

The Death Penalty: A Masculine Power Struggle

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Introduction

The death penalty sentence in the United States is disproportionately applied to men and women, with men receiving about 98% of the total sentences.¹ It is common for those analyzing the gender issue prevalent within the American capital punishment system to conclude that women receive preferential treatment regarding murder cases. However, this is not the case. Actually, men are receiving discriminatory treatment when assigning capital punishment because of the number of men in positions of power who enforce patriarchal attitudes within the criminal justice system.²

As a result of the patriarchal mindset, men are more likely to support capital punishment for men who commit death-eligible crimes. In addition, men in power are not as likely to support the death penalty for women because they are viewed as less of a threat than men are.³ Therefore, the issue at hand is not why women get fewer death sentences but why men get more death sentences. The death penalty is an attack on men, and the lack of sentencing for women doesn't necessarily indicate that society is "easier" on women. The criminal justice system is a patriarchal institution and it is necessary to look at each step in the process to analyze how the death penalty is but one way in which men are able to preserve societal norms and eliminate threats to that culture of power.⁴

¹ Streib, Victor. "Death Penalty for Female Offenders, January 1, 1973 through December 31, 2012." *Death Penalty Information Center*. (2013). Web.

<<http://www.deathpenaltyinfo.org/documents/FemDeathDec2012.pdf>>.

² Heberle, Renee. "Disciplining Gender; Or, Are Women Getting Away with Murder?" *Signs* 24.4 (1999), p. 1106.

³ Rapaport, Elizabeth. "The Death Penalty and Gender Discrimination." *Law & Society Review* 25.2 (1991), p. 368.

⁴ Heberle, Renee. "Disciplining Gender; Or, Are Women Getting Away with Murder?" *Signs* 24.4 (1999), p. 1106.

Death Penalty History and Procedure

In 1972, the Supreme Court of the United States ruled in *Furman v. Georgia* that death penalty laws without clear conviction guidelines for juries to follow are considered unconstitutional cruel and unusual punishments.⁵ The basis of declaring the laws unconstitutional centered around the perception that the death penalty could be handed down arbitrarily and without much consideration, resulting in the death penalty being imposed unfairly.⁶ Two members on the Court, Justices Marshall and Brennan, filed concurring opinions asserting that regardless of how the law is written, the death penalty is unconstitutional.⁷ In Justice Marshall's concurring opinion, he refutes the six possible purposes of the death penalty, "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy," and also argues that it is discriminatorily imposed against men and African Americans.⁸

Four years after *Furman*, thirty-five states and Congress enacted death penalty statutes that included judicial protocols to resolve the penalty's arbitrariness.⁹ *Gregg v. Georgia* was heard before the Supreme Court in 1976 and addressed the new procedures established by the aforementioned death penalty statutes that attempted to provide safeguards in the sentencing.¹⁰ The Court opinion stated that the new method of trial pertaining to death penalty cases was constitutional because it separates the decisions of

⁵ *Furman v. Georgia*. 408 US 238. Supreme Court of the US. 1972.

⁶ Hurwitz, Mark. "Given Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence." *The Justice System Journal* 29.3 (2008), p. 243.

⁷ *Ibid.*, p. 245.

⁸ *Furman v. Georgia*. 408 US 238. Supreme Court of the US. 1972, p. 342.

⁹ Hurwitz, Mark. "Given Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence." *The Justice System Journal* 29.3 (2008), p. 247.

¹⁰ *Ibid.*

guilt and sentencing so that a jury can closer examine the potential death penalty sentencing.¹¹ The changes were made to be in favor of the three remaining justices from the majority decision in the *Furman* case who didn't agree with Justices Marshall and Brennan, and believed that the death penalty was a sufficient punishment as long as it contained appropriate procedural protections.¹²

Following the Supreme Court death penalty cases in 1972 and 1976, the states were constitutionally required to create death penalty laws that included a bifurcated trial. This creates separate jury decisions to first determine the guilt or innocence of a defendant and then to examine whether the death penalty should be imposed if he or she is found guilty.¹³ Establishing the court procedure in this manner requires juries to review mitigating and aggravating evidence before delivering the death sentence.¹⁴ The United States Code outlines some important aggravating and mitigating factors that juries or fact-finders must consider when deciding whether or not to impose the death penalty.¹⁵ Specifically related to homicide, aggravating factors to consider include death while committing another crime, previous violent felony or serious offense conviction, depraved method of committing offense, serious federal drug offenses, multiple killings, and other high level offenses.¹⁶ While aggravating factors typically aid in convicting a person and sentencing the death penalty, mitigating factors are considered in order to do the opposite and give reason as to why the death penalty shouldn't be imposed. These factors involve impaired capacity,

¹¹ Ibid.

¹² Ibid., p. 248.

¹³ Entzeroth, Lyn Suzanne. "The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century." *Oregon Law Review* 60 (2012), p. 797.

¹⁴ Ibid.

¹⁵ 18 U.S. Code §3592.

