

5-1-2011

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### Recommended Citation

Jessica Salvucci, *Femininity and the Electric Chair: An Equal Protection Challenge to Texas's Death Penalty Statute*, 31 B.C. Third World L.J. 405 (2011), <http://lawdigitalcommons.bc.edu/twlj/vol31/iss2/7>

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# FEMININITY AND THE ELECTRIC CHAIR: AN EQUAL PROTECTION CHALLENGE TO TEXAS'S DEATH PENALTY STATUTE

JESSICA SALVUCCI\*

**Abstract:** Capital punishment in the United States appears to apply to only one class of citizens—men. Despite their significant proportional commission of homicides, women account for less than one percent of executions in America. This Note evaluates this trend in the context of a Fourteenth Amendment equal protection challenge to capital punishment in Texas, America's staunchest death penalty supporter. It discusses issues of paternalism and gender theory as they relate to the Texas capital punishment statute and its application throughout the legal and political process. Finally, this Note argues that despite a series of constitutional obstacles, the Supreme Court should strike down the Texas death penalty statute based on its invidious gender discrimination.

## INTRODUCTION

In 1974, Doyle Skillern waited in a nearby car as a friend shot and killed an undercover narcotics agent.<sup>1</sup> Eleven years later, he was executed by the state of Texas for the agent's murder.<sup>2</sup> In 1980, Pamela Lynn Perillo robbed a man and strangled him to death after he picked her up as a hitchhiker.<sup>3</sup> Her death sentence was overturned; she is currently serving life in a Texas prison but could be eligible for parole in 2014.<sup>4</sup> At first glance, it seems strange that Skillern was put to death for his peripheral involvement in a homicide, whereas Perillo, who killed a man with her own two hands, escaped with her life and may walk free

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\* Comment Editor, *BOSTON COLLEGE THIRD WORLD LAW JOURNAL* (2010–2011).

<sup>1</sup> *Texan Executed for Killing*, L.A. TIMES, Jan. 16, 1985, at 2.

<sup>2</sup> *Id.*

<sup>3</sup> Bill Murphy, *Court's Ruling Favors Woman on Death Row*, HOUSTON CHRON., Mar. 3, 2000, at A33.

<sup>4</sup> *Fate of Texas Women's Death Row Inmate May Be in Governor's Hands*, KWTX (Nov. 30, 2004), <http://www.kwtx.com/news/headlines/1111972.html>.

in a few years.<sup>5</sup> It would, however, be more unusual if Perillo had been executed.<sup>6</sup>

There are more women awaiting execution in the United States than in any other country in the world.<sup>7</sup> Although this statistic may seem to indicate that American women are sentenced to death at an alarming rate, women actually account for less than one percent of people executed in the United States.<sup>8</sup> Since the reinstatement of the death penalty in 1976, only twelve women have been executed.<sup>9</sup> Three of these women were executed in Texas.<sup>10</sup> Texas tends to have the reputation as the most “bloodthirsty” death penalty state and has executed more people than any other state in the nation.<sup>11</sup> But even Texas fails to apply capital punishment equally to its male and female offenders.<sup>12</sup>

<sup>5</sup> See *id.*; *Texan Executed for Killing*, *supra* note 1.

<sup>6</sup> See, e.g., *Women and the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/women-and-death-penalty> (last visited May 8, 2011) (showing that only twelve women have been executed since 1976).

<sup>7</sup> Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN'S L.J. 283, 314 (1996).

<sup>8</sup> See *id.*; Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 609 (2006).

<sup>9</sup> See *Women and the Death Penalty*, *supra* note 6. Since 1976, 1235 men have been executed. *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions> (select “m” under “Gender of Person Executed”; then follow “Search by Details” hyperlink) (last visited May 8, 2011); *Women and the Death Penalty*, *supra* note 6. The year 1976 is often used as the marker for “modern” capital punishment because of the Supreme Court’s decision in *Furman v. Georgia*, which effectively placed a moratorium on capital punishment until 1976. See 408 U.S. 238, 239–40 (1972); Streib, *supra* note 8, at 621–22. *Furman* effectively invalidated all death penalty statutes and forced states to reevaluate their capital punishment statutes for constitutionality. See Streib, *supra* note 8, at 621–22. The Court eventually approved certain state death penalty statutes in *Gregg v. Georgia*, thus lifting the moratorium. See 428 U.S. 153, 169 (1976); Streib, *supra* note 8, at 621–22.

<sup>10</sup> See *Women and the Death Penalty*, *supra* note 6 (showing that Texas is tied with Oklahoma for the highest number of women executed).

<sup>11</sup> See KATHLEEN A. O’ SHEA, *WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–1998*, at 329 (1999) (calling Texas the “Death Penalty Capital of the Western World”); Debra Cassens Weiss, *Texas High Court Judge Defends Execution Order: We’re Not ‘Bloodthirsty,’* A.B.A. J. (June 19, 2008), [http://www.abajournal.com/news/article/texas\\_high\\_court\\_judge\\_defends\\_execution\\_order\\_were\\_not\\_bloodthirsty](http://www.abajournal.com/news/article/texas_high_court_judge_defends_execution_order_were_not_bloodthirsty) (quoting Judge Cheryl Johnson’s statement that Texas courts are “always accused of being callous and bloodthirsty”); *Women and the Death Penalty*, *supra* note 6 (showing that Texas and Oklahoma have each executed three women since 1976, more than any other state).

<sup>12</sup> See Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 585 (2000).

Since the reinstatement of the death penalty, Texas has executed 464 men and only three women.<sup>13</sup>

The gender disparity in Texas's executions is not due to a mere disparity in the commission of homicides, but is rather due to far more complicated factors.<sup>14</sup> Although women commit nearly ten percent of death-eligible crimes, they almost never receive the state's ultimate punishment.<sup>15</sup> America's paternalistic view of women has shaped Texas's views on moral culpability and produced a capital punishment statute that punishes "masculine" rather than "feminine" crimes.<sup>16</sup> If women do become eligible for death sentences, this paternalism continues to provide protection to female defendants as they are charged, tried, sentenced, and reviewed for clemency.<sup>17</sup> Women lose this protection only if they stray from feminine norms or breach their duties as wives, mothers, and caretakers.<sup>18</sup>

This Note will demonstrate that Texas applies its death penalty statute in a way that discriminates against men and violates the Equal Protection Clause of the Fourteenth Amendment. Part I of this Note will give a brief overview of the history of the death penalty and the American government's paternalistic treatment of women. It will also explore two predominant theories regarding gender and the death penalty and explain why so few women are given death sentences. Part II will evaluate Texas's death penalty statute by explaining the gender bias inherent in its aggravating factors and mitigating circumstances. Part III will ex-

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<sup>13</sup> See *State by State Database*, DEATH PENALTY INFO. CENTER, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited May 8, 2011); *Women and the Death Penalty*, *supra* note 6.

<sup>14</sup> See, e.g., Rapaport, *supra* note 12, at 585; Streib, *supra* note 8, at 609 (stating that women receive favorable treatment within the capital punishment system); *Women and the Death Penalty*, *supra* note 6.

<sup>15</sup> See *Women and the Death Penalty*, *supra* note 6 (showing that women account for ten percent of murder arrests but less than one percent of executions).

<sup>16</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010); Janice L. Kopec, Student Article, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 CAP. DEF. J. 353, 355 (2003) (explaining that men tend to commit willful killings during the commission of robbery, rape, or abduction, whereas women tend to kill family members and loved ones in the heat of passion).

<sup>17</sup> See Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 453 (2000) (noting that according to a 1989 study, females received more lenient sentences, even compared with males who committed equivalent crimes); S. Carolina Confronts Death Penalty for Women, AUGUSTA CHRON., June 26, 2006, at B8 (explaining that prosecutors often shy away from charging women with capital crimes). See generally Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967 (2001) (explaining that women receive favorable treatment during clemency proceedings).

<sup>18</sup> See Shapiro, *supra* note 17, at 459; Kopec, *supra* note 16, at 358.

plore gender discrimination throughout the processes of charging, trying, and sentencing a capital crime. It will also discuss gender bias within considerations of clemency. Part IV will profile the three women that Texas has executed since 1976 and attempt to explain why they have been singled out as the only women deserving of execution in modern Texan history. Part V will argue that the Texas capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment and discuss and refute oppositions to this argument.

## I. HISTORY AND GENDER THEORY

### A. History

Since the colonial period in America, more than 20,000 people have been executed by the federal and state governments.<sup>19</sup> Only about 400 of these people, however, have been women.<sup>20</sup> The first legal execution in the United States took place in 1608, but the first execution of a woman did not take place until 1632.<sup>21</sup> Even during a time when executions were commonplace entertainment, the public still found something abhorrent about executing women.<sup>22</sup> In the 1700s, for example, it was standard practice in England to hang and burn immoral criminals.<sup>23</sup> When Margaret Sullivan suffered this fate, however, a local newspaper noted, "There is something inhuman in burning a woman."<sup>24</sup>

For many years, it was considered acceptable and even natural to treat women more leniently when sentencing them for their crimes.<sup>25</sup> For example, men were historically given death sentences for a variety of offenses, including petty theft, while women were primarily executed only for more serious crimes such as homicide or witchcraft.<sup>26</sup> Society

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<sup>19</sup> Thad Rueter, *Why Women Aren't Executed: Gender Bias and the Death Penalty*, 23 HUM. RTS. 10, 10 (1996).

<sup>20</sup> *See id.*

<sup>21</sup> See Harry Greenlee & Shelia P. Greenlee, *Women and the Death Penalty: Racial Disparities and Differences*, 14 WM. & MARY J. WOMEN & L. 319, 320 (2008). The first woman executed in the United States was Jane Champion of Virginia; her crime is unknown. O'SHEA, *supra* note 11, at 4.

<sup>22</sup> *See* O'SHEA, *supra* note 11, at 2-3.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 3. This sympathy did not extend to women of color, especially African American women, who were executed frequently. *See* Kopec, *supra* note 16, at 353-54 (showing that forty-seven percent of women executed throughout American history were black).

<sup>25</sup> *See* Kopec, *supra* note 16, at 353.

