UNEQUAL BEFORE THE LAW: MEN, WOMEN AND THE DEATH PENALTY

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"Thou shalt not kill."  
- Old Testament

"I wish to God the men I know would help me now."  
- Eva Coo, convicted murderer, 1930

I. INTRODUCTION

In a landmark death penalty case, McCleskey v. Kemp, defendant Warren McCleskey, a Black man, appealed his conviction and death sentence on the grounds that Georgia's death penalty scheme violated both the Eighth Amendment to the United States Constitution and his equal protection rights as guaranteed by the Fourteenth Amendment. McCleskey based his claimed violation of the Equal Protection Clause on a study of murder cases in Georgia during the period from 1973 to 1978, conducted by David Baldus, Charles Pulaski, and George Woodworth ("Baldus study"). The Baldus study included one model that accounted for more than thirty-nine non-racial variables in death penalty cases. Unlike studies preceding it, the Baldus study did not focus on the race of defendants convicted and death-sentenced, but rather on the race

4. See McCleskey v. Kemp, 481 U.S. 279, 283-84 (1987) (stating that McCleskey was convicted for killing a police officer during a robbery).
5. See U.S. CONST. amend. VIII (stating that cruel and unusual punishments will not be inflicted). McCleskey's contention was that Georgia's death penalty scheme fostered arbitrary and unfair imposition of the death sentence based on race and that this arbitrariness constituted cruel and unusual punishment. See McCleskey, 481 U.S. at 286 (noting that McCleskey argued that the capital punishment process in Georgia was administered in a racially discriminatory way).
6. See U.S. CONST. amend. XIV, § 1 (stating that no state shall deny to any person within its jurisdiction the equal protection of the laws); see also McCleskey, 481 U.S. at 286 (noting that McCleskey raised 17 other claims in his defense).
7. McCleskey, 481 U.S. at 286.
9. See McCleskey, 481 U.S. at 286 (stating that the Baldus study examined 2,000 murder cases).
10. See McCleskey, 481 U.S. at 287 (discussing the Baldus study). After subjecting data to extensive analysis, one of the models in the study concluded that, even after accounting for 39 non-racial variables, a Black defendant who kills a White victim has the greatest likelihood of receiving the death penalty. See id. (noting that prosecutors sought the death penalty in 70% of cases involving Black defendants and White victims compared to 19% of cases involving White defendants and Black victims).
11. See LATZER, supra note 8, at 231 (citing M. Wolfgang & M. Reidel, Race, Judicial
of the defendants’ victims. It illustrated that when the victims of homicide were White, it was statistically likely that the defendant would be convicted and sentenced to death.

The Supreme Court’s standard for showing an equal protection violation has historically been “proof of purposeful or intentional discrimination.” This is the standard the Court adopted in the McCleskey decision. Racially disproportionate impact has rarely been viewed as proof of a constitutional violation of the Equal Protection Clause. The Court accepted the Baldus study as statistically valid, but refused to acknowledge that the study proved any actual discrimination in Georgia’s capital justice system. It rejected McCleskey’s claims of constitutional violations, and specifically his claims of an equal protection violation.

McCleskey addresses an alleged equal protection violation based on racial discrimination. It is clear, however, from the plurality opinion that the Justices feared implications far beyond that of racial discrimination in capital cases. Justice Powell wrote:

12. See Latzer, supra note 8, at 231 (discussing the disparity of the imposition of the death penalty when the victim is Black versus a White victim).

13. See David C. Baldus, George Woodworth & Charles J. Pulaski, Jr., Law and Statistics in Conflict: Reflections on McCleskey v. Kemp, in Capital Punishment and the Judicial Process 147, 148, Table 13.2 (Randall Coyne & Lyn Entzeroth eds., 1994) [hereinafter Law and Statistics] (enumerating variables accounted for, and presenting the outcome that when one or more victims of murder is White it is 4.2 times more likely that the defendant will be sentenced to death).

14. See Washington v. Davis, 426 U.S. 229, 239-44 (1976) (discussing standards for establishing racial discrimination). “[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” Id. at 239; see also Latzer, supra note 8, at 232 (discussing the type of proof needed before the Court will consider constitutional claims).

15. See McCleskey, 481 U.S. at 292 (setting forth the principle that a defendant alleging an equal protection violation has the burden of proving “the existence of purposeful discrimination”) (citing Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

16. See Latzer, supra note 8, at 239 (stating that racially discriminatory impact was not enough to demonstrate an equal protection violation but statistical evidence of different treatment of Blacks and Whites might be).

17. See McCleskey v. Kemp, 481 U.S. 279, 292 n.7 (1987) (“We assume the study is valid statistically...”).

18. See id. (“Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia.”).

19. See id. at 292 (agreeing with the Court of Appeals that McCleskey’s claim must fail).

20. See id. at 291 (stating that McCleskey argued that race “infected” the administration of Georgia’s death penalty statute).
If we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.... As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.

It seems the Court feared similar challenges based on various other types of statistical evidence, with what it perceived to be no limit on who could bring such challenges. With its refusal to recognize the Baldus study as proof that McCleskey may have been wrongly convicted based on his race, the Court attempted to curtail future similar challenges. The Court held that proof of purposeful and intentional discrimination must be established by each defendant, specific to that defendant’s case. This is arguably an unreasonable threshold to meet. It almost requires a juror or judge to admit that he or she purposefully discriminated against a defendant.

This Comment poses a challenge to the imposition of the death penalty under the Equal Protection Clause, seeking to establish a case of disparate impact on the basis of sex discrimination. It presents an


22. See McCleskey v. Kemp, 481 U.S. 279, 317-18 (1987) (“[I]f arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could... be based upon any arbitrary variable... that some statistical study indicates may be influential in jury decision making.”).

23. See id. at 339 (Brennan, J., dissenting) (stating that the prospect of even more widespread abuse of the capital sentencing system than that shown by McCleskey does not justify “complete abdication” of the judiciary’s role).

24. See id. at 337 (Brennan, J., dissenting) (noting that the Court, citing a need for individualized decisions, rejects evidence that race more likely than not infects capital sentencing decisions). “The Court’s position converts a rebuttable presumption into a virtually conclusive one.” Id.

25. This Comment looks largely at statistics and studies that show a different standard of treatment accorded men and women in the judicial system in the United States, particularly in cases of murder. See discussion infra at Parts IV, IV.A-B (examining data and studies that illustrate this discrepancy in treatment). Historically, statistics have not always substantiated a claim of discrimination on the basis of sex; they have, however, proved useful in establishing claims of discrimination on the basis of race in employment cases. See Katharine T. Bartlett & Angela P. Harris, Gender and the Law: Theory, Doctrine, Commentary 165 (1998) (noting that “especially pronounced statistical disparities” have been sufficient to show race discrimination under Title VII). Statistics have not been enough to prove a sex discrimination claim. See, e.g., EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988). Statistics have not yet been accepted in cases of capital sentencing as proof of either race or sex discrimination. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (stating that there must be proof of discrimination in the case at hand). It is the author’s hope that eventually the Supreme Court will recognize both the validity of statistical evidence, and the validity of applying such evidence to cases that come before it.
argument similar to that raised in McCleskey, but based on sex rather than race. It confirms that men are disproportionately arrested and convicted for murder, sentenced to death and executed in the United States, as compared to women who commit substantially similar crimes. It argues that this discrimination on the basis of sex is both purposeful and knowing, and thus, meets the Supreme Court's threshold for finding a constitutional violation.

In light of the publicity and press surrounding the execution of convicted murderer Karla Fay Tucker in Texas on February 3, 1998, it is timely to focus on the existing disparity between men and women who are death-eligible for crimes they have committed. Convicted male murderers receive the death sentence in proportionately greater numbers than convicted female offenders. Even when statistics are adjusted to reflect the fact that men commit both greater numbers and percentages of murders in the United States, men are convicted and receive the death sentence at a disproportionately greater rate than women.

26. This Comment uses the term "sex" to distinguish between male and female, as opposed to gender. See Leane Renee, Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law, 5 AM. U. J. GENDER & L. 343, 346 n.11 (1997) (describing the difference between sex and gender). "Sex is used in its realist, essentialist sense to mean a fundamental, natural, biological determination of 'maleness' or 'femaleness'... gender, in contrast, is used to mean a culturally determined, socially constructed, and historically variant description of those acts that compose how an individual does 'being male' or 'being female.'" Leslie Pearlman, Transsexualism as Metaphor: The Collision of Sex and Gender, 43 BUFF. L. REV. 835, 839-40 (1995) (quoting Druann Pagliasotti, On the Discursive Construction of Sex and Gender, 20 COMM. RES. 472, 474-75 (1993)).

27. See Victor L. Streib, Death Penalty for Female Offenders, January 1, 1973 to the Present (last modified June 1999) <http://www.law.osu.edu/faculty/streib/femdeath.htm> [hereinafter Death Penalty for Female Offenders] (listing the small percentage of women that were arrested for murder, sentenced to death, and executed).

28. See id. at 2 (noting that Tucker's case received world-wide attention). Karla Faye Tucker and a companion were sentenced to death for bludgeoning two people to death with a pickaxe, in June of 1983. See Mike Ward, Tucker's Plea Denied: Execution Set for Today, PALM BEACH POST, Feb. 3, 1998, at 1A (describing the crime as a "drug-crazed" attack). While in prison, Tucker became a born-again Christian and something of a celebrity. She claimed to have found God and ministered to others in prison. See id. Despite pleas for clemency from persons such as Pat Robertson and Bianca Jagger, the Texas parole board and Governor George W. Bush denied Tucker's request. Death Penalty Information Center, The Death Penalty in 1998: Year-End Report (visited Jan. 6, 1999) <http://www.essential.org/dpic/yrendp98.html> [hereinafter Year-End Report] (stating that the execution prompted a reevaluation of Texas' clemency process). Tucker was the first female in Texas to be executed since the Civil War, and the first in the nation since 1984. See Tucker Offers Apology Before Texas Execution: Death Penalty Debate Goes on Outside Prison, PATRIOT LEDGER, Feb. 4, 1998, at 4 (noting that the execution of a woman is rare).

29. See Death Penalty for Female Offenders, supra note 27 (arguing that females are "screened out" of the capital punishment system).

30. See Death Penalty for Female Offenders, supra note 27 (noting that women account for one in eight murder arrests, or 13%, whereas men account for the other seven of eight, or 87%).

31. See Death Penalty for Female Offenders, supra note 27 (indicating that women account for only one in 53 death sentences imposed at the trial level, or 1.9%, and account for only three of 540 persons executed since 1970, or .6%). Streib defines 1973 and forward as the "modern era"
This Comment systematically establishes an existing disparate impact that illustrates a violation of the Equal Protection Clause on the basis of sex when imposing the death penalty. Part II discusses the history of the death penalty in the United States, beginning with debates over the meaning of the "cruel and unusual" clause in the Eighth Amendment. In the late 1800s and early 1900s, there was a relatively brief period during which several states abolished death penalty statutes altogether, although most reinstated these statutes not long after their abolition. The debate continues today, with

of death penalty consideration. See id. at 5. He does this because of the Supreme Court's holding in *Furman v. Georgia*, that the death penalty, as applied, was unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 240-41 (1972). There were subsequent revisions of death penalty statutes by the states, culminating with the Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), which once again held state death penalty schemes to be constitutional. See id. at 187 ("[T]he death penalty is not a form of punishment that may never be imposed . . ."). During the period from 1970 to 1979, three people were executed, but none of them were women. See *Death Penalty for Female Offenders*, supra note 27, at 3 (setting forth a chronology of executions of women in the twentieth century).


What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have [sic] to ascertain, point out, and determine what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to the crime; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

Id.

Patrick Henry also feared the power of an unrestrained Congress. He addressed the Virginia Convention on the Bill of Rights:

What says our [Virginia] bill of rights?—"that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them lose; you do more—you depart from the genius of your country.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment.

strong supporters for both maintaining and abolishing the death penalty.  

Part III of the Comment discusses the failed challenges to the constitutionality of the death penalty. These include challenges on grounds of age, mental competency, and race. Although it can be argued that many of these cases heard by the Supreme Court have been compelling, the Court has remained consistent in upholding the constitutionality of the death penalty. It has yet to hear an equal protection challenge based on sex.

Part IV examines evidence of the disparate impact of the death penalty in the United States on male and female offenders. It compares numbers and percentages of capital crimes committed, the perpetrators of those crimes, and the sentences handed down to defendants. It discusses the similarities of crimes committed by male and female offenders, and the often vastly different sentences each receive. It explores various reasons for why men are treated more harshly than women in trials for capital offenses. It discusses several theories posited for women's preferential treatment in capital cases and further contemplates whether some of these theories, if true, offer support for the contention that the different treatment of men in the capital justice system is intentional.