¹⁶ Ibid.

duress, minor participation, equally culpable defendants, no past criminal record, disturbance, victim's consent, or other factors relating to the defendant's character, background, circumstances, or record.¹⁷ In rare cases, the judge may also take on the role of the jury in fact-finding and deciding the outcome of capital punishment cases, but they still have to follow the bifurcated rule of sentencing.¹⁸

Gregg v. Georgia reinstates the death penalty under the assumption that the capital punishment institution is merciful because the prosecutor, the jury, the judge, and the governor all possess the ability to either not impose or remove the death penalty sentence from a defendant.¹⁹ However, it is not uncommon that defendants feel that these federal safeguards are violated and are thus able to bring up that issue beginning in the state courts. If a defendant feels that the death penalty was not an appropriate sentence or that it was imposed in a reckless way, then he or she may appeal to the federal court system, beginning with a United States District Court trial,²⁰ then possibly appealing to a United States Court of Appeals and petitioning the United States Supreme Court.²¹ Although the facts of the case are not typically questioned at the federal level, the courts will consider whether or not any federal issues were correctly interpreted at the state level.²²

Another way that the death penalty is said to be safeguarded, and thus constitutional, is through the United States Attorney General's office. According to a

¹⁷ Ibid.

¹⁸ Palmer, Louis J., Jr. *Encyclopedia of Capital Punishment in the United States*. Second ed. McFarland and Company, 2008, p. 54.

¹⁹ *Gregg v. Georgia*. 428 US 153. Supreme Court of the US. 1976, p. 156.

²⁰ "Appeals." *United States Courts*. Web. <<http://www.uscourts.gov/about-federal-courts/types-cases/appeals>>.

²¹ Yackle, Larry W. "Capital Punishment, Federal Courts, and the Writ of Habeas Corpus." *Beyond Repair? America's Death Penalty*. Ed. Stephen P. Garvey. Durham: Duke University Press, 2003, p. 62.

²² Ibid., p. 64.

document published by the United States Department of Justice, once a defendant is charged with a federal capital-eligible offense in any case, then the United States Attorney has to submit the case for review to a Department of Justice committee before the Attorney General ultimately considers its authorization.²³ Prior to this protocol, it was at the discretion of the United States Attorney to submit the death-eligible case for review to the Attorney General, usually only if they felt it was the appropriate action.²⁴ In an update memorandum published by former Attorney General Eric Holder, he establishes that the United States Attorney and Capital Review Committee may only submit recommendations with supporting evidence that will be reviewed by the Attorney General who is able to make the decision of whether or not to administer the death penalty independently.²⁵

Analysis of the Capital Punishment Process with a Gender Lens

Understanding the Gender Perspective

In order to analyze gender issues within the death penalty process, it is important to first introduce elements of gender studies such as patriarchal ideals, masculine stereotypes, and feminine stereotypes. Patriarchy includes a gender hierarchy where the men are in the powerful position and women are either not powerful or submissive.²⁶ Men maintain this position in society by acting consistent with gender norms and embodying the masculine stereotype.²⁷ The masculine stereotype embraces ideals of strength, courage,

²³ Vera Institute of Justice. "The Federal Death Penalty System: A Statistical Survey (1988-2000)." *Federal Sentencing Reporter* 14.35 (2001).

²⁴ Ibid.

²⁵ Holder, Eric H., Jr. "Memorandum to All Federal Prosecutors." Memo. 27 July 2011. TS. Office of the Attorney General. Department of Justice, Washington, D.C.

²⁶ Holter, Oystein Gullvag. "Social Theories for Researching Men and Masculinities." *Handbook of Studies on Men and Masculinities*. Ed. Michael S. Kimmel, Jeff Hearn, and R.W. Connell. Sage, 2005., p. 17.

²⁷ Ibid., p. 18.

violence, and toughness.²⁸ On the other side of the spectrum, the feminine stereotype exemplifies inferiority, weakness, and vulnerability, but possesses the ideals of compassion, subjectivity, and mercy.²⁹ Thus, within a patriarchal society, it is men who confront each other in a struggle for power.³⁰

Jury Selection and Deliberation

If a case involves aggravating circumstances, it will most likely be heard as a capital case, although it is up to the discretion of the judge whether to hear the case as such.³¹

During the *voir dire* process, the judge and court attorney together select the jurors who will sit on the capital case and assess whether or not they are death-qualified, or able to deliver the death penalty to a defendant.³² The death qualification process was instated following the *Wainwright v. Witt* (1985) Supreme Court decision holding that a prospective capital juror can be classified as incompetent if they have views against the death penalty.³³ In analyzing this portion of a capital trial, data has shown that women are more likely than

²⁸ Dowd, Nancy E., Nancy Levit, and Ann C. McGinley. "Feminist Legal Theory Meets Masculinities Theory." *Masculinities and the Law*. By Frank Rudy Cooper and Ann C. McGinley. NYU Press, 2012., p. 32.