<sup>26</sup> *See* Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75

saw women as feeble creatures that needed to be protected and generally spared them from state-imposed death in the same way women were excused from military service.<sup>27</sup> As one Oregon governor stated after granting clemency to a condemned woman, “When I saw that woman in the penitentiary (the only one there), it made me sick, and so I turned her loose.”<sup>28</sup>

Women who violated their sacred roles as wives and mothers by killing their husbands or children were the exception to the societal unwillingness to execute women.<sup>29</sup> Under English common law, women who killed their husbands could be tried not only for murder but also for treason.<sup>30</sup> Traditionally, women are also punished more harshly than men for the murder of their own offspring.<sup>31</sup> In colonial America, for example, any non-slave woman who killed her illegitimate child for the purposes of concealment would automatically receive a death sentence.<sup>32</sup>

Today, women and men do not receive facially different treatment when being tried, convicted, and sentenced for capital crimes.<sup>33</sup> Nevertheless, many of the historical viewpoints and themes discussed above continue to be an implicit part of the death penalty.<sup>34</sup> Many capital punishment statutes, including the one in Texas, have a disparate effect favoring female offenders.<sup>35</sup> Women also tend to receive more lenient treatment from prosecutors, juries, judges, and politicians.<sup>36</sup> Regard-

TEX. L. REV. 1413, 1430 (1997) (noting that most women executed throughout American history were convicted of homicide, though seven percent were executed for witchcraft); Kopec, *supra* note 16, at 353–54.

<sup>27</sup> See Kopec, *supra* note 16, at 354–55. Some countries, including many former Soviet Bloc nations, completely exempt women from capital punishment or provide mitigation for pregnancy or motherhood. Streib, *supra* note 8, at 616.

<sup>28</sup> See Rapaport, *supra* note 12, at 588 (quoting Governor West’s 1908 statement).

<sup>29</sup> See Schmall, *supra* note 7, at 304.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See Rapaport, *supra* note 12, at 589; *e.g.*, TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010).

<sup>34</sup> See Schmall, *supra* note 7, at 304 (detailing the harsh punishments historically given to women who killed their husbands or children); Kopec, *supra* note 16, at 358–63 (showing that women continue to be most harshly punished for acting contrary to their roles as wives and mothers).

<sup>35</sup> See § 19.03; Kopec, *supra* note 16, at 355; *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6.

<sup>36</sup> See, *e.g.*, Shapiro, *supra* note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Streib, *supra* note 8, at 628 (explaining that politicians are hesitant to advocate for gender equality in the death penalty setting); Kopec, *supra* note 16, at 356–57 (stating that judges and juries are more likely to view

less, the protections afforded by womanhood can be lost if a woman violates her gender-specific role as a wife, mother, and caretaker.<sup>37</sup> The two sides of this dichotomy have become known as the “chivalry theory” and the “evil woman theory.”<sup>38</sup>

### B. *The Chivalry Theory*

As discussed above, the criminal justice system has long treated women leniently.<sup>39</sup> This is due in part to the paternalistic view that women are weak and passive and thus need male protection.<sup>40</sup> A classic example of paternalism is seen in the case of Ethel Spinelli, a California woman who sat on death row in the 1940s.<sup>41</sup> Before Spinelli’s pending execution, thirty male inmates petitioned the governor to commute her sentence and offered to draw straws and be sent to the gas chamber in her place.<sup>42</sup> The inmates argued,

Mrs. Spinelli’s execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman would hurt California in the eyes of the world; that both the law and the will of the people were against the execution; that Mrs. Spinelli, as the mother of three children, should have special consideration; that California’s proud record of never having executed a woman should not be spoiled.<sup>43</sup>

Women receive more sympathy than men, and their crimes are often excused “as aberrations, caused by a mental defect or some weak-

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women as sympathetic and capable of rehabilitation); *S. Carolina Confronts Death Penalty for Women*, *supra* note 17 (explaining that prosecutors often shy away from charging women with capital crimes).

<sup>37</sup> See, e.g., Carroll, *supra* note 26, at 1422; Kopec, *supra* note 16, at 358.

<sup>38</sup> Elizabeth Marie Reza, Note, *Gender Bias in North Carolina’s Death Penalty*, 12 DUKE J. GENDER L. & POL’Y 179, 182–83 (2005).

<sup>39</sup> See *supra* Part I.A.

<sup>40</sup> See Alan Rogers, “Success—At Long Last”: *The Abolition of the Death Penalty in Massachusetts, 1928–1984*, 22 B.C. THIRD WORLD L.J. 281, 346 (2002) (showing that the Commonwealth of Massachusetts supported the death penalty in part because of “women’s ‘desperate need’ for protection” (quoting Commonwealth’s Supplemental Brief at 6, 8, 10, 35, Commonwealth v. O’Neal, 339 N.E. 2d 676 (Mass. 1975) (on file at the Massachusetts SJC Archives))); Shapiro, *supra* note 17, at 456.

<sup>41</sup> See Reza, *supra* note 38, at 183. Spinelli was convicted for ordering the murder of a fellow gang member. O’SHEA, *supra* note 11, at 69.

<sup>42</sup> Shapiro, *supra* note 17, at 457.

<sup>43</sup> *Id.* The governor rejected the inmates’ petition and Spinelli was executed in California’s gas chamber on November 21, 1941. O’SHEA, *supra* note 11, at 68–69.

ness of character or by circumstances beyond their control.”<sup>44</sup> Under the chivalry theory, women are helpless and, like children, the mentally retarded, and the insane, they should not be punished with death.<sup>45</sup>

### C. *The Evil Woman Theory*

Although paternalism affords women a certain amount of protection, a woman can lose this protection if she strays from expected feminine norms.<sup>46</sup> When a woman’s crime violates her role as a wife, mother, or caretaker, a jury may treat her even more harshly than it would a man.<sup>47</sup> Often, being a bad wife or mother is what actually condemns a woman.<sup>48</sup> For example, although domestic homicides typically are considered less serious than other killings, more than half of the women on death row in 2005 were there for killing family members and lovers.<sup>49</sup> In fact, eight of the twelve women executed in the modern era were convicted of killing their husbands, lovers, or children.<sup>50</sup>

These two theories of crime and gender create underlying themes in capital punishment law and practice in Texas.<sup>51</sup> Paternalistic roots

<sup>44</sup> Shapiro, *supra* note 17, at 469.

<sup>45</sup> See Rueter, *supra* note 19, at 11; see also *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005) (holding that the execution of individuals who were under eighteen years of age at the time they committed a capital crime was unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of individuals with mental retardation was unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding that the execution of a person who is insane was unconstitutional).

<sup>46</sup> See Carroll, *supra* note 26, at 1422; Kopec, *supra* note 16, at 358.

<sup>47</sup> See Schmall, *supra* note 7, at 310.

<sup>48</sup> See Carroll, *supra* note 26, at 1422; Kopec, *supra* note 16, at 358.

<sup>49</sup> See Streib, *supra* note 8, at 615, 626. Within the category of “family murder,” another category has emerged for women who kill family members for economic gain, a motivation that allows prosecutors to paint them as “black widows.” See MARY WELEK ATWELL, *WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT* 110 (2007) (detailing the trial of Betty Lou Beets, in which the defendant was portrayed as a black widow serial killer who preyed upon her husbands for their money); Rapaport, *supra* note 12, at 583; Schmall, *supra* note 7, at 302.

<sup>50</sup> See *Women and the Death Penalty*, *supra* note 6. This includes Velma Barfield (convicted of poisoning her boyfriend to cover up incidences of theft); Judy Buenoano (convicted of murdering her husband for insurance purposes); Betty Lou Beets (convicted of murdering her husband for insurance purposes); Christina Riggs (convicted of smothering her two young children); Wanda Jean Allen (convicted of murdering her lesbian lover); Marilyn Plantz (convicted of hiring her boyfriend to kill her husband); Frances Newton (convicted of murdering her husband and children); and Teresa Lewis (convicted of murdering her husband and stepson for insurance purposes). See generally ATWELL, *supra* note 49 (discussing the twelve women executed in the modern era and their crimes); *Women and the Death Penalty*, *supra* note 6.

<sup>51</sup> See Reza, *supra* note 38, at 182–86 (explaining the chivalry and evil woman theories and discussing gender bias in modern capital statutes).



have shaped the Texas death penalty statute, characterizing crimes committed more often by men as the most deserving of harsh punishment and permitting juries to find feminine qualities as the most deserving of mercy—a bias that continues throughout the capital punishment process.<sup>52</sup>

## II. STATUTORY BIAS

Although factoring gender into the scheme of criminal punishment has been commonplace in American history, since the Supreme Court's decision in *Furman v. Georgia*, favoring or disfavoring either sex in a sentencing scheme violates the Equal Protection Clause of the Fourteenth Amendment.<sup>53</sup> Therefore, death penalty statutes no longer contain any mention or consideration of gender.<sup>54</sup> Despite their facial neutrality, however, most capital statutes, including the one in Texas, are drafted in ways that make it more likely that men will be charged with capital crimes.<sup>55</sup>

State legislatures are responsible for deciding which crimes should be death penalty-eligible.<sup>56</sup> In Texas, one such crime is capital murder, which includes intentional killing, intentional acts which are dangerous to human life, and felony murder.<sup>57</sup> To further narrow these death-

<sup>52</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010); Reza, *supra* note 38, at 182–86; *infra* Part II. See generally Rapaport, *supra* note 17 (explaining the impact of gender on clemency decisions).

<sup>53</sup> See *Furman v. Georgia*, 408 U.S. 238, 238 (1972); Rapaport, *supra* note 12, at 588–89. *Furman v. Georgia* was a consolidation of three death penalty cases. 408 U.S. at 238 (consolidating *Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*). The Court found that the imposition of capital punishment in each of the three cases violated the Eighth and Fourteenth Amendments. *Id.* Each of the five justices in support of the judgment filed his own opinion and some justices suggested that the unconstitutionality was based on the death penalty's arbitrary or prejudicial application. See *id.* at 242 (Douglas, J., concurring) (noting that the death penalty violates the Constitution if it allows for prejudicial application); *id.* at 310 (Stewart, J., concurring) (calling imposition of the death penalty “wanton” and “freakish”).

<sup>54</sup> See Streib, *supra* note 8, at 616. Gender is an express consideration in some state capital punishment statutes but only with regards to pregnant women. *Id.*

<sup>55</sup> See § 19.03; Streib, *supra* note 8, at 616; Kopec, *supra* note 16, at 355.

<sup>56</sup> See Streib, *supra* note 8, at 615.

<sup>57</sup> § 19.02(b).