Part V proposes some recommendations for sparing both men and women this unequal and unconstitutional treatment. This Comment is written from the point of view that the death penalty as applied in


35. See generally Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (concluding that neither historic nor modern societal consensus forbids imposing capital punishment on one who murders at age 16 or 17); Thompson v. Oklahoma, 487 U.S. 815, 821-38 (1988) (discussing the minimum age at which one can be put to death under the auspices of the Constitution and a consensus of state legislatures).

36. See generally Penry v. Lynaugh, 492 U.S. 302, 328-40 (1989) (discussing mental retardation as a factor to be considered when imposing capital punishment); Ford v. Wainwright, 477 U.S. 399, 408 (1986) ("Today, no State in the Union permits the execution of the insane.").

37. See McCleskey v. Kemp, 481 U.S. 279, 292-93 (1987) (holding that proof of racial discrimination in general is not enough to prove racial discrimination in this particular defendant's case).

38. See discussion infra at Parts III.A-C (discussing challenges to the death penalty based upon age, mental capacity, and race).
the United States is inherently unconstitutional in all cases, because its imposition is always arbitrary and capricious, and there is no real way to circumvent these circumstances. One approach is to make the system as uniform as possible. This, however, infringes on the consideration of each defendant as a singular individual. Competing interests best serve to illustrate that the current system cannot adequately redress the disparate impact on men and is unconstitutional as applied. As such, the clearest solution to the problem is the abolition of the death penalty.

The Comment concludes that the violation of the Equal Protection Clause on the basis of sex is not simply a transgression of the Fourteenth Amendment, but adds to the overall arbitrary nature of the United States' system of capital punishment. Ultimately, the argument is that the death penalty is in and of itself unconstitutional. A challenge on the grounds of sex is only the latest in a long line of challenges that attempt to prove the arbitrariness of the capital system in the United States.

II. HISTORY OF THE DEATH PENALTY IN THE UNITED STATES

A. Colonial Times to the Bill of Rights (1791)

From the earliest times of the colonies, the death penalty was justified by reference to the Bible. It was applied for crimes that

39. See, e.g., Gregg v. Georgia, 428 U.S. 155, 197 (1976) (noting that the Georgia death penalty statute requires juries to focus on the characteristics of the person who commits the crime). Jurors are instructed to inquire as to prior offenses and special mitigating facts about the defendant. Id.

40. See McCleskey, 481 U.S. at 320 (Brennan, J., dissenting) (noting that despite all attempts at safeguarding an elevated degree of care when imposing capital punishment, it is still four times more likely that a defendant who kills a White victim will receive death than a defendant who kills a Black victim). "Nothing could convey more powerfully the intractable reality of the death penalty: 'that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.'" Id. (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in judgment)).

41. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 305 (1989) (regarding the death penalty and the mentally retarded); Stanford v. Kentucky, 492 U.S. 361, 364-65 (1989) (discussing whether the imposition of the death penalty for a crime committed by a minor constituted a violation of the Eighth Amendment); McCleskey, 481 U.S. at 282-83 (discussing racial considerations when determining if the death penalty should be imposed); Furman v. Georgia, 408 U.S. 238, 242-43 (1972) (discussing the seriousness of the crime committed and the punishment imposed).

42. "He that smiteth a man so that he die, shall so be surely put to death." Exodus 21:12. "Who so sheddeth a man's blood, by man shall his blood be shed: for in the image of God made he man." Genesis 9:6; see also New England Execution Sermon and Condemned's Response (1636), in CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 12 (Brian Vila & Cynthia Morris eds., 1997) [hereinafter CAPITAL PUNISHMENT] (describing 17th century New England's capital crimes as being largely defined by biblical scripture and arguments in support of the death penalty relying often on the "word of God").
today would certainly not be considered death-worthy.\textsuperscript{43} The laws of
capital punishment were modifications of English common law\textsuperscript{44} and
continued to be observed in the United States up to and beyond the
adoption of the Bill of Rights in 1791.\textsuperscript{45}

The particularly heinous executions carried out prior to the
adoption of the Bill of Rights may have prompted some of the
subsequent debates\textsuperscript{46} and changes to death penalty laws in the United
States.\textsuperscript{47} In 1786, Hannah Ocuish was condemned to death for the
murder of a six-year old child of a well-to-do family in Connecticut.\textsuperscript{48}
Although there was no question that Hannah committed the crime,
Hannah was very young, mentally retarded and had been abandoned
by her mother and passed through various foster homes.\textsuperscript{49} She was
sentenced to death despite all of these mitigating factors.\textsuperscript{50} The judge
justified his sentence by telling the young girl of limited
understanding that "the sparing of you on account of your age,
would, as the law says, be of dangerous consequences to the public by

\footnotesize\textsuperscript{43} See The Capital Laws of Massachusetts (1641), in CAPITAL PUNISHMENT, supra note 42, at 8
(describing the various crimes contained in the section of the Liberties entitled Capital [sic]
Laws, including offenses such as idolatry, witchcraft, and bestiality). It was only as recently as
1977 that administering the death penalty to convicted rapists was found to be a
disproportionate punishment for the crime committed and therefore unconstitutional. See
Coker v. Georgia, 433 U.S. 584, 598 (1977) (concluding that a sentence of death is excessive
punishment for the crime of rape).

\footnotesize\textsuperscript{44} See THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 3-4 (Hugo Adam Bedau
ed., 1997) [hereinafter DEATH PENALTY] (noting that although the colonies modified the law as
applied to the death penalty according to localities, all continued to authorize public execution
by hanging as the mandatory punishment for various crimes against the state, the person and
property); see also ANN JONES, WOMEN WHO KILL 29 (1996) (noting that colonial law on murder
mirrored English common law, including findings of premeditation, malice, cruelty, self-
defense and accidental homicide). "[W]here common law and the Bible parted, Massachusetts
followed the Bible — manslaughter, defined as unpremeditated and committed in the heat of
the moment," was punishable by death, according to the Bible. Id. at 30. Leviticus 24:17 and
Numbers 35:20, 21 both prescribe that "if any person slayeth another suddenly, in his ANGER or
CRUELTY of passion, he shall be put to death." Id. (emphasis in original).

\footnotesize\textsuperscript{45} See DEATH PENALTY, supra note 44, at 4 (noting that the adoption of the Eighth
Amendment to the Constitution was ultimately interpreted only as a prohibition on inflicting
death in its most cruel forms, such as crucifixion or burning at the stake, and not a strict
prohibition on the imposition of death as a punishment).

\footnotesize\textsuperscript{46} See ROGER LANE, MURDER IN AMERICA: A HISTORY 79 (1997) (discussing the movement
away from believing that crime was not a result of original sin, or a weak or corrupted will, but
instead a result of bad circumstances). Bad circumstance included bad company, bad families
and poverty or ignorance. Punishment continued to be used to deter persons from engaging in
anti-social behavior, but it also mutated so as to end in the rehabilitation of the criminal,
enabling him/her to return as a useful member to his/her society. Id.

\footnotesize\textsuperscript{47} See id. (noting that most states ultimately did away with "cruel and unusual"
punishments such as whippings, brandings, cutting ears and slitting nostrils, as well as capital
punishments such as burning at the stake and butchering).

\footnotesize\textsuperscript{48} The Execution of Hannah Ocuish, in CAPITAL PUNISHMENT, supra note 42, at 18-19.
\footnotesize\textsuperscript{49} The Execution of Hannah Ocuish, in CAPITAL PUNISHMENT, supra note 42, at 18-19.
\footnotesize\textsuperscript{50} The Execution of Hannah Ocuish, in CAPITAL PUNISHMENT, supra note 42, at 19.
holding up an idea, [sic] that children might commit such atrocious acts with impunity.\(^\text{51}\)

B. Bill of Rights (1791) to Fourteenth Amendment (1868)

After the adoption of the Bill of Rights, states began to define varying “degrees” of murder.\(^\text{52}\) During this time states also abolished public executions; Pennsylvania was the first state to begin using private executions in 1834.\(^\text{53}\) Eleven years later, every state in New England had abolished public executions.\(^\text{54}\)

It was also during this time that courts granted discretion in sentencing to the jury,\(^\text{55}\) although the origins of this development are unclear.\(^\text{56}\) Two other notable developments occurred in death penalty law during this period. One was limiting the crimes for which a defendant might face the death penalty; these considerations tended to vary by region.\(^\text{57}\) A second development was the abolition movement.\(^\text{58}\) Beginning with Michigan in 1847,\(^\text{59}\) a scattered number of states across the country abolished the death penalty; such abolition was usually followed by later reinstatement of the death

\(^{51}\) The Execution of Hannah Ocuish, in CAPITAL PUNISHMENT, supra note 42, at 19.

\(^{52}\) See Law and Statistics, supra note 13, at 5 (discussing this development as the resulting compromise between those who wished to completely abolish the death penalty and those who wished to retain it in its exact state). This was a first effort on the part of the defenders of capital punishment to distinguish between those individuals the public perceived as evil enough to deserve the death penalty, and those who the public perceived as simply bad. CAPITAL PUNISHMENT, supra note 42, at 19.

\(^{53}\) Law and Statistics, supra note 13, at 33.

\(^{54}\) Law and Statistics, supra note 13, at 53.

\(^{55}\) See LANE, supra note 46, at 101-02 (discussing the fact that it was in the early to mid-1800s that a movement occurred in about 50% of the states to afford juries discretion in imposing the death sentence in cases of first degree murder). This meant that there were no cases in which the law required a jury to impose a death sentence on a defendant; a finding of life or death was completely discretionary on the part of the jury. This system of complete jury discretion attracted much criticism. See, e.g., Benjamin N. Cardozo, What Medicine Can Do for Law, Address Before the New York Academy of Medicine (Nov. 1, 1928), in LAW & LITERATURE 70, 100-01 (1931) (objecting to giving juries unfettered discretion “under a cloud of mystifying words” like “premeditation,” “deliberation,” and “malice aforethought”); Daniel Givelber, The New Law of Murder, 69 IND. L.J. 375, 380-81 (1994) (discussing Justice Cardozo’s objection to the system of jury discretion).

\(^{56}\) See DEATH PENALTY, supra note 44, at 5-6 (explaining that Tennessee and Alabama both allowed jury discretion in sentencing for murder as early as 1841, and Louisiana as early as 1846; it is thought this was to allow the all-White juries to be more lenient with White defendants).

\(^{57}\) See DEATH PENALTY, supra note 44, at 9 (explaining that death-eligible crimes in the West might be for horse thievery or cattle rustling, while in the South crimes such as rape or kidnapping might qualify). Punishment by death for the crime of rape was practiced in the United States until the Supreme Court held it unconstitutional in 1977. Coker v. Georgia, 433 U.S. 584, 600 (1977).

\(^{58}\) DEATH PENALTY, supra note 44, at 8.

\(^{59}\) DEATH PENALTY, supra note 44, at 8.
penalty. In the mid-1800s, the abolitionist movement took hold in the United States. John O’Sullivan, a well-known opponent of the death penalty at the time, put forth an especially persuasive argument. He asked that people:

[Respect the life of man even in the person of the very wretch who has himself forgot to respect it in the person of the victim he did not spare. Treat as a madman him who could be guilty of such a monstrous and stupendous outrage upon his own proper nature—and none but madmen will commit it.]

Debates raged in the United States as the abolitionists pushed their position and those who favored the death penalty pushed just as hard, each side using eloquent prose to back up its argument.

Debate over the death penalty shifted with the ratification of the Fourteenth Amendment in 1868. Eventually, courts interpreted the Fourteenth Amendment to mean that the states had an obligation to apply the Bill of Rights to all persons equally. Ideally, the

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60. See Galliher, Ray & Cook, supra note 33, at 541 and accompanying text (discussing the abolition and reinstatement of the death penalty in a variety of states). Scholars proffer various reasons to explain the relatively quick reinstatement of the death penalty in early abolitionist states. One is the non-repentant attitudes of convicted murderers who received life sentences. Id. at 574. Another is that without a “legal” provision for implementing the death penalty, people were taking the law into their own hands and carrying out illegal lynchings, primarily of Black people. Id.

61. Galliher, Ray & Cook, supra note 33, at 541.

62. See John O’Sullivan, Document 18: Report in Favor of the Abolition of the Punishment of Death by Law, in CAPITAL PUNISHMENT, supra note 42, at 52 (arguing that the United States should abolish the death penalty because it violates the precepts of religious belief).

