

Capital Crimes

AMONG THE many deficiencies of the American death penalty system is a systemwide bias based upon the sex of the offender.¹ Even though scholars² continue to debate both the causes and the impacts of this bias—indeed its very existence³—the discrepancy in outcome between men and women as revealed in our execution statistics has been recognized, at least in passing, even by the U.S. Supreme Court.⁴ Joan Howarth, a leading scholar on gender issues, has concluded that “Capital jurisprudence—the law for deciding whether to kill—is also a hidden battleground of gender.”⁵ The working definitions for the gender concepts of masculine and feminine relied upon in this book also come from Professor Howarth: “Masculinity or maleness is a social construction, to which some women have access and from which some men are excluded. Similarly, both men and women can and do exhibit ‘female’ qualities of emotionality, intense interrelatedness, and contextual reasoning. But just as countless businessmen can wear pink button-down shirts without eradicating the gender from pink and blue, women who are unemotional, hard-driving, and distant are described as masculine.”⁶

The author of this book has pushed these conclusions even further in previous work: “This gendering of capital jurisprudence appears to have infected all who come into contact with the entire death penalty system and to have pushed aside concerns about justice and reduction of violent crime.”⁷ The following two sections discuss, respectively, sources of sex or gender bias in the selection and definition of death penalty crimes, and in the shaping of these crimes under the law through aggravating and mitigating circumstances.

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Legislatures designate certain crimes as eligible for the death penalty, constrained almost solely by U.S. Supreme Court rulings limiting capital crime essentially to murder.⁸ However, even within the crime of capital murder, certain acts receive quite different treatment. Domestic homicide, the killing of relatives and sexual intimates, appears to be discounted in perceived seriousness and punishability, certainly as compared to homicides by and against strangers.⁹ The crimes most commonly committed by those on death row today are felony murders, homicides committed during a dangerous felony such as robbery or rape.¹⁰ This shortcut to death row raises serious jurisprudential questions and has a quite different impact upon male offenders and female offenders. Similarly, the tendency to exclude domestic homicides from capital murder, certainly as compared to stranger homicides and felony murders, also leads to the exclusion of women’s homicides as compared to men’s homicides.¹¹ One questionable result of this disparity is the societal judgment that convenience store robbers who kill store clerks should face the death penalty more often than mothers who kill their children.¹²

This brief sketch of the definition-of-crime issue illustrates that men and women typically commit different kinds of homicides. Therefore, the attachment of the death penalty to some kinds of murder and not to others can be expected to produce a disparate impact upon males who kill versus females who kill. Similarly, the tendency of prosecutors to seek the death penalty for some kinds of capital murder more often than for other kinds makes a difference as to men and women being sentenced to death. A similar disparate impact from the sex of the offender can be found in the statutory factors pushing the sentencing jury toward or away from the death penalty.

Aggravating and Mitigating Circumstances in Death Penalty Statutes

Although modern death penalty statutes typically list a variety of express factors to be considered in aggravation or mitigation,¹³ no such express consideration of the offender's sex appears in any death penalty statute in the United States. An apparently increasing number of other countries (primarily former Soviet Bloc nations) do include express provisions in their death penalty statutes either excluding female offenders or giving them special mitigation (such as pregnancy and the responsibilities of motherhood) in imposing death sentences.¹⁴ American death penalty statutes provide no such sweeping provisions (except for pregnancy), but schemes of aggravating and mitigating circumstances can and apparently do have a disparate impact.

Consider some typical aggravating circumstances found in death penalty statutes. One is the commission of a murder for hire, either as the hired killer or as the person who hired the killer to commit the homicide.¹⁵ The Ohio statute is broad and straightforward: "The offense was committed for hire."¹⁶ Women convicted of murder are generally more likely than men to have hired a killer to commit their homicide. However, the killers that women hire are almost always men, as are the killers hired by men. Assuming that the hired killers sentenced to death are almost always men regardless of the sex of the person who hired them, the impact of this aggravating factor may militate somewhat against men. Nonetheless, the use of this aggravating factor against the person hiring the killer probably results in a higher percentage of death sentences for women than of death sentences for men.