A person commits an offense if he:

- (1) intentionally or knowingly causes the death of an individual;
- (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
- (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to

eligible crimes, the Texas statute includes several aggravating factors.<sup>58</sup> Aggravating factors are indicators of blameworthiness, and a finding of at least one aggravating factor is required for a death sentence.<sup>59</sup>

Many legislatures also include mitigating factors in their death penalty statutes.<sup>60</sup> Mitigating factors are circumstances that should cause a jury to afford a certain amount of leniency to a defendant and can justify a sentence of life imprisonment for an offender who might otherwise receive the death penalty.<sup>61</sup> Interestingly, many of the aggravating factors in capital punishment statutes apply disproportionately to men, and many of the mitigating circumstances apply disproportionately to women.<sup>62</sup>

### A. Aggravating Factors

Texas's death penalty statute includes the following aggravating factors: murder of a public safety officer or firefighter in the line of duty; murder during the commission of specified felonies (kidnapping, burglary, robbery, aggravated rape, arson, and terroristic threat); murder for hire; multiple murders; murder during a prison escape; murder of a correctional officer; murder of a judge; murder by a state prison inmate who is serving a lifetime sentence for certain offenses; and murder of an individual under six years of age.<sup>63</sup> All of these factors,

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commit an act clearly dangerous to human life that causes the death of an individual.

*Id.* One who commits murder as defined in § 19.02(b) is eligible for the death penalty only if at least one aggravating circumstance is present. *See* §§ 12.31, 19.03.

<sup>58</sup> *See* § 19.03; Reza, *supra* note 38, at 185–86; *infra* Part II.A.

<sup>59</sup> *See* Streib, *supra* note 8, at 618.

<sup>60</sup> *See id.*; *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty> (last visited May 8, 2011).

<sup>61</sup> *See* Streib, *supra* note 8, at 618 (noting that juries find two common mitigating factors—acting under duress or emotional disturbance and acting under the substantial domination of another—more often in women's cases).

<sup>62</sup> *See id.* at 616–19 (discussing the disparate impact of aggravating and mitigating circumstances in death penalty statutes).

<sup>63</sup> § 19.03(a). The Texas Penal Code states:

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1),(3),(4),(5) or (6);

with the exception of murder of an individual under six years of age, apply predominantly to crimes committed by male defendants.<sup>64</sup>

The commission of felony murder, for example, is a commonly applied aggravating factor both nationally and in Texas.<sup>65</sup> Nearly eighty percent of inmates on death row in the United States received their sentences after felony murder convictions.<sup>66</sup> Women, however, commit only six percent of felony murders, a number out of proportion with their percentage of murder arrests generally.<sup>67</sup>

Another commonly occurring aggravating factor in Texas is the commission of murder for hire.<sup>68</sup> Regardless of the gender of the hirer, men are almost always the contractors in murder for hire cases.<sup>69</sup> Yet another aggravating factor with a statistical gender disparity is the commission of multiple murders.<sup>70</sup> While women commit ten percent of

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:  
 (A) who is employed in the operation of the penal institution; or  
 (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:  
 (A) while incarcerated for an offense under this section or Section 19.02, murders another; or  
 (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:  
 (A) during the same criminal transaction; or  
 (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under six years of age; or

(9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

*Id.*

<sup>64</sup> See *infra* notes 65–75 and accompanying text.

<sup>65</sup> See Streib, *supra* note 8, at 617; *Crimes Punishable by the Death Penalty*, *supra* note 60 (showing that felony murders are death-eligible crimes under most state laws).

<sup>66</sup> See Kopec, *supra* note 16, at 355.

<sup>67</sup> See *id.*; *Women and the Death Penalty*, *supra* note 6 (showing that women account for ten percent of murder arrests).

<sup>68</sup> See § 19.03(a)(3); Streib, *supra* note 8, at 616.

<sup>69</sup> See Streib, *supra* note 8, at 616.

<sup>70</sup> See Jack Broom, *Death Penalty Rare for Women*, SEATTLE TIMES, Dec. 30, 2007, at B1.

murders generally, they commit only five percent of multiple murders.<sup>71</sup>

Finally, the fact that women are less likely than men to have criminal histories impacts several of the Texas aggravating factors, such as killing by a lifetime inmate, killing during a prison escape, or killing of a correctional officer or judge.<sup>72</sup> Typically, female killers have not had the prior experience with the penal system necessary to satisfy these factors.<sup>73</sup> Rather, as discussed above, female offenders are most likely to commit domestic homicides, killing their husbands, lovers, relatives, or children.<sup>74</sup> Under most current statutory schemes, these domestic homicides are seen as less serious than other types of murders (including felony murder).<sup>75</sup>

### B. *Mitigating Circumstances*

Mitigating circumstances are essentially the opposite of aggravating factors because they provide guidance to juries about what makes offenders deserve sympathy and leniency.<sup>76</sup> Most mitigating circumstances also seem to provide more protection to women than they do to men.<sup>77</sup> For example, one common mitigating circumstance is the existence of “extreme mental or emotional disturbance,” a trait more often associated with women than men.<sup>78</sup> Another consideration is whether the defendant is under the “substantial domination” of another person.<sup>79</sup> Juries commonly apply this factor to women because many jurors

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<sup>71</sup> *Id.*

<sup>72</sup> See § 19.03; Streib, *supra* note 8, at 617–18.

<sup>73</sup> See Streib, *supra* note 8, at 617–18, 626.

<sup>74</sup> See *id.* The Texas Penal Code permits leniency in punishment during a capital case if the offender acts “under the immediate influence of sudden passion.” § 19.02(d). Domestic homicides often fall into this category. See Streib, *supra* note 8, at 617–18.

<sup>75</sup> See Streib, *supra* note 8, at 615. Defendants who kill family members are punished less harshly than defendants who kill non-family members. See Schmall, *supra* note 7, at 312. Interestingly, it also seems that domestic homicides where the victim is a woman are seen as less serious than domestic homicides where the victim is a man. See *id.* Men who kill their romantic partners are less likely to be charged with first or second degree murder than women who kill their husbands or lovers. *Id.* This reinforces the evil woman theory and makes a frightening statement about the public acceptance of traditional domestic violence. See *id.*; *supra* Part I.C.

<sup>76</sup> See Streib, *supra* note 8, at 618–19.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* (“[J]udges and juries generally are more likely to find duress or emotional disturbance for female offenders than for male offenders in homicide cases.”).

<sup>79</sup> *Id.*

assume that women commit crimes only because of their commitments to their husbands or lovers.<sup>80</sup>

The Texas Penal Code, however, does not lay out specific mitigating factors.<sup>81</sup> Instead, it contains a “catch-all” provision that allows a jury to consider any and all characteristics of a particular defendant when deciding whether to sentence that defendant to death.<sup>82</sup> Although seemingly innocuous, such catch-all provisions also discriminate against men because “[j]udges and juries generally are more likely to find sympathetic factors in the lives and backgrounds of women than of men.”<sup>83</sup> Although this may be explained partially by the reluctance of male defendants to expose vulnerable or sympathetic aspects of their lives, the fact that women receive greater public empathy is undeniable.<sup>84</sup> In addition, judges and juries are more likely to see women as capable of rehabilitation, an element that often factors into a sentencing decision.<sup>85</sup>

### III. BIAS WITHIN THE LEGAL SYSTEM

Assuming, *arguendo*, that the Texas death penalty statute is valid on its face, the gender bias inherent in its application may make it un-

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<sup>80</sup> See Schmall, *supra* note 7, at 306.

<sup>81</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010). Many states no longer limit a jury to a specific list of mitigating factors because after the Supreme Court decision in *Lockett v. Ohio*, an individualized determination of mitigating factors is constitutionally required. 438 U.S. 586, 608–09 (1978). Interestingly, *Lockett*, the defendant, was female, a factor that the Supreme Court may have consciously or unconsciously wanted a jury to be able to consider. See *id.* at 589.

<sup>82</sup> See TEX. CODE CRIM. PROC. ANN. art. 37.071(e)(1) (West 2006). A capital jury must decide

[w]hether, taking into consideration all of the evidence, including circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

*Id.*

<sup>83</sup> See Streib, *supra* note 8, at 619. For example, after the passage of the Violence Against Women Act in 1994, female defendants are able to introduce evidence of battered women’s syndrome during a presentation of mitigating circumstances. O’SHEA, *supra* note 11, at 17. More than half of the women on death row in 1999 had been victims of abuse. See *id.*

<sup>84</sup> See Schmall, *supra* note 7, at 288–89 (explaining that female victims who had abusive childhoods are afforded more sympathy than male victims); Streib, *supra* note 8, at 619 (noting the unwillingness of male defendants to expose sympathetic factors).

<sup>85</sup> See Kopec, *supra* note 16, at 356.

constitutional.<sup>86</sup> There is overt evidence of gender discrimination throughout all stages of a capital case in Texas—from the decision to prosecute through the trial, sentencing, and clemency proceedings.<sup>87</sup>

### A. *Charging a Defendant with a Capital Crime*

Before a jury is faced with the difficulty of hearing a capital case, the district attorney's office must decide whether to even seek the death penalty.<sup>88</sup> For many prosecutors, this decision comes down to whether the case is winnable, an evaluation that can automatically eliminate some female defendants.<sup>89</sup> "Almost all prosecutors think about their odds of winning the death penalty case . . . and if the defendant is a woman, then the odds are much less."<sup>90</sup> Therefore, female defendants are at an advantage before the trial even begins.<sup>91</sup>

Furthermore, a prosecutor's decision may be influenced by the public because "[t]he decision to seek the death penalty is often tied to politics and community outrage rather than to the heinousness of the homicide."<sup>92</sup> The public tends to have a paternalistic attitude towards women who remain in their stereotypical roles, which may protect women from community outrage and thus from the most serious penalties.<sup>93</sup>

### B. *The Trial and Sentencing*

Not only do female defendants benefit from a lower likelihood of being charged with capital crimes, but female defendants also use emo-

<sup>86</sup> See, e.g., *Williams v. Currie*, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000) (finding unconstitutional gender bias against a male co-defendant during the trial and sentencing stages of a murder case).

<sup>87</sup> See, e.g., Shapiro, *supra* note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Kopec, *supra* note 16, at 356 (noting that judges and juries are more likely to view women as sympathetic and capable of rehabilitation); *S. Carolina Confronts Death Penalty for Women*, *supra* note 17. See generally Rapaport, *supra* note 17 (discussing gender bias in governors' decisions to grant clemency).

<sup>88</sup> See O'SHEA, *supra* note 11, at 23 (noting that the district attorney holds the power to decide whether to charge a defendant with first-degree murder, offer a plea bargain, submit a first-degree murder charge to a jury, ask for a death sentence, affirm the conviction of a death sentence, and execute a death sentence).

<sup>89</sup> See *S. Carolina Confronts Death Penalty for Women*, *supra* note 17.

<sup>90</sup> *Id.* (quoting a statement by Professor Victor L. Streib).

<sup>91</sup> See *id.*

<sup>92</sup> Amy L. Edwards & Susan Jacobson, *Few Women Face Execution—But Will Casey Anthony?*, ORLANDO SENTINEL, Oct. 16, 2008, at A1 (quoting Richard Dieter, Executive Director of the Death Penalty Information Center).

