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Stories That Kill: Masculinity and Capital Prosecutors' Closing Arguments

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STORIES THAT KILL: MASCULINITY AND CAPITAL PROSECUTORS' CLOSING ARGUMENTS

PAMELA A. WILKINS*

ABSTRACT

The American death penalty is a punishment by, for, and about men: Both historically and today, most capital prosecutors are men, most capital defendants are men, and killing itself is strongly coded male. Yet despite—or perhaps because of—the overwhelming maleness of the institution of capital punishment, the subject of masculinity is largely absent from legal discourse about the death penalty. This Article addresses that gap in the legal discourse by applying the insights of masculinities theory, an offshoot of feminist theory, to capital prosecutors' closing arguments. This Article hypothesizes that capital prosecutors' masculinity is strongly influenced both by white Southern ideologies around manhood and by the hypermasculinity common within law enforcement. In turn, these ideologies influence capital prosecutors' sentencing phase closing arguments.

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I. INTRODUCTION

Killing is a guy thing. Sure, women sometimes kill, but killing in all its forms—be it the hunting or other slaughter of animals, murder, voluntary manslaughter, etc.—is overwhelmingly the province of the masculine.

Like other killing, the death penalty is also a guy thing. Public opinion polls reveal a strong gender divide in support for the death penalty.[1] This gender divide finds its

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[1] *See, e.g.*, *Gallup Poll: Public Support for the Death Penalty Lowest in a Half-Century*, DEATH PENALTY INFO. CTR. (Nov. 24, 2020), https://deathpenaltyinfo.org/news/gallup-poll-

way into the jury box: Both psychological experiments and research on capital juries show that male jurors—especially white male jurors—are less receptive than women to mitigating evidence about a defendant and substantially more inclined to vote for death.[2] It finds its way into the prosecutor's chair, where men are usually the ones advocating to jurors[3] for the state-sponsored killing of a (virtually always male) defendant.[4] It certainly finds its way into the execution chamber, where men escort and strap down the condemned man and where (mostly) men push the buttons and pull the levers that activate the machinery of death.[5] It's only a slight exaggeration to say that the American death penalty system is comprised of men advocating to other men for the killing of yet another man (who himself has been convicted of killing someone).

Yet despite the overwhelming maleness of the death penalty industrial complex, questions about masculinity and the death penalty have largely been ignored in legal discourse. To be sure, articles have been written about women and the death penalty, or about gender discrimination and the death penalty, but this Author found only one law review article focused principally on masculinity and the death penalty.[6] Moreover, *no* law review articles used the phrases *death penalty* and *masculinities*

public-support-for-the-death-penalty-lowest-in-a-half-century (citing public opinion poll showing that male support for the death penalty was seven percentage points higher than female support).

2 *See infra* Subpart III.A (describing Capital Jury Project research concerning capital jurors' sentencing considerations).

3 *Cf. Tipping the Scales: Challengers Take on the Old Boys' Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2019), https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf (analyzing data to conclude that 76% of elected prosecutors in 2019 were male and 24% were female, which represents an increase in the percentage of female prosecutors).

4 In December 2020, for example, 98% of death-sentenced inmates in the United States were male. *See Capital Punishment 2020–Statistical Tables*, BUREAU JUST. STATS. (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf.

5 Given the secrecy often surrounding executions, it is nearly impossible to gather accurate statistics regarding the gender of members of execution teams. *Cf.*, *e.g.*, *Missouri Paid More than $250,000 in Cash to Executioners, with No Tax Documentation*, DEATH PENALTY INFO. CTR. (Feb. 2, 2016), https://deathpenaltyinfo.org/news/missouri-paid-more-than-250-000-in-cash-to-executioners-with-no-tax-documentation (detailing efforts by State of Missouri to keep secret the identities of executioners). Nonetheless, accounts of executions and articles about executioners in the media suggest the vast majority of execution team members—especially on the strap-down team—are male. Given the secrecy often surrounding executions, it is nearly impossible to gather accurate statistics regarding the gender of members of execution teams. *See, e.g.*, *In the Busiest Death Chamber, Duty Carries Its Own Burdens*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/in-the-busiest-death-chamber-duty-carries-its-own-burdens (last visited Feb. 25, 2023).

6 *See* Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002) (exploring the execution of Karla Faye Tucker through the lens of gender theory).

theory within the same paragraph. Rather, there is simply a gaping hole—a chasm, even.

This Article shouts into that chasm. Specifically, it focuses on the intersection of masculinities theory and capital prosecutors' sentencing phase closing arguments. Given the overwhelming masculinity of the death penalty industrial complex—given, even, that the death penalty may be *about* masculinity—prosecutors' arguments for death are likely to be performances of masculinity with appeals to male jurors' own masculinity. This Article explores this intersection by examining both the masculinity of and its use in the closing arguments of two very deadly prosecutors of an earlier era: Joe Freeman Britt[7] and Donnie Myers.[8]

The cases, prosecutors, and closing arguments examined hearken from an earlier era, but the analysis of how the prosecutors manifested and used masculinity remains relevant for at least two reasons. In recent years, there has been a resurgence of aggressive forms of masculinity,[9] which exist alongside and in tension with (indeed, in resentment of) much of American culture's more sophisticated understandings of gender and greater gender fluidity.[10] Accompanying and probably related to the resurgence of aggressive forms of masculinity is, at least in spots, a resurgence in use of the death penalty after years of decline.[11] For example: After a seventeen-year hiatus in federal executions, the Trump administration carried out thirteen federal executions in a sixth month period;[12] in response to a request by the state attorney general, the Oklahoma courts have scheduled twenty-five executions over the next

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[7] *See infra* Subpart IV.A.

[8] *See infra* Subpart IV.B.

[9] *See, e.g.*, KRISTEN KOBES DU MEZ, JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION (2020) (describing how modern evangelical Christians have replaced the Jesus of the Gospels with an idol of rugged masculinity and white nationalism); *see also* Katelyn Fossett, *Why Republicans Can't Stop Talking About Masculinity: A Q&A with Historian Kristen Kobes Du Mez on Josh Hawley, J.D. Vance, and Why Manhood Seems to be Such a Big Topic on the Right Today*, POLITICO (Nov. 21, 2021), https://www.politico.com/news/magazine/2021/11/21/josh-hawley-madison-cawthorn-jd-vance-masculinity-523136 (describing resurgence of aggressive forms of masculinity during the Trump era).

[10] *Cf.*, *e.g.*, Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME (Mar. 26, 2017), https://time.com/magazine/us/4703292/march-27th-2017-vol-189-no-11-u-s/ (discussing evolution in understandings of gender, especially among youth and young adults).

[11] *The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf (highlighting the "unprecedented execution spree" of federal executions under the Trump Administration stretching across the 2020 presidential transition to the Biden Administration).

[12] *See* Michael Tarm & Michael Kunzelman, *Trump Administration Carries out Thirteenth and Final Execution*, ASSOCIATED PRESS (Jan. 15, 2021), https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50.

two years;[13] in recent years, South Carolina, Oklahoma, and Mississippi have adopted the firing squad as a method of execution.[14] Both prosecutors featured enjoyed considerable success in obtaining death sentences during capital punishment's post-*Furman* heyday. The past is prologue, so understanding how two highly successful capital prosecutors of an earlier era used masculinity to achieve death sentences provides a template for how capital prosecutors are likely to use masculinity *now*.

A qualification: This Author's aim is limited. This Article does not seek to be prescriptive. It does not propose a remedy for capital prosecutors' use of and appeals to masculinity. Indeed, it does not even assert that such use and appeals are wrong (nor does it assert they are *not* wrong or problematic). Rather, this Author's only goal is descriptive: This Article seeks to explore the masculinity of two capital prosecutors and to show how they used this masculinity in advocating for death sentences for the defendants. Later projects may explore how defense lawyers use masculinity in crafting counter-narratives, how defense lawyers might counter prosecutors' masculinity narratives, and whether there are legal grounds for challenging prosecutors' masculinity narratives. However, each of those questions falls beyond the scope of this Article.

This Article proceeds in five parts. In addition to providing a general overview of masculinities theory, Part II explores the masculinities of prosecutors—especially white Southern male capital prosecutors. Part III turns to the death penalty and examines the legal, historical, and sociological literature on gender and the American death penalty.

In Part IV, the rubber hits the road, bringing the insights of Part II and the data of Part III to bear on two capital prosecutors and one of their closing arguments. Specifically, Part IV explores implicit and explicit expressions of and appeals to masculinity in these prosecutors' arguments for death. Apart from their zeal for the death penalty, Joe Freeman Britt and Donnie Myers were very different men with very different masculinities. Joe Freeman Britt was hypermasculine, with traces of the intellectual "marketplace man," the form of masculinity hegemonic in American culture.[15] Donnie Myers's masculinity appears to have stemmed from Southern white men's sports culture, in which men prove their masculinity through dominance in competitive enterprises like football and hunting.[16] Although their closing arguments shared certain common features—a flair for the dramatic and a tendency to bully the jury—Britt and Myers used masculinity differently. For example, in *State v.*

[13] *Oklahoma Court Schedules 25 Executions Between August 2022 and December 2024*, DEATH PENALTY INFO. CTR. (July 6, 2022), https://deathpenaltyinfo.org/news/oklahoma-court-schedules-25-executions-between-august-2022-and-december-2024.

[14] *See, e.g.*, Maurice Chammah, *The Return of the Firing Squad?*, THE MARSHALL PROJECT (Apr. 8, 2022), https://www.themarshallproject.org/2022/04/08/the-return-of-the-firing-squad (discussing states' adoption of the firing squad as a method of execution).

[15] *See infra* Part II & Subpart IV.A (defining different kinds of masculinity and exploring Britt's masculinity).

[16] *See infra* Part II & Subpart IV.B (defining different kinds of masculinity and exploring Myers's masculinity).

Barfield,[17] a case with a female defendant, Britt portrayed the victim's death as not merely painful and dehumanizing, but also as emasculating, and he treated the alleged emasculation as a *de facto* aggravating circumstance.[18] A man's emasculation by a woman would be a particular insult to a hypermasculine man, given hypermasculinity's honor culture, and Britt used this point effectively in arguing to a jury that likely included men who were heavily influenced by Southern male honor culture. Part IV is dedicated to an in-depth exploration of the two men and of Britt's closing argument in *State v. Barfield*. Finally, Part V briefly concludes.

II. MASCULINITIES THEORY

A. Overview

In the eyes of many scholars, masculinities theory is the intellectual child of feminist theory.[19] Unlike feminist theory, which was an outgrowth of feminist activism and politics, masculinities theory began in the academy.[20] If feminist theory seeks to understand and explain the systemic, patriarchal oppression of women in all its manifestations,[21] masculinities theory seeks in part to understand and explain how patriarchy shapes men.[22] More specifically, it asks how "'different ideologies about

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17 State v. Barfield, 298 N.C. 306, 332, 354–55 (1979) (holding record supported jury's finding of aggravated circumstances).

18 *See infra* Part IV.A (discussing Britt's use of masculinity in closing argument in *State v. Barfield*).

19 *See, e.g.*, Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 330 (2013) (describing masculinities theory as an "outgrowth of the feminist theorizing that developed during the feminist movement of the late 1960s and early 1970s"); *cf.* Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 415 (2010) (describing masculinities scholarship as an "essential piece of feminist analysis"); Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 159 (2010) (describing masculinities theory as a "promising line[] of emerging scholarship . . . that demonstrate[s] the capacity of feminist legal theory to generate new insights for a new generation").

20 *See* McGinley & Cooper, *supra* note 19, at 331 (describing the social sciences as the origin of masculinities theory); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L. J. 619, 629 (2013) (noting that masculinities theory first developed in the fields of psychology and sociology); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 208 (2008) (identifying masculinities theory and study as initially "particularly situated in the discipline of sociology").

21 *See, e.g.*, Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL'Y & L. 13, 14 (2005) (describing feminist concern with the "implications of historic and contemporary exploitation of women within society, seeking the empowerment of women and the transformation of institutions dominated by men").

22 *Cf.* Dowd, *Asking the Man Question*, *supra* note 19, at 418 (observing that masculinities scholarship shows how the "culture and structure of gender harms boys and men . . ., whether it is the 'price' of privilege . . . or the result of men subordinating men as a way of performing masculinities"). As *Asking the Man* shows, however, masculinities theory is not limited to examination of how patriarchy shapes men. *See id.* (detailing major insights of masculinities theory).

manhood develop, change, are combined, amended, contested—and gain the status of truth.'"[23]

Drawing from the "fields of cultural studies, history, queer theory, and sociology,"[24] masculinities theory presumes that "men's behavior is socially constructed."[25] It naturally follows that "[d]ifferent cultures, and different periods of history, construct masculinity differently":[26]

> For instance, some cultures make heroes of soldiers, and regard violence as the ultimate test of masculinity; others look at soldiering with disdain and regard violence as contemptible. Some cultures regard homosexual sex as incompatible with true masculinity; others think no one can be a real man without having had homosexual relationships.[27]

The cultural construction of masculinity also explains the terms "masculinities" theory (as opposed to the singular "masculinity"). As R.W. Connell points out, "in large-scale multicultural societies there are likely to be multiple definitions of masculinity."[28] Identity is shaped not only by gender, but also by culture, class, race, etc. Thus, "there is not one form of masculine identity, but a plurality of identities, such as a working-class white masculinity, an upper-class gay [B]lack masculinity, and so on."[29]

However, despite theorists acknowledging a plurality of masculine identities, many theorists argue that these masculinities exist within a hierarchy in which there is a "struggle for dominance amongst different concepts of masculinity"[30] within any particular cultural context. Within that context, one concept of masculinity becomes hegemonic. It's certainly possible—likely, even—that most men within that culture do not embody the hegemonic form of masculinity, but "it is 'normative' in that it serves as the ideal toward which all men are supposed to strive."[31]

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[23] Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 684 (2009) (quoting GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES 1880-1917 at 7 (1995)).

[24] *Id.* at 683.

[25] *Id.* at 684.

[26] R.W. Connell, *Understanding Men: Gender Sociology and the New International Research on Masculinities*, 24-1 SOC. THOUGHT & RSCH. 13, 16 (2001).

[27] *Id.* at 16.

[28] *Id.*

[29] Cooper, *supra* note 23, at 685.

[30] *Id.* at 686.

[31] *Id.* at 686–87.

According to sociologist Michael Kimmel, "marketplace man" is the current hegemonic model of American masculinity.[32] "Marketplace man" is focused on economic success and is "'aggressively competitive, goal-driven, and instrumental in . . . pursuit of success.'"[33] Marketplace man is also stoic, unemotional, and heterosexual.[34] He is white, middle-class, middle-aged, and educated.[35] He seeks (sometimes indirectly) dominance over contrast figures,[36] such as women, gay men, men of color, and men of lower socioeconomic status.

As scholars acknowledge, though, any given culture has multiple masculinities, and multiple ways of embodying masculinity. Given this diversity of masculinities, what does masculinity look like within the criminal justice system?

B. Masculinities Theory and the Criminal Justice System

A number of sociologists and other social scientists, perhaps most notably James Messerschmidt, have focused on masculinity and criminal justice,[37] but within the legal academy, the work of Angela Harris forms a starting point.[38] Harris's seminal essay *Gender, Violence, Race, and Criminal Justice*[39] explores how masculinities manifest themselves within the criminal justice system.

