

# Chivalry Is Not Dead:

## *Murder, Gender, and the Death Penalty\**

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### ABSTRACT

Chivalry—that set of values and code of conduct for the medieval knightly class—has long influenced American law, from Supreme Court decisions to substantive criminal law doctrines and the administration of criminal justice. The chivalrous knight was enjoined to seek honor and defend it through violence and, in a society that enforced strict gender roles, to show gallantry toward “ladies” of the same class, except for the women of the knight’s own household, over whom he exercised complete authority. This article explores, for the first time, whether these chivalric values might explain sentencing outcomes in capital cases. The data for the article comes from our original study of 1299 first degree murder cases in California, whose death penalty scheme accords prosecutors and juries virtually unlimited discretion in making the death-selection decision. We examined sentencing outcomes for three particular types of murder where a “chivalry effect” might be expected—gang murders, rape-murders, and domestic violence murders. In cases involving single victims, the results were striking. In gang murders, the death-sentence rate was less than one-tenth the overall death-sentence rate. By contrast, in rape-murder cases, the death-sentence rate was nine times the overall death-sentence rate. The death-sentence rate for single-victim domestic violence murders was roughly 25% lower than the overall death-sentence rate. We also examined, through this study and earlier California studies, more general data on gender disparities in death sentencing and found substantial gender-of-defendant and gender-of-victim disparities. Women guilty

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of capital murder were far less likely than men to be sentenced to death, and defendants who killed women were far more likely to be sentenced to death than defendants who killed men. We argue that all of these findings are consistent with chivalric norms, and we conclude that, in prosecutors' decisions to seek death and juries' decisions to impose it, chivalry appears to be alive and well.

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## INTRODUCTION

In his 1962 memoir, Clinton Duffy, the former warden of San Quentin State Prison,<sup>1</sup> tells a story about Eithel Spinelli, the first woman to be executed in California.<sup>2</sup> In 1941 when Spinelli was on California's death row, thirty male inmates at San Quentin prison sent a petition to Duffy:

A lengthy document, it said, among other things: that Mrs. Spinelli's execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman

1. San Quentin is the prison where executions in California are held. CAL. PENAL CODE § 3603 (West 2010).

2. CLINTON DUFFY, 88 MEN AND 2 WOMEN 134-41 (1962).

would hurt California in the eyes of the world; that both 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.

The signers offered to draw straws to take her place in the gas chamber.<sup>3</sup> For Duffy, the petition by these hardened criminals, some of them slated for execution themselves, confirmed the chivalrous reaction evoked by the prospect of executing a woman.<sup>4</sup> Duffy himself "was sure that, for no other reason than her sex, her sentence would be commuted to life imprisonment."<sup>5</sup> The inmates' reaction cannot be explained on the basis that Spinelli was a particularly attractive or sympathetic person. According to Duffy, Spinelli was the head of a criminal gang and apparently had directed the killing of a gang associate to prevent him from "talking" about another gang murder.<sup>6</sup> She was the "coldest, hardest character, male or female" Duffy had ever known and was also utterly unattractive: "a hag, evil as a witch, horrible to look at."<sup>7</sup>

At the time of Spinelli's execution, chivalric values regularly found expression in the law as a whole, in the administration of criminal justice, and in the application of the death penalty.<sup>8</sup> In more recent years, chivalry in the law has come under attack. For some scholars, the story of the San Quentin inmates' gallantry—their reluctance to see a female murderer executed—is reflective of archaic paternalism<sup>9</sup> and of gender stereotyping of women as the weaker, more passive sex.<sup>10</sup> Do chivalric norms affect the administration of the present-day death penalty, as they apparently did in Spinelli's time? While scholars have written about the significant gender-of-defendant disparities in death sentencing,<sup>11</sup> this broader question has yet to be addressed. Using empirical data

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3. *Id.* at 136.

4. *Id.* at 135–37; see Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 457 (2000) (citing the Spinelli story as an example of chivalry); Elizabeth Rapaport, *Equality of the Damned: the Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 588–89 (2000) (same).

5. DUFFY, *supra* note 2, at 134.

6. *Id.*

7. *Id.* at 136. That Spinelli was executed despite the chivalric response may be explained by the fact that chivalry does not protect all women equally and that Spinelli's crime, her behavior, and even her appearance were altogether unfeminine. See Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 879 (1990) [hereinafter Streib, *Death Penalty (Article)*]; Joan W. Howarth, *Executing White Masculinities: Learning From Karla Faye Tucker*, 81 OR. L. REV. 183, 211 (2002) ("Most of the women charged with capital murder are not sufficiently feminine—because of poverty, mental illness, race, or the violent agency of the crime of which they are accused, to earn the full protection of womanhood through informal immunity from being charged as capital defendants.").

8. See *infra* Part I.

9. Shapiro, *supra* note 4, at 456–57.

10. Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1418 (1997).

11. See *infra* Part I.C.2.

drawn from a recent study of death sentencing in California, we explore whether chivalric norms might explain sentencing outcomes in death penalty cases—that is, whether there is a discernible “chivalry effect.”<sup>12</sup>

Chivalry incorporated a broad set of cultural norms<sup>13</sup> when it emerged as a comprehensive code of conduct among knights in the High Middle Ages.<sup>14</sup> However, three central norms of medieval chivalry define the present inquiry: the elevation of honor above all virtues, the strict sex roles subordinating women to male protectors, and the class limits to chivalry.

Honor was the core value of chivalry and the most important of the three virtues of the chivalric knight.<sup>15</sup> For the chivalrous knight, honor had an intimate relationship with violence, and the essence of chivalry was its regulation of honor violence.<sup>16</sup> As Richard Kaeuper has emphasized, “The vast and complex literature of chivalry celebrates knightly violence even as it attempts to reform or deflect it into channels where it would produce less social damage.”<sup>17</sup> Chivalry placed the highest value on winning honor with knightly prowess.<sup>18</sup> Most honorable was the display of prowess during war, but honor could also be won through the use of violence in tournaments or private disputes.<sup>19</sup> As Kaeuper explains,

Only after reading scores of works of chivalric literature can we fully appreciate the utterly tireless, almost obsessional emphasis placed on personal prowess as the key chivalric trait. Not simply one quality among others in a list of virtues, prowess often stands as a one-word definition of chivalry in these texts.<sup>20</sup>

Consequently, violence was an accepted means for settling any dispute between knights, especially any perceived affront to honor. Violence might be

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12. The California death penalty scheme provides an ideal vehicle to examine the role of chivalry in death sentencing because of the sweeping discretion afforded prosecutors and juries in the death selection process and because of the availability of substantial empirical evidence on the operation of the scheme. *See infra* Part II.
  13. Although there is no doubt that chivalry as an ideal took hold at some point in the High Middle Ages, its temporal and geographical scope is unclear and the extent to which knights adhered to the code is unknown. JOHN FRASER, *AMERICA AND THE PATTERNS OF CHIVALRY* 38–39 (1982).
  14. The term “chivalry” was used in other senses by medieval writers, *see* RICHARD KAEUPER, *CHIVALRY AND VIOLENCE IN MEDIEVAL EUROPE* 4 (1997), but our concern is with chivalry as a code of conduct.
  15. F. J. C. Hearnshaw, *Chivalry and its Place in History*, in *CHIVALRY: A SERIES OF STUDIES TO ILLUSTRATE ITS HISTORICAL SIGNIFICANCE AND CIVILIZING INFLUENCE* 1, 27–33 (Edgar Prestage ed., 1928). The other two important virtues were gallantry (or courtesy)—the quality displayed by the San Quentin inmates—and Christian piety. *See generally id.* at 1–33.
  16. KAEUPER, *supra* note 14, at 7–9.
  17. *Id.* at 160.
  18. *Id.* at 129–30.
  19. *See generally id.* at 129–160.
  20. *Id.* at 135 (citations omitted).

precipitated by even an apparently trivial affront, for example, an assertion of better lineage, a dispute over whose lady was fairer, a request for a knight's name, or even the question, "Why are you so sad?"<sup>21</sup> Violence was also honorable when used to win a lady from another knight or to protect ladies.<sup>22</sup>

Chivalry enforced strict gender roles because it was a code of conduct only for men; women could not earn honor through physical or martial prowess.<sup>23</sup> While knights were enjoined to be gallant toward ladies, chivalric literature was of two minds concerning women, sometimes idealizing them as inspiring knights to great achievement and sometimes denouncing them as a distraction and impediment to real male concerns,<sup>24</sup> but always judging them in terms of whether they brought honor to men. Insofar as chivalry addressed relations between men and women, "women seem to have been considered property in much chivalric literature, prizes to be won by knightly prowess or to be defended against the prowess of others."<sup>25</sup>

Because women could not achieve honor and would in fact be in danger in the often-violent world, their place was in the home.<sup>26</sup> However, notwithstanding the gallantry generally demanded of knights, chivalry had no solicitude for a knight's wife. The honorable knight, as ruler of his home, was permitted and even expected to physically punish his wife if she "misbehaved."<sup>27</sup> In the words of C. Quince Hopkins, "[T]he 'Age of Chivalry' was a hard time for victims of domestic violence, when physically 'chastising' one's wife was considered an honorable knight's duty."<sup>28</sup>

Medieval society was divided into rigid classes, and chivalry was a code of conduct only for the knightly class. According to F.J.C. Hearnshaw, this was one of the principal vices of chivalry: "[Chivalry] was an exclusive class-institution; it placed a gulf between the knightly order and the commonalty, and restricted its code of honour and courtesy peculiarly to members of its own caste; it generated a contempt for social inferiors and a disregard for their feelings. . . ." <sup>29</sup> As a consequence of adherence to a code of conduct that only governed relations within the knightly class and a "brutal indifference to human suffering,"<sup>30</sup> chivalric knights engaged in public and private warfare felt no inhibitions against attacking common people and laying waste to their property.<sup>31</sup>

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21. *Id.* at 159.

22. *Id.* at 226–27.

23. *Id.* at 213.

24. *Id.* at 211–12.

25. *Id.* at 226.

26. RICHARD W. KAEUPER & ELSPETH KENNEDY, *THE BOOK OF CHIVALRY OF GEOFFROI DE CHARNY: TEXT, CONTEXT AND TRANSLATION* 191–93 (1996).

27. MARGI LAIRD MCCUE, *DOMESTIC VIOLENCE: A REFERENCE HANDBOOK* 26 (1995).

28. C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination*, 9 VA. J. SOC. POL'Y & L. 411, 421 (2001).

29. Hearnshaw, *supra* note 15, at 31.

30. *Id.* at 30 (quoting JOHN RICHARD GREEN, *A SHORT HISTORY OF THE ENGLISH PEOPLE* 182 (1874)).

31. See KAEUPER, *supra* note 14, at 176–85.

The interplay among these three norms is best illustrated by the chivalric knights' particular and peculiar view of the crime of rape. The rules of chivalry were quite clear that raping or otherwise harming a "lady" was unacceptable unless the knight had "won" her in combat with her male protector:

The custom and policy at the time were as follows: any knight meeting a damsel who is alone should slit his own throat rather than fail to treat her honourably, if he cares about his reputation. For if he takes her by force, he will be shamed forever in all the courts of all lands. But if she is led by another, and if some knight desires her, is willing to take up his weapons and fight for her in battle, and conquers her, he can without shame or blame do with her as he will.<sup>32</sup>

Thus the harm caused by the rape of an unaccompanied lady was the dishonor brought on her male protector and the offending knight. Further, because chivalry imposed duties on the knight only in regard to ladies of his class, no dishonor attached to the rape of peasant women.<sup>33</sup> Nor would the chivalrous knight, who was entitled to employ physical violence against his wife, suffer dishonor if he used force to obtain sex from her.<sup>34</sup>

These three norms of medieval chivalry become our standards for evaluating whether there is a chivalry effect in the modern administration of the death penalty. In Part I, by way of background, we explore the role of chivalry in the law and the recent attacks on chivalry. In particular, we review the existing evidence that chivalry has played a role in decisions of the Supreme Court, in the general operation of the criminal justice system, and in the administration of the death penalty. In Part II, we describe the operation of California's death penalty scheme and the empirical research that is the subject of this article. This research examined cases where an adult defendant was found guilty of first degree murder and was statutorily death-eligible (such murders being referred to as "capital murders") to determine the existence of patterns in death sentencing. In Part III, we analyze disparities in the application of the death penalty in the case of three "gendered" forms of capital murder: gang murders, rape-murders, and domestic

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32. *Id.* at 227 (citing a translation of Chrétien de Troyes's medieval poem *Lancelot, the Knight of the Cart*).

33. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 290 (1975) (citing the writings of Andrew the Chaplain).

34. See generally James A. Brundage, *Implied Consent to Intercourse*, in *CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES* 245, 245–56 (Angeliki Laiou ed., 1993) (explaining the medieval concept of conjugal debt and its implications for the use of force to obtain sex within a marriage). In fact until very recently, in this country, a man using force against his wife to obtain sex was not guilty of rape. WAYNE R. LAFAVE, *CRIMINAL LAW* § 17.4(d) (5th ed. 2010). Although no state any longer retains an absolute version of the common law "marital immunity" rule, "[t]he law in more than half the states today makes it harder to convict men of sexual offenses committed against their wives." Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 *HASTINGS L.J.* 1465, 1468–73 (2003).

violence murders. In Part IV, we examine disparities in sentencing outcomes by gender of defendant and gender of victim. We conclude that chivalric norms may explain the disparities we identify and that when prosecutors and jurors are given unguided discretion to make life and death decisions, those enduring norms may play a significant role in determining who lives and who dies.

## I. CHIVALRY IN THE LAW

Chivalry has exerted a powerful influence on American culture throughout the nation's history,<sup>35</sup> particularly in the South, where the pursuit and defense of honor has often justified violence<sup>36</sup> and where the modern death penalty has flourished.<sup>37</sup> As a persistent element of American culture, chivalry was, until recently, an accepted feature of the law and legal institutions. In recent years, feminist scholars and lawyers have challenged the role of chivalric norms in constitutional interpretation, in criminal justice, and in the use of the death penalty.

### A. Chivalry and the Supreme Court

For most of the United States' history, the Supreme Court endorsed a chivalric view of women and women's place in society, emphasizing the distinct roles that women and men were meant to occupy, in cases such as *Bradwell v. State* (1872),<sup>38</sup> *Muller v. Oregon* (1908),<sup>39</sup> and *Hoyt v. Florida* (1961).<sup>40</sup> In *Bradwell*, the Court upheld Illinois's refusal to allow women to practice law, explaining:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother.<sup>41</sup>

In *Muller*, the Court upheld a state law limiting the hours a woman could

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35. See FRASER, *supra* note 13; see also Andrew Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 407 (2005) ("[T]hrough the term is rarely used, there is ample empirical evidence of a powerful 'chivalry' norm continuing in modern American culture.").

36. See Donald Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 498–99 (2009). The Ku Klux Klan and related racist and xenophobic organizations justified their use of violence in chivalric terms. See generally NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY* (1994).

37. The eleven states of the former Confederacy have conducted 73% of the post-*Furman* executions. See DEATH PENALTY INFO. CTR., *FACTS ABOUT THE DEATH PENALTY* (2010) available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

38. 83 U.S. 130 (1872).

39. 208 U.S. 412 (1908).

40. 368 U.S. 57 (1961).

41. 83 U.S. at 141.

work, citing women's "physical structure and performance of maternal functions" as justifying protective legislation.<sup>42</sup> In *Hoyt*, the Court upheld a state law excusing women from jury service because, as the "center of home and family life," women had "special responsibilities" justifying relief from civic duties.<sup>43</sup> In these cases and others, the Court both expressed and relied on the chivalric view that a woman's place was in the home, while a man's role was to engage in civic life and to protect women.