<sup>93</sup> See *id.*; *supra* Part I.B.

tional tactics to gain the sympathy of juries in the courtroom.<sup>94</sup> Many defense attorneys counsel their female clients to cry profusely on the stand, to shake uncontrollably, or to hang their heads in shame.<sup>95</sup> Portraying women as damaged and fragile can be a strong defense tactic because it “lumps women in with the retarded and children by implying that they can’t control their own actions.”<sup>96</sup> For example, women who kill their abusive spouses are represented as helpless victims.<sup>97</sup> Another tactic is to portray a female defendant as traditionally feminine, especially as a mother or grandmother.<sup>98</sup> Even supposedly impartial judges admit to treating women with more leniency and mercy.<sup>99</sup>

Furthermore, mothers and grandmothers defy the typical image of brute murderers and make it difficult for a jury to reconcile these two conflicting images.<sup>100</sup> For example, Dorothea Puente was a grandmother who lived in an adorable home and grew rhododendrons in her front yard when the police found seven corpses buried on her property.<sup>101</sup> Puente had killed the elderly tenants that lived in her boarding house in order to collect their government checks, but she narrowly escaped the death penalty, some say due to her gender and age.<sup>102</sup>

In order to obtain a death sentence, prosecutors must overcome this gender hurdle.<sup>103</sup> One prosecutorial tactic is to “de-feminize” defendants by portraying them as lesbians or gang leaders.<sup>104</sup> In fact, “lesbians are also convicted and sentenced to death at disproportionately high rates” and at least two of the twelve women executed since 1976

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<sup>94</sup> See Rueter, *supra* note 19, at 11; Jack Elliott Jr., *Women on Death Row Are Rare: Three Miss. Inmates Facing Execution for Murder Convictions*, COMM. APPEAL, Oct. 9, 2007, at B7 (“[D]efense attorneys go to great lengths to make sure jurors will be sympathetic [to female defendants].”).

<sup>95</sup> See Rueter, *supra* note 19, at 11.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See, e.g., Elliott, *supra* note 94; see also Schmall, *supra* note 7, at 314 (“[S]ociety doesn’t want to be reminded that mothers and grandmothers are destined to die against their will.” (quoting Lane Nelson, *Death Watch: Women on the Row*, ANGOLITE, Sept.-Oct. 1995, at 17)).

<sup>99</sup> See Shapiro, *supra* note 17, at 456.

<sup>100</sup> See Scott Smith, *Could Gender Spare Huckaby?: Death Penalty Seldom Meted Out to Women*, RECORD (Stockton, Cal.) (Sept. 20, 2009), [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20090920/A\\_NEWS/909200310/-1/NEWSMAP](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20090920/A_NEWS/909200310/-1/NEWSMAP).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See Schmall, *supra* note 7, at 314 (noting that juries have trouble convicting a woman if she is a mother, a widow, attractive, or if she cries on the stand).

<sup>104</sup> See Rueter, *supra* note 19, at 11.

were gay.<sup>105</sup> Furthermore, jurors respond to de-feminization attempts more often when the defendant is an ethnic minority; black women account for two-thirds of executions since the 1700s.<sup>106</sup> Finally, the most popular way to de-feminize a female offender is to show that she has violated her duties as a wife, mother, and caretaker.<sup>107</sup> Juries tend to be more comfortable convicting and sentencing women who have strayed from their expected roles in society.<sup>108</sup>

### C. Clemency and Commutation

In 1981, Guinevere Garcia confessed to the murder of her infant daughter and received a ten-year prison sentence.<sup>109</sup> Four months after her release, she killed her husband and received a death sentence.<sup>110</sup> Garcia refused to appeal and rejected all efforts and assistance from public interest groups.<sup>111</sup> Despite her efforts, she was eventually saved.<sup>112</sup> Mere hours prior to her scheduled execution, Illinois Governor Jim Edgar commuted Garcia's sentence to life in prison.<sup>113</sup> This was his first use of clemency in his five years in office.<sup>114</sup>

While Texas governors rarely grant clemency, even Texas governors can feel trepidation when sending a woman to her death.<sup>115</sup> Be-

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<sup>105</sup> See Shapiro, *supra* note 17, at 459; *Women and the Death Penalty*, *supra* note 6. Wanda Jean Allen was executed in 2001 after killing her gay lover in front of a police station. See Kopec, *supra* note 16, at 361–62. In 2002, Aileen Wuornos, a former prostitute, was executed for the murders of six of her “customers.” *Id.* at 362–63. Wuornos’s lesbian lover was used as the prosecution’s chief witness against her. *Id.* Wuornos’s case received a large amount of media attention—the movie *Monster*, starring Charlize Theron, tells her story. See Streib, *supra* note 8, at 611. For both Allen and Wuornos, sexuality played a prominent role during trial, indicating that women are punished more harshly for straying from gender expectations with regards to sexuality. See Kopec, *supra* note 16, at 361–63.

<sup>106</sup> See Shapiro, *supra* note 17, at 458.

<sup>107</sup> See *id.* at 459; Kopec, *supra* note 16, at 358.

<sup>108</sup> See Shapiro, *supra* note 17, at 458; Kopec, *supra* note 16, at 358.

<sup>109</sup> Schmall, *supra* note 7, at 294–96.

<sup>110</sup> See *id.*

<sup>111</sup> See Rueter, *supra* note 19, at 10; Schmall, *supra* note 7, at 296.

<sup>112</sup> Schmall, *supra* note 7, at 285. In a tape-recorded message to the governor, Garcia pleaded: “Do not consider this petition based on the fact that I am a woman. If you grant this petition, you are sending a message to every woman in this state that the death penalty applies only to men.” *Id.* at 286.

<sup>113</sup> See Rueter, *supra* note 19, at 10.

<sup>114</sup> *Id.*

<sup>115</sup> See Lise Olsen, *Perry Uses Clemency Sparingly on Death Row: Governor Has Never Called Off an Execution on a Claim of Innocence*, HOUSTON CHRON., Oct. 18, 2009, at A1; see also GEORGE W. BUSH, *A CHARGE TO KEEP: MY JOURNEY TO THE WHITE HOUSE* 154 (2001). In his first nine years in office, Governor Perry of Texas granted only one reprieve for a death



fore the execution of Karla Faye Tucker, former governor George W. Bush received desperate pleas to spare her life.<sup>116</sup> Governor Bush refused to commute her sentence and used the opportunity to make a statement about the equal application of the death penalty.<sup>117</sup> He said, “When I was sworn in as the Governor of Texas, I took an oath of office to uphold the laws of our state, including the death penalty. My responsibility is to ensure our laws are enforced fairly and evenly without preference or special treatment . . . .”<sup>118</sup> Bush’s spokeswoman, Karen Hughes, further stated that “[t]he gender of the murderer did not make any difference to the victims” in an attempt to indicate that the governor made decisions without regard to the gender of the accused.<sup>119</sup>

Despite his seemingly gender-blind view of the death penalty, Bush later admitted in his autobiography that reading the above statement was “one of the hardest things” he had ever done and that awaiting Tucker’s execution “felt like a huge piece of concrete was crushing me.”<sup>120</sup> As governor of Texas, Bush sent 152 inmates to their death, some of whom still claimed actual innocence.<sup>121</sup> It is telling that the minutes spent awaiting the execution of Tucker, an admittedly guilty axe murderer, were the most excruciating of his career.<sup>122</sup>

#### IV. THE EXECUTED WOMEN

Since 1976, Texas has executed only three women: Karla Faye Tucker, Betty Lou Beets, and Frances Newton.<sup>123</sup> All three of these women were cast into the “evil woman” category and therefore lost the protection of the biased Texas system.<sup>124</sup>

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row inmate claiming innocence. Olsen, *supra*. That reprieve went to female defendant, Frances Newton, who was later executed. *Id.*; *infra* Part IV.C (discussing Newton’s case).

<sup>116</sup> ATWELL, *supra* note 49, at 79. Karla Faye Tucker’s case is discussed in more detail in Part IV.A, *infra*.

<sup>117</sup> See BUSH, *supra* note 115, at 154.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 145.

<sup>120</sup> See *id.* at 154.

<sup>121</sup> Helen Prejean, *Death in Texas*, N.Y. REV., Jan. 13, 2005, at 4.

<sup>122</sup> ATWELL, *supra* note 49, at 64; BUSH, *supra* note 115, at 155 (“Karla Faye Tucker was pronounced dead at 6:45 P.M. Those remain the longest twenty minutes of my tenure as Governor.”).

<sup>123</sup> *Women and the Death Penalty*, *supra* note 6.

<sup>124</sup> See ATWELL, *supra* note 49, at 215; Kopec, *supra* note 16, at 358–63.

### A. *Karla Faye Tucker*

Karla Faye Tucker is perhaps the most notorious woman ever to receive the death penalty, in part because she was white, eloquent, and attractive.<sup>125</sup> Tucker had a troubled childhood and was a drug-addicted prostitute at the time of her arrest for the murder of two people.<sup>126</sup> In June of 1983, Tucker, her boyfriend, and another acquaintance decided to break into Jerry Lynn Dean's home to intimidate him or perhaps to steal motorcycle parts.<sup>127</sup> After breaking into the home, Tucker woke Dean by straddling him before she and her boyfriend struck him several times with a pickaxe.<sup>128</sup> After Dean was dead, Tucker noticed another body in the bed, a woman Dean had met at a bar that evening.<sup>129</sup> Tucker attacked her with the pickaxe as well, allowing her boyfriend to finish the woman off.<sup>130</sup>

The prosecution emphasized Tucker's later comment that she reached a sexual climax with every swing of the pickaxe.<sup>131</sup> Tucker exhibited a masculine proclivity for sex and violence, and the jury therefore sentenced her to death.<sup>132</sup> While in prison, Tucker stopped using drugs and alcohol, became a devout Evangelical Christian, and eventually married the prison chaplain.<sup>133</sup> Even so, Tucker was the first woman executed in Texas since the Civil War.<sup>134</sup> Directly after her execution, Texan support for the death penalty dropped from eighty-five percent to sixty-eight percent.<sup>135</sup>

<sup>125</sup> See ATWELL, *supra* note 49, at 63; Rapaport, *supra* note 12, at 591 (“[Tucker’s] wan, pixie-ish good looks, her youthfulness, her wry, self-deprecating humor, and her self-possession, articulateness and thoughtfulness, captivated television audiences.”).

<sup>126</sup> ATWELL, *supra* note 49, at 64, 66.

