



Spring 3-1-2003

Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It

Janice L. Kopec

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Janice L. Kopec, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 Cap. DEF J. 353 (2003).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol15/iss2/3>

This Article is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It

Janice L. Kopec*

I. Introduction

The death penalty in America has traditionally been a masculine affair. American socialization is imbued with the world view that women are the more genteel and the less culpable of the sexes. This persistent reluctance to impose the ultimate sanction upon the gentler sex has resulted in a gender disparity in our capital system that has an adverse impact on male offenders. The root of this disparity is so embedded in our national conscience that the actors in the death penalty system often have fixed perceptions: a male murderer is dangerous, a female murderer is tragic. To undo this conundrum would require a remedy that levels the very core of America's notions about gender—a remedy that simply does not exist. Thus, the reality remains that men are executed at a disproportionate rate to women. The justice system has, in deed if not in word, all but ceased to execute female offenders. Because in all but the most extreme cases, the death penalty has become an unconscionable penalty for women, equal protection under the law demands that the same treatment is afforded to men.

II. An Overview of Women and the Death Penalty

A. Historical Perspective

About 20,000 executions have taken place in the United States during the last four centuries; of these, only 562 involved female defendants.¹ Even when the death penalty was a much more common punishment, women faced it less often and for fewer crimes than men. In early America, men were executed for stealing, but women were almost exclusively executed for homicide or

* J.D. Candidate, May 2004, Washington and Lee University School of Law; B.A., 1999, College of the Holy Cross. The author would like to thank her parents and sister for their continued support. She would also like to thank Professor Roger D. Groot and the students in the Virginia Capital Case Clearinghouse—particularly Priya Nath, Kristen F. Grunewald, and Philip H. Yoon—for their insight and assistance.

1. Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 446 (2002) [hereinafter Streib, *Gendering*] (providing a history of women who received sentences of death).

witchcraft.² Forty-seven percent of the total number of American women who have been executed were African-American, and a large portion of these women were slaves executed in the eighteenth and nineteenth centuries.³ Traditionally, society shields women from harsher penalties in much the same way that it exempts them from military danger.⁴ The notions of chivalry loom large when considering the life and death of a woman, and these notions have not faded in the modern era.

As capital punishment entered the twentieth century, the incidents of female executions decreased even further. Only one woman in the twentieth century was executed for any crime other than homicide, whereas men were executed for other crimes until mid-century.⁵ Thousands of men have been executed in the last one hundred years, but only forty-nine women have suffered the same fate.⁶ In the modern era of the death penalty, 1976 until the present day, this disparity has continued; only ten women have been executed compared with 829 men.⁷ Currently, women commit about one in every eight homicides, but they are represented in less than one in every eighty executions.⁸ This fact illustrates that men are not simply more violent and therefore executed with greater frequency; even when women do act violently they disproportionately avoid execution.

2. Compare Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 852 table 2 (1990) [hereinafter Streib, *Female Offenders*] (listing only five women ever to be executed for theft), with Margaret Vandiver & Michel Coconis, "Sentenced to the Punishment of Death": *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 867 (2001) (providing examples of older offenses that were punishable by death). "Tennessee's early laws were harsh, with provisions for execution on the second offense for the crimes of horse stealing, theft of goods to the value of ten dollars, forgery, perjury, and the burning of houses or barns." *Id.* at 867.

3. Streib, *Female Offenders*, *supra* note 2, at 853.

4. Victor L. Streib, *Executing Women, Children, and the Retarded: Second Class Citizens in Capital Punishment, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 201, 220 (James R. Acker et al. eds., 1998).

5. Streib, *Female Offenders*, *supra* note 2, at 857. The exception to the homicide rule was the execution of Ethel Rosenberg on June 13, 1953 for espionage. *Id.*

6. DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/article.php?scid=24&did=229> (last visited Mar. 18, 2003); see also Streib, *Gendering*, *supra* note 1, at 433 (stating that 3,827 men have been executed since 1930).

7. DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY at www.deathpenaltyinfo.org/article.php?did=230&scid=24 (last visited Mar. 18, 2003) (listing ten women who have been executed since 1976); DEATH PENALTY INFO. CTR., NUMBER OF EXECUTIONS BY YEAR SINCE 1976, at <http://www.deathpenaltyinfo.org/dpicexec.html> (last updated Mar. 20, 2003) (listing total number of executions from 1976-2003 as 839). The modern era of the death penalty is typically bracketed from 1976 to the present day. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (holding that the death penalty in Georgia does not violate the constitution).

8. Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U.L. REV. 501, 504-05 (1990) [hereinafter Rapaport, *Some Questions*] (explaining the average number of homicides which are perpetrated by women); see DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY, *supra* note 7 and accompanying text.

B. *Why Women Are Rarely Executed*

1. *Paternalism*

The American legal system has an entrenched history of paternalism. Political participation and the right to sit on a jury were denied to women in part because these tasks were considered too difficult and burdensome for the weaker sex.⁹ The lingering ideals of male protector and chivalric duty cling even to the female criminal. Early in the twentieth century, thirty male prisoners petitioned for a commutation of Eithel Spinelli's death sentence.¹⁰ The men volunteered to draw straws and die in her stead so that the state's record of only executing men would not be tarnished.¹¹ In the modern era, only twenty-three out of the thirty-nine death penalty jurisdictions have imposed a sentence of death on a female, and only six of those jurisdictions have actually carried out the sentences.¹² Even in the state of Texas, where the death penalty enjoys a wide base of popular support, the execution of Karla Faye Tucker was divisive and drew a considerable amount of public outcry.¹³

2. *Statutory Classifications of Capital Murder*

Most capital murder statutes are designed in such a way that men are much more likely to be charged with a capital crime.¹⁴ As many as eighty percent of the offenders on death row were convicted of felony murder.¹⁵ Yet, only six percent of accused felony murderers are female.¹⁶ The Virginia capital murder

9. See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (rejecting a woman's request to practice law in part because "[t]he paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother"); U.S. CONST. amend. XIX (stating that the right to vote "shall not be denied . . . on account of sex"); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a law which placed women on jury rosters only upon request because a "woman is still regarded as the center of home and family life"), *overruled by Taylor v. Louisiana*, 419 U.S. 522, 537-38 (1975) (holding that a jury must contain a cross-section of the community and may not exclude distinctive groups such as women).

10. See Rapaport, *Some Questions*, *supra* note 8, at 501 (inferring that the thirty inmates who were willing to be executed in Spinelli's stead were men based on the reason for their protest).

