

Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary¹

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American death penalty laws and procedures persistently minimize cases involving female capital offenders. Recognizing some benign explanations for this disparate impact, Professor Streib nonetheless sees the dearth of female death penalty trials, death sentences, and actual executions as signaling sex bias throughout the death penalty system. In this article, he provides data concerning death sentencing and execution patterns and then suggests both substantive and procedural means to address the apparent sex bias. Much more significant, however, is the unique lens for examining the death penalty that is provided by a sex bias analysis. Professor Streib concludes that this perspective unmasks the system's crime-fighting rhetoric to reveal a macho refuge that masculinizes all who enter therein.

I. INTRODUCTION

The death penalty system in the United States continues to carry the heavy burdens of intense political agendas, discrimination against certain offenders and victims, inept defense attorneys, and even execution of the innocent.² Among these many deficiencies is a system-wide apparent bias based upon the sex of the offender. This apparent sex bias has been recognized at the highest levels, including by such extraordinary legal scholars as Justice Thurgood Marshall:

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women

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¹This article is based upon a paper, entitled "Assessing Sex Discrimination Issues in Death Penalty Statutes," that the author was honored to present at The Ohio State University Moritz College of Law on March 30, 2001, as a part of the *Ohio State Law Journal's* symposium, *Addressing Capital Punishment Through Statutory Reform*.

²See, e.g., Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517 (2000).

have received such favored treatment since the purposes allegedly served by capital punishment seemingly are applicable to both sexes.³

Female offenders⁴ are unlikely to be arrested for murder, only very rarely sentenced to death, and almost never executed. Males who commit homicide are nearly seven times as likely to be sentenced to death as are females who commit homicide.⁵ This aggressive diversion of females who commit murder away from actual execution is nothing new. Of the over 8,000 persons lawfully executed in United States since 1900, only forty-six (0.6%) were female offenders.⁶

The death penalty system described and dissected in this article is not that of theoretical discussions as to the jurisprudential underpinnings and who does or does not deserve to die. Neither is it a sanitized and idealized version of the death penalty system currently structured by our statutes and case law. The death penalty system examined herein is a collage of government agents and agencies currently operating in fits and starts in our many death penalty states.⁷ The question is not whether some offenders deserve to die, but whether we can trust this hodgepodge of local, state, and federal government agents and agencies to choose the right ones to execute and to carry out the process fairly and accurately. The overarching query is what we learn about ourselves from the actual

³ *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) (footnotes omitted).

⁴ The term "females" is used most consistently throughout this article, with occasional use of the term "women." When either term is used, it is meant to refer to persons of the female sex of any age. It is understood that the term "females" is less socially and politically acceptable than the term "women," but the latter term could be misleading. The youngest apparently was Hannah Ocuish, executed on December 20, 1786, in Connecticut for a murder committed when she was only twelve years old, making her clearly a "girl" and not a "woman." The oldest apparently was Margaret Scott, age 75, executed in Massachusetts on September 22, 1692, for the crime of being a witch. Therefore, to avoid repeated use of more clumsy terminology in this article, the umbrella term "females" is meant to include both girls and women of any and all ages.

⁵ See *infra* tbl.2 and accompanying text.

⁶ See *infra* app.

⁷ A particularly insightful analysis of this perspective is provided in Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995). Judge Kozinski's thesis and his frustration are reflected in the following:

The net effect is that we have little more than an illusion of a death penalty in this country. To be sure, we have capital trials; we have convictions and death sentences imposed; we have endless and massively costly reviews by the state and federal courts; and we do have a small number of people executed each year. But the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every year. Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims' families—these purposes are not served by the system as it now operates.

Id. at 3–4 (footnotes omitted).

functioning of the death penalty system and which of our less desirable characteristics are further exacerbated as we continue our allegiance to this system.⁸

A careful analysis of the aggravating and mitigating circumstances within death penalty statutes reveals several which favor male capital defendants but many more which favor female capital defendants. While substantial evidence suggests jury bias in favor of female defendants in capital cases, the voir dire process of selecting capital juries almost always omits questions about such biases. When the time comes to choose between life and death, very few judges instruct capital juries to acknowledge their biases and to minimize their impact. Sex of the offender also appears to be significant in appellate and post-conviction review of death cases, but this factor is rarely acknowledged at these stages either. Sex bias also infects the final stage of the death penalty system: commutation proceedings before governors and presidents.

This article proceeds from an assumption that sex bias in the death penalty system is objectionable and is, at least in most instances, similar to race bias or class bias. Given this operating premise, each point of discretion within the death penalty system at which sex bias could be a factor is scrutinized. The constant theme is how to modify our capital punishment policies and practices to reduce this apparent sex bias in the fundamental choice of who lives and who dies. In contrast, this article does not participate in the broad controversy over “women’s rights versus men’s rights” or over whether the death penalty in general is right or wrong, moral or immoral, effective or ineffective. Moreover, the research analysis provided herein is that of academic research and not of advocacy research.⁹

⁸ The leading new exploration of these fundamental questions is AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2001). Sarat’s thesis is compelling:

What does the persistence of capital punishment mean for our law, politics, and culture? What impulses does state killing nurture in our responses to grievous wrongs? What demands does it place on our legal institutions? How is the death penalty represented in our culture? In addressing these questions, *When the State Kills* is animated by the belief that capital punishment has played, and continues to play, a major, and dangerous, role in the modern economy of power. If we are to understand this role, our thinking about the death penalty has to go beyond treating it as simply a matter of moral argument and policy debate. We must examine the connections between capital punishment and certain fundamental issues facing our legal, political, and cultural systems. We must ask what the death penalty does *to* us, not just what it does *for* us.

Id. at 13–14.

⁹ The broad goal of academic research is to generate and publish accurate information based upon research results, regardless of whether that information advances or hinders any particular advocacy position or political agenda. In contrast, the much more focused objective of advocacy research is to bolster the arguments of a given candidate or political effort, aggressively discounting or burying research results unhelpful to those arguments. For more of the author’s views on these two distinct categories of research and publication, see Victor L.

Finally, this article admittedly is yet one more effort to “tinker with the machinery of death,”¹⁰ while fully understanding—and admittedly hoping—that efforts to improve the American death penalty system increasingly appear to be akin to rearranging the deck chairs on the Titanic.

As interesting and politically loaded as this search for apparent sex bias may be,¹¹ much more significant revelations concerning the death penalty are exposed

Streib, *Academic Research and Advocacy Research*, 36 CLEV. ST. L. REV. 253 (1988).

¹⁰ This oft-quoted, dramatic turn of a phrase comes from Justice Blackmun’s dissent from the denial of certiorari in *Callins v. Collins*, 510 U.S. 1141 (1994). Consideration of Justice Blackmun’s full statement may be helpful in understanding the context of the topic of this article:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Id. at 1145–46 (footnotes omitted).

¹¹ The leading scholar on sex bias in the death penalty system is Professor Elizabeth Rapaport of the University of New Mexico. See, e.g., Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507 (1996) [hereinafter Rapaport, *Capital Murder*]; Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC’Y REV. 367 (1991) [hereinafter Rapaport, *The Death Penalty*]; Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581 (2000) [hereinafter Rapaport, *Equality*]; Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990) [hereinafter Rapaport, *Some Questions*]. Others also have made significant contributions. See, e.g., Joan W. Howarth, *Review Essay: Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN’S STUD. 401 (1992); Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN’S L.J. 283 (1996); see also Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413 (1997); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL’Y & L. 427 (2000). The author helped to begin this debate and to spread the discussion to a broader audience. See, e.g. Victor L. Streib, *Death Penalty for Battered Women*, 20 FLA. ST. U. L. REV. 163 (1992); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845 (1990); Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT’L L.J. SEX. ORIENTATION L. 105 (1994) available at <http://sunsite.unc.edu/gaylaw>; Victor L. Streib, *Sentencing Women to*

as a result of the search. On the way to finding sources of sex bias, this research has more clearly revealed the death penalty as a masculine sanctuary. Throughout the death penalty system, typical macho posturing over the death penalty is disrupted and confused when the murderer is a murderess. Not unlike the classic cigar-smoke-filled men's club, the death penalty system is a refuge for classic masculine behavior, whether exhibited by men or women agents within the system or imposed upon male or female offenders. Those of us continuing to follow this particular gender thread of analysis are indebted to many scholars who have gone before us, but the most influential has been Professor Joan Howarth.¹² Her earlier work examining the decision process of capital jurors established the basic theme of this article: "Capital jurisprudence—the law for deciding whether to kill—is also a hidden battleground of gender."¹³ This gendering of capital jurisprudence appears to have infected all who come into contact with the entire death penalty system and to have pushed aside concerns about justice and reduction of violent crime.

This article first sketches patterns of death sentences and executions for female offenders in order to provide a context for the analyses and presumptions that follow. Finding at least a strong appearance of sex bias, the focus then examines several stages of the death penalty system to seek the sources of and antidotes for such bias. These stages include the legislative selection of crimes to receive the death penalty, as well as the aggravating and mitigating factors to be considered in any death penalty decision. The capital jury is a critical agent in almost all death penalty jurisdictions, so selecting and charging these juries is another opportunity to address sex bias. Classic defense challenges to sex bias are examined, but all appear to have limited promise.

The final substantive section of the article examines the death penalty system through the lens provided by this sex bias analysis. This lens cuts through the traditional deterrence and retribution rhetoric to reveal a masculine sanctuary for

Death, 16 CRIM. JUST. 24 (2001) [hereinafter Streib, *Sentencing Women*]; Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. 3 (1989).

¹² As of June 2001, Professor Howarth is a permanent member of the law faculty at Golden Gate University and a visiting member of the law faculty at the University of California at Berkeley. ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 2000–2001 613 (2000).

¹³ Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WISC. L. REV. 1345, 1347. Professor Howarth also provided the working definitions relied upon in this current article for the gender concepts of masculine and feminine:

Masculinity or maleness is a social construction, to which some women have access and from which some men are excluded. Similarly, both men and women can and do exhibit "female" qualities of emotionality, intense interrelatedness, and contextual reasoning. But just as countless businessmen can wear pink button-down shirts without eradicating the gender from pink and blue, women who are unemotional, hard-driving, and distant are described as masculine.

Id. at 1350.

all participants. This perspective reveals more clearly than any other the true motivating forces behind the general death penalty debate. Finally, the article provides six specific recommendations to begin to address the apparent sex bias and a caveat concerning the masculinization of the death penalty system.

II. PATTERNS OF DEATH SENTENCES AND EXECUTIONS

A. *Sentences in the Current Era, 1973–Present*¹⁴

¹⁴ A ubiquitous error in descriptions of the modern death penalty system is the premise that the current era began with the holding of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). While *Gregg* did mark the Supreme Court's first opportunity in the current era to rule that the death penalty in general was not cruel and unusual punishment as that concept is defined by the Eighth Amendment to the United States Constitution, *Gregg* followed by several years the actual beginning of the era of the modern death penalty system. Particularly significant to the analysis in this article, the death penalty system begins when a capital crime is committed, the crime is investigated, and the apparent offender is arrested. The trial typically follows at least a year after arrest, and subsequent appellate and post-conviction challenges extend on for many years. Actual execution, if it ever occurs, takes place typically about ten years after the death sentence is imposed.

The previous death penalty era was terminated by the Supreme Court's decision in *Furman v. Georgia*, which in effect struck down all then-existing death penalty statutes. 408 U.S. 238 (1972). However, both Florida and Utah enacted new death penalty statutes before the end of 1972, and fifteen more states followed suit in 1973. By the date of the *Gregg* decision, July 2, 1976, at least thirty-five states and the federal government had enacted new death penalty statutes. *Gregg*, 428 U.S. at 179–80. Demonstrating the resolve of these death penalty states, over 460 capital offenders had already been sentenced to death under these new death penalty statutes by early 1976. *Id.* at 182. For example, the petitioner, Troy Leon Gregg, committed his capital crime on November 21, 1973, and was sentenced to death by the trial court under the then-new Georgia death penalty statute. *Id.* at 158–61. For Troy Gregg and the rest of the 460 persons who were on death row in 1976, the death penalty system clearly was already functioning and obviously had not waited for the *Gregg* decision by the United States Supreme Court.

Actual executions began soon after the *Gregg* decision, with the first being that of Gary Mark Gilmore on January 17, 1977, in Utah. In fact, the second execution in the current death penalty era resulted from a crime committed and a death sentence imposed long before *Gregg* was decided. John Arthur Spinkelink was executed in Florida on May 25, 1979, under the 1972 Florida death penalty statute. Spinkelink's crime was committed on February 4, 1973, and he was sentenced to death on December 20, 1973. *Spinkelink [sic] v. Wainwright*, 578 F.2d 582, 586 (5th Cir. 1978). See generally Victor L. Streib, *Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight"*, 15 RUTGERS L.J. 443 (1984).