<sup>127</sup> *Id.* at 64–65; Rapaport, *supra* note 12, at 591.

<sup>128</sup> ATWELL, *supra* note 49, at 65.

<sup>129</sup> *Id.* at 65–66.

<sup>130</sup> *Id.* at 66.

<sup>131</sup> See *id.* at 68, 71.

<sup>132</sup> See *id.* at 71.

<sup>133</sup> See Rapaport, *supra* note 12, at 591. Tucker did appear to be the poster-child for reform and, on appeal, she raised a Fourteenth Amendment claim, arguing that although female prisoners are more likely to be rehabilitated, a woman had never been granted clemency on the basis of rehabilitation. ATWELL, *supra* note 49 at 76–77.

<sup>134</sup> See ATWELL, *supra* note 49, at 64.

<sup>135</sup> *Id.* at 83. Regarding the drop in support for the death penalty, Texas Poll Director Ty Meighan stated, “Some of it has got to be people re-evaluating their opinion in light of the Karla Faye Tucker execution.” See Kathy Walt, *Death Penalty’s Support Plunges to a 30-Year Low: Karla Faye Tucker’s Execution Tied to Texans’ Attitude Change*, HOUSTON CHRON., Mar. 15, 1998, at A1. This was due in part to the success of Tucker’s public relations campaign. See *id.* Dianne Clements, president of Justice for All, stated, “They brought her into our living rooms and wanted to make her a part of our lives.” *Id.*

Tucker's case is especially interesting because she was sentenced to death when she failed to fit into a feminine role, yet given public sympathy when she conformed.<sup>136</sup> At the time of her trial, Tucker was a violent and over-sexualized prostitute and thus lost the protection of femininity.<sup>137</sup> By the time of her execution, however, she had transformed into the loving Christian wife society expected her to be, thus sparking public outrage and disapproval at her fate.<sup>138</sup>

### B. *Betty Lou Beets*

Betty Lou Beets had been in a series of abusive relationships before shooting and killing her fifth husband, Jimmy Don Beets.<sup>139</sup> Jimmy was missing for two years before police found his body buried in a sleeping bag in the family's front yard, alongside the body of one of Beets's previous husbands.<sup>140</sup> The prosecution asserted that Beets killed her husbands for the life insurance money and portrayed her as a greedy "black widow" who systematically preyed on her lovers.<sup>141</sup> But the most shocking offense, the prosecution argued, was that she corrupted her children by employing her adult son and daughter to help hide the two bodies.<sup>142</sup>

Beets thus defied her role not only as a wife but also as a mother.<sup>143</sup> She was a "corrupter of the home" who "used her ultimate feminine power—motherhood—to implicate her children in her own wrongdoing."

<sup>136</sup> See ATWELL, *supra* note 49, at 63–83; Shapiro, *supra* note 17, at 459 (discussing the protections afforded by "ladylike" behavior and the dangers created by rejection of it). On appeal, Tucker argued that the media created an improper bias against female defendants. See ATWELL, *supra* note 49, at 76–77. Because the high profile case spurned discussion about "equal justice," Tucker argued that she was sentenced to death solely as to send a message of gender equality. See *id.* Thus, "she would be executed *because* she was a woman." *Id.* at 76.

<sup>137</sup> See ATWELL, *supra* note 49, at 63–83.

<sup>138</sup> See Rapaport, *supra* note 12, at 591; see also Kopec, *supra* note 16, at 355 (noting that there was "public outcry" after Tucker's execution).

<sup>139</sup> See ATWELL, *supra* note 49, at 104–08; *Women and the Death Penalty*, *supra* note 6. The fact that Beets was abused by her husband may actually have worked against her, since the state can claim an additional motive of revenge in cases where there is a history of domestic violence. ATWELL, *supra* note 49, at 118. Also, although the state belabored the fact that Jimmy Don Beets was Beets's fifth husband, the jury was not informed that she was his fourth wife. *Id.* at 113.

<sup>140</sup> See ATWELL, *supra* note 49, at 108; Kopec, *supra* note 16, at 360.

<sup>141</sup> See ATWELL, *supra* note 49, at 108–10. Beets's gender made this motive more credible. *Id.* at 118. "It is easy for a jury to believe a woman (who has no resources or legacy of her own) would kill a man, the rightful owner of the family property." *Id.*

<sup>142</sup> See *id.* at 109; Kopec, *supra* note 16, at 360–61.

<sup>143</sup> See Kopec, *supra* note 16, at 360–61.

ing.”<sup>144</sup> Beets was executed in 2000 and was the fourth woman executed in the United States since 1976.<sup>145</sup>

### C. *Frances Newton*

Frances Newton was executed on September 14, 2005, and was the eleventh woman to have been executed in the United States since 1976.<sup>146</sup> Newton was sentenced to death for the murders of her husband Adrian, and her two children (Alton, age seven and Farrah, age twenty-one months).<sup>147</sup>

During the trial, Newton was portrayed as “promiscuous and greedy.”<sup>148</sup> The district attorney focused on Newton’s extramarital affair and the fact that she had previously taken out insurance policies on her husband and children.<sup>149</sup> The prosecutor, who had also prosecuted the case against Karla Faye Tucker, painted a picture of a coldhearted woman who wished to collect the insurance money and run off with her lover.<sup>150</sup> The prosecutor’s closing powerfully condemned Newton for betraying the trust of her children.<sup>151</sup> He stated,

What does it tell us about a person that can pick up . . . their own 21-month-old child that they personally bore . . . [and] look that baby in the eye and what do you suppose that little baby, what does a 21-month old baby think towards its mother. Love. That’s all a baby has. . . . What does it tell us about a person who could look in that baby’s eyes and execute them?<sup>152</sup>

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<sup>144</sup> *Id.* During her trial, Beets actually attempted to place blame for the murder on her son, Robbie. ATWELL, *supra* note 49, at 110. The prosecutor used this defense to further attack Beets’s performance as a mother saying, “What kind of a mother would seek to pin a murder on her own child? The female of the species protects the young, above all, above her own life.” *Id.* at 111.

<sup>145</sup> *See Women and the Death Penalty, supra* note 6.

<sup>146</sup> *See id.*

<sup>147</sup> *See id.* Newton claimed innocence and stated that she and her cousin called the police after returning home and finding that her family had been shot to death. *See* ATWELL, *supra* note 49, at 208–09. Newton believed that the murders had been committed by a drug dealer to whom her husband owed money. *See id.* at 212.

<sup>148</sup> ATWELL, *supra* note 49, at 210.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 208, 210.

<sup>151</sup> *See id.* at 215.

<sup>152</sup> *Id.*

According to many, a mother's killing of her young child is the ultimate rejection of feminine identity.<sup>153</sup> The prosecutor's reference to Newton's pregnancy highlights a woman's unique role as the bearer and protector of children.<sup>154</sup> In violating that role, Newton joined Tucker and Beets in rejecting her femininity and condemning herself to a masculine fate.<sup>155</sup>

#### D. *Death Row Today*

Ten women are currently on death row in Texas.<sup>156</sup> As is typical in Texas, most of these condemned women have committed "domestic" crimes or crimes that are otherwise at odds with a woman's stereotypical gender role.<sup>157</sup> In fact, only two of the ten women presently on Texas's death row earned a place there without targeting vulnerable victims such as children, the mentally retarded, or the elderly.<sup>158</sup>

<sup>153</sup> See Kopec, *supra* note 16, at 361 (naming infanticide as the "ultimate anti-feminine act").

<sup>154</sup> See ATWELL, *supra* note 49, at 214–15; Kopec, *supra* note 16, at 361.

<sup>155</sup> See ATWELL, *supra* note 49, at 214–15; Kopec, *supra* note 16, at 358 ("[B]y 'acting out' from the duties of [feminine] roles, [female] defendants defiled society's notions of womanhood and lost the protection that femininity typically affords them in the jury room."); *supra* Part IV.A–C.

<sup>156</sup> *Offenders on Death Row*, TEX. DEPARTMENT OF CRIM. JUST., <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited May 8, 2011). There are 314 people on death row in Texas. *Gender and Racial Statistics of Death Row Offenders*, TEX. DEP'T OF CRIM. JUST., <http://tdcj.state.tx.us/stat/racial.htm> (last visited May 8, 2011); *Offenders on Death Row*, *supra*.

<sup>157</sup> See *Case Summaries for Current Female Death Row Inmates*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/case-summaries-current-female-death-row-inmates> (last visited May 8, 2011); *Fate of Texas Women's Death Row Inmate May Be in Governor's Hands*, *supra* note 4; *Offenders on Death Row*, *supra* note 156. The women currently on death row include: Melissa Lucio (convicted of the beating and murder of her daughter); Chelsea Richardson (convicted of murdering two adults while they were in their home); Erica Sheppard (convicted of murdering a woman during an attempt to steal a car); Linda Carty (convicted of the kidnapping and murder of a young woman and the kidnapping of her three-day-old baby); Suzanne Basso (convicted of murdering a mentally retarded man after luring him with promises of marriage); Kimberly McCarthy (a nursing home therapist convicted of murdering a seventy-one-year-old woman); Brittany Holberg (a prostitute convicted of murdering an eighty-year-old client); Darlie Routier (convicted of the stabbing murder of her five-year-old son); Lisa Coleman (convicted of the murder of a nine year old boy); and Cathy Henderson (convicted of the murder of an infant she was responsible for babysitting). See *id.*

<sup>158</sup> See *Offenders on Death Row*, *supra* note 156. Only Chelsea Richardson and Erica Sheppard have a different profile. See Kopec, *supra* note 16, at 358; *Offenders on Death Row*, *supra* note 156.

## V. THE FOURTEENTH AMENDMENT CHALLENGE

The Fourteenth Amendment guarantees all persons in the United States equal protection of the laws.<sup>159</sup> The application of the death penalty in Texas shows that men may not receive equal protection during the various stages of a capital case in Texas.<sup>160</sup> Some have argued that the best way to attack the death penalty on Equal Protection Clause grounds is to raise the challenge in those states that have capital punishment but have never executed a woman.<sup>161</sup> The case seems even stronger in Texas, however, because even in Texas, a state that has executed more women than almost any other, application of capital punishment may still be unconstitutionally gender biased.<sup>162</sup>

Although facially neutral, Texas's capital punishment statute has an unconstitutional disparate impact on male offenders.<sup>163</sup> While women commit 10% of homicides, they account for only 0.6% of executions in Texas.<sup>164</sup> This disparity is much too stark to be explainable by other reasoning and amounts to a Fourteenth Amendment violation.<sup>165</sup> There is also implicit discrimination in the Texas death penalty statute itself.<sup>166</sup> The statute uses factors that apply disproportionately to male offenders to determine whether a defendant is death-eligible and per-

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<sup>159</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

<sup>160</sup> See generally Kopec, *supra* note 16 (making a similar argument about the unconstitutionality of Virginia’s capital murder statute); *supra* Parts II–III.