11. *Id.*

12. DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY *at* www.deathpenaltyinfo.org/article.php?did=230&scid=24 (last visited Mar. 18, 2003) (listing the women executed in the modern era and the states that executed them); DEATH PENALTY INFORMATION CENTER, STATE BY STATE DEATH PENALTY INFORMATION, *at* <http://www.deathpenaltyinfo.org/firstpage.html> (last visited Mar. 18, 2003) (listing thirty-eight states and the federal government as death penalty jurisdictions).

13. Streib, *Gendering*, *supra* note 1, at 451-53.

14. Rapaport, *Some Questions*, *supra* note 8, at 509.

15. *Id.*

16. *Id.* at 509.

statutes, for example, include three types of felony murder that are typically committed by male offenders: "The willful, deliberate, and premeditated killing of any person in the commission" of sex offenses, robbery, or abduction.¹⁷ In the modern era of executions, Virginia has executed eighty-seven men, but not a single woman.¹⁸

Not only do women tend not to engage in felony murder, but the types of murder they do carry out are usually not considered capital crimes.¹⁹ Women are more likely to act without premeditation when committing a homicide, rendering their offenses statutorily less serious and often precluding a capital charge.²⁰ Women typically commit "domestic homicides."²¹ They often kill in the midst of the rage and fear of a domestic altercation; therefore, they lack the premeditation necessary for prosecutors to prove even first-degree murder, let alone capital murder.²²

3. *Effects of Mitigators and Aggravators*

The use of aggravating and mitigating factors in capital sentencing proceedings often have a benevolent impact on women and a negative impact on men.²³ Many capital systems include future dangerousness, a prior history of violence, or both, among their statutory aggravators.²⁴ Women are more likely than men to be first-time offenders with little or no criminal record.²⁵ Because of this fact, when a prior history of violence is a statutory aggravator, men are at a greater disadvantage before the sentencing jury than women. Judges and juries alike also tend to perceive women as less dangerous and more open to rehabilitation than

17. VA. CODE ANN. § 18.2-31(1) (Michie Supp. 2002); VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002); VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2002). Virginia's modern executions in reliance on these three statutes have only targeted men. See *infra* note 219 and accompanying text.

18. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, EXECUTION INFORMATION, at <http://www.vadp.org/exinfo.htm> (last visited Mar. 18, 2003).

19. Streib, *Gendering*, *supra* note 1, at 459.

20. *Id.* at 458, 458 n.130.

21. *Id.* at 458. Domestic homicide is defined as the killing of a relative or a sexual intimate. *Id.*

22. *Id.* at 458, 458 n.130.

23. *Id.* at 459.

24. See, e.g., 18 U.S.C. § 3592(C)(2)-(4), (10), (12), (15) (2000) (listing six Federal Death Penalty aggravators which involve prior convictions); TEX. CRIM. PROC. CODE ANN. § 37.071(2)(b)(1) (Vernon Supp. 2003) (stating that the jury must decide if the defendant will continue to commit violent acts and continue to threaten society); FLA. STAT. ANN. § 921.141(5)(a)-(b) (West 2001) (listing two aggravating factors which involve past criminal conduct); VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (stating that the Commonwealth must prove beyond a reasonable doubt that the defendant "would constitute a continuing serious threat to society").

25. Streib, *Gendering*, *supra* note 1, at 461.

their male counterparts.²⁶ This perception insulates women from prosecutorial assertions of future dangerousness.

Mitigating factors often benefit female offenders more than they benefit male offenders.²⁷ Mitigating factors can include extreme mental or emotional disturbance, substantial domination by another, character, circumstances, and family background.²⁸ Juries are often more open to believing that a female, as opposed to a male, has been dominated or influenced by a stronger party or that she might have suffered from duress or an emotional disturbance.²⁹ Moreover, the burden of leaving behind motherless children presumably weighs more heavily on a jury than the burden of leaving behind fatherless children.³⁰ A woman who kills is not likely to kill in a manner punishable by death, but even if she does, juries are difficult to convince that the requisite aggravators are present, and they are more sympathetic to mitigating factors.

C. Modern Era Executions and the "Evil Woman" Theory

In the modern era of capital punishment, the American taboo surrounding the execution of women has grown even more pronounced. However, reinstatement of the death penalty has not brought about a perfect record. Nationwide, there are currently fifty-two women on death row and ten women have been executed since 1976.³¹ These exceptions illustrate the rare circumstances in which American juries will disregard their distaste for female executions and

26. Streib, *Female Offenders*, *supra* note 2, at 875 (stating that observers view women as less dangerous and "better candidates for" rehabilitation than men); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 94 (1994) (stating that researchers have found that "females are far less likely than males to repeat their violent offenses; and . . . females are far more likely to desist from further violence").

27. Streib, *Gendering*, *supra* note 1, at 463.

28. See, e.g., 18 U.S.C. § 3592(a) (2000) (listing impaired capacity, duress, minor participation, equal culpability, no prior criminal record, and disturbance as mitigating factors in the Federal Death Penalty Act); FLA. STAT. ANN. § 921.141(6) (West 2001) (listing as mitigating factors no prior criminal history, mental or emotional disturbance, minor participation, duress or substantial domination by another, and background); OHIO REV. CODE ANN. § 2929.04 (West Supp. 2002) (listing duress, mental defect, lack of criminal history, and minor participation as mitigating factors); ALA. CODE § 13A-5-51 (1994) (listing lack of criminal history, mental or emotional disturbance, minor participation, duress or substantial domination, and mental incapacity as mitigating factors); VA. CODE ANN. § 19.2-264.4(B) (Michie 2000) (including as examples of mitigating factors a lack of criminal history, impaired capacity, and mental or emotional disturbance).