63. CAPITAL PUNISHMENT, supra note 42, at 53.

64. See generally Galliher, Ray & Cook, supra note 33, at 538 (documenting the rhetoric of both abolition and death penalty supporters). “The fatal defect of the capital punishment theory is that it cheapens life instead of magnifying it as its votaries have believed. The criminal usually takes life hurriedly without much deliberation, but the law takes plenty of time and does it deliberately.” Id. at 546 (citing Letter from Governor E.W. Hoch to Robinette Scheier, Kansas State Historical Society (Mar. 23, 1907)). “I subscribe, also, to the belief held by millions and yet increasing millions, that capital punishment is a relic of barbarism; that the legalized taking of life is a straining of Christ’s law which has no place in modern civilization.” Id. at 551 (quoting Governor Hunt, Mar. 12, 1912) (citing William L. Eaton, The Death Penalty in Arizona (1864-1933), Arizona State Historical Society). “I say there is law to crush and obliterate the foul monster who stalks to kill . . . .” Id. at 568 (citing Death Penalty in State is Restored, SEATTLE TIMES, Mar. 12, 1919, at 9).

We have a large negro population in our state, many of them are ignorant and brutal. I honestly think there are thousands of them that would commit murder for ten dollars if they thought they would not be hung or electrocuted. These people and some Whites do not fear the penitentiary.

Galliher, Ray & Cook, supra note 33, at 557 (citing Letter from John P. Williams to Governor Thomas Rye (Apr. 7, 1915) (on file with the Tennessee State Historical Society)).

65. U.S. CONST. amend. XIV.

66. U.S. CONST. amend. XIV, § 1 (affirming that no state shall deny any person equal protection of the laws).
ramification of the Fourteenth Amendment, with respect to the application of the death penalty, would be that courts no longer had the ability to sentence Black defendants to death for crimes for which they did not sentence White defendants to death. In practice, the ratification of the Fourteenth Amendment had little effect on the implementation of the death penalty.

C. Twentieth Century

During the next several decades, the two World Wars overshadowed the debate over the death penalty in the United States. People struggled through wartime shortages, followed by a depression and another war. As a result, debate over the death penalty was not the greatest concern of most people.

In the early 1950s, the trial of accused spies Ethel and Julius Rosenberg prompted the return of the death penalty to the forefront of the public's attention. William H. Rehnquist, a Supreme Court clerk at the time of the Rosenbergs' executions, stated in a memorandum prior to their execution that "the Rosenbergs were fitting candidates for the electric chair and that it is too bad that drawing and quartering has been abolished." Not everyone shared Rehnquist's sentiments. The trial and convictions prompted a resurgence of debate over the death penalty, which played out against the backdrop of the United States' recent war-torn decades and its emerging Cold War status.

67. See Document 23: The Fourteenth Amendment, Section 1, in CAPITAL PUNISHMENT, supra note 42, at 65 (quoting Michigan Senate Joint Committee on Reconstruction member Jacob M. Howard as explaining in 1866 that the Fourteenth Amendment "prohibits the hanging of a Black man for a crime for which the White man is not to be hanged").

68. See generally McCleskey v. Kemp, 481 U.S. 279, 287-92 (1987) (holding that proof of racial discrimination in general, without other corroboration, is not enough to prove racial discrimination in a particular defendant's case); see also infra notes 82-86 and accompanying text.

69. CAPITAL PUNISHMENT, supra note 42, at 75 (discussing the United States' struggle to cope with its own growth as it went from an economic boom to a depression, through a war, into another depression, through another war and, finally, into economic recovery and prosperity).

70. CAPITAL PUNISHMENT, supra note 42, at 76.

71. See CAPITAL PUNISHMENT, supra note 42, at 76 (noting that during "the most contentious [decade] since the controversy over slavery in the 1850s," reformers were focused on relief programs and politics, and not on social reforms such as capital punishment).

72. See JANICE SCHUEIT, THE LOGIC OF WOMEN ON TRIAL: CASE STUDIES OF POPULAR AMERICAN TRIALS 111, 111 (1994) (noting that the Rosenbergs were tried in 1951 and convicted in 1953).

73. CAPITAL PUNISHMENT, supra note 42, at 75.

74. See SCHUEIT, supra note 72, at 111 (discussing the trial of Ethel Rosenberg). Ethel Rosenberg was a Jewish woman of Eastern European immigrant parentage; as such, she grew up poor working class, and associated with the garment unions and the Communist party. Id. at
In the 1960s, the American public once again debated the use of the death penalty.\(^7\) The controversy surrounding it, however, moved from religious and moral considerations to legal considerations, such as whether courts imposed the death sentence fairly and in compliance with constitutional provisions.\(^6\) The 1960s and 1970s saw several challenges to the imposition of the death penalty, including challenges involving disproportionality of the punishment to the crime committed,\(^7\) the state of mind of the defendant at the time of the crime,\(^8\) the age of the offender,\(^9\) the mental capacity of the offender,\(^8\) and the race of the offender.\(^8\)

In *Furman v. Georgia*,\(^2\) the Supreme Court held that Georgia's application of the death penalty, under its state statute of the time,
was unconstitutional. States struggled to reconstruct their statutes following the Furman ruling. In 1976, in Gregg v. Georgia, the Supreme Court once again recognized a state statute implementing the death penalty as constitutional. During the years 1970 to 1979, debate over the death penalty was intense and the Supreme Court attempted to ensure "correct" application of the death penalty. Only three executions took place during that time, and all three were men. After a short hiatus in the mid-1970s, courts imposed the death penalty fairly regularly throughout the 1980s and into the 1990s. Between early 1980 and June of 1998, states executed 462 capital offenders, only three of whom were women.

III. CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY

A. Age

1. Thompson v. Oklahoma

As recently as 1989, the Supreme Court considered at what the minimum age courts may consider a juvenile death-eligible. In Thompson v. Oklahoma, the Court considered whether a defendant who was fifteen years old at the time of his offense was eligible for the death penalty.

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83. See id. at 285-86 (holding that it is a violation of the Eighth Amendment to arbitrarily subject a person to the death penalty).
84. 428 U.S. 153, 198 (1976) (holding that the legislative guidelines of Georgia, and the review function of the Supreme Court of Georgia, prevented the wanton imposition of the death sentence and therefore Georgia's administration of the death penalty fell within constitutional boundaries).
85. See id. at 187.
86. See supra note 31 and accompanying text (discussing the death penalty throughout the seventies and eighties).
87. See supra note 31 and accompanying text (stating that states rarely used the death penalty during the 1970s).
88. See Death Penalty for Female Offenders, supra note 27 (noting the regularity with which courts have imposed death sentences throughout these decades).
89. Death Penalty for Female Offenders, supra note 27.
91. See Thompson v. Oklahoma, 487 U.S. 815, 818-19 (1988) (considering whether a juvenile who was 15 at the time of his offense was old enough for the court to deem him eligible for the death penalty); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (finding nothing to forbid the imposition of the death sentence on one who is 16 or 17 years old at the time he or she murders).
93. See id. at 818-19.
can engage in certain activities, such as voting and driving, the Court held that executing the defendant would violate the Eighth Amendment prohibition against cruel and unusual punishment.

Justice Stevens delivered the opinion in *Thompson*. In support of the prohibition against executing one who committed his or her offense while under the age of sixteen, he quoted from an earlier Oklahoma case, *Eddings v. Oklahoma*.

But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

The Court seemed to realistically address the imprudence of executing one who is a minor at the time he or she commits a crime. It recognized an exemption for juveniles as a class from the capital justice system.

2. *Stanford v. Kentucky*

The very next year, however, ignoring its own eloquent arguments from *Thompson*, the Court held that a juvenile who commits a crime at the age of sixteen is death-eligible. In deciding *Stanford v. Kentucky*, the Court found no "historical nor modern societal consensus forbidding the imposition of capital punishment on any person who murders at sixteen or seventeen years of age," and

94. See id. at 838.
95. See id.
96. See id. at 818.
97. 455 U.S. 104 (1982).
99. See id. at 824.
100. See id. at 824-28.
102. See Thompson, 487 U.S. at 837 (noting it is unlikely that a teenage offender would make any kind of cost-benefit analysis including the possibility of execution prior to committing a crime). The Court goes on to say that "it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century." Id. at 838.
104. Id. at 380.
redefined juveniles as a class as death-eligible. It did this despite its own recognition of the immaturity of juveniles' psychology and judgment capabilities. It created an artificial dividing line to establish a uniform system for determining the death-eligibility of juveniles, despite its earlier recognition of the different developmental capacities of juveniles. Although the Court delivered seemingly contradictory arguments in Thompson and Stanford as to who courts consider a juvenile, it managed to uphold the death penalty as constitutional, even in cases where the defendant was arguably a juvenile at the time of the crime.

B. Mental Competency

1. Ford v. Wainwright

The leading cases in which the Supreme Court considered the issue of mental competency as a factor in determining death eligibility are Ford v. Wainwright and Penry v. Lynaugh. In Ford v. Wainwright, the Court considered the case of Alvin Ford, who appealed his death sentence on the grounds that he suffered from a severe mental disorder and was unable to assist in his defense. Ford

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105. See id.
106. See Thompson, 487 U.S. at 834.
107. See id.
108. See Thompson v. Oklahoma, 487 U.S. 815, 823-35 (1988) (holding that the Eighth and Fourteenth Amendments preclude the imposition of the death penalty on a defendant who was sixteen at the time of his offense).
111. Id.
113. See Ford, 477 U.S. at 405 (reporting that the doctor who examined Mr. Ford in 1983 concluded that he had a "major mental disorder ... severe enough to substantially effect Mr. Ford's present ability to assist in the defense of his life"). Competency to stand trial is a different consideration from that of whether a defendant was insane at the time he or she committed a criminal act. Id. at 406-08.
did not contend that he was mentally incompetent at the time he committed his crime, nor at his subsequent trial and sentencing, but rather claimed that he became increasingly unstable during the time he spent in prison.\textsuperscript{114} The Court held that if Ford proved his allegations of insanity, the state should not execute him, and remanded the case to the Court of Appeals.\textsuperscript{115} It did so noting that "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today."\textsuperscript{116}

2. Penry v. Lynaugh\textsuperscript{117}

In 1989, the Court considered the case of Penry v. Lynaugh.\textsuperscript{118} In this case, defendant Penry, who had the reasoning capacity of a seven-year old, challenged the imposition of the death sentence.\textsuperscript{119} In Penry, the Court did not follow its own precedent.\textsuperscript{120} Despite its prior findings that it violated the Constitution to execute one who is insane,\textsuperscript{121} the Court found that the Constitution permits the execution of one who is mentally retarded.\textsuperscript{122} It determined that, as long as the jury could consider mental incapacity as a mitigating factor, this was enough of a safeguard to protect the rights of one who suffered from mental illness or incapacity.\textsuperscript{123}

As it often does with death penalty cases, the Court construed a very narrow interpretation of its previous decision. It relied on "evolving standards of decency"\textsuperscript{124} and concluded that it was not the time to preclude the imposition of the death penalty on the mentally retarded.\textsuperscript{125}

\textsuperscript{114.} See generally id. at 402 (describing the increasingly pervasive delusions Ford suffered in prison).
\textsuperscript{115.} Id. at 417-18.
\textsuperscript{116.} Id. at 409.
\textsuperscript{118.} Id.
\textsuperscript{119.} Penry, 492 U.S. at 308 (reporting that Penry confessed to the rape and murder of Pamela Carpenter. Penry had mild to moderate retardation. Testing before trial revealed he had an IQ of 54. The trial court convicted Penry of capital murder, rejecting his insanity defense).
\textsuperscript{120.} Id. at 340.
\textsuperscript{121.} Ford, 477 U.S. at 409.
\textsuperscript{122.} See Penry, 492 U.S. at 340 ("[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone.").
\textsuperscript{123.} See id. at 312.
\textsuperscript{124.} Id. at 334.
\textsuperscript{125.} See id. at 312.
C. Race

In 1987, the Supreme Court decided *McCleskey v. Kemp*. Warren McCleskey sought to have his death sentence overturned on both Fourteenth Amendment equal protection and Eighth Amendment arbitrariness grounds. As proof of his claims, McCleskey offered the comprehensive Baldus study. The Baldus study used a 230-variable logistic multiple-regression model to determine when it is most and least likely that a defendant will receive the death penalty. Baldus and his co-researchers used variables they considered both conceptually and statistically important. The study illustrated, quite starkly, that defendants were most likely to receive a death sentence in cases where their victim was white.

