capacity to act with irrevocable finality—is suggested by the degree of public consensus in favor of capital punishment even after its systemic flaws have been disclosed, as has been the case repeatedly over the course of the past half decade.

Why is it, though, that human bodies in general, and dead ones more particularly, are so well suited to the task of reinvigorating state authority? Elaine Scarry offers a possible explanation. In *The Body in Pain* (1985), as I noted in chapter 5, she argues that when convictions central to a culture’s self-conception no longer appear self-evidently so, the brute facticity of the body is often appropriated in order to secure for these immaterial creatures of collective invention a revitalized aura of transcendent authority. Although Scarry draws most of her examples from the domains of war and torture, another instance of what she calls “analogical verification” is human sacrifice. On her account, this practice can be understood as a ritual through which a collectivity’s intangible beliefs about the supernatural are reaffirmed, made to appear as something unmade, via their materialization within the palpable reality of a body in pain or, alternatively, a corpse: “Unable to apprehend God with conviction, they will—after the arrival of the plague or the disease-laden quail or the fire or the sword or the storm—apprehend him in the intensity of the pain in their own bodies, or in the visible alteration in the bodies of their fellows or in the bodies (in only slightly different circumstances) of their enemies” (201). Because nei-

ther the invisible word of God nor the incorporeal authority of the liberal state is self-authenticating, both demand confirmation in the realm of matter. And what better matter than that of the human body, especially given that the hyperbolic ideal of sovereign power over life and death, whether divine or secular, finds its primordial source in the concrete capacity of women and men to harm and sometimes to kill one another?

Executed bodies perform their political mission well when their utter impotence, their absolute lack of vitality, testifies to the robust agency of the state; the consummation of a death sentence is one of the more striking means by which, to quote Scarry again, "real human pain" is "converted into a regime's fiction of power" (1985, 18). What Scarry fails to ask, however, is whether some bodies are better than others at satisfying the imperatives of analogical verification. Arguably, today, African-American bodies, especially if male, are best able to do so, at least within the confines of the United States. In such cases, the ultimate sacrifice is exacted from persons whose antecedent marginalization marks them as beings whose elimination from the body politic will reconsolidate, if only in part, the dominant collective identity presently under assault by forces the state can no longer contain.

But what about women? This is a complicated question, in part because considerations of race and gender may point in opposing directions when considering the suitability of candidates for the labor of analogical verification. Apparently, as the first section of this chapter implied, the corpses of African-American women served as tolerably effective substantiations of a slave order's unsteady claim to authority in the years just prior to and during the Civil War. What might otherwise have occasioned horror, the execution of women, was offset by a racial identity that coded these beings, especially once accused of crimes against their masters, as something other than women, as animals, as monsters. However, as the example of Karla Faye Tucker hints, it is not quite so easy to divest a white woman of her gendered identity and so to overcome the ambivalence occasioned when the state puts to death a person belonging to a class it is otherwise pledged to protect.<sup>2</sup>

This dilemma grows still more thorny within a regime that is rhetorically committed to the principles of liberalism. The success of analogical verification turns on the capacity of the material to substantiate the uncertain reality of the immaterial, and that in turn requires an

obdurately concrete body. From the standpoint of liberalism, however, the problem with such a body is that it is far too concrete in the sense that it is particularistically marked by gender, by race, by class, and so forth. If a liberal regime is to make good on its promise of formal equality, if its justice is to be truly blind, the body caught up within its legal complex must become an abstraction—a being stripped of all the differentiating features that make it this body rather than that. But can such a deracinated juridical subject perform the reality-conferring work of analogical verification? (In chapter 7, to anticipate, I ask whether execution by lethal injection similarly compromises the project of analogical verification.) The example of black men, I would argue, suggests that such a subject can do so only when its body reabsorbs all of the individualizing features (in this instance, its racial identity) that liberalism must seek to expunge in order to satisfy its own legitimation imperatives.

Whether the executed bodies of women can do the work of analogical verification is a question that cannot be answered unambiguously. From one point of view, the state-sponsored killing of an occasional woman materializes and so reinforces the liberal ideal of equality before the law, a principle that is otherwise mocked by the incredibly long odds against achieving this status.<sup>3</sup> Arguably, such an event generates internal as well as external legitimation effects. By persuading those within the legal system, whether juror, judge, police officer, or warden, of the essential fairness of death penalty adjudication, the execution of a woman now and then may help to quiet whatever lingering qualms these state agents may have about a regime that mandates calculated acts of licensed violence. Beyond the confines of the legal system, if the occasional execution of a woman legitimates capital punishment as a practice by demonstrating the sincerity of the liberal state's commitment to formal equality, and if the right to put persons to death is one of the defining traits of political power in a liberal regime, as John Locke (1988) informed us over three centuries ago, then such killings may bolster public endorsement of that state's claim to monopolistic control over the means of legitimate violence.