Therefore, the origins of the current death penalty era can be found in the months following the Supreme Court's decision in *Furman* on June 29, 1972. For simplicity of comparison, the analysis in this article marks the beginning as January 1, 1973, allowing for a period of six months following *Furman* for the various jurisdictions to reconsider the death penalty. A closing date of June 30, 2001, is used as the date of this writing, even though the

Only anecdotal information is available for death sentences of female offenders prior to this current era. While such sentences are of interest, the lack of complete data concerning those earlier sentencing patterns precludes any meaningful analysis. However, we do have complete and accurate data for all female offenders sentenced to death in the current death penalty era (since 1973).¹⁵ These data provide insights into the fundamental values and characteristics of the death penalty system as it confronts the female offender, as well as reflecting issues faced by male offenders in that same system.

The annual death sentencing pattern for female offenders in the current death penalty era has held consistently at about 2% of all death sentences.¹⁶ A total of 138 death sentences were imposed upon female offenders from January 1, 1973, through June 30, 2001.¹⁷ The typical annual rate is between five and seven such sentences. Each year has seen at least one death sentence for a female offender, but wide fluctuations from one to eleven sentences in a given year have occurred during the past decade. These fluctuations are unexplained by changes in statutes, court rulings, or public opinion.

These are death sentences only, and relatively few of these cases can be expected to result in actual execution. For example, as of June 30, 2001, only seven (5%) of these 138 death sentences had resulted in actual execution.¹⁸ Another seventy-nine death-sentenced female offenders had seen their sentences reversed or commuted, and only fifty-two of the original 138 female offenders receiving death sentences remain on death row.¹⁹ These fifty-two female offenders currently on death row continue to challenge their death sentences, and their cases have not yet reached final resolution.²⁰ This means that eighty-six of the original 138 death sentences have been finally resolved by reversal, commutation, or execution. Of these eighty-six final resolutions of death sentences for female offenders, only seven (8%) have resulted in actual execution.

current death penalty era continues for the foreseeable future. These twenty-eight and a half years from January 1973 through June 2001 reflect a halting progression through an early shaping period into what is now a fully mature death penalty system.

¹⁵ The author's research on the death penalty for female offenders began in the early 1980s and continues through today. Among other dimensions, this research documents each and every death sentence for female offenders, beginning in 1973. Periodic reports of the data from this research have been generated by the author since 1987. The most recent issue can be found at www.law.onu.edu/faculty/streib/femdeath.htm in pdf format [hereinafter *Streib, Femdeath*].

¹⁶ *Streib, Femdeath, supra* note 15, at 6–7, tbl.2.

¹⁷ *Id.*

¹⁸ *Id.* at 4–5, tbl.1.

¹⁹ *Id.* at 8.

²⁰ Of course, some women on death row, along with some men on death row, do refuse to pursue challenges to their death sentences and instead “volunteer” for execution. The most recent example of this was Christina Marie Riggs, executed in Arkansas on May 2, 2000. See *infra* text accompanying notes 104–11. However, as of this writing, apparently none of the fifty-two women currently on death row are “volunteering” for execution.

By any analysis, then, female offenders sentenced to death have a very small chance of ever being executed.

These 138 death sentences for female offenders since 1973 have been imposed in twenty-three individual states, comprising well over half of the death penalty jurisdictions during this time period. Table 1 provides these data by state and race of offender. Four states (North Carolina, Florida, California, and Texas) account for 42% (58/138) of all such sentences since 1973. As an individual state, North Carolina has sentenced the most female offenders to death (16), followed closely by Florida (15), California (14), and Texas (13). Since January 1, 1998, twelve states have sentenced a total of twenty female offenders to death. Four were in California and three each in North Carolina and Texas.

TABLE 1

STATE-BY-STATE BREAKDOWN OF DEATH SENTENCES FOR FEMALE
OFFENDERS,
JANUARY 1, 1973, THROUGH JUNE 30, 2001

Rank	Sentencing State	Race of Offender				Total Female Sentences
		White	Black	Latin	American Indian	
1	North Carolina	10	4	0	2	16
2	Florida	11	3	1	0	15
3	California	7	3	4	0	14
4	Texas	10	3	0	0	13
5	Ohio	3	6	0	0	9
6	Alabama	6	2	0	0	8
7	Illinois	1	4	2	0	7
7	Mississippi	5	2	0	0	7
7	Oklahoma	6	1	0	0	7
10	Georgia	5	1	0	0	6
11	Missouri	4	0	1	0	5
11	Pennsylvania	2	3	0	0	5
13	Indiana	2	2	0	0	4
14	Kentucky	3	0	0	0	3
14	Maryland	1	0	0	2	3
14	New Jersey	3	0	0	0	3
17	Arizona	2	0	0	0	2

17	Arkansas	2	0	0	0	2
17	Idaho	2	0	0	0	0
17	Louisiana	1	1	0	0	2
17	Nevada	1	1	0	0	2
17	Tennessee	2	0	0	0	2
23	South Carolina	1	0	0	0	1
	Totals:	90	36	8	4	138

Perhaps the most striking appearances of sex bias in death sentencing practices come from Virginia and Ohio. Virginia is currently a leading death penalty state for male offenders²¹ and has executed more female offenders throughout American history than any other jurisdiction.²² However, Virginia has not imposed any death sentences at all on female offenders since 1973. The last execution of a female offender in Virginia took place in 1912.²³ Ohio's pattern also raises serious questions. Ohio was a leader in sentencing female offenders to death in the 1970s and 1980s but has not sentenced a woman to death since 1989.²⁴ The last execution of a woman in Ohio was in 1954.²⁵

Of these 138 death sentences imposed since 1973, only fifty-two female offenders remained under sentences of death in seventeen states as of June 30, 2001.²⁶ These fifty-two death-sentenced female offenders constitute only 1.4% of the total death row population of about 3,711 persons²⁷ and less than 0.1% of the approximately 50,000 women in prison in the United States.

The ages as of mid-2001 of these fifty-two female offenders ranged from twenty-two to seventy-two years old.²⁸ These women had been under sentences

²¹ See NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW USA 8 (Spring 2001) [hereinafter NAACP] (quarterly report listing all executions, all prisoners on death row, and other pertinent information about current death penalty practices).

²² See app.

²³ Virginia Christian was only seventeen years old when she was executed by the Commonwealth of Virginia on August 16, 1912. See VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 89-90 (1988) [hereinafter STREIB, DEATH PENALTY FOR JUVENILES].

²⁴ Streib, *Femdeath*, supra note 15, app. A at 12.

²⁵ Dovie Blanche Myers Dean was electrocuted on January 15, 1954 at the Ohio Penitentiary in Columbus. See Edward Colonel, *Eyewitness Account of Dean Execution*, CLERMONT COURIER (Batavia, Ohio), Jan. 21, 1954, at 2. Less than five months later, Betty Butler met the same fate on June 11, 1954. *Betty Butler Dies in Chair*, CINCINNATI ENQUIRER, June 12, 1954, at 1. No women have been executed in Ohio since 1954.

²⁶ Streib, *Femdeath*, supra note 15, at 8.

²⁷ The total number of death row inmates comes from the premiere source of this information: NAACP, supra note 21, at 24-25 (data current as of April 1, 2001). However, that report includes some reversed death sentences and concludes that fifty-six female offenders were on death row. *Id.* at 1.

²⁸ Streib, *Femdeath*, supra note 15, at 8 tbl.4. Christina Walters in North Carolina was

of death from three months to over nineteen years. California had the most female offenders on death row (12), followed at a distance by Texas (7) and North Carolina (6).²⁹ In terms of female percentage of death row population as of mid-2001,³⁰ the clear leader is Idaho with 5% (1/20). The North Carolina proportion was 2.6% (6/233), California was 2.0% (12/592), and Texas was 1.6% (7/450).³¹

While the absolute number of male and female offenders sentenced to death each year and now on death row can be revealing, perhaps more helpful are the proportions of male and female murderers who receive death sentences for those murders. We don't know precisely how many actual murderers there are in any one year, since only about 70% of murders result in arrests. Further, the complexity and magnitude of death penalty investigations and trials require so much effort and preparation that the actual death sentence, if it ever is imposed, does not come until about one year after the offender was arrested for the capital murder. A capital defendant is almost never sentenced to death in the same year that he or she was arrested for the crime and only very rarely does the sentence follow the arrest by two or more years. National data for murder arrests and death sentences imposed are easily available only on an annual basis, so a uniform one year delay can be used for consistency and to most closely reflect real world practices.

The data arrayed in table 2 link the number of murders in any one year to the number of death sentences imposed during the following year, approximating the typical death penalty process nationally. Table 2 includes these data for only the fifteen-year period from 1984–1985 through 1998–1999, the most recent period during which the death penalty system has been operating at what has become its normal levels. This time period precludes the pre-1984/1985 period when the death penalty system could be described as operating in a start-up phase. Also precluded is the post-1998/1999 period, for which complete data are not available as of this writing. This fifteen-year period also traces the dramatic rise and fall of the annual numbers of murders as a background setting for the annual number of death sentences.

Perhaps the most striking impression from the data in table 2 is that murder arrestees, whether female or male, have over a 98% probability of not being sentenced to death. Knowing that only a small portion of those sentenced to death are ever actually executed, arrested murderers have well over a 99% probability of never being executed. Zeroing in on the sex of the offender, it appears that males arrested for murder were six times more likely to be sentenced to death than were females arrested for murder (1.34% for males versus 0.22% for females).

twenty-two and Priscilla Ford was seventy-two. *Id.* at 17–18.

²⁹ *Id.* app. B at 15–16, 18, 19.

³⁰ See NAACP, *supra* note 21, at 25–61.

³¹ Streib, *Femdeath*, *supra* note 15, app. B at 15–16, 18, 19.

The annual rates of death sentences for persons arrested for murder ranged from 0.05% to 0.40% for females and from 1.09% to 1.68% for males. At the start of this fifteen-year period in the mid-1980s, the total number of murder arrests had fallen to under 20,000. This number rose to over 28,000 in the early 1990s, and then fell back to under 20,000 again in the very late 1990s. In contrast, the death sentencing rate for male murder arrestees was very high during the mid-1980s, fell steadily until the early 1990s, and then rose again to its mid-1980s level by the very late 1990s. This inverse correlation results from the fact that the annual number of death sentences for male arrestees remained at essentially the same level over this period, even as the annual number of murder arrests rose and fell dramatically.

TABLE 2

MURDERS COMMITTED ANNUALLY³² AND
DEATH SENTENCES IMPOSED IN THE FOLLOWING YEAR³³

Years of Homicide/Sentence	Female Offenders			Male Offenders		
	Murders Committed Each Year	Death Sentences in the Following Year		Murders Committed Each Year	Death Sentences in the Following Year	
1984/85	2,828	5	(0.18%)	17,509	264	(1.51%)
1985/86	2,735	3	(0.11%)	17,637	297	(1.68%)
1986/87	2,853	5	(0.18%)	19,324	285	(1.47%)
1987/88	2,748	5	(0.18%)	18,955	287	(1.51%)
1988/89	2,755	11	(0.40%)	20,077	248	(1.24%)
1989/90	2,712	7	(0.26%)	20,994	246	(1.17%)
1990/91	2,756	6	(0.22%)	23,709	258	(1.09%)
1991/92	2,816	10	(0.36%)	25,452	278	(1.09%)
1992/93	2,543	6	(0.24%)	24,005	284	(1.18%)
1993/94	2,628	5	(0.19%)	25,009	314	(1.26%)
1994/95	2,570	7	(0.27%)	23,920	312	(1.30%)
1995/96	2,140	1	(0.05%)	22,049	315	(1.43%)
1996/97	2,271	3	(0.13%)	20,141	273	(1.36%)
1997/98	2,082	7	(0.34%)	18,520	293	(1.58%)
1998/99	2,085	5	(0.24%)	17,167	267	(1.55%)
Totals:	38,522	86	(0.22%)	314,468	4,221	(1.34%)

³² The data on the annual number of arrests for murders and non-negligent manslaughters were gleaned from the BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S., at <http://www.ojp.usdoj.gov/bjs/homicide/tables/osextab.htm> (last visited on Apr. 20, 2001). Of course, only a portion of these homicides would have been capital murders, complete with the requisite aggravating factors, etc. However, accurate data does not exist on the number of persons arrested annually for capital murder, so this larger, more inclusive pool of annual arrests for all murders and non-negligent manslaughters is used for comparison to the number of death sentences imposed during the following years. The operating, but obviously unproven, assumption is that the portion of all murders that are capital murders remained fairly constant over this fifteen year period.