Harris's argument begins with an acknowledgement of many different masculinities within a particular culture but posits that all forms of masculinity within

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32 *See* MICHAEL S. KIMMEL, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, *in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 28 ("It is this notion of manhood—rooted in the sphere of production, the public arena, a masculinity grounded not in landownership or in artisanal republican virtue but in successful participation in marketplace competition—this has been the defining notion of American manhood."); Cooper, *supra* note 23, at 687 (discussing marketplace man as the hegemonic model of American manhood).

33 Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 375 (2013) (citations omitted).

34 David S. Cohen, *No Boy Left Behind?: Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L. J. 135, 144 (2009).

35 Cooper, *supra* note 23, at 689.

36 *Id.* at 688–89 ("Hegemonic masculinity is tied to hierarchy: one proves one's manhood by dominating those further down in the social hierarchies.").

37 *See generally* JAMES W. MESSERSCHMIDT, CRIME AS STRUCTURED ACTION: DOING MASCULINITIES, RACE, CLASS, SEXUALITY, AND CRIME (2013) (discussing masculinities within the criminal justice system); ANTHONY ELLIS, MEN, MASCULINITIES, AND VIOLENCE: AN ETHNOGRAPHIC STUDY 1 (2015) (studying British men who engage in interpersonal violence); KATIE SEIDLER, CRIME, CULTURE AND VIOLENCE: UNDERSTANDING HOW MASCULINITY AND IDENTITY SHAPES OFFENDING 2–3 (2010) (studying masculinity and crime in Australia).

38 *See generally* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

39 *Id.*

American culture share two features.[40] Men "establish themselves [their identities] on the ground of what they are not"[41]—first, women[42]; second, gay.[43] And *men*—not women—form the principal audience for men's performances of masculinity.[44] Differently put, men seek to prove their masculinity to other men.

According to Harris and the scholars upon whose works she relies, "[m]anliness is one of those ideas that is often made real with violence."[45] This is so because the ways in which men seek to prove they are not women and not gay create binds in which violence always lurks beneath the surface.[46] In Western culture, some of the traditional paths for proving masculinity—"such as sport, battle, and mentorship—involve the sort of close, emotionally intense, and frequently physically and sexually charged relationships that subject men to the suspicion that they are homosexual."[47] Scholars assert that one result of this double bind is a "reservoir of potential for violence":[48]

> This account of contemporary hegemonic masculine identity suggests that violence—whether directed at women, at other men, or at oneself—is never far below the surface. Men must constantly defend themselves against both women and other men in order to be accepted as men; their gender identity, crucial to their psychological sense of wholeness, is constantly in doubt . . . . [U]nder these circumstances, gender performance frequently becomes gender violence.[49]

This "reservoir of potential violence" finds a natural home in virtually every corner of the criminal justice system. First, criminals, especially violent criminals, are

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40 *Id.* at 785–87.

41 *Id.* at 785.

42 *Id.* at 785–86.

43 *Id.* at 786–87.

44 *E.g.*, Dowd, *Asking the Man Question*, *supra* note 19, at 419–20 ("Masculinity is as much about relation to other men as it is about relation to women."). Michael Kimmel describes masculinity as a "homosocial enactment" stating, "[w]e are under the constant careful scrutiny of other men. Other men watch us, rank us, grant our acceptance into the realm of manhood. Manhood is demonstrated for other men's approval. It is other men who evaluate the performance. . . . . Masculinity is a *homosocial* enactment. We test ourselves, perform heroic feats, take enormous risks, all because we want other men to grant us our manhood." KIMMEL, *supra* note 32, at 33 (emphasis in original).

45 Harris, *supra* note 38, at 781.

46 *Id.* at 787–88.

47 *Id.* at 787 (citing EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 186 (1990).

48 *Id.*

49 *Id.* at 788.

overwhelmingly male.[50] Second, policing is a male-coded occupation.[51] Third, and perhaps most importantly, neither violent criminals nor law enforcement typically embrace or practice American culture's hegemonic form of masculinity, with its focus on "intellectual mastery, technological prowess, and the rationalized control of behavior (both one's own behavior and the behavior of others)."[52]

Sociologists have argued that many men who (for whatever reason) lack access to the culture's hegemonic form of masculinity instead resort to hypermasculinity, "the exaggerated exhibition of physical strength and personal aggression . . . in an attempt to gain social status."[53] The masculine strictures against femininity and homosexuality assume particular importance,[54] as do aspects of honor culture, which share the belief that violence is a justifiable response to insults that threaten to reduce one's social standing.[55]

Hypermasculinity is common both among police officers and among some groups of men and sometimes boys—street gangs, for example—who engage in violent crime.[56] As both Angela Harris and James Messerschmidt argue, hypermasculinity and police work are closely associated: such hypermasculinity is seen in the qualifications for the job (such as a focus on physical strength);[57] the extremely hierarchical structure of the workplace;[58] the often paramilitary style of policing, characterized by aggression and dominance;[59] and a "masculine culture of brotherhood that rests on the division between 'us' and 'them.'"[60]

Street gangs are "united in a kind of masculine community"[61] with police. They share an honor culture in which "respect must be paid or violence will follow,"[62] and

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50 *Id.* at 781.

51 *Id.* at 781–82.

52 *Id.* at 784–85 (citing Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC'Y 527, 531 (1996)).

53 *Id.* at 785.

54 *Id.* at 793.

55 *Id.* at 793 (citing Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567, 570 (1998)).

56 *Id.* at 793–96.

57 *Id.* at 793–94 ("Size requirements and entry exams that emphasize upper-body strength also assume that policing requires that one be able to physically dominate others.").

58 *Id.* at 793.

59 *Id.* at 793–94.

60 *Id.*

61 *Id.* at 793.

62 *Id.* at 795.

an aim to be "sovereign protectors of turf"[63] and the "baddest 'mofo's' on the block."[64] And of course violent crimes often can be other kinds of masculine performances, but a common (though not inevitable) thread is that the violence can be "an affirmative way of proving individual or collective masculinity."[65]

What place, if any, do (male) prosecutors—especially DAs or county solicitors who prosecute death penalty cases—occupy in this particular "masculine community"?

C. Masculinities Theory, the Criminal Justice System, and Local and State Prosecutors

This Author has not identified any specific sociological or legal literature focused on prosecutors and masculinities—a subject worth studying if ever there was one. That said, the known information furnishes fertile ground for hypothesizing.

First is an obvious but important point: Prosecutors are lawyers, part of a learned profession that enjoys considerable cultural cachet in American society, lawyer jokes notwithstanding. Lawyers are disproportionately represented in the halls of power in both the governmental[66] and business[67] realms. With their education, wealth, and power, lawyers at white-shoe firms often are exemplars of hegemonic masculinity.[68]

Second is a well-known fact about the legal profession: The profession has a class hierarchy, with white-shoe business lawyers—those at large or elite boutique firms—at the top of the hierarchy and, say, personal injury lawyers who represent plaintiffs

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63 *Id.* at 794.

64 *Id.*

65 *Id.* at 781.

66 For example, in the 117th Congress, 175 members of Congress (United States House of Representatives and United States Senate combined) had law degrees. AMERICAN BAR ASS'N, *Attorneys in the 117th Congress* (Jan. 26, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/january-2021-wl/attorneys-117thcongress/.

67 In 2017, for example, lawyers comprised roughly nine percent of CEOs at S&P 1500 firms; this number is significant given that an MBA or other business degree is the ordinary credential. Irena Hutton, *Lawyer CEOs*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (July 11, 2017), https://corpgov.law.harvard.edu/2017/07/11/lawyer-ceos/.

68 Professor Ann McGinley describes law firm culture as follows: "Law firms are hierarchical institutions where a dominant form of hegemonic masculinity prevails. Law firm culture is both masculine and antiquated, making it difficult for women and persons of color, but also challenging men, white and of color, to engage in masculine competitive behaviors that harm some men and many women. The dominant type of masculinity—hegemonic masculinity—is the norm in law firms. Hegemonic masculinity, as I use it here, is the most powerful, upper middle class, intellectual version of masculinity. It is competitive and aggressive. It is greedy, boastful, self-confident. It is elitist and self-serving. Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423, 428–29 (2013); *but see* Richard Collier, *Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-life Balance in Large Law Firms*, 13 NEVADA L.J. 410 (2013) (arguing, *inter alia*, that traditional concept of hegemonic masculinity is both inherently problematic and outdated as applied to lawyers at large, transnational law firms).

near the bottom. Government lawyers may be either high, mid-level, or low: A lawyer at the Office of the U.S. Solicitor General may be considerably more elite than one at a white-shoe firm; a government lawyer for a federal agency may represent the solid middle to upper middle class of the profession; a state governmental lawyer may represent the upper middle, middle, or lower middle class of the profession's class hierarchy, depending on agency, position, etc. Given this class hierarchy, one would expect multiple masculinities within the legal profession: Not everyone will be the hegemonic marketplace man described by Connell and others.[69]

State court prosecutors occupy an interesting place in the legal profession's class hierarchy.[70] They aren't white-shoe lawyers by any stretch of the imagination. On the whole, they attend less elite law schools and, at those schools, often are not top-of-the-class students.[71] Their daily work rarely focuses on captains of industry, Silicon Valley wizards, and masters of the universe;[72] rather, all too often the victims, witnesses, and defendants with whom and against whom they work are more *Ozark* than *Succession*.[73] The work touches upon both the sad and the sordid. Although law is a learned profession and many lawyers embody "marketplace man," the hegemonic model of masculinity in the United States, few state court prosecutors would be mistaken for "marketplace man."

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[69] KIMMEL, *supra* note 32, at 27–28; *see also* Connell, *supra* note 26, at 17.

[70] In contrast, United States Attorneys and Assistant United States Attorneys are among the profession's elite, occupying at least the upper middle class of the profession in this Author's view.

[71] Obtaining comprehensive information about state court prosecutors is exceptionally difficult, in part because counties and states generally do not collect or compile data on schools that prosecutors have attended. Given that, this Author's statements about law schools attended and grades earned is based largely on anecdote and experience.

[72] Most criminal defendants are poor. The most recent report on this topic from the Bureau of Justice Statistics observed that over 80% of felony defendants in large state courts were represented by public defenders or appointed counsel. *See* BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf. Though quite dated, these statistics likely remain accurate. In 1998, the year used in the report, the poverty rate in the United States was 12.7%. UNITED STATES CENSUS BUREAU, POVERTY IN THE UNITED STATES: 1998 (Sep. 1999), https://www.census.gov/library/publications/1999/demo/p60-207.html. The overall poverty rate from 2015-2019 was 13.4%. American Community Survey Briefs, *Changes in Poverty Rates and in Poverty Areas Over Time: 2005 to 2019* (2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-008.pdf. Given the lack of any substantial change in the poverty rate, one would not expect a substantial downward shift in the rate of indigent criminal defendants.

[73] *Ozark (TV Series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ozark_(TV_series) (last visited Mar. 4, 2023) (portraying financial advisor and his family embroiled in local criminal activity); *see generally* The Politics of Everything, *Succession's White Collar Criminals* (Oct. 13, 2021), https://newrepublic.com/article/163976/succession-hbo-white-collar-crime (portraying billionaire media conglomerate family engaged in white collar crime).

Third, although this may be changing to a degree,[74] the culture at many prosecutor's offices (county, state, and—to a degree—federal) is notably aggressive[75]—with direct aggression coded masculine in American culture.[76] Anecdotally speaking, anyone who has played in a lawyers' softball league knows exactly what this Author means: The prosecutors want to *win*. Indeed, there are systemic incentives for this aggressive, win-at-all-costs mentality: Prosecutorial success is often measured by conviction rates.[77] As some scholars have pointed out, the adversarial system itself is another systemic incentive for aggression and hyper-competitiveness.[78] The fact most district attorneys/county prosecutors are elected

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[74] The progressive prosecutor movement is perhaps the most important factor countering the traditional aggressive, win-at-all-costs environment at many district attorneys' offices. The term "progressive prosecutor" typically refers to a prosecutor challenging the embedded incumbents with a "progressive prosecutorial agenda in pursuit of criminal justice reform, including and especially alternatives to incarceration in appropriate cases." Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7 (2019). In the November 2020 elections following the murder of George Floyd, progressive and reform-minded prosecutors scored large victories at the ballot box. *See, e.g.*, Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, THE CONVERSATION (Nov. 18, 2020), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322. Rising violent crime rates, resistance from tough-on-crime governors and state legislators, and in-office rebellion from prosecutorial staff all have slowed the progress of this reform movement. *See, e.g.*, Wendy N. Davis, *Progressive Prosecutors are Encountering Pushback*, ABA JOURNAL (July 21, 2022), https://www.abajournal.com/web/article/progressive-prosecutor-pushback.

[75] *See, e.g.*, Brett L. Tolman, *Deterring Prosecutors from Abusive Behavior: A Former Federal Prosecutor's View*, 58 U. LOUISVILLE L. REV. 415, 417–18 (2020) (acknowledging from personal experience a "culture of aggressive prosecution" with "built-in incentives which reward the aggressive prosecutor willing to charge a lot of cases and secure long prison terms"); Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 17 (2009) (arguing that, given various media and political pressures, "the goal of winning often takes precedence over the ends of justice in key moments").

[76] *See, e.g.*, MICHAEL E. ADDIS & ETHAN HOFFMAN, THE PSYCHOLOGY OF MEN IN CONTEXT 171 (2020) ("Scholars from gender studies have noted the central role that aggression plays in demonstrating or performing masculinity.").

[77] *See, e.g.*, Tolman, *supra* note 75, at 418; Brink, *supra* note 75, at 17. Those seeking legal reforms have focused on changing how prosecutorial success is measured. *Cf.* LDF Thurgood Marshall Inst., *Prosecutorial Success Based on Conviction Rates Distorts the Criminal Justice System*, NAACP LEGAL DEF. FUND: VOTING FOR JUST., https://votingforjustice.azurewebsites.net/wp-content/uploads/2020/10/E_LDF_09282020_VFJToolkit_ProsecutorialSuccess-w_finished-endnotes-1-1.pdf (last visited Sept. 3, 2022) (calling on prosecutors to abandon conviction rates as a measure of success and instead to adopt restorative justice models).

[78] *See, e.g.*, Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1433 (2018) (describing culture of competitiveness in prosecutors' offices and arguing that prosecutors' adversarial role is inconsistent with their role as ministers of justice).

creates its own incentives for aggressiveness, especially aggressiveness in prosecuting alleged offenders.[79]

Fourth, state prosecutors work closely with law enforcement. This may be especially true for prosecutors in homicide units. As noted above, police work and hypermasculinity are closely associated.[80] In addition to its focus on strength and aggression and its strict honor culture, the culture of hypermasculinity includes a resentment-tinged critique of this culture's hegemonic masculinity: "Marketplace man," with his focus on intellect and control, is "soft."[81] Law enforcement's hypermasculine culture may rub off on state prosecutors. At the same time, though, police officers may either lump prosecutors in with the rest of the legal profession, including white-shoe lawyers, or at least may consider them a lot closer to other lawyers than to cops.