²⁹ Heberle, Renee. "Disciplining Gender; Or, Are Women Getting Away with Murder?" *Signs* 24.4 (1999), p. 1106-1108; Howarth, Joan W. "Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors," 1994 *Wis. L. Rev.* 1345 (1994), p. 1345.

³⁰ Holter, Oystein Gullvag. "Social Theories for Researching Men and Masculinities." *Handbook of Studies on Men and Masculinities*. Ed. Michael S. Kimmel, Jeff Hearn, and R.W. Connell. Sage, 2005, p. 20.

³¹ Yackle, Larry W. "Capital Punishment, Federal Courts, and the Writ of Habeas Corpus." *Beyond Repair? America's Death Penalty*. Ed. Stephen P. Garvey. Durham: Duke University Press, 2003, p. 60.

³² Haney, Craig, Aida Hurtado, and Luis Vega. "'Modern' Death Qualification: New Data on Its Biasing Effects." *Law and Human Behavior* 18.6 (1994).

³³ Krauss, Stanton D. "Death-Qualification After *Wainwright v. Witt*: The Issues in *Gray v. Mississippi*." *Washington University Law Review* 65.3 (1987), p. 508.

men to oppose the death penalty and ultimately be removed from the case.³⁴ This is an important distinction because this is not the case with other non-capital cases, where women are the majority, about 57%, of those serving on the jury.³⁵

The opinion in *Witt* reveals an underlying gender bias in this area. It does so perhaps because exceedingly violent men threaten the power of law-abiding men, whose only ability to protect themselves and society is by delivering a death sentence.³⁶ In addition, males have an ethic of justice, which tends to favor the death penalty, and females have an ethic of care, which shows an opposition to the death penalty.³⁷ With masculine stereotypes dominating the jury, there is a bias towards conviction and against compassion during deliberation.³⁸ Some masculine ideals in regard to justice and punishment include detachment and responsibility.³⁹ This indicates that juries will also likely have less sympathy in order to hold the defendant responsible for the alleged crime, thus enforcing the power imbalance.

³⁴ Elliot, Rogers, and Robert J. Robinson. "Death Penalty Attitudes and the Tendency to Convict or Acquit: Some Data." *Law and Human Behavior* 15.4 (1991), p. 394; Gonzalez-Perez, Margaret. "The Potential for Bias in Capital Juries." *The Justice System Journal* 23.2 (2002).

³⁵ Lehmann, Jee-Yeon K., and Jeremy Blair Smith. *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences*, 2013, p. 12.

³⁶ Dowd, Nancy E., Nancy Levit, and Ann C. McGinley. "Feminist Legal Theory Meets Masculinities Theory." *Masculinities and the Law*. By Frank Rudy Cooper and Ann C. McGinley. NYU Press, 2012, p. 25.

³⁷ Howarth, Joan W. "Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors," 1994 *Wis. L. Rev.* 1345 (1994), p. 1345.

³⁸ *Ibid.*, p. 1348

³⁹ Schwickert, Eva-Maria, and Sarah Clark Miller. "Gender, Morality, and Ethics of Responsibility: Complementing Teleological and Deontological Ethics." *Hypatia* 20.2 (2005), p. 174.

State Trial Courts

Historically, men hold positions of power within society and the only threat to that power is other men, especially those that attempt to assert dominance and disrupt the social order.⁴⁰ Male judges are more likely to have an authoritarian style in the courtroom in order to emphasize their position of power and masculinity.⁴¹ State judges also have an incentive to establish their authority by ensuring more criminals get convicted, because the average voting population will elect judges with high conviction rates.⁴² However, a study conducted by Kathleen Daly (1989) indicates that male judges adopt a sense of paternalism and find it more challenging to jail a woman than a man, because a woman is more valuable to a family in the home.⁴³ This further perpetuates the idea that the justice system is biased towards male criminals, because judges need to convict and believe men should be the ones held accountable. Consider the fact that in 2012 only 25% of judges in all state trial courts are women, with that percentage hovering around or below 20% in the southern states where death penalty convictions are more prevalent.⁴⁴ It appears that most courts operate under a similar masculine bias.

⁴⁰ Dowd, Nancy E., Nancy Levit, and Ann C. McGinley. "Feminist Legal Theory Meets Masculinities Theory." *Masculinities and the Law*. By Frank Rudy Cooper and Ann C. McGinley. NYU Press, 2012, p. 25.

⁴¹ Fox, Richard, and Robert Van Sickel. "Gender Dynamics and Judicial Behavior in Criminal Trial Courts: An Exploratory Study." *The Justice System Journal* 21.3 (2000), p. 261.

⁴² Pozen, David E. "The Irony of Judicial Elections." *Columbia Law Review* 108.2 (2008), p. 278.

⁴³ Daly, Kathleen. "Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing." *Gender and Society* 3.1 (1989), p. 9.

⁴⁴ The American Bench. "2012 Representation of United States State Court Women Judges." *National Association of Women Judges*. Web. <http://www.nawj.org/us_state_court_statistics_2012.asp>.