In the 1970s, in response to critiques by second-wave feminists, the Court's views changed. In a string of cases addressing women's participation in the public sphere, the Court held that discrimination—even "positive" discrimination—with regard to women was invidious and denied them an equal role in society. The Supreme Court first articulated this principle in *Reed v. Reed*,<sup>44</sup> holding that a law that gave preference to men in the administration of estates violated the Equal Protection Clause.<sup>45</sup> The Court found that while there was a legitimate goal of reducing the workload of the probate courts, choosing administrators solely on the basis of their sex was not a rational way to accomplish that goal.<sup>46</sup> Two years later, the Court emphasized that even laws intended to benefit women are unconstitutional if they differentiate on the basis of sex. In *Frontiero v. Richardson*, Justice Brennan, writing for the Court, explicitly rejected the reasoning of *Bradwell*, writing, "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>47</sup> The Court reiterated this understanding in *Mississippi University for Women v. Hogan*, holding that "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."<sup>48</sup>

*J.E.B. v. Alabama ex rel. T.B.*<sup>49</sup> may be the high water mark of the Supreme Court's refusal to allow government actions to be based on gender stereotypes. *J.E.B.* was a paternity action prosecuted by the state of Alabama on behalf of the mother against J.E.B., the putative father.<sup>50</sup> During jury selection, the state, not irrationally, used its peremptory strikes to remove all the male jurors, assuming that they would identify with the putative father.<sup>51</sup> Conversely, J.E.B. used his strikes to remove female jurors.<sup>52</sup> Because the jury *venire* was

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42. 208 U.S. at 421.

43. 368 U.S. at 62.

44. 404 U.S. 71 (1971).

45. *Id.* at 76.

46. *Id.*

47. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

48. 458 U.S. 718, 725 (1982).

49. 511 U.S. 127 (1994).

50. *Id.* at 129.

51. *Id.*

52. *Id.*

two-thirds women, the state succeeded in empanelling an all-female jury that found against J.E.B.<sup>53</sup> The Court found the state's actions unconstitutional.<sup>54</sup> The Court pointed out the history of excluding women from juries and noted that such exclusion was based on stereotypes of women as too fragile for the duties of civic life.<sup>55</sup> The Court forcefully rejected reliance even on stereotypes that might be based on a "shred of truth."<sup>56</sup> The Court held that distinguishing between men and women based on sex-based stereotypes violates the Constitution, stating: "Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."<sup>57</sup> Thus, even though the reliance on gender stereotypes in this case worked to the mother's advantage, the Court understood that such reliance would, in the end, disadvantage women.<sup>58</sup>

Despite this apparent progress, chivalry continues to play a role in cases involving access to and control over women's bodies. For example, in *Michael M. v. Superior Court*, the Court upheld California's gender-specific statutory rape law (which criminalized sex with underage girls, but not sex with underage boys) by finding that it served the government interest of preventing teenage pregnancy because "males alone can 'physiologically cause the result which the law properly seeks to avoid.'"<sup>59</sup> In upholding the gendered law, the Court reinforced stereotypes about women, men, and sex: that, when it comes to sex, the male is the aggressor and the female the passive victim, and, consequently, that females need the protection of the state. Feminist critics of California's law

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53. *Id.*

54. *Id.*

55. *Id.* at 131–32.

56. *Id.* at 140.

57. *Id.* at 130–31.

58. The Court's progress toward eliminating chivalry in its legal reasoning in cases involving women's entrance into, and acceptance in, various aspects of the public sphere has not been a smooth road, nor one tread by all members of the Court. For example, in *United States v. Virginia*, 518 U.S. 515 (1996), although the majority held that the Virginia Military Institute's (VMI) policy of excluding women from admission violated the constitutional guarantee of equal protection, Justice Scalia's dissent was, in part, a eulogy for the vanishing role of chivalry in our culture. In arguing that VMI should have been allowed to exclude women from admission, Scalia extolled the value of the "manly 'honor'" for which he believed VMI stood. *Id.* at 601 (Scalia, J., dissenting). He quoted from VMI's "Code of a Gentleman," the chivalric rules by which the students at VMI were to conduct their lives:

Without a strict observance of the fundamental Code of Honor, no man, no matter how "polished," can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defense-less and the champion of justice . . . or he is not a Gentleman.

*Id.* at 602. After reciting the Code of a Gentleman, Justice Scalia lamented, "I do not think any of us, women included, will be better off for its destruction." *Id.* at 603.

59. 450 U.S. 464, 457 (1981) (quoting *Michael M. v. Superior Court*, 601 P.2d 572, 575 (Cal. 1979)). This statement is baffling; it is axiomatic that males *alone* cannot cause pregnancy.

and the Court's holding have argued that "[t]he state restricts the young woman's sexual behavior for reasons related to sexist notions of what makes females valuable. The state does not merely restrict the young woman's freedom; it also treats her sexuality as a thing that has a value of its own and must be guarded."<sup>60</sup>

*Michael M.* can be viewed as just one link in a chain of cases in which the Court has reinforced chivalric sex stereotypes by failing to acknowledge how the state's regulation of matters involving women's physical bodies reifies gender stereotypes. The chain runs from *Roe v. Wade*<sup>61</sup> (which treated abortion as a "purely physiological phenomenon" rather than examining the potential sex discrimination inherent in abortion regulation<sup>62</sup>), through *Geduldig v. Aiello*<sup>63</sup> and *General Electric Co. v. Gilbert*<sup>64</sup> (which held that pregnancy discrimination is not sex discrimination), to the Court's recent and troubling decision in *Gonzales v. Carhart*<sup>65</sup> (which upheld federal regulation of late-term abortions as serving the government's interest in protecting women).<sup>66</sup>

In *Carhart*, as justification for banning an abortion procedure thought by many physicians to be safer for their patients than alternative procedures, the government argued that abortion causes serious mental health problems for women and thus is harmful to women who choose it.<sup>67</sup> Thus, the Partial Birth Abortion Ban Act was to some extent positioned as a public health measure to protect women from psychological harm.<sup>68</sup> Justice Kennedy, writing for the Court, endorsed this view, relying on affidavits from women "who claimed to have been coerced into and harmed by abortion."<sup>69</sup> Justice Kennedy echoed the theme used by the proponents of the Act, questioning a woman's capacity to make rational decisions with the observation that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."<sup>70</sup> In addition to endorsing the view that women

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60. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 406 (1984).

61. 410 U.S. 113 (1973).

62. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 128 (2010).

63. 417 U.S. 484 (1974).

64. 429 U.S. 125 (1976).

65. 550 U.S. 124 (2007).

66. According to Reva Siegel, the Court's apparent reliance on gender stereotypes in this area occurs because "[t]he Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264-65 (1992); see also Franklin, *supra* note 62, at 128.

67. Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L. J. 1641, 1642 (2008) [hereinafter *The Right's Reasons*].

68. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 224 (2009).

69. Siegel, *The Right's Reasons*, *supra* note 67, at 1642.

70. 550 U.S. at 159.

cannot make rational health care decisions for themselves, the Court also implied that women's true or most important identity role was that of a mother, with Justice Kennedy explaining that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."<sup>71</sup>

Thus, the *Carhart* majority relied upon two chivalric themes—that women lack the capacity to make decisions and therefore need the protection of men (in the guise of the state) and that a woman's true calling is motherhood—resurrecting a reliance on chivalry that the Court had seemed to reject in other contexts. As Justice Ginsburg charged in dissent:

"This way of thinking reflects notions about women's place in the family and under the Constitution—ideas that have long since been discredited . . . . This Court has repeatedly confirmed that '[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society . . . .'"<sup>72</sup>

## B. Chivalry and Criminal Justice

In the modern state, the criminal law replaced the chivalric code as the regulator of violent behavior. Yet, for a time in this country, honor-based killings were excused in law or in fact. For example, dueling was illegal at the common law, but it was an acceptable custom in the early nineteenth century and persisted up to the Civil War, especially in the South.<sup>73</sup> Well into the twentieth century, a number of states treated a different kind of "honor" killing as a justifiable homicide—a husband's killing of a man caught in the act of adultery with his wife.<sup>74</sup> All such laws have since been repealed.<sup>75</sup> Nonetheless, in its regulation of violent crime, the criminal law has continued to recognize and apply chivalric norms, in particular in regard to defenses to homicide—self-defense and heat of

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71. *Id.* Reinforcing the idea that a woman's one true calling is motherhood, Justice Kennedy ignored the fact that the women he was referring to were precisely women who did not want to become mothers and who did not consider the fetus they carried to be a child. *See* Manian, *supra* note 68, at 225 ("*Carhart's* portrayal of women evokes a century-old societal view of femininity . . . [and] reflects a gender-stereotyped view of women's nature.>").

72. 550 U.S. at 185 (quoting in part *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992)). At least one author, however, has argued that the majority's woman-protective argument is in fact merely an extension of feminist arguments, raised in the context of abortion, rape, and domestic violence, regarding women's psychological trauma. Jeannie Suk points out that *Roe* also relied on the notion of psychological harm to women—in that case from carrying to term an unwanted pregnancy—as a justification for making abortion legal. Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

73. C.A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1818 (2001).

74. Lois J. Frankel, *Sex Discrimination in the Criminal Law: The Effects of the Equal Rights Amendment*, 11 AM. CRIM. L. REV. 469, 500–01 & n.244 (1973).

75. The four states that had such laws into the 1970s were Georgia, New Mexico, Texas, and Utah. Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 230–36 (1986).

passion—and in regard to crimes committed primarily against women: rape and domestic abuse.<sup>76</sup>

### 1. Self-defense

The law of self-defense (and defense of another) makes justifiable a homicide where the defendant kills under the reasonable belief that the defendant (or another) will suffer an imminent deadly attack by an aggressor.<sup>77</sup> Although the defense might be explained on utilitarian grounds—if a life is to be lost, better that it be the life of the aggressor than the life of the innocent defendant—at least two aspects of the defense echo chivalric values.

First, the general rule, and the rule in California, is that the defense applies even when the defendant could safely have retreated from the encounter and thereby avoided the loss of life.<sup>78</sup> The “no-retreat” rule serves no utilitarian purpose, so it can only be justified on the basis of the so-called “true man” doctrine.<sup>79</sup> That doctrine holds that the true man cannot be expected to suffer the loss of dignity and honor that would result from fleeing his assailant because the virtue of the true man is worth more than the life of an aggressor.<sup>80</sup> This doctrine is a product of chivalric values:

The judicial proponents of the “true man” doctrine—which constituted a sharp break with English common law—were located in the South and West. By virtue of the slave culture in the former and the frontier culture in the latter, both of these regions had inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to slights.<sup>81</sup>

To critics of this “true man” doctrine, it was those very chivalric values that did not belong in the criminal law:

The feeling at the bottom of the [rule] is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife’s paramour; the feeling which would compel a true man to kill the ravisher of his daughter.<sup>82</sup>

Second, although the defense is in theory gender-neutral, feminists have argued that, as applied, it is a man’s defense and of little use to women. This is

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76. The following discussion focuses on California law because the study referred to in Parts II and III was done in California, but California law is not unrepresentative of the law generally.

77. LAFAVE, *supra* note 34, at § 10.4; *see, e.g.*, *People v. Randle*, 111 P.3d 987 (Cal. 2005).

78. LAFAVE, *supra* note 34, at § 10.4(f); *see, e.g.*, *People v. Holt*, 153 P.2d 21, 24 (Cal. 1944).

79. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 429–35 (1999).

80. *Id.* at 431.

81. *Id.* at 432–33.

82. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 577, 581 (1903).

most clear with regard to the “imminence” element of the defense. Men, because of their generally greater size and strength or because of their acculturation and experience with violence, or both,<sup>83</sup> are far more likely than women to be able to respond successfully to the threat of immediate deadly force.<sup>84</sup> Thus, when women kill in response to a threatened or actual attack (or a series of threatened or actual attacks)—most often in the context of domestic abuse—the killing may occur during a period of relative calm when the woman can gain the upper hand, for example, when the attacker is asleep.<sup>85</sup> Men, on the other hand, often can—and are often raised to believe they should—respond to threats immediately with physical violence.<sup>86</sup>

## 2. Heat of Passion

The heat of passion defense mitigates murder to voluntary manslaughter when the defendant has killed in the heat of passion upon adequate provocation.<sup>87</sup> At the common law, there were a limited number of categories of adequate provocation: adultery by a spouse, mutual combat, assault to oneself, assault to a family member, or unlawful arrest.<sup>88</sup> Under modern codes, and in California, provocation is no longer limited to specific categories but extends to any conduct that would provoke the reasonable person.<sup>89</sup> Even more clearly than self-defense, the heat of passion defense is based on chivalric norms.

From its origins in English common law, the theory of the heat of passion defense was that the defendant’s intentional killing was mitigated by the victim’s affront to the defendant’s honor. The case of *Regina v. Mawgridge*<sup>90</sup> is usually cited as the leading common law case on the defense. There, Chief Justice Holt explained why each of the categories of provocation recognized by the law constituted an affront to the defendant’s honor that partially justified the killing,

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83. See *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1977) (“In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.”).

84. Relying on research in the natural and social sciences disclosing gender-based differences in the processing of emotions by the brain—in particular, that in a stressful situation, men reach emotional clarity quickly, while women wrestle with emotional complexity—Katharine K. Baker has argued that self-defense and heat of passion are gendered defenses. Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 460 (2005) (“As long as men react immediately, thoughtlessly, and without emotional struggle, their violent acts are minimized or excused.”).

85. For that reason, some activists and scholars have sought to expand the doctrine of self-defense to cover such situations by seeking to admit evidence regarding “battered women’s syndrome.” See *infra* notes 119–121 and accompanying text.

86. See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections On Provocation Law, Sexual Advances, And The “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 735–36 (1995) (comparing the responses of men and women to provocation).

87. LAFAVE, *supra* note 34, at § 15.2.

88. *Id.* at § 15.2(b).

89. See *id.*

90. (1707) 84 Eng. Rep. 1107 (K.B.).

and he acknowledged that the law “may seem hard” for making such killings a crime at all.<sup>91</sup> In sum, the provocation-based defenses “partially excused men for behaving in accord with outdated notions of masculinity and honor.”<sup>92</sup> A defense based on affronts to honor is a gendered defense because “honor violence” historically has been sanctioned for men, not women.<sup>93</sup> Consequently, men invoke the heat of passion defense far more often than do women.<sup>94</sup>

More recently, many American courts have tended to recast the defense as an excuse defense, along the lines of the Model Penal Code’s reduction to manslaughter of killings resulting from “the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.”<sup>95</sup> The result in these courts has been to focus less on the nature of the provoking incident and whether the incident would affront the honor of a reasonable man and to focus more on the intensity of the defendant’s emotion and its psychological effects.<sup>96</sup> Consistent with that approach, the California Supreme Court has expanded the defense by holding that the provocation may be sufficient to invoke the defense even if not falling within the four categories of provocation recognized at the common law, so long as the defendant’s reason was “disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection . . . .”<sup>97</sup>

Even this expanded defense, divorced of its roots in “honor violence,” remains deeply gendered. Men are the predominant beneficiaries of the doctrine because here the criminal law follows “boys’ rules.”<sup>98</sup> As Joshua Dressler explains,

What is important here . . . is not simply that the average male is more susceptible to violent loss of self-control than is the average woman. It is also necessary to consider how men and women respond to affronts, *i.e.*, to provocations. Women usually submit stoically to their victimization or deny their status as victims by blaming themselves (“I deserve this treatment”); men are more likely to characterize themselves as victims of injustice, or to think

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91. *Id.* at 1115.

92. Henry F. Fradella, *From the Legal Literature*, 42 CRIM. L. BULL. 775, 775 (2006).

93. Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AMER. U. J. GENDER SOC. POL’Y & L. 27, 31 (2006).

94. “The origins of the provocation defense are deeply gendered; it was created for and has always been used far more often by men than women.” *Id.* at 31; *see also*, SAMUEL PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 147–55 (1998) (arguing that provocation-based defenses permit outdated, sexist views about gender roles to control the legal system in a manner that systematically discriminates against women).

95. MODEL PENAL CODE § 210.3 (1962).

96. PILLSBURY, *supra* note 94, at 131.

97. *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976) (quoting *People v. Valentine*, 169 P.2d 1, 12 (Cal. 1946)).