Differently put, with respect to masculinity, state prosecutors find themselves between two kingdoms.[82] As members of a learned profession—and with many prosecutors aspiring to the bench—they are at least proximate to hegemonic masculinity. But they are also proximate to the working-class hypermasculinity that often characterizes police and, in fact, given structural incentives for professional advancement within prosecutors' offices,[83] may be encouraged to exercise some form of hypermasculinity-lite. Professor Angela Harris has observed that men are engaged in "relations of competition, envy, and desire"[84] across masculinities. For example,

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79 *Id.* at 1477 ("It is conventional wisdom that the fact that most head prosecutors in the United States are elected makes them more punitive and more focused on conviction statistics."). However, Fish also noted that empirical evidence calls into doubt the conventional wisdom stating, "[r]ecent empirical scholarship gives some reason to doubt the existence of this electoral incentive. Several studies suggest that prosecutorial elections are low-information affairs in which incumbency is an overwhelming advantage (indeed, many are uncontested), and in which conviction rates and other metrics of adversarial success bear little apparent relationship to electoral success. Importantly, this is a different question from whether prosecutors *perceive* that their conviction statistics matter for reelection." *Id.* at 1478; *see also* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1546 (2020) (summarizing study of prosecutorial elections and finding, *inter alia*, that incarceration rates are highest in areas with the least competitive elections: "those jurisdictions that are most likely to have an insufficient supply of candidates [for prosecutor]—small and rural counties—are the places where incarceration rates are the highest").

80 *See supra* Part II.B.

81 Pyke, *supra* 52, at 531–32 (describing how hypermasculine, working class men "reconstruct their position as embodying true masculinity" and "symbolically turn the table on managers, whom they ridicule as conforming 'yes-men' and 'wimps' engaged in effeminate paper-pushing kinds of labor").

82 *Cf.* SUSAN SONTAG, ILLNESS AS METAPHOR 3 (1978) ("Everyone who is born holds dual citizenship, in the kingdom of the well and in the kingdom of the sick."); *see also* SULEIKA JAOUAD, BETWEEN TWO KINGDOMS: A MEMOIR OF A LIFE INTERRUPTED 46–47 (2021) (memoir about author's diagnosis with and treatment for leukemia in early adulthood).

83 *See supra* note 75 and accompanying text (finding that professional status and advancement may depend on conviction rates, etc.).

84 Harris, *supra* note 38, at 785.

she considers this envy and desire in the context of different manifestations of masculinity in white and Black men:

> At the cultural level, however, these competing forms of masculinity allow for interracial relations of envy and desire as well as mutual hostility. Observers of African American alternative masculinities argue that [B]lack men, while expressly denigrating white men and white masculinity, also pay homage to the white masculine ideal. Meanwhile, racist stereotypes leave room for a sneaking desire and envy on the part of white men for the supposed sexual potency, athleticism, and sensual physicality of white men. The relations between white and [B]lack men, then, are more complex than "dominant" and "subordinate": men divided by racial power may look at one another with admiration, envy, or desire.[85]

These relationships of envy and desire are not limited to race. Rather, they extend to class and profession as well. County and state prosecutors are not fully part of the hypermasculine kingdom of the police, but—despite lawyers' higher status—they may admire, envy, and desire a share of that hypermasculine kingdom.

However, this analysis of state and county prosecutors is too general, failing to account for the influences of both region and prosecutorial specialty.

D. Southern Masculinities and the Capital Prosecutor

Finally, with respect to death penalty prosecution and capital prosecutors, region matters. The Bible Belt and the historic Death Penalty Belt overlap substantially: Although the death penalty certainly exists in other pockets of the country, support for and use of it has always been greatest in the Southern United States (the South).[86] Just as there are multiple masculinities throughout the United States, there are multiple masculinities in the South,[87] and given the social construction of masculinity,[88] those masculinities have changed over time and continue to evolve.

Notwithstanding this evolution, however, historians and sociologists have identified several Southern masculinities both historically and now.[89] Because this Article concerns capital prosecutors—those who seek to use the coercive power of the State to kill—this Author's focus is on *white* Southern masculinities. Craig Thompson Friend describes two white Southern masculinities that emerged out of the antebellum

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[85] *Id.* at 784.

[86] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 137–43 (2009) (describing, *inter alia*, how and why the American death penalty is largely a Southern phenomenon).

[87] *See, e.g.*, CRAIG THOMPSON FRIEND, *From Southern Manhood to Southern Masculinities: An Introduction*, *in* SOUTHERN MASCULINITY: PERSPECTIVES ON MANHOOD IN THE SOUTH SINCE RECONSTRUCTION vii–xxvi (Craig Thompson Friend ed., 2009) (describing various Southern masculinities from the post-Civil War era through the twentieth century).

[88] *See supra* Subpart II.A.

[89] FRIEND, *supra* note 87, at viii.

Southern honor cultures and cultures of mastery.[90] The first white manhood that emerged during Reconstruction was that of the "Christian gentleman—honorable, master of his household, humble, self-restrained, and above all, pious and faithful."[91] (This model of masculinity became available to Black men for a time during Reconstruction as well.[92]) The second white manhood (masculinity) that emerged was the "masculine martial ideal."[93] Like the Christian gentleman model, this masculinity "built upon the ideals of honor and mastery"[94] but violence played a more overt and openly ideological role:[95] Violence alone was not proof of masculinity; rather, the purpose of violence was "to demonstrate honor in and protection of one's self, family, and region."[96] (Lynching was a major ritualized form of this violence.[97])

Scholars identify a third white Southern masculinity that emerged later than but existed alongside the Christian gentleman and the masculine martial models.[98] A third form of masculinity—"New South self-made manhood,"[99] which was individualistic and focused on business success and the economic development of the region—arose as part of the New South movement.[100] Self-made manhood was the hegemonic model of masculinity in the nineteenth century industrial North,[101] and "[i]n promoting industrial growth and agricultural diversification, New South advocates specifically

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90 *Id.* at xi.

91 *Id.* ("[A]s the church became the more crucial center for [B]lack life during Reconstruction, and racial barriers to [B]lack civic participation became relaxed, African American men also appropriated the Christian gentleman as a model for manliness. The Christian gentleman, then, provided a 'race-neutral language' for masculinity, situating manliness in terms of religious and civic presentations that were available to [B]lack men as well as white.").

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at xi–xii.

96 *Id.* at xii.

97 *See* Kris DuRocher, *Violent Masculinity: Learning, Ritual and Performance in Southern Lynchings*, *in* SOUTHERN MASCULINITY: PERSPECTIVES ON MANHOOD IN THE SOUTH SINCE RECONSTRUCTION 47 (Craig Thompson Friend ed., 2009) ("The lynching ritual offered a public space for white male southerners to assert idealized roles of being . . . 'Man-the-Impregnator-Protector-Provider.'") (citations omitted).

98 *See* FRIEND, *supra* note 87, at xvi ("By World War I, then, at least three models of manhood—the Christian gentleman, the masculine martial, and the self-made man—coexisted uneasily in the South and across racial boundaries.").

99 *Id.* at xv–xvi.

100 *Id.* at xv.

101 *Id.*

pushed southern masculinity away from its past."[102] Part of this separation from the past concerned race: Masculine martial ideals were openly and aggressively racist, relying on violence to preserve the racial status quo,[103] but New South advocates "believed that economic development needed racial peace."[104]

More recent white Southern masculinities draw from each of these three models. For example, mastery and honor are part of Southern white men's sports culture:[105]

> Racing [NASCAR], competing in football, making a big kill [hunting]—such activities were the . . . equivalent of proving manhood in antebellum dueling or sharpshooting. The rules of the hunt or the sport were designed to ensure fair play and, therefore, honorable victory. And as in the Old South, public demonstration of honor and success in competition enabled white men to claim rewards. As an example, between 1915 and 1973, the tradition among Texas A&M football players was to visit the notorious Chicken Ranch brothel after victories over their rivals at the University of Texas, symbolically making sexual pleasure the reward for successful demonstrations of manly power.[106]

This Southern white "sports culture" masculinity emphasizes honor and mastery but exists in tension with yet another white Southern masculinity that focuses on *self*-mastery. Southern evangelical Christian culture offered "religious visions of masculinity,"[107] with a "physically powerful and hypermasculine image of Jesus . . . [that] emphasiz[ed] the militant and aggressive nature of faith."[108] Within this evangelical culture, white men's self-mastery was a predicate to their becoming "worthy masters of their families and communities."[109] Scholars have argued that "the tension between the primitive masculinity of honor and the evangelical demands for

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102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at xvii ("But honor and mastery were not dead . . . . Aggressive and even combative, this attitude [of individualized honor] arose in the South alongside the masculine culture of sport and fitness"). (Of course, sports culture is not unique to white Southern men.)

106 *Id.* at xix.

107 *Id.*; *cf.* Seth Dowland, *A New Kind of Patriarchy: Inerrancy and Masculinity in the Southern Baptist Convention, 1979-2000*, *in* SOUTHERN MASCULINITY: PERSPECTIVES ON MANHOOD IN THE SOUTH SINCE RECONSTRUCTION 247 (Craig Thompson Friend ed., 2009) (tracing development of the "new kind of patriarchy" that "sanctioned masculine privilege through explicit reference to scripture" and "placed adherence to biblical gender norms at the heart of theological orthodoxy").

108 FRIEND, *supra* note 87, at xix.

109 *Id.*

mastery of the animal within increasingly became the primary paradigm of white southern masculinity"[110] during the twentieth century.

E. Masculinities Theory and the Capital Prosecutor: A Synthesis

In sum, the form of masculinity of most capital prosecutors is likely to include the following influences:[111]

- Marketplace man, with his stoicism, easy sense of command, and intellectualism;[112]
- Hypermasculine man, with his bluster, overt desire for domination, often overt racism and sexism, and "us versus them" mentality;[113]
- The old masculine martial ideal, in which violence is viewed as not merely justified but in fact righteous, when employed to protect "one's family, self, and region";[114]
- Southern sports and hunting culture, in which men prove mastery and honor through rule-based competition (one might argue that the aggressive culture at prosecutors' offices is simply a riff on sports and hunting culture, with defense lawyers as opponents and defendants as prey);[115] and
- Southern white evangelical Christian culture, focused on a very masculine deity and the imperative of self-control—taming the animal within—as a precondition to being worthy masters of household and community. (The prosecutor in question need not be an evangelical Christian to be influenced by this culture.)[116]

Masculinities theory speaks not only to the likely influences on capital prosecutors, but also about the relationship between capital prosecutors and defendants. Three subjects merit brief acknowledgement: (1) capital prosecution as emasculation; (2) masculinity and racism; and (3) capital prosecutor's envy of and identification with defendants.

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110 *Id.*

111 Another obvious influence is the specific social environment of a prosecutor's family of origin, current family, and community. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 464 (2017).

112 *See supra* Subpart II.A.

113 *See supra* Subpart II.B.

114 FRIEND, *supra* note 87, at xii.

115 *See supra* Subpart II.D.

116 *See supra* Subpart II.D.

First, the prosecutor's seeking a death sentence against a defendant may be an attempt at emasculation or at least an attempt to prove "who's the man."[117] In American culture, multiple masculinities hold in common the injunction not to be a "girl."[118] Angela Harris (among others) observes that men sometimes prove their dominance over other men—their masculinity—by "symbolically reducing others in the group to women and abusing them accordingly."[119]

Second, masculinities theory arguably predicts many capital prosecutors' explicit and implicit racial appeals regarding Black male defendants (especially when victims are white). Prosecutors' arguments to juries are often racist,[120] but masculinities theory would posit that racist appeals are not *only* racist appeals. They are also prosecutorial attempts to shore up one's own masculinity and place in the gender hierarchy by denigrating contrast figures:

> The role of the denigration of contrast figures deserves further elaboration. The idea is that men have often identified other groups of men from whom they distinguish themselves. Gay men, racial minorities, Jews, and women have served as contrast figures for the historically dominant straight, white, Christian male. The denigration of these figures has allowed dominant men to bolster their masculine esteem. As criminologist James Messerschmidt has discussed, there is a long history of police harassment of [B]lack and gay men. That history is related to the bolstering of . . . masculine esteem. For now, it suffices to say homosocial competition and anxiety are structured into masculinity and lead to the denigration of contrast figures.[121]

Third—and perhaps this admittedly speculative observation belongs more to psychoanalysis than to masculinities theory—this Author thinks it likely that the deadliest capital prosecutors (the "super" prosecutors and Dr. Deaths of a prior generation) identify strongly with and possibly even envy capital defendants.[122] For example, in interviewing capital prosecutor Donnie Myers, journalist Ed Pilkington

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117 *Cf.* Cooper, *supra* note 23, at 699 (arguing that police behavior during encounters with civilians often involves "masculinity contests" in which the officer attempts to prove dominance to prove his own masculinity).

118 *E.g.*, Dowd, *Asking the Man Question*, *supra* note 19, at 418 ("The two most common pieces defining masculinity are, at all costs, to be not like a woman and to not be gay.").

119 Harris, *supra* note 38, at 785.

120 *See, e.g.*, Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE WESTERN L. REV. 39 (2020) (compiling instances of racist prosecutorial rhetoric); *see also* Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 U. DENVER L. REV. 457 (2021) (describing racialized stock stories and narratives in criminal trials).

121 Frank Rudy Cooper, *Masculinities, Post-Racialism, and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEVADA L.J. 1, 18–19 (2010).

122 Ed Pilkington, *The Business of Securing Death Sentences: 40 Years and 28 Men*, THE GUARDIAN (May 5, 2017), https://www.theguardian.com/world/2017/may/05/donnie-myers-interview-death-penalty-prosecutor-south-carolina.

observed the similarities between Myers's approach to seeking death sentences and the attitude toward killing expressed by one of Myers's capital defendants.[123]

The masculinity of capital prosecutors may vary widely, but one thing is clear: As Part III demonstrates, gender plays a major role in the capital process.

III. GENDER AND THE AMERICAN DEATH PENALTY

Although there is a dearth of legal scholarship focused on masculinity and the death penalty, empirical research, psychological experimentation, traditional legal scholarship, and even straightforward data shed light on the influence of gender on the death penalty. The findings confirm that gender matters: the gender composition of capital juries matters; men and women serving on capital juries tend to see aggravating and mitigating evidence differently (although race plays a major role here as well); certainly, the gender of the defendant is significant in both the prosecutor's decision to seek the death penalty and in the jury's consideration of the punishment. This Part explores the influence of gender on capital punishment generally and capital sentencing more specifically.

A. Gender and Capital Juries

To this day, the Capital Jury Project remains the richest source of information about the deliberations and behavior of capital jurors. The Capital Jury Project was a multi-state, multi-disciplinary study of how capital jurors make sentencing decisions.[124] As part of the project, researchers and trained interviewers conducted extensive interviews (three to four hours) with eighty to 120 capital jurors in selected states.[125] Researchers also sometimes reviewed trial transcripts and interviewed judges and lawyers involved in the cases.[126]

The research findings of the Capital Jury Project were wide-ranging, focusing on, *inter alia*, when individual jurors initially decide to vote for life or death,[127] whether jurors understand instructions about aggravating and mitigating circumstances,[128] and

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[123] *Id.* (noting death-sentenced inmate's "insights into the psychology of killing" might shed light on the psychology of capital prosecution).