If a capital offender waives his or her right to a jury trial and has a bench trial instead, the judge will still have to go through both the guilt and penalty phase proceedings separately. The major difference is that instead of being subjected to jury bias, the defendant is solely subject to a judge's potential bias throughout the entire trial, as detailed above. Although some argue that a bench trial is less promising for the defendant due to the judge's desire to convict, there wouldn't be a major difference because under both situations there is a tendency to do so.

Another aspect of trial courts is the role played by public defenders. This role is interesting because in most states trial judges appoint public defenders to individual cases.⁴⁵ Therefore in order to serve their best interest, the judges will assign public defenders who have a low dismissal rate to the murder cases because more convictions will please the public and lead to judicial retention during elections.⁴⁶ In addition, a level of care is not taken for these capital defenders' competence due to the masculine ideal that men who commit crimes should be punished in order to uphold the masculine honor in society where men are the protectors.⁴⁷ Weakening the defense before the trial also exemplifies how a judge can use his hierarchal position against another man who is a threat to his power.⁴⁸

The third internal component of trial courts is the prosecutor. This official typically desires convictions in order to ensure both justice and job security. The primary function of

⁴⁵ Banner, Stuart. *The Death Penalty: An American History*. London: First Harvard University Press, 2002, p. 279.

⁴⁶ Canes-Wrone, Brandice, Tom S. Clark, and Jason P. Kelly. "Judicial Selection and Death Penalty Decisions." *American Political Science Review* 108.1 (2014), p. 25.

⁴⁷ Tiger, Lionel. "Man, Aggression, and Men." *Sex: Male / Gender: Masculine*. Ed. John Petras. Alfred, 1975, p. 32-33.

⁴⁸ *Ibid.*, 36.

the prosecutor is to impress upon the jury all of the bad things the defendant has done.⁴⁹ When the prosecutor is facing a male defendant, it is easy to paint the picture of him being barbaric and a threat to society.⁵⁰ However, it is harder for the prosecutor to portray a female as a severe threat to society due to the fact that society automatically attaches roles such as caregiver, mother, or daughter to women. Thus, women are typically viewed as more humane and this makes it harder to seek the death penalty.⁵¹

Penalty Phase

If the jury finds the capital defendant guilty (or the judge in a bench trial), then the trial enters the penalty phase. During this phase, the jury must consider both aggravating and mitigating circumstances before imposing the death penalty. Although there must be some statutory aggravating and mitigating circumstances for a death penalty law to be constitutional, the jury is still charged with the task of interpreting the facts and applying them to the circumstances outlined in the statutes. This is a stage where a gender bias could reveal itself in several ways.

Death penalty statutes regarding aggravating and mitigating circumstances tend to be partial towards female defendants and count against the male defendants.⁵² Women who are most often sentenced the death penalty are those who have killed relatives, however society views “economic and other predatory murder” as more severe than

⁴⁹ Banner, Stuart. *The Death Penalty: An American History*. London: First Harvard University Press, 2002, p. 294.

⁵⁰ Tiger, Lionel. "Man, Aggression, and Men." *Sex: Male / Gender: Masculine*. Ed. John Petras. Alfred, 1975, p. 33.

⁵¹ Daly, Kathleen. "Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing." *Gender and Society* 3.1 (1989), p. 9.

⁵² Streib, Victor L. "Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary." *Ohio State Law Journal* 63.433 (2002), p. 1.

domestic murder.⁵³ This is because many of the aggravating circumstances are related to felony murders such as burglary, arson, rape, and robbery, and very few are related to domestic situations like child abuse.⁵⁴ Therefore, men are most likely to fall under having aggravating circumstances and be sentenced the death penalty. On the other hand, mitigating circumstances such as not being a future danger⁵⁵ are more likely to be assigned to women than men by juries and judges.⁵⁶ This leads to the argument that men may be often wrongly convicted due to the interference of the societal ideal that men who are guilty of an aggravated crime are a threat to society and no longer embody the human rationality,⁵⁷ leading juries to sentence them to death.

Appeals

State Court Appeals

Each state allowing the death penalty allows appeals of criminal convictions. Furthermore, although they are not constitutionally required to do so, all these states except Utah have an automatic appellate review process for capital cases.⁵⁸ Appellate courts are only able to review the evidence and other records produced by the trial court and are unable to produce new testimony. Therefore, the main purpose of appellate courts

⁵³ Rapaport, Elizabeth. "The Death Penalty and Gender Discrimination." *Law & Society Review* 25.2 (1991), p. 367.

⁵⁴ Ibid., p. 370.

⁵⁵ Palmer, Louis J., Jr. *Encyclopedia of Capital Punishment in the United States*. Second ed. McFarland and Company, 2008, p. 368.

⁵⁶ Streib, Victor L. "Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary." *Ohio State Law Journal* 63.433 (2002), p. 13.