29. Streib, *Gendering*, *supra* note 1, at 462-63.

30. In a federal prosecution, the Government sought the death penalty against Kristen Gilbert. Adam Gorlick, *Nurse Sentenced to Life in Prison for Killing Patients at Hospital*, THE ASSOCIATED PRESS, Mar. 26, 2001, 2001 WL 16547737. Gilbert worked as a nurse in a veterans hospital and killed several of her patients. *Id.* Gilbert, however, received a life sentence from the jury after her family pleaded for mercy on behalf of her children. *Id.*

31. DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY, at www.deathpenaltyinfo.org/womenstats.html (last updated Jan. 1, 2003).

impose a traditionally “male” penalty. A prominent theory offered to explain these exceptions is labeled the “evil woman theory.” This theory centers around the roles the defendant women were in when they carried out their crimes. These roles include wives, mothers, nurses, and prostitutes.³² Nine out of the ten women who were executed were acting in the capacity of a traditional female role, endowed with a certain amount of expectation and trust from society at large.³³ The “evil women” acted out from feminine roles and killed victims who had placed themselves at the mercy of the feminine expectations built into these relationships.³⁴ Scholars have theorized that by “acting out” from the duties of these roles, the defendants defiled society’s notions of womanhood and lost the protection that femininity typically affords them in the jury room.³⁵ One way of interpreting this phenomenon is that these women destroyed the veneer that their gender usually gives them; in short, they opened themselves up to masculine penalties.³⁶ Under this theory, with only one exception, every modern day execution has targeted a man, or a woman who has rejected the comforts of her gender and who is therefore viewed by society as a masculine offender. An overview of the ten modern era female executions is critical to illustrate just how rare these events are, and to understand the similarities between each of the crimes that bolster the “evil woman” theory.

The first of the modern era executions took place on November 2, 1984 in North Carolina.³⁷ A jury sentenced Velma Barfield (“Barfield”) to death for

32. These roles are not limited to the modern era; historically, 274 of the total number of female executions were for homicide and a large portion of these homicides involved a woman who killed her child, her husband, or her lover. Streib, *Female Offenders*, *supra* note 2, at 851.

33. One of the executions does not comply with the evil woman theory. The state of Alabama executed Lynda Lyon Block for murdering a police officer with her common-law husband. Todd Kleffman, *State Executes Block*, MONTGOMERY ADVERTISER, May 10, 2002, available at <http://www.clarkprosecutor.org/html/death/US/block775.htm>. Block never filed an appeal and was executed on May 10, 2002. *Id.*

34. See *infra* note 35 (explaining how modern scholars define the relationship between defendant women and society’s gender expectations).

35. Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL’Y & L. 427, 459 (2000), WL 8AMUJG SPL 427 (explaining that when a woman strays from an expected feminine role and “offends society as a whole with her ‘unladylike’ behavior,” judges and juries lose their reluctance to sentence her to death); Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1421 (1997) [hereinafter Carroll, *Images of Women*] (positing that when women offend society’s notions of femininity, they lose the benefits and protections that their gender normally provides them with); Rapaport, *Some Questions*, *supra* note 8, at 512-13 (theorizing that women who commit typically male offenses or defy gender norm expectations are punished in the same manner as men); Denno, *supra* note 26, at 86 (stating that “society deems women who engage in crime to be ‘doubly deviant’—defying both the law and their gender role”).

36. Carroll, *Images of Women*, *supra* note 35, at 1421-22 (explaining that when women defy their gender they “transcend notions of femininity” and join their male counterparts as death eligible).

37. Streib, *Gendering*, *supra* note 1, at 450.

poisoning her boyfriend with arsenic.³⁸ Barfield also admitted that she poisoned her mother, and that while she was acting as a nurse to an elderly couple, she poisoned them as well.³⁹ Barfield was also suspected of poisoning her husband several years earlier.⁴⁰ Barfield acted out from her roles of girlfriend, wife, daughter, and nurse by preying on those closest to her and violating the trust they placed in her feminine capacity.

After Barfield's execution, 407 men were executed before another state put a woman to death.⁴¹ On February 3, 1998, the state of Texas executed Karla Faye Tucker ("Tucker").⁴² Texas, never shy to impose the death penalty, had not executed a woman since 1863 and Tucker's execution drew a torrent of media attention.⁴³ Tucker's sensational crime was the murder of two sleeping victims with a pickax.⁴⁴ Tucker boasted that with each blow of the pickax she reached sexual climaxes and was described as a woman who killed "like a man."⁴⁵ The brutality of Tucker's crime and her sexualized description of the murders combined with her involvement in drugs and prostitution to create an image of a woman casting aside the garb of femininity and trampling traditional notions of gender.

Judias Buenoano ("Goodyear") was executed a few weeks later on March 30, 1998, in Florida.⁴⁶ Over the course of two weeks, Goodyear slowly poisoned her husband with arsenic after he returned home from a tour of duty in Vietnam.⁴⁷ After his death, she collected her husband's veteran benefits as well as several life insurance policies.⁴⁸ Next, Goodyear poisoned a boyfriend and collected on three separate insurance policies. Finally, she attempted to kill her fiancé, again to collect on a life insurance policy.⁴⁹ During Goodyear's appeal, the court pointed out that all three of her victims "established a close relation-

38. *State v. Barfield*, 259 S.E.2d 510, 519, 523 (N.C. 1979) (declining to set aside Barfield's sentence of death).

39. Streib, *Gendering*, *supra* note 1, at 450; *Barfield*, 259 S.E.2d at 527.

40. Streib, *Gendering*, *supra* note 1, at 450; *Barfield*, 259 S.E.2d at 521-22.

41. Streib, *Gendering*, *supra* note 1, at 450.

42. *Id.* at 451; see *Tucker v. State*, 771 S.W.2d 523, 527 (Tex. Crim. App. 1988) (affirming Tucker's conviction of capital murder).

43. Streib, *Gendering*, *supra* note 1, at 451-52.

44. *Id.* at 452; *Tucker*, 771 S.W.2d at 525.

45. *Tucker*, 771 S.W.2d at 526-27; Streib, *Gendering*, *supra* note 1, at 452. The court recounted Tucker's description of the events in its recitation of the facts: "There, she related the events of the morning to Doug, describing how she and Danny had 'offed Jerry Dean last night.' She said, 'Dan hit him with the hammer and I picked him,' and 'Doug, I come with every stroke' of the pickax." *Tucker*, 771 S.W.2d at 526-27.

46. Streib, *Gendering*, *supra* note 1, at 453.

47. *Buenoano v. State*, 527 So. 2d 194, 195-96, 199 (Fla. 1988) (affirming first-degree murder conviction and sentence of death).

48. *Id.* at 196.

49. *Id.*

ship with . . . [Goodyear] either as her husband, common-law husband or fiancé.”⁵⁰ The court concluded that her sentence of death was appropriate in part because “[s]ystematically poisoning one’s husband over a period of time until it causes death and witnessing the effects of the poison is an unusual manner and method of committing a homicide.”⁵¹ The court also noted that Goodyear gave her final victim vitamin C tablets when he caught a cold.⁵² The tablets, which actually contained arsenic, led to the hospitalization of Goodyear’s fiancé.⁵³ In all three cases, Goodyear sullied the traditional notions of caretaker and nurturer by delivering the poison to her unsuspecting partners and watching them die. The court’s concern with the manner and relationships involved in Goodyear’s crimes lends support for the “evil woman” theory.