³³ The data on the annual number of death sentences imposed following convictions for capital murder were gleaned from the BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1999 13 and from Streib, *Femdeath*, *supra* note 15, at 6, tbl.2.

This is not true for the annual number of death sentences for female murder arrestees. That death sentencing pattern is essentially sporadic, jumping up and down in no obvious pattern and seeming indifferent to the overall number of murder arrests. However, note that while the number of murder arrests for males rose and fell dramatically from 1984 through 1998, the number of murder arrests for females steadily declined by over 25%. Nonetheless, the annual number of death sentences imposed upon females during this fifteen-year period certainly is not steady and seems to be headed neither up nor down.

B. Executions of Females, 1900–Present³⁴

Although we do not have complete and accurate data for death sentences imposed upon female offenders prior to 1973, the author's research has documented all executions of female offenders since at least the beginning of the twentieth century and nearly all since our earliest colonial period.³⁵ The pre-twentieth century executions of female offenders are a fascinating study of those time periods, but they have little relevance to the focused topic of this article and will be left to a subsequent article. However, the executions of female offenders

³⁴ As of June 30, 2001.

³⁵ The author's research attempts to identify each and every lawful execution of a female offender in the United States and its colonial predecessors. A preliminary compilation of 398 such executions was presented and analyzed in the author's 1990 article: *Death Penalty for Female Offenders*, *supra* note 11, at 848–67. The preliminary nature of that compilation was made clear in the introduction to that article:

This article reports the first stages of research documenting past executions and current death sentences for female offenders. The documentation has been compiled for the most part but is still being studied and sifted, making this report only preliminary. As this research continues, the data and analyses will be expanded and refined, presumably leading to more insightful and perhaps even different conclusions than those reported herein. But because nothing else in the scholarly literature deals at any length with this issue, it seems appropriate to put in place this first stepping stone to what it is hoped will be a long and fruitful inquiry into a fascinating and almost unexplored topic.

Id. at 847.

That early compilation received the attention of other scholars working in this field. *See, e.g.,* Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 282–83 n.418 (1996); KATHLEEN A. O'SHEA, *WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–1998* xi (1999); Rapaport, *Some Questions*, *supra* note 11, at 502; Schmall, *supra* note 11, at 316.

As forecast in the author's 1990 article, this research has continued to uncover and document additional executions of female offenders, primarily those which occurred prior to the nineteenth century. The author's inventory now stands at 562 executions of female offenders from 1632 through this writing (June 2001). These 562 female executions comprise only about 3% of all executions (males and females) as documented by the research of Watt Espy in Headland, Alabama, the leading authority concerning all executions throughout United States history.

in the past century do provide a context for understanding the current era death sentences for female offenders and for revealing the death penalty system as a masculine sanctuary. Given that premise, this section will explore just those executions of female offenders since January 1, 1900.

Only forty-six executions of female offenders have occurred since 1900, so such executions are extremely rare occurrences. The appendix to this article lists each of these forty-six cases. Following an overview of executions of female offenders throughout American history, this analysis of actual executions will dwell upon the current era, even though the current era represents only the last quarter of the twentieth century.

1. Female Execution Patterns Since 1900 and Earlier

The entire American experience with execution of offenders, including women and even girls as young as age twelve,³⁶ fits with the general pattern of the current era. Beginning with the American Colonial period, female executions constituted less than 3% (562 / 20,000) of all American executions. Comparing twentieth century data with data from previous American eras reveals that this practice is even rarer now than in previous centuries. Post-1900 execution patterns show that females were 0.6% of all executions, while pre-1900 execution patterns show females at 4.3% of all executions.

The data set for post-1900 executions of female offenders is now essentially complete and provides an overall impression of this practice in reasonably modern times. Only the twenty states listed in table 3 and in the appendix to this article carried out such executions during the entire twentieth-century. The clear leader was New York with eight executions of female offenders, including the federal execution of Ethel Rosenberg in 1953. California and Mississippi each imposed four such executions. Moreover, these twenty states essentially comprise the deep Southern states, currently so heavily involved in the death penalty, and the older Midwestern and Eastern states that were heavily involved in the death penalty during the first half of the twentieth century but not so much today.

³⁶ Hannah Ocuish was only twelve years old when she was executed by the State of Connecticut on December 20, 1786. See VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 74-75 (1988).

TABLE 3³⁷

STATES THAT HAVE EXECUTED FEMALE OFFENDERS SINCE 1900

Alabama (3)	Florida (1)	Missouri (1) ³⁸	Pennsylvania (2)
Arizona (1)	Georgia (1)	New York (8) ³⁹	South Carolina (2)
Arkansas (1)	Illinois (1)	North Carolina (3)	Texas (2)
California (4)	Louisiana (3)	Ohio (3)	Vermont (1)
Delaware (1)	Mississippi (4)	Oklahoma (3)	Virginia (1)

Half of these post-1900 executing states drop out if the time period is post-1950,⁴⁰ and only five states (Arkansas, Florida, North Carolina, Oklahoma, and Texas) have executed any female offenders in the current era (1973–present). Therefore, comparable to the American execution pattern for male offenders, the recent executions of female offenders are limited to a very few states. Death penalty statutes can be found currently in thirty-eight states along with two federal statutes (military and civilian),⁴¹ but only in a few states do female offenders appear to have much of a chance of actually being executed.

If only twenty states have executed female offenders since 1900, with only five of these states doing so in the past quarter-century, what about earlier periods of American history? The next group of states to be considered are those which executed female offenders prior to the twentieth century but not since 1900. This group of fourteen states and the District of Columbia are of historical interest but are admittedly of very little relevance to the current death penalty era. Table 4 lists these fifteen jurisdictions, with footnotes sketching their histories of executions of female offenders prior to the twentieth century.

Unlike the other two groups of states, these jurisdictions with only pre-1900 executions of female offenders do not form a pattern or a reasonably contiguous block. This group ranges from Nevada and New Mexico to Maine. Massachusetts is well known for its seventeenth century purge of witches, but such executions account for only about 40% of all executions of females in Massachusetts. Another very active state was Maryland with forty-seven executions of female offenders but none after the nineteenth century.

³⁷ As of June 30, 2001. The appendix at the end of this article lists names, dates, and additional information about these executions.

³⁸ This execution was a federal case carried out in Missouri. See the appendix for details.

³⁹ One of these executions was a federal case carried out in New York. See the appendix for details.

⁴⁰ All executions of female offenders occurred prior to 1950 for the states of Arizona, Delaware, Georgia, Illinois, Louisiana, Mississippi, Pennsylvania, South Carolina, Vermont, and Virginia. See the appendix for complete listings.

⁴¹ See NAACP, *supra* note 21, at 1.

In fairness, it might be observed that only eight of these jurisdictions⁴² have death penalty statutes in force in 2001 and only four (Kentucky, Maryland, Nevada, and Tennessee) have actually executed any male offenders in the current era.⁴³ In any event, the popularity of the death penalty ebbs and flows in various jurisdictions over several centuries, and these states generally may have evolved beyond the use of this punishment for male or female offenders.

TABLE 4

STATES WITH EXECUTIONS OF FEMALE OFFENDERS ONLY PRIOR TO 1900

Connecticut ⁴⁴	Massachusetts ⁴⁵	New Jersey ⁴⁶
District of Columbia ⁴⁷	Michigan ⁴⁸	New Mexico ⁴⁹
Kentucky ⁵⁰	Minnesota ⁵¹	Rhode Island ⁵²
Maine ⁵³	Nevada ⁵⁴	Tennessee ⁵⁵
Maryland ⁵⁶	New Hampshire ⁵⁷	West Virginia ⁵⁸

Careful readers will have noted that yet another group of states did not appear on either table 3 or table 4. This remaining group of sixteen states has never executed any female offenders in their entire histories, even back through earliest recorded colonial and territorial periods. Almost all of these states (see table 5) are in the Northwest quadrant of the United States, starting with Iowa and Kansas and moving in a northwestern direction, even on out to Alaska and Hawaii. Most of these states have also used the death penalty only sparingly against male offenders, so one would not expect them to be very much involved in executing female offenders. However, several centuries of absolutely no executions of

⁴² Connecticut, Kentucky, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, and Tennessee have retained the death penalty. *Id.* at 1.

⁴³ *Id.* at 8–9.

⁴⁴ Connecticut has executed a total of fourteen female offenders, 1648–1786.

⁴⁵ Massachusetts has executed a total of forty-nine female offenders, 1638–1789.

⁴⁶ New Jersey has executed a total of fifteen female offenders, 1717–1881.

⁴⁷ The District of Columbia has executed a total of one female offender, 1865.

⁴⁸ Michigan has executed a total of two female offenders, 1763–1777.

⁴⁹ New Mexico has executed a total of one female offender, 1861.

⁵⁰ Kentucky has executed a total of twenty-five female offenders, 1798–1868.

⁵¹ Minnesota has executed a total of one female offender, 1860.

⁵² Rhode Island has executed a total of three female offenders, 1687–1737.

⁵³ Maine has executed a total of two female offenders, 1644–1735.

⁵⁴ Nevada has executed a total of one female offender, 1890.

⁵⁵ Tennessee has executed a total of five female offenders, 1807–1837.

⁵⁶ Maryland has executed a total of forty-seven female offenders, 1664–1871.

⁵⁷ New Hampshire has executed a total of three female offenders, 1739–1768.

⁵⁸ West Virginia has executed a total of four female offenders, 1798–1832.

females makes it clear that, in practice, female offenders are not, and have never been, eligible for capital punishment in one-quarter of the United States.

TABLE 5

STATES WITH NO EXECUTIONS OF FEMALE OFFENDERS IN ANY TIME PERIOD

Alaska	Iowa	Oregon
Colorado	Kansas	South Dakota
Hawaii	Montana	Utah
Idaho	Nebraska	Washington
Indiana	North Dakota	Wisconsin
		Wyoming

In many ways, the list in table 5 is the most interesting list of all. To be sure, many of the states on this list are simply the traditionally abolitionist states (for example, Alaska, North and South Dakota, and Wisconsin) with very few executions historically of male offenders, so the total absence of executions of female offenders may not be too remarkable. However, other states on this list (for example, Colorado, Indiana, Oregon, and Washington) generally have had functioning death penalty systems during their state histories, but they have totally excluded female offenders from this punishment. An examination of the execution patterns of such states might expect to result in more or less executions of female offenders from state to state, as well as periods of no such executions at all in some states. However, what this examination has revealed is that a group of sixteen essentially contiguous states—the entire northwest quadrant of the United States—has never, ever executed even one female offender.

One is tempted to speculate as to the cause of this total absence of such executions. Is it the chivalry of the western gentleman? Is it a result of some unwritten “code of the West?” Is it because women, until at least the beginning of the twentieth century, were scarce in the West (and therefore to be preserved at all costs)? And, as the population of this western quadrant of our country changes, might we now expect female offenders to be included in this practice? On this latter point, for example, a Seattle-area woman currently is under arrest for a horrible murder, with prosecutors trying to decide whether or not to seek the death penalty in her case.⁵⁹ They realize that of the 229 capital murder convictions in Washington during the past twenty years, only seven have been of women offenders.⁶⁰ None of those seven women were sentenced to death.⁶¹ Even

⁵⁹ See Janet Burkitt, *Female on State's Death Row? It's Unprecedented, but Possible for Everett Woman*, SEATTLE TIMES, June 5, 2001, at A1.

⁶⁰ *Id.*

with the rapidly changing population of the Seattle area, it appears that the perfect record of Washington is unlikely to fall in the near future. And, it is buffered by Idaho, Montana, Oregon, and etc., also with "perfect records" and no apparent change on the horizon.

2. *Current Era Executions of Females*

While the preceding historical perspective may be helpful in understanding the theme of this article, much of it reflects the execution of witches and slaves, and it would be difficult to extrapolate from those cases to the current era (1973–present). Therefore, this section focuses much more extensively upon the actual executions of female offenders in the current era, seeking to understand why these women were selected for such a rare honor.