<sup>161</sup> See Kopec, *supra* note 16, at 364 (arguing that Virginia’s death penalty scheme violates the Fourteenth Amendment because no women have been executed in the state since 1976).

<sup>162</sup> See *id.*; *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6 (showing that Texas and Oklahoma lead the country in female executions).

<sup>163</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010); *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6.

<sup>164</sup> See *State by State Database*, *supra* note 13 (showing that Texas has executed 467 people); *Women and the Death Penalty*, *supra* note 6 (showing that only three of those people were women, but noting that women commit ten percent of homicides).

<sup>165</sup> See *Williams v. Currie*, 103 F. Supp. 2d 858, 868 (M.D.N.C. 2000); Kopec, *supra* note 16, at 373. In *Williams v. Currie*, the petitioner and his male co-defendant received twenty-three- to twenty-seven-year sentences for shooting into various homes and cars, while their female co-defendant, Jamie Forehand, received only an eight-month sentence. 103 F. Supp. 2d at 859–61. Finding that the petitioner’s Fourteenth Amendment rights had been violated, the court noted, “The only truly noticeable difference between Forehand and her two [male] co-defendants is gender. This record is sufficient to allow a finding that gender discrimination accounts for most, if not all, of the more than twenty-year gap between plaintiff’s total sentence and Forehand’s total sentence.” *Id.* at 868.

<sup>166</sup> See § 19.03; *supra* Part II.

mits unguided consideration of mitigating circumstances, which allows juries to rely on gender-based stereotypes and paternalistic attitudes when making sentencing decisions.<sup>167</sup>

Furthermore, the Texas statute is unconstitutional not only because of discriminatory application during the initial determination of death eligibility, but also because legal and political actors treat male offenders more harshly.<sup>168</sup> Juries convict women of murder less frequently than they convict men, and they tend to convict women of lesser degrees of murder, which carry lighter sentences.<sup>169</sup> Judges, politicians, and the general public also treat women with leniency and purposefully give them protections and considerations to which men are not entitled.<sup>170</sup> In the rare instances when women do receive death sentences, they are even more rarely executed.<sup>171</sup> Whereas nearly forty-five percent of men on death row are eventually executed, this figure may be as low as sixteen percent for women.<sup>172</sup> Since the reinstatement of the death penalty,

<sup>167</sup> See § 19.03; TEX. CODE CRIM. PROC. ANN. art. 37.071(e)(1) (West 2006); Streib, *supra* note 8, at 616–20; see also *State v. White (White II)*, 982 P.2d 819, 828 (Ariz. 1999) (allowing a jury to find that being a “caring mother” was a mitigating circumstance in a female co-defendant’s case while rejecting that being a “caring father” was a mitigating circumstance in her husband’s case).

<sup>168</sup> See, e.g., Shapiro, *supra* note 17, at 456 (noting that many judges have admitted to treating women with more leniency than men); Kopec, *supra* note 16, at 357 (discussing that judges and juries are more likely to view women as sympathetic and capable of rehabilitation); *S. Carolina Confronts Death Penalty for Women*, *supra* note 17 (explaining that prosecutors often shy away from charging women with capital crimes).

<sup>169</sup> See Shapiro, *supra* note 17, at 451–52.

<sup>170</sup> See Rapaport, *supra* note 12, at 584–85 (explaining that the “sheer unusualness” of a female facing capital punishment causes judges, politicians, jurists, and the press to afford a woman’s case “closer scrutiny”); Shapiro, *supra* note 17, at 456 (revealing that some judges admit to being knowingly more lenient towards women). There may also be political reasons to treat women with more leniency: George W. Bush, who oversaw more than 120 executions during his governorship, reported “the concern felt in his administration that the execution of a woman would make him and the State of Texas appear inhumane and ‘bloodthirsty.’” Rapaport, *supra* note 12, at 585 (quoting BUSH, *supra* note 115, at 146). Even judges with lifetime tenure worry that ordering the execution of a woman would cause them to lose public support. See *id.*

<sup>171</sup> See *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited May 8, 2011); *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6. Since the reinstatement of the death penalty in 1976, Texas has meted out 905 death sentences to men and nineteen to women. See *Death Sentences in the United States from 1977 by State and by Year*, *supra*; *Women and the Death Penalty*, *supra* note 6. While 464 of those men have been executed, only three of those women have been executed. See *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6.

<sup>172</sup> See *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 171; *Executions per Death Sentence*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited May 8, 2011) (showing that the overall

nineteen death sentences were imposed upon women in Texas, but only three of those women were actually executed.<sup>173</sup> This is due in part to the purposeful consideration of gender by governors and judges during the process of granting reversals and stays.<sup>174</sup>

Despite this potential gender discrimination, an analysis under the Equal Protection Clause of the Fourteenth Amendment is far from straightforward.<sup>175</sup> Though a gender-based equal protection challenge to the death penalty has the makings of a winning argument, it must first overcome certain obstacles, including level of scrutiny, qualification of male offenders as a suspect class, facial neutrality, real differences, and contradictory precedent.<sup>176</sup>

### A. *Level of Scrutiny*

The success of a Fourteenth Amendment claim often depends on the standard of review that courts use when evaluating claims by a given group.<sup>177</sup> For example, while consideration of discrimination against racial and ethnic groups receives strict scrutiny in equal protection challenges, the standard for gender-based challenges is somewhat less rigid, and an intermediate standard is generally applied.<sup>178</sup> Intermedi-

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rate of executions per death sentence in Texas from 1977 to 2007 was 44.7%); *State by State Database*, *supra* note 13; *Women and the Death Penalty*, *supra* note 6.

<sup>173</sup> See *Women and the Death Penalty*, *supra* note 6.

<sup>174</sup> See, e.g., BUSH, *supra* note 115, at 155 (showing the Texas governor's moral struggle with executing a woman); Rapaport, *supra* note 12, at 585; Shapiro, *supra* note 17, at 456 (revealing that some judges admit to being more lenient towards women).

<sup>175</sup> See, e.g., Shapiro, *supra* note 17, at 465 (predicting difficulty for men in obtaining status as a suspect class); Kopec, *supra* note 16, at 373–82.

<sup>176</sup> See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 466–67 (1981); Shapiro, *supra* note 17, at 465; Kopec, *supra* note 16, at 373–82.

<sup>177</sup> See Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 188–95 (2003). There are three recognized levels of judicial scrutiny. *Id.* at 188. The first, strict scrutiny, requires that a discriminatory law or policy be narrowly tailored to serve a compelling government interest. *Id.* at 190–91. This has been the standard applied to cases involving classifications based on race or national origin. *Id.* at 192. The second, intermediate scrutiny, requires that a classification be substantially related to an important government interest. *Id.* at 191. The third, rational basis, requires only that a classification be rationally related to a legitimate government purpose. *Id.* at 188–89.

<sup>178</sup> See *id.* at 192–93. Traditionally, courts applied only minimal scrutiny to gender classifications because it was believed that “[w]omen’s proper place was at the center of family life, not the market or politics; and, it was constitutional for states to try to protect them from the vicissitudes of life when they ventured outside the home.” See *id.* at 220–21. In the 1970s, however, perceptions of a woman’s role began to change, and courts began affording intermediate scrutiny to gender bias claims. See *id.* at 221–25. Today, it is unclear what the standard of review should be for gender classifications—some courts have applied



ate review requires only that a discriminatory policy be substantially related to an important government interest.<sup>179</sup> It is possible, however, that courts will apply a stricter standard when hearing a gender-based challenge.<sup>180</sup> In *Frontiero v. Richardson*, for example, a military policy allowed the spouses of male military service members to receive benefits more easily than the spouses of female military service members.<sup>181</sup> The Court found that the government purpose of administrative ease did not pass strict scrutiny and was invalid.<sup>182</sup> More recently, in *United States v. Virginia*, the majority opinion held that sex discrimination had to be “exceedingly persuasive” in its justification.<sup>183</sup> Therefore, one could argue that a discriminatory gender classification would receive at least intermediate scrutiny, if not strict scrutiny.<sup>184</sup>

It might also be possible that none of this case law or precedent is relevant, based on the principle that “death is different.”<sup>185</sup> For many years, the U.S. Supreme Court has required additional safeguards for capital cases that are not required for any other criminal trials.<sup>186</sup> The rationale behind this special treatment is that because taking a human life is the ultimate state sanction, it must be done with as much exactness and deliberation as possible.<sup>187</sup> Therefore, regardless of the level of scrutiny a gender claim might be given in another scenario, it is pos-

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intermediate scrutiny, while others seem to use a higher or lower standard. *See id.* at 195–96. For example, in *United States v. Virginia (VMI)*, Justice Scalia accused the majority of using strict scrutiny to evaluate a gender-based claim. *See* 518 U.S. 515, 571–76 (1996) (Scalia, J., dissenting). Later, in *Nguyen v. INS*, the dissenters voiced concern that the majority applied rational basis review to a gender-based claim and merely labeled it intermediate review. *See* 533 U.S. 53, 74–78 (2001) (O’Connor, J., dissenting).

<sup>179</sup> *See* Deutsch, *supra* note 177, at 191.

<sup>180</sup> *See, e.g., VMI*, 518 U.S. at 531 (majority opinion); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973).

<sup>181</sup> *See Frontiero*, 411 U.S. at 678.

<sup>182</sup> *Id.* at 690–91 (“[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

<sup>183</sup> *See VMI*, 518 U.S. at 531.

<sup>184</sup> *See* Deutsch, *supra* note 177, at 270–71.

<sup>185</sup> *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 459–60 (1984); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“Death is a unique punishment . . .”); *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

<sup>186</sup> *See* Stefanie Lindeman, Note, *Because Death Is Different: Legal and Moral Arguments for Broadening Defendants’ Rights to Discovery in Federal Capital Cases*, 73 ST. JOHN’S L. REV. 541, 559 (1999).