[124] For a description of the Capital Jury Project and a summary of its early findings, *see* William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L. REV. 1476, 1477 (1998) (finding that roughly half of capital jurors believed they knew the appropriate punishment even before the sentencing phase of trial); Marla Sandys, *Cross-Over Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1187 (1995) (noting that many capital jurors make up their minds about guilt and sentencing at the same time).

[128] *See, e.g.*, Ursula Bentele &William J. Bowers, *How Jurors Decide Death: Guilt is Overwhelming, Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1076 (2001) (detailing ways in which capital jurors misunderstand jury instructions);

which forms of aggravation and mitigation jurors find most compelling.[129] For a sense of the influence of this project within the legal academy, note that a search for "Capital Jury Project" yields more than 400 law review articles.[130] More importantly, the findings of the Project have influenced lawyers' arguments before the United States Supreme Court[131] and the Court's actual decisions.[132]

Unlike race, gender has not been a major focus of scholarship stemming from the Capital Jury Project.[133] The role of race is well known in both the history of the American death penalty[134] and in challenges to its constitutionality.[135] Although

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James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 CRIME & DELINQUENCY 412, 422–23 (1998) (describing findings of mock juror study showing limited juror comprehension of sentencing phase instructions).

129 *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538–39 (1998) (summarizing Capital Jury Project research on factors most significant to jurors' sentencing decisions); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L. 1, 47 (1989) (finding jurors identified manner of the killing as the most frequent justification for imposition of death sentence); Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998) (finding perceptions of a defendant's remorse significant in jurors' sentencing decisions).

130 Westlaw search in Law Reviews and Journals database for "Capital Jury Project" yielded approximately 410 articles (search conducted Feb. 7, 2022).

131 Westlaw search in U.S. Supreme Court database for "Capital Jury Project" yielded approximately thirty documents – amicus briefs, petitions for certiorari, and petitioners' briefs – and this Author suspects far more documents rely on research findings without identifying the project directly.

132 The Court's decisions about future dangerousness and a defendant's parole eligibility stand out in this regard. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 163–64 (1994) (citing article based on Capital Jury Project research about jurors' confusion regarding jury instructions, including those about the meaning of a life sentence).

133 Consider the results of two searches, both in Westlaw's Law Reviews and Journals database. A search with terms *"Capital Jury Project" /p race* yielded approximately 65 articles; the terms *"Capital Jury Project" /p gender* yielded approximately only 10. To be fair, there are many articles that consider the relevance of jurors' gender. *See, e.g.*, Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 L. & HUM. BEHAVIOR 529, 539 (2004) (finding, *inter alia*, that females are more receptive than males to mitigating evidence).

134 *See, e.g.*, Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96–110 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (providing brief historical overview of the role of race in the American death penalty).

135 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 314–19 (1987) (rejecting argument that Eighth Amendment was violated because of systemic racial disparities in the administration of the death penalty in the State of Georgia); *but see* Flowers v. Mississippi, 588 U.S. 2234, 2251 (2019) (reversing defendant's conviction and death sentence based on evidence pointing clearly to racially discriminatory peremptory challenges).

certainly less important than race, the role of gender has been comparatively under-studied and undertheorized.

However, despite the lack of major focus on gender, both the numerical and qualitative data from the Capital Jury Project yielded important findings about the role of gender—and especially the combination of gender and race—on capital juries. These findings include the following:

- The "white male dominance" effect: Capital Jury Project researchers have found that "the presence of five or more white male jurors on a jury was associated with a much higher rate of death sentencing in cases where there was a Black defendant and white victim."[136] Controlled experiments suggest that white men are "disproportionately influential in the group setting, persuading other jurors during the deliberations to join them in rendering death verdicts,"[137] and that their "concentrated presence made it more difficult for the women and non-white males on the jury to maintain their original, more pro-life positions."[138]
- The "Black male presence" effect: The presence of one or more Black men on a capital jury substantially reduced the likelihood of a death sentence in cases with a Black defendant and white victim.[139]
- In Black defendant/white victim cases, there is a general racial divide in receptivity to mitigating evidence about the defendant, with Black jurors more receptive to such mitigation.[140] However, this general racial divide is by far the largest between men: The data showed a huge divide between Black and white men on "lingering doubt about the defendant's guilt, impressions of the defendant's remorsefulness, and perceptions of the defendant's future dangerousness":[141]

  > [T]hese differences of perspective on aggravating and mitigating considerations between [B]lack and white jurors were most pronounced between the males of each race. Thus [B]lack males were the most likely, and white males were the least likely, to have lingering doubt about the defendant's guilt, chiefly about the extent of the defendant's involvement or

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136 Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 580 (2011).

137 *Id.* at 585.

138 *Id.*

139 *Id.*

140 *See* William J. Bowers, Marla Sandys, & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1502–03 (2004) (reporting differences between Black and white jurors regarding a variety of punishment-related considerations, such as perceptions of a defendant's remorsefulness).

141 *Id.* at 1502.

> responsibility for the crime. Again, [B]lack males were most likely, and white males the least likely, to see the defendant as remorseful and to identify with the defendant's situation or that of his family. And, on the flip side, white males were the most likely, and [B]lack males the least likely, to see the defendant as dangerous and to believe that he would be released from prison soon if not given the death penalty.[142]

- Black female jurors are most likely, and white female jurors least likely, to describe a capital defendant in a Black defendant/white victim case as emotionally unstable or disturbed.[143]

Moreover, although the evidence is mixed, research outside the Capital Jury Project suggests that women are less punitive than men.[144]

Gender is salient well before a capital case proceeds to trial. As Subpart III.B shows, the gender of the crime victim affects the jury's sentencing decision.[145]

B. Gender and Murder Victims in Capital Cases

Lawyers and academics in the capital punishment world know that the characteristics of victims matter in the sentencing determination.[146] The Baldus Study established a race-of-victim effect in capital cases in Georgia: Defendants whose victims were white were more likely to be sentenced to death than defendants whose victims were Black.[147] Other victim characteristics also are salient—for whatever reason, including illegitimate reasons—to jurors' sentencing determinations: For

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142 *Id.* at 1503.

143 *Id.* at 1508.

144 *See, e.g.*, Brewer, *supra* note 133, at 537 (citing sources suggesting a relationship between gender and punitiveness, with female gender associated with lower punitiveness).

145 *See infra* Subpart III.B. For a discussion of the relevance of the defendant's gender, *see infra* Subpart IV.A (analyzing gender in a case with a female defendant).

146 *See, e.g.*, Caisa Elizabeth Royer et al., *Victim Gender and the Death Penalty*, 82 UMKC L. REV. 429, 429 (2014) ("Do the characteristics of the victim determine a murderer's punishment? Theory and research both suggest they do.").

147 *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661. 709–08 (1983); *see also* McCleskey v. Kemp, 481 U.S. 279, 279 (describing Baldus study). This race-of-victim finding has been replicated in many different states during many periods of time. *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1660–61, 1742–44 (1998) (describing empirical studies showing racial disparities in death sentencing in several states); Jelani Jefferson Exum & David Nivens, *Where Black Lives Matter Less: Understanding the Impact of Black Victims on Sentencing Outcomes in Texas Capital Murder Cases from 1973–2018*, 66 ST. LOUIS L.J. 677, 683 (2022) (presenting comprehensive data showing pervasive influence of race in capital sentencing outcomes in the State of Texas).

example, many jurors were less likely to initially vote for a death sentence when they considered the victim in some sense "unworthy."[148]

What about the gender of the murder victim? In addition to confirming a race-of-victim effect, the Baldus Study observed a gender-of-victim effect, with female victim cases treated more harshly than male victim cases.[149] However, the researchers did not consider this disparity a result of gender discrimination but of another factor, many female victims' physical vulnerability (which may also be true of children, the elderly, those with disabilities, etc.).[150]

In sum, both the Capital Jury Project and other research shows the influence of gender upon death penalty decisions: White men and those with traditional understandings of gender are more likely to vote for death.[151] As Part IV demonstrates, capital prosecutors (whether consciously or unconsciously) use gendered arguments to persuade these jurors.

IV. Masculinity in Closing Argument: Analysis of the Two Southern "Super"-Prosecutors and Their Use of Masculinity in Arguments for Death

Two killer prosecutors: How do these killer prosecutors "do" masculinity, and how do they use masculinities—whether their own, the jurors', or the defendant's—during penalty phase closing arguments in capital trials? First, the prosecutors performed their masculinities because that is who they were. In that sense, their performance of masculinity was not intended to persuade. Second, though—and this may have been unconscious—the prosecutors included masculine appeals because such appeals worked: They made jurors more comfortable with sentencing someone to death.

This Author selected the prosecutors specifically because of their reputations for securing death sentences. Joe Freeman Britt and Donnie Myers both hearkened from an earlier era in which support for the death penalty was considerably higher than it is now[152] and arguably in which understandings of gender were less sophisticated.[153]

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148 *See, e.g.*, Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 354 (2003) (finding that although most jurors said they considered most victim characteristics irrelevant to their sentencing decisions, the data "suggested a fairly strong correlation between a juror's perception that a victim had a troubled life . . . and an inclination to choose a life sentence rather than a death sentence").

149 Royer, *supra* note 146, at 430 (finding the Baldus Study "confirmed that the victim's gender was statistically associated with death sentencing as well. Georgia prosecutors and juries treated female victim cases more harshly than male victim cases, with juries influenced more strongly than prosecutors by the victim's gender.").

150 *Id.*

151 *See supra* Part III.

152 *See* Frank R. Baumgartner, *If Biden Abolishes the Federal Death Penalty, He'll Have More Support Than You Think*, WASH. POST (Aug. 3, 2021), https://www.washingtonpost.com/politics/2021/08/03/if-biden-abolishes-federal-death-penalty-hell-have-more-support-than-you-think/ (finding support for death penalty at lowest level in almost fifty years and finding that support for capital punishment peaked in 1997).

153 *Cf., e.g.*, Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME (Mar. 26, 2017), https://time.com/magazine/us/4703292/march-27th-2017-vol-

Nonetheless, the death penalty may be resurgent;[154] moreover, aggressive forms of masculinity are resurgent as well,[155] existing alongside and in tension with much of American culture's greater gender fluidity. Although one of the men is dead and the other is retired, they themselves, as well as their arguments for death, still have something to teach us.

A. Joe Freeman Britt and State of North Carolina v. Velma Barfield

1. Britt and Hypermasculinity

Joe Freeman Britt is the deadliest prosecutor in North Carolina history.[156] He won forty-seven death sentences,[157] including almost two dozen death sentences in a two-year period.[158] Despite his serving as district attorney for two rural counties in eastern North Carolina, Britt was known as America's "deadliest D.A." for his ability to secure death sentences.[159] These sentences were rarely carried out, in part because of Britt's own errors and misconduct.[160]

With Britt, a variation on a famous phrase comes immediately to mind: Sometimes a cigar is *not* just a cigar.[161] This phrase came immediately to mind as this Author looked at the March 1987 cover of *Southern Magazine*. The feature article is entitled

189-no-11-u-s/ (discussing evolution in understandings of gender, especially among youth and young adults).

154 *See supra* Part I.

155 *See supra* Part I.

156 Matt Schudel, *Joe Freeman Britt, Prosecutor Who Sent Dozens to Death Row, Dies at 80*, WASH. POST (Apr. 16, 2016), https://www.washingtonpost.com/national/joe-freeman-britt-prosecutor-who-sent-dozens-to-death-row-dies-at-80/2016/04/15/b246f27e-025b-11e6-b823-707c79ce3504_story.html.

157 *Id.*

158 Alan Blinder, *Joe Freeman Britt, Called America's "Deadliest D.A.," Dies at 80*, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/us/joe-freeman-britt-called-americas-deadliest-da-dies-at-80.html.

159 *Id.*

160 *See, e.g.*, Ariana Costakes, *Misconduct of Five "Deadly" Prosecutors Led to Wrongful Convictions*, INNOCENCE PROJECT (July 7, 2016), https://innocenceproject.org/new-report-details-actions-five-deadly-district-attorneys/ (describing report by Harvard Law School's Fair Punishment Project that noted that Britt committed misconduct or other legal errors in at least fourteen capital trials).

161 *Sometimes a cigar is just a cigar* has long been attributed to Sigmund Freud, although I have been unable to confirm that he wrote or even said it. For some internet sleuthing on the origin of the phrase, *see generally* Larry Holzwarth, *10 of the Most Famous Quotes Never Said or Misattributed*, HISTORY COLLECTION (Apr. 18, 2018), https://historycollection.com/10-of-the-most-famous-quotes-never-said-or-misattributed/3/.

Hot Blood: The Man Who Won't Forgive Murder.[162] Looking out from the cover is a middle-aged man with wavy gray hair, a grey tweed coat, blue button-down shirt, and navy patterned tie.[163] Nothing too interesting there. But two features really grab you: the man's direct, arresting gaze—he's glaring right at you—and the big cigar, burnt embers and all, protruding from the side of his half-closed mouth.[164] Looking at the picture, you're not surprised to learn Britt enlisted in the army and ultimately retired from the Reserve as a Colonel.[165] You're not surprised to learn of his love for piloting planes and helicopters.[166]

Nor are you surprised to learn that Britt's closing arguments were compelling performances of masculinity. At six-foot-six and "powerfully built,"[167] Britt was an imposing figure and an "intimidating courtroom presence,"[168] and newspapers described his closing arguments as "thundering,"[169] full of "flamboyant oratory,"[170] all accentuated by his "booming baritone voice."[171] He was known to brandish the bloody clothing of murder victims and wave a Bible before the jury.[172]

Unlike that of some small-town prosecutors, Britt's flamboyant oratory was supported by his significant command of literature. A "voracious reader[,] . . . Britt would weave English literature, American literature into his arguments."[173] He had a special fondness for the work of Rudyard Kipling.[174]

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162 *See* Amazon, SOUTHERN MAGAZINE (Mar. 1987), https://www.amazon.com/SOUTHERN-MAGAZINE-March-Britt-Jordan/dp/B003ZYX2TE (last visited Sept. 4, 2022).

163 *Id.*

164 *Id.*

165 Blinder, *supra* note 158.

166 *Joe Freeman Britt*: *July 22, 1935-April 6, 2016*, FLOYD MORTUARY & CREMATORY, INC, https://www.floydmortuary.net/obituary/5211333 (last visited Sept. 4, 2022).

167 Schudel, *supra* note 156.

168 *Id.*

169 Blinder, *supra* note 158.

170 *Id.*

171 Schudel, *supra* note 156.

172 *Id.*

173 Paul Woolverton, *World's "Deadliest" Prosecutor, Robeson County's Joe Freeman Britt, Dies at 80*, FAYETTEVILLE OBSERVER (Apr. 7, 2016), https://www.fayobserver.com/story/news/crime/2016/04/07/world-s-deadliest-prosecutor-robeson/22309947007/.

174 *Joe Freeman Britt: Loved, Loathed, Always Effective*, THE ROBESONIAN (Apr. 13, 2016), https://www.robesonian.com/opinion/86369/joe-freeman-britt-loved-loathed-always-effective.