The state of Texas executed a second woman, Betty Lou Beets (“Beets”), two years later on February 24, 2000.⁵⁴ Several years after Beets’s husband apparently disappeared in a fishing accident, his body was discovered in a wishing well on his property; the body of another of Beets’s former husbands was also discovered on the property.⁵⁵ After her husband’s disappearance, Beets inquired about recovering from his life insurance policy and his pension benefits.⁵⁶ When she learned that she would have to wait seven years to recover due to the missing body, she attempted to sell some of his property and their house mysteriously burned down.⁵⁷ At trial, Beets also admitted to shooting another former husband in the side and the stomach.⁵⁸ Like Goodyear, Beets repeatedly attacked her partners and, in at least one case, evidence was presented to demonstrate a motive of financial gain. The lengthy facts presented in the appellate court’s opinion record not only Beets’s actions, but also the involvement of two of her children in the murders.⁵⁹ The jury and the court may have viewed Beets not only as a murderer of her men, but also as a corrupter of the

50. *Id.* at 197.

51. *Id.* at 199.

52. *Id.* at 196.

53. *Buenoano*, 527 So.2d at 196.

54. Streib, *Gendering*, *supra* note 1, at 454.

55. *Beets v. State*, 767 S.W.2d 711, 715-17 (Tex. Crim. App. 1987).

56. *Id.* at 716.

57. *Id.* at 716 n.7, 716-17.

58. *Id.* at 722.

59. *Id.* at 717-19. The court’s opinion included portions of the testimony of Beets’s daughter Shirley:

She told [Shirley] that she waited until [Barker] went to sleep and then she got the gun and covered it with a pillow and pulled the trigger . . . Thereafter, Shirley assisted her mother in disposing of Barker’s body: ‘We drug him from the trailer outside to the back and put him in the hole that had already been dug [in order to build a barbecue pit].’

Id. at 718-19. The court’s opinion contained a similar passage which described how Beets’s son Robbie helped his mother bury her other husband. *Id.* at 718.

home because she used her children to help her hide the bodies. Beets not only tainted her own femininity by killing her husbands, but she used her ultimate feminine power—motherhood—to implicate her children in her own wrongdoing.

The state of Arkansas executed Christina Marie Riggs (“Riggs”) on May 2, 2000.⁶⁰ Riggs worked as a nurse at the Arkansas Heart Hospital in Little Rock.⁶¹ On November 4, 1997, Riggs took home the antidepressant Elavil, morphine, and potassium chloride.⁶² Riggs had two children, ages two and five, and she injected both children with the Elavil to put them to sleep.⁶³ She then injected her older child with the potassium chloride; he awoke crying from the pain of the poison at which point Riggs injected him with morphine.⁶⁴ When the drug did not calm him, Riggs smothered him with a pillow.⁶⁵ She then smothered her second child, later telling police that her second child only fought “a little bit.”⁶⁶ Riggs then wrote several suicide notes, took a large dose of Elavil, and injected herself with potassium chloride.⁶⁷ She was discovered the next day and survived.⁶⁸ Riggs confessed and pleaded not guilty by reason of mental defect.⁶⁹ The jury rejected her defense of mental defect and found her guilty on two counts of capital murder.⁷⁰ Riggs asked for a sentence of death; the jury obliged her.⁷¹ Riggs took advantage of her position as a nurse to prey upon her children and commit perhaps the ultimate anti-feminine act: infanticide.

On January 1, 2001, the state of Oklahoma executed Wanda Jean Allen (“Allen”).⁷² After a domestic dispute, Allen shot and killed her gay lover in front of a police station.⁷³ The prosecutor played upon homosexual stereotypes during Allen’s trial and despite being borderline mentally retarded, Allen was sentenced to death.⁷⁴ Allen had been convicted previously for manslaughter after having

60. Streib, *Gendering*, *supra* note 1, at 454.

61. *Riggs v. State*, 3 S.W.3d 305, 307 (Ark. 1999).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 308.

67. *Riggs*, 3 S.W.3d at 308.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Streib, *Gendering*, *supra* note 1, at 455.

73. *Allen v. State*, 871 P.2d 79, 86 (Okla. Crim. App. 1994).

74. David Kirby, *Was Justice Served? The Execution of a Lesbian Raises Tough Questions About the Death Penalty*, THE ADVOC., Feb. 27, 2001, at http://www.advocate.com/html/stories/832/832_wandajeane.asp. “They point to such statements as one by the prosecutor in which he said Allen was the one who ‘wore the pants’ in the relationship with Leathers.” *Id.*

pistol-whipped and shot another former lover.⁷⁵ The prosecutor used this conviction as evidence that Allen was a continuing threat to society.⁷⁶ On its face, Allen's crime appears to be a heat of passion offense, which is not typically treated as a capital murder. The prominent role her sexuality played evidences again that when a woman acts out from society's gender expectations, she faces harsher penalties.

Months after Allen's execution, Oklahoma executed its second woman, Marilyn Kay Plantz ("Plantz") on May 1, 2001.⁷⁷ Plantz wanted to collect on her husband's life insurance, which totaled approximately \$299,000.⁷⁸ She enlisted her lover and one of his friends to kill her husband.⁷⁹ After several botched attempts, the two men beat Plantz's husband with baseball bats in her home while her two young children slept in their bedrooms.⁸⁰ Plantz then directed the men to drive her husband away in his pickup, burn him, and leave him on the side of the road.⁸¹ The men complied and noted that the victim was not yet dead when they lit him on fire.⁸² Plantz's violation of the marital trust, combined with the masculine brutality of her orders, awarded her a sentence of death.

Lois Nadean Smith ("Smith") murdered her son's girlfriend on July 4, 1982.⁸³ Smith choked the victim, stabbed her in the throat, and then drove her to another location.⁸⁴ Smith sat the victim in a recliner and taunted her with a revolver, shot the chair, and wounded the victim.⁸⁵ Smith then jumped on the victim's neck and laughed as her son reloaded the revolver; finally, Smith shot the victim several more times and killed her.⁸⁶ Smith's crime creates another picture of a sinister mother, using her matriarchal power to kill her victim and corrupt her son. The state of Oklahoma executed Smith on December 4, 2001.⁸⁷

The state of Florida executed a female serial killer, Aileen Wuornos ("Wuornos"), on October 9, 2002.⁸⁸ Wuornos was a prostitute who worked

75. *Allen*, 871 P.2d at 103-04.