The execution of Velma Barfield in North Carolina on November 2, 1984, was the first execution of a female offender during the first quarter century of the current death penalty era.⁶² Executions of male offenders in the current era began with that of Gary Gilmore on January 17, 1977, and a total of twenty-eight men were executed before Velma Barfield.⁶³ Completely isolating her execution, another 407 men were executed after her before another woman was executed.⁶⁴ This means that Barfield was the only female among the 436 offenders executed for the first twenty-five years (1973 through 1997) of the current death penalty era.⁶⁵

Barfield's execution met with considerable press coverage and political discussion.⁶⁶ She had been officially sentenced to death only for the arsenic poisoning death of her boyfriend.⁶⁷ However, Barfield also admitted to the lethal poisoning of an elderly couple for whom she was employed as nurse/caretaker, as well as the poisoning death of her own mother.⁶⁸ If that were not enough, she also was a key suspect in the poisoning death of her husband some years earlier.⁶⁹ Apparently a serial killer posing as a caring nurse, Barfield claimed she killed only to cover up her thefts needed to finance her addiction to prescription tranquilizers.⁷⁰ By the time she was executed, Barfield had changed into a drug-free, born-again Christian, beloved by inmates and staff alike at her prison and receiving the aggressive support of Ruth Graham, wife of evangelist Billy

⁶¹ Streib, *Femdeath*, *supra* note 15, at 7–8.

⁶² See NAACP, *supra* note 21, at 9–22.

⁶³ *Id.* at 9–10.

⁶⁴ *Id.* at 10–17.

⁶⁵ *Id.* at 9–17.

⁶⁶ See generally Rapaport, *Equality*, *supra* note 11, at 590, 592–93.

⁶⁷ See *State v. Barfield*, 259 S.E.2d 510, 519–20, 544 (N.C. 1979).

⁶⁸ See Rapaport, *Some Questions*, *supra* note 11, at 539.

⁶⁹ See *Barfield*, 259 S.E.2d at 521–22.

⁷⁰ *Id.* at 522.

Graham.⁷¹ This fifty-two year old grandmother was the first female offender to be executed by lethal injection, in North Carolina or apparently anywhere in the world.⁷²

Barfield's execution also had a prominent political twist. North Carolina's governor, Jim Hunt, was running against incumbent Jesse Helms for the United States Senate.⁷³ Barfield's execution was scheduled for the weekend just before the Tuesday election, and Governor Hunt faced the no-win choice of (1) granting clemency or a delay, thus appearing to waffle on his commitment to the death penalty, or (2) going ahead with the execution and alienating religious opposition to taking the life of a born-again Christian grandmother.⁷⁴ He chose option two and lost the election, which he may have lost anyway. The larger point is that whether or not to execute Velma Barfield was, to a significant degree, a political decision, tending to ignore concerns about deterrence, retribution, and reduction of violent crime.

Given the rarity and relative isolation of executions of female offenders since 1900, the last few years have been astounding. From 1900 through 1997, only forty (0.5%) of the 7,759 total executions were of female offenders.⁷⁵ For the last three and one-half years as of this writing (January 1, 1998 through June 30, 2001), six (2.0%) of the approximately 294 total executions were of females, a rate four times higher than for the previous century.⁷⁶ It is much too early to determine if this rash of executions of female offenders is the return to the 1930s–1950s rates⁷⁷ or just an isolated blip on this execution pattern.

The first of this very recent era was Karla Faye Tucker, executed in Texas on February 3, 1998.⁷⁸ Despite the strong leadership of Texas in the death sentencing and actual executions of male offenders, this was the first execution of a female offender in Texas since that of Chipita Rodriguez in 1863.⁷⁹ A public opinion poll

⁷¹ See William E. Schmidt, *Woman Executed in North Carolina*, N.Y. TIMES, Nov. 2, 1984, at A1; William E. Schmidt, *Decision on Execution Order a Key Issue in Carolina Race*, N.Y. TIMES, Sept. 27, 1984, at A1, [hereinafter Schmidt, *Decision on Execution Order*].

⁷² Lethal injection as a means of lawful state execution did not come into use until 1977, during the current era of the death penalty, and continues to be used only in the United States. Therefore, as the first woman executed in the current era, Barfield was the first woman to be executed by lethal injection. See generally Deborah W. Denno, *Adieu to Electrocution*, 26 OHIO N.U. L. REV. 665, 675–78 (2000).

⁷³ See Schmidt, *Decision on Execution Order*, *supra* note 71.

⁷⁴ See *id.*; Rapaport, *Equality*, *supra* note 11, at 592–93.

⁷⁵ See Streib, NAACP, *supra* note 21, at 7; *Femdeath*, *supra* note 15, at 4–5 tbl.1.

⁷⁶ *Id.*

⁷⁷ See execution patterns reflected in the appendix.

⁷⁸ See Sam Howe Verhovek, *Divisive Case of a Killer of Two Ends as Texas Executes Tucker*, N.Y. TIMES, Feb. 4, 1998, at A1.

⁷⁹ The author's research has documented this and essentially all other executions of female offenders in the United States and its antecedent colonies and territories. The 1863 execution of Chipita Rodriguez was reported to various media by the author, verified by them, and then

conducted in Texas just weeks prior to Tucker's execution found that 61% supported the death penalty but only 48% thought Tucker should be executed.⁸⁰ The uniqueness of such an execution even stimulated then-presidential candidate George W. Bush to devote a substantial portion of his campaign manifesto to the Tucker case.⁸¹

Tucker's crimes and life history would not seem to have been a likely stimulus for reluctance toward her execution in Texas. Involved at a young age with drugs and prostitution, Tucker had a history of violent behavior.⁸² The specific 1983 crime for which she was sentenced to death was the murder of two sleeping victims using a pickax as the murder weapon, with Tucker later boasting that she had reached sexual climaxes with each stroke of the pickax.⁸³ Far from the *Arsenic and Old Lace*⁸⁴ image of women who kill, Tucker killed "like a man."⁸⁵

Tucker's 1998 execution was accompanied by enormous media coverage in the United States and worldwide,⁸⁶ and its unusualness apparently gave then Texas Governor, now United States President George W. Bush considerable

widely reported by them. See, e.g., *Gender and Death*, WALL STREET JOURNAL, Feb. 2, 1998, at A22 (editorial); Daniel Pedersen, *Praying for Time*, NEWSWEEK, Feb. 2, 1998, at 66; Sam Howe Verhovek, *As Woman's Execution Nears, Texas Squirms*, N.Y. TIMES, Jan. 1, 1998, at A1, A12.

⁸⁰ Sam Howe Verhovek, *Texas, in First Time in 135 Years, is Set to Execute Woman*, N.Y. TIMES, Feb. 3, 1998, at A1.

⁸¹ See generally GEORGE W. BUSH, A CHARGE TO KEEP 140-55 (1999).

⁸² Tucker v. State, 771 S.W.2d 523, 527 (Tex. Crim. App. 1988).

⁸³ *Id.* at 526-27.

⁸⁴ JOSEPH KESSELRING, ARSENIC AND OLD LACE (1941). This marvelous work of fiction describes two kind and gentle elderly ladies with the strange habit of poisoning gentlemen callers and burying them in their cellar.

⁸⁵ Such "unladylike" killings already have been characterized as a factor in selecting which female murderers are sentenced to death and actually executed:

While some of the recently sentenced females committed their crimes with accomplices, the females typically were proven to be the dominant actor[s] in the group, which went against any presumption in their favor. Their crimes tended to be horribly violent felony-murders. Indeed, their crimes and behavior could be characterized as more like those of male killers than female killers, perhaps removing them from the normally protective constructs for female offenders.

Streib, *Death Penalty for Female Offenders*, *supra* note 11, at 879.

⁸⁶ For example, Larry King interviewed Tucker on camera while she was on death row, and that interview was broadcast as a part of his television show. *Larry King Live* (CNN television broadcast, Jan. 14, 1998). Tucker also appeared on the CBS News program *60 Minutes*. *60 Minutes: Inmate 777; Woman on Death Row Gets Support from the Christian Community* (CBS television broadcast, Dec. 7, 1997). The execution additionally received world wide front page newspaper coverage. See, e.g., Jesse Katz, *Should Karla Faye Tucker Be Executed?*, L.A. TIMES, Jan. 9, 1998, at A1.

pause.⁸⁷ The fact that Tucker was a very attractive, photogenic, articulate, white woman undoubtedly contributed to both the extensive media coverage and to the reluctance of the system to carry through to the end.⁸⁸ To put this execution in context, George Bush, as Governor of Texas, carried out over 130 executions.⁸⁹ None of these executions received nearly as much publicity or caused Governor Bush as much anguish as did the execution of Karla Faye Tucker.⁹⁰

While the Tucker execution on February 3, 1998, appears to have ignited the current rash of executions of female offenders, the media frenzy around Tucker's case has not carried over to these subsequent cases.⁹¹ Judias Buenoano (also known as Judy Goodyear) was executed in Florida on March 30, 1998, only weeks after Tucker died in Texas, but Buenoano's execution seemed routine.⁹² Exceeding even the rarity of such executions in Texas, Buenoano, born in Panama, was the first execution of a female offender in Florida since that of a black slave named Celia Bryan in 1848, over one and one-half centuries ago.⁹³

Buenoano had been convicted of the poisoning death of her husband, the drowning death of her paralyzed son, and she was suspected of other murders and attempted murders by poisoning.⁹⁴ With striking similarities to the Barfield case,

⁸⁷ See BUSH, *supra* note 81, at 140–55; see also Margaret Carlson, *Death, Be Not Proud*, TIME, Feb. 21, 2000, at 38; Verhovek, *supra* note 80.

⁸⁸ Although Tucker repeatedly stated that she should not receive any special treatment because she was a woman, her gender nonetheless permeated all of her efforts: "Gender may not be an explicit component of her pleas, but being a petite, photogenic, rosy-lipped woman of 38 with flowing brown curls has surely kept it from falling on deaf ears." Katz, *supra* note 86, at A14; see also Sue Anne Pressley, *Pro-Death Penalty but Chivalrous Texans Debate Fate of Karla Faye Tucker*, WASH. POST, Jan. 25, 1998, at A3.

⁸⁹ See generally NAACP, *supra* note 21, at 9–23; Frank Bruni, *Woman, 62, Put to Death in Texas*, N.Y. TIMES, Feb. 25, 2000, at A12.

⁹⁰ Governor Bush acknowledged that the pressures surrounding the Tucker execution were more intense than any others he had faced as governor and that the time interval between Tucker's lethal injection and her resulting death were "the longest twenty minutes" of his governorship. BUSH, *supra* note 81, at 155.

⁹¹ See Rapaport, *Equality of the Damned*, *supra* note 11, at 596.

⁹² See, e.g., Tony Boylan, *Florida to Execute Woman Amid No Outcry*, CELEBRITIES, USA TODAY, Mar. 23, 1998, at 1A; Miry Navarro, *Execution Without All the Attention*, N.Y. TIMES, Feb. 10, 1998, at A10. But see Alan Judd, *Buenoano Death Raises Execution Issue; When Judy Buenoano Went to the Electric Chair Monday She Resurrected the Larger Issue of the Role Gender Plays in Death Sentences and in How They Are Carried Out*, SARASOTA HERALD-TRIBUNE, Mar. 31, 1998, at 4B.

⁹³ The author's research has documented this and essentially all other executions of female offenders in the United States and its antecedent colonies and territories. The 1848 execution of Celia Bryan was reported to various media by the author, verified by them, and then widely reported by them. See, e.g., Boylan, *supra* note 92, at 2A; Navarro, *supra* note 92, at A10; Sam Howe Verhovek, *Karla Tucker Is Now Gone, But Several Debates Linger*, N.Y. TIMES, Feb. 5, 1998, at A12.

⁹⁴ See *Buenoano v. State*, 527 So. 2d 194, 194–96 (Fla. 1988); Navarro, *supra* note 92, at A10.

Buenoano was a fifty-four year old grandmother executed for poisoning those close to her.⁹⁵ However, Buenoano did not find religion while on death row, showed no remorse for her several murders, and never enjoyed the focused support of influential persons and groups on the outside.⁹⁶ She was neither the kindly old grandmother nor the pretty petite white woman, perhaps explaining in part the relative lack of interest in her case by the national and international media.