Britt held a notably gladiatorial philosophy of lawyering, counseling prosecutors to "go after them [defense lawyers and defendants] and tear that jugular out."[175] If his goal with defense attorneys and defendants was to tear out the jugular, his goal with capital juries was to extinguish a natural flame: "Within the breast of each of us burns a flame that constantly whispers in our ear 'preserve life at any cost.' It is the prosecutor's job to extinguish that flame."[176] His skill at extinguishing that flame—in fact, his skill in the courtroom more generally—acquired the status of near legend, and "other lawyers would come to watch him."[177]

Which masculinities predominated in Britt? Hypermasculinity, without a doubt. An erudite version, to be sure, but hypermasculinity nonetheless. Britt also appears to have been influenced by the old Southern masculine martial ideal, with its focus on honor and mastery and its belief in violence to preserve its vision of proper order.

The 1987 cover of *Southern Magazine* furnishes circumstantial evidence for Britt's hypermasculinity. The stare, the *cigar*: What other conclusion is even possible? But the evidence is not limited to a feature in a now-defunct magazine. For example:

- *Britt's hypermasculinity was evidenced in his crude and public use of misogynistic language to denigrate other men*. When one of his distant cousins—also a local prosecutor—criticized Britt for his bullying and "run[ning] over people."[178] Britt replied by calling his cousin a "pussy": "Well, let's say if I was a bully, he is a pussy. How about that?"[179] Britt continued: "I think [my cousin] has been hanging around too much with the wine and cheese crowd."[180] The hypermasculinity in the use of the word *pussy* to describe anyone, but especially another man, is clear: Recall that hypermasculinity's strictures against femininity ("don't be a girl") and homosexuality ("don't be gay") are especially strong, even exaggerated, as is the urge to dominate other men.[181]

  The reference to *wine and cheese crowd* is less clear (because less familiar) but also supports the theory that hypermasculinity was Britt's dominant form of masculinity. The term *wine and cheese crowd* may be

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175 Schudel, *supra* note 156.

176 Josie Duffy Rice, *Terrifying Report Highlights Americas 5 Deadliest Prosecutors*, DAILY KOS (June 30, 2016), https://www.dailykos.com/stories/2016/6/30/1544017/-Terrifying-report-highlights-America-s-five-deadliest-prosecutors.

177 Woolverton, *supra* note 173; *see also Joe Freeman Britt: Loved, Loathed, Always Effective*, *supra* note 174 (noting that Britt's courtroom performances often were witnessed by "third parties who had simply stopped in for the show").

178 Robert A. Oppel Jr., *As Two Men Go Free, A Dogged Ex-Prosecutor Digs In*, NY TIMES (Sept. 7, 2014), https://www.nytimes.com/2014/09/08/us/as-2-go-free-joe-freeman-britt-a-dogged-ex-prosecutor-digs-in.html.

179 *Id.*

180 *Id.*

181 Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000).

best known within sports.[182] It refers to fanbases that are genteel, passive, notably non-aggressive: Florida State University basketball star Sam Cassell referred to the University of North Carolina fanbase as a wine and cheese crowd.[183] The phrase connotes a lack of masculinity: In 2022, Boston sports radio and television personality Mike Felger described the fanbase for the Golden State Warriors as a "wine and cheese crowd" and "kind of froufrou."[184] When used as an adjective, *froufrou* refers to something "very showy or fancy."[185] When defining *froufrou*, the Urban Dictionary directly refers to homosexuality and to effete men:

> (1) A showy individual, usually a homosexual, who tries to get attention through a public exhibition of various bizarre garmets [sic].
>
> (2) A man acting in a womanly fashion.[186]

In short, accusing someone of "hanging around too much with the wine and cheese crowd" serves the same function as calling them a "pussy": It both calls them out for their lack of masculinity and, in fact, dominates them through a form of emasculation. Recall that hypermasculinity often includes a resentment-tinged critique of hegemonic masculinity ("marketplace man") as soft.[187] Britt was calling his cousin soft and, through the misogynistic insult, also sought to dominate him through a form of emasculation.

- *Britt's hypermasculinity was evidenced in his litigation philosophy and in his reputation for bullying and intimidation*. Recall hypermasculinity's exaggerated focus on physical aggression and intimidation.[188] Britt's belief that prosecutors should "go after" defendants and defense counsel and "tear out the jugular" was

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182 *See, e.g.*, Matt Hladik, *Roy Williams Took a Jab at the UNC Home Crowd Last Night*, THE SPUN BY SPORTS ILLUSTRATED (Dec. 1, 2016), https://thespun.com/acc/north-carolina/roy-williams-unc-crowd-fans-dean-dome (describing how UNC fanbase earned reputation as wine and cheese crowd).

183 *Id.*

184 *See, e.g.*, Grant Marek, *Boston Radio Guy Suggests Warriors' Chase Center Has a "Wine and Cheese Crowd" That's "Kind of Froufrou"*, SFGATE (June 2, 2022), https://www.sfgate.com/warriors/article/Celtics-media-guy-mocks-Chase-Center-17216453.php.

185 *Froufrou*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/froufrou (last visited July 4, 2022).

186 *Froufrou*, URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=froufrou (last visited July 4, 2022).

187 *See supra* Subpart II.C.

188 *See supra* Subpart II.B.

metaphorical, but the physical aggression captured by the metaphor is unmistakable. Similarly, his courtroom presence—his towering over others, his thundering oratory—suggests he sought to dominate the setting not only legally and intellectually, but also physically.

- *Britt's hypermasculinity also was evidenced in his long-term military service and his avocation as a pilot*. Britt's long-time service in the Army reserves and his avocation as an airplane and helicopter pilot also suggests hypermasculinity. To be sure, neither military service nor piloting inherently require hypermasculinity, and many service members and pilots are not hypermasculine. However, as Professor Valerie Vojdik has noted, hypermasculinity is part and parcel of military service in the United States:

> [A] "variety of rituals and practices compel males to prove their social identity as men through both the symbolic and actual enactment of a hypermasculinity that denigrates women." Drill sergeants humiliate recruits by calling them "pussies," "sissies," or "fags."[189]

To this day, the culture of piloting is hypermasculine.[190] The culture of avocational aviation has its roots in military combat training,[191] and one scholar of aviation has argued that virtually every aspect of private aviation "reinforced the message that flying was by, for, and about men."[192]

Britt's longstanding and substantial commitments to the military and to piloting—two hypermasculine communities—supports the conclusion that Britt himself was hypermasculine. Hypermasculinity is typically more associated with blue collar professions than with learned professions, and, not surprisingly, not all of Britt's life neatly fits a hypermasculinity hypothesis. His deep involvement with the State Bar, his time as a state court judge, his love for teaching and active participation in training sessions, and his love for literature[193] point to a more "establishment" form of masculinity—a Southern predecessor to marketplace man. But even here are

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[189] Valerie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 942 (2014) (quoting Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 342 (2005)); *see also* Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 710 (1996) (discussing how military socialization produces a hypermasculine man characterized by self-reliance and domination of others).

[190] *See* ALAN MEYER, WEEKEND PILOTS: TECHNOLOGY, MASCULINITY, AND PRIVATE AVIATION IN POST-WAR AMERICA 3–4 (2016).

[191] *Id.* at 19–49 (describing origins of postwar private flying).

[192] Book Description for WEEKEND PILOTS, JOHNS HOPKINS UNIV. PRESS, https://www.press.jhu.edu/books/title/11418/weekend-pilots (last visited Sept. 4, 2022).

[193] *See Joe Freeman Britt*: *July 22, 1935-April 6, 2016*, *supra* note 166.

indications of hypermasculinity: Rudyard Kipling, whose subjects were empire and manhood,[194] was Britt's favorite author.[195]

Britt's masculinity informed his closing arguments in many respects—not only his demeanor, but also his words. One sees this in his closing argument in *State v. Barfield*.

2. *State v. Barfield*: Appeals to Masculinity in Britt's Closing Argument

This closing argument concerned a female defendant, Velma Barfield.[196] In 1978, Ms. Barfield was convicted of murder and sentenced to death for murdering her fiancé through arsenic.[197] Although Barfield was prosecuted only for the murder of Stewart Taylor, evidence suggested she had poisoned several others, including her mother and an earlier husband.[198]

As Joan Howarth has observed,[199] sentencing women to death—*some* women, anyway—falls outside the ordinary schemas for the American death penalty. *Killing* is coded masculine; equally important, *moral accountability* (and thus being subject to the death penalty) is coded masculine.[200]

Scholars have offered two major explanations for the disparity in capital sentencing rates between men and women accused and convicted of capital crimes: the chivalry theory and the evil woman theory.[201] The chivalry theory attempts to

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194 *See, e.g.*, BRADLEY DEANE, *Gunga Din and Other Better Men: The Burden of Imperial Manhood in Kipling's Verse*, *in* MASCULINITY AND THE NEW IMPERIALISM: REWRITING MANHOOD IN BRITISH POPULAR LITERATURE, 1870-1914 19–50 (2014).

195 *See Joe Freeman Britt*: *July 22, 1935-April 6, 2016*, *supra* note 166.

196 *Velma Margie Barfield*, OFF. OF THE CLARK CNTY. PROSECUTING ATTORNEY, http://www.clarkprosecutor.org/html/death/US/barfield029.htm (last visited Feb. 13, 2023).

197 State v. Barfield, 259 S.E.2d 510, 518 (N.C. 1979). The North Carolina Supreme Court opinion contains most of the facts necessary for an understanding of the crime, including of the evidence in aggravation and mitigation of punishment. *See also* JERRY BLEDSOE, DEATH SENTENCE: THE TRUE STORY OF VELMA BARFIELD'S LIFE, CRIMES, AND PUNISHMENT 149 (1998). [Note: pagination is from the Kindle edition.].

198 *Barfield*, 259 S.E.2d at 520–22.

199 Howarth, *supra* note 6, at 186 ("In some sense, then, the executions of feminine subjects are gender mistakes, placing the masculine authority of the state at risk.").

200 *See id.* at 213 (arguing that "the notion of 'responsible agency' is deeply masculine").

201 *See, e.g.*, Andrea Shapiro, *Unequal Before the Law: Men, Women, and the Death Penalty*, 8 AM. U. J. GENDER, SOC. POL'Y, & L. 427, 453–59 (2000) (exploring theories for disparate treatment of male and female defendants in the capital process); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 878 (1990) (finding that women sentenced to death lack traditional markers of femininity); Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1416 (1997). *But see* Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 504–05 (1990) (taking issue to a degree with chivalry thesis). For an extensive treatment of the chivalry theory, *see generally* Steven F. Schatz & Naomi R. Schatz, *Chivalry Is Not Dead: Murder, Gender, & the Death Penalty*, 27 BERKELEY J. GENDER, L., & JUST. 64 (2012)

explain the dearth of women sentenced to death and executed in the United States. As Jenny Carroll has described, there is a cultural reluctance to sentence women to death because of a chivalrous attitude toward women: The gendered culture stereotype is that women are weaker than, dependent on, and submissive to men, and, therefore, in need of male protection.[202] An inherently weak figure needs protection and may not be fully morally accountable. Calling the death penalty for women not merely rare, but also anomalous, Professor Elizabeth Rapaport noted the tension between cultural reluctance to sentence women to death and the legal norms of gender equality:

> There are deep cultural inhibitions against the deliberate killing of women, even women who have been convicted of heinous murders, which war with the criminal law norm of equality of treatment of all cases and the strictures of the fourteenth amendment's equal protection clause . . . .
>
> ***
>
> The death penalty, as society's most awesome sanction, symbolizes the power of society to exact justice for the violation of rights it chooses to protect. The impression that women are spared death, despite our gathering commitment to sexual equality, is indicative of the conviction, deep in the culture, that *women will continue to lack full moral, political and legal stature, and that they gain certain protections in exchange for accepting these limitations*.[203]

Just as the chivalry theory seeks to account for the relative dearth of women on death row, the evil woman theory seeks to account for those who are sentenced to death and even executed.[204] Professor Victor Streib's studies of women sentenced to death suggest that these women typically fall outside society's definitions of appropriate femininity.[205] Among other things, "appropriate femininity" does not include: (i) lesbianism—a disproportionate share of women sentenced to death are lesbians; (ii) Blackness—historically, Black women have been sentenced to death and executed in greatly disproportionate numbers; and (iii) women who commit murder in a visibly violent way or whose behavior is otherwise deemed unfeminine.[206]

One might argue that the chivalry and evil woman theories are different sides of the same coin. Chivalry's so-called benefits are extended only to women deemed

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(analyzing gender disparities in California death sentencing and concluding that chivalric norms strongly influence capital sentencing).

[202] Carroll, *supra* note 201, at 1418–19.

[203] Rapaport, *supra* note 201, at 503, 508 (emphasis added). To be fair, Rapaport disputed the evidence for the chivalry theory, arguing that the principal reason for the capital sentencing disparity is that most female murderers do not commit murders (such as felony murders) that qualify for the death penalty. *Id.* at 509.

[204] Carroll, *supra* note 201, at 1423.

[205] Streib, *supra* note 201, at 879; *see, e.g.*, Shapiro, *supra* note 201, at 453–59 (summarizing research supporting the evil woman theory).

[206] Shapiro, *supra* note 201, at 453–60.

worthy of paternalistic protection.[207] Those unworthy of protection do not merit protection and can—at times, *should*—be eliminated.[208] The exclusion of Black women from the so-called protection of chivalry is longstanding: Sojourner Truth's *Ain't I a Woman?* speech calls out both white male chivalry's exclusion of Black women and the chivalric assumption of all women's unequal status.[209] Lesbians and women who commit violent murders or are otherwise deemed unfeminine present a different case. Unlike Black women, who were excluded from chivalry's protections principally because of racism, lesbians and other "unfeminine" women are excluded because part of their implicit—sometimes explicit—rejection of the chivalric bargain: An apparently benevolent protection given in exchange for staying in one's (inferior) gender lane.[210]

An obvious point nonetheless merits acknowledgement: Chivalry is about masculinity. Chivalry often characterizes honor cultures, in which violence may be justified in response to affronts to honor.[211] As Professors Schatz and Schatz observe, "[c]hivalry enforced strict gender roles because it was a code of conduct *only for men*; women could not earn honor through physical or martial prowess."[212] Indeed, although chivalric norms may require the idealization and protection of women, men are always the point: Women are "always judg[ed] . . . in terms of whether they brought honor to men."[213]

Moreover, chivalry characterizes many white Southern masculinities. This is certainly true of the old masculine martial ideal, in which men gain honor by employing violence in protection of those under their protection.[214] The connection with medieval chivalric norms is evidenced even by the name of the masculine martial ideal's most notorious organization: the *Knights* of the Ku Klux Klan.[215] Chivalry also emerges in modern white Southern evangelicalism, with its image of an imposing and hypermasculine Jesus.[216]

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207 *Id.* at 456–57.

208 *Id.* at 458–59.

209 Sojourner Truth, Ain't I a Woman? (1851).

210 *See* Rapaport, *supra* note 201 and accompanying text.

211 *See* Schatz & Schatz, *supra* note 201, at 67 ("Honor was the core value of chivalry and the most important of the three virtues of the chivalric knight. For the chivalrous knight, honor had an intimate relationship with violence, and the essence of chivalry was its regulation of honor violence.").

212 *Id.* at 68 (emphasis added).

213 *Id.*

214 *See supra* notes 93–114 and accompanying text (describing masculine martial ideal).

215 Ann S. Kaufman, *The Birth of a National Disgrace: Medievalism and the KKK*, THE PUBLIC MEDIEVALIST (Nov. 21, 2017), https://www.publicmedievalist.com/birth-national-disgrace/.