⁵⁷ Gardiner, Judith Kegan. "Men, Masculinities, and Feminist Theory." *Handbook of Studies on Men and Masculinities*. Ed. Michael S. Kimmel, Jeff Hearn, and R.W. Connell. Sage, 2005, p. 36.

⁵⁸ Palmer, Louis J., Jr. *Encyclopedia of Capital Punishment in the United States*. Second ed. McFarland and Company, 2008, p. 27.

its to review the aggravating and mitigating circumstances presented and determine whether or not capital punishment was appropriate for the case at hand.⁵⁹

Some state appellate court judges are also elected, or at least have retention elections, similar to the trial court judges. Therefore many partisan political issues that accompany the trial courts will also follow in the state appellate courts, because these judges are attempting to please their electorate, especially in regards to the death penalty.⁶⁰ When appellate court judges are appointed, other factors play more of a role in their decision-making such as legal preferences, quality of counsel, and aggravating factors.⁶¹ Studies have also been done in individual states regarding the state supreme courts, or courts of last resort, in which the liberal-leaning justices/judges will vote with the court majority and against their ideologies more often in capital punishment cases than other criminal cases.⁶² Justices have expressed the reasoning in doing this is to not attract unwanted media attention as a result of voting unfavorably on a divisive issue.⁶³ They also do this because when the public opinion favors the death penalty, then a convicting judge is more likely to be retained.⁶⁴

⁵⁹ Ibid.

⁶⁰ Canes-Wrone, Brandice, Tom S. Clark, and Jason P. Kelly. "Judicial Selection and Death Penalty Decisions." *American Political Science Review* 108.1 (2014), p. 37.

⁶¹ Brace, Paul, and Brent D. Boyea. "State Public Opinion, the Death Penalty, and the Practice of Electing Judges." *American Journal of Political Science* 52.2 (2008), p. 370.

⁶² Hall, Melinda Gann. "Electoral Politics and Strategic Voting in State Supreme Courts." *The Journal of Politics* 54.2 (1992), p. 431.

⁶³ Ibid.

⁶⁴ Brace, Paul, and Brent D. Boyea. "State Public Opinion, the Death Penalty, and the Practice of Electing Judges." *American Journal of Political Science* 52.2 (2008), p. 370.

In 2012, 32% of all intermediate and final appellate state court judges were women.⁶⁵ This means that it is mostly men handing down final decisions regarding a capital case. So it is not unreasonable to assume that masculine ideals continue to be imposed on defendants, even when a case is appealed to a higher court. Men favor stronger punishment for men who commit murder in order to preserve the patriarchal hierarchy because other men who are a threat must be removed from the society. Also, male judges weigh the aggravating factors less for a woman, because she must commit an extraordinary, masculine crime to be considered a threat to the patriarchal order.⁶⁶ As a result, appellate courts tend to affirm the lower court decision. This trend perpetuates gender bias against men because it assumes all male defendants are threatening to society if not put to death.

Federal Court Jurisdiction and Appeals

If a case reaches the court of last resort within the state, a lawyer may seek an appeal by petitioning for a writ of certiorari directly to the U.S. Supreme Court (U.S.S.C). Then, if a writ is issued, the U.S.S.C. will interpret the meaning of the state law at hand. Another avenue that a case may be reviewed upon conclusion at the state's highest court is by petitioning for *habeas corpus* to a U.S. District Court, but this is limited to federal issues brought up in the case.⁶⁷ At this level, the district court may review briefs provided by the prosecution and defense or even hold a new evidentiary hearing if necessary, and ultimately overturn the sentence or conviction or dismiss the petition altogether. One may

⁶⁵ The American Bench. "2012 Representation of United States State Court Women Judges." *National Association of Women Judges*. Web.

<http://www.nawj.org/us_state_court_statistics_2012.asp>.

⁶⁶ Buchbinder, David. *Studying Men and Masculinities*. Routledge, 2013, p. 71.

⁶⁷ "Overview of the Capital Appeals Process." *Capital Punishment in Context*. Web. <<http://www.capitalpunishmentincontext.org/resources/dpappealsprocess>>.

also attempt to then appeal to a U.S. Court of Appeals based on an issue raised in the U.S. District Court. This court has powers similar to a district court, and if relief is still not achieved, then one can still petition the U.S.S.C.⁶⁸

Similar to the courts of appeals within the state, the main function of the federal courts is to interpret how the facts of the case apply to the law or statute in question. However, federal courts have different principal actors than state courts. For defense, there are two types offered at the federal level: federal public defense and community defense. The federal public defenders work in a federal defender organization, which is headed by a chief federal public defender appointed by the court of appeals over the region of the organization. Community defender organizations are non-profits established by state law and funded with federal grants.⁶⁹ This federal oversight for both types of defense removes the power from a judge to select the defense in a case. Unfortunately, the Bureau of Justice Statistics, nor any other source, could adequately identify the number of men that serve as federal public defenders compared to women. However, the separation between judge and public defense weakens extralegal influence and reduces bias in death penalty cases.