Despite the fact that the Court accepted the Baldus study as valid, it rejected McCleskey's claims of a constitutional violation based on racial discrimination, holding that proof of systemic racial discrimination was not enough to prove that McCleskey had been specifically affected by discrimination at his particular sentencing.

127. *See id.* at 286 (claiming that Georgia administers its capital sentencing process in a racially discriminatory manner, which violates the Fourteenth Amendment to the United States Constitution).
128. *See id.*; *see also* Furman v. Georgia, 408 U.S. 238, 274-77 (Brennan, J., concurring) (discussing arbitrary imposition of death sentence as prohibited by the Eighth Amendment).
129. *See McCleskey*, 481 U.S. at 286 (explaining that the Baldus study is actually two statistical studies examining more than 2,000 murder cases in Georgia during the 1970s). The study found that in cases where the victim was Black, the defendant received a death sentence only 1% of the time, whereas in cases where the victim was White, the defendant received a death sentence 11% of the time. *Id.* In cases where the victim was White and the defendant was Black, courts imposed the death penalty in 22% of cases; in cases where the victim was Black and the defendant White, courts imposed the death penalty was imposed in only 8% of cases. *Id.* The percentages were even more striking when illustrating cases in which prosecutors sought the death penalty; in cases with White victims and Black defendants, prosecutors sought the death penalty 70% of the time while they sought it in only 19% of cases where the victim was Black and the defendant White. *Id.* at 287.
130. *See Law and Statistics*, supra note 13, at 133-35; *see also* McCleskey, 481 U.S. at 287 n.5 (discussing the construction of the Baldus study). The 230-variable model divided cases into eight ranges, according to the aggravation level of the crime. *See id.* at 287 n.5. The Baldus study found that evidence of racial bias was most pronounced in the mid-range cases. *Id.* The study illustrated that where there was the most room for juries to exercise discretion, the greatest evidence of racial factors was present. *Id.* The McCleskey case fell into the mid-range category. *Id.*
131. *See Law and Statistics*, supra note 13, at 147 n.4 (describing conceptually important factors as those that are widely recognized by criminologists, prosecutors and legislators as significant determinants of death-sentence outcomes, such as a serious prior record or multiple victims). Statistically important factors are those which did, in fact, strongly correlate to the likelihood that a defendant would receive a death sentence. *Law and Statistics*, supra note 13, at 147 n.5.
The Court established a threshold of "exceptionally clear proof" before it would infer any abuse of discretion in the Georgia capital sentencing system. It rejected arguments raised by McCleskey's attorneys based on both a jury-selection model and the employment discrimination model.

It is important to note that the McCleskey opinion is a plurality opinion, not a majority opinion, and includes a well-reasoned and persuasive dissent by four members of the Court. The dissenters take issue with many of the conclusions Justice Powell reached in the opinion. Significantly, Justice Brennan states that "since Furman, the Court has been concerned with the risk of the imposition of an

133. See id. at 297 (holding that the Baldus study was clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose).

134. See id. (noting that because discretion is essential to the criminal justice process, the Court demands exceptionally clear proof before inferring that discretion has been abused).

135. See id. (holding that because criminal laws require the use of discretion, only exceptionally clear proof would permit an inference of abuse of discretion).

136. See id. at 294 (rejecting both the venire-selection and Title VII arguments). "But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the venire-selection or Title VII cases." Id.

137. See McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting) (contending that the death penalty is in all circumstances cruel and unusual punishment).

138. Justice Brennan was historically an opponent of the death penalty. He joined with the majority and wrote his own concurring opinion in Furman v. Georgia, 408 U.S. 238 (1972), in which the Court held that the death penalty as implemented by the states was unconstitutional. His contention was that any punishment severe enough to be degrading to human dignity was "cruel and unusual" punishment under the Eighth Amendment. Id. at 281 (Brennan, J., concurring).

It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under this test, death is today "cruel and unusual" punishment.

Id. at 285.

The Court re-implemented the death penalty with its ruling in Gregg v. Georgia, 428 U.S. 153 (1976). Justice Brennan wrote a dissenting opinion in which he said that it is "my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." Id. at 227 (Brennan, J., dissenting). He included this phrase when writing on the death penalty in subsequent cases, usually followed by his adjudged disposition of the case. See, e.g., Keenan v. California, 190 U.S. 1012, 1012 (1989) (Brennan, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment, prohibited by the Eighth and Fourteenth Amendments, I would grant certiorari and vacate the death sentence in this case."); Brown v. North Carolina, 479 U.S. 940, 942 (1986) (Brennan, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment, prohibited by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case."); Banks v. Texas, 464 U.S. 904, 904-05 (1983) (Brennan, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment, prohibited by the Eighth and Fourteenth Amendments, I would vacate the death sentence in this case.").
arbitrary sentence, rather than the proven fact of one." He further writes that "this emphasis on risk . . . reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational." In Justice Brennan's language addressing risk and arbitrariness lies the prospect of one day presenting to the Court a persuasive equal protection argument regarding the death penalty based on sex discrimination.

Justice Powell stated in the McCleskey opinion that:

McCleskey relies on "historical evidence" to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and after the Civil War. Of course, the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. But unless historical evidences reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.

If the Court's true concern was that historical evidence of discrimination be contemporaneous to the case for which it was cited, recent "historical evidence" of sex discrimination is abundant in the United States. Paternalistic attitudes and actions toward women have been abundantly documented throughout the centuries, continuing into the 1990s. It is this attitude, still prevalent today,

139. McCleskey, 491 U.S. at 322 (Brennan, J., dissenting).
140. Id. at 328.
142. See, e.g., California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 274-77 (1987) (considering whether the Pregnancy Discrimination Act of 1978 preempts a state's statute requiring employers to provide leave to pregnant employees); City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978) (considering whether employer may charge women more for pension plan because they live longer than men); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545-44 (1971) (considering whether employer could refuse to hire women with pre-school aged children, while hiring men in the same category).
143. See, e.g., Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (noting Judge Posner's determination on when it is appropriate for a woman to decide she has been sexually harassed). "It is no doubt distasteful to a sensitive woman to have such a silly man one's boss, but only a woman of Victorian delicacy . . . mysteriously aloof from contemporary American popular culture . . . would find [his] patter substantially more distressing than . . . the cigarette smoke of which the plaintiff does not complain." Id.; see also Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (discussing the United States' history of paternalism):
that evidences discrimination "against" men and "for" women when charging, convicting and sentencing defendants in capital cases.\textsuperscript{144}

IV. EQUAL PROTECTION VIOLATION—DISPARATE IMPACT BY SEX

"She's run out of arguments. She's gonna be executed. A lot more women are gonna be executed now."

"Why's that?"

"Women's lobby. They all want equal treatment before the law."\textsuperscript{145}

Since 1990, about ninety percent of the murders committed in the United States have been committed by men.\textsuperscript{146} Even after accounting for the fact that men are far more likely to commit murder than are women, women are still less likely to be convicted and sentenced to death;\textsuperscript{147}—estimates for death sentences imposed at the trial level are one in fifty-three or 1.9%.\textsuperscript{148} Presently, women comprise about 1.3% of all persons on death row.\textsuperscript{149} It is extremely unlikely that even the few women who are actually convicted and sentenced to death will ever be executed.\textsuperscript{150} Professor Victor L. Streib\textsuperscript{151} notes that, since the earliest colonial times, executions of females have numbered 539 of 19,200 total executions, or a mere three percent.\textsuperscript{152} Since 1900, even

cage . . . . As a result of notions such as these, our statute books became laden with gross, stereotyped distinctions between the sexes, and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of Blacks under the pre-Civil War slave codes.

\textit{Id.} at 684-85.

\textsuperscript{144} \textit{See} discussion \textit{infra} at Parts IV.B-C.

\textsuperscript{145} \textit{See} \textit{The Last Dance} (Buena Vista 1997).

\textsuperscript{146} \textit{See} LATZER, \textit{supra} note 8, at 252 (citing U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, Table 3.138).

\textsuperscript{147} \textit{See} R. BARR FLOWERS, FEMALE CRIME, CRIMINALS AND CELLMATES: AN EXPLORATION OF FEMALE CRIMINALITY AND DELINQUENCY 217 (1995) (noting that women prisoners are rarely sentenced to death or executed in the United States); \textit{see also} Gerrie Ferris, Bill Hendrick & Chris Burritt, \textit{The Susan Smith Case: Women Who Kill Usually Escape Ultimate Penalty}, ATLANTA J. CONST., July 29, 1995, at 10A (noting that, according to a former head of the Capital Punishment Research Project at the University of Alabama, only one percent of the approximately 2,000 women who commit murder each year are actually sentenced to death).

\textsuperscript{148} \textit{See} \textit{Death Penalty for Female Offenders, supra} note 27, at 3 (noting that women are unlikely to be sentenced to death).

\textsuperscript{149} \textit{See} \textit{Death Penalty for Female Offenders, supra} note 27, at 3 (finding that few women are presently awaiting executions).

\textsuperscript{150} \textit{See} Ferris, Hendrick & Burritt, \textit{supra} note 147, at 10A (noting that more than 98% of death penalty sentences for women are ultimately overturned); \textit{see also} \textit{Death Penalty for Female Offenders, supra} note 27 (documenting that of the 120 women sentenced to death since January 1, 1973, 65 have had their sentences reversed, seven have had them commuted, 45 are currently still on death row, and only three have actually been executed).

\textsuperscript{151} Victor L. Streib, Dean and Professor of Law, The Claude W. Retit College of Law, Ohio Northern University.

\textsuperscript{152} \textit{Death Penalty for Female Offenders, supra} note 27, at 3; \textit{see also} Ferris, Hendrick & Burritt,
that small number has fallen significantly, with only forty-one of 7,729 executions of women in the twentieth century, or 0.5%.\textsuperscript{153}

Since 1973, the post-	extit{Furman} era of the death penalty, 120 death sentences have been imposed on female defendants.\textsuperscript{154} Of those 120, only forty-four females remain on death row today.\textsuperscript{155} These women constitute only 1.3% of the total death row population\textsuperscript{156} and less than 0.1% of all women in prison in the United States.\textsuperscript{157} Three women have been executed since 1973;\textsuperscript{158} the remainder have either had their sentences reversed or commuted.\textsuperscript{159} More than half (twenty-five) of all women on death row at the end of 1997 were sentenced in only four out of the thirty-eight states that authorize the death penalty: California, Texas, Florida, and Pennsylvania.\textsuperscript{160} Florida, North Carolina, and Texas are the three leading states for convicting and sentencing women to death.\textsuperscript{161}

By the end of 1997, there was a total of 3,335 prisoners on death row.\textsuperscript{162} Of these 3,335 prisoners, 98.5% were men\textsuperscript{163} and just 1.5% were women.\textsuperscript{164} These numbers simply do not correlate to the fact that women are responsible for one in eight murders in this country.\textsuperscript{165} It is logical to suspect, based on the empirical evidence,
that discrimination is responsible for the differences in convicting and sentencing men and women to death.

A. State Conviction and Sentencing Data

1. Florida

Significantly, just as Florida, North Carolina, and Texas lead the nation in convicting and sentencing women to death, it is only in these three states that any women have actually been executed since 1973—one woman in each state. Florida convicted for murder and sentenced to death fifteen females. Florida is a leader both in numbers of total death sentences and in numbers of women sentenced to death. At the end of 1997, Florida had 370 prisoners on death row. This is greater than ten percent of the total of 3,335 prisoners in the country under a sentence of death at the time. Florida executed Judias Buenoano in March of 1998. In light of these numbers, one might assume that Florida's rates of convictions and sentences to death for women might be on par with those of men in the state, but that is not the case. Of its 387 total prisoners on death row as of October 1, 1998, only four were women. Florida is just one example of the disparity that exists between men and women who receive a death sentence.

2. North Carolina

Given its relative population, North Carolina leads in both total...
prisoners under a death sentence and women prisoners under sentence of death.\textsuperscript{173} Between January 1973 and December 1996, North Carolina convicted and sentenced to death thirteen females.\textsuperscript{174} As of October 1998, North Carolina had 207 prisoners on death row.\textsuperscript{175}

Again, it would seem logical that a state that applies the death sentence with such regularity might apply it proportionately to both men and women. This is not the case in North Carolina. Of the 207 prisoners on death row in October 1998 only three were women.\textsuperscript{176} North Carolina last executed a woman in November 1984,\textsuperscript{177} when it put Velma Barfield\textsuperscript{178} to death. North Carolina offers another example of the disproportionate rate at which men receive the death sentence as compared to women.