216 *See supra* notes 107–08 and accompanying text (describing masculinity in white Southern evangelicalism).

Assuming any validity to the chivalry and evil woman theories, Britt faced a complex task in arguing for Barfield's death. The masculinity of several jurors likely was influenced by chivalry—recall white Southern masculinity's roots in honor culture.[217] Sentencing even a guilty woman to death could offend chivalric norms and thereby challenge some jurors' sense of their own masculine identity as benevolent protectors. Furthermore, advocating for a woman's death might call Britt's masculinity into question both with the jury and, for that matter, with himself. Recall the homosocial nature of masculinities: Men seek to prove their masculinity to other men.[218] Given that, Britt could not afford to lose the respect of jurors: To the extent Britt's masculinity was a source of his credibility and authority, actions with the potential to call his masculinity into question presented an obvious litigation risk.

A prosecutor facing this complex task could employ either of two approaches. One approach would call for the prosecutor to emphasize (whether explicitly or implicitly) gender equality and call into question chivalric norms (again, whether explicitly or implicitly). This approach is more consistent with legal and constitutional norms of equality but is psychologically problematic: It is no small feat even temporarily to cast aside one's deeply felt gender identity with all that accompanies it.

The second approach is more straightforward psychologically: The prosecutor can decline to challenge chivalric norms while arguing (implicitly) that, as an "evil woman," Barfield has forfeited the protections of those norms. The obvious psychological benefit of this approach is that neither the prosecutor's nor the jurors' masculinities are necessarily threatened or called into question. The challenge of the approach is convincing jurors that Barfield falls so squarely outside the chivalric bargain—is so evil or unfeminine—that she can be put to death.

How difficult a task would this be with Barfield? None of the obvious chivalry exclusions apply: Velma Barfield was a white, heterosexual woman,[219] so the exclusions for Black women and lesbians would not apply. Moreover, at least at first blush, she does not appear to have been unfeminine. Quite the opposite, in fact. She was a grandmother,[220] and was often described as a devout, church-going Christian,[221] an important marker of femininity in the small-town South. By all accounts she was a devoted mother to her children.[222]

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217 FRIEND, *supra* note 87, at xi.

218 Cooper, *supra* note 23, at 18.

219 Mindy Griffith et. al., *Margie Velma Barfield "Death Row Granny" "Mama Margie"*, DEPT. OF PSYCH., RADFORD U. http://maamodt.asp.radford.edu/Psyc%20405/serial%20killers/Barfield,%20Velma%20-%202005,%20Fall.pdf (last visited Feb. 2, 2022).

220 BLEDSOE, *supra* note 197, at 16 (noting Barfield's fear at the time of her arrest that she would be unable to see her "grandbabies").

221 *See, e.g.*, *Velma Margie Barfield*, http://www.clarkprosecutor.org/html/death/US/barfield029.htm (last accessed Jan. 30, 2023).

222 BLEDSOE, *supra* note 197 (repeatedly describing Barfield's commitment to her children). *But see id.* at 158–61 (suggesting Barfield attempted to poison her daughter).

On the other hand, even the most mediocre prosecutor could make an "evil woman" case for Velma Barfield. Although she was tried capitally only for the murder of her fiancé, Barfield poisoned *at least* four people (and probably more)—her second husband, her fiancé, an elderly woman for whom she was caring, and her own mother.[223] By all accounts, these deaths were excruciatingly painful[224] and were at least partially motivated by Barfield's desire to prevent the victims from discovering she had stolen from them by writing checks on their accounts or by other similar means.[225] And for the many years during which Barfield's role in the victims' deaths was unknown, Barfield apparently used her history of loss to garner sympathy for herself.[226] As for her religiosity, she poisoned at least one of her victims just before they attended a revival.[227]

Nonetheless, the evil woman narrative is less straightforward than the last paragraph would imply. When law enforcement learned that her fiancé had died by arsenic poisoning, Barfield admitted within a few days that she had poisoned him and several others.[228] However, she denied that she intended to cause death;[229] rather, she claimed she only intended to make the victims sick for a long enough period to allow her to pay back money she had "borrowed."[230] Furthermore, she claimed her judgment was substantially clouded and compromised by her extreme substance abuse.[231] This history of substance abuse was well-documented: She had a decades-long history of addiction to various painkillers and would obtain prescriptions from multiple

[223] *See* State v. Barfield, 259 S.E.2d 510, 520–22 (N.C. 1979); BLEDSOE, *supra* note 197, at 149.

[224] *See, e.g.*, BLEDSOE, *supra* note 197, at 138–41 (describing one victim's suffering).

[225] *See, e.g.*, *id.* at 215.

[226] *Id.* at 70.

[227] *Id.* at 205.

[228] *Id.* at 56.

[229] Had the jury agreed that Barfield did not intend to cause death, she would have been guilty only of second-degree murder and, therefore, ineligible for the death penalty in North Carolina. *See id.* at 203.

[230] *Id.* at 215.

[231] State v. Barfield, 259 S.E.2d 510, 522 (N.C. 1979); BLEDSOE, *supra* note 197, at 279.

doctors.[232] Family members sometimes found her passed out.[233] She was hospitalized on occasion.[234]

In addition to supporting an argument that Barfield was guilty only of second-degree murder and ineligible for the death penalty, the facts about Barfield's addiction and its influence on her intent and criminal conduct support a narrative that would allow the jury to extend the chivalric bargain to her. In this narrative, Barfield was a weak and vulnerable woman, and her crimes were both a mistake and the product of her brokenness. In this narrative, Barfield needed protection from herself, and both arguing for (Britt) and imposing a death sentence (jury) would be decidedly unchivalrous.

Given these complexities, how did Britt use masculinity—including his own hypermasculinity—in arguing for Barfield's death? He used it principally in three ways, each of which is discussed in greater detail below. First, for the most part, he chose not to challenge chivalric norms, but instead argued that Barfield was an evil woman and, therefore, not entitled to chivalric protection (implicit argument). Britt's more specific argument was that Barfield was *especially* evil because she had disguised herself as and deceived others into believing she was an "appropriate" woman. Second—and indirectly related to the evil woman argument—Britt focused on the emasculating nature of the victim's death: Barfield had not merely caused her fiancé a painful and premature death, but an unmanly death. In fact, she had repeatedly violated the victim's masculine prerogatives. This focus tacitly encouraged jurors not only to identify with the victim but also to resent and punish the woman who took his manhood. Third, Britt used his masculinity—his body and voice, to be sure, but also his words—to communicate both legal and moral authority. Let's take each of these in turn, focusing largely (albeit not exclusively) on Britt's sentencing phase closing argument.

a. Chivalric Norms Do Not Apply: Barfield as Evil Woman, Britt as Hypermasculine Prosecutor

Britt believed Barfield was an evil and deceitful *woman*—not merely an evil and deceitful person—and he made a conscious choice both to treat her and to portray her as such. As regards to gender, Britt leaned in.[235] Though risky, this strategy made sense: An evil and deceitful woman would be exempted from the chivalric bargain requiring gentle treatment of "appropriate" women.

The first clear manifestation of this strategy—and this is prefatory to analysis of his closing argument—was Britt's cross examination of Barfield during the guilt-or-innocence phase of the trial. In an exceedingly risky move, Barfield's lawyer put her

232 *Barfield*, 259 S.E.2d at 522.

233 *See, e.g.*, BLEDSOE, *supra* note 197, at 103 (noting that daughter found Barfield "in bed, foaming at the mouth"); *id.* at 106 (noting that son had found Barfield "sprawled on the dining room floor, a pool of blood beneath her head" because she had "taken too many pills, fallen and struck her head on the corner of the table").

234 *Barfield*, 259 S.E.2d at 522 (noting Barfield had been admitted to the hospital at least four times for overdoses).

235 *Cf.* SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013) (reference intended ironically).

on the stand to testify in support of the defense position that she was guilty only of second-degree murder.[236] She testified that she never intended to cause the death of the defendant she was accused of murdering or that of others who died through her arsenic poisoning.[237] Of course, her testimony would also support the defense theory about her extent of drug abuse and haziness.[238] At the same time, the jury would have the opportunity to see an older, traditionally feminine (though not "pretty"), and unimposing woman—someone who might be an object of pity and protection, certainly not someone who "needed" to be killed.

Britt's cross examination strategy was not to treat her with any of the deference or gentility with which even hypermasculine white Southern men typically used for white Southern women. He consciously rejected even the appearance of chivalry (or respect, for that matter), instead opting for fast questions and overt hostility.[239] Britt had read in medical reports that Barfield was passive-aggressive and became aggressive when confronted or threatened.[240] Given this, Britt believed that an aggressive, hostile, contemptuous cross-examination would likely elicit Barfield's anger.[241] From the very first word of his cross examination, Britt addressed Barfield in a "sharp and indignant" tone, peppering her with questions, "bristling" at times and "practically yelling at her" on other occasions, sometimes dripping with "heavy sarcasm," "loud and antagonistic" throughout the cross-examination.[242]

Cross-examination is inherently adversarial, and loud, hectoring, hypermasculine displays may be commonplace in some courtrooms. Nonetheless, Britt's rejection of even a semblance of chivalry in favor of a calculated hypermasculine attack on an older woman was risky. Although jurors would not have doubted that Britt was, in fact, masculine—hypermasculine—they could have seen him as engaging in bullying behavior toward a weak woman. They could have believed Britt violated the chivalric bargain. His behavior could have benefited the defense.

But Britt's gamble paid off. Barfield did lose her temper during cross-examination.[243] Rather than seeming remorseful, weak because of her drug dependency, and otherwise appropriately feminine, Barfield was angry and defiant.[244]

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236 BLEDSOE, *supra* note 197, at 203.

237 *Id.* at 208.

238 *Id.* at 279.

239 *Id.* at 208–10.

240 *See id*. at 208–16 (describing Britt's cross-examination of Barfield).

241 *Id.* at 209.

242 *Id*. at 208–16 (describing cross-examination).

243 *Id.* at 209.

244 *Id.* at 211 ("She crossed her arms defiantly and chewed her gum fiercely.").

Her responses were sharp,[245] her eyes were "flinty as steel,"[246] and she was by turns defiant, petulant, and contemptuous.[247] At one point Barfield's son thought "his mother looked as if she might spring off the stand and throttle Britt."[248] After Britt's guilt phase closing argument, a smirking Barfield "raised her hands in silent applause."[249] Barfield's defiant, contemptuous behavior during cross-examination and Britt's guilt phase closing argument may have sealed her fate: Her lawyer said she would have received a life sentence "if only she hadn't argued with Joe Britt . . . I had jurors tell me that."[250]

Differently put, Britt gambled that if he took the chivalric gloves off and hit Barfield with the full force of his aggressive hypermasculinity, Barfield would show herself as not meriting the chivalric gloves in the first place. His aggressive and hypermasculine response would trigger in Barfield a response that was not only inappropriate to the occasion in the obvious way—killers should show remorse—but inappropriate for a *woman*—women should not treat men in authority with contempt and defiance.

Britt's argument that Barfield was an evil and deceptive woman masquerading as a traditionally good woman extended to his penalty phase closing argument as well. Again, rather than avoid discussion of Barfield's gender, Britt leaned in. The final lines of Britt's argument captured his position and made effective use of gender (Barfield's and the victim's, not to mention his own) in doing so:

> Take one picture with you [into the jury room], please, as [the victim] lay there dying in Southeastern General Hospital, *knowing that his Florence Nightingale was beside him but not knowing that his Florence Nightingale was in truth Lucretia Borg* [sic] *as she stood there* . . . [a]s he lay there writhing around in severe pain, she stood there watching and waiting.[251]

These were shrewd metaphors. If Barfield's gender and the chivalric bargain presented the largest obstacle to Britt's obtaining the death penalty against her—to kill her would be unmasculine or at least unchivalric—he was shrewd to rely on a metaphor for an evil *woman* (Lucretia Borgia)—and an apparently feminine evil woman at that. It isn't okay to kill a good woman—Florence Nightingale—but one can and should kill an evil destructress like Lucretia Borgia. Moreover, there's the obvious metaphor of someone posing as a caring healer (Nightingale) while in fact being a poisoner (Borgia

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245 *Id.* at 209 ("Velma's responses were growing sharper.").

246 *Id.* at 210.

247 *Id.* at 209–14 (describing Barfield's affect).

248 *Id.* at 225.

249 *Id.* at 232.

250 Kathy Sawyer, *Tears Might Have Eased Penalty*, WASH. POST (Oct. 21, 1984), https://www.washingtonpost.com/archive/politics/1984/10/21/tears-might-have-eased-penalty/2dfae8cb-b1d1-477a-afba-c7d4ca62921b/ (quoting defense lawyer).

251 Transcript of Record at 436 (emphasis added), State v. Barfield, 259 S.E.2d 510 (N.C. 1979) (No. 12).

by reputation if not in fact poisoned enemies with Cantarella, believed to be a form of arsenic[252]).

The metaphors were also shrewd in their depiction of women in right and wrong relation to men and to masculine, patriarchal authority. While Florence Nightingale is rightly revered as a giant in the field of public health,[253] she is best known for her role as a nurse to wounded soldiers during the Crimean War.[254] What could be more appropriately feminine (appropriate in patriarchal terms) than tenderly caring for men wounded on the battlefield (perhaps ground zero for patriarchal masculinity as well as hypermasculinity)? In contrast, although she probably never actually killed anyone,[255] Lucrezia Borgia's reputation was as a femme fatale who slept with and poisoned countless men.[256] What could be a greater offense to patriarchal masculinity—to the appropriate order—than a woman poisoning a man?[257]

In using these metaphors for Barfield, Britt was not merely arguing that Barfield's self-presentation was deceptive. Similarly, he was not merely arguing that Barfield was a destructor rather than a healer and was, therefore, evil. By implication, he was asserting (at least to a small degree) that some portion of her evil stemmed from her flouting the gender order.

Strains of the evil woman theme sounded throughout Britt's argument. Britt implied that Barfield's killings were sexually perverse.[258] He implied that she was cheap, easy, and loose.[259] He argued she was "hard."[260] Although each of these arguments may be applied to defendants of any sex or gender identity, when applied to a female defendant, they give added fuel to an "evil woman" theory that exempts

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[252] *See Cantarella*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cantarella (last accessed Jan. 31, 2023).

[253] *See Florence Nightingale*, WIKIPEDIA, https://en.wikipedia.org/wiki/Florence_Nightingale (last accessed Jan. 31, 2023).

[254] *Id.*

[255] *See, e.g.*, *Lucrezia Borgia*, BRITTANICA, https://www.britannica.com/biography/Lucrezia-Borgia (last accessed Jan. 31, 2023) (describing Borgia as "more of an instrument for the ambitious projects of her father and brother than an active participant in their crimes").

[256] It seems she gained this reputation because of Victor Hugo's play depicting her as such. *See* VICTOR HUGO, LUCREZIA BORGIA (1833); *Was Lucrezia Borgia Really a Passionate Poisoner?*, MODERNLEGENDS (Sept. 20, 2016), https://modernlegends.wordpress.com/2016/09/20/was-lucrezia-borgia-really-a-passionate-poisoner/.