Another actor in the federal court system is the federal prosecutor. Federal prosecutors are the ones who make the important decisions in determining how to prosecute a case or sentence a criminal. These decisions can be influenced by gender, which is examined in an essay presentation written by Todd Lochner and Dorie Apollonio (2012). The authors come to the ultimate conclusion that women must face higher barriers

⁶⁸ Ibid.

⁶⁹ Administrative Office of the United States Courts. "Defender Services." *United States Courts*. Web. <<http://www.uscourts.gov/services-forms/defender-services>>.

of entry to this profession because only about 32% of federal prosecutors are women.⁷⁰

Also, after manipulating the data provided in the article, it is seen that of those prosecutors whose category of practice is violent crime 64% are men and 36% are women.⁷¹ The research from this article also makes it apparent that female prosecutors are affected by the masculinity that persists in the legal sphere. Of the women who are federal prosecutors, most of them have male-like aggressive tendencies and attempt to prove themselves in a way by convicting criminals more frequently.⁷²

The third actor in federal courts is the lower federal court judges and Supreme Court justices. The President appoints every federal judge or justice, causing him or her to be responsible to the U.S. Congress instead of directly to voters. However, federal judges are appointed for life (under good behavior) and are less concerned about public opinion and will focus more on their ideologies and legal factors when making decisions.⁷³ There is typically a balance between reliance on each of those decision-making factors among federal judges and justices. They want to honor the political preferences of who appointed them, but they also don't want to see their court opinion to be unfounded and thus overturned later on. Therefore with a greater chance of appellate review, judges are more likely to rule in a way that tends to be conservative because they interpret the law as closely as possible to how it is written.⁷⁴ In a study performed by Zorn and Bowie (2010),

⁷⁰ Lochner, Todd, and Dorie E. Apollonio. "The Effect of a Prosecutor's Gender on Federal Prosecutorial Decision Making and Area of Practice." Western Political Science Association. Portland, OR. Mar. 2012, p. 18.

⁷¹ Ibid.

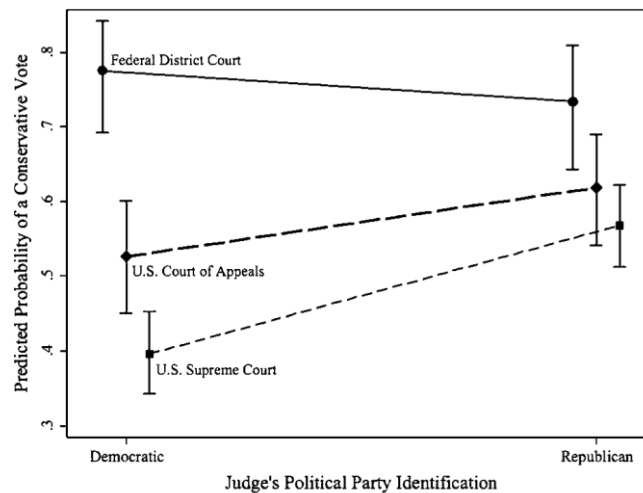
⁷² Ibid., 17.

⁷³ Zorn, Christopher, and Jennifer Barnes Bowie. "Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment." *The Journal of Politics* 72.4 (2010), p. 1213.

⁷⁴ Ibid., p. 1219.

they mapped the predicted probabilities of a conservative vote and measured the votes by the judges' party identification (see Figure 1).

Figure 1: "Predicted Probabilities of a Conservative Vote, by Party Identification and Court"⁷⁵



Note: Figure plots the predicted probability of a conservative vote in a case with a mean random effect ($\alpha_i = 0$), along with 95% pointwise confidence intervals. See text for details.

This graph shows that judges tend to vote more in line with their ideologies as they move up to higher positions in the judicial branch. However, the higher the court is in the hierarchy, the fewer cases are heard and thus lower courts have the greatest influence on the most amount of cases that proceed through the justice system. Conservative ideology also tends to be more masculine because it encourages solutions such as personal responsibility⁷⁶ and military force.⁷⁷ Conservatives also tend to support the death penalty, so ultimately there are increased capital sentences due to the likelihood of courts making conservative decisions.

⁷⁵ Ibid.

⁷⁶ Mansfield, Harvey C. *Manliness*. N.p.: Yale, 2006, p. 17.

⁷⁷ Kimmel, Michael S. "Globalization and Its Mal(e)contents." *Handbook of Studies on Men and Masculinities*. Ed. Michael S. Kimmel, Jeff Hearn, and R.W. Connell. N.p.: Sage, 2005, p. 416.