Following the Buenoano execution by nearly two years, Texas executed Betty Lou Beets on February 24, 2000.⁹⁷ Texas had seen a gap of 135 years (1863–1998) between the executions of Rodriguez and Tucker, but now just two years (February 1998–February 2000) had elapsed between the executions of Tucker and Beets. Beets had been convicted of shooting and killing her fifth husband in order to get money from his retirement benefits and life insurance policies.⁹⁸ She endured seven marriages to five husbands, shot three of her husbands, and killed two of them.⁹⁹ The *Beets* case had lingered in the courts for fifteen years, in part because she was a battered wife with a long history of violent abuse from the parade of men in her life.¹⁰⁰ While Beets denied guilt in the deaths of her husbands, she became a spokesperson for understanding battered women caught up in such a hellish life.¹⁰¹ A sixty-two year old great-grandmother when executed,¹⁰² Beets apparently was the oldest female executed since 1900.¹⁰³

Just over two months later, Christina Marie Riggs was executed in Arkansas on May 2, 2000.¹⁰⁴ Repeating the pattern from Texas and Florida, Riggs was the first female offender executed in Arkansas since the execution of Mrs. Moses Dean in November 1868.¹⁰⁵ Riggs represents the opposite pole from Beets in Texas, in that Riggs was on death row for less than two years prior to being

⁹⁵ Judd, *supra* note 92, at 1A.

⁹⁶ See Navarro, *supra* note 92, at A10.

⁹⁷ See Diane Jennings, *Beets Executed for Husband's Murder: Woman Is Second To Be Put to Death in Texas Since Civil War*, DALLAS MORNING NEWS, Feb. 25, 2000, at 1A.

⁹⁸ See *Beets v. State*, 767 S.W.2d 711, 714–23 (Tex. Crim. App. 1987).

⁹⁹ See Jim Yardley, *Texas Board Denies Clemency for Woman, 62, on Death Row*, N.Y. TIMES, Feb. 23, 2000, at A12.

¹⁰⁰ See Diane Jennings, *Murderer or Victim of Abuse? As Beets' Death Date Nears, Her Claims Ridiculed By Slain Man's Son*, DALLAS MORNING NEWS, Feb. 11, 2000, at 1A.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See the appendix for a list of females (with ages) executed since 1900.

¹⁰⁴ See Emily Yellin, *Arkansas Executes a Woman Who Killed Both Her Children*, N.Y. TIMES, May 3, 2000, at A22.

¹⁰⁵ As with the cases in Texas and Florida, this history of Arkansas executions of female offenders was first verified by the author's research and then provided to the media. See, e.g., Jamie Stengle, *Woman First To Be Executed in Arkansas in 155 Years*, COMMERCIAL APPEAL (Memphis, Tenn.), May 3, 2000, at B4 (Associated Press article); *Arkansas Executes 1st Woman Since 1845; Former Nurse Smothered Her Kids*, FLORIDA TIMES-UNION (Jacksonville, Fla.), May 3, 2000, at A-9.

executed.¹⁰⁶ This extraordinarily short post-sentencing period resulted from Riggs refusing to pursue any reviews of her death sentence and requesting to be executed as soon as possible.¹⁰⁷

Riggs, a former nurse suffering from deep depression, had been convicted of smothering to death her two children, ages two and five, in November 1997.¹⁰⁸ She then tried to kill herself with potassium chloride but was unsuccessful.¹⁰⁹ Bizarrely, potassium chloride was one of the drugs used in her lethal injection by the State of Arkansas on May 2, 2000.¹¹⁰ As with almost all of these cases of executed female offenders, Riggs was the focus of national and international press coverage.¹¹¹

At the dawning of the new millennium on January 1, 2001, Oklahoma had three women on its death row but was to execute two of them in the next five months.¹¹² Wanda Jean Allen was executed in Oklahoma on January 11, 2001,¹¹³ the first such execution of a woman in Oklahoma since 1903 and the first execution of a black woman anywhere in the United States since 1954.¹¹⁴ Allen's sexual orientation also was prominently described in news reports, as her capital crime was shooting and killing her lesbian lover.¹¹⁵ Finally, Allen arguably was mentally retarded, having received a score of sixty-nine on an IQ test at age

¹⁰⁶ See Streib, *Femdeath*, *supra* note 15, app. A at 13.

¹⁰⁷ See, e.g., Suzi Parker, *Killer Declines Clemency Bid; Arkansan Sought Execution*, DALLAS MORNING NEWS, May 3, 2000, at 21A.

¹⁰⁸ See Yellin, *supra* note 104, at A22.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Arkansas Executes First Woman in 150 Years*, DEUTSCHE PRESSE-AGENTUR, May 3, 2000, available at LEXIS, News Library, Deutsche Presse-Agentur File; *Arkansas to Execute First Woman in 150 Years*, AGENCE FRANCE PRESSE, May 2, 2000, available at LEXIS, News Library, Agence France Presse File; *Arkansas Woman Executed for Murder of Children*, WASH. POST, May 3, 2000, at A10; Ron Moore, *At Last I Can Be With My Babies; Chilling Last Words of Nurse Who Killed Her Kids*, SCOTTISH DAILY RECORD & SUNDAY MAIL, May 4, 2000, at 24; *Child Poisoner Will Have Her Death Wish Granted Today*, DAILY MAIL (London), May 2, 2000, at 31; *U.S. Woman Facing Execution Wants to Die*, TORONTO STAR, May 2, 2000, available at LEXIS, News Library, Toronto Star File.

¹¹² Wanda Jean Allen, Marilyn Kay Plantz, and Lois Nadeau Smith were on Oklahoma's death row on January 1, 2001. See Streib, *Femdeath*, *supra* note 15, app. B at 18.

¹¹³ See *Woman Is Executed in Oklahoma for Killing in 1988*, ST. LOUIS POST-DISPATCH, Jan. 12, 2001, at A7.

¹¹⁴ See *Black Woman Executed in Oklahoma Is First in U.S. Since 1954*, JET, Jan. 29, 2001, at 12.

¹¹⁵ See, e.g., *Nation in Brief*, WASH. POST, Jan 12, 2001, at A26; *Call for Execution Moratorium in "Killing Machine" State*, IRISH TIMES, Jan. 15, 2001, at 13; see also Drew Alice Timmins, *A Death Sentence Waiting to Happen: The Tragic Case of Wanda Jean Allen*, LESBIANATION, at www.lesbianation.com (last visited Dec. 14, 2000); David Kirby, *Was Justice Served? Death Penalty Conviction Against Lesbian Defendant*, THE ADVOCATE, Feb. 27, 2001, at 26. See generally Streib, *Death Penalty for Lesbians*, *supra* note 11.

fifteen.¹¹⁶ Her plight attracted the attention of the Reverend Jesse Jackson, who was arrested in a protest outside of Allen's prison the night before Allen's execution.¹¹⁷ Nonetheless, Allen's execution occurred on schedule.

Marilyn Kay Plantz was executed by Oklahoma on May 1, 2001, the last execution of a female offender as of this writing.¹¹⁸ Comparable to the pattern in Texas, Oklahoma had gone for ninety-eight years (1903–2001) without executing a female offender, and then it executed Plantz less than four months after executing Allen.¹¹⁹ Plantz, a married white woman, had hired two of her teenage black male lovers to kill her husband, trying to make it look like an accident so she could collect more on his life insurance policy.¹²⁰ The murder was particularly brutal—beginning with a nearly lethal beating with baseball bats when he returned home from work and ending with burning the victim to death in his truck to make it look like a traffic accident.¹²¹ One of the hired killers testified against Plantz at her trial, and she confessed fully as to her involvement in the murder.¹²²

In sum, the current era has seen a very slow start in our return to executing female offenders, followed by a flurry of such executions since 1998. Nonetheless, these seven executions of female offenders have comprised less than 1% of the well over 700 total executions during this time period.¹²³ Five of the women executed have been white, with one black and one Hispanic. All but one (Allen's) of their victims were white, and all but one of the executed women (Tucker) killed husbands, other close family members, or lovers. Three of the executed women were grandmothers, with one a great-grandmother. Only one (Riggs) was executed for killing her children, and she volunteered for execution. From this very small sample of female executions, no particular patterns can be discerned, other than the surprising and unexplained rash of such executions since 1998. What remains to be seen is whether this rash of recent executions of women is the beginning of a major change in this practice or just a temporary disturbance in what previously had been a very consistent pattern.

¹¹⁶ See Arnold Hamilton, *Oklahoma Woman Denied Clemency; Execution Set for Next Month*, DALLAS MORNING NEWS, Dec. 16, 2000, at 43A.

¹¹⁷ See *Jesse Jackson Arrested in Execution Protest*, CHICAGO TRIBUNE, Jan. 11, 2001, at 10; see also *Pending Execution of Mentally Disabled Woman in Oklahoma Draws Criticism* (NPR radio broadcast, Jan. 5, 2001).

¹¹⁸ See Bob Doucette, *Woman Dies for Husband's 1988 Slaying*, DAILY OKLAHOMAN, May 2, 2001, available at LEXIS, News Library, The Daily Oklahoman File; *Oklahoma Executes Second Female Prisoner*, WASH. POST, May 2, 2001, at A22.

¹¹⁹ See Doucette, *supra* note 118.

¹²⁰ *Plantz v. State*, 876 P.2d 268, 271–72 (Okla. Crim. 1994); TOM KUNCL, DEATH ROW WOMEN 193–215 (1994); Doucette, *supra* note 118.

¹²¹ *Plantz*, 876 P.2d at 271–72; KUNCL, *supra* note 120, at 193–215; Doucette, *supra* note 118.

¹²² Doucette, *supra* note 118.

¹²³ NAACP, *supra* note 21, at 7.

III. COUNTERING SEX BIAS WITHIN THE DEATH PENALTY SYSTEM

It seems clear that female capital offenders are under-represented in capital trials, on death rows, and in execution chambers. As the previous section documented, major death penalty states such as Florida, Oklahoma, and Texas went a century or more without executing female offenders, and the entire northwest quadrant of the United States has never executed a female offender in all of its history. The Commonwealth of Virginia, second only to Texas in the current era in executions of male offenders,¹²⁴ last executed a female in 1912.¹²⁵ These stark facts raise at least a strong presumption of sex bias in the death penalty system.

Several instances in which this sex bias occurs may be quite legitimate, not unlike prohibiting boys from using the girls' restroom in high schools. Whatever might be the avant garde adult convention of a single community restroom for everyone (for example, as glorified in such television shows as *Ally McBeal*), it seems perfectly defensible to discriminate totally, based upon sex, in permitting high school students to use a certain restroom. Similar instances of sex bias in the death penalty system may also be perfectly acceptable. However, most instances of sex bias seem much less defensible and more akin to prohibiting girls from playing on the high school football team. In addition, the sex bias in the death penalty system also seems much more subtle and unspoken, often even denied by those engaged in it. Finally, it appears not to be limited to one or two offices or junctures but to be pervasive throughout the governmental agents and agencies that comprise the death penalty system. This section touches on a few such points, more as examples than as a thorough analysis of the entire system.

A. *Selecting Crimes for the Death Penalty*

The obvious beginning point is the legislative decision to designate a crime as being eligible for the death penalty in the first place. Constitutional rulings have limited this choice of crime essentially to murder,¹²⁶ but even within the crime of murder a range of discretion exists. Legislatures tailor their standard first-degree murder crimes in specific ways so as to make some murders much more likely than others to be capital murders. The following section discusses the primary technique for doing this by using aggravating and mitigating circumstances.

¹²⁴ *Id.* at 8.

¹²⁵ Virginia Christian was executed by the Commonwealth of Virginia on Aug. 16, 1912. See STREIB, DEATH PENALTY FOR JUVENILES, *supra* note 23, at 89–90.

¹²⁶ See, e.g., *Tison v. Arizona*, 481 U.S. 137, 148 (1987) (noting that “[a]rmed robbery is a serious offense, but one for which the death penalty is plainly excessive”); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (stating that “death is a disproportionate penalty for the crime of raping an adult woman”).

However, a more subtle theme is operating beneath these express statutory provisions.

Domestic homicide (the killing of relatives and sexual intimates) tends to be discounted in perceived seriousness and punishability, certainly as compared to homicides by and against strangers.¹²⁷ Probably the most common crime committed by those on death row today is felony murder (homicide committed during a dangerous felony such as robbery or rape).¹²⁸ Thus, this appears to be a statement that such forms of murder are more serious and more deserving of the harshest of punishments than instances in which persons simply kill members of their families without broader involvement in an additional felony. While employing the felony murder rule makes the prosecution's job easier by not having to prove a murderous *mens rea*, this short cut to death row raises serious jurisprudential questions as well as having a quite different impact upon male offenders and female offenders. In addition, the tendency to exclude domestic homicides from capital murder, certainly as compared to stranger homicides and felony murders, tends also to exclude women's homicides as compared to men's homicides.