98. Dressler, *supra* note 86 at 735 (citing SUSAN ESTRICH, *REAL RAPE* 60 (1987)).

that their self-worth has been attacked, and to act offensively as a result. One glance at the common law categories of “adequate provocation” shows that the defense has served a male interest, by mitigating the predominantly male reaction of retaliating for affronts and other “injustices.”<sup>99</sup>

### 3. Rape

Rape has always been acknowledged as among the worst of the violent crimes.<sup>100</sup> However, consistent with chivalric norms, only certain cases of rape have historically been punished by our legal system. The law of rape has always been characterized on the one hand by severe condemnation of the crime<sup>101</sup> and the imposition of extreme penalties<sup>102</sup> and on the other hand by the exclusion of spouses from those protected by the rape laws,<sup>103</sup> a tolerance of “acquaintance” rape,<sup>104</sup> and trial rules (e.g., requiring corroboration of the victim’s testimony, permitting evidence of the woman’s prior sexual conduct or reputation for chastity, and authorizing cautionary jury instructions which impugn the victim’s credibility)<sup>105</sup> that make even the conviction of “stranger” rapists difficult.

This treatment of rape reflects chivalric attitudes regarding sexual violence. As noted above, the rules of chivalry were very clear that raping or otherwise harming a “lady” was unacceptable. Yet no such disapproval applied to the rape of peasant women, or to a knight’s sexual abuse of his wife.<sup>106</sup> In the modern history of rape law, the race, social class, and sexual behavior of the victim have all influenced the degree of outrage over her rape.<sup>107</sup> Particularly in the South, fear of black men raping white women was a driving force behind capital rape laws.<sup>108</sup> Rape of a black woman, on the other hand, was not a crime for much of our nation’s history.<sup>109</sup> Thus, although rape has long been seen as a particularly awful crime, it is only a certain kind of rape—namely the rape of a chaste, white woman by a stranger—that has been punished harshly by the criminal law.<sup>110</sup>

99. *Id.* at 736 (citations omitted).

100. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“Short of homicide, [rape] is the ‘ultimate violation of self.’”).

101. *See id.* (“[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . .”).

102. *See infra* notes 128–144 (discussing the application of the death penalty in rape cases).

103. BROWNMILLER, *supra* note 33, at 380–82.

104. *Id.* at 351–52.

105. *Id.* at 368–74.

106. *Id.* at 290, 380–82 (citing a treatise by twelfth-century writer Andrew the Chaplain and later discussing the marital rape exemption).

107. *See generally* Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 Chi.-Kent L. Rev. 359 (1993).

108. Corey Rayburn, *Better Dead than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119, 1128 n.58. (2004).

109. Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 6 (2006).

110. *See* Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 706–08 (2000) (explaining the stereotype of a white woman forcibly raped by a stranger and the reluctance of a jury to convict beyond those circumstances) [hereinafter

In recent years, the feminist movement has succeeded in bringing many changes to rape laws. In California, for example, the legislature enacted a spousal rape statute<sup>111</sup> and rape shield laws protecting the victim from questioning about her prior sexual conduct,<sup>112</sup> and the California Supreme Court held that the prosecution need not prove the victim's physical resistance in order to sustain a rape charge.<sup>113</sup> Nevertheless, in practice, prosecutors in rape cases still face evidentiary hurdles not faced in non-gendered crimes. As one scholar explains, "The problem . . . is that when a man rapes a woman in circumstances that do not fit the stereotype of a rape, which is most of the time, the woman's credibility will be suspect."<sup>114</sup>

#### 4. Domestic Violence

In the 1970s and 1980s, at the height of the women's rights movement, feminists, along with their efforts to reform rape laws, raised the issue of domestic violence and criticized the state, the police, and the courts for their gender bias and reluctance to intervene in "domestic matters."<sup>115</sup> Again, advocates were successful in changing laws and practices. California, for example, enacted legislation that increased the penalties for domestic violence,<sup>116</sup> required a certain police response in domestic violence cases,<sup>117</sup> and mandated domestic violence training for court employees.<sup>118</sup> The legislature also sought to protect women victims of domestic violence by making expert testimony regarding "battered women's syndrome" admissible in a criminal case,<sup>119</sup> and the California Supreme Court has recognized "battered women's

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Crocker, *Crossing the Line*].

111. CAL. PENAL CODE § 262 (West 2010).

112. CAL. EVID. CODE §§ 782, 1103(c) (West 2010).

113. *People v. Barnes*, 721 P.2d 110 (Cal. 1986).

114. Crocker, *Crossing the Line*, *supra* note 110, at 708.

115. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 11–12 (2006); Deborah M. Weissman, *The Personal is Political*, 2007 B.Y.U. L. REV. 387, 396 (2007).

116. *See, e.g.*, CAL. PENAL CODE §§ 273.5, 243(e)(1) (West 2010).

117. *See id.* § 836(c).

118. *See* CAL. GOV. CODE § 68555 (West 2010).

119. The 1991 legislation added Evidence Code § 1107(a) which provided, *inter alia*, that "expert testimony is admissible . . . regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence." 1991 CAL. STAT. 3612–13. The section was subsequently amended to be gender-neutral and to eliminate reference to a "syndrome," and it now provides that expert testimony is admissible regarding "intimate partner battering and its effects." CAL. EVID. CODE § 1107(a) (West 2010). Since expert testimony on battered women's syndrome was originally admitted on the basis of research purporting to show that *women* victims of battering relationships exhibited a common pattern of responses to that experience (*see generally* LENORE WALKER, *BATTERED WOMAN* (1979) and *THE BATTERED WOMAN SYNDROME* (1984)), the amendment has the effect of undercutting the justification for such expert testimony. Scholars challenging the validity of the research on battered women's syndrome have called into question whether expert testimony should ever have been allowed on the subject. *See, e.g.*, David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997).

syndrome” as a mitigating or even excusing factor for a domestic violence survivor’s killing of her abuser.<sup>120</sup> Throughout the country, states have adopted civil and criminal protection orders that could exclude the abuser from the family home.<sup>121</sup>

Nevertheless, the responses to domestic violence have not been wholly emancipatory for women. For example, police mandatory arrest policies, prosecutorial “no-drop” policies,<sup>122</sup> and court- or probation department-imposed criminal protection orders<sup>123</sup>—adopted to prevent coercion of the domestic violence victim by the abuser—have created obstacles to victims of domestic violence being treated as fully autonomous under the law. Such policies deny agency to victims of domestic violence under the chivalric and paternalistic assumption that women cannot make the “right” decisions for themselves about whether they need state intervention in their violent relationships.<sup>124</sup> Rather than recognizing the many reasons that survivors of domestic violence may choose to stay in their relationships despite such violence or the reasons they may want to end those relationships privately without police or court involvement, these policies assume a childlike naïveté on the part of women and transfer control over women’s private lives to the state, allowing the state to take steps to end women’s intimate relationships.

A defendant’s use of battered women’s syndrome evidence in a murder case is similarly problematic because it seems to rely on the assumption that a woman lacks autonomy in a domestic relationship.<sup>125</sup> While such evidence can help the factfinder understand the psychological effects of being in a battering relationship and thereby explain the defendant’s conduct, such syndrome evidence has pathological implications that can compromise a defendant’s claim

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120. *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

121. Suk, *supra* note 115, at 15–16 (“The protection order was to be a legal tool that would transform the home from a wife’s prison into her fortress. It would ban the husband from the space in which his power over her found expression.”).

122. Mandatory arrest policies require police to arrest one or both individuals when they respond to domestic violence calls. “No-drop” policies require prosecutors who handle domestic violence cases to prosecute them despite requests by the victim to drop the charges.

123. Recently, criminal courts have begun to routinely issue orders of protection in cases involving domestic violence, whether or not the victim wants such an order in place, and regardless of the relationship between the parties. *See* Suk, *supra* note 115, at 42–50. State departments of probation and parole have also developed policies making such orders conditions of supervised release. *See e.g.*, *Moller v. Dennison*, 849 N.Y.S.2d 645 (N.Y. App. Div. 2008); *Dawson v. State*, 894 P.2d 672, 680 (Alaska Ct. App. 1995); *People v. Jungers*, 25 Cal. Rptr. 3d 873 (Cal. Ct. App. 2005). These provisions impose a “de facto” divorce on couples who have experienced domestic violence, even over the explicit objections of the “victim” that the policies purport to protect. Suk, *supra* note 115, at 42; *In re Williams v. N.Y. State Div. of Parole*, 899 N.Y.S.2d 146, 148 (N.Y. App. Div. 2010), *lv. denied* 15 N.Y.3d 710 (2010).

124. “Perpetrators no longer are able to manipulate the system by coercing the victim into dropping the charges; control has been shifted from the perpetrator to the government.” Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 16 (1999).

125. *See* Suk, *supra* note 72, for a discussion of how battered women’s syndrome developed and became accepted into the law within a feminist discourse on trauma.

that she acted as a reasonable person and the killing was a justified response to finding herself held hostage by an individual with physical, financial, or social power over her.

As has been true in other areas of the criminal law, the attacks on the chivalric norm granting the husband authority over his wife and the right to use physical force against her have brought about significant changes. Aya Gruber describes the success of feminist efforts in this area: “Society moved from viewing domestic violence as legitimate or private to regarding batterers as among the lowest forms of criminals.”<sup>126</sup> Nevertheless, as in the other areas of criminal law discussed, chivalry continues to affect the administration of the law. The law of self-defense continues to embody the “true man” doctrine, heat of passion continues to be a gendered defense, and rape prosecutions—particularly in the case of “date rape” or spousal rape—encounter unique obstacles. So too the law continues to take a more lenient view toward domestic violence crimes, even murder,<sup>127</sup> and to demean female victims by treating them as less than fully autonomous beings.

### C. Chivalry and the Death Penalty

Chivalric norms may affect the choice of crimes to which the death penalty is applied or the treatment of the sexes as defendants or victims in murder cases. In the past, the issue of chivalry and the death penalty has been examined in the context of rape defendants and female murder defendants.

#### 1. Rape and the Death Penalty

Chivalry, rape, and the death penalty have a linked history in the United States. The feminist critique of the death penalty as a punishment for rape begins with the epidemic of lynchings—primarily in the South and primarily of African American men<sup>128</sup>—in the late nineteenth and early twentieth centuries. It is estimated that there were 4,743 deaths by lynching between 1882 and 1968, with the overwhelming majority occurring between 1889 and 1918.<sup>129</sup> According to Stuart Banner,

Lynching was a form of unofficial capital punishment, adjudication of guilt and execution by groups lacking the formal authority for either. The victims were usually black, the executioners usually white. The line between a lynching and an official execution could be thin. The participants in lynchings often included the very same people who, in their official capacities, administered the criminal justice system. Official trials and executions in the South could take place astonishingly fast, so fast as to closely resemble

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126. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 584 (2009).

127. *See infra* Part III.

128. FRANK ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 90 (2003).

129. *Id.*

lynchings, when a case carried racial implications.<sup>130</sup>

At its height, lynching was much more common than official capital punishment,<sup>131</sup> enjoyed substantial public support among whites,<sup>132</sup> and virtually never resulted in prosecution of any of the responsible parties.<sup>133</sup> Thus, lynching was a substitute for judicial process and execution and a precursor of the modern death penalty.<sup>134</sup>

Although lynchings were first and foremost a vehicle for racial oppression, the justifications given for the practice were seen by feminists to oppress women as well. The myth that supported the lynchings was that the lynching victims were guilty of rape or other sexual behavior toward a (white) woman, and the lynchings were justified in chivalric terms as necessary to redeem the woman's honor.<sup>135</sup> In her biography of Jessie Daniel Ames, the leader of the Association of Southern Women for the Prevention of Lynching (ASWPL) in the 1930s, Jacquelyn Dowd Hall explained the dilemma that lynching posed for women:

The lynch mob in pursuit of the black rapist thus represented the trade-off implicit in the code of chivalry, for the right of the southern lady to protection presupposed her obligation to obey. The connotations of wealth and family background attached to the position of the lady in the antebellum South faded in the twentieth century, but the power of "ladyhood" as a value construct remained. The term denoted chastity, frailty, graciousness . . . . Internalized by the individual, this ideal regulated behavior and restricted interaction with the world. If a woman passed the tests of ladyhood, she could tap into the reservoir of protectiveness and shelter known as southern chivalry . . . . Together the practice of ladyhood and the etiquette of chivalry functioned as highly effective strategies of control over women's behavior as well as powerful safeguards of caste restrictions.<sup>136</sup>

Ames's response on behalf of the ASWPL was to rebel against "the crown of chivalry which has been pressed like a crown of thorns on our heads."<sup>137</sup> While Ames and her supporters did not reject the norms of ladyhood outright, they sought to "strike down the apologetics of lynching by disassociating the

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130. STUART BANNER, *THE DEATH PENALTY—AN AMERICAN HISTORY* 229 (2002).

131. *Id.*

132. See HORTENSE POWDERMAKER, *AFTER FREEDOM* 389 (1939) (citing a 1930s study showing that 64% of whites thought that lynching for rape was justifiable).

133. Dripps, *supra* note 36, at 499 n.132 (2009) ("less than 1% of lynchings in period 1900–1930 resulted in conviction of any responsible individual").

134. As lynchings declined in the mid-twentieth century, the number of legal executions increased, and the "high-lynching" states (including all the states of the former Confederacy) became the "high-execution" states in the post-*Furman* era. See ZIMRING, *supra* note 128 at 89–114.

135. JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY* 145–46 (1979).

136. *Id.* at 151–52.

137. *Id.* at 167.

image of the lady from its connotations of female vulnerability and retaliatory violence.”<sup>138</sup> They attacked the paternalism inherent in the justification for lynching, arguing that “the presumptive tie between lynching and rape cast white women in the position of sexual objects—ever threatened by black lust, ever in need of rescue by their white protectors.”<sup>139</sup>

When lynching died out after 1930, use of the death penalty for rapists grew.<sup>140</sup> From 1930 until the *Furman* decision in 1972, 455 men were executed for rape in the United States, almost 90% of them African Americans.<sup>141</sup> Many feminists continued to oppose capital punishment for rapists. In *Coker v. Georgia*,<sup>142</sup> Ruth Bader Ginsburg (now Justice Ginsburg of the U.S. Supreme Court) was the lead attorney on an amicus brief for the American Civil Liberties Union and others, including five women’s rights organizations.<sup>143</sup> The brief argued that the death penalty for rape was a product of chivalry:

The death penalty for rape should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to a crippling “chivalric protection.” It is part of the fabric of laws and enforcement practices surrounding rape which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.<sup>144</sup>

Although the Court in *Coker* held that the death penalty was a disproportionate punishment for rape of an adult woman and therefore was unconstitutional under the Eighth Amendment, the Court did not address the “chivalry” argument.

## 2. Gender and the Death Penalty

The chivalry hypothesis suggests that female defendants would be favored by the criminal justice system and that they would be convicted of lesser crimes or receive lesser sentences than similarly situated men. Recent studies have

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138. *Id.* at 194.

139. *Id.* Lillian Smith, a post-World War II civil rights leader, described the ASWPL campaign against lynching in these terms: “The lady insurrectionists . . . said calmly that they were not afraid of being raped; as for their sacredness, they could take care of it themselves; they did not need the chivalry of lynching to protect them and they did not want it.” *Id.* at 196.

140. As the lynchings diminished, the “high-lynching” states (including all the states of the former Confederacy) became the “high-execution” states in the post-*Furman* era. See ZIMRING, *supra* note 128 at 89–114.

141. *See Furman v. Georgia*, 408 U.S. 238, 364 (1972).

142. 433 U.S. 584 (1977).

143. The women’s rights organizations were the National Organization for Women Legal Defense and Education Fund, the Women’s Law Project, the Center for Women Policy Studies, the Women’s Legal Defense Fund, and Equal Rights Advocates, Inc. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 18142.