Another very common aggravating circumstance is the offender's previous record of violent crimes.¹⁷ If the defendant convicted of the present murder also has a previous criminal record of violent crimes, it is more likely that the defendant will receive the death penalty instead of a prison sentence. Again, women convicted of murder are generally less likely than men to have prior convictions for murder, attempted murder, or other violent crimes.¹⁸ Therefore, this aggravating circumstance will be available in a smaller percentage of women's cases than of men's cases. However justifiable this aggravating circumstance may appear to some, it nonetheless strongly favors female capital defendants over male capital defendants.

A third common aggravating circumstance is a finding that the current homicide was part of a felony murder.¹⁹ Common in felony murder formulations within state death penalty statutes are homicides committed during a rape, kidnapping, or armed robbery. The felony murder formulation avoids the requirement of proving the defendant's criminal intent to commit murder, often the most difficult part of a murder prosecution, thus making successful prosecution more likely. In a typical felony murder case, the prosecutor simply proves the defendant's criminal intent to commit the associated felony (robbery, rape, etc.) and the fact that the defendant caused the victim's death during that felony. This application of the felony murder rule has resulted in capital murder convictions for a very high percentage of men on death row but for a much smaller percentage of women on death row.²⁰ In addition to all of the other concerns about the appropriateness of using the felony murder shortcut to obtain a capital conviction, this aggravating factor tends to punish men more than women.

A final example is the aggravating circumstance of a homicide particularly planned or premeditated.²¹ The federal statute provides a good example: "The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism."²² Judges and juries generally find that women convicted of murder are less likely than men to have premeditated their homicides and more likely than men to have killed while impassioned, angry, or in fear.²³

Mitigating circumstances make the death penalty less likely to be imposed. Like aggravating circumstances, they go both to the seriousness of the crime and to the characteristics of the defendant. A very common mitigating circumstance is that the offender acted under duress or emotional disturbance at the time of the homicide.²⁴ California lists as a mitigator "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."²⁵ The Ohio statute, too, is a typical example of the duress mitigator: "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."²⁶ This factor is present to varying degrees in many homicide cases, but finding convincing evidence of it usually is quite difficult. Judges and juries generally are more likely to find duress or emotional disturbance for women offenders than for men offenders in homicide cases.²⁷ Even casual observation of male and female criminal defendants reveals the greater ability of almost all women to manifest their emotional side, providing the defense

attorney with a more effective means of demonstrating this mitigating circumstance.

The list of mitigating factors in many death penalty statutes includes the factor that the offender acted under the substantial domination of another.²⁸ Again, the California statute is a good example: “Whether or not defendant acted under extreme duress or under the substantial domination of another person.”²⁹ The presumed fact pattern is one in which two or more offenders are involved in the homicide and related criminal activity. When a woman commits a homicide jointly with a man, judges and juries generally are more likely to find that the man was the dominant actor. This occurs with all other variables being the same and only the sex of the offender being different.

Probably the most intriguing and debatable mitigating circumstance is the catch-all provision usually found at the end of the list.³⁰ For example, the Ohio list of mitigating factors ends with “[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death.”³¹ This open invitation provides the defense the opportunity to present evidence as to “any other” mitigating circumstance, so long as the mitigating evidence is relevant and material to the nature and circumstances of the crime or to the character and background of the defendant.³² Judges and juries generally are more likely to find sympathetic factors in the lives and backgrounds of women than those of men in homicide cases, in part because female defendants may be less reluctant to expose these factors than are male defendants.

This brief sketch of the differential treatment of men and women in the national death penalty system identifies two primary sources of this disparity. The first is probably unintentional and usually benign, in that some factors in death penalty law and procedure may not intend to treat women differently but nonetheless do have a disparate impact. Obvious examples are using the felony murder rule and a past record of violent crime in considering the death sentence, both of which are more likely to put a man on death row than a woman, albeit perhaps for good reason. The second source of differential treatment may be subconscious, but certainly not benign. Examples here are assumptions that women who kill are more likely than men who kill to have been acting under emotional disturbance or under the domination of their cofelons. These mitigating factors provide opportunity for biases in favor of women defendants that are quite difficult to support.