76. *Id.* at 104.

77. Streib, *Gendering*, *supra* note 1, at 456. Plantz was a twenty-eight year old white woman and her two conspirators were black teenagers. *Id.*

78. *Plantz v. State*, 876 P.2d 268, 271 (Okla. Crim. App. 1994).

79. *Id.* at 271-72.

80. *Id.* at 272-73.

81. *Id.* at 272.

82. *Id.*

83. *Smith v. State*, 727 P.2d 1366, 1368 (Okla. Crim. App. 1986).

84. *Id.*

85. *Id.*

86. *Id.*

87. Oklahoma Department of Corrections, at <http://www.doc.state.ok.us/DOCS/CapitalP.HTM> (last updated Mar. 20, 2003).

88. *Female Serial Killer in Florida Put to Death by Lethal Injection*, JEFFERSON CITY NEWS TRIBUNE ONLINE EDITION, Oct. 9, 2002, <http://www.newstribune.com/stories>.

interstate exits along the Central Florida highways.⁸⁹ Wuornos claimed that one of her customers tied her hands to a steering wheel, violently raped her, and threatened to kill her.⁹⁰ She claimed she shot him in self-defense.⁹¹ She was convicted of five other murders, each a customer, and in each case she claimed self-defense.⁹² At trial, the prosecutor described Wuornos as a “‘predatory prostitute’ whose ‘appetite for lust and control had taken a lethal turn,’ who ‘had been exercising control for years over men,’ and who ‘killed for power, for full and ultimate control.’”⁹³ The prosecution used Wuornos’s gay lover as the star witness against her.⁹⁴ Wuornos’s jury took less than two hours to return a guilty verdict and less than two hours to sentence her to death.⁹⁵ Wuornos inverted a relationship where typically the woman is subordinate and often victimized; a serial killer prostitute was a frightening spin on the more typical story of a male serial killer who hunts prostitutes.⁹⁶ This inversion and Wuornos’s sexuality fit the evil woman exception—she used her sexuality to disarm her victims and murder them when they were most vulnerable.⁹⁷

Nine of the ten women executed in the modern era fall into the evil woman theory; their actions so horrified traditional gender expectations that they forfeited their femininity and were treated like men. These women and their crimes support the hypothesis that American juries will sentence only masculine offenders to death. Women are protected from death through the statutory construction of capital crimes, prosecutorial discretion, the reliance on mitigating and aggravating factors to control death sentences, and finally by the perceptions of individual jurors in the jury room. These conditions point to the conclusion that the American populace has in effect determined that death is an inappropriate punishment for women.

89. *Wuornos v. State*, 644 So. 2d 1000, 1004 (Fla. 1994).

90. *Id.* at 1004.

91. *Id.*; Phyllis Chesler, *Sexual Violence Against Women and a Woman's Right to Self-Defense: The Case of Aileen Carol Wuornos*, CRIM. PRAC. L. REP. 1993, at 1, 3, <http://www.phyllis-chesler.com/publications/sexual.violence.html>.

92. Chesler, *supra* note 91, at 7.

93. *Id.*

94. *Id.*

95. *Id.* at 8.

96. Oliver Burkeman, *Florida Executes Woman Serial Killer*, THE GUARDIAN, Oct. 10, 2002, <http://www.guardian.co.uk/international/story/0,3604,808734,00.html>.

Mr[.] Singhal said Wuornos’s gender had been the determining factor. “If this was flipped around, and a male serial killer was preying on women prostitutes—that’s typically not a death-penalty case, but a life imprisonment case. Even Ted Bundy [who probably killed at least 36 women] was offered life This case has been reaching for death from day one.”

Id.

97. *Wuornos*, 644 So. 2d at 1004 (describing the bodies of several of Wuornos’s victims which were discovered in remote locations and often were nude).

However, an impression of national gender discrimination does not necessarily equate to a constitutional violation. The fact remains that six states have enforced the death penalty against women and that the rate of female executions has increased significantly in the past five years.⁹⁸ The theoretical reasons explaining these ten executions are compelling; nonetheless, feminist theory cannot erase the fact that some juries, in some states, are overcoming their reluctance to impose death sentences on women. Because of the relative inconsistencies in the national scene, the strongest arena in which to mount a gender challenge to the death penalty is an active death penalty state which never executes female offenders.

D. The Modern Era Death Penalty in Virginia

Since 1976, Virginia has executed eighty-seven men, but not a single woman.⁹⁹ Currently, there are thirty men on death row, but not a single woman.¹⁰⁰ These facts do not mean that women in Virginia refrain from committing murder. In 1999, women committed twenty-four murders,¹⁰¹ in 2000 they committed forty-nine,¹⁰² and in 2001 they committed forty-two.¹⁰³ Men in Virginia committed 152 murders in 1999,¹⁰⁴ 346 murders in 2000,¹⁰⁵ and 333 murders in 2001.¹⁰⁶ Between 1999 and 2001 sixteen men received death sentences in Virginia.¹⁰⁷ Because women have committed about one in every eight homicides in that time, it stands to reason that at least two women should have

98. Between the years 1976 and 1998 only one woman was executed; however, in the five year span between 1998 and 2003, nine women were executed. DEATH PENALTY INFO. CTR., WOMEN AND THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/article.php?scid=24&did=229> (last visited Mar. 18, 2003). Three states, Florida, Texas, and Oklahoma, each executed more than one woman in those five years. *Id.*

99. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, EXECUTION INFORMATION at www.vadp.org/exinfo.htm (last modified Nov. 14, 2002).

100. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, VIRGINIA DEATH PENALTY INFORMATION, at <http://www.vadp.org/info.htm> (last modified Nov. 14, 2002).

101. VIRGINIA STATE POLICE: CRIME STATISTICS, MURDER/NONNEGLIGENT MANSLAUGHTER OFFENDERS BY AGE, GENDER, AND RACE 12, at http://www.vsp.state.va.us/Crime_in_Virginia_1999.pdf (last visited Mar. 18, 2003).