144. *Id.* at 6; *see also* Rayburn, *supra* note 108, at 1126 (“the only way to guarantee exclusive control of [women] by husbands was to threaten the ultimate punishment: death.”).

shown that at all stages of the criminal judicial process female defendants are treated more leniently than males<sup>145</sup> and that in homicide cases male offenders generally receive longer sentences than female offenders.<sup>146</sup> An earlier study concluded: “A review of the post-1975 literature suggests that the chivalry hypothesis is now wholly accepted.”<sup>147</sup>

Studies of gender and the death penalty have, for the most part, focused on the gender of the defendant and have consistently found that women are sentenced to death and executed at significantly lower rates than men.<sup>148</sup> A study of the death penalty applied to women from 1973-2005 found that at every stage of the process female defendants appear to be diverted away from the death penalty at a greater rate than men. While 10% of people arrested for murder are women, only 2% of death sentences imposed at trial are imposed upon women,<sup>149</sup> and women account for only 1.1% of persons actually executed.<sup>150</sup> Men arrested for murder are six times more likely to be sentenced to death than are women arrested for murder.<sup>151</sup> Many scholars have posited that the reason for this discrepancy is chivalric beliefs.<sup>152</sup> The theory, affirmed by studies of attitudes toward female offenders,<sup>153</sup> argues that women “are stereotyped as weak and passive, creating and continuing men’s protective attitude toward women.”<sup>154</sup> That any women at all are executed is explained by the fact that those women did not fit the stereotypical feminine role because they were women of color or lesbians or had in some way rejected the prescribed wife-and-mother role.<sup>155</sup>

Dissenting from the conclusion that chivalry explains the scarcity of

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145. Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism*, 42 LAW & SOC’Y REV. 45, 47 (2008); Shapiro, *supra* note 4, at 452.
  146. Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 371 (2003).
  147. Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME AND JUSTICE, AN ANNUAL REVIEW OF RESEARCH 113 (M. Tonry & N. Morris eds. 1983).
  148. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 621–22 (2006) [hereinafter Streib, *Rare and Inconsistent*]. The conclusion is based on the number of women arrested for murder by jurisdiction, rather than the number of arrests, prosecutions or convictions for capital murder. *Id.* at 620.
  149. VICTOR L. STREIB, DEATH PENALTY FOR FEMALE OFFENDERS 3 (2006), available at <http://www.deathpenaltyinfo.org/FemDeathDec2005.pdf> [hereinafter STREIB, DEATH PENALTY (REPORT)].
  150. *Id.*
  151. Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 442 (2002).
  152. See Herzog & Oreg, *supra* note 145, at 47. *But see* Streib, *Rare and Inconsistent*, *supra* note 148, at 627 (finding no pattern or rational explanation of the gender discrepancies in the application of the death penalty).
  153. See Herzog & Oreg, *supra* note 145, at 66.
  154. Shapiro, *supra* note 4, at 456.
  155. Carroll, *supra* note 10, at 1421; Joan W. Howarth, Review Essay, *Feminism, Lawyering, and Death Row*, 2 S. CAL. REV. L. & WOMEN’S STUD. 401, 417 n.86 (1992); Streib, *Death Penalty (Article)*, *supra* note 7, at 879.

women sentenced to death, Elizabeth Rapaport is one of the few researchers to argue in favor of other explanatory factors.<sup>156</sup> While acknowledging that “[t]here are deep cultural inhibitions against the deliberate killing of women”<sup>157</sup> and that male murderers are substantially more likely to receive a death sentence than female murderers,<sup>158</sup> she has argued that “[t]he fundamental reason why so few women murderers are death sentenced is that women rarely commit the kinds of murders that are subject to capital punishment,” particularly felony-murders.<sup>159</sup> Rather, she argues that when women murder, they overwhelmingly murder family members, and domestic murder is rarely treated as seriously by the criminal justice system as stranger murder.<sup>160</sup> As discussed in Part IV, the empirical data from California calls into question these broad assertions.<sup>161</sup>

The chivalry hypothesis suggests that crimes against women would be more harshly punished than similar crimes against men. At least in the case of homicide, there is a general consensus that, regardless of the gender of the offender, killing a woman results in a longer sentence than killing a man.<sup>162</sup> This disparity exists even in forms of homicide where intent of the offender plays no

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156. Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990).

157. *Id.* at 503.

158. *Id.* at 505. Rapaport asserted that male murderers are “twenty times” more likely to be sentenced to death, but that figure, based on death sentences from a single year (1986) when only three women were sentenced to death, is clearly exaggerated. *See* STREIB, DEATH PENALTY (REPORT) *supra* note 151, at 444 tbl. 2.

159. Rapaport, *supra* note 156, at 509–10. This argument contains a significant ambiguity: it is not clear whether Rapaport is arguing that women do not commit the kinds of murders that are, by statute, capital murders or do not commit the kinds of capital murders that usually result in a death sentence.

160. Of course, what Rapaport may be noticing is simply that chivalric values influence voters and legislatures as well as judges and juries—leading them to discount domestic violence and exclude domestic murders from the list of capital murders. *See infra* notes 170–73 and accompanying text.

161. For example, while Rapaport presumes that felony-murderers are more likely candidates for the death penalty than other murderers, in this study, at least, that depends entirely on the underlying felony. Murderers who killed during theft-related felonies (the most common capital felony-murders) were rarely sentenced to death, even more rarely than domestic violence murderers. And, although Rapaport is correct that domestic violence murders constitute a higher percentage of capital murders for women than for men and that the death penalty is underused for domestic violence murders, in this study, most capital murders by women (75%) were not domestic violence murders, while the only woman to receive a death sentence did commit a domestic violence murder. Rapaport also contends that male murderers are more likely to have prior convictions for violent crimes, making them better candidates for a death sentence. Rapaport, *supra* note 156, at 510. She offers no evidence for this assertion other than the fact that men commit more than 95% of violent crimes. However, if women commit approximately 5% of violent crimes and approximately 5% of capital murders (*see infra* Part IV.A), then, as a statistical matter, the female murderer is no less likely than the male murderer to have committed prior violent crimes.

162. Glaeser & Sacerdote, *supra* note 146, at 375–76. Of course, as has been noted with sentencing discrepancies based on the gender of the offender, the *type* of woman in question plays a role. Offenders who kill women who do not conform to traditional ideas of appropriate femininity and womanhood, such as prostitutes, do not receive sentences that are as long as those who kill “stereotypical” women victims. *See id.* at 373.

role, such as vehicular homicide.<sup>163</sup> Three empirical studies primarily focused on race of victim disparities in death sentencing have noted that the odds of a death charge or death sentence are significantly higher if the victim is a woman rather than a man.<sup>164</sup> However, scholarship discussing the issue of women as victims in capital cases has focused almost exclusively on rape-murder and has documented that it is punished more severely than other forms of murders.<sup>165</sup>

Despite the apparent solicitude for women reflected in the heavy use of the death penalty in rape-murder cases, Phyllis Crocker argues that making rape-murderers death-eligible manages to de-emphasize women and incorporate chivalric stereotypes rather than emphasize the abhorrent nature of the crime of rape.<sup>166</sup> Crocker's studies of the application of the death penalty to rape-murder have found that whether a homicide preceded by sexual assault is punished by the death penalty depends both on whether the defendant and victim were strangers and on the races of the defendant and victim.<sup>167</sup> As Crocker points out, if the death penalty were being used to punish the experience of rape—the violence and harm the victim suffers—it would not matter whether the defendant was a stranger or an acquaintance, black or white. Instead, the death penalty is deployed to strongly condemn rapes that fit the stereotypical definition of “real” rape, which focuses on the identities of the participants rather than the nature of the crime. Further, Crocker argues that once a rape becomes a rape-murder, the stereotypes and evidentiary hurdles attendant to simple rape trials evaporate, and juries require less evidence of rape in rape-murder cases than in rape cases.<sup>168</sup> While at first blush this might appear to be a victory for feminists, it again illustrates the ways in which the criminal justice system discounts the agency of women. As Crocker puts it, “When a woman is alive to testify about the rape, her credibility is questioned. In a rape-murder case, when the woman is dead, her inability to speak speaks for her; her silence, when dead, is more powerful than her voice when alive.”<sup>169</sup>

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163. *Id.* at 376–78.

164. See Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 564–65 (2006); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 25–26 (1991); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 190 (2006).

165. See, e.g., Phyllis L. Crocker, *Is the Death Penalty Good for Women?*, 4 BUFF. CRIM. L. REV. 917 (2001).

166. Crocker, *Crossing the Line*, *supra* note 110, at 693.

167. *Id.* at 702–03.

168. *Id.* at 710–15. Crocker discusses cases from Ohio where defendants were given the death penalty for rape-murders in which the rapes fell outside the stereotyped “real” rape of a stranger on an unsuspecting female victim. For example, she discusses a case in which the victim was drunk and/or high and voluntarily walked with the defendant into the woods; and another case where the only evidence supporting the rape charge was a witness who had said the defendant intended to kill the victim because “she would tell” (though what she would tell was never established). *Id.*

169. *Id.* at 704.

In stark contrast to rape-murder, domestic violence murders rarely are prosecuted as capital crimes in most states.<sup>170</sup> Because domestic violence murders often are seen as heat of passion murders or (if the survivor of the domestic violence is the killer) the product of “battered women’s syndrome,” the killer may not be prosecuted for murder at all. Even when a domestic violence murderer is convicted of first degree murder and is death-eligible, a death sentence is rarely imposed.<sup>171</sup> This leniency toward domestic violence murderers is particularly troubling in light of the fact that women are much more likely to be murdered by intimate partners than under other circumstances.<sup>172</sup> As was noted earlier, this is consistent with the culture of chivalry, wherein spousal violence was traditionally either condoned or ignored by the law because it was a private matter between the partners.<sup>173</sup>

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Over the last forty years, struggles against chivalry in the formal law and in the administration of the law have frequently succeeded. Nevertheless, the victories have not been complete, and, despite much progress, chivalric norms appear to remain deeply embedded in American culture, continuing to influence decision-making at all levels of the legal system. It should come as no surprise, therefore, that chivalry affects the most profound decisions that prosecutors and jurors make: the decisions to seek and to impose the death penalty.

## II. THE CALIFORNIA DEATH PENALTY SCHEME: VIRTUALLY UNFETTERED DISCRETION

In the 1972 landmark decision of *Furman v. Georgia*,<sup>174</sup> the Supreme Court held that the death penalty, as then administered in the United States, violated the Eighth Amendment. Although there was no majority opinion in *Furman*, all five justices in the majority focused on the infrequency with which the death penalty was imposed.<sup>175</sup> Justices Stewart and White, in particular,

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170. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 S.M.U. L. Rev. 1507 (1996). *But see* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101 (2006) (challenging the historical accuracy of this assertion by looking at cases from the turn of the twentieth century that demonstrate that prosecutors and courts treated intimate homicides by men very seriously).

171. *See infra* Part III.C.

172. Dana M. Britton, *Feminism in Criminology: Engendering the Outlaw*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 64 (2000).

173. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 181 (2007) (discussing how courts have “sheltered” spousal violence under a privacy doctrine).

174. 408 U.S. 238 (1972).

175. 408 U.S. at 248 n.11 (Douglas, J., concurring); *id.* at 291–95 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 354 n.124, 362–63 (Marshall, J., concurring). It was the Justices’ understanding that only 15–20% of death-eligible murderers were being sentenced to death. This was the figure cited by Chief Justice Burger, writing for the four dissenters. *Id.* at 386 n.11 (Burger, C.J., dissenting). Justice Powell, also writing for the four dissenters, cited similar statistics. *See id.* at 435 n.19 (Powell, J., dissenting). Justice Stewart, in turn, cited to the Chief Justice’s statement as

emphasized that the relative infrequency of its application created the risk that it would be arbitrarily applied.<sup>176</sup> In subsequent cases, the Court cited the opinions of Justices Stewart and White as embodying the *Furman* holding.<sup>177</sup> In *Zant v. Stephens*,<sup>178</sup> the Court held that, to meet the *Furman* concern about the risk of arbitrary enforcement, the states, by statute, were required to “genuinely narrow,” by rational and objective criteria, the death-eligible class.<sup>179</sup> The Court later explained the point of the *Furman/Zant* rule as follows:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate . . . [juries] will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its significance as a sentencing device.<sup>180</sup>

Thus, the Court seemed to say that the measure of a constitutional death penalty scheme was whether death was imposed on a “substantial portion” of those who were death-eligible, that is, whether the scheme produced a higher death-sentence rate than the pre-*Furman* rate.<sup>181</sup> While the Supreme Court was insisting that death penalty schemes be narrowly drafted so that the death penalty is in fact imposed on a substantial portion of the death-eligible class, California was proceeding in the opposite direction.

### A. The California Death Penalty Scheme

The present California death penalty scheme was enacted through the 1978 Briggs Death Penalty Initiative six years after *Furman*.<sup>182</sup> According to its author, State Senator John V. Briggs, the initiative was intended to “give

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support for his conclusion that the imposition of death was “unusual.” *Id.* at 309 & n.10 (Stewart, J., concurring). Subsequently, in *Gregg v. Georgia*, the plurality reiterated this understanding: “It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment.” 428 U.S. 153, 182 n.26 (1976) (plurality opinion).

176. Justice Stewart found that the death sentences at issue in *Furman* were “cruel and unusual” because, of the many persons convicted of capital crimes, only “a capriciously selected random handful” were sentenced to death. 408 U.S. at 309–10 (Stewart, J., concurring). Justice White concluded that, “the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Id.* at 313 (White, J., concurring).

177. See *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976) (plurality opinion); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

178. 462 U.S. 862 (1983).

179. *Id.* at 877.

180. *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (quoting *Gregg*, 428 U.S. at 222 (White, J., concurring)).

181. See *id.* at 327.

182. Death Penalty Act, Initiative Measure Proposition 7 (Nov. 7, 1978).

Californians the toughest death-penalty law in the country.”<sup>183</sup> By “the toughest death penalty law,” the proponents meant the law “which threatens to inflict that penalty on the maximum number of defendants.”<sup>184</sup> That “toughest death penalty law” has since been expanded by the voters on three occasions since 1978<sup>185</sup> and is the broadest death penalty scheme in the country.<sup>186</sup>

The California Penal Code starts with an expansive definition of first degree murder<sup>187</sup> and then enumerates thirty-three special circumstances that make a first degree murderer death-eligible (i.e., that make the murder “capital murder”).<sup>188</sup> This extensive list of special circumstances covers almost all forms of first degree murder, because virtually all first degree murders are either

183. *Ballot Propositions and Key Races*, 9 CAL. J. (SPECIAL SECTION) 5 (Oct. 1978).

184. *Carlos v. Superior Court*, 672 P.2d 862, 871 n.13 (Cal. 1983).

185. *See* Crime Victims Justice Reform Act, Initiative Measure Proposition 115 § 9 (June 5, 1990); 1995 CAL. STAT. 478, enacted by Proposition 196 § 2 (Mar. 26, 1996); 1998 CAL. STAT. 629, enacted by Proposition 18 (Mar. 7, 2000); Gang Violence and Juvenile Crime Prevention Act, Initiative Measure Proposition 21 § 11 (Mar. 7, 2000).

186. Amended Declaration of David C. Baldus at ¶ 69 *Ashmus v. Wong*, Civ. No. C93-00594-TEH (N.D. Cal.). (“[T]he rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is a product of the number and breadth of special circumstances under California law.”). In fact, the California scheme is so broad that the death sentencing rate among death-eligible cases is “over two-thirds lower than the death sentencing rate in pre-*Furman* Georgia.” *Id.* at ¶ 71. *See also* Tuilaepa v. California, 512 U.S. 967, 994 (Blackmun, J., dissenting) (noting that California’s special circumstances create “an extraordinarily large death pool”); Symposium, *Report of Governor’s Council on Capital Punishment*, 80 IND. L.J. 1, 9 (2005) (citing California and Illinois as having exceptionally broad definitions of death-eligibility).