3. Texas

One final state that provides empirical evidence of the disproportionate application of the death penalty in the U.S. capital justice system is Texas. Texas convicted and sentenced to death eleven women between the years 1973 and 1996.\textsuperscript{179} The number of women remaining under sentence of death as of October 1998 was seven.\textsuperscript{180} This is a virtually negligible number when compared to the total of 436\textsuperscript{181} prisoners on Texas' death row at the same time. Texas has always been a leader in convicting and sentencing to death defendants accused of murder.\textsuperscript{182} It has executed 144 prisoners since 1977,\textsuperscript{183} and a total of 441 since 1930.\textsuperscript{184} This is almost ten

\textsuperscript{173. See Bulletin, supra note 109, at 1 (following Texas and California with the number of prisoners sentenced to death).}
\textsuperscript{174. See Death Penalty for Female Offenders, supra note 27, at 6 (following Florida with the number of women receiving death sentences).}
\textsuperscript{175. See North Carolina (visited Jan. 1, 1999) <http://www.essential.org/dpic/northcarolina.html>.}
\textsuperscript{176. See id. (indicating that 10 executions have taken place as of Oct. 28, 1998).}
\textsuperscript{177. See Death Penalty for Female Offenders, supra note 27, at 4.}
\textsuperscript{178. See Death Penalty for Female Offenders, supra note 27, at 4.}
\textsuperscript{179. See Death Penalty for Female Offenders, supra note 27, at 6 (following Florida and North Carolina with the highest number of women receiving death sentences).}
\textsuperscript{180. See Texas (visited Jan. 1, 1999) <http://www.essential.org/dpic/texas.html>.}
\textsuperscript{181. See id. (indicating that 160 executions have taken place as of Oct. 28, 1998).}
\textsuperscript{182. See Year-End Report, supra note 28, at 1 (stating that in 1998, Texas led the country with 20 executions, while Virginia was second with 19).}
\textsuperscript{183. See BULLETIN, supra note 109, at 10 (reflecting the highest number of persons executed among the states since 1977).}
\textsuperscript{184. See BULLETIN, supra note 109, at 10 (reflecting the highest number of persons executed among the states since 1930).}
percent of the total 4,291 prisoners executed in the United States between 1930 and 1997\textsuperscript{185} and close to one-third of the 432 executions that were carried out in the United States between 1977 and 1997.\textsuperscript{186} Between January 1, 1998 and November 30, 1998, Texas executed seventeen people—almost thirty percent of total executions in the United States for the year.\textsuperscript{187} Once more, it is clear that the numbers of men to women who are executed are vastly different; only one woman was executed.\textsuperscript{188}

B. Studies – Preferential Treatment for Women

In 1997, the South and the West experienced higher rates of violent crime than the Northeast and the Midwest.\textsuperscript{189} Of a total 501,353 arrests for violent crimes, 80,975, or 16.2\% were committed by females.\textsuperscript{190} One thousand three hundred and seventeen, or 10.3\% of a total 12,764, arrests for murder or non-negligent manslaughter were females.\textsuperscript{191} By contrast, men were arrested for 11,447, or 89.7\% of murders, and for 420,378, or 83.8\%, of total violent crimes.\textsuperscript{192} Both sets of numbers represent an overall decrease from 1996 to 1997, for both males and females, in the numbers of arrests for murders.\textsuperscript{193} They also indicate an overall decline in total arrests of males for all violent crimes,\textsuperscript{194} but an increase in total arrests of females for all violent crimes.\textsuperscript{195} A number of studies have been conducted over the years to determine whether, in fact, women receive preferential treatment in the judicial system, particularly when it comes to women who

\textsuperscript{185} See \textit{Bulletin}, supra note 109, at 10 (citing 4,291 executions in all 50 states since 1930).
\textsuperscript{186} See \textit{Bulletin}, supra note 109, at 10 (leading the states in executions with 98 executions since 1997).
\textsuperscript{187} See \textit{Bulletin}, supra note 109, at 12 (leading the states in executions performed in 1998).
\textsuperscript{188} See \textit{Bulletin}, supra note 109, at 12 (showing that 18 states have executed 58 prisoners, only 2 of which have been women).
\textsuperscript{189} See \textit{Fed. Bureau of Investigation, Uniform Crime Reports for the United States} 12 (1997) [hereinafter \textit{Uniform Crime Reports}] (documenting the South recording 682 violent crimes per 100,000 inhabitants and the West as recording 692 per 100,000 inhabitants, as compared to 536 for the Northeast and 526 for the Midwest). Murders accounted for one percent of all violent crimes. \textit{Id.}
\textsuperscript{190} See \textit{id.} at 239 (reflecting a lower percentage of women arrested for violent crimes than for all crimes).
\textsuperscript{191} See \textit{id.} at 239 (constituting 0.1\% of all crimes committed by women).
\textsuperscript{192} See \textit{id.} at 239 (constituting 3.5\% of all crimes committed by women).
\textsuperscript{193} See \textit{Uniform Crime Reports}, supra note 189, at 231 (showing a greater decrease in arrests for women).
\textsuperscript{194} See \textit{Uniform Crime Reports}, supra note 189, at 231 (reflecting a decrease of 1.7\%).
\textsuperscript{195} See \textit{Uniform Crime Reports}, supra note 189, at 231 (reflecting an increase of 4.8\%).
murder. A classic early study, Patterns of Criminal Homicide, was published in 1957. The results of the study showed that, "[a]s always, the courts were more lenient with these and other women than with men, convicting them at a lower rate, but above all of lesser degrees of homicide, carrying much lighter sentences." A more recent study produced similar findings; a study conducted in 1978 of California's sentencing practices in felony cases concluded that fewer women were incarcerated for similar crimes than their male counterparts. A 1983 study of Florida's sentencing practices made similar findings.

Researchers have found that there is often no significant difference in the treatment of men and women at earlier stages in the judicial process, such as at the negotiating, prosecuting, or convicting stages. Rather, it is most often at the sentencing stage where gender plays a role. A 1989 study that was based on interviews with twenty male and female judges in New York and Massachusetts found that women generally received lighter sentences than men.

196. See infra notes 198-206 and accompanying text (discussing the disparity between men and women in the penal system).

197. See LANE, supra note 46, at 254-55 (documenting Marvin Wolfgang's classic study of 635 homicide cases investigated by the Philadelphia police between 1948 and 1952). Philadelphia was a typical urban region for the time period, with a murder rate of 5.7 per 100,000 inhabitants annually. Id. at 255. Eighteen percent of the offenders reported were female. Id. at 256. One hundred of those murders reported were domestic homicides; they were split fairly evenly, with 53 husbands accused of killing their wives and 47 wives accused of killing their husbands. Id. Of the 53 accused men, 36 actually went to trial. Of these 36, 34 (94%) were found guilty as charged. Id. Of the 47 accused women, 42 had been tried at the time the study was published. LANE, supra note 46, at 256. Only 26 (62%) were found guilty as charged. Id.

198. LANE, supra note 46, at 256.


200. See id. (citing 1983 study conducted by Frazier, Bock & Henretta). The study controlled for one dozen social and legal variables, and found that men were still 23% more likely to be jailed than women, when each had committed similar crimes. Id.

201. See id. at 351.


203. See Julian, supra note 199, at 353 (citing J. Daly, Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing, in GENDER AND SOCIETY 3(1):9-36). Daly found paternalistic attitudes among judges were fairly pervasive—the attitudes were directed mostly toward mothers. Id. at 353. Mothers who were taking care of their children were thought of as "good." Id. Those who were not (for whatever reasons) were perceived as irresponsible. Id. Daly also found that White women received greater deference than both men and minority women. Id. at 358. Women of maturity, status, respectability, and mothers of minor children all appeared to receive leniency from the courts. Julian, supra note 199, at 358.
Another study published in 1989 analyzed the cases of female felons in six states, and compared the females to a matched sample of males. The primary conclusion from this study was that, in most cases, even with well-matched male and female offenders, the females tended to receive lenient sentencing for similar crimes. These studies seem to indicate that women are less likely than men to receive jail time for violent crimes.

C. Rationales for Different Treatment

There are currently few theories that explore why women receive the death penalty at such a different rate than men, particularly since research suggests that female and male killers are similar in more ways than they are different. Women and the death penalty do not seem to be two topics often discussed together in the legal arena, and yet the fact remains that women do receive different treatment. Those who sit in judgment are hesitant to impose harsh sentences on women, particularly a sentence of death.

What are the factors, then, that will cause a judge or jury to convict and impose a harsh sentence on a woman? First, nearly half of the

204. See Dean J. Champion, A Comparative Analysis of Female Felons: Some Recent Trends in Sentencing Severity Compared with a Matched Sample of Male Offenders, in Female Criminality: The State of the Art 363 (Concetta C. Culliver ed., 1993) (studying female felons in Alabama, Florida, Georgia, Kentucky, Tennessee, and Virginia from 1983 to 1985). He matched the male sample for age, race, socio-economic characteristics, prior records, and other demographic data. Id. at 370. He also controlled for the judges sentencing both samples. Id.

205. See id. at 371 (noting that even implementing sentencing changes in the various states to address the disparate sentences received by males and females, there were still quite considerable discrepancies in sentencing). The study also concludes that at other stages, females receive lenient treatment in that police are less likely to arrest a female, prosecutors are less likely to go forward with what might be an unpopular prosecution and juries tend to be sympathetic to females. Id. Champion also notes the rarity of executions of female felons for capital crimes, despite the fact that many of them were convicted in various states that had death penalty statutes. Id.

206. See Jenny E. Carroll, Note, 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, 1414 (1997) (noting the dearth of studies on women and capital punishment).

207. See FLOWERS, supra note 147, at 88 (describing the findings of John Humphrey and John Kirkpatrick in their two-year study, Stress in the Lives of Female Criminal Homicide Offenders). The co-authors interviewed both males and females jailed for committing murder or manslaughter, and found that individuals in both groups suffered from abusive backgrounds and low socio-economic status. Id.

208. See Carroll, supra note 206, at 1415 n.16 (noting that a search of Westlaw using the terms "female" or "woman" in addition to either "death penalty" or "capital" produced only four articles). This was also the author's experience while researching this Comment.

209. See discussion supra at Part IV.B (discussing studies that indicate that women receive preferential treatment).

210. See Julian, supra note 190, at 343 (quoting one criminal court judge as admitting "It's difficult to send a mature woman to prison. I keep thinking... Hey! She's somebody's mother!").
women on death row are there for killing family members or other intimates, such as a boyfriend.\textsuperscript{211} Additionally, most of these women have killed for economic gain.\textsuperscript{212} Historically, men and women have been viewed as fundamentally different creatures.\textsuperscript{213} The characteristics attributed to women are not necessarily considered positive attributes;\textsuperscript{214} women are often thought to be the worst kinds of criminals and are viewed as overemphasizing the "typically female" traits of emotionalism or sexuality.\textsuperscript{215}

211. See Elizabeth Rapaport, \textit{Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era}, 49 SMU L. REV. 1507, 1517 (1996) [hereinafter \textit{Capital Murder and the Domestic Discount}] (noting that about one-half of the men on death row for murdering family or intimates killed in retaliation for a woman leaving a sexual relationship, while this reason was quite rare among the female killers). Two-thirds of the women killed for pecuniary gain, a motive notably lacking among the men. \textit{Id.}

212. See \textit{id.} at 1517-18 (stating that society looks at women killing for economic gain as the worst type of female crime). Barbara Stager was given the death sentence in North Carolina. \textit{Id.} at 1517-18 (relating the story of Stager as an example). Stager shot her sleeping husband to prevent him from learning of her bad debts, and to recover financially. \textit{Id.} at 1518. At her trial, evidence was introduced that indicated she had killed her first husband in the same manner. Rapaport, \textit{supra} note 211, at 1518. Judi Buenoano was also convicted of killing her husband. \textit{Id.} at 1519 n.42 (illustrating the stigma attached to a crime because of the murderer's gender). At her trial, a witness testified that Buenoano advised her that instead of divorcing her husband, she should take out more life insurance on him and then poison him. \textit{Id.; see also} THOMAS S. DUKE, \textit{CELEBRATED CRIMINAL CASES OF AMERICA} 437-40 (1991) (relating the story of Mrs. Belle Gunness, a serial murderer in the early 1900s). Mrs. Gunness was suspected of killing two husbands; one died of heart failure, which his relatives suspected was actually caused by poison. The other died when a meat cleaver "fell" off a shelf and split his head open. Mrs. Gunness collected life insurance on both men. It is suspected that she killed at least three other men after acquiring money from them. In April 1908, her house burned down killing her and her three children. When police subsequently investigated the suspected arson, they discovered a private graveyard in Mrs. Gunness' backyard. \textit{Id.}

Murders by females for economic gain are found throughout American history. \textit{See generally} KERRY SEGRAVE, \textit{WOMEN SERIAL AND MASS MURDERERS: A WORLDWIDE REFERENCE}, 1580 THROUGH 1990, 92-97 (1992) (documenting various female serial and mass murderers throughout the centuries). Nannie Doss was convicted of killing 10 people, including four husbands, by arsenic poisoning between 1924 and 1954. \textit{Id.} at 92. Although she collected life insurance on many of them, she told the court at her trial that she killed one "because he got on my nerves." \textit{Id.} at 95. The prosecutor in the case sought the death penalty, but the judge accepted a guilty plea and sentenced Doss to life imprisonment. \textit{Id.}

Between 1912 and 1921, in Chicago, Tillie Klimek killed nine men, mostly her husbands, by arsenic poisoning. \textit{Id.} at 92. The prosecutor in this case also sought a sentence of death, but Klimek received a life sentence. \textit{Id.} at 95. Interestingly, the prosecutor sought to show that women were generally treated more leniently than men when charged with similar crimes, and specifically in cases of spousal murder. \textit{Id.} He pointed out that in recent years prior to the case, 28 women had been acquitted on charges of murdering their husbands. Of the four women who had been convicted of the crime, one was judged insane, one was "more than middle-aged," and the other two were termed "no beauties." \textit{Id.}

213. See ALLISON MORRIS, \textit{WOMEN, CRIME AND CRIMINAL JUSTICE} 12 (1987) (explaining that women are perceived as "pure, passive, dependent, submissive, selfless, caring and gentle," while men are perceived as possessing qualities opposite those of women).