102. VIRGINIA STATE POLICE: CRIME STATISTICS, MURDER/NONNEGLIGENT MANSLAUGHTER OFFENDERS BY AGE, GENDER, AND RACE 12, at http://www.vsp.state.va.us/Crime_in_Virginia_2000.pdf (last visited Mar. 18, 2003).

103. VIRGINIA STATE POLICE: CRIME STATISTICS, MURDER/NONNEGLIGENT MANSLAUGHTER OFFENDERS BY AGE, GENDER, AND RACE 12, at http://www.vsp.state.va.us/Crime_in_Virginia_2001.pdf (last visited Mar. 18, 2003).

104. VIRGINIA STATE POLICE: CRIME STATISTICS, *supra* note 101, at 12.

105. VIRGINIA STATE POLICE: CRIME STATISTICS, *supra* note 102, at 12.

106. VIRGINIA STATE POLICE: CRIME STATISTICS, *supra* note 103, at 12.

107. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, EXECUTION INFORMATION, at <http://www.vadp.org/menrow.htm> (last visited Mar. 18, 2003).

been sentenced to death.¹⁰⁸ Instead, the last time Virginia executed a woman was on August 16, 1912.¹⁰⁹

Several factors contribute to the lack of female executions in Virginia. Virginia's capital murder statute targets felony murder which is typically, though not always, a male offense.¹¹⁰ When women do commit death-worthy crimes, juries and judges are reluctant to sentence them to death. Kelley Ann Tibbs ("Tibbs") and Domicia Chantel Winckler ("Winckler") were both charged with capital murder for robbing and killing another woman.¹¹¹ Tibbs and Winckler participated in a group beating of the victim, cut her with box cutters, and stole her jewelry.¹¹² A short time afterwards, both women participated in a second beating which resulted in the victim's death.¹¹³ All of the women who participated in the crime, as well as the victim, were gay.¹¹⁴ Winckler was also an African-American.¹¹⁵ Both Tibbs and Winckler were convicted of capital murder.¹¹⁶ Tibbs was sentenced to life and Winckler was sentenced to death.¹¹⁷ However, the trial court overruled the jury and fixed Winckler's sentence at life imprisonment.¹¹⁸ In the rare instance that a jury actually imposed a sentence of death, the final protection of judicial discretion saved Winckler from execution.

This deferential treatment of women is not solely the result of sympathetic juries or a subtle bias in the statutory system. Prosecutorial discretion plays perhaps the most crucial role in keeping female defendants out of the capital murder system. Prosecutorial discretion manifests itself through plea arrangements and through charging decisions. For example, Betty Jean Angeline ("Angeline") was charged with and pleaded guilty to first-degree murder and capital murder for the shooting of two women.¹¹⁹ As part of a plea arrangement,

108. Of the murders for which gender is known that occurred between 1999 and 2001, women committed 115 and men have committed 831. See VIRGINIA STATE POLICE: CRIME STATISTICS, *supra* notes 101-106 (listing the number of male and female murderers in Virginia in 1999, 2000, 2001).

109. DEATH PENALTY FOR FEMALE OFFENDERS JANUARY 1, 1973, THROUGH DECEMBER 31, 2002, <http://www.law.onu.edu/faculty/streib/femdeath.htm>.

110. See *infra* note 219 (listing the number of executions in Virginia for the crime of felony murder).

111. *Tibbs v. Commonwealth*, 525 S.E.2d 579, 580-81 (Va. Ct. App. 2000); *Winckler v. Commonwealth*, 531 S.E.2d 45, 46 (Va. Ct. App. 2000).

112. *Tibbs*, 525 S.E.2d at 581-83.

113. *Id.*

114. *Winckler*, 531 S.E.2d at 47.

115. Michael Paul Williams, *Does Justice Peep Through Her Blindfold?*, RICH. TIMES-DISPATCH, Feb. 9, 1998, at B1, 1998 WL 100021291.

116. *Tibbs*, 525 S.E.2d at 580; *Winckler*, 531 S.E.2d at 48.

117. *Tibbs*, 525 S.E.2d at 580; *Winckler*, 531 S.E.2d at 48.

118. *Winckler*, 531 S.E.2d at 48.

119. *Plea Brings Details in 2 Murders To Light*, ROANOKE TIMES, Nov. 13, 2001, at B1, 2001 WL 25129578.

Angeline was sentenced to two consecutive life terms.¹²⁰ Two women, Kia Yovah Brooks (“Brooks”) and Brandi Nicole Dalton (“Dalton”), who allegedly participated in the slaying and robbery of a Richmond man, were charged with first-degree murder and robbery.¹²¹ Brooks and Dalton could have been charged with capital murder pursuant to Virginia Code Section 18.2-31(4).¹²² Jodie Elizabeth Brown (“Brown”) attempted to purchase cocaine and ended up murdering the seller.¹²³ Brown stabbed her victim seventy-two times; she was sentenced to twenty-five years for first-degree murder.¹²⁴ Brown could have been charged with capital murder pursuant to Section 18.2-31(9).¹²⁵ Naquisha Silver (“Silver”) was convicted of two counts of first-degree murder and received four life sentences.¹²⁶ Silver participated in the murder of two women who were sexually assaulted and beaten to death.¹²⁷ She also participated in the malicious wounding of a third victim who was burned on over forty percent of her body and eventually required the amputation of all four of her limbs.¹²⁸ Silver could have been charged with capital murder pursuant to Section 18.2-31(7).¹²⁹ Rebecca L. Scott (“Scott”) offered two of her friends fifteen-hundred dollars to whomever killed her father first; one friend promptly shot Scott’s father.¹³⁰ Scott was convicted of first-degree murder, but it does not appear that she was ever charged with capital murder pursuant to Section 18.2-31(10).¹³¹ Lavada Madeshia Tucker (“Tucker”) and two men attacked three people in an armed drug robbery.¹³² Two of the victims were killed.¹³³ The two men Tucker was

120. *Id.*

121. Mark Bowes, *Six Charged in Robbery Killing; 19-Year-Old’s Body Was Found in His Car*, RICH. TIMES-DISPATCH, Dec. 12, 2001, at B1, 2001 WL5341739.

122. See VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery”).

123. Alan Cooper, *Woman Gets 25 Years in Gilpin Court Death, Prison Term Leave [sic] Seven Children Motherless*, RICH. TIMES-DISPATCH, July 31, 2001, at B3, 2001 WL 5329842.

124. *Id.*

125. See VA. CODE ANN. § 18.2-31(9) (Michie Supp. 2002) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of any person” while violating the controlled substance statute when the killing is done in furtherance of the violation).