A dramatic example of domestic homicide almost always excluded from capital murder is infanticide, typically cases in which women kill their children. Women who kill their children almost never get executed for it. In the recent era, for example, only one (Christina Marie Riggs) of the seven women executed died for killing her children, and Riggs "volunteered" for execution, leaving even her case with a figurative asterix beside it.¹²⁹ Some observers, including the author, might suggest that the murder of several children by their own mother or father is one of the most heinous homicides imaginable.¹³⁰ The victims are particularly

¹²⁷ For a particularly persuasive piece on this issue, see Rapaport, *Capital Murder*, *supra* note 11.

¹²⁸ See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1104 n.2 (1990).

¹²⁹ See *supra* notes 104–11 and accompanying text.

¹³⁰ Some women who kill their children do get sentenced to death, and this number may be increasing in recent years. Of course, getting from a death sentence to an execution remains a long and uncertain journey. Consider this sketch of some of the current cases making that journey:

From an overall historical perspective, women who kill their own children are almost never sentenced to death. However, California recently seems to be determined to change that pattern. Dora Buenrostro of San Jacinto was convicted of stabbing to death her three children, ages four to nine, during a fit of rage. She was sentenced to death on October 2, 1998. One year later, Susan Eubanks received her death sentence for shooting to death her three sons, ages four to seven. Eubanks' attempt to kill herself as her final act failed, and she now resides on California's death row. The most recent of California's lethal mothers is Sandi Nieves, sentenced to death on October 6, 2000, for killing her four daughters. Nieves used arson to kill her children. All three instances of these multiple murders—those by Buenrostro, Eubanks, and Nieves—were committed out of anger toward an estranged husband and boyfriend. And, if murdering moms are not enough, consider the California

innocent and vulnerable, the murderers had special societal obligations as child care-givers not to harm the victims, and the broad negative impact of infanticide upon an entire community typically is more severe than for most other homicides.¹³¹

The goal of this analysis is not to push for more executions of female offenders by elevation of their typical murders to capital murders, nor is it to push for fewer executions of male offenders by downgrading their typical murders. The much simpler goal is to point out that men and women tend to commit different kinds of homicides. Therefore, the attachment of the death penalty to some kinds of murder and not to other kinds of murder commonly will have a disparate impact upon males who kill versus females who kill. This fact should be kept in mind by legislatures when deciding which crimes should be capital crimes and by courts in ruling which crimes are serious enough to pass Eighth Amendment muster.

B. Aggravating and Mitigating Circumstances in Death Penalty Statutes

Unlike the minimum age limits in death penalty statutes that preclude the death penalty for juveniles at some age, no such express consideration of the offender's sex appears in our death penalty statutes. Some other countries (for example, Russia and India) include express provisions in their death penalty statutes for either excluding female offenders or giving them special mitigation in imposing sentences.¹³² American death penalty statutes provide no such sweeping provisions, but our schemes of aggravating and mitigating circumstances can and apparently do have a disparate impact along sex lines.

With the extremely rare exceptions, the death penalty in the United States is essentially limited to the worst forms of criminal homicide. This zeroing in on what defines a capital case typically begins with limiting the statutory crimes eligible for death sentences to first degree murder, labeled aggravated murder in Ohio. Going even beyond this extremely narrow class of crimes, the state is also required to prove the existence of at least one aggravating circumstance

case of Caroline Young. She was sentenced to death in 1995 for killing her grandchildren, ages four and six.

Streib, *Sentencing Women*, *supra* note 11, at 25.

¹³¹ Sadly, these cases are fairly typical. The one making headlines as of this writing is that of Andrea Yates who drowned her five young children on June 20, 2001, in Houston. *See, e.g.*, Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20. As of June 2001, prosecutors have not yet decided whether or not to seek the death penalty. Even if they do charge Yates with capital murders, what we know about the death penalty for female offenders generally suggests that Yates' trial would be a year away, the possibility of her receiving a death sentence would be very small, and her actual execution almost undoubtedly would never take place.

¹³² *See generally* Streib, *Death Penalty for Female Offenders*, *supra* note 11, at 880.

concerning the specific murder committed before the defendant convicted of that crime can be sentenced to death. If that stage is reached, the defendant then tries to prove mitigating circumstances in order to convince the sentencing agent (either the jury or the judge) that the death sentence should not be imposed. Thus we have a two-step, two-stage process: first proving that the defendant has committed a terrible homicide and then deciding whether this case is one deserving of a death sentence. This final choice between the death sentence and life in prison focuses both upon the nature and circumstances of the crime and upon the character and background of the person who committed that crime. Regardless of the seriousness of the crime, it cannot automatically result in the death penalty. The personal characteristics of the convicted murderer also must be weighed in the balance. This is where the sex of the offender can come into play, probably unintentionally, but nonetheless with important consequences. As is explained below, this sex-specific impact may either favor or disfavor female capital defendants.

Consider some typical aggravating circumstances found in death penalty statutes.¹³³ A common one is having committed a murder for hire, either as the hired killer or as the person who hired the killer to commit the homicide.¹³⁴ A focused example of this aggravating circumstance can be found in the Arizona death penalty statute: "The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."¹³⁵ The Ohio statute is broader and less specific: "The offense was committed for hire."¹³⁶

Women convicted of murder are generally more likely than men to have hired a killer to commit their homicide. A current comparison is that eight of the fifty-two women on death row as of June 2001 were convicted of hiring someone to kill their husbands. However, all eight of these current women inmates hired men to do the killing, and this has almost always been the findings of past research. In an overall proportion of capital cases, a much higher percentage of women's cases than men's cases involve hiring a killer. Therefore, this aggravating factor can be seen as resulting in a higher percentage of women's death sentences than of men's death sentences.

Another very common aggravating circumstance is the offender's having a previous record of violent crimes.¹³⁷ The federal death penalty statute is

¹³³ The examples of death penalty statutes used in this analysis are from the federal statute and the state statutes of Arizona, California, Georgia, and Ohio, but this analysis is intended to apply to essentially all death penalty statutes.

¹³⁴ See, e.g., 18 U.S.C. §§ 3592(C)(7)–(8) (2000); ARIZ. REV. STAT. §§ 13-703(F)(4)–(5) (1995); GA. CODE ANN. § 17-10-30(b)(4) (1997); OHIO REV. CODE § 2929.04(A)(2) (1997).

¹³⁵ ARIZ. REV. STAT. § 13-703(F)(4).

¹³⁶ OHIO REV. CODE § 2929.04(A)(2).

¹³⁷ See, e.g., 18 U.S.C. §§ 3592(A)(5), (C)(2), (C)(3), & (C)(4) (1997); ARIZ. REV. STAT. § 13-703(F)(2); CAL. PENAL CODE § 190.2(a)(2) (1998); GA. CODE ANN. § 17-10-30(b)(1) (1997); OHIO REV. CODE § 2929.04(A)(5).

particularly sweeping in this regard, including as separate individual aggravating factors (1) a previous conviction of a violent felony involving a firearm;¹³⁸ (2) a previous conviction of an offense for which a sentence of death or life imprisonment was authorized;¹³⁹ and (3) two or more previous convictions of violent crimes punishable by more than one year.¹⁴⁰ If the defendant convicted of the present murder also has a previous criminal record of violent crimes, it is more likely that the defendant will receive the death penalty instead of a prison sentence. Again turning to well-established research, we know that women convicted of murder are generally less likely than men to have prior convictions for murder, attempted murder, or other violent crimes. Therefore, this aggravating circumstance can be expected to be relied upon in a small percentage of women's cases as compared to those of men. However justifiable this aggravating circumstance may appear to some, it nonetheless strongly favors female capital defendants over male capital defendants.

A third common aggravating circumstance is a finding that the current homicide was part of a felony-murder.¹⁴¹ On this point, the federal statute sweepingly includes a death, or injury resulting in death, which occurred while committing or attempting to commit a long list of federal crimes, including destruction of aircraft or motor vehicles; violence at international airports; violence against Members of Congress, Cabinet Officers, or Supreme Court Justices; escape or attempted escape by prisoners; destruction of property affecting interstate commerce by explosives; maritime violence; and aircraft piracy.¹⁴² This list of included felonies provides an extraordinarily broad net for bringing offenders into the federal death penalty system. Moreover, almost all of these federal aggravators are essentially acts of violence, typically committed by males and not by females.

More common in felony murder formulations within state death penalty statutes are homicides committed during a rape, kidnapping, or armed robbery. This application of the felony murder rule has resulted in capital murder convictions for a very high percentage of men on death row but for very few women on death row. Even outside of capital cases, women convicted of murder are generally much less likely than men to have committed the homicide as part of another dangerous felony. In addition to all of the other concerns about the appropriateness of using the felony murder shortcut to obtain a capital conviction, this aggravating factor tends greatly to punish men more than women.

¹³⁸ 18 U.S.C. § 3592(C)(2).

¹³⁹ 18 U.S.C. § 3592(C)(3).

¹⁴⁰ 18 U.S.C. § 3592(C)(4).

¹⁴¹ See, e.g., 18 U.S.C. § 3592(C)(1); ARIZ. REV. STAT. § 13-703(F)(8); GA. CODE ANN. § 17-10-30(b)(2); OHIO REV. CODE § 2929.04(A)(7).

¹⁴² 18 U.S.C. § 3592(C)(1).

A final example is the aggravating circumstance of a particularly planned or premeditated homicide.¹⁴³ The federal statute provides a good example: "The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism."¹⁴⁴ The premise appears to be that it is worse to kill in this especially planned manner than in an agitated, emotional state. Judges and juries generally find that women convicted of murder are less likely than men to have premeditated their homicides and more likely than men to have killed while impassioned, angry, or in fear. More important, if this factor is in doubt, it appears that the sentencing agent is more likely to find it for women defendants than for men defendants.

Mitigating circumstances make the death penalty less likely to be imposed. As with aggravating circumstances, they also go both to the seriousness of the crime and to the characteristics of the defendant. A very common mitigating circumstance is that the offender acted under duress or emotional disturbance at the time of the homicide.¹⁴⁵ California lists as a mitigator "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."¹⁴⁶ The Ohio statute is a typical example of the duress mitigator: "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."¹⁴⁷ This factor would appear to be present to varying degrees in many homicide cases, but finding convincing evidence of it usually is quite difficult. We do know that judges and juries generally are more likely to find duress or emotional disturbance for women offenders than for men offenders in homicide cases. Even casual observance of male and female criminal defendants reveals the greater ability of almost all women to manifest their emotional side as compared to men, providing the defense attorney with a more effective means of demonstrating this mitigating circumstance.

The list of mitigating factors in many death penalty statutes includes the factor that the offender acted under the substantial domination of another.¹⁴⁸ Again, the California statute is a good example: "Whether or not defendant acted under extreme duress or under the substantial domination of another person."¹⁴⁹ The presumed fact pattern is one in which two or more offenders are involved in the homicide and related criminal activity. When a woman commits a homicide

¹⁴³ See, e.g., 18 U.S.C. § 3592(C)(9); CAL. PENAL CODE § 190.2(a)(15) (1998); OHIO REV. CODE § 2929.04(A)(7).

¹⁴⁴ 18 U.S.C. § 3592(C)(9).

¹⁴⁵ See, e.g., 18 U.S.C. §§ 3592(A)(2) & (6); ARIZ. REV. STAT. § 13-703(G)(2); CAL. PENAL CODE § 190.3(d); OHIO REV. CODE § 2929.04(B)(2).

¹⁴⁶ CAL. PENAL CODE § 190.3(d).

¹⁴⁷ OHIO REV. CODE § 2929.04(B)(2).

¹⁴⁸ See, e.g., 18 U.S.C. § 3592(A)(3); CAL. PENAL CODE § 190.3(g); OHIO REV. CODE § 2929.04(B)(6).

¹⁴⁹ CAL. PENAL CODE § 190.3(g).

jointly with a man, judges and juries generally are more likely to find that the man was the dominant actor. This occurs with all other variables being the same and only the sex of the offender being different.

Probably the most intriguing and debatable mitigating circumstance is the catch-all provision found at the end of the list.¹⁵⁰ For example, the Ohio list of mitigating factors ends with “any other factors that are relevant to the issue of whether the offender should be sentenced to death.”¹⁵¹ This open invitation provides the defense the opportunity to present evidence as to “any other” mitigating circumstance, so long as the mitigating evidence is relevant and material to the nature and circumstances of the crime or to the character and background of the defendant. Judges and juries generally are more likely to find sympathetic factors in the lives and backgrounds of women than of men in homicide cases. This could be in part because female defendants may be less reluctant to expose these factors than are male defendants.