214. See MORRIS, \textit{supra} note 213, at 12 (describing women as "childlike, narcissistic, emotional, jealous, malicious, deceptive, sexual and unstable").

215. See MORRIS, \textit{supra} note 213, at 12 (explaining that female murderers exhibit the negative qualities inherent in women because they have not been "neutralized" by the more positive qualities). An 1860 newspaper article described a murder thought to be committed by
The theories postulated have been created largely at the behest of feminists to explain why so few women receive the death penalty.\(^{216}\) At present, these theories lack the extensive statistical support that race and class discrimination studies have.\(^{217}\) The theories focus on explaining why the actors in the capital justice system, from the prosecutors who refer indictments, to judges who charge juries, and the jurors themselves, are so reluctant to impose severe sentences on women, particularly the death sentence.\(^{218}\)

As one judge stated: "I don't think there's any rational or objective thought about it, but there's a feeling that incarceration for a woman is far more degrading than for a man . . . ."\(^{219}\) In fact, it seems that judges consider different factors, dependent on the gender of the defendant.\(^{220}\) Professor Victor L. Streib recognizes this reluctance, particularly in judges, to convict and sentence women to death.\(^{221}\) He notes that:

Even when all of the specific aggravating and mitigating factors are the same for male and female defendants, females still tend to
receive significantly lighter sentences in criminal cases generally. Judges admit that they tend to be more lenient toward female offenders in general. Also juries tend to be more lenient toward female offenders, particularly in serious crimes, for a variety of ingrained, cultural reasons.... This tendency is consistent with the extraordinary low number of death sentences and executions of adult female offenders in our history.222

These theories present an initial foundation for constructing a disparate impact argument for men and women in the capital justice system.223 If judges admit that they are more lenient towards women and more reluctant to sentence them, it seems to follow that they are harsher with men and their discrimination on the basis of sex is both purposeful and knowing.224 They may not be able to explain why they feel this way, but they certainly seem to recognize that they do feel this way, and that they act in specific response to those feelings.225

1. **Chivalry Theory**

The chivalry theory purports that few women are sentenced to death because the legal field is largely a male arena, compounded by the fact that the United States still operates as a paternalistic society.226 Women in American society are stereotyped as weak and passive, creating and continuing men's protective attitude toward women.227 Proponents of the chivalry theory postulate that the death penalty is perceived as the ultimate sanction for violating the social values and rights that society chooses to protect.228 These proponents contend that the small number of women on death row is a result of the “tradeoff women make between full moral, social, and legal stature and certain social protections.”229

One illustrative example of the paternalistic attitude in American

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222. See id. at 877-78 (explaining how mitigating factors have an impact on sentencing).
223. See Some Questions About Gender, supra note 216, at 504 (discussing disparity of treatment as a result of the chivalrous attitude of the court system).
224. See Some Questions About Gender, supra note 216, at 506 (commenting that actors in the capital justice system use their discretion to the advantage of women).
225. See Some Questions About Gender, supra note 216, at 504 (stating that Justice Marshall recognized the presence of sex discrimination in the capital justice system).
226. See Carroll, supra note 206, at 1418 (explaining the reluctance of those in the criminal justice system to impose the death sentence on women).
227. See Carroll, supra note 206, at 1418; Some Questions About Gender, supra note 216, at 504 (suggesting that the small number of women on death row is a result of society's “chivalrous disinclination to sentence women to die”).
228. See Carroll, supra note 206, at 1419 (explaining that society seeks to protect these values and rights).
229. See Carroll, supra note 206, at 1419 (commenting that women choose a less moral, social, and legal stature in exchange for protection).
society is the case of Eithel Spinelli. Thirty male inmates offered to draw straws so that one of them would be sent to the gas chamber in Ms. Spinelli’s place if the governor of California would not commute her sentence.\textsuperscript{230} They petitioned the warden of San Quentin with the following words:

\textquote{That Mrs. Spinelli’s execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman would hurt California in the eyes of the world; that both the law and the will of the people were against the execution; that Mrs. Spinelli, as the mother of three children, should have special consideration; that California’s proud record of never having executed a woman should not be spoiled.}\textsuperscript{231}

Essentially, the chivalry theory offers a traditional explanation of a protective, paternalistic society to explain why so few women are convicted and sentenced to death.\textsuperscript{232} Because of these stereotypes, it is difficult for the actors in the capital justice system to condemn female offenders to death, even those who may have committed crimes just as heinous as any male offender.\textsuperscript{233}

Look at the paradoxical examples young girls are offered when growing up—they are taught, on the one hand, that theirs is the pacific, nurturing sex. No outlet is provided for their feelings of anger and aggression. Yet they are human—it is . . . no more than stupidity to believe that they don’t experience anger, hatred, feelings of hostility. And as they do, they also hear different sorts of stories . . . of cruel goddesses and wanton queens, whose very creative or supreme power permits them to indulge in rage, revenge, and destruction. What lesson would you take from it all?\textsuperscript{234}

\textsuperscript{230} See Carroll, \textit{supra} note 206, at 1417-18 (showing that even the male inmates did not like the idea of a woman being sentenced to death).

\textsuperscript{231} See \textit{Some Questions About Gender, supra} note 216, at 501 (quoting CLINTON T. DUFFY, \textit{88 MEN AND 2 WOMEN} 135-36 (1982)).

\textsuperscript{232} See \textit{MORRIS, supra} note 213, at 101 (noting that certain women do not conform with the stereotypical “appropriate” behaviors or appearances, specifically those who are divorced, aggressive, sexual, or Black). She notes that Moulds argues for the use of the ‘paternalism’ in such cases, instead of using 'leniency' because paternalism more accurately conveys the underlying process. \textit{See id.} (discussing Moulds’ assertion that “lenient, paternalistic and harsh dispositions are all linked to the perpetuation of traditional role stereotypes.”). “Lenient treatment is presented as conditional on the acceptance of stereotypical behaviour [sic]; paternalistic and harsh treatment as punishment for the breach of that behaviour in addition to the breach of the criminal law.” \textit{Id.} (citing E. Moulds, \textit{Chivalry and Paternalism: Disparity of Treatment in the Criminal Justice System, in WOMEN, CRIME AND JUSTICE} (S. Datesman & F. Scarpitti eds., 1980)).

\textsuperscript{233} See Carroll, \textit{supra} note 206, at 1418 (explaining that men feel protective toward women because of women’s dependence on them).

\textsuperscript{234} See \textit{CALEB CARR, THE ANGEL OF DARKNESS} 179 (1997) (explaining the reasons why some
2. **Evil Woman Theory**

Another theory offered to explain why some women receive the death sentence is the "evil woman" theory. The "evil woman" is that rare woman who does receive the death penalty. Rather than instilling in those who would judge her a feeling of paternalistic protectionism, she is a woman whom judges and jurors are not reluctant to sentence to death. However, even with the so-called "evil woman," there is a tendency to try to explain her crime in such a way as to make it more palatable to society.

Professor Victor L. Streib has extensively studied the type of woman who is often given the death penalty and found that she possesses many of the same qualities as the typical male offender sentenced to death. She falls outside what society defines as an appropriately feminine woman. Particularly affected by this purported definition of the true feminine woman is the Black woman. Two-thirds of women executed since colonial times have been Black. In the Twentieth Century the percentage of Black women who have been executed has been lower than in the past.

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235. See Carroll, *supra* note 206, at 1422 (explaining that the evil woman theory claims that a woman becomes eligible for execution when she acts in a manner forbidden by society).

236. See Carroll, *supra* note 206, at 1423 (explaining that the evil woman is punished to set an example and prevent other women from straying outside of the traditional expectations).

237. See Carroll, *supra* note 206, at 1423 (discussing the execution of evil women as a way for society to determine the "outer limits" of acceptable gender roles).

238. See *No Angels: Women Who Commit Violence* xi, xiii (Alice Myers & Sarah Wight eds., 1996) (describing the attempt to translate a violent woman's actions into less threatening terms by explaining them away). Society excuses the woman's "unwomanly" behavior because she is either mad - hysterical, insane, or suffering from premenstrual syndrome, or Battered Women's Syndrome. Attributing these conditions to a violent woman allows a judge or jury to be more lenient with the woman; the conditions provide excuses and take away the "normal" responsibility she might exercise over her own actions. *Id.*

239. See Streib, *supra* note 221, at 878 (describing the women executed from colonial times to the present day as generally poor, uneducated and of the lowest social class). The victims of these women sentenced to death also tend to be White, and belong to a particularly protected class, such as children. *Id.* Professor Streib further describes the crimes and behaviors of these women as more like those of the stereotypical male killer. *Id.* at 879.

240. See Streib, *supra* note 221, at 879 (suggesting that traditional social protection is not extended to female offenders who are sentenced to death because they share many of the same characteristics as their male counterparts).

241. See Joan W. Howarth, *Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN'S STUD. 401, 417 n.85 (1992) (sighting to Barbara Smith's comments that Black women were not thought of as females); see also Claire M. Renzetti, *Connecting the Dots: Women, Public Policy, and Social Control, in Crime Control and Women: Feminist Implications of Criminal Justice Policy* 181, 185-86 (Susan L. Miller ed., 1998) (commenting that Black women are "stereotyped as violent, dangerous, and immoral").

242. See Streib, *supra* note 221, at 866 (noting that in the Twentieth Century, the percentage of Black women who have been executed has decreased).

243. See Streib, *supra* note 221, at 879 (stating that 99% of women executed in the Twentieth
Additionally, lesbians are also convicted and sentenced to death at disproportionately high rates. Our societal propensity to convict and sentence to death women who at some points in history were, and too often still are, considered to exist outside the accepted norm of the “feminine woman” illustrates society’s need to make a woman appear unacceptable to the mainstream before it condemns her to death.

The “evil woman” theory posits that, when a woman commits a crime for which a judge or juror has no reluctance to sentence her to death, she offends society as a whole with her “unladylike” behavior. This image of a woman straying from her expected role in society allows the legal system to rein in and dispose of these “evil” women, thereby perpetuating the protective, paternalistic society. It also leaves society with a very narrow definition of what constitutes a true woman—seemingly, it is a white woman of middle or upper class status. As a result, women are most vulnerable to attack by the judicial system when they step outside the bounds of normative femininity.

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244. See Carroll, supra note 206, at 1424 n.59 (citing Victoria A. Brownworth, Dykes on Death Row, ADVOCATE (Los Angeles), June 16, 1992, at 62) (noting that in 1992, 17 of the 41 women on death row were lesbians, and three of them were sentenced in that year). Victor Streib also suggests that prosecutors attempt to portray female defendants as lesbians even when they are not because it helps the prosecutor “defeminize” the defendants. See Carroll, supra note 206, at 1424 n.59.

245. See Carroll, supra note 206, at 1423 (noting that if being a woman traditionally affords one greater protection under the law, the womanhood of those who are executed must be made “invisible” to the jury).