[257] Admittedly, even if Borgia *had* poisoned many men (she didn't), the nature of the patriarchal offense would be unclear given her relationship to her male relatives. If this was simply part of the family business with her following the lead of her father, brothers, etc., the patriarchal offense might be less. *See supra* note 255 and accompanying text.

[258] Transcript of Record, *supra* note 251, at 427.

[259] BLEDSOE, *supra* note 197, at 238.

[260] *Id.* at 236.

men from any chivalric duties. A sexually perverse or cheap woman is not entitled to chivalric protection even if she has hurt no one.

Britt's closing reference to Lucrezia Borgia hints at sexual perversity. As noted above, Borgia's principal reputation was as a poisoner; however, history has also tagged her as having committed incest with both her father and her brother and with being promiscuous more generally.[261] If this were the only hint Britt dropped, this Author would disregard it and assume he used the reference only for the association with poisoning. However, earlier in his argument, Britt speculated that Barfield might derive erotic pleasure from poisoning people:

> Did she demonstrate at the time that she was indifferent to the suffering that Stewart Taylor was undergoing at this time or, in the disjunctive again, even taking pleasure in the pain or distress of another? *Could it be that she does get her kicks from this type of thing*?[262]

Britt immediately followed that statement with one insinuating Barfield was cheap and easy: "*The Lord knows that the evidence would show that she has done enough for a cheap enough price . . . .*"[263]

The italicized statements both technically concerned legal issues. The "get her kicks" language arguably advanced Britt's argument that the killing satisfied a statutory aggravating circumstance that the killing be "heinous, atrocious, and cruel," which would include indifference to or pleasure at the pain or suffering of another.[264] The "cheap enough price" language referred to Barfield's poisoning others to prevent them from knowing of the relatively trivial amounts she had stolen from them.

Notwithstanding some tenuous connection with legal issues raised in the case, both statements ("get her kicks" and "cheap enough price") paint Barfield as an evil woman not entitled to any chivalric protections. The thinly veiled implication is that Barfield is evil and deserves killing not just because she's a murderer, but also because she's a cheap, easy pervert. Moreover, the statements are misogynistic slurs characteristic of some forms of hypermasculinity.[265] The trial court was unimpressed—it sustained an objection to the statements and ordered the jury to disregard them[266]—but one can only speculate whether Britt's slurs might have increased his rapport with some jurors while also damning Barfield even more than the evidence itself might warrant.

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[261] Even a television series about the notorious Borgia family depicts the alleged incestuous relationships. *See* Curt Wagner, *Francois Arnaud Talks Sibling Love in 'The Borgias'*, CHI. TRIB. (Apr. 28, 2013), https://www.chicagotribune.com/redeye/ct-redeye-xpm-2013-04-28-38882993-story.html (describing incest story line in television series).

[262] Transcript of Record, *supra* note 251, at 427 (emphasis added).

[263] *Id.*

[264] N.C. Gen. Stat. § 15A-2000(e)(9); State v. Barfield, 259 S.E.2d 510, 523 (N.C. 1979); State v. Johnson, 298 N.C. 47, 81 (N.C. 1979).

[265] *Cf.* Nancy Chi Cantalupo, *Masculinity and Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 923 (2014) (describing misogyny in hypermasculine settings).

[266] Transcript of Record, *supra* note 251, at 427.

Finally, on the "evil woman" question, Britt characterized Barfield as a "hard" woman.[267] Part of the basis for the chivalric bargain is that women are (supposedly or supposed to be) soft,[268] so this argument goes directly to whether Barfield was the kind of female who merits compassion or care.

> What you have seen, I suggest, has been a cool—yes, cold—individual fighting, ready to fight in this lawsuit to what? To avoid the supreme penalty in this case. I suggest to you that you should know from her demeanor on the witness stand that you are dealing with a *hard woman*; *a hard woman and even as hard as she is*, that yes, she liked her medicine and, well, helped her deal with what she had done with her life and to the lives of others.[269]

In sum, Britt implicitly used a masculine principle—chivalry, part of honor-based forms of masculinity and, at times, part of hypermasculinity—as part of his sentencing phase closing argument. By focusing on Barfield's gender and depicting her as a hard, cheap, sexually perverse killer hiding under the façade of traditional femininity, Britt gave permission to male (and arguably female) jurors to sentence Barfield to death with no threat to their own masculine chivalric values or sense of proper gender order.

b. The Emasculated Victim: Emasculation as a De Facto *Aggravating Circumstance*

The second way Britt used masculinity in his closing argument concerned Stuart Taylor, the murder victim. Britt indirectly characterized Taylor's death as not merely painful and confusing, but also as emasculating: Barfield killed Taylor in a way that (figuratively) unmanned him.[270] Further, Britt characterized Barfield's secondary motivation for the killing not merely as theft, but as taking from the victim's household, a highly gendered characterization.[271]

The depiction of the victim's death as emasculating was indirect and occurred early in Britt's closing argument. After describing the physical agony the victim endured in his final moments, Britt said:

> Stewart Taylor did not die at the end of a double-barrel shotgun. He didn't even face his murderer and know he was facing his murderer at that time. He wasn't shot with a thirty-eight. He didn't have his neck cut and he didn't have a chance to grapple with the assailant and try to save his life because she was

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[267] *Id.* at 433

[268] Howarth, *supra* note 6, at 204.

[269] Transcript of Record, *supra* note 251, at 432–33 (emphasis added).

[270] BLEDSOE, *supra* note 197, at 153.

[271] *See* Transcript of Record, *supra* note 251 at 420–21 ("He was a fifty-six year-old man, I would suggest to you; that the evidence would demonstrate that he was an innocent human being who was just snuffed before his time because of the malicious intent of this *female* defendant sitting over here who was determined to *take what she could from his household that week*.") (emphasis added). To note Barfield stole from the victim is an accurate and fair point, but the *female* signifier and the *from his household* signifier distinctly suggest the theft was aggravated by its flouting of the proper gender order.

> doing to him some nefarious sort of act in secret and he didn't even realize what was happening to him. All he knew he was in terrible pain and very, very sick and he died.[272]

Of course, this argument focused on an entirely legitimate point distinct from gender: The victim had no ability to try to save himself because he didn't know the true source of his pain—the actions of a killer.

However, a statement or argument can do double duty by making more than one point. In addition to making the direct point that the victim's murder was aggravated by his inability to fight for his life or even to know he should fight for his life, Britt made the indirect point that the victim was not only murdered but was deprived of a manly death. Three aspects of Britt's language reveal his implicit argument that Taylor's death was not merely painful and dehumanizing, but also—a further, final insult—emasculating.

First, Britt identified murder weapons "preferable" to poison: a double-barreled shotgun, a thirty-eight, and a knife ("[h]e didn't have his neck cut"[273]). Knives' and especially guns' association with masculinity is risibly clear.[274] Indeed, the "association between gun ownership and masculinity enjoys a rich sociological literature,"[275] with theories for men's greater gun ownership and greater gun violence ranging from embrace of honor culture,[276] to threatened loss of masculine identity (*e.g.*, loss of breadwinner status),[277] to lack of access to hegemonic masculinity.[278] However, whatever the explanation—be it historical, sociological, or Freudian—the

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272 *Id.* at 422.

273 *Id.*

274 A search in the Galileo social science database using the search terms "masculinities and guns" yielded more than 32,000 results in the scholarly articles database.

275 C.D. Christensen, *The "True Man" and his Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. WOMEN & L. 477, 483 (2017) (citing to studies about masculinity and gun ownership). *See, e.g.*, Joan Burbick, *Cultural Anatomy of a Gun Show*, 17 STAN. L. & POL'Y REV. 653, 657 (2006) (describing guns as a "commodity fetish," the sale of which is fueled not only by the need for self-defense but also by "myths of masculinity"); Verna L. Williams, *Guns, Sex, and Race: The Second Amendment through a Feminist Lens*, 83 TENN. L. REV. 983, 985 (2016) (noting the gendered and racialized nature of gun ownership).

276 *See, e.g.*, Kristen Matsen, Tiffany D. Russell, & Alan R. King, *Gun Enthusiasm, Hypermasculinity, Manhood Honor, and Lifetime Aggression*, J. AGGRESSION, MALTREATMENT, & TRAUMA, Mar. 2019, at 369, 380 (reporting on research that concluded that honor ideology and emotion devaluation best accounted for gun enthusiasm).

277 *See, e.g.*, Dan Cassino & Yasemin Bessen-Cassino, *Sometimes (but Not This Time) a Gun is Just a Gun: Masculinity Threat and Guns in the United States, 1999-2018*, SOCIOLOGICAL FORUM, Mar. 2020, at 5 (studying the effect of high rates of unemployment on rates of gun ownership by men).

278 *See, e.g.*, Angela Stroud, *Good Guys with Guns: Hegemonic Masculinity and Concealed Handguns*, 26 GENDER & SOC'Y 216, 234 (2012) (using research to argue that part of the appeal of carrying concealed weapons is that it allows men to identify with hegemonic masculinity).

association of guns with masculinity speaks for itself: *res ipsa loquitur*.[279] In contrast, poison, at least when used as an instrument of crime, is coded feminine.[280] Thus, Britt's statement that the victim was not killed with a gun or a knife, but with poison, pointed not only to the killer's secretiveness as regards to the victim, but also to the fact he was killed through feminine means rather than traditionally masculine means.[281] In short, the use of poison deprived him of a more masculine murder.

Second, Britt pointed out that the victim lacked any opportunity for self-defense or for facing his killer. Specifically, Britt noted that Taylor "didn't have a chance to *grapple with the assailant* and try to save his life"[282] and that "he didn't even *face his murderer* and know he was facing his murderer."[283] Again, the argument that a victim was deprived of a chance to save his own life because of the defendant's deception is a fair one. Nonetheless, references to the victim's inability to "grapple with his assailant" or to "face his murderer" are strongly gender coded. Legal scholar Susan Estrich observed that criminal law largely concerns "'boys' rules' applied to a boys' fight."[284] Professors Ann McGinley and Frank Rudy Cooper (among others) have used the scenario of battered women who are denied self-defense instructions[285] to show the extent to which the concept of self-defense (*i.e.*, "grappl[ing] with the assailant") is rooted in masculine norms:

> [W]hy do battered women lose when they launch preemptive strikes? Perhaps because, as legal scholar Susan Estrich and others have pointed out, the self-defense requirements reflect "boys' rules" in that they imagine a prototypical schoolyard fight. So *self-defense law rewards people for being appropriately manly*. In the schoolyard, people would think a boy is justified in flattening the local bully if, and only if, the bully is threatening the boy right then and the boy doesn't respond to a punch with a bazooka. Similarly, in the schoolyard fight, *boys are supposed to confront their bully face to face* (or expected to just "take it like a man," . . .). When a battered woman instead

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[279] *R*es *Ipsa Loquitur*, CORNELL, https://www.law.cornell.edu/wex/res_ipsa_loquitur (last visited Jan. 31, 2023).

[280] Just google it, dear reader. This coding of poison as feminine has some basis in reality. Although very few male or female murderers kill by poison, female killers nonetheless are seven times more likely to poison their victims than men are. Dan Keating, *The Weapons Men and Women Use Most Often to Kill*, WASH. POST (May 7, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/05/07/poison-is-a-womans-weapon/.

[281] One might credibly argue that a knife or gun killing is faster and less painful than a killing by poison, but Britt does not even hint at that point. *See* Transcript of Record, *supra* note 251, at 422.

[282] Transcript of Record, *supra* note 251, at 422 (emphasis added).

[283] *Id.* (emphasis added).

[284] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986).

[285] This quote should not be read to imply that Velma Barfield was battered or was acting in self-defense. The point is to show that the images Britt chose were rooted in masculine norms and schemas.

> stabs her batterer in the back or while he is sleeping, the harm is not deemed to be imminent. The requirement that the harm one reasonably feared be imminent does not make sense when imposed on battered women. Battered women are constantly, reasonably in fear that they will soon be harmed again. So gender is certainly at work in that the exemption from self-defense rules is granted to men in battle with other men, either literally or figuratively, but not to women unless they can make out a special battered women's syndrome defense. Women are underprivileged, even when most obviously justified in using violence.[286]

The male norms embodied in the self-defense standard have long historical roots in both English and American law. Cynthia Gillespie pointed out that "as the American law developed, the only two situations in which a self-defense plea was felt to be appropriate (by male judges and male legislators) were still the ancient ones in which men most frequently found themselves: the sudden attack by a stranger and the fight between equals that got out of hand."[287]

In summoning the image of the victim as deprived of the opportunity of "grappl[ing] with the assailant" or of "fac[ing] his murderer," Britt indirectly argued that the victim was deprived of a *masculine* death, even of an honorable death. He lacked the opportunity to "grapple" with someone—presumably someone of similar physical strength—and he was deprived of a face-to-face encounter with a (known) killer. Moreover, Britt implied that this deprivation aggravated the killing.

c. Prosecutor as Teacher and Authority Figure: Hegemonic Masculinity in Action

The final way in which Britt used masculinity in his closing argument was more subtle but also more pervasive and probably more powerful. He explained the law, sometimes in greater detail than necessary, and he explicitly foreshadowed the trial court's instructions.[288] He described the form the jury would be asked to complete.[289] He praised the law, including the portions of the law that appear to favor the defendant:

> When I first started practicing law . . ., in capital cases, the case was put to the jury and the jury simply went to the jury room and if they felt like it, they could recommend life imprisonment. If they made no other statement and merely found the defendant guilty of murder in the first degree, then capital punishment was imposed. . . . Eventually a case worked its way to the United States Supreme Court and the highest court in this country said, "No, we can't do it that way because it's so capricious." One jury sitting in one county

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[286] Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 U. DENVER L. REV. 187, 203–04 (2013) (emphasis added) (internal citations omitted).

[287] CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 49 (1989).

[288] *See, e.g.*, Transcript of Record, *supra* note 251, at 427 (using Supreme Court case name in describing "heinous, atrocious, and cruel" aggravator).

[289] *See, e.g.*, *id.* at 425–26.

> might hear a case and impose the death penalty and another jury sitting in another county might hear the identical case . . . and recommend life imprisonment. So it is just not a fair way to go. So the State of North Carolina said, well, if that is the law, perhaps the fairest thing to do would be . . . if somebody is convicted of murder in the first degree, then they will suffer capital punishment . . . that one went to the United States Supreme Court and they said, no, that's a little bit too hard. We don't want to have that because everybody ought to be given a chance to demonstrate their good qualities and demonstrate their bad qualities and what the jury ought to have is some sort of yardstick to go by . . . . I suggest to you, *it is a good law*. *It is the way it ought to be*.[290]

At first blush (and second and third as well), Britt's behavior was unremarkable. Lawyers of all genders, all ethnicities, all ages, all *whatever*: Lawyers explain the law to jurors. So why include Britt's explanations of the law during closing argument as examples of his use of masculinity?

First, research suggests that competence is associated with masculinity,[291] and special demonstrations of competence likely boost a male lawyer's authority. Second, the law is coded masculine,[292] so Britt's expressions of approval of Supreme Court doctrines—even doctrines appearing to favor the defendant—and references to jury instructions align him with abstract masculine authority.