When death penalty cases are ultimately appealed to the Supreme Court, some strictly consider the “cruel and unusual punishment” clause, while some analyze the issues with regard to the entire language of the 8th and 14th amendments. Justice Marshall discusses these cases in his concurring opinion to the *Furman* case, and describes that past case law enforces the idea that cruel and unusual punishment includes any punishment that is excessive.⁷⁸ “The entire thrust of the Eighth Amendment is, in short, against ‘that which is excessive.’” In discussing this, Justice Marshall also mentions the importance of the gender disparity, which aligns with the idea that men are more inclined than women to receive the death penalty. Marshall states, “There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.”⁷⁹

Execution

When the extensive legal process concludes with a death penalty conviction, there is a controlled and private process of execution today in the United States. Prior to 17th century America, the British had a mandatory death penalty practice. As the U.S. gained independence, more jurisdictions rejected this practice and implemented a process by which a judge or jury would perform the sentencing.⁸⁰ Then when the Constitution and Bill of Rights were written, it recognized that the government could take life as long as the legal

⁷⁸ *Furman v. Georgia*. 408 US 238. Supreme Court of the US. 1972, p. 331-332.

⁷⁹ *Ibid.*, p. 365.

⁸⁰ Entzeroth, Lyn Suzanne. "The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century." *Oregon Law Review* 60 (2012), p. 801.

process was followed. After a death penalty abolition movement started and ended in the 19th century, the Supreme Court heard death penalty cases and ruled that execution by firing squad and electric chair were constitutional.⁸¹ Eventually, through states abolishing, reinstating, or amending death penalty laws in response to court opinions, the U.S. came to the system that is in place today.

Executions were originally thought to be constant reminders of the ultimate price for extreme criminal behavior and the goal was deterrence. Men in the 18th century actually described the purpose of public capital punishment as a way to create fear of disobeying the law.⁸² This behavior is evidence of male leaders in the patriarchal society attempting to preserve their position of power against any threat to the law and order that they established.⁸³ The history of execution is embedded in the history of power and hierarchy within our country, so that men who are a threat to other men by force or murder are ultimately removed from society. Therefore, "the death penalty system is a refuge for classic masculine behavior."⁸⁴

A study conducted by Victor Streib (2013) presented an analysis of the number of women who were sentenced to death and those who were ultimately executed in the current era (1973-2012). Out of all people sentenced to death, 2.1% were women.⁸⁵ Women also make up 1.9% of people currently on death row and .9% of people executed

⁸¹ Ibid., p. 803.

⁸² Banner, Stuart. *The Death Penalty: An American History*. London: First Harvard University Press, 2002, p. 10.

⁸³ Buchbinder, David. *Studying Men and Masculinities*. Routledge, 2013, p. 72.

⁸⁴ Streib, Victor L. "Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary." *Ohio State Law Journal* 63.433 (2002).

⁸⁵ Streib, Victor. "Death Penalty for Female Offenders, January 1, 1973 through December 31, 2012." *Death Penalty Information Center*. (2013). Web.

<<http://www.deathpenaltyinfo.org/documents/FemDeathDec2012.pdf>>.

during this era.⁸⁶ In contrast, that means that the percentage of male defendants who are affected by the death penalty is in the high nineties and the data below will further break down these numbers to gain a comprehensive understanding of why men are so overrepresented on death row.

Methodology

To more closely examine the claim that men are targeted for execution more often than women, I utilized data from the FBI Supplementary Homicide Report. This was done to provide a comprehensive look at gender in regards to homicide, the most common capital offense, from 1980 to 2012. The first analysis of this data includes the comparison between the sex of the offender and the relationship of the offender and victim [Table 1]. The second analysis compares the sex of the offender to the sex of the first victim [Table 2]. Transforming the data to percent values in Tables 1 and 2 clarifies how the genders vary in murder behavior, since men are reported to commit the majority of murders [Table 3 and Table 4]. In Table 5, I also recalculated the murder percentage totals by gender to understand the gender distribution of offenders. The homicide data illustrates why courts react in the manner that they do against men who commit capital crimes.

Besides capital-eligible crimes, I also want to examine the gender of those involved in the judicial process of convicting people of capital-eligible murder and sentencing them to death. From 1789-present, the Federal Judicial Center provides a database of all members of the federal judiciary that includes gender demographics, which I've grouped in Table 6.

⁸⁶ Ibid.

Data

[Table 1] - Sex of offender (rows) by relationship to victim (columns) for United States⁸⁷

Count	Family	Acquaintance	Stranger	Unknown	Total
Male	60451	220882	101722	72517	455572
Female	22575	25616	4460	3828	56479
Unknown	23	112	116	394	644
Total	83049	246609	106298	76739	512695

[Table 2] - Sex of offender (rows) by sex of first victim (column) for United States⁸⁸

Count	Male	Female	Unknown	Total
Male	353667	101589	316	455572
Female	44309	12114	57	56479
Unknown	534	100	10	644
Total	398511	113802	383	512695

[Table 3] - Offender-Victim Relationship as a Percentage⁸⁹

Male Offenders – Relationship to Victim (%)		Female Offenders – Relationship to Victim (%)		Unknown Gender Offenders – Relationship to Victim (%)	
Family	13.27%	Family	39.97%	Family	3.57%
Acquaintance	48.48%	Acquaintance	45.35%	Acquaintance	17.39%
Stranger	22.33%	Stranger	7.90%	Stranger	18.01%
Unknown	15.92%	Unknown	6.78%	Unknown	61.18%

⁸⁷ Puzzanchera, C., G. Chamberlin, and W. Kang. "Easy Access to the FBI's Supplementary Homicide Reports: 1980-2012." *Office of Juvenile Justice and Delinquency Prevention*. Web. <<http://www.ojjdp.gov/ojstatbb/ezashr/>>.