126. Alan Cooper, *City Woman Gets 4 Life Terms, Judge Cites Depravity of Double Murder*, RICH. TIMES-DISPATCH, June 21, 2001, at B1, 2001 WL 5326721.

127. *Id.*

128. *Id.*

129. See VA. CODE ANN. § 18.2-31(7) (Michie Supp. 2002) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction”).

130. *Scott v. Commonwealth*, No. 2132-00-1, 2001 WL 316159, at *1, *2 (Va. Ct. App. Apr. 3, 2001).

131. *Id.*, at *1; see VA. CODE ANN. § 18.2-31(10) (Michie Supp. 2002) (defining capital murder as murder for hire).

132. *Alexandria Woman Charged in Slayings*, WASH. POST, Jan. 12, 2002, at B02, 2002 WL

with were charged with capital murder; Tucker was charged with two counts of felony murder.¹³⁴ Women are not innocent of committing the more gruesome murders that often result in capital sentences for men, but prosecutorial discretion prevents them from being charged with capital murder.

Moreover, prosecutorial discretion is not likely to be balanced by changes to Virginia's capital murder statutes. At the end of the 1980s and into the 1990s, several women killed infants or young children; the bodies of the dead children possessed signs of chronic abuse.¹³⁵ Possibly the most notorious of these cases involved Karen Diehl ("Diehl"). Diehl and her husband raised sixteen children, thirteen of whom were adopted, in a converted bus.¹³⁶ Diehl kept one thirteen-year old boy naked and tied to the floor of the bus and tortured him.¹³⁷ Rescue workers discovered the child clinically dead, but revived him and he lingered in a coma for five days.¹³⁸ The child weighed seventy pounds and died from head injuries caused by battering.¹³⁹ Diehl admitted that she had struck the child in the head with a wooden paddle as many as thirty times and that she had struck him directly on top of his head a few days before he died.¹⁴⁰ Diehl was convicted of child neglect, assault and battery, abduction, and involuntary manslaughter.¹⁴¹ She was sentenced to a total of thirty-one years in prison, but served less than half of that time.¹⁴²

In 1998, the Virginia state legislature passed an addition to the capital murder statute.¹⁴³ Virginia Code Section 18.2-31(12) defines capital murder as the "willful, deliberate and premeditated killing of a person under the age of

2520661.

133. *Id.*

134. *Id.*

135. Barbara Jo Archie was convicted of first-degree murder for killing her boyfriend's three-year old daughter and sentenced to life imprisonment. *Archie v. Commonwealth*, 420 S.E.2d 718, 719 (Va. Ct. App. 1992). Thipsukon Arnold Rhodes killed her three-month old daughter; she was charged with and convicted of first-degree murder and sentenced to twenty years in prison. *Rhodes v. Commonwealth*, 384 S.E.2d 95, 96 (Va. 1989). Stacy Myers killed her newborn baby by placing it inside a plastic bag where the child suffocated. *Myers v. Commonwealth*, No. 1780-92-1, 1994 WL 389748, at *1, *2 (Va. Ct. App. July 26, 1994). Myers was indicted for first-degree murder, she had a bench trial, and the court convicted her of second-degree murder. *Id.*, at *1. Autopsies of Archie's victim and Rhodes's victim indicated a pattern of child abuse. *Archie*, 420 S.E.2d at 719-20; *Rhodes*, 384 S.E.2d at 96.

136. *Diehl v. Commonwealth*, 384 S.E.2d 801, 803 (Va. Ct. App. 1989).

137. *Id.* at 804.

138. *Id.* at 803.

139. *Id.* at 803-04.

140. *Id.* at 804.

141. *Id.* at 803.

142. *Diehl*, 384 S.E.2d at 803; Kerry Dougherty, *The Re-Emergence of Karen Diehl Revives Horrors of Abused Child*, THE VIRGINIAN-PILOT, Oct. 6, 2001, at B1, 2001 WL 26277916 (reporting that Diehl now works in a facility for elderly people).

143. See generally VA. CODE ANN. § 18.2-31 (Michie Supp. 2002) (amended 1998).

fourteen by a person age twenty-one or older.”¹⁴⁴ This statute gives prosecutors the authority to charge women who murder children with capital murder. In January of 2000, Annabelis Corrales (“Corrales”) smothered her newborn baby in a white plastic trash bag.¹⁴⁵ Corrales was twenty-five years old at the time; she was charged with first-degree murder, convicted of second-degree murder, and sentenced to five years in prison.¹⁴⁶ In October of 2000, Stacy Renee Atkinson (“Atkinson”) beat her two-and-a-half-year old stepson to death.¹⁴⁷ The child’s body had fifty-one bruises and lacerations.¹⁴⁸ Although initially charged with capital murder, prosecutors eventually negotiated a plea agreement; Atkinson was sentenced to fifteen years in prison for second-degree murder.¹⁴⁹ In February of 2001, rescue workers discovered the body of a four-year old who died from a severe beating.¹⁵⁰ Prosecutors charged the boy’s twenty-two-year old mother with second-degree murder and felony child abuse.¹⁵¹ At the same time, prosecutors have not been reluctant to charge men with capital murder pursuant to Section 18.2-31(12).¹⁵² In theory, the adoption of Section 18.2-31(12) should have resulted in an increase of female capital murder charges and convictions. In reality, prosecutorial discretion is still controlling. This development indicates that the capital murder system is inequitable at every turn—attempting to change

144. VA. CODE ANN. § 18.2-31(12) (Michie Supp. 2002).

145. Kiran Krishnamurthy, *Woman Held in Death of Newborn, First-Degree Murder is Charged*, RICH. TIMES-DISPATCH, Jan. 21, 2000, at B4, 2000 WL 5027934.

146. See *id.*; Corrales v. Commonwealth, No. 2797-01-2, 2002 WL 31553222, at *1 (Va. Ct. App. Nov. 19, 2002).

147. Alan Cooper, *15 Years in Toddler’s Death*, RICH. TIMES-DISPATCH, Oct. 5, 2001, at B3, 2001 WL 5335696.

148. *Id.*

149. *Id.*

150. Mike Allen, *Bassett Woman Charged in 4-Year-Old Son’s Death; Charge is Second-Degree Murder*, THE ROANOKE TIMES, Apr. 3, 2001, at B4.