246. See Carroll, supra note 206, at 1421 (stating that women who commit such heinous crimes actually violate two societal values: they offend the very idea of femininity with their “unladylike” behavior, and, like male criminals, they offend humanity with their crimes); see also Some Questions About Gender, supra note 216, at 512-13 (explaining that when a woman is perceived to be guilty of a stereotypically “male” offense, she is likely to be more harshly punished because she has violated stereotypical gender expectations).

247. See Howarth, supra note 241, at 414 (defining capital punishment as a control of social power by which the wielders of this power not only keep all members of society in check, but particularly women who stray from their stereotypical role in society).

248. See Howarth, supra note 241, at 417 (noting that the women who are sentenced to death are disproportionately Black and are all poor).

249. See Renzetti, supra note 241, at 185 (commenting that women who choose to live alone, single mothers and white women who date minority men are all viewed as living outside feminist norms and therefore are subject to unfair treatment in the criminal justice system). “Black women do not conform to normative femininity by virtue of their race, but instead of being viewed as vulnerable, [b]lack women are considered immune from attack because they are stereotyped as violent, dangerous and immoral.” Id. at 186.
D. Equal Protection Analysis

1. Arizona v. White

In Arizona v. White, defendant Michael Ray White appealed his conviction of first-degree murder and subsequent death sentence. He claimed that his equal protection rights were violated because his female co-defendant, who was convicted for the same crime, received life imprisonment instead of the death sentence. White argued that this was the result of sex discrimination because, despite the fact that women commit ten percent of all murders in Arizona, no woman had received a death sentence under the then current Arizona sentencing guidelines.

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252. See id. at 873 (noting that the lower court declined to find leniency).
253. See id. at 871-72 (listing the fourteen issues to be addressed on appeal). The fourteen issues included:

Did the trial court err in refusing to give a jury instruction concerning the jury's role in determining the admissibility of a co-conspirator's statement? Did the trial court's refusal to instruct the jury that it must disregard a co-conspirator's statements that fell outside the scope of the conspiracy found by the jury deny the defendant his right to a trial by jury? Did the trial court's refusal to instruct the jury on its role in determining the admissibility of hearsay statements deprive the defendant of his constitutional right to confrontation? Did the trial court err in admitting hearsay statements made (a) by a co-conspirator after the shooting, which defendant claims were neither in "furtherance of" nor "in the course of" the conspiracy? (b) by the defendant relating to the co-conspirator's efforts to enlist defendant in the plan to kill the victim? Did the trial court err in admitting testimony that defendant was bigamist and further err in denying him motion for a mistrial? Is the defendant entitled to a new trial because of the cumulative effect of the evidentiary errors? Does "conviction of conspiracy to murder and aiding and abetting murder constitute double jeopardy?" Was due process denied when this court refused to order a mental examination after a prima facie showing of incompetency to assist in the appeal? Did the death qualification voir dire of the jury improperly prejudice the jury and deprive the defendant of his right to an impartial jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article 2, §§ 1, 4, 23 and 24 of the Arizona Constitution? Was the imposition of the death penalty inappropriate in this case when the only aggravating factor found by the trial court was that the murder was committed in expectation of pecuniary gain? Was equal protection denied because a female co-defendant received life imprisonment for the same crime? Was appellant denied the right to provide mitigation evidence to this court? Is Arizona's capital punishment statute constitutional under the various arguments presented herein? And, was the death sentence under the circumstances of this case excessive and/or disproportionate to the crime.

Id. at 871-72.

254. See id. at 882 (claiming that he was discriminated against because of his sex).
255. See id. at 882.
256. See Arizona, 815 P.2d at 882 n.2 (noting that, since the appeal was presented to the court, at least one woman, Debra Jean Mike, was sentenced to death).
The Arizona Supreme Court disagreed with White’s contention, holding that the sentencing jury’s finding of an aggravating circumstance, with no finding of mitigating circumstances, was enough to qualify the defendant for the death sentence. In contrast, the female co-defendant’s jury did find mitigating circumstances and thus recommended leniency for her. Therefore, the court found no merit to the defendant’s equal protection claim. The court supported its finding by referring to an earlier case in which it had defined equal protection “as it applies to capital sentencing.”

"Equal protection of the laws here means only that the death penalty may be applied to all persons in the state in a like position .... Equality of treatment does not destroy individualization of sentencing to fit the crime and the individual persons convicted of the same crime can constitutionally be given different sentences." However, there is evidence throughout history indicating the unwillingness of those sitting in judgment to convict women of violent crimes or felonies, or to impose a prison or death sentence on any such convicted woman.

Unfortunately, based on such holdings as in *McCleskey v. Kemp* and *Arizona v. White*, it is unlikely that the Supreme Court will hear

257. See id. at 882 ("We disagree. Our statutory sentencing scheme provides for the death sentence upon a finding of one or more aggravating circumstances and no mitigating circumstances sufficient to warrant leniency. The propriety of the death sentence, therefore, is, and must be, made on a case-by-case basis. The statute is gender-neutral.") (citation omitted).


259. See id. at 883 (explaining that the court took into account that the co-defendant was a “kind and caring mother, [the] death sentence would be devastating to her six-year-old daughter ... [and her] difficult marriage to Clifford Minter followed by a difficult dissolution”); see also Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 Wis. WOMEN'S L.J. 283, 288 (1996) (commenting that though there may be just as many male murderers as female murderers who have suffered abuse and might be considered “similarly situated” persons for purposes of sentencing, men in the capital justice system are not afforded the same opportunity as women to tell their stories).

260. See White, 815 P.2d at 882 (holding that there is a rational basis for the different sentences imposed).

261. Id. at 883.

262. See White, 815 P.2d at 883 (citing State v. Maloney, 464 P.2d 793, 799 (Ariz. 1970)) (emphasis added) (stating that Arizona’s laws do not violate equal protection because all persons who commit murder have an equal chance of being sentenced to death).

263. See LANE, supra note 46, at 26 (noting that in medieval times, women who were indicted for murder were acquitted more often than men, even if the woman actually caused the death). Colonial juries also freed women indicted for murder more often than they did men. Id. at 56 (commenting on the similarities the colonial system shared with the English medieval system).


265. 815 P.2d 869, 883 (Ariz. 1991) (finding that the imposition of different sentences for
an equal protection challenge to the death penalty based on sex discrimination anytime in the near future. The Court has implemented fairly insurmountable barriers to succeeding with such a claim. This, however, is not reason enough to stop exploring the ways in which such a challenge might be framed. As one author notes, there is a "disconnect between constitutional theory and legal practice" that infects the current United States justice system. Legal practitioners should seek to eliminate this disconnect.

For purposes of the Equal Protection Clause, the state death penalty statutes do not, on their face, discriminate on the basis of sex. They are seemingly gender-neutral with no suspect classifications that would prompt the Court to review them with a heightened level of scrutiny. The Court has curtailed potential claims of sex discrimination with its two established requirements for such a finding: that a complainant be a member of a suspect class, and that the state intended to discriminate when it developed the challenged statute. It has been argued that courts should abandon
“the requirement of a showing of discriminatory purpose, in favor of a principle recognizing a law's discriminatory impact as a constitutional harm requiring justification by the state.”

If state courts and the Supreme Court shifted focus from the underlying intent of the law to the actual impact and effect of the law, an equal protection challenge to the death penalty based on sex discrimination could be successful.

2. **Title VII of the Civil Rights Act of 1964**

Barring the success of an equal protection challenge, a defendant might currently look to Title VII of the Civil Rights Act of 1964 for guidance in mounting a sex discrimination argument. The Court stated in *McCleskey* that the use of statistics as proof of discrimination in Title VII cases did not translate into their use in capital sentencing decisions. The Court's argument, however, is not persuasive and the dissent in the case argued that the use of statistics is valid in both types of cases.

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276. See Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 488 (commenting that states should be required to offer substantial justification for their discriminatory policies).

277. See id. (discussing how requiring proof of a wrongful purpose in cases of racial or sex discrimination shifts the focus of the inquiry to those perpetrating the discrimination from the actual harms caused to those discriminated against).


279. Id.

280. Id. (providing statutory guidelines in disparate impact suits).


282. See id. at 350-51 (Blackmun, J., dissenting) (refuting the majority's opinion that statistics cannot be used to illustrate discrimination in capital sentencing decisions).
Current equal protection law exists in the sphere of employment law and is pursued largely under Title VII. Sex discrimination challenges may be asserted under Title VII through either a showing of disparate treatment or disparate impact. It appears from the holding in Arizona v. White that a disparate treatment argument is not a winning one. If it is accepted that equal treatment at trial does not guarantee equal treatment at sentencing, then arguing that one defendant is being treated differently from another will be ineffectual.

A disparate impact argument seems more ideal for challenging the death penalty on grounds of an equal protection violation based on sex discrimination. Seemingly gender-neutral death penalty statutes are resulting in vastly greater numbers of convictions and executions for men than for women. Statistics similar to those documented throughout this Comment have been used to prove race discrimination.

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283. Unlawful employment practices include a failure or refusal to hire or to discharge any individual, or to otherwise discriminate against any individual, on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) (1998). It is also unlawful to deprive an individual of employment opportunities or otherwise adversely affect an individual's opportunities because of the individual's sex. 42 U.S.C. § 2000e-2(a) (2) (1998).

284. Disparate treatment requires that the complaining party show that he or she is being treated differently and less favorably than other similarly situated individuals, based explicitly on that party's race, sex, religion, or national origin. See BARTLETT & HARRIS, supra note 25, at 164-65 (stating also that disparate treatment cases may be brought individually, but also as a "pattern and practice" claim in which the plaintiff must show that the treatment is a regimented policy of the employer). See, e.g., Torre v. Federated Mut. Ins. Co., 862 F. Supp. 299, 301 (D. Kan. 1994), aff'd, 124 F.3d 218 (10th Cir. 1997) (noting that plaintiff failed to meet her burden of showing that defendants took adverse employment action based on her sex); Green v. USX Corp., 896 F.2d 801, 806 (3d Cir. 1990) (discussing failure to establish successful prima facie case of disparate treatment because plaintiffs failed to show intentional discrimination against Blacks due to their race).

285. A disparate impact challenge requires a showing by the complaining party that a gender-neutral rule, regulation or requirement affects women disproportionately and is unrelated to job performance. See BARTLETT & HARRIS, supra note 25, at 166 (stating that in proving her case, the plaintiff need not show discriminatory intent and that when the prima facie case is proven, the burden shifts to the employer to refute the allegations). See, e.g., Melendez v. Illinois Bell Tel., 867 F. Supp. 637, 642 (N.D. Ill. 1994) aff'd, 79 F.3d 661 (7th Cir. 1996) (noting that a violation under a disparate impact claim is illustrated where it is shown that an employer uses a specific employment practice that is neutral on its face, but has a substantially adverse impact on a protected class and is not justifiable as a legitimate business goal); Council 31 v. Ward, 771 F. Supp. 247, 249 (N.D. Ill. 1991) (noting that in order to succeed with a disparate impact argument, a complainant must prove a prima facie case, which includes identifying a facially neutral employment practice that has a significant adverse impact on a protected class).


287. See id. (holding that different persons convicted of the same crime can constitutionally receive different sentences).

288. See Death Penalty for Female Offenders, supra note 27 (stating that death penalty statutes use aggravating factors such as past criminal activity that tends to lead to the conviction of more males than females because males have a more extensive prior criminal history record).
discrimination in hiring practices. Courts have held use of statistics insufficient in cases asserting sex discrimination in the workplace. The argument faces the even greater challenge of overcoming the Supreme Court's rejection of statistical evidence to prove racial discrimination in \textit{McCleskey v. Kemp}. However, in light of the fact that \textit{McCleskey} is a plurality opinion, and Justice Powell, who authored the opinion, changed his mind about using the death penalty, a disparate impact argument based on illustrative statistics has the chance of succeeding.

In order to establish a \textit{prima facie} case of disparate impact under Title VII, the complaining party must be a member of a suspect class. For purposes of Title VII, the best way to satisfy this requirement would be to have a Black man file the challenge because he would be considered a member of a protected class, and his case would therefore be subject to heightened scrutiny by a court. A Black man, might one day assert a successful challenge based on both race and sex discrimination.