<sup>187</sup> *See id.* at 543.

sible that it would receive a stricter level of scrutiny in a capital punishment context.<sup>188</sup>

### B. *Suspect Class Status*

The Fourteenth Amendment is generally seen as a way to protect individuals in historically marginalized groups from discrimination based on their status.<sup>189</sup> Therefore, it is somewhat counterintuitive for men to be considered a suspect class in an equal protection challenge because they are not a historically disadvantaged group.<sup>190</sup> In *City of Richmond v. J.A. Croson Co.*, however, the Supreme Court held that all racial classifications, even those discriminating against white citizens, were subject to the highest standard of scrutiny, a holding that could apply equally to gender discrimination against men.<sup>191</sup>

Further, there have been several instances where courts have recognized valid gender bias claims brought by men.<sup>192</sup> In *Craig v. Boren*, for example, an Oklahoma statute prohibited the sale of certain alcoholic beverages to men under the age of twenty-one and women under the age of eighteen.<sup>193</sup> After applying an intermediate standard of scrutiny, the Supreme Court found that the statute violated the Fourteenth Amendment rights of men between the ages of eighteen and twenty-one.<sup>194</sup> Later, in *Orr v. Orr*, the Court invalidated a statute that could require men, but not women, to pay alimony in a divorce proceeding, noting, “The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.”<sup>195</sup>

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<sup>188</sup> See *id.* at 559.

<sup>189</sup> See *Craig v. Boren*, 429 U.S. 190, 218–19 (1976) (Rehnquist, J., dissenting); Kopec, *supra* note 16, at 373.

<sup>190</sup> See Shapiro, *supra* note 17, at 465; Kopec, *supra* note 16, at 373.

<sup>191</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989). *Croson* concerned a city’s policy that thirty percent of all contracting work be given to minority-owned businesses. *Id.* at 477–78. The Court held that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” and that the single standard of review for racial classifications should be strict scrutiny. See *id.* at 493–94.

<sup>192</sup> See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”); *Craig*, 429 U.S. at 204. In *Mississippi University for Women v. Hogan*, the Court used an “exceedingly persuasive justification” standard and found that a nursing school policy which prohibited the admission of men was invalid under the Fourteenth Amendment. See 458 U.S. at 720–21, 724, 733.

<sup>193</sup> *Craig*, 429 U.S. at 191–92.

<sup>194</sup> See *id.* at 204.

<sup>195</sup> *Orr v. Orr*, 440 U.S. 268, 270, 279, 283 (1979).

### C. *Facial Neutrality and Disparate Impact*

Even if men achieve status as a suspect class in the capital punishment context, they must next overcome the difficulties posed by Texas's facially neutral statute.<sup>196</sup> When evaluating equal protection claims, the Supreme Court has placed its focus on intentional or purposeful discrimination.<sup>197</sup> Thus, statutes creating a disparate impact are valid as long as they were not created with a discriminatory purpose.<sup>198</sup> The Texas death penalty statute does not, on its face, discriminate between men and women.<sup>199</sup> While this makes a constitutional challenge more difficult, it is still possible that the Court will hold that the statute is unconstitutional.<sup>200</sup>

First, it is possible that the disparate impact of the Texas death penalty statute is in fact intentional.<sup>201</sup> As discussed earlier, it is not uncommon for judges or governors to feel more sympathy towards or afford more leniency to female criminals.<sup>202</sup> This prevailing paternalistic attitude could certainly be held by the members of the Texas legislature as well.<sup>203</sup> If the Texas statute was purposefully constructed to encourage convictions for male offenders and protection for female offenders, it would be invalid despite its lack of explicit discriminatory language.<sup>204</sup>

Such purposeful discrimination might also exist in the application of Texas's death penalty statute and intentional gender discrimination during the pre-trial, trial, or sentencing phases of a capital case might also violate a defendant's equal protection rights.<sup>205</sup> In *Williams v. Currie*, for example, a U.S. district court found that a male defendant's Fourteenth Amendment rights were violated based on a gross disparity between his sentence and that of his female co-defendant.<sup>206</sup> While the

<sup>196</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (noting that “[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the [legislative] decision,” judicial deference is not justified and a state action can be considered a violation of the Equal Protection Clause).

<sup>197</sup> See *Arlington Heights*, 429 U.S. at 265.

<sup>198</sup> See *id.*

<sup>199</sup> See § 19.03.

<sup>200</sup> See Kopec, *supra* note 16, at 375.

<sup>201</sup> See, e.g., BUSH, *supra* note 115, at 155 (showing the governor's moral struggle with executing a woman); Shapiro, *supra* note 17, at 456 (revealing that some judges admit to being more lenient towards women).

<sup>202</sup> See, e.g., BUSH, *supra* note 115, at 154; Shapiro, *supra* note 17, at 456.

<sup>203</sup> See, e.g., Shapiro, *supra* note 17, at 456; Streib, *supra* note 8, at 628; *supra* Part I.B.

<sup>204</sup> See *Arlington Heights*, 429 U.S. at 265.

<sup>205</sup> See *Williams*, 103 F. Supp. 2d at 868; *supra* Part III.

<sup>206</sup> See *Williams*, 103 F. Supp. 2d at 868.

decision in *Williams* did not void the relevant punishment statute, a court may find a statute unconstitutional when it is applied in such a discriminatory way.<sup>207</sup>

#### D. Real Differences

There are some circumstances in which the state may constitutionally discriminate against one gender on the basis of so-called “real differences.”<sup>208</sup> In *Michael M. v. Superior Court*, for example, a California statute that punished men, but not women, for statutory rape was challenged under the Fourteenth Amendment.<sup>209</sup> The Court found that this discriminatory treatment was justified by the state’s interest in preventing illegitimate teenage pregnancies.<sup>210</sup> Because women are not biologically capable of impregnating men, the statute was justified by a real difference.<sup>211</sup>

In contrast, eligibility for execution involves no such real differences.<sup>212</sup> While there are obviously inherent differences between men and women, there is no logical difference that qualifies men, but not women, to die for their wrongdoings.<sup>213</sup> Even if a real differences argument were presented, surely no biological difference or state objective is critical enough to justify violating the equal protection rights of a male defendant in a capital case.<sup>214</sup>

Even if the gender discrepancy in death sentences is the result of real differences in the types of crimes committed by men and women, and even if the aggravating and mitigating factors are constitutional, the

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<sup>207</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 357, 373–74 (1886) (finding that a neutral ordinance requiring permits for laundromat operation could be invalid if enforced in a discriminatory manner); *Williams*, 103 F. Supp. 2d at 868.

<sup>208</sup> See *Deutsch*, *supra* note 177, at 211.

<sup>209</sup> See *Michael M.*, 450 U.S. at 466.

<sup>210</sup> See *id.* at 467.

<sup>211</sup> See *id.* This principle was used again in *Country v. Parratt*, where a forcible rape statute created harshest penalties for male aggressors who attacked female victims. 684 F.2d 588, 589, 592–93 (8th Cir. 1982). The statute was upheld based on real differences because only female victims of male aggressors can suffer the unique harm of pregnancy. See *id.*

<sup>212</sup> See *Furman*, 408 U.S. at 365 (Marshall, J., concurring) (“There is . . . overwhelming evidence that the death penalty is employed against men and not women. . . . It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.”).

<sup>213</sup> See *id.*; *Commonwealth v. Butler*, 328 A.2d 851, 858 (Pa. 1974) (holding that a resentencing act that contained minimum sentences for men and not women violated the Fourteenth Amendment because gender has no rational relationship to parole eligibility).

<sup>214</sup> See *Furman*, 408 U.S. at 286–87 (Brennan, J., concurring) (emphasizing the extreme nature of the death penalty as punishment); *Butler*, 328 A.2d at 858.

statute's constitutionality is still questionable.<sup>215</sup> Stereotypical conceptions of gender may be taken into account when defining which sorts of crimes are among the worst and which sorts of factors warrant sympathy.<sup>216</sup> For example, according to apparent societal standards, "convenience store robbers who kill store clerks should face the death penalty more often than mothers who kill their children."<sup>217</sup> Therefore, it is possible that many of the aggravating factors in the Texas statute are ultimately deemed death-worthy only because of their objective male-ness.<sup>218</sup>

### E. *Contradictory Precedent*

The Supreme Court has never heard a gender-based equal protection challenge to the death penalty.<sup>219</sup> In *McCleskey v. Kemp*, however, the Court heard and rejected a race-based equal protection challenge to a death penalty statute.<sup>220</sup> While some argue that this holding makes a gender-based challenge more difficult, *McCleskey* leaves the door to constitutional challenge open wider than it might originally seem.<sup>221</sup> Also, though some negative precedent has emerged from lower courts, a successful gender-based claim is still quite possible.<sup>222</sup>

#### 1. *McCleskey v. Kemp* & Challenges to the Death Penalty

In 1987, the Supreme Court heard an equal protection challenge to the death penalty on the basis of race in *McCleskey v. Kemp*.<sup>223</sup> In support of his argument, the defendant, an African American male, introduced research known as the Baldus Study, which indicated that African American defendants were sentenced to death at disproportionately higher rates than white defendants in the state of Georgia.<sup>224</sup> The Court held that the Fourteenth Amendment was not violated by evidence of a

<sup>215</sup> See Streib, *supra* note 8, at 615–19; *supra* Part II.

<sup>216</sup> See Streib, *supra* note 8, at 615–19.

<sup>217</sup> *Id.* at 615.

<sup>218</sup> See ATWELL, *supra* note 49, at 63–86, 104–18, 207–21; Streib, *supra* note 8, at 615–19.

<sup>219</sup> ATWELL, *supra* note 49, at 27.

<sup>220</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 282–83, 319 (1987); *infra* Part V.E.1.

<sup>221</sup> See *McCleskey*, 481 U.S. at 282–83, 319; Shapiro, *supra* note 17, at 461–62; Kopec, *supra* note 16, at 376–77.

<sup>222</sup> See, e.g., Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978); State v. White (*White I*), 815 P.2d 869, 882–84 (Ariz. 1991), *abrogated by* State v. Salazar, 844 P.2d 566 (Ariz. 1992); ATWELL, *supra* note 49, at 27; Shapiro, *supra* note 17, at 462–63; see also *infra* Part V.E.2.

<sup>223</sup> See *McCleskey*, 481 U.S. at 282–83.

<sup>224</sup> See *id.* at 283, 286; Shapiro, *supra* note 17, at 429.

statistical racial disparity and that a constitutional violation occurs only when there is purposeful discrimination against a particular defendant on the basis of race.<sup>225</sup>

Some scholars believe that *McCleskey* has, at least temporarily, closed off Fourteenth Amendment challenges to death penalty statutes by all suspect classes.<sup>226</sup> The language in *McCleskey* indicates a preoccupation with the slippery slope that could occur if statistically based challenges are accepted as equal protection violations.<sup>227</sup> Gender bias within the capital punishment system, however, is significantly different from racial bias.<sup>228</sup> The statistical disparity between condemned men and women is far more drastic than the disparity between Caucasians and African Americans.<sup>229</sup> In 2000, African Americans made up 12.3% of the population but accounted for nearly 35% of executions.<sup>230</sup> Men, however, make up less than half of the population but account for more than 99% of executions.<sup>231</sup> This statistic shows a dramatically disparate impact even after considering that women commit only 10% of capital crimes.<sup>232</sup>

Moreover, it is important to note that *McCleskey* was a five to four decision with a strong dissent.<sup>233</sup> Justice Brennan and his fellow dissenters were disturbed by the fact that the race of a killer and the race of a victim are more determinative than many other details of a crime when predicting whether a defendant will be sentenced to death.<sup>234</sup>

<sup>225</sup> See *McCleskey*, 481 U.S. at 319; Shapiro, *supra* note 17, at 429.