While the execution of women may corroborate the story we tell ourselves about liberal law's abstraction from various sources of ostensibly nonpolitical differentiation, it simultaneously disturbs other tales to which we are equally committed. More often than not, as I explained

in contrasting the typical homicides committed by each gender, when women murder, their victims are known to them, often intimately. Such violence provokes anxiety because it unsettles our conventional understanding of the sphere to which liberalism has historically relegated women, a sphere putatively governed by the norms of uncoerced affection, of spontaneous altruism, of maternal nurturance. To sentence such an embodiment of gender trouble to death, a legal determination that entails ascribing to her the sort of autonomous criminal intent customarily reserved to men, is perhaps to allay the unease her deed has aroused. But to actually extinguish the life of that body, one that is routinely excluded from frontline combat duty in order to shield it from violence, is to highlight once again the sort of hypocrisy Wendell Phillips identified when he suggested that women's liability to the law's harshest punishment is inconsistent with her disenfranchisement at the polls.

Perhaps more significantly, the execution of a woman effectively accentuates the harsh realities of capital punishment by bringing the state's full force to bear on a body conventionally coded as docile, as nonpredatory, as in need of masculine protection. If the punitive conduct of a liberal order is to remain congruent with the sensibilities of a culture given to humanist claptrap, its formal political organs must do what they can to obscure the brutality of official killing. Because the execution of a woman harbors the potential to undercut this goal, it may impair the state's quest to secure unequivocal control over the semiotic import of its violence. As such, its effect may be not unlike that produced by a botched execution, one in which the state's script for the perfect judicially mandated killing goes awry because its discursive, technological, and embodied constituents do not seamlessly cohere.

As this last point suggests, the relationship of gender to capital punishment cannot be understood absent consideration of other developments in the rationalization of state violence. Consider, for example, the shift from public to private executions in the nineteenth century, which I traced in the context of England, as well as the more recent turn from hanging, shooting, gassing, and electrocution to lethal injection, which I take up in chapter 7. Although the latter helps to sanitize the state's violence and the former makes it more difficult to contest its construction by the voice of officialdom, these moves simultaneously complicate the task of analogical verification. By transforming the dead

body into an abstraction, an unseen entity that bears no visible traces of the harm it suffers, these reforms vitiate much of the legitimating benefit the state might otherwise derive from more palpable confirmation of its intangible pretense to sovereign authority.

On the one hand, because it affords the death-sentenced body a measure of concrete specificity, the execution of a woman may help the state offset the legitimation costs incurred when capital punishment becomes a routinized deed performed behind closed doors and upon liberalism's disembodied legal subjects. On the other hand, and precisely because it does remind us of the body's sexed character, the execution of a woman may destabilize this method of revalorizing state authority, and that may prove true for persons who occupy very different places on the political map. As the two polls cited in the opening paragraph of this section suggest, those who were once more or less uncritically wedded to the rightness of capital punishment (e.g., many identified with the Christian Right) may find that commitment shaken when the "wrong" sort of body is disposed of. At the same time, others of very different political persuasion may be induced by this event to ask about the relationship between capital punishment and acts of violence against women that are condoned but not formally authorized by the state. In sum, when it comes to killing women, it would appear that the late liberal state is damned if it does, and damned if it doesn't.

### *A Modest Prediction*

What, then, is a troubled state to do? It would be a mistake, I think, to anticipate an accelerating trend on the basis of the execution of Karla Faye Tucker and the five women who have followed her into the death chamber since 1998. Granted, given that incarceration is now a growth industry, one that is vital to the economic well-being of many communities, we should expect the number of persons jailed to rise steadily, and so it seems not implausible to predict that more women will be imprisoned and that, possibly, more will be sentenced to die. Relatively few, however, are likely to be executed. More probably, as Robert Weissberg (1983) has argued with respect to capital punishment generally, state agents will stumble unwittingly and unconcertedly toward discovery of the optimal ratio of death sentences relative to actual executions, where the measure of optimality is the figure that most ade-

quately secures a tolerable compromise among the various internal and external demands imposed on the state.<sup>4</sup> The two demands that I have cited here are, first, the equalitarian pressure on the liberal state to rationalize the relationship between gender and criminal law, that is, to treat similarly situated male and female criminals as if they were genderless, and by extension to execute more women; and, second, the inegalitarian pressure to leave intact and, if possible, to reinforce the cultural norms that tend to exempt women from capital punishment while leaving them prey to other less well-publicized forms of violence.<sup>5</sup> What these competing pressures may well generate is an incremental increase in the number of persons sentenced to death, men as well as women, combined with more or less unrestrained operation of the discriminatory practices that insure that actual execution is reserved for the most vulnerable or despised, women as well as men. Only if the bodies of these few, standing in for the many, are not up to the task of analogically verifying troubled state authority will it prove politically expedient to pursue a more dramatic acceleration of its machinery of death.