Legislative solutions to these discriminatory aggravating and mitigating circumstances include a range of possibilities. Some have a discriminatory impact that may be quite acceptable, such as the aggravating circumstance of having a previous record of violent crime. Strong arguments can be made that this factor does make the offender much more punishable than he or she otherwise might be. However, aggravating circumstances, such as having hired the killer, and mitigating circumstances, such as acting under the domination of another, have a discriminatory effect that is less justifiable. The wisest approach may be to determine whether an aggravating or mitigating circumstance has a biased impact based upon the sex of the offender, and then ask whether that biased impact is nonetheless justifiable. The results of such an inquiry would lead either to retaining that circumstance or to modifying or eliminating that circumstance.

C. Selecting and Charging the Jury in a Capital Case

Unlike essentially all other criminal cases, death penalty cases almost always involve the trial jury in the sentencing process. Following the guilty-or-not-guilty trial stage, the same jury sits through a second evidentiary hearing focused solely on whether the now-convicted offender should be sentenced to death or to life imprisonment. Knowing that this jury must be both neutral as to the facts of the crime and also be able to choose either sentence alternative, the jury is selected prior to the guilt stage with an eye toward its ability to vote for the death sentence.¹⁵²

¹⁵⁰ See, e.g., 18 U.S.C. § 3592(A)(8); ARIZ. REV. STAT. § 13-703(G); CAL. PENAL CODE § 190.3(k); OHIO REV. CODE § 2929.04(B)(7).

¹⁵¹ OHIO REV. CODE § 2929.04(B)(7).

¹⁵² See generally *Morgan v. Illinois*, 504 U.S. 719 (1992); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

After a quarter century of blocking out the boundaries of the selection process for capital juries, a line of United States Supreme Court cases has outlined what we need to know about prospective jurors' views on the death penalty. The line starts in 1968 with *Witherspoon v. Illinois*,¹⁵³ a major case today even though it preceded the complete revamping of the death penalty system in the early and mid-1970s. Under *Witherspoon*, judges and the attorneys in capital cases can question prospective jurors as to their personal views on the death penalty but cannot exclude them for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."¹⁵⁴ In 1985, the Supreme Court clarified this principle, reiterating that a prospective juror may be excluded for cause if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"¹⁵⁵ The other end of this spectrum was established a few years later in *Morgan v. Illinois*,¹⁵⁶ which authorized exclusion for cause of any prospective juror who states that he or she will automatically vote for the death penalty regardless of any mitigating circumstances.

The Supreme Court's discussion of death-qualifying a capital jury, along with the broad issue of selecting a fair and impartial jury in criminal cases, provides a context for exploring the inherent sex bias in prospective jurors in capital cases. As a beginning, the Court has established that capital defendants accused of interracial crimes are entitled to have prospective jurors questioned on the issue of race bias.¹⁵⁷ Similar questions could be drafted to explore prospective jurors' views on the roles of men and women, on whether they might see a woman as more likely than a man to be emotionally disturbed if she committed a homicide, more likely to commit violent crimes in the future, and more likely to deserve mercy for her misdeeds. A juror's religious views, political opinions, and many other lifestyle characteristics can reveal these viewpoints. In most instances, this line of inquiry would be most fruitful where the offender is male and prospective jurors could be seen as being more punitive toward males than females. In any event, providing statutory authorization for this inquiry and possible challenge for cause seems worth pursuing.

The trial judge's final charge to the jury before they retire to deliberate upon life versus death might be influential. The federal death penalty statute has made express the concern, among others, over the sex of the offender:

[T]he court . . . shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the . . . sex of the defendant . . . and the jury is not to recommend a sentence of death unless it has concluded that it

¹⁵³ 391 U.S. at 510.

¹⁵⁴ *Id.* at 522.

¹⁵⁵ *Wainwright*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 47-48 (1980)).

¹⁵⁶ 504 U.S. at 719.

¹⁵⁷ *Turner v. Murray*, 476 U.S. 28 (1986).

would recommend a sentence of death for the crime in question no matter what the . . . sex of the defendant . . . may be.¹⁵⁸

When the jury in a federal capital case returns its sentencing recommendation in a capital case, each juror must sign a certificate verifying that the sex of the offender, along with several other factors, was not considered.¹⁵⁹ Might not such a procedure be a worthwhile addition to proceedings in state death penalty cases?

Experienced criminal court judges and lawyers commonly question whether the charge to the jury really makes any impact on its recipients. However, it seems plausible that such a jury charge, harkening back to sex bias questions being asked at voir dire, would at least remind the jury to be aware of this issue in its deliberations. The final act of certifying in writing that the sex of the offender was not a factor might give us the most we can expect from implementing this change.

IV. DEFENSE CHALLENGES TO SEX BIAS

A. Raising Sex Bias in Appellate and Post-Conviction Stages

If a plausible sex bias argument can be made, why not pursue this argument in the courts instead of the legislatures? Over the years, the author has been approached by several men on death row seeking to mount major litigation to prove widespread sex bias in the operation of the death penalty system. In essence, male offenders argue that they might not or would not have been sentenced to death if they were female offenders. Although it appears that an overall pattern of sex bias very likely could be proven, such litigation would run into the brick wall of *McCleskey v. Kemp*.¹⁶⁰ *McCleskey* requires not only proof of a general pattern of discrimination within the jurisdiction but also that the death-sentenced inmate's specific case involved provable race discrimination.¹⁶¹ Evidence to prove this additional factor almost always must come from admissions of racial prejudice from sentencing trial judges and jurors, and such admissions are almost impossible to elicit.

McCleskey addressed solely racial bias but clearly would apply to claims of sex bias. Indeed, this fear of broadening the concern from race and minority status to gender issues was an explicit factor in Justice Powell's majority opinion:

Two additional concerns inform our decision in this case. First, *McCleskey's* claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth

¹⁵⁸ 18 U.S.C. § 3593(f) (1997).

¹⁵⁹ *Id.*

¹⁶⁰ 481 U.S. 279 (1987).

¹⁶¹ *See id.* at 292.

Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, 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.¹⁶²

Assuming that the *McCleskey* test would be required in sex bias cases as in race bias cases, proving a pattern of discrimination based upon the sex of the offender would satisfy only the first step. The petitioner would then have to prove that sex bias was involved *in his case*. Perhaps it would be more socially acceptable for a judge or juror to admit to special treatment of women over men, but it does seem nearly as difficult as obtaining admissions of race bias.

B. *Chief Executive Commutations of Death Sentences*

The last stage preceding implementation of the death penalty is the commutation proceedings before a governor or, in federal cases, the President. This seems an appropriate point to raise the sex bias issue one last time. Clearly, data can be presented to demonstrate the degree of apparent sex bias in that specific jurisdiction. If any evidence, even anecdotal evidence, exists suggesting consideration of the offender's sex, then that can be put forward. The condemned female offender also can rely upon the lower political payoff for executing a woman as compared to a man. However, the male offender, who almost always will be the one penalized by sex bias, will not have this inherent advantage. Finally, whether the governor does or does not grant clemency to the condemned offender, the governor cannot be expected to be candid about the role that sex of the offender played in the decision.¹⁶³ However, as legislation is considered for structuring this clemency and pardoning process, the issue of sex bias could be inserted along with several other issues.

C. *Gender Justice Acts*

In the aftermath of *McCleskey*, those seeking to remedy race bias in the death penalty system turned to promotion of legislative initiatives which were to become known as Racial Justice Acts. In 1988, the year following *McCleskey*, a federal version of this proposed legislation was debated in the United States Congress.¹⁶⁴ This legislation would have allowed capital defendants to challenge

¹⁶² *Id.* at 314–17.

¹⁶³ See, e.g., Schmall, *supra* note 11.

¹⁶⁴ H.R. 4442, 100th Cong. (1988); see NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 284 (2001).

their death sentences by using statistical evidence of discriminatory practices. Once a presumption of racial bias was established, it then fell to the prosecution to prove that such general racial bias did not infect the specific case at hand. Regularly introduced for many years, this federal bill never became law. However, in 1998, Kentucky passed its own Racial Justice Act,¹⁶⁵ and other states have considered following suit.

One more prong of the effort to reduce sex bias in the death penalty system might be either to add sex bias to the language of these Racial Justice Acts or to draft a proposed "Gender Justice Act" focused solely on the sex bias issue. Using a similar analysis, if a capital appellant could demonstrate a general sex bias in the specific jurisdiction, then it would fall to the state to prove that sex bias did not play a part in the death penalty for this condemned offender. Of course, opposition to such legislation would argue that meeting this burden of proof of absence of sex bias would be extremely difficult if not impossible to do. It also is clear that this issue would be raised almost solely by male death row inmates, and they constitute 98.6% of those sentenced to death. Thus, while seemingly a minor issue, one would expect it to be raised in essentially every death penalty case, far more frequently than the race bias could be raised.

V. EXAMINING THE DEATH PENALTY SYSTEM THROUGH THE LENS OF SEX BIAS

Raising the specter of sex bias in the death penalty system tends to generate confusion and friction among those who work within and around the death penalty system. Many political activists working to abolish the death penalty for all offenders are uneasy about research reports raising the possible interpretation that "not enough" female offenders are being executed, at least if we are to level the death penalty's playing field for male and female offenders. The political agendas of others are focused upon revealing the many ways in which women are subjected to unrestrained violence and even death in our society. They appear nervous that revelations about "too few" lawful executions of female offenders might detract from their valid and laudable concern about far, far too many unlawful beatings, rapes, and murders of females.

On the other end of the political spectrum are those resisting efforts to expand women's rights and opportunities, fearing such an expansion may come at the expense of men's prerogatives and advantages. This group may welcome research revealing sex bias against men in any societal arena, using it as a springboard to claim similar bias in other arenas. Their arguments may even go to characterizations of any protected status of women within the death penalty system as yet more evidence of the many comforts women enjoy by remaining in a protected status, even if that status may be a second-class status. One also

¹⁶⁵ KY. REV. STAT. ANN. §§ 532.300–.309 (Michie 1999).

suspects a sense among this group that women should be screened away from the death penalty, or at least “real women” should. Such a group, of course, would exclude lesbians, demonstrably violent women, and others exhibiting unlady-like behavior. They might argue that women such as their mothers, wives, and daughters should be out of harms way, they might argue. The exception, of course, is the wife who poisons or hires someone to kill her husband. That scenario is a little too close to home, they might think, and they may see a need to “send a message” to the wives of America that such behavior is too threatening to be treated less harshly.

This research and its results apparently fuel all of those anxieties and agendas, as well as many more. Admittedly, the author embarked on this research topic over twenty years ago in an effort to see if sex bias does exist in the death penalty system. More and more research can always be done on this topic, but it appears at this juncture that the author has found the answer to that question. However, as in so much academic and scientific research, the most interesting results are on a side issue not the original focus of the research. On the way to finding sources of sex bias, this research has more clearly revealed the death penalty as a masculine sanctuary, uncomfortable with a female capital offender in its midst. Analogies that come to mind are the classic cigar-smoke-filled men’s club, the “boys’ night out” poker game, and (unfortunately) still too many corporate board meetings and law firm partner gatherings. Outright admissions of this discomfort are rare, but simply observing the body language of the men in the room makes it clear.

In a simpler piece written for a quite different audience, the author tried to communicate this perception with a more dramatic and playful question: “If it is heroic to kill the malicious, malevolent male, is it simply brutish to do the same to his twin sister?”¹⁶⁶ Unable (or unwilling) to let my more scholarly voice dispassionately explore my position, I ended on a shrill crescendo:

The comparison to high school football is too obvious to ignore. For many, the football field is one of the last places where real men can take on other real men, intentionally knocking them down, the harder the better. Players celebrate and crowds cheer a particularly violent block or tackle. If the opposing player is down and out for awhile, then this is even stronger evidence of the masculine superiority of the hero who put him there. What happens when a girl plays football on the boys’ team? Do the team’s really tough guys reap the same rewards for knocking *her* down? For causing *her* to be carried off the field? Or, does the sole fact that she is a girl alter both the motivation and the rewards?

....

My three decades of research on this and similar issues have led me to conclude that the death penalty system is the most extreme refuge of *macho* men, both the good guys and the bad guys. Our most highly touted system of justice

¹⁶⁶ Streib, *Sentencing Women*, *supra* note 11, at 25.

appears to be more about insecure middle-age male egos needing to reassure themselves and others of their continuing manhood than it is about the more commonly heard principles of deterrence, justice, retribution, and incapacitation. To bolster their manliness, they need to dispatch the toughest of male opponents; zapping the skinny little guy just doesn't deliver. Needless to say, executing a woman does not give them that masculine rush. To the contrary, it stains them as "guys who hit girls," the ultimate wimps on the playground.¹⁶⁷

Hindsight the morning after typically providing a more level head, I might have chosen less provocative and challenging language—something to the effect of not "tug[ging] on Superman's cape."¹⁶⁸ However, I have not changed my basic conclusion.