187. There are twenty-one categories of first degree murder in California. CAL. PENAL CODE § 189 (West 2010).

188. *Id.* § 190.2(a). The thirty-three special circumstances may be grouped as follows:

Two “other murder” circumstances: the defendant was convicted of more than one murder ((a)(3)) or was previously convicted of murder ((a)(2));

Eight “victim” circumstances: the defendant intentionally killed a peace officer ((a)(7)), federal law enforcement officer or agent ((a)(8)), firefighter ((a)(9)), witness ((a)(10)), prosecutor or former prosecutor ((a)(11)), judge or former judge ((a)(12)), elected official or former elected official ((a)(13)), or juror ((a)(20));

Six “manner” circumstances: the murder was committed by a destructive device, bomb, or explosive planted ((a)(4)) or mailed ((a)(6)) or was intentionally committed by lying in wait ((a)(15)), by the infliction of torture ((a)(18)), by poison ((a)(19)), or by shooting from a motor vehicle ((a)(21));

Four “motive” circumstances: the defendant committed the murder for financial gain ((a)(1)); to escape arrest ((a)(5)); because of the victim’s race, color, religion, national origin, or country of origin ((a)(16)); or to further the activities of a criminal street gang ((a)(22));

Twelve “commission of a felony” circumstances: the murder was committed while the defendant was engaged in, or an accomplice to, robbery ((a)(17)(A)), kidnapping ((a)(17)(B)), rape ((a)(17)(C)), forcible sodomy ((a)(17)(D)), child molestation ((a)(17)(E)), forcible oral copulation ((a)(17)(F)), burglary ((a)(17)(G)), arson ((a)(17)(H)), train wrecking ((a)(17)(I)), mayhem ((a)(17)(J)), rape by instrument ((a)(17)(K)), or carjacking ((a)(17)(L)); and

One “catchall” circumstance: the murder was especially heinous, atrocious, or cruel ((a)(14)). This last circumstance was held unconstitutional on vagueness grounds. *See* *People v. Superior Court (Engert)*, 647 P.2d 76, 77–78 (Cal. 1982); accord *People v. Wade*, 750 P.2d 794, 804 (Cal. 1988). Consequently, the “heinous, atrocious, or cruel” circumstance was ignored for purposes of the studies discussed in this article.

premeditated killings or felony-murders.<sup>189</sup> Most premeditated murders are capital murders under California's unique "lying in wait" special circumstance<sup>190</sup> that makes death-eligible a murderer who intentionally kills his victim by surprise and from a position of advantage.<sup>191</sup> As for felony-murder, currently all but one (torture) of the thirteen felonies that may be the basis for a first degree felony-murder conviction are also special circumstances,<sup>192</sup> and California is one of only a handful of states where a defendant would be death-eligible for an unintentional, even wholly accidental, killing during a felony.<sup>193</sup>

The most significant category of commonly occurring first degree murders not expressly covered by the special circumstances are domestic violence murders.<sup>194</sup> Many domestic violence killings do not result in a murder conviction at all. Men, in particular, have been able to make use of the heat of passion defense to negate malice and reduce such killings to voluntary manslaughter.<sup>195</sup> Similarly, victims of domestic violence who kill their abusers have been able to use battered women's syndrome to prove self-defense or imperfect (unreasonable) self-defense, reducing the crime to voluntary manslaughter.<sup>196</sup> Still, some domestic violence killings do result in first degree murder convictions. Even in the absence of a special circumstance explicitly covering domestic violence murders,<sup>197</sup> many such murders are made capital murders by

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189. See *Loving v. United States*, 517 U.S. 748, 755–56 (1996) (holding that a death penalty scheme that made death-eligible all those who committed premeditated murders or felony-murders would encompass so many murders it would "not narrow the death-eligible class in any way consistent with our cases.")

190. See CAL. PENAL CODE § 190.2(a)(15) (West 2010).

191. *People v. Morales*, 770 P.2d 244, 260–61 (Cal. 1989).

192. Compare CAL. PENAL CODE § 189 with § 190.2(a)(17) (West 2010). Torture, although not one of the felony-murder special circumstances, is a special circumstance when occurring in conjunction with an intentional killing. CAL. PENAL CODE § 190.2(a)(18) (West 2010).

193. The other states are Florida, Georgia, Idaho, Maryland, and Mississippi. Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 761 (2007).

194. For purposes of this article, we employ the definition of domestic violence used by the California legislature:

"Domestic violence" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

CAL. PENAL CODE § 13700(b) (West 2010).

195. See *People v. Berry*, 556 P.2d 777, 778 (Cal. 1976).

196. See *supra* notes 119–120 and accompanying text.

197. Significantly, although rape is a special circumstance making a murderer death-eligible, rape of a spouse is not. Compare CAL. PENAL CODE §§ 261–262 (West 2010) with CAL. PENAL CODE § 190.2(a)(17)(C) (West 2010).

one or more existing special circumstances—for example, multiple murder,<sup>198</sup> financial gain,<sup>199</sup> torture,<sup>200</sup> or lying in wait.<sup>201</sup>

The breadth of capital murder in California gives prosecutors and juries extraordinary discretion to select defendants for death, and in practice, that discretion is not otherwise limited. Prosecutors have unfettered discretion in their decisions to seek the death penalty in capital murder cases.<sup>202</sup> After a defendant has been convicted of first degree murder and a special circumstance has been found true at the guilt phase of a capital trial, the sentencing jury is accorded virtually unlimited discretion in its decision. The jurors are instructed to consider a list of eleven factors and told to weigh the aggravating factors against the mitigating factors in reaching their decision (although they are not told which factors are aggravating or mitigating).<sup>203</sup> The jurors are not required to agree on aggravating and mitigating factors, and they do not have to make findings in support of, or otherwise explain, their penalty decision.<sup>204</sup> And, although the California Supreme Court ostensibly will engage in individual proportionality review<sup>205</sup>—potentially a *post hoc* limitation on prosecutors' and juries' exercise of discretion—the court has never found a death sentence to be disproportionate in its more than thirty years of reviewing death sentences under the current law.

The California death penalty scheme is unique, not only for its breadth, but also because it is a product of direct democracy, unmediated by the legislature or the courts. The legislature has had no role in the enactment or repeated expansions of the 1978 death penalty law, and with the exception of its 1982 decision holding unconstitutional the “heinous, atrocious, or cruel” special circumstance,<sup>206</sup> the California Supreme Court has taken no role in limiting death-eligibility.<sup>207</sup>

The California death penalty scheme is also dysfunctional. Former Chief Justice Ron George testified to its dysfunction before the California Commission

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198. See, e.g., *People v. Bunyard*, 200 P.3d 879 (Cal. 2009) (defendant kills his wife and the fetus she is carrying).
  199. See, e.g., *People v. Crew*, 74 P.3d 820 (Cal. 2003) (defendant kills his wife to get possession of her bank accounts and other property).
  200. See, e.g., *People v. Cole*, 95 P.3d 811 (Cal. 2004) (defendant kills his sleeping girlfriend by setting her on fire).
  201. See, e.g., *People v. Ceja*, 847 P.2d 55 (Cal. 1993) (defendant kills the mother of his child by luring her out of her house).
  202. See, e.g., *People v. Ramirez*, 139 P.3d 64, 117 (Cal. 2006) (holding that prosecutorial discretion to seek the death penalty does not violate the federal Constitution); *People v. Gray*, 118 P.3d 496, 543 (Cal. 2005) (same).
  203. See CAL. PENAL CODE § 190.3 (West 2010).
  204. See *People v. Solomon*, 234 P.3d 501, 539 (Cal. 2010).
  205. See, e.g., *People v. Lenart*, 88 P.3d 498, 512–13 (Cal. 2004); *People v. Lawley*, 38 P.3d 461, 508–509 (Cal. 2002).
  206. *People v. Superior Court*, 647 P.2d 76, 77–78 (Cal. 1982).
  207. In *Carlos v. Superior Court*, 672 P.2d 862 (Cal. 1983) (en banc), the court interpreted section 190.2 to require proof of intent to kill for a special circumstances finding. Less than four years later, the court held that interpretation to be erroneous and overruled *Carlos* in *People v. Anderson*, 742 P.2d 1306, 1325–31 (Cal. 1987).

on the Fair Administration of Justice,<sup>208</sup> and the Commission agreed with his testimony.<sup>209</sup> In the thirty-three years between the reinstatement of the death penalty in 1977 and the end of 2010, over 900 defendants were sentenced to death.<sup>210</sup> However, only thirteen were executed.<sup>211</sup> More than six times as many inmates died of natural causes or suicides during that time.<sup>212</sup> As of the end of 2010, there were 713 prisoners on death row,<sup>213</sup> the largest death row in the country. Executions in California are so infrequent that they cannot serve a penological purpose. Even those scholars who contend that the death penalty has a deterrent effect concede that it cannot deter when executions are as infrequent as they are in California.<sup>214</sup> Nor can the death penalty serve a retributive purpose when most of those selected as the “worst of the worst” are never executed.<sup>215</sup>

Prosecutors, and even some jurors, are doubtless aware of these facts. For those who are, their decisions to seek or impose the death penalty may not be based on an expectation that an execution will actually result. Instead, they might intend “to ‘send a message’ of extreme disapproval for the defendant’s acts.”<sup>216</sup> Still, the prosecutors’ and jurors’ choices regarding who should receive this message would seem to be just as valid an expression of their values as a sentence they believe will be carried out. Given the virtually unfettered discretion accorded to prosecutors and jurors in making those choices, California offers an ideal laboratory for exploring the expression of contemporary cultural values in the administration of the death penalty.

## B. The Current Study

To test how prosecutors and juries<sup>217</sup> use their virtually unfettered

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208. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 114 (Gerald Uelman ed., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

209. *Id.* at 116–17.

210. CAL. DEP’T OF CORR. & REHAB., CONDEMNED INMATE SUMMARY (2011), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf).

211. *Inmates Executed 1978–Present*, CAL. DEP’T OF CORR. AND REHAB., [http://www.cdcr.ca.gov/Capital\\_Punishment/Inmates\\_Executed.html](http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html) (last visited Nov. 5, 2011). One other prisoner sentenced to death was executed in another state. *Id.*

212. CAL. DEP’T OF CORR. & REHAB., CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2011), available at [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf).

213. CAL. DEP’T OF CORR. & REHAB., *supra* note 210.

214. See Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 233–42 (2005).

215. See *Furman v. Georgia*, 408 U.S. 238, 311–12 (1972) (White, J., concurring) (“[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society’s need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.”).

216. *Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) (quoting *Maggio v. Williams*, 464 U.S. 46, 54–55 (1983) (Stevens, J., concurring)).

217. We refer to “juries” as the sentencers because, although in theory a defendant could waive a

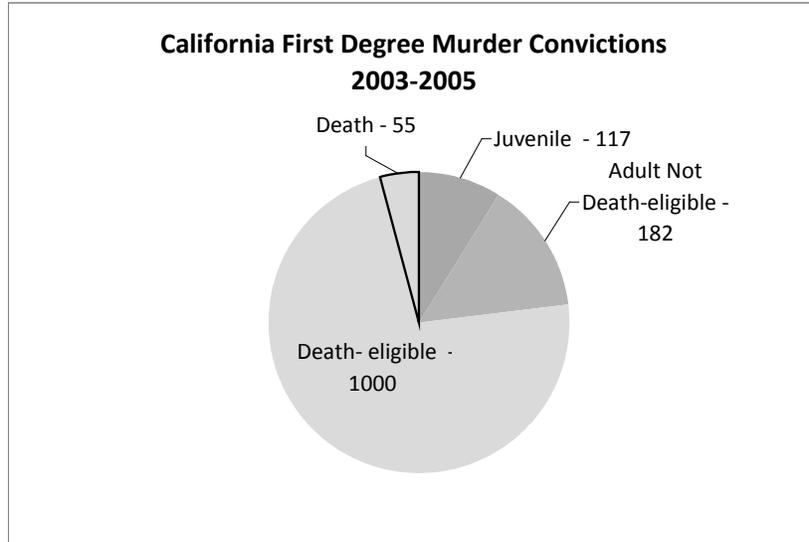
discretion, we examined 1299 cases of defendants convicted of first degree murder during the three-year period from 2003 through 2005. The cases were identified and the data gathered by means of a defense subpoena in a capital case. The defendant in that case challenged the constitutionality of the California death penalty law under the Eighth Amendment because of its overbreadth and subpoenaed pre-sentence reports (“PSRs”) for all defendants convicted of first degree murder during the period in order to present empirical evidence in support of his challenge.<sup>218</sup> Because the quality of the information contained in the PSRs varied from county to county and many of the PSRs were produced with substantial redactions, the information was supplemented with appellate decisions where available.<sup>219</sup> In 117 of the 1299 cases, the defendant committed the murder while a juvenile, and therefore was not death-eligible.<sup>220</sup> In the remaining cases, we categorized the case as “capital murder” where a special circumstance was admitted or found true or where a special circumstance could have been found beyond a reasonable doubt by the factfinder.<sup>221</sup> In 182 cases, we found that the murder was not a capital murder. That is, based on the facts contained in the PSR and any related appellate opinion, if available, there was not substantial evidence to permit an appellate court to uphold a special circumstances finding. Of the remaining 1000 cases we classified as capital murder cases, a special circumstance was found in 509 cases and could have been found based on the facts set forth in the other 491 cases. Thus, 84.6% of the adult first degree murder cases were factually capital cases. In 55 of the 1000 capital cases (5.5%), the defendant was sentenced to death.

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jury at the penalty phase of a capital case, this is almost never done and was not done in any case that went to a penalty phase in the current study. The study is based on sentencing outcomes, so no distinction is made between prosecutors and juries—that is, we do not attempt to separately analyze prosecutors’ charging decisions. In fact, there is reason to assume that the decisions of prosecutors and juries are closely aligned since the main factor driving some prosecutors’ decisions whether to seek the death penalty is their assessment of the likelihood of obtaining a death verdict. See Dashka Slater, *The Death Squad* (1992), reprinted in NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 316, 317 (3d ed. 2009) (quoting a leading death penalty prosecutor in California). In any case, the actions of both prosecutors and juries are expressions of prevailing cultural norms.

218. The PSRs were produced under a court protective order prohibiting the disclosure of confidential information. We do not cite to any individual cases in this article with the exception of the cases resulting in a death sentence (which were identified independently of the PSRs).
219. There were some defendants for whom no PSR was produced and some PSRs that did not provide sufficient usable information, but we estimate that the 1299 cases represent 98–99% of the first degree murder cases (and all of the death cases) during the period.
220. See CAL. PENAL CODE §190.5(A) (West 2010).
221. In making this latter determination, we applied two principles: (1) we treated as controlling a factfinder’s determination that no special circumstance was proved, unless that determination was made by a jury and there was overwhelming evidence of jury nullification; and (2) where no finding was made, we determined, by reference to appellate decisions on similar facts, whether an appellate court would have upheld such a special circumstances finding had such a finding been made.

The following graph sets forth this distribution of cases.



We examined the data to determine if there were disparities in death sentencing outcomes correlated with certain types of capital murder or with the gender of the defendants and victims. The present study is, in certain respects, both more comprehensive and more precise than prior studies addressing gender disparities in other jurisdictions.<sup>222</sup> It is more comprehensive in that we examined the different ways in which chivalric norms might affect death sentencing. It is more precise in that (as was true of the two earlier California studies described below) our data is derived from cases in which the defendant was death-eligible rather than more general arrest or homicide data. Some of our findings have to be viewed with caution for two reasons. First, the number of death sentences in the study is relatively small, creating a significant margin of error as to some findings. Second, the sentence in any given case may be determined by factors other than the nature of the crime or the gender of the parties—for example, legitimate factors such as the quality of the witnesses and other evidence or the past record of the defendant, or illegitimate factors such as the race of the victim or the location of the killing. At the same time, to the extent that our findings in the current study suggest the existence of a “chivalry effect,”<sup>223</sup> such findings tend to be corroborated by the general evidence of the role of chivalric norms in American society, by the findings of other researchers, and, in particular, by data drawn from two earlier studies of California’s death penalty—a study based on a sample of 404 first degree murder appeals decided in the period 1988–1992 (“Appellate Study”) and a study of 473 first degree

222. *See supra* Part I.C.2.