⁸⁸ Ibid.

⁸⁹ Ibid.

[Table 4] – Victim Genders as a Percentage⁹⁰

Male Offenders – Gender of Victim (%)		Female Offenders – Gender of Victim (%)		Unknown Gender Offenders – Gender of Victim (%)	
Male	78.63%	Male	78.45%	Male	82.92%
Female	22.30%	Female	21.45%	Female	15.53%
Unknown	0.07%	Unknown	0.10%	Unknown	1.55%

[Table 5] – Homicides Committed by Gender⁹¹

Gender of Offender	Percent of Total Homicides Committed
Men	88.86%
Women	11.02%
Unknown	0.13%

[Table 6] – Gender Makeup of the Federal Judiciary from 1789-Present⁹²

Men	Women
3,160	400
88.76%	11.24%

Analysis

The data above clearly show that males are the most murdered gender with 284,709 more homicides than women. Both genders murder men about 78% of the time, which indicates that men are the clear targets. In addition to men being the most likely victims, they are also the leading offenders because 88.86% of homicides are committed by men. But when it comes to punishing men for their crimes, 97.9% of capital punishments are sentenced to men and 99.1% of the executed are men. So although it could be argued that

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² "History of the Federal Judiciary, 1789-Present." *Federal Judiciary Center*. Web. 30 Mar. 2015. <<http://www.fjc.gov/history/home.nsf/page/export.html>>.

men are deserving of a greater share of executions, the discrepancy between homicide rate and execution rate is worth analyzing further.

Due to the fact that men are both the most murdered gender and commit the highest amount of murders, it would make sense that society places a greater weight on sentencing men to death and removing the threat completely of any repeat actions. In theory, men associate with each other to preserve patriarchal norms, so when a man becomes a murderer he becomes a threat to patriarchal norms and that power so other men want him to die and be removed from society. Society also fears men more than women because over 70% of a male murder's victims are either only acquaintances or are complete strangers. This fear also perpetuates the idea that these men could disrupt the law and order, which is ultimately what capital punishment intends to prevent. Although women commit capital crimes against men, they aren't stereotyped to be strong and aggressive so society generally fears them less.⁹³ Women also tend to commit murders within the home or of acquaintances, so people don't view these women as that much of a threat. Due to the historical oppression of women, who are expected to remain in the domestic sphere, men in power don't necessarily see murderous women as a threat to society. A result is that women will be sentenced life in prison instead of death.

People who see themselves as potential victims are more likely to support the death penalty and this extralegal factor will continue to impact the judiciary over time. Since the creation of our constitutional regime in 1789, men have comprised 88.76% of the total federal judges. After analyzing the data with the literature, I theorize that capital

⁹³ Heberle, Renee. "Disciplining Gender; Or, Are Women Getting Away with Murder?" *Signs* 24.4 (1999), p. 1106.

punishment law has been pushed through the court system to be scrutinized and interpreted chiefly by men, which could have an effect of preserving the patriarchal hierarchy by being stricter on men who commit murder and thus unapologetically sentencing them to death.

Conclusion

The analysis I have put forth in this paper leads to certain implications that are disconcerting within the context of a civilized society. Men and women are inherently subject to different levels of scrutiny within the criminal justice system, as illustrated with many examples and figures provided in this study. Certain men may be deserving of the death penalty with their heinous actions, but there are a few cases that are not as clearly defined and then not fully examined due to the gender constraints imposed by the criminal justice system. The perceived threat to society holds greater value than the truth in these cases, and therefore There needs to be further analysis into this issue of how capital punishment is actually deterring crime or lessening the threat of murder. Finally, there needs to be reform of capital punishment statutes so that the system focuses more on the facts of the case and not the perceived impact on society.

Another potential remedy to the problem could be women having more positions of power within the court system. That could lead to less of a masculine power struggle and attention to justice would be taken with greater care and compassion. Even with 1/3 of the powerful judicial offices being held by women, it isn't enough to overcome the masculine culture that is established. There is little literature on the subject of the negative impact of the inherent masculinity within the criminal justice system. Research on this subject could create a deeper understanding of this issue and potentially suggest needed reform.

Examining capital punishment through a gender lens is not uncommon among the literature today. What is uncommon, however, is the critical analysis of how males are disproportionately executed compared to women. The literature consistently focuses on how the courts are lenient on female offenders, but rarely does it attempt to assert that the courts are harsher on male offenders. There could be greater societal constructs at play that have prevented the exploration of this issue, but nevertheless it was a challenging endeavor and I hope there will be increasing analysis of this issue as we progress towards gender equality into the future.

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