But the more important point concerns Britt's embodiment of hegemonic masculinity when he explains the law. Recall that the hegemonic form of masculinity in the United States—marketplace man—values control, stoicism, competence, dominance without hypermasculine physicality.[293] Recall also that most men do not embody hegemonic masculinity; rather, it is the norm by which many are measured and to which many—perhaps most—aspire.[294] In his moments of explaining legal doctrine, praising the Supreme Court, and assuming an authoritative, teaching function in relation to jurors, Britt was embodying hegemonic masculinity. Given this is the standard to which many of the jurors no doubt aspired, Britt's performance amounted to a polite dominance display and invited willing deference and admiration.[295]

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[290] *See, e.g.*, *id.* at 424–25 (describing *Furman v. Georgia*, *Woodson v. North Carolina*, and *Gregg v. Georgia* to the jury).

[291] *See, e.g.*, Reiko Hasuike, *Credibility & Gender in the Courtroom*, 11-3 PRACTICAL LITIGATOR 19, 21 (May 2000) (describing findings of studies that show that people rate men more highly than females on competence).

[292] *See, e.g.*, Dylan A. Yaeger, Masculinity and Law (Mar. 28, 2019) (S.J.D. dissertation, Fordham Univ. Sch. of L.), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1019&context=sjd (noting that the "reach of masculinity stretches deep into the very fiber of the law. Masculinity has for too long served as an invisible bedrock on which the law founded both its substance and method").

[293] *See supra* Part II (describing hegemonic masculinity in the United States).

[294] *See supra* Part II (noting that hegemonic masculinity is normative).

[295] Without question, many female lawyers would act similarly, explaining the law, praising courts and cases, teaching the jury. This Author's point, however, is that this kind of competence

In contrast, as Subpart IV.B demonstrates, the displays by the South Carolina prosecutor Donnie Myers were rarely polite and rarely intellectual. Myers's masculinity was of a different sort, and his closing arguments reflected that.

B. Donnie Myers and the Use of Masculinity in Improper Arguments

Donald V. ("Donnie") Myers is the deadliest prosecutor in South Carolina history.[296] He personally prosecuted more than forty death penalty trials and secured thirty-nine death sentences against a total of twenty-eight men (some were retried).[297] Like the other prosecutor featured in this Article, he was frequently accused of and found to have committed misconduct during capital trials: For example, his office surreptitiously videotaped meetings between defendants and their lawyers.[298] This misconduct extended to his closing arguments, which were known for their racist dog whistles,[299] inappropriate theatricality,[300] and bullying and hectoring the jury.[301]

To understand Myers' use of masculinity in closing argument, one must first have a sense of Myers' own masculinity and that of many in the communities for which he served as prosecutor.

Of all the masculinities described above, the closest fit for Myers is the Southern white men's hunting and sports culture, in which "making a big kill [hunting] . . . [is]

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when displayed by men invites more deference than when displayed by women (when it may invite resentment). *See supra* Subpart IV.A.1.

296 Fair Punishment Project, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, at 3 (June 2016), https://files.deathpenaltyinfo.org/documents/FairPunishmentProject-Top5Report_FINAL_2016_06.pdf.

297 *See* Ed Pilkington, *Interview: The Business of Securing Death Sentences: 40 Years and 28 Men*, THE GUARDIAN (May 5, 2017, 3:00 PM), https://www.theguardian.com/world/2017/may/05/donnie-myers-interview-death-penalty-prosecutor-south-carolina.

298 *See In re* Myers, 584 S.E.2d 357 (S.C. 2003) (upholding private reprimand for failure to supervise office prosecutors regarding eavesdropped conversation between defense attorney and client and finding misconduct regarding failure to provide videotape of eavesdropped conversation to defense).

299 *See* Bennett v. Stirling, 170 F. Supp. 3d 851, 864 (D.S.C. 2016) (granting death-sentenced inmate's petition for habeas corpus when Myers referred to defendant as "King Kong[,]" a characterization consistent with a "long and ugly history of depicting African-Americans as monkeys and apes, and the pejorative and inflammatory nature of such references"), *aff'd*, 842 F.3d 319 (4th Cir. 2016).

300 *See, e.g.*, State v. Northcutt, 641 S.E.2d 873, 881–82 (S.C. 2007) (reversing conviction for prejudicial and inflammatory prosecutorial argument in which Myers produced a large black shroud, draped it over the infant victim's crib in a staged funeral procession, and claimed it would be "open season on babies" if jury rejected a death sentence).

301 *See, e.g.*, *id.* at 881 (finding inappropriate argument in Myers' statement that he "expect[ed]" the jury to impose death penalty and that a failure to do so would mean "open season on babies").

the . . . equivalent of proving manhood in antebellum dueling or sharpshooting."[302] This form of masculinity allows men to exhibit mastery and dominance through rule-based competition,[303] and this Author has speculated that this is a common culture within prosecutors' offices.

Known facts about Myers' life, Myers' own words, and others' descriptions of Myers all suggests the influence of this form of masculinity. First, Myers participated directly in this culture: He played football at a Division I school (University of South Carolina) in the Southern United States.[304] Second, all indications suggest Myers is a heavy or problem drinker: He faced three alcohol-related charges during his final decade as county solicitor.[305] Although heavy drinking is not required within this white men's hunting and sports culture, it is certainly a common characteristic. Third, frankly, was his apparent attitude toward his work. Defense lawyer David Bruck has identified Myers as a hunter: "It was as though he [Myers] had won a raffle that allowed him to hunt really big game; that's what death penalty cases were for him—hunting really big human game."[306] Myers himself has compared capital trial preparation to a really hard football practice, admitting that the cases "are more draining than the worst football practice I'd ever gone through."[307] Finally, Myers apparently relished his identity as a "redneck."[308]

Although the football and hunting culture masculinity involves rules—one shows honor and dominance by prevailing in rule-based competition, not chaotic free-for-alls[309]—Donnie Myers was never above bending—or breaking—the rules. He was disciplined for breaking the rules in connection with a videotape of a defendant's meeting with his attorney.[310] He crossed the line repeatedly in his rhetoric in closing

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302 FRIEND, *supra* note 87, at xviii.

303 *Id.* at xvii–xviii.

304 *E.g.*, Pilkington, *supra* note 297 (quoting Myers' statements about attending University of South Carolina on a football scholarship).

305 *E.g.*, *Jury Convicts Solicitor of DUI*, WRDW (Feb. 23, 2016, 9:26 AM), https://www.wrdw.com/content/news/11th-Judicial-Circuit-Solicitor-arrested-on-DUI-charges-369802451.html (noting DUI was Myers's third alcohol-related offense).

306 Pilkington, *supra* note 297.

307 *Id.*

308 *See, e.g.*, Jack Kuenzie, *Supreme Court Considers Reprimand for Lexington County Solicitor*, WIS NEWS (Sept. 21, 2002, 7:37 PM), https://www.wistv.com/story/941163/supreme-court-considers-reprimand-for-lexington-county-solicitor/ (quoting Myers that "[i]t's hard to embarrass a redneck").

309 *See* FRIEND, *supra* note 87, at xvii and accompanying text.

310 *See* Kuenzie, *supra* note 308 and accompanying text.

arguments.[311] As David Bruck said, "[t]here was no trick too dirty."[312] Lawyer John Blume has attributed this willingness to break the rules to Myers's hyper-competitiveness: "He's so competitive and so driven to win at all costs that he frequently crosses the line."[313]

If Southern white football and hunting culture furnishes the melody for Myers's masculinity, then the masculine martial ideal furnishes the major harmony line. Within the masculine martial ideal, violence in protection of self, family, or region was considered a feature of masculinity.[314] Furthermore, this masculine martial ideal fueled and justified much of the South's racist violence, including lynching.[315]

The influence upon Myers of the masculine martial ideal is evidenced in two ways. First is Myers's obvious relish in pursuing violent punishment for defendants. Former United States Attorney (S.C.) Bill Nettles said that "[v]irtually the only time you see him in the courtroom is when he's trying to kill people."[316] Indeed, his nickname in the media and local legal community—"Dr. Death"[317]—evidenced his passion for capital punishment. Second, the masculine martial ideal is evidenced through Myers's racist dog whistles, such as his none-too-subtle reference to a Black defendant as "King Kong."[318]

In this Author's view, marketplace man masculinity and Christian gentleman/white evangelical masculinity are notably absent in Myers. Without question, Myers would have encountered versions of "marketplace man" masculinity—or, at the very least, the self-made manhood of the New South, with its focus on business success and its attempt to distance itself from the South's racist past—while in law school. In many ways, Myers appears to have defined himself in opposition to marketplace man or the New South's self-made manhood. Myers self-identified as a "redneck."[319] He also appears to have rejected life paths that would have been more consistent with these masculinities: He says he entered law school with a plan of working in his wealthy father-in-law's private practice,[320] which

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[311] Adam Beam, *Solicitor Finds Solace in Court*, THE STATE (Mar. 7, 2008, 3:31 PM), https://www.thestate.com/news/local/article14328710.html.

[312] Pilkington, *supra* note 297.

[313] Beam, *supra* note 311.

[314] *See* Friend, *supra* note 87, at 6 and accompanying text.

[315] *Id.* at 6–7.

[316] Fair Punishment Project, *supra* note 296, at 11.

[317] *See, e.g.*, Editorial Board, '*Dr. Death'*, WASH. POST: OP. (July 17, 2016), https://www.washingtonpost.com/opinions/dr-death/2016/07/17/574df77c-4942-11e6-acbc-4d4870a079da_story.html (describing Donnie Myers's legacy of misconduct as one of the deadliest prosecutors in the United States).

[318] Bennett v. Stirling, 170 F. Supp. 3d 851, 864 (D.S.C. 2016).

[319] *See* Kuenzie, *supra* note 308 and accompanying text.

[320] Beam, *supra* note 311.

obviously did not happen; moreover, although he began his practice in criminal prosecution, he first worked on appellate criminal litigation, and his first case was before the United States Court of Appeals for the Fourth Circuit.[321]

Similarly, although Myers has been described as a "fire and brimstone" prosecutor,[322] this Author does not see a neat fit with the masculinity of the Christian gentleman or Southern white evangelical. These forms of masculinity prize self-control and humility—mastery of the animal within.[323] Neither self-control nor humility characterize Myers: quite the opposite, in fact. Myers' repeated arrests and convictions for alcohol-related offenses, as well as his general enthusiasm for drinking, attest to his struggles with self-control.[324] More to the point, Myers's closing arguments were dramatic exercises in excess—calculated excess, perhaps, but excess nonetheless. During closing arguments, Myers cried;[325] set fires;[326] held mock funerals, complete with burial shrouds.[327]

Finally, although Myers appears to have some traits and behaviors consistent with hypermasculinity, this Author does not believe that form of masculinity best describes him. To be sure, Myers is deeply competitive and appears to have a strong drive to dominate others. However, despite his time as a college defensive back, Myers's competitiveness does not appear to have manifested itself in displays of physical strength or even in undue emphasis on physical strength. Furthermore, at least from a distance, Myers appears unaffected by hypermasculinity's strictures against femininity and homosexuality. As to dress, Myers was something of a redneck dandy, delighting as much in sartorial as in rhetorical excess.[328] He was apparently unafraid to admit women's influence on him: He never hesitated to credit his (late) wife Vance for her influence on his closing arguments[329] and, indeed, on his behavior more generally.[330]

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321 *Id.*

322 Fair Punishment Project, *supra* note 296, at 11.

323 *See* FRIEND, *supra* note 87, at xviii.

324 *See* Beam, *supra* note 311 and accompanying text.

325 *E.g.*, State v. Northcutt, 641 S.E.2d 873, 881 (S.C. 2007).

326 State v. Finklea, 697 S.E.2d 543, 544 (S.C. 2010) (finding no error by trial court in allowing Myers to use an incendiary device during closing argument).

327 *Northcutt*, 641 S.E.2d at 881.

328 Clif LeBlanc, *Exclusive: First Challenger to Myers Announces Candidacy for the 11th Circuit Prosecutor*, THE STATE (Feb. 26, 2016, 5:09 PM), https://www.thestate.com/news/local/article62710762.html; Tim Flach, *Hubbard Makes His Move to Become Top Prosecutor in Lexington County*, THE STATE (May 30, 2016, 7:28 PM), https://www.thestate.com/news/local/article77809107.html.

329 Beam, *supra* note 311 (noting that Myers consulted his wife "on every closing argument for every death penalty case" and that she "was a big part of the nicknames Myers likes to give to defendants").

330 *Id.* (engaging in charitable giving because "it's what his wife would have wanted").

This Article will not examine the masculinity appeals in any one of Myers's closing arguments in depth. However, several themes emerge. First, Myers's frequent use of colloquialisms and poor grammar during closing arguments—*e.g.*, "ain't no money in there now"[331]; "there wasn't no use to look no more"[332]—distances him from "marketplace man" and mainstream American hegemonic masculinity. The poor grammar may have come naturally to Myers, but there was probably an element of calculation as well: Many of the Lexington County, South Carolina jurors of the 1980s, 1990s, and even early 2000s may have resented those embodying hegemonic masculinity, for reasons related to region and to social class.[333] Myers's assiduous avoidance of subject-verb agreement expressed his Southern sports culture masculinity and fostered jurors' identification with and non-resentment of him. He wanted jurors to know that his was a *Southern* masculinity, not one that predominated in New York or San Francisco.

Second, Myers's improper and inflammatory arguments[334] are also best understood through the lens of his masculinity. His Southern sports masculinity included a hypercompetitive desire to prove mastery and dominance through victories between adversaries. His improper arguments reveal his hypercompetitive willingness to cut corners in order to dominate and symbolically emasculate not only the capital defendant but also defense counsel. In this respect, Myers's racist arguments did double duty. To be sure, these racist appeals—calling a Black defendant "King Kong"[335] being the most notorious—appealed to hypermasculine jurors' need to denigrate contrast figures and restore "proper" hierarchies.[336] However, they also demonstrated Myers's willingness to use anything and to break any rules in order to win and achieve a death sentence.

V. CONCLUSION

In some respects, masculine appeals in capital trials may be largely invisible: The prosecutors making such appeals may do so subconsciously and the jurors hearing them may not know what they've heard. However, even subconsciously made and subconsciously received appeals can exert a strong influence on jurors' decision-making. A capital trial is, among other things, a complex dance of the masculinities of all (especially the male) actors in the process: lawyers, defendant, jurors, and judge. To provide competent representation, lawyers should at least know they're dancing and understand something about the dance.

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[331] Transcript of Record at 2055, State v. Bennett, 632 S.E.2d 281 (S.C. 2006) (No. 26174).

[332] *Id.* at 2056.

[333] *See* KELLY ROBSON ET AL., EDUCATION IN THE AMERICAN SOUTH: HISTORICAL CONTEXT, CURRENT STATE, AND FUTURE POSSIBILITIES, at 3, 5, 11, 20–21, 28 (Bellwether Education Partners, May 2019), https://eric.ed.gov/?id=ED596492.

[334] *See* Bennett v. Stirling, 170 F. Supp. 3d 851, 866 (D.S.C. 2016); State v. Northcutt, 641 S.E.2d 873, 885 (S.C. 2007).

[335] Transcript of Record, *Bennett*, *supra* note 331, at 2079.

[336] *See* FRIEND, *supra* note 87, at xv; Harris, *supra* note 38, at 785 (describing exaggerated racism and sexism among hypermasculine men).