223. Our hope is that our findings will spur further empirical research exploring a possible chivalry effect in the death penalty.

murder cases for murders committed in Alameda County during the period 1978–2001 (“Alameda Study”).<sup>224</sup>

### III. THE DEATH PENALTY AND PARTICULAR KINDS OF MURDERS

Although the sweep of the special circumstances in California makes the overwhelming majority of adult first degree murderers death-eligible, death-sentence rates demonstrate that prosecutors and jurors consider certain kinds of murders to be more aggravated (i.e., more “death-worthy”) than others. Previous California studies have established that two classes of capital murders are considered more highly aggravated (i.e., they produce a significantly higher death-sentence rate) than other commonly occurring types of capital murder.<sup>225</sup> First are the cases in which the defendant has murdered more than one person: prior murder<sup>226</sup> or multiple murder cases<sup>227</sup> (hereafter “multiple murder”). Second are the cases where the defendant intentionally inflicted or attempted to inflict additional serious physical or psychological harm beyond the killing itself: torture,<sup>228</sup> rape or other sexual assault,<sup>229</sup> mayhem,<sup>230</sup> or kidnapping<sup>231</sup> (hereafter “additional-injury murder”).<sup>232</sup> By contrast, most cases not falling within these two categories of highly aggravated murders fell into one of two other large categories: the theft-related felony-murders (robbery,<sup>233</sup> burglary,<sup>234</sup> and carjacking<sup>235</sup>) and what might be termed “ordinary premeditated murders” (lying in wait<sup>236</sup> and drive-by shooting<sup>237</sup>).<sup>238</sup> The current study confirms that multiple

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224. These two earlier studies were conducted by Professor Shatz, who gathered and analyzed the data for the current study. The Appellate Study was based on all published murder appeals and all unpublished murder appeals decided by the First Appellate District of the Court of Appeal during the study period. The Alameda Study was based on all first degree murder convictions for murders committed during the study period. Consequently, the Appellate Study primarily covered murders committed in the 1980s while the Alameda Study primarily covered murders committed in the 1980s and 1990s. Only portions of the data from the earlier studies have been published. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1326–38 (1997) (using data from the Appellate Study); Shatz, *supra* note 193, at 736–45 (using data from both studies).

225. *See* Shatz, *supra* note 193, at 739–44. A substantial majority of the murders in the current study were committed post-1999.

226. CAL. PENAL CODE § 190.2(a)(2) (West 2010).

227. *Id.* § 190.2(a)(3).

228. *Id.* § 190.2(a)(18).

229. *Id.* §§ 190.2(a)(17)(C)-(F), (17)(K).

230. *Id.* § 190.2(a)(17)(J).

231. *Id.* § 190.2(a)(17)(B).

232. Certain other kinds of murders identified by the special circumstances may be considered equally aggravating, but they occur so infrequently in the cases (e.g., murder for financial gain or murder of a peace officer) that their effect cannot be measured. *See id.* §§ 190.2(a)(1), (7).

233. *Id.* § 190.2(a)(17)(A).

234. *Id.* § 190.2(a)(17)(G).

235. *Id.* § 190.2(a)(17)(L).

236. *Id.* § 190.2(a)(15).

237. *Id.* § 190.2(a)(21).

murders and additional-injury murders continue to be viewed as the most death-worthy. In capital cases falling within one or both of these categories, the death-sentence rate was 14.4%. By contrast, the death-sentence rate for all other cases was 1.6%.

Against this background, we examine three kinds of murders—gang murders, rape-murders, and domestic violence murders—all of which have a significant gender component and thus may shed light on the chivalry question. In order to avoid the distortion created by the aggravating effect of multiple murder, we limit our consideration to cases with a single victim and no prior murder conviction for the defendant. In such cases, the overall death-sentence rate was 3.4%. In the case of each of these “gendered” murders, we compare the death-sentence rate for that kind of murder with the death-sentence rate for all other single-victim capital cases in the study.

### A. Gang Murders

The rise in gang violence in recent decades prompted the addition of the “gang motive” special circumstance in 2000.<sup>239</sup> That circumstance makes death-eligible a defendant convicted of first degree murder who “intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang.”<sup>240</sup> In the current study, gang murder was the most commonly occurring special circumstance, appearing in 31.5% of all cases and in 33.9% of the capital cases.<sup>241</sup> Gang murder is a gendered crime. In the study, while women constituted about 6.8% of the non-gang murderers, they constituted only 3.3% of the gang murderers. The gender disparity is even greater with regard to the victims of gang murders—they are disproportionately men. In single-victim non-gang capital murders in the study, women were the victims in 30.5% of the cases; in gang murder cases, women were the victims in only 6.7% of the cases. In short, gang murder cases usually involve men killing men.

The facts of the hundreds of gang murders are depressingly repetitive, tending to follow one of three patterns. In one version, in the manner of the Jets and the Sharks in *West Side Story*, gang members in one gang agree with members of a rival gang to confront each other. *People v. Sanchez*<sup>242</sup> is a case in that mode. There, the two defendants, Sanchez and Gonzalez, were members of rival gangs and were convicted of first degree murder under the following circumstances. Sanchez and a fellow gang member drove to a house where Gonzalez and his fellow gang member were standing outside. The Sanchez car

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238. The gang murder special circumstance, the most commonly occurring special circumstance in the current study, was not added to section 190.2(a) until 2000 and so was not considered in the earlier studies.

239. *See id.* § 190.2(a)(22).

240. *Id.* We refer to such murders coming within this special circumstance as “gang murders.”

241. Adults committing a gang murder before 2000 and juveniles were not death-eligible.

242. 29 P.3d 209 (Cal. 2001).

made several passes in front of house, with the defendants engaging in provocative conduct. On the third pass, the defendants opened fire on each other, killing an innocent bystander. In the second version, the members of one gang plan and carry out an attack on members of a rival gang (or persons they believe to be members of a rival gang) in retaliation for an offense that they believe the other gang committed. For example, in *People v. Shabazz*,<sup>243</sup> the defendant learned the location of a car believed to have been used in a drive-by shooting by a rival gang, went to the location, and, on finding a rival gang member in the car, opened fire, killing the rival's companion. The third version is typified by *People v. Medina*,<sup>244</sup> where an unplanned encounter between gang members at a party escalated from a verbal confrontation to a fistfight to a shooting.<sup>245</sup>

The California Supreme Court, relying on the testimony of police gang experts, has referred to gang violence as being the product of gangs' "code of honor,"<sup>246</sup> and the Court has described the genesis of the violence as follows:

[G]ang members view behavior that disrespects their gang as a challenge and a "slap in the face" which must be avenged. Gang members perceive that, if no retaliatory action is taken in the face of disrespectful behavior, the challenger and others will view the gang member and the gang itself as weak. . . . [V]iolence is used as a response to disrespectful behavior and disagreements and as a means to gain respect.<sup>247</sup>

Scholars who have studied street gangs confirm the views of the court: if a gang member suffers an insult, his honor and status are at stake, and the only way to save face is to retaliate with violence.<sup>248</sup> Violence, then, is meant to "defend the 'honor of males; to secure and defend the reputation of their local area and the honor of their women.'"<sup>249</sup> As such, violence is deeply tied to notions of masculinity.<sup>250</sup>

Gang rules of conduct thus can be seen as a modern incarnation of chivalry.<sup>251</sup> Mirroring knightly violence, gang violence is deployed to define and defend territorial boundaries, to achieve power by vanquishing rival gangs and

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243. 130 P.3d 519, 521–22 (Cal. 2006).

244. 209 P.3d 105, 108 (Cal. 2009).

245. For first-hand accounts of life in California gangs, see CUPCAKE BROWN, *A PIECE OF CAKE* 105–37 (2006); STANLEY TOOKIE WILLIAMS, *BLUE RAGE, BLACK REDEMPTION* 79–210 (2004).

246. *People v. Cervantes*, 29 P.3d 225, 235 (Cal. 2001).

247. 209 P.3d at 109.

248. LARRY J. SIEGEL & BRANDON C. WELSH, *JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW* 311 (2009).

249. John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 *CRIME & JUST.* 365, 373 (1998) (quoting in part Walter Miller, *Violent Crime in City Gangs*, in *DELINQUENCY, CRIME, AND SOCIAL PROCESS* 707 (Donald R. Cressey & David Ward eds. 1969)).

250. *Id.* at 398. Our focus here is on the *conduct* of the gang members. The complex psychological, economic, and social factors that cause persons to join gangs and that create the honor culture described here are beyond the scope of this article.

251. *Id.* at 371–72 (gang violence between neighborhood peer groups mimics feudal rivalries).

taking their territories, and above all to defend and protect the honor of the gang and gang members. Like knightly violence, gang violence also is a means to address even trivial personal affronts. Just as the chivalric knight might have responded with violence to a request for his name,<sup>252</sup> so a gang member might respond violently to the question, “Where are you from?”<sup>253</sup> Indeed, in the world of gangs, as was true in the world of knights, death in service to the gang may even be a path to honor and glory.<sup>254</sup>

Despite the sheer number of gang murders in California and the grip that gang violence has on many communities, the gang murders studied almost never resulted in a death sentence. Of the fifty-five death-sentenced defendants in the study, only six had committed a proved or provable gang murder, and five of those six had committed multiple murders. Thus, out of 296 single-victim gang murder cases, only one defendant (0.3%) was sentenced to death, and that case was atypical because the defendant was convicted of intentionally killing a police officer to effect an escape from custody.<sup>255</sup> It would seem that, consistent with chivalric norms, Californians (as represented by prosecutors and jurors) were more tolerant of killings among men in the context of defending the honor of groups or individuals than of almost any other form of capital murder. To suggest that prosecutors’ and jurors’ refusal to impose the death penalty for gang murders is an expression of chivalric norms is not to assert that prosecutors and jurors mistake gang members for knights of the Round Table. Rather, it is to argue that their outrage at the murderer is tempered by the same “boys will be boys” attitude that accepted the often “heedless violence”<sup>256</sup> of the medieval knights.

While the extraordinarily low death-sentence rate for gang murders strongly suggests a societal tolerance for “honor violence” and is consistent with such tolerance expressed in other aspects of the criminal law,<sup>257</sup> other factors may be at work. The low death-sentence rate may be due in part to the fact that the victims in gang murders are overwhelmingly men and, as we discuss

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252. See *supra* note 21 and accompanying text.

253. *People v. Medina*, 209 P.3d 105, 111 (Cal. 2009).

254. In the words of rapper The Notorious B.I.G.—perhaps one of the most famous casualties of gang violence—“you’re nobody til somebody kills you.” THE NOTORIOUS B.I.G., *You’re Nobody*, on LIFE AFTER DEATH (Bad Boy Records 1997). The idea that dying to defend one’s honor or to defend or protect others is admirable has also been a recurring theme in the popular imagination of knighthood. See, e.g., JOE DARION & MITCH LEIGH, *The Impossible Dream*, MAN OF LA MANCHA (1964) (describing the requirements of a knight as “to be willing to march into hell for a heavenly cause”).

255. See Wendy Thomas Russel, *Cop Killer Gets Death; Daryle Black’s Murderer to be Executed*, LONG BEACH PRESS-TELEGRAM, May 10, 2003, at A1. The extraordinarily low death-sentence rate for single-victim gang murders cannot be explained on the hypothesis that a higher percentage of gang murder cases involve multiple victims. In fact, the percentage of gang murder cases that are multiple murder cases is 11.2%, significantly lower than the percentage for non-gang murder cases, 16.0%.

256. See KAEUPER, *supra* note 14, at 29.

257. See *supra* notes 73–99 and accompanying text.

below,<sup>258</sup> the death penalty is far more likely to be imposed for murder of a woman than murder of a man. Other characteristics of the victims may also contribute to the low death-sentence rate. Victims of gang violence are more likely to be racial minorities and to be living in the more marginal communities where gangs operate, and the victims may be, or may be perceived as being, themselves participants in the gang culture.<sup>259</sup> Consequently, prosecutors and juries may deem such victims less worthy of the “protection” of the death penalty.

Though these factors suggest that a societal tolerance for honor violence may not be the only explanation for the treatment of gang murders, they do not refute the chivalry hypothesis. To the extent that the death penalty is imposed according to the gender of the victim, it is an expression of chivalric values. Similarly, disparities in the use of the death penalty based on the race and class of the victims recall the rigidly class-based distinctions in medieval times defining to whom the knight owed a duty of protection. In sum, whether the observed failure to employ the death penalty in gang murder cases is due entirely to a tolerance for honor violence or, instead, to certain characteristics of the victims, that failure strongly suggests a chivalric effect.

### B. Rape-Murders

The data in the current study demonstrates that rape-murder is the crime most likely to result in a death sentence. In single-victim rape-murder cases, the death-sentence rate was 31.7%, almost sixteen times the rate for all other single-victim capital cases (2.0%). This strikingly disproportionate use of the death penalty in rape-murder cases, marking rape-murderers as the worst of the worst, appears even more noteworthy in light of the fact that murderers in this category may or may not have actually committed a rape—an attempt is enough—and may or may not have intended, or even foreseen, the death.<sup>260</sup> Rape is the quintessential “gendered” crime.<sup>261</sup> In California, while rape-murder could in

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258. See *infra* notes 312–319 and accompanying text.

259. Interestingly, this pattern holds true even when the victim is an innocent bystander and has not assumed the risks of gang life. See, e.g., *People v. Shabazz*, 130 P.3d 519, 522 (Cal. 2006), *People v. Sanchez*, 29 P.3d 209, 215 (Cal. 2001).

260. The felony-murder special circumstances apply if the murder was committed while the defendant was engaged in the commission or attempted commission of certain felonies. CAL. PENAL CODE § 190.2(a)(17), and the California Supreme Court has held that, in the case of the felony-murder special circumstances, the prosecution need not prove that the defendant had any *mens rea* as to the killing. See, e.g., *People v. Mitcham*, 824 P.2d 1277, 1295 (Cal. 1992); *People v. Earp*, 978 P.2d 15, 66 (Cal. 1999).

261. Rape is defined as an act of sexual intercourse accomplished by “force, violence, duress, menace, or fear of immediate and unlawful bodily injury” or under various other circumstances inconsistent with the victim’s consent. CAL. PENAL CODE § 261 (West 2010). Sexual intercourse is defined as any penetration of the victim’s vagina or external genital organs. *Id.* § 263; *People v. Karsai*, 182 Cal. Rptr. 406, 411 (Ct. App. 1982). The California Judicial Counsel’s pattern jury instructions read as follows:

To prove that the defendant is guilty of this crime, the People must prove that:

theory be committed in other ways,<sup>262</sup> in virtually all cases, the crime is committed (and, in every case in the study, was committed) by a man against a woman.<sup>263</sup>

Setting aside momentarily the critique of rape and rape-murder prosecutions as determined by class and race bias<sup>264</sup>—likely a product of chivalric norms that defined only certain “ladies” as deserving of the knight’s protection—the question remains whether the disproportionate use of the death penalty can be explained as a chivalry effect. The extraordinary 31.7% death-sentence rate may best be appreciated by comparing death sentences for single-victim rape-murders and for multiple murders. There is consensus among those who have studied the death penalty that, if there is to be a death penalty, defendants who kill more than one victim should be death-eligible<sup>265</sup>—that they are clearly among the worst of the worst.<sup>266</sup> Three recent proposals to reform and narrow the death penalty at the state level all would retain multiple murder as a death-eligibility factor. For example, the Governor’s Commission in Illinois recommended the reduction of death-eligibility factors in Illinois from twenty to five, retaining multiple murder.<sup>267</sup> The Massachusetts Governor’s Council on Capital Punishment, called upon to draft a “model” death penalty law, would have created a death penalty scheme with only six death-eligibility factors, including multiple murder.<sup>268</sup> Finally, the non-governmental Constitution Project would have retained multiple murder as one of only five death-eligibility factors.<sup>269</sup> No similar consensus exists regarding rape-murder. In fact, none of

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1. The defendant had sexual intercourse with a woman;

...

3. The woman did not consent to the intercourse; AND

4. The defendant accomplished the intercourse by [any of the means listed in § 261].

*Sexual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis.

JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS, No. 1000 (2011).

262. Rape-murder could be committed in the following ways: by a woman against a man if she were to kill him in course of trying to have sexual intercourse with him without his consent; by a woman against a woman, if she aided a man’s attempt to rape the victim; or by a man against a man, if the defendant killed another man to facilitate the rape of a woman.

263. In one case in the study, *People v. Morales*, the defendant in a rape-murder case killed four victims, including a man. See *Murderer of 4 Family Members Gets Death*, L.A. TIMES, Aug. 24, 2005.

264. See *supra* notes 107–110 and accompanying text.

265. See, e.g., David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1605 (1996); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 30 (1995).

266. See *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“[T]he death penalty must be reserved for ‘the worst of the worst.’”).

267. GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT 65, 67 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf).