<sup>226</sup> See Shapiro, *supra* note 17, at 461–62.

<sup>227</sup> See *id.* at 429–30. The slippery slope concern applies to other penalties and to other minority groups. See *McCleskey*, 481 U.S. at 315–18.

[I]f 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 of 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.

*Id.* at 315–17 (footnotes omitted).

<sup>228</sup> See Kopec, *supra* note 16, at 376.

<sup>229</sup> See *id.* at 376–77; *Women and the Death Penalty*, *supra* note 6.

<sup>230</sup> See Kopec, *supra* note 16, at 376.

<sup>231</sup> See *id.* at 377.

<sup>232</sup> See *Women and the Death Penalty*, *supra* note 6.

<sup>233</sup> See *McCleskey*, 481 U.S. at 282, 320 (Brennan, J., dissenting); Shapiro, *supra* note 17, at 445. Of the four dissenters, only Justices Brennan and Marshall would find that “the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments . . .” *McCleskey*, 481 U.S. at 320.

<sup>234</sup> See *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

The dissenters were not convinced by the majority's argument that discrimination must be shown in the case at hand and instead felt that such a strong racial disparity was at odds with the concern for rationality in capital sentencing.<sup>235</sup> Justice Blackmun noted that "[d]isparate enforcement of criminal sanctions 'destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.'"<sup>236</sup> The dissent further accused the majority of applying an inappropriate standard of scrutiny when evaluating the Fourteenth Amendment challenge, noting that a legitimate state interest is not sufficient when dealing with a life or death matter.<sup>237</sup> Considering the close vote and impassioned minority in *McCleskey*, it is possible that a change in the Court's composition could result in the overruling of this decision.<sup>238</sup>

## 2. Gender and the Death Penalty—Lower Court Decisions

While the Supreme Court has yet to hear an equal protection challenge to the death penalty on the basis of gender discrimination, several lower courts have discussed the issue.<sup>239</sup> The resulting decisions consider many of the issues inherent in gender-based challenges to facially neutral statutes.<sup>240</sup> For example, many courts have relied on the

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At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing . . . that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence . . . .

*Id.*

<sup>235</sup> See *id.* at 322–23. "The Court's evaluation of the significance of petitioner's evidence is fundamentally at odds with our consistent concern for rationality in capital sentencing, and the considerations that the majority invokes to discount that evidence cannot justify ignoring its force." *Id.* at 322 (arguing that McCleskey should not have to prove racial bias in his case in particular and that fear of encouraging other sentencing challenges is not a valid justification).

<sup>236</sup> *Id.* at 346 (Blackmun, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979)).

<sup>237</sup> See *id.* at 347–8.

<sup>238</sup> See *id.* at 320 (Brennan, J., dissenting); Shapiro, *supra* note 17, at 445.

<sup>239</sup> See, e.g., *Spinkellink*, 578 F.2d at 616, 621 (upholding Florida's death penalty statute despite arguments that it was applied in a discriminatory manner against males in violation of the Equal Protection Clause of the Fourteenth Amendment); *White I*, 815 P.2d at 882–83 (upholding Arizona's death penalty statute despite a gender-based equal protection challenge); ATWELL, *supra* note 49, at 27 (noting that the opportunity for a gender-based death penalty challenge has not been foreclosed because the Supreme Court has not yet considered the issue).

<sup>240</sup> See *White II*, 982 P.2d at 827–29; *State v. Holsinger*, 563 P.2d 888, 897–98 (Ariz. 1977); *supra* Part V.A–D.

challenged statute's facial neutrality and examined only the specific circumstances of a defendant's case.<sup>241</sup>

In *State v. White*, Michael White was convicted for murder and appealed his death sentence on several grounds.<sup>242</sup> One of White's grounds for appeal was that his female co-defendant, Susan Johnson, received only life imprisonment for her crime.<sup>243</sup> The Arizona Supreme Court rejected White's equal protection claim, holding that, after an individual evaluation, the sentencing court appropriately found mitigating circumstances only in Johnson's case.<sup>244</sup> Here, the court relied on the facial neutrality of the Arizona death penalty statute and stated, "Male murderers are not singled out for capital punishment. The statute does not, on its face, distinguish between the sexes."<sup>245</sup> Similarly, in *Galloway v. State*, the male defendant was sentenced to death, whereas the female defendants received plea bargains for lesser sentences.<sup>246</sup> Again, the court found no gender-based equal protection violation because the prosecutor evaluated the defendants as individuals before deciding whom to prosecute.<sup>247</sup>

Courts have also been unwilling to acknowledge the stark gender disparities created by capital punishment schemes.<sup>248</sup> In *White*, for example, the court refused to take into account the fact that although

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<sup>241</sup> See, e.g., *White I*, 815 P.2d at 882-84 (finding mitigating factors in female co-defendant's case and holding that "[t]he statute does not, on its face, distinguish between the sexes"); *Holsinger*, 563 P.2d at 897-98 (finding defendant who received a death sentence was not denied equal protection of the laws despite the fact that his wife and co-defendant received life imprisonment because the trial court found a mitigating circumstance in the wife's case and not the defendant's).

<sup>242</sup> See *White I*, 815 P.2d at 871-73.

<sup>243</sup> See *id.* at 871-73, 882-83.

<sup>244</sup> See *id.* at 882-83. Years later, in a subsequent appeal, the Arizona Supreme Court again considered the sentencing disparity in White's case. See *White II*, 982 P.2d at 828-30. The court noted that Johnson was a "caring mother" and took into account the devastating effect a life sentence would have on her young daughter. *Id.* The court noted that being a "caring father" was not equivalent to being a "caring mother" in this instance. See *id.* In the prior appeal, the court noted that Johnson's difficult marriage and divorce were mitigating factors and that all twelve jurors recommended leniency for Johnson. See *White I*, 815 P.2d at 882-83. This exemplifies the tendency of juries to find sympathetic factors primarily in the lives of females. See *White II*, 982 P.2d at 828-30; *White I*, 815 P.2d at 882-83; Streib, *supra* note 8, at 619.

<sup>245</sup> See *White I*, 815 P.2d at 882-84.

<sup>246</sup> See *Galloway v. State*, No. 73766, 2003 WL 1712559, at \*6 (Tex. Crim. App. Jan. 29, 2003).

<sup>247</sup> See *id.* In this case, Galloway and his friends hatched a plan to lure a stranger to their motel room to kill and rob him. *Id.* at \*1. The defendant's girlfriend lured the victim to the motel, where Galloway and a male friend killed him. *Id.*

<sup>248</sup> See, e.g., *State v. Banks*, 271 S.W.3d 90, 157 (Tenn. 2008); *White I*, 815 P.2d at 882-84.



women commit ten percent of Arizona homicides, no women had been executed under the current statute.<sup>249</sup> Dismissing this data, the court stated, “[N]either the federal constitution nor this court has ever required that the imposition of the death penalty precisely reflect the composition of the general population.”<sup>250</sup> A statistical argument was also raised in *State v. Banks*, where a Tennessee death row inmate challenged his sentence on the grounds that Tennessee’s death row housed ninety-two men but only two women.<sup>251</sup> The court rejected this argument, finding that the discrimination could be explained on other grounds, such as fewer commissions of capital crimes by women.<sup>252</sup>

Thus far, American courts have held tightly to the notion that a discriminatory impact does not violate equal protection absent a discriminatory purpose.<sup>253</sup> The courts in the aforementioned cases do not consider the potential to preserve the requirement of a discriminatory purpose even in the face of a successful gender-based equal protection challenge to the death penalty.<sup>254</sup> Texas’s death penalty statute, although facially neutral, is certainly structured and applied in a way that discriminates against male defendants.<sup>255</sup> In the case of a gender-based challenge to Texas’s capital punishment statute, courts should recognize this intentional discrimination and find the statute unconstitutional as a violation of the Fourteenth Amendment.<sup>256</sup>

## CONCLUSION

With a few rare exceptions, the death penalty effectively applies only to men. Women are condemned to death in American society only

<sup>249</sup> See *White I*, 815 P.2d at 882.

<sup>250</sup> *Id.* (alteration in original) (quoting *State v. Richmond*, 666 P.2d 57, 66–67 (Ariz. 1983)); see also *Kindred v. State*, 540 N.E.2d 1161, 1184–85 (Ind. 1989) (finding that a mere showing that no females were sentenced as habitual offenders under an Indiana statute did not constitute an equal protection violation), *abrogated by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

<sup>251</sup> See *Banks*, 271 S.W.3d at 157.

<sup>252</sup> See *id.* The court in *Banks* mentioned in a footnote that “there is a well-documented variance between the types of murders generally committed by men and those generally committed by women.” *Id.* at 157, n.60. The court, however, declined to expand on this point and did not analyze Tennessee’s gendered understanding of capital crime. See *id.* at 157.

<sup>253</sup> See Shapiro, *supra* note 17, at 462–63; *supra* Part V.B–C.

<sup>254</sup> See *McCleskey*, 481 U.S. at 322–23 (Brennan, J., dissenting); Kopec, *supra* note 16, at 376–77; *supra* Part III, V.C.

<sup>255</sup> See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010); *McCleskey*, 481 U.S. at 322–23 (Brennan, J., dissenting); Kopec, *supra* note 16, at 376–77; *supra* Part III, V.C.

<sup>256</sup> See § 19.03; *McCleskey*, 481 U.S. at 322–23 (Brennan, J., dissenting); Kopec, *supra* note 16, at 376–77; *supra* Part III, V.C.

if they blatantly defy feminine stereotypes and thus forfeit the protection that being a woman otherwise affords. The Texas capital punishment statute, in particular, is constructed in a way that permits and even encourages unconstitutional gender discrimination, thereby depriving male defendants of their equal rights to life. Given the extreme gender disparity in the application of the Texas statute, the Supreme Court should distinguish *McCleskey v. Kemp* and hold that the Texas capital punishment statute violates the Equal Protection Clause of the Fourteenth Amendment.