A member of a suspect class who is discriminated against on the basis of immutable characteristics presents a persuasive case. The Supreme Court recognizes only a small set of job-specific factors as legitimate when opportunities are limited; immutable characteristics such as skin color or sex are rarely considered legitimate limiting factors. It is arguable that being male and being Black are both immutable characteristics. The opportunity limited for this

\begin{enumerate}
\item \textit{See} Bartlett \& Harris, \textit{supra} note 25, at 165 (stating that "evidence of statistical disparities that are especially pronounced may be sufficient" to meet the burden of showing unlawful discrimination in a Title VII race discrimination case).
\item \textit{See id.} (noting that sex discrimination cases based on statistics alone have not succeeded when brought under Title VII).
\item \textit{See John C. Jeffries, Jr., A Change of Mind that Came Too Late, N.Y. Times, June 23, 1994, at A23 (quoting Justice Powell). "I have come to think that capital punishment should be abolished." ID.}
\item Title VII provides that an unlawful employment practice based on disparate impact is established if the complaining party demonstrates that the respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is job related for the position in question. 42 U.S.C. \textsection 2000e-2(k)(1)(A) (1998). Classifications based on race, sex or national origin are viewed as inherently suspect. \textit{See Frontiero v. Richardson, 411 U.S. 677, 682 (1973)} (holding that classifications based on sex "are inherently suspect and must therefore be subjected to close judicial scrutiny.").
\item \textit{See Frontiero, 411 U.S. at 682 (1973)} (stating that classifications based on sex, race and alienage should be subject to "close judicial scrutiny").
\item \textit{See Phillips v. Martin Marietta, 400 U.S. 542, 549 (1971)} (describing immutable characteristics as those characteristics over which one has no control, such as height and age).
\item Sex and color are generally immutable characteristics; not easily changed. Both are suspect classifications, subject to heightened scrutiny. \textit{See Frontiero, 411 U.S. at 686-88 (1973).}
\end{enumerate}
hypothesis: the defendant is that of living a long life.\textsuperscript{297}

Given the fairly short shrift afforded Michael White's argument by the Arizona court, it is unlikely that an argument premised on sex discrimination, that the death penalty violates equal protection guarantees, will succeed in the near future.\textsuperscript{298} Gender-neutral, but vague, death penalty statutes leave room for judges and juries to act on feelings and emotions.\textsuperscript{299} Such feelings and emotions produce different outcomes in death penalty cases for men and women.\textsuperscript{300} There is much debate about whether special treatment should be accorded some defendants (and, by default, not others).\textsuperscript{301} Such debate illustrates the Supreme Court's threshold of "willful and knowing."\textsuperscript{302} If there is open debate about treating defendants (stating that what "differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

\textsuperscript{297} Title VII prohibits limitation of opportunities based on an individual's sex or color. 42 U.S.C. § 2000e-2(a)(2) (1998).

\textsuperscript{298} See Arizona v. White, 815 P.2d 869, 882-83 (Ariz. 1991) (discussing White's alleged equal protection violation). "The issue here, as the state points out, is whether defendant is a member of a recognizable class, singled out by law or by practice for distinctive treatment without a rational basis. We believe he is not. Male murderers are not singled out for capital punishment." Id.

\textsuperscript{299} See McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (citing Peters v. Kiff, 407 U.S. 493, 503 (1972)). Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Id.

\textsuperscript{300} See Susan Bandes, Empathy, Narrative and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 384 (1996) (noting that "[e]ach individual is situated in her own experience").


\textsuperscript{302} Bartlett & Harris, supra note 25, at 782-84 (discussing the suggestion put forth by some commentators that mothers be afforded special treatment in sentencing, because they suffer more from similar sentences).

The purpose of just punishment emphasizes consistency in sentencing. If the "same" sentence has an inconsistent impact on two different defendants, then considering the two sentences as equivalent is unjust. An incarcerative sentence may have a distinctly different impact on a parent than it has on a non-parent.


Such a policy would effectively use the criminal law to reward women for their status as mothers (or, alternatively, to punish women for not having children). It would say, in effect, "you have violated the criminal law, but we'll overlook that so you can do what you're supposed to do—care for your children." This denies single-mother offenders
differently, can the Court really continue to support a claim that people do not "willfully and knowingly" do so?

V. RECOMMENDATIONS

The capital punishment system in the United States directly conflicts with the way other punishments and sentences are determined and applied throughout the United States justice system. The Supreme Court, whether consciously or not, has essentially made this statement. Most states currently have determinate sentencing schemes, similar to the federal sentencing guidelines and mandatory minimum sentence laws. Both those who oppose and those who support the death penalty endorse sentencing structures that attempt to promote uniformity because both believe that discrimination based on race, class, and gender exists in state sentencing systems. These attempts to achieve uniformity in sentencing directly conflict with the capital punishment scheme that each defendant be considered an individual, on a case-by-case basis. It is unreasonable to think that the United States can perfect a sentencing system that strives to preserve both uniformity and individuality at the same time.

the status of full moral agents and disregards the social contributions of childless women, whose employment and community ties are not given the same consideration in sentencing.

Id.

303. See McCleskey v. Kemp, 481 U.S. 279, 289-90 (1987) (stating "[i]t would not make sense for the system to require the exercise of discretion in order to be facially constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results from what appear to be exact duplicates . . .").


305. See Christopher M. Alexander, Crushing Equality: Gender Equal Sentencing in America, 6 AM. U. J. GENDER & L. 199, 202 (1997) (noting that many states have also enacted "Three Strikes" laws). These laws are efforts to prevent serious felonies; the rationale is that fear of an automatic prison sentence will keep felons from repeating serious crimes. See id. at 202 n.24 (citing CAL. PENAL CODE §§ 667(a)(4), 667.5(c), 1192.7(c) (West 1995)). The code provides that in California "such serious [violent] felonies include: (1) Murder or voluntary manslaughter; . . . (7) any felony punishable by death or life imprisonment in the state prison." Id.

306. See MICHAEL TONRY, MALIGN NEGLECT – RACE, CRIME AND PUNISHMENTS IN AMERICA 164, 164-65 (1995). Liberals supported implementation of guidelines because they believed that discrimination "in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials' discretion offered the only way to limit . . . disparities." Id. Conservatives supported guidelines because they thought the guidelines would provide "greater certainty in sentencing and less coddling of criminals by liberal judges and parole boards." Id.

The Supreme Court and the states have worked for years attempting to create a fair system. After observing the inequities and arbitrariness of the system, individuals who have worked within the system have reached the conclusion that they were unsuccessful in creating a fair and unbiased system. The system continues to fail in achieving its purported deterrent purpose. The death penalty is a punishment that should be removed from all United States statutes. Society must admit that death is a punishment that does not work. It is used primarily as retribution against those perceived as the most “deviant,” and therefore the most threatening to societal norms, instead of as a well-crafted and fair punishment for crimes committed. There are cases of persons convicted of similar crimes receiving dissimilar sentences. There is no satisfactory, objective explanation for such discrepancies in the system. The decision of whether a defendant lives or dies is based on the individual beliefs and life experience of the juror or judge. It is based on whether a defendant and her victim are attractive or sympathetic.

308. See, e.g., Furman v. Georgia, 408 U.S. 238, 240-41 (1972) (holding the death penalty unconstitutional because of arbitrary imposition); Gregg v. Georgia, 428 U.S. 153, 186-87 (1976) (holding the imposition of the death penalty as constitutional if the states develop proper guidelines to diminish arbitrary outcomes).

309. See, e.g., Jeffries, supra note 292, at A23 (quoting Justice Powell, the author of the plurality opinion in McCleskey v. Kemp as stating that he has changed his mind about capital punishment, largely because of the arbitrary nature of the system, and that he wishes he had voted the other way in McCleskey).

310. See UNIFORM CRIME REPORTS, supra note 189, at 12 (documenting that although the South imposes the greatest number and percentage of death sentences, and carries out the largest numbers of executions, it still ranks ahead of the West, Northeast and Midwest for numbers of violent crimes per 100,000 inhabitants).

311. UNIFORM CRIME REPORTS, supra note 189, at 12.

312. See Ashley Paige Dugger, Note, Victim Impact Evidence in Capital Sentencing: A History of Incompatibility, 23 AM. J. CRIM. L. 375, 398 (1996) (noting that the United States’ criminal justice system contemplates that the State will seek retribution for a murder victim because the victim cannot do so).

313. See, e.g., Arizona v. White, 815 P.2d 869 (Ariz. 1991) (holding that defendant, who was convicted of first-degree murder, was appropriately sentenced to death, despite the fact that the case involved only one aggravating factor while his co-defendant was not sentenced to death).

314. Bandes, supra note 300, at 384. See also Michael Mello & Ruthann Robson, Judge Over Jury: Florida’s Practice of Imposing Death Over Life in Capital Cases, 13 FLA. ST. U. L. REV. 31, 37 (1985) (discussing the increasing number of jury overrides by judges in Florida death penalty cases). Ironically, the jury override was held constitutional in the post-Furman era so that “the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience.” Id. at 37 (citing Florida v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)).

315. See Bandes, supra note 300, at 407 (discussing the attractive and unattractive victim). “[I]f there are loved, law-abiding, gentle and undeserving victims, then there must be unloved, lawbreaking, violent, and deserving victims as well.” Id.
Existing state guidelines are not enough. They cannot eliminate the arbitrary nature of the system because they cannot eliminate individual beliefs and perceptions. Our culture remains one in which women are often perceived as more sympathetic creatures than men.\textsuperscript{316} Judgments of death are reserved for those women who blatantly and explicitly disturb society's notions of the "real" woman.\textsuperscript{317} Women who maintain, for the most part, the image of a "real" woman will be spared from the ultimate sentence of death.\textsuperscript{318}

Women's crimes are seen as aberrations, caused by a mental defect or some weakness of character or by circumstances beyond their control.\textsuperscript{339} Society chooses to protect these women; to put them somewhere they cannot hurt others, but in a place where they have the opportunity to contemplate their crimes, and to repent for them and go on with their lives.\textsuperscript{330} Men in society are not afforded these same protections and excuses.\textsuperscript{321}

The United States must reach a consensus that the death penalty is, in all cases, cruel and unusual punishment. The legislatures and the courts need to fashion appropriate punishments for the crime of murder that fall short of imposing state-sanctioned killing. Those who recognize that the system does not work must assert challenges in all possible instances, based on age, race, and sex. Forcing the courts and the legislatures to keep reviewing the capital punishment system is the only way to achieve official acknowledgment of the arbitrary way in which the system is implemented.

\textsuperscript{316} See Schuetz, supra note 72, at 121 (noting juror did not want to convict Ethel Rosenberg because Rosenberg was a mother).

\textsuperscript{317} See Ward, supra note 28, at 1A (reporting that the parole board in making its decision weighed the crime and claims of rehabilitation and found that the gruesomeness of the crime outweighed claims of rehabilitation). Karla Faye Tucker and a companion were sentenced to death for bludgeoning two people to death, with a pickaxe, in June of 1983. The husband of the woman Tucker killed stated that he could not forgive her for the brutal crime, and that his wife would take care of her when Tucker got to the other side. The brutality of Tucker's crime contributed to her failed pleas for clemency. See id. (describing that the "horrific nature of the crime carried a lot of weight" in the Parole Board's decision).

\textsuperscript{318} See Bartlett & Harris, supra note 25, at 782-84 (discussing the desire of some to afford mothers special treatment in sentencing consideration).

\textsuperscript{319} See discussion supra at Part IV.C (stating that women's crimes are caused by their emotionalism or sexuality).


\textsuperscript{321} See id.
VI. CONCLUSION

The people of the United States are unable to apply the death penalty fairly. This is not a failing of the people, but rather of the process. It illustrates that people have consciences that often override unfair and poorly implemented laws. A system that relies on uniform guidelines which themselves are subject to individual interpretation, no matter how well-crafted, must fail.

This lack of fairness seriously undermines the reliability of the results reached in many cases and the trust that citizens are willing to place in the court system. Unfortunately, many criminal justice systems lack the most basic components of fairness: fair and impartial judges, prosecutors free from political influences, and effective representation for those accused of crimes.32

A violation of the Equal Protection Clause on the basis of sex is a transgression of the Fourteenth Amendment, which adds to the overall arbitrary nature of the system. The imposition of the death penalty is always arbitrary and capricious. There is no genuine way to circumvent these circumstances. Attempts to make the system uniform infringe on the necessity of considering each defendant as an individual. Such attempts serve only to illustrate that the current system cannot adequately redress the disparate impact on men and women, and is unconstitutional as applied. The clearest and most obvious solution to this seemingly unsolvable problem is a complete abolition of the death penalty in the United States.

The United States’ capital justice system has failed. It cannot be successful. It is a system that attempts to apply uniform treatment of all defendants at the same time that it attempts to ensure individualized consideration of each defendant. It is a system with two different purposes that are at odds with one another. It is a system with which the courts and legislatures need to stop “tinkering,” and abolish altogether.