268. Joseph L. Hoffman et al., *Report of the Governor’s Council on Capital Punishment*, 80 IND. L.J. 1, 7, 8 (2005).

269. THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED

the three above reform proposals would have included rape-murder as a capital crime. However, California's prosecutors and jurors disagree.<sup>270</sup> In California, the death-sentence rate for rape-murders is almost twice that for defendants guilty of multiple murder and more than three times the death-sentence rate for defendants who kill "only" two victims.<sup>271</sup> That California prosecutors and jurors would see killing one person in the course of a rape or attempted rape as so much more heinous than killing two people is on its face remarkable<sup>272</sup> and requires an explanation.

Feminist scholars have long argued that rape should not be viewed as a sexual act but as an especially aggravated form of violence and dominance perpetrated primarily by men against women in an assertion of power.<sup>273</sup> As such, rape has been analogized to torture,<sup>274</sup> and both U.S.<sup>275</sup> and international courts have held rape to be torture under international law.<sup>276</sup> Torture, like rape, is a special circumstance under California law.<sup>277</sup> The circumstance requires proof that the defendant intentionally acted to inflict extreme physical pain on the victim while alive and intentionally killed the victim.<sup>278</sup> It would seem that,

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xxiv-xxv (2006), available at <http://www.constitutionproject.org/manage/file/30.pdf>. The Constitution Project, housed at Georgetown University, seeks to develop bipartisan solutions to contemporary issues. Its Death Penalty Initiative was co-chaired by the Honorable Charles F. Baird, former judge of the Texas Court of Criminal Appeals; the Honorable Gerald Kogan, former Chief Justice of the Florida Supreme Court; and Beth A. Wilkinson, the prosecutor in the Oklahoma City bombing case. *Id.* at xxxvii.

270. The views of California prosecutors and jurors are likely more representative of American cultural norms than those of the various commissions, which were dominated by legal or criminal justice professionals and which were obliged to issue reports defending their recommendations in rational terms.
271. Only when defendants have killed three or more victims does their death-sentence rate exceed the death-sentence rate for single-victim rape-murder defendants. The death-sentence rate for rape-murders is also substantially higher than for other forms of capital murder which some might think are particularly heinous, such as murder of a child or murder for financial gain (contract murders or murders to collect life insurance).
272. To the extent that this hierarchy of values is based on comparative harms inflicted on victims, prosecutors and jurors seem to think that rape plus death is worse than death plus death or that rape is a fate worse than death, a position that has been strongly disputed by some feminist scholars. In praising the feminist movement for changing societal ideas about rape, Susan Jacoby has written, "But the most important change brought about by the women's movement is abandonment of the antediluvian notion that rape is 'a fate worse than death.' Nothing is worse than death . . ." Susan Jacoby, *Thank Feminists for Rape Reforms*, BALT. SUN, Aug. 13, 2002, at 11A.
273. See generally BROWNMILLER, *supra* note 33, at 377; Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 461-67 (2005) (discussing the sex/violence dichotomy).
274. See NANCY VENABLE RAINE, *AFTER SILENCE* 258 (1998).
275. *Zubeda v. Ashcroft*, 333 F.3d 463, 472-73 (3d Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002). Congress has also defined torture to include rape. See, e.g., Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 3, 112 Stat. 3016 (codified at 22 U.S.C. § 2152(3) (2006)).
276. See Bonita C. Meyersfield, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 394-95 (2003) (discussing decisions of international tribunals recognizing rape as a form of torture).
277. CAL. PENAL CODE § 190.2(a)(18) (West 2010).
278. *People v. Jennings*, 237 P.3d 474, 498 (Cal. 2010).

measured by either the depravity of the defendant or the harm to the victim, the torture-murderer—who has killed intentionally after inflicting extreme physical pain—is at least as deserving of the death penalty as the rape-murderer—who may not have killed intentionally and may have done no more than attempt the rape. However, that is not the outcome California prosecutors and jurors reach. The death-sentence rate for single-victim torture-murder cases in the study was 9.0%, less than one-third the death-sentence rate for single-victim rape-murder cases. The disproportionate use of the death penalty in rape-murder cases, particularly in comparison with its use in multiple murder and torture murder cases, confirms that rape continues to be viewed as a singular crime requiring the harshest of punishments.

Since chivalric times, rape (and therefore rape-murder) has never been viewed as simply a crime against the female victim; rather, it has been viewed, perhaps even primarily, as a crime against the honor of the man who was her protector (her husband or her father)<sup>279</sup> because it was a crime against the man's property:

The historical origin of the death penalty for rape lies in the long standing view of rape as a crime of property where the aggrieved was not the woman but her husband or father. In the Southern states this view coalesced with a tradition which valued white women according to their purity and chastity . . . .<sup>280</sup>

The excessive use of the death penalty to punish rape-murders reflects a societal view that “elevates [women’s] chastity to the very essence of their identity.”<sup>281</sup> These views concerning the special harms caused by rape, and thus by rape-murder, found voice in Chief Justice Burger’s dissent in *Coker v. Georgia*,<sup>282</sup> where he wrote: “Rape . . . is destructive of the human personality. The remainder of the victim’s life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband.”<sup>283</sup> While explaining the harms caused by rape, the Chief Justice conflated the experiences of the victims with the effect rape has on the men to whom rape victims “belong.”

The extraordinary disparity in the employment of the death penalty in single-victim rape-murder cases—almost sixteen times the rate for other single-victim cases and almost twice the rate for multiple murder cases—may have less to do with the heinousness of rape-murder compared to other forms of capital murder and more to do with outdated notions about honor, violence, and sex.

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279. BROWNMILLER, *supra* note 33, at 376; *See also* KAEUPER, *supra* note 14, at 225–26.

280. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *supra* note 143 at 6. *See also* Rayburn, *supra* note 108, at 1126 (“the only way to guarantee exclusive control of [women] by husbands was to threaten the ultimate punishment: death.”).

281. Rayburn, *supra* note 108, at 1154.

282. *Coker v. Georgia*, 433 U.S. 584 (1977).

283. *Id.* at 612 (Burger, C.J., dissenting).

### C. Domestic Violence Murders

In contrast to rape-murderers, domestic violence murderers seldom are sentenced to death. The data from the current study confirms that domestic violence murders are disproportionately excluded at all levels, first by the voters' definition of death-eligibility and then by the prosecutors' and juries' charging and sentencing decisions. Single-victim domestic violence murders constituted 12.8% of all first degree murders in the current study, 9.3% of the capital murders, and 6.9% of the death sentences. When domestic violence murderers are death-eligible under one of the existing special circumstances, they are sentenced to death at a lower-than-average rate. In the current study, the death-sentence rate in single-victim domestic violence capital murders was 2.6%, below the 3.7% death-sentence rate for all other single-victim capital murders. So stated, the disparity may not appear substantial, but, in light of the fact that more than 66% of the victims in single-victim domestic violence capital murders were women<sup>284</sup> and that the death penalty is otherwise disproportionately applied in woman-victim cases,<sup>285</sup> the result is striking. In single-victim domestic violence cases in the study, women were the victims in fifty-three cases. The fifty-three cases resulted in one death sentence, a death-sentence rate (1.9%) less than one-seventh the death-sentence rate for women victims in other single-victim cases (14.5%). While the numbers are small, the data from the Appellate Study is similar: a death-sentence rate of 2.7% where women were the victims in single-victim domestic violence murders in contrast to a death-sentence rate of 18.5% for non-domestic violence murders involving a single woman victim.

This relative tolerance for domestic violence murderers—consistent with the chivalric norm that the knight was the unquestioned master of his household—is troubling in light of the fact that women are much more likely to be murdered by intimate partners than under other circumstances.<sup>286</sup> Until recently, the law either condoned or ignored spousal violence as a private matter between the partners.<sup>287</sup> Cases from around the country demonstrate the patriarchal views that judges (mostly male) have regarding domestic violence and domestic violence murder.<sup>288</sup> One aspect of this patriarchal belief can be a sense of identification with the defendant on the part of the judge. For example, in one 1995 case that may not be typical but reflects the persistence of chivalric norms, a man had been arrested four times for domestic violence against his ex-wife, and the judge had sentenced him to one eight-hour domestic violence

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284. This contrasts with an overall rate for female victims in single-victim capital murder cases of 21.6%. *See infra* Part IV.B.

285. *See infra* Part IV.B.

286. Britton, *supra* note 172, at 64.

287. *See* SIMON, *supra* note 173, at 181 (discussing how spousal violence has been “sheltered” by the courts under a privacy doctrine).

288. *See* Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063–67 (1995) (describing cases where judges espoused such views).

program.<sup>289</sup> After the man killed his wife (the day after completing the program) the judge stated that he had given him such a light sentence because, having gone through a divorce himself, he had identified with the defendant and why he was angry.<sup>290</sup> The fact that the death penalty is seldom implemented in cases of domestic violence murder highlights that, whether the discounting is done by the voters, the prosecutor, or the jury, society does not condemn the murder of a present or past intimate partner to the same degree that it rejects the murder of any other victim.

Another reason for the tolerance shown toward domestic violence murderers may be a misguided belief on the part of voters, prosecutors, and juries that the victim of a domestic violence murder is somehow partly responsible for her own death. This view holds that women provoke or instigate domestic violence against themselves or unreasonably fail to take steps to end the abuse.<sup>291</sup> For example, one judge expressed this belief in a case where a man tracked down his wife who was trying to flee their abusive marriage and shot her five times in the face.<sup>292</sup> The judge imposed a minimal sentence, which the defendant served on the weekends.<sup>293</sup> The judge reasoned that the victim “provoked” her husband by not telling him she was leaving.<sup>294</sup> Further, even if the victim did nothing that a prosecutor or jury may believe “provoked” the murder in that moment, these decision-makers may believe that simply by being involved with an abusive man a woman has some responsibility for her own murder. As we discuss below, the decision-making process for capital jurors is often deeply personal, and jurors are more likely to impose a death sentence when they feel personally threatened by the defendant.<sup>295</sup> In cases of domestic violence, jurors may feel that they would never get themselves into a situation where they were being abused or that if they were in an abusive relationship they would have the sense to leave before it turned deadly. Thus, they may have trouble identifying with the victim. Such an attitude represents a deep misunderstanding of the dynamics of domestic violence: the manipulation by the abuser, the time taken to break down the victim’s feelings of self worth<sup>296</sup> and

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289. *Day One: Soft on Domestic Violence?* (ABC television broadcast, Feb. 2, 1995) (LEXIS).

290. *Id.*

291. See, e.g., Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 Alb. L. Rev. 1027, 1051–52 (1995).

292. *Court Backs Judge Who Found Slayer Had Been Provoked*, N.Y. TIMES, July 17, 1984, at A22; *Life Insurance Changes Judge’s Mind on Sentence*, N.Y. TIMES, June 30, 1983, at A14 [hereinafter *Life Insurance*]; Schafran, *supra* note 288, at 1065–66.

293. *Life Insurance*, *supra* note 292; Schafran, *supra* note 288, at 1066.

294. *Life Insurance*, *supra* note 292; Schafran, *supra* note 288, at 1066; see also Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 Or. L. Rev. 945, 969 (discussing a judge who granted summary judgment in a civil case for assault based on the husband’s argument that the wife had not sought medical attention or contacted the police when he punched her).

295. See *infra* Part IV.A.

296. See, e.g., *Domestic Violence*, NAT’L CTR. FOR VICTIMS OF CRIME <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32347#3> (last visited Nov. 5, 2011); *Domestic Violence*, U.S. DEP’T OF JUSTICE: OFFICE ON

avenues of escape, and the power and control that the abuser wields over the victim. This misunderstanding may explain why prosecutors and juries have less sympathy for domestic violence murder victims and less inclination to impose the death penalty on their murderers.

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The sentencing results for these three “gendered” types of murder—gang murder, rape-murder, and domestic violence murder—highlight the ways in which the California death penalty is applied in accordance with chivalric ideas. The dichotomy now-Justice Ginsburg once noted, whereby “women [are] viewed both as the property of men and as entitled to a crippling ‘chivalric protection,’”<sup>297</sup> led to a strikingly different application of the death penalty in the case of the gender-based crimes of rape-murder and domestic violence murder. The death-sentence rate for single-victim rape-murders that were not domestic violence murders was 33.3%, while the death-sentence rate for single-victim domestic violence murders that were not rape-murders was 2.7%. When murders occurred in the context of a culture in which honor violence is endemic—gang murders—or in the context of an intimate relationship where violence has long been tolerated—domestic violence murders—the severity of those murders tended to be discounted and the death penalty rarely employed. The treatment of these three particular kinds of murder in the cases in this study sheds light on the parallels between chivalric culture and our current society, indicating that in contexts where gender plays a salient role in crime, we may still adhere to medieval views on the interplay between gender and violence.

#### IV. THE DEATH PENALTY AND GENDER

The disparities in death sentencing for “gendered” murders form the background for a discussion of the broader issue of gender and the death penalty. This section examines whether there are gender-of-defendant or gender-of-victim disparities in the administration of the death penalty and, if so, whether those disparities are consistent with a chivalry effect.

##### A. Gender of the Defendant

The data in the current study confirms the most well-known aspect of the relationship of gender to the death penalty—that women murderers are sentenced to death at a significantly lower rate than men. In the cases examined, fifty-one women were convicted of capital murder (5.1% of the 1000 defendants convicted of capital murder), and only one, Angelina Rodriguez, was sentenced to death.<sup>298</sup> She was convicted of killing her husband by poisoning him, plainly

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VIOLENCE AGAINST WOMEN, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Nov. 5, 2011).

297. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *supra* note 143, at 11.

298. See Anna Gorman, *Jury Calls for Poisoner's Death*, L.A. TIMES, Nov. 13, 2003, at B3.

violating chivalric norms by her choice of victim (a lady should not be killing her “lord and master”<sup>299</sup>) and her choice of means (killing by stealth is dishonorable because it denies the victim the opportunity to defend himself<sup>300</sup>), thus making her a likely candidate for a death sentence. While the numbers in the current study are, independently, too small to prove the existence of a gender-of-defendant disparity, when combined with the data from the earlier studies, these numbers confirm the findings of previous researchers.<sup>301</sup> Combining the data from all three California studies, women constituted 5.3% of the death-eligible defendants convicted of first degree murder and not sentenced to death, but only 1.2% of the defendants sentenced to death.

Two explanations, both consistent with chivalric norms, suggest why death-eligible women convicted of first degree murder are so infrequently sentenced to death. The simple explanation is that women are sentenced to death at a lower rate than men because of chivalric attitudes on the part of prosecutors and juries. Because women are stereotyped as weak, passive, and in need of male protection, prosecutors and juries may be reluctant to impose the death penalty upon them.<sup>302</sup> In this sense the criminal justice system treats women almost like children—considered less rational and less able to make appropriate decisions, they are held to a lower moral standard when they transgress societal rules. Some authors argue that “the relative dependence of women on men translates into a diminished culpability and an increased possibility of rehabilitation” in the eyes of prosecutors and juries.<sup>303</sup> Of course, some women *are* sentenced to death. That too can be explained in chivalric terms; women who receive the death penalty tend to be women who do not fit traditional, idealized notions of femininity (e.g., prostitutes, lesbians, and women of color) and thus do not benefit from this attitude of chivalry.<sup>304</sup>

The second reason relates to the role that “future dangerousness” plays in death penalty decisions. Studies of decision-making by capital juries indicate that a major factor in their sentence choice is whether they believe the defendant, if allowed to live, will pose a danger to others.<sup>305</sup> Some states, including the two

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299. At the common law, the wife who killed her husband was regarded as having committed a crime worse than murder: “[S]he not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime, a species of treason . . .” Edward Christian, *Notes on the Thirteenth Edition of WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND*, 445 (13th ed. 1800).

300. See JOHN BELLAMY, *CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES* 54 (1973) (“[Homicide by stealth] was heinous, not because of any evil preparations, but because it caught a man off his guard.”).

301. See *supra* notes 145–173 and accompanying text.

302. Shapiro, *supra* note 4, at 456. This theory has been suggested as the reason for the low rates of women tried, convicted, and sentenced for crimes in general. See Herzog & Oreg, *supra* note 145, at 47.