Sifting through the 562 cases of executed female offenders throughout our history, as well as at least a portion of the many thousands of cases of female offenders sentenced to death but never executed, leaves a residue on the researcher. Examining the death penalty system and all of its baggage—statutes, case law, jurisprudential arguments, and political rantings—reveals an assumed all-male activity, an exclusively men's hunting club. More clearly, feminine girls and women are simply unwelcome, while those females displaying masculine traits may be allowed to enter.

VI. CONCLUSIONS AND RECOMMENDATIONS

If women are unlikely to be arrested for murder, extremely unlikely to be sentenced to death, and almost never executed, does this necessarily indicate sex bias in the death penalty system? Professor Elizabeth Rapaport, the top scholar in this field, argues that the under-representation of female offenders on death row is actually a discounting of the seriousness of the sort of homicide women typically commit.¹⁶⁹ That is, women's murders are more likely than those of men to be of intimates in domestic violence cases. The criminal justice system tends to treat domestic violence cases less harshly, resulting in fewer death penalties for the offender, whether male or female. Because women are more commonly the victims of domestic violence than the perpetrator, the discounting of such cases actually works against women generally more than it works to their advantage. Professor Rapaport's analysis undoubtedly has merit but seems to explain only part of the differential.

As detailed in this article, about five to ten female offenders receive death sentences annually, compared to almost 300 men, and actual executions of female offenders have been extremely rare over the past century, even if more common since 1998. The majority of death sentences imposed upon female offenders since

¹⁶⁷ *Id.* at 28.

¹⁶⁸ JIM CROCE, *YOU DON'T MESS AROUND WITH JIM* (EMI-Special Markets 1973).

¹⁶⁹ *See, e.g.,* Rapaport, *Equality*, *supra* note 11, and other articles cited therein.

the early 1970s have been reversed on appeal with no execution being imposed, and only fifty-two women remain on death row.¹⁷⁰ Some will be executed, but almost undoubtedly a smaller portion than of the about 3,655 men currently on death row.¹⁷¹ The author's preliminary research on capital punishment of female offenders in other countries suggests a global pattern. The Indian death penalty statute expressly lists the offender's sex as an extenuating circumstance, and the former Soviet and current Russian capital punishment statutes expressly prohibit the death penalty for female offenders.¹⁷² Moreover, reputable news reports of the execution of female offenders worldwide indicate that this practice is rare everywhere.

This article asks first that we recognize the overwhelming evidence of apparent sex bias in the death penalty system in the United States. Given this overwhelming evidence, it falls upon those who would deny it or explain it away to establish that what appears to be is not so. Unless this evidence can be countered convincingly, I recommend several broad actions:

-First, discussions within judicial opinions, legislative halls, political arenas, and scholarly literature should include the premise of sex bias in the death penalty system.

-Second, legislative selection of crimes for capital punishment should consider the possibility of sex bias.

-Third, aggravating and mitigating circumstances included within death penalty statutes should be reviewed for sex bias and, if appropriate, amended to reduce such sex bias.

-Fourth, presumptive sex bias among jurors in capital cases should be reduced through including this issue more centrally in the voir dire, through express inclusion of this issue within the trial judge's charge to the jury, and through a written certification by jurors that sex bias was not a factor.

-Fifth, death penalty statutes should be amended by Gender Justice Acts to address sex bias at post-trial levels.

-Sixth, new legislative initiatives concerning commutation in death penalty cases should include provisions for sex bias issues.

For those of us who work to abolish the death penalty entirely, any effort to make it simply fairer is a less than satisfying pursuit. In exposing the apparent sex bias in the death penalty system, some might even fear that "[a]t worst, it suggests a campaign to exterminate a few more wretched sisters."¹⁷³ While some may fear this "worst" solution, others might see that the sex of the offender, just as race and class and so many other characteristics, is an inappropriate factor in deciding who lives and who dies. However, basic assumptions about men and women, perhaps

¹⁷⁰ See Streib, *Femdeath*, *supra* note 15, at tbl.4.

¹⁷¹ See NAACP, *supra* note 22, at 1.

¹⁷² See generally Streib, *Death Penalty for Female Offenders*, *supra* note 11, at 880.

¹⁷³ This wonderful characterization comes from Rapaport, *The Death Penalty*, *supra* note 11, at 368.

even more than race and class, seem widespread and are unlikely to be countered or even moderated unless put on the table and directly addressed. The most obvious means of doing this is to amend our death penalty statute by recognizing these male and female stereotypes and working to modify the structure of the death penalty system so as to reduce their effect.

Most of the amendments to statutes and agency procedures recommended in this article would be fairly simple to implement, but two reservations must be noted. First, as one of the last safe harbors for the death penalty, the United States faces enormous political pressures from its allies and from the global community to get rid of this practice for all offenders, male or female.¹⁷⁴ If this is on the near horizon, then minor tinkering is not worth the candle. Second, if this article's more revealing observation is true, if the death penalty system is truly more of a masculine sanctuary than a system of justice, then minor tinkering will not prevent the system's agents and agencies from continuing business as usual. Race bias has been demonstrated over and over in the death penalty system, but we have no indication that the system has been able to correct that bias or even to deal with it in a candid and forthright manner. Demonstration of sex bias and system-wide efforts to correct sex bias will likely have the same result. As with race bias, one suspects that fundamental attitudes about appropriate sex roles will not be changed by this article or by a few statutory amendments. However, the exposure of sex bias in the death penalty system peels one more layer off of this jurisprudential onion, admittedly intensifying the odor but nonetheless reducing the size of this odorous system.

¹⁷⁴ See generally Duke University's collection of articles on the ABA's proposed moratorium on the death penalty, compiled into a symposium issue. Symposium, *The ABA's Proposed Moratorium on the Death Penalty*, 61 LAW & CONTEMP. PROBS. 1 (1998).

APPENDIX

STATE AND FEDERAL EXECUTIONS OF FEMALE OFFENDERS SINCE 1900¹⁷⁵

State	Date of Execution	Name	Race	Age at Crime ¹⁷⁶
Alabama ¹⁷⁷	01-24-1930	Gilmore, Selena	Black	[A]
	09-04-1953	Dennison, Earle	White	54
	10-11-1957	Martin, Rhonda Belle	White	48
Arizona ¹⁷⁸	02-21-1930	Dugan, Eva	White	49
Arkansas ¹⁷⁹	05-02-2000	Riggs, Christina Marie	White	26
California ¹⁸⁰	11-21-1941	Spinelli, Eithel Leta Juanita	White	52
	04-11-1947	Peete, Louise	White	58
	06-03-1955	Graham, Barbara	White	32
	08-08-1962	Duncan, Elizabeth Ann	White	58
Delaware ¹⁸¹	06-07-1935	Carey, May H.	White	52
[Federal] ¹⁸²				
Florida ¹⁸³	03-30-1998	Buenoano, Judias	White	54
Georgia ¹⁸⁴	03-05-1945	Baker, Lena	Black	44

¹⁷⁵ The author has compiled an inventory of 562 lawful executions of female offenders, with the first such documented execution occurring in 1632 (Jane Champion; Virginia) and the last as of June, 2001 (Marilyn Kay Plantz; Oklahoma). This appendix provides information concerning only 46 of these executions, those which occurred from January 1, 1900, through June 30, 2001. However, information via footnote is provided state-by-state for the total executions of female offenders and the time period of those executions.

¹⁷⁶ The offender's age at the time of the crime is determined most often from reports stating her age at the time of execution and the date of the crime, allowing one therefore to compute her age at the time of the crime. However, only in rare cases are the offenders' exact birth dates available, so age at the time of crime is usually only an informed estimate. In some cases, insufficient data was available to estimate an exact age, but it was clear that the offender was an adult woman at the time of the crime. In those cases, the symbol [A] has been used to indicate "adult."

¹⁷⁷ Alabama has executed a total of nineteen female offenders, 1825–1957.

¹⁷⁸ Arizona has executed a total of two female offenders, 1865–1930.

¹⁷⁹ Arkansas has executed a total of five female offenders, 1832–2000.

¹⁸⁰ California has executed a total of seven female offenders, 1851–1962.

¹⁸¹ Delaware has executed a total of eight female offenders, 1688–1935.

¹⁸² See the entries under New York (Ethel Rosenberg; 06-19-1953) and Missouri (Bonnie Brown Heady; 12-18-1953).

¹⁸³ Florida has executed a total of three female offenders, 1835–1998.

¹⁸⁴ Georgia has executed a total of twenty-two female offenders, 1735–1945.

Illinois ¹⁸⁵	01-28-1938	Porter, Marie	White	38
Louisiana ¹⁸⁶	02-01-1929	Leoeuf, Ada	White	38
	02-08-1935	Moore, Julia (aka Powers; Williams)	?	[A]
	11-28-1942	Henri, Toni Jo (aka Annie)	White	26
Mississippi ¹⁸⁷	01-13-1922	Perdue, Pattie	Black	[A]
	10-13-1922	Knight, Ann	Black	[A]
	04-29-1937	Holmes, Mary	Black	32
	05-19-1944	Johnson, Mildred Louise	Black	34
Missouri ¹⁸⁸ (federal)	12-18-1953	Heady, Bonnie Brown	White	41
New York ¹⁸⁹	03-29-1909	Farmer, Mary	White	29
	01-12-1928	Snyder, Ruth Brown	White	33
	08-09-1934	Antonio, Anna	White	27
	06-27-1935	Coo, Eva	White	40
	07-16-1936	Creighton, Mary Francis	White	36
	11-16-1944	Fowler, Helen	Black	37
	03-08-1951	Beck, Martha	White	29
(federal)	06-19-1953	Rosenberg, Ethel ¹⁹⁰	White	32
North Carolina ¹⁹¹	01-01-1943	Phillips, Rosana Lightner	Black	25
	12-29-1944	Williams, Bessie May	Black	19
	11-02-1984	Barfield, Velma	White	52
Ohio ¹⁹²	12-07-1938	Hahn, Anna Marie	White	32
	01-15-1954	Dean, Dovie Smarr	White	55
	06-12-1954	Butler, Betty	Black	25
Oklahoma ¹⁹³	07-17-1903	Wright, Dora	Black	[A]
	01-11-2001	Allen, Wanda Jean	Black	29
	05-01-2001	Plantz, Marilyn Kay	White	27
Pennsylvania ¹⁹⁴	02-23-1931	Schroeder, Irene	White	22
	10-14-1946	Sykes, Corrine	Black	22

¹⁸⁵ Illinois has executed a total of two female offenders, 1845–1938.

¹⁸⁶ Louisiana has executed a total of twenty-eight female offenders, 1730–1942.

¹⁸⁷ Mississippi has executed a total of eighteen female offenders, 1833–1944.

¹⁸⁸ Missouri has executed a total of seven female offenders, 1828–1953.

¹⁸⁹ New York has executed a total of forty-two female offenders, 1669–1953.

¹⁹⁰ Ethel Rosenberg's capital crime was espionage, the only one of these twentieth century executions of female offenders which involved a crime other than murder.

¹⁹¹ North Carolina has executed a total of twenty-four female offenders, 1720–1984.

¹⁹² Ohio has executed a total of four female offenders, 1844–1954.

¹⁹³ Oklahoma has executed a total of three female offenders, 1903–2001.

¹⁹⁴ Pennsylvania has executed a total of thirty-two female offenders, 1724–1946.

STATE AND FEDERAL EXECUTIONS OF FEMALE OFFENDERS SINCE 1900
(CONT.)

South Carolina ¹⁹⁵	01-15-1943	Logue, Sue Stidham	White	43
	01-17-1947	Stinette, Rose Marie	Black	49
Texas ¹⁹⁶	02-03-1998	Tucker, Karla Faye	White	38
	02-24-2000	Beets, Betty Lou	White	46
Vermont ¹⁹⁷	12-08-1905	Rogers, Mary Mabel	White	21
Virginia ¹⁹⁸	08-16-1912	Christian, Virginia	Black	17

¹⁹⁵ South Carolina has executed a total of thirty-five female offenders, 1738–1947.

¹⁹⁶ Texas has executed a total of five female offenders, 1854–2000.

¹⁹⁷ Vermont has executed a total of two female offenders, 1883–1905.

¹⁹⁸ Virginia has executed a total of 123 female offenders, 1632–1912, by far the most of any United States jurisdiction.