303. Carroll, *supra* note 10, at 1418.

304. Herzog & Oreg, *supra* note 145, at 48–49.

305. John H. Blume et al., *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397, 398 (2001).

with the highest execution rates—Texas and Virginia—expressly make future dangerousness an aggravating factor. However, the Supreme Court has assumed that juries consider the issue even in states, like California, that do not identify it as an issue for the jury.<sup>306</sup> Studies of capital juries by the Capital Jury Project have confirmed that assumption. Even in cases where the state does not place the future dangerousness of the defendant at issue, jurors still consider future dangerousness in making their sentencing decisions.<sup>307</sup> Jurors not only consider the issue, but place unwarranted weight on it, because they “grossly underestimate how long capital murderers not sentenced to death stay in prison.”<sup>308</sup>

In considering future dangerousness, jurors seem primarily to consider whether the defendant could be a danger to them personally, rather than the likelihood that the defendant would pose harm to someone else.<sup>309</sup> One consequence is that jurors tend to identify with victims who were killed by strangers, rather than by acquaintances,<sup>310</sup> and with victims who were themselves “innocent,” rather than those engaged in risky or illegal behavior.<sup>311</sup> Women defendants are likely to be physically smaller and weaker than most men, and their appearance, coupled with cultural assumptions about women’s capacity for violence, means that even women who have committed capital murder will be perceived as less dangerous to the jurors personally than male defendants committing similar crimes.

### B. Gender of the Victim

While past studies have examined gender-of-defendant disparities, gender-of-victim disparities have only been noted in passing in studies focused on other issues.<sup>312</sup> However, the gender-of-victim disparities found in the present study are striking. Women were the victims in 21.9% of the single-victim capital cases. In those cases, the death-sentence rate was 10.9%, more than seven times the rate when men were the victims (1.5%). The earlier California studies also reflect significant gender-of-victim disparities, although not of the same order as the present study. In the Appellate Study, the comparable figures were 14.0% for female victim cases and 5.7% for male victim cases. In the Alameda Study, the figures were 18.4% for female victim cases and 5.7% for male victim cases.<sup>313</sup>

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306. See *California v. Ramos*, 463 U.S. 992, 1008 (1983); see generally Blume, et al., *supra* note 305.

307. See generally Blume, et al., *supra* note 305.

308. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 648 (1999).

309. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 364–65 (2003).

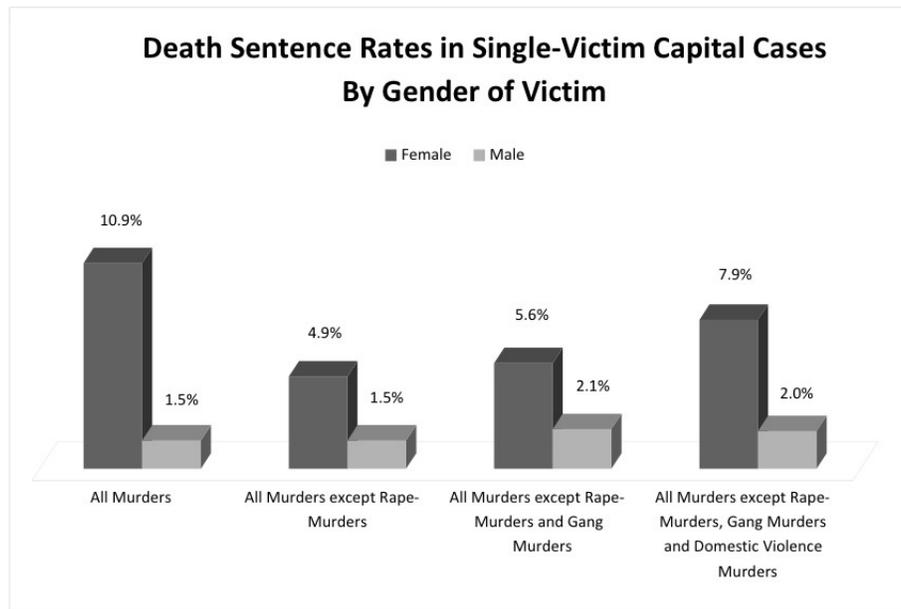
310. *Id.* at 359.

311. *Id.* at 364.

312. See *supra* note 164, and accompanying text.

313. As to what might explain the apparent increase in the gender-of-victim disparity over time, two factors should be noted: (1) the percentage of first degree murder convictions based on

This gender-of-victim disparity is produced in part, but only in part, by the high death-sentence rate for rape-murders (where all the victims were women) and the low death-sentence rate for gang murders (where the victims were disproportionately men). When rape-murders are excluded from consideration, the death-sentence rate in the current study for female victim cases is 4.9% compared to 1.5% in male victim cases. The disparity also persists in the earlier California studies when rape-murders are excluded. In the Appellate Study, the death-sentence rate for female victim cases was 10.3%, as against the 5.7% for male victim cases. In the Alameda Study, the comparable figures were 17.5% and 5.7%, respectively. Excluding the gang murder cases along with the rape-murder cases further reduces the gender-of-victim disparity in the current study, but the disparity remains substantial. Excluding both rape-murder and gang murder cases, a death sentence was imposed in 5.6% of the female victim cases and only 2.1% of the male victim cases.<sup>314</sup> If all three gendered crimes identified earlier are excluded, the respective death-sentence rates are: 7.9% in female victim cases and 2.0% in male victim cases. These figures are set out in the following chart:



That prosecutors and jurors found the murder of a woman by someone other than an intimate partner so much more aggravated than the murder of a

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gang killings has increased significantly and men are disproportionately the victims in gang killings, where the death penalty is rarely imposed; and (2) there has been a substantial decline in the absolute number, and the percentage, of capital case defendants sentenced to death, which may exaggerate disparities as use of the death penalty becomes more narrowly focused on particular kinds of murders, such as rape-murder.

314. There is no comparable data from the earlier California studies on gang murders.

man or a woman in the course of domestic violence is consistent with chivalric norms, which allowed knights to kill other men and gave them plenary power over women in their household but held that killing any other woman was dishonorable because she was defenseless. In an age when killings were committed by armored knights engaged in hand-to-hand combat, women were especially vulnerable and in need of protection. Whether they remain relatively more vulnerable today, when a substantial majority of murders are committed with firearms,<sup>315</sup> is unclear. Nonetheless, studies of capital juries' decision-making confirm that jurors are still influenced by such views. Although the jurors interviewed by the Capital Jury Project claimed that the victim's gender was irrelevant to their decisions,<sup>316</sup> in actual cases, jurors were more likely to return a sentence of death if the victim was female.<sup>317</sup> The researchers found that the degree to which the victim was perceived to be innocent (not engaged in "risky behavior")<sup>318</sup> or helpless played a significant role in the jurors' decisions.<sup>319</sup> Presumably the jurors concluded that female victims—except victims of domestic violence—were more innocent or more vulnerable than male victims. These factors help explain why California, consistent with chivalric norms, punishes male-on-male violence or male-on-female violence within the home (which may be seen as the male's prerogative or for which the female victim may be seen as partly to blame) less severely than stranger (usually male) violence toward a supposedly innocent and helpless female.

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The data reveals disparities in death sentencing by both the gender of the defendant and the gender of the victim, with the gender of the victim having an even greater impact on penalty outcomes than the gender of the defendant.<sup>320</sup> As

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315. See U.S. DEPT. OF JUSTICE, MURDER VICTIMS BY WEAPON, 2005–2009 (2010), available at [http://www2.fbi.gov/ucr/cius2009/offenses/expanded\\_information/data/shrtable\\_08.html](http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_08.html).

316. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998); Sundby, *supra* note 309, at 347 (finding that only 5% of jurors said they would be much more likely to vote for death if the victim were female). At least some jurors, however, recognized that they found the murder of women to be more troubling than the murder of men. One female juror described her process in deciding how bad the case she sat on was this way: "I thought about a scale—the cliché of thinking about Manson, but that kind of crime, that kind of mass murder, serial murder involving children or women as the worst. I don't know why that seems to me—children in particular and, unfairly, women before men." Sundby, *supra* note 309, at 368.

317. Sundby, *supra* note 309, at 357–58.

318. *Id.* at 364.

319. *Id.* at 352.

320. This pattern replicates the pattern consistently found in studies of race and the death penalty, from the seminal study of the Georgia death penalty by Professor Baldus and others (the basis for the constitutional challenge in *McCleskey v. Kemp*, 481 U.S. 279 (1987)) to the recent eight-state study by the American Bar Association which found that "Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim." AM. BAR ASS'N, STATE DEATH PENALTY ASSESSMENTS: KEY FINDINGS 5 (2007), available at <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>. That both the race of the victim and the gender of the victim seem to have a substantial effect on death sentencing raises the troubling possibility that the victim's identity may matter as much or more to

noted, these disparities cannot be explained away by the nature of the murders. Treating women as less culpable and less to be feared when they murder and weaker and more in need of society's protection when they are victims is a clear expression of chivalric values.

### CONCLUSION

Forty years ago, in his concurring opinion in *Furman*, Justice Marshall warned that giving juries "untrammelled discretion" in capital cases was "an invitation to open discrimination."<sup>321</sup> His concern was not only about racial discrimination but also about gender discrimination: "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>322</sup> Justice Marshall's concern about gender discrimination has not found voice in later cases. In fact, in *McCleskey v. Kemp*, Justice Powell, writing for the majority, rejected defendant McCleskey's claim that a complex statistical study proved a substantial risk of racial bias in capital sentencing.<sup>323</sup> The Justice wrote that "the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender."<sup>324</sup> Justice Powell thus made clear his view that considering gender disparities in death penalty sentencing was an extreme to which the Court would not go. The Court has never since mentioned the issue. The lower courts have been similarly dismissive of claims of gender disparities in death sentencing, finding that such claims are foreclosed by *McCleskey*.<sup>325</sup>

Recently, and apparently for the first time, the California Supreme Court addressed a "chivalry" challenge to a defendant's death sentence. In *People v. Carasi*, the male defendant, Carasi, and his girlfriend, Lee, were charged with the double murder of Carasi's mother and his former girlfriend.<sup>326</sup> The prosecution sought the death penalty against both defendants.<sup>327</sup> The prosecution's evidence was that the defendants had plotted the murders, lured the women victims to a parking garage, and then stabbed the victims to death.<sup>328</sup> Both defendants moved for severance on several occasions, and one of Carasi's arguments was that a joint trial with a female co-defendant would inevitably put him at a disadvantage at the penalty phase because of "misplaced chivalry" by

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prosecutors and juries than the nature of the crime or the character of the defendant.

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

322. *Id.*

323. 481 U.S. 279.

324. *Id.* at 315–17.

325. *See, e.g., Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988).

326. 190 P.3d 616, 622 (Cal. 2008).

327. *Id.*

328. *Id.* at 622–23.

the jury.<sup>329</sup> As the United States Supreme Court has recognized, the issue of relative culpability can be a “critical issue” in the penalty phase of a death penalty case.<sup>330</sup> Nevertheless, the motions were denied, both defendants were convicted of first degree murder, and the special circumstances were found true.<sup>331</sup> At the joint penalty phase, Carasi was sentenced to death.<sup>332</sup> The jury was unable to agree on Lee’s sentence, and she subsequently received life without possibility of parole.<sup>333</sup> On appeal, the California Supreme Court dismissed Carasi’s “chivalry” challenge out of hand.<sup>334</sup> The court found no reason to believe that chivalry might have affected the result because Carasi had offered “only generalized assumptions about cultural stereotypes and gender biases in criminal cases” to justify his claim.<sup>335</sup> The Court held that there was evidence in the record that could have justified the different outcomes and noted that the jury was instructed to consider each defendant individually, “based solely on the evidence applicable to that defendant.”<sup>336</sup>

Two theories, both reminiscent of Justice Powell’s opinion for the majority in *McCleskey*, may explain the courts’ indifference to the possible influence of chivalric norms, in general, and gender, in particular, on death sentencing. First, the courts may view the documented disparities—such as treating the murder of a woman as especially heinous (except when she is the victim of domestic violence)—as natural or, in Justice Powell’s words, “inevitable.”<sup>337</sup> Certainly, the Justice’s dismissive reference to possible claims based on gender suggests as much. Second, the courts’ concern may be that an attack on chivalry in the death penalty may be, in effect, an attack on the death penalty itself.<sup>338</sup> From its roots in the lynching culture<sup>339</sup>—the “peculiar chivalry”<sup>340</sup>—to the present emphasis on retribution and “honoring the victim” as the justifications for its use,<sup>341</sup> the

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329. *Id.* at 639, 649.

330. *Green v. Georgia*, 442 U.S. 95, 97 (1978).

331. 190 P.3d at 639, 622.

332. *Id.* at 622.

333. *Id.* at 622 n.2.

334. *Id.* at 649.

335. *Id.*

336. *Id.* at 649–50 (quoting CAL. JURY INSTRUCTIONS 8.84 (2005)). It is not clear whether the court rejected the defendant’s claim because it found that the mere fact of gender-of-defendant disparities in the application of the death penalty failed to establish that there was a risk of gender bias in sentencing or because proving a *risk* of gender bias was insufficient if the defendant could not prove gender bias in his case.

337. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

338. Justice Powell voiced this concern about *McCleskey*’s challenge: “Given . . . safeguards already inherent in the imposition and review of capital sentences, the dissent’s call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution.” *Id.* at 313 n.37.

339. *See supra*, notes 128–139 and accompanying text.

340. JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSON, *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990*, at 38–65 (1994) (chapter discussing the history of rape, race, and “peculiar chivalry” in the United States).

341. *See* Sister Helen Prejean, *Our Need to Journey With Clergy and Laity who are Ambivalent*

death penalty itself seems to have an intimate relationship with chivalric norms.

In the forty years since *Furman*, the attacks on chivalry in the areas of constitutional law and the general administration of criminal justice<sup>342</sup> have been successful in bringing about significant changes in the law. However, the empirical evidence demonstrating a tolerance for honor killings (as reflected in the negligible use of the death penalty in gang murders), a grossly disproportionate use of the death penalty for rape-murderers coupled with its scant use for domestic violence murderers, and the substantial disparities in death sentencing based on the genders of defendants and victims strongly suggests that little has changed with regard to the administration of the death penalty. The promise of *Furman* and succeeding cases was that the modern death penalty would be administered in a rational, non-arbitrary manner<sup>343</sup>—that capital punishment would “be imposed fairly, and with reasonable consistency, or not at all.”<sup>344</sup> The promise of *J.E.B.* was that the law would not be administered on the basis of “invidious, archaic, and overbroad” gender stereotypes.<sup>345</sup> Despite these promises, when prosecutors and jurors are called upon to make a life or death decision unconstrained by legal standards, chivalry appears to be alive and well.

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*About Capital Punishment, and Then to Act Together for its Abolition*, 4 RUTGERS J. OF LAW & RELIGION 31, 35 (2002) (noting that victims’ families seek and judges impose the death penalty to honor victims). Recently, California Supreme Court Justice Moreno asserted in a concurring opinion that the purpose of a penalty phase “is not to honor the victim but to decide whether the defendant should receive a death sentence,” but no other justice joined him in that position. *People v. Verdugo*, 236 P.3d 1035, 1073–74 (Cal. 2010) (Moreno, J., concurring); *see also* *People v. Kelly*, 171 P.3d 548, 576 (Cal. 2007) (Moreno, J., concurring and dissenting) (criticizing the victim impact evidence on the ground that “the punishment phase of a criminal trial is not a memorial service for the victim”) (quoting *Salazar v. State*, 90 S.W.3d 330, 335–36 (Tex. Crim. App. 2002)).

342. *See supra* Parts I.A, I.B.

343. *See* *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Kansas v. Marsh*, 548 U.S. 163, 203 (Souter, J., dissenting).

344. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

345. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 (1994). To say that a death penalty scheme administered on the basis of gender stereotypes violates the promise of *J.E.B.* is not to say that a defendant would succeed with an Equal Protection challenge to the scheme. The defendant making such a challenge would have the same problem Warren McCleskey had in *McCleskey v. Kemp*, 481 U.S. 279 (1987)—the difficulty of proving that either the prosecutor or the jurors in his or her case was acting with discriminatory intent.