151. *Id.*

152. Jermaine Donel Poindexter has been charged with several counts of capital murder including Section 18.2-31(12). *Man Indicted; Death Brings Murder Charges*, RICH. TIMES-DISPATCH, Mar. 5, 2003, at B2, 2003 WL 8016016; see § 18.2-31(12) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of a person under the age of fourteen by a person twenty-one or older”).

Gregory Murphy was charged with capital murder for knifing an eight-year old boy to death. Patricia Davis, *Bill Would End Cap on Treating Suspects*, WASH. POST, Jan. 9, 2003, at T06, 2003 WL 2367681.

Orlando Covington was charged with capital murder for beating a three-year old to death. Tom Campbell, *Judge Finds Man Guilty in Beating Death of Boy*, RICH. TIMES-DISPATCH, June 20, 2002, at B3, 2002 WL 7202970.

James Edward Knight was charged with capital murder for killing his infant daughter. *Man Sentenced to Life in Prison; Knight Killed Infant Daughter*, RICH. TIMES-DISPATCH, Feb. 15, 2002, at B2, 2002 WL 7192116.

Eric A. Vickers was charged with capital murder for beating his girlfriend’s son to death. *Woman Admits She Let Boyfriend Beat Son*, RICH. TIMES-DISPATCH, Feb. 12, 2002, at B2, 2002 WL 7191854.

one portion of the system cannot ameliorate the inequity latent in the other components.

The lack of women in Virginia's history of executions or currently on Virginia's death row is not the result of a total lack of deserving female offenders. Statutory construction, juries, judges, and prosecutors combine to create a system with layers of protection for female defendants. This raises two questions, the first being whether Virginia's capital system creates two classes of offenders, divided by gender. Male homicide offenders are eligible for the death penalty; women are not. The fact that there are culpable female offenders in Virginia and yet not a single final sentence of death has been imposed on a woman indicates that the Virginia capital system has deemed death to be a disproportionate penalty for one gender, but not the other. These conditions make Virginia the ideal state to challenge the gender disparity in the application of the death penalty; it actively uses its death system, but targets only men.

The second question raised is whether Virginia's statutory system violates the Equal Protection clause in its determination of death-eligible offenses. Virginia's capital system essentially creates two classes of murder, male felony murder punishable by death and female domestic murder, punishable at most by life imprisonment.¹⁵³ Is shooting a convenience store clerk in the commission of a robbery truly a more dangerous crime than killing one's spouse to collect on an insurance policy? If Virginia's capital system is based upon deterring the types of murder that have the most deleterious effects upon society, the Commonwealth makes a value judgment that appears misguided at best and discriminatory at worst.

III. Virginia's Capital Murder Statute Is Unconstitutional

Virginia's capital system has three constitutional weaknesses. First, the Virginia statute tends to exclude the types of homicide that women commit most and even when women do commit a capital offense prosecutors tend not to charge them under Section 18.2-31. With one exception, juries in the modern era will not sentence a woman to death. These facts support the proposition that evolving standards of decency have determined that executing a female constitutes a cruel and unusual punishment; therefore, the statute violates the Eighth Amendment. Second, the death penalty is disparately applied which results in de facto discrimination and violates the Equal Protection clause of the Fourteenth Amendment. Prosecutors choose not to charge women with capital murder for the same crimes that essentially guarantee men a capital indictment.¹⁵⁴ Third, Virginia's statutory decision to label felony murder, but not domestic murder, a capital offense creates an invidious classification which violates the

153. Even when women do commit felony murder, they do not receive sentences of death. See *supra* notes 119-34 and accompanying text.

154. See *supra* notes 119-34, 145-52 and accompanying text.

Equal Protection clause of the Fourteenth Amendment.

A. *The Eighth Amendment*

The Eighth Amendment prohibits punishments that are excessive or disproportionate to the offense; a punishment that is either disproportionate or excessive can be rendered cruel and unusual.¹⁵⁵ Whether or not a punishment is disproportionate to the offense is determined by the standards which "currently prevail" within the collective criminal justice conscience.¹⁵⁶ The United States Supreme Court in *Atkins v. Virginia*¹⁵⁷ framed its proportionality review with the following words: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁵⁸ The Court has repeatedly relied on the "evolving standards of decency" to refine its definition of cruel and unusual punishment.¹⁵⁹ The execution of women fits clearly into this pattern of evolving standards. With every passing generation, fewer and fewer women have been executed until such executions have all but ceased.¹⁶⁰ All parts of the legal system, judges, prosecutors, and juries, have developed a habit of restraint when it comes to executing a woman. Society has matured to a level at which the execution of a woman offends its sense of decency. The execution of a woman is excessive and disproportionate to any crime she may commit.

The United States Supreme Court catalogued the factors to consider in weighing the evolving standards of decency in *Coker v. Georgia*.¹⁶¹ At issue in *Coker* was a Georgia statute which allowed for a capital sentence in cases of rape

155. *Atkins v. Virginia*, 122 S. Ct. 2242, 2246-47 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded).

156. *Id.* at 2247.

157. 122 S. Ct. 2242 (2002).

158. *Atkins*, 122 S. Ct. at 2247 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

159. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 330-331, 335 (1989) (relying on the evolving standards of decency to deny petitioner's claim that the execution of the mentally retarded violated the Eighth Amendment); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (considering evolving standards of decency in determining if the execution of offenders aged sixteen and seventeen at the time of the offense constituted cruel and unusual punishment); *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986) (considering evolving standards of decency in determining if the execution of the insane amounted to cruel and unusual punishment).

160. This observation does not ignore the fact that Texas, Florida, and Oklahoma have increased their female executions in the past five years. DEATH PENALTY INFO. CTR., *supra* note 98. However, these three states are much in the minority. DEATH PENALTY INFO. CTR., *supra* note 12.

161. *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (holding that capital punishment for the crime of rape of an adult woman violates the Eighth Amendment protection from cruel and unusual punishment).

of an adult woman.¹⁶² Georgia was the last state to permit the death penalty for rape, and the Court traced the progression of other death states abandoning the penalty over time.¹⁶³ Similarly, most modern death states have abandoned imposing the death penalty on women over a progression of time.¹⁶⁴ The only difference is that in *Coker*, states altered their statutes to reflect the change in societal norms. Of course, a state can limit its capital offenses without violating the Constitution, but a state cannot limit its class of potential capital offenders by gender without undermining the legitimacy of its capital system. Virginia will not change its statute to reflect the fact that its citizens will not impose a sentence of death on a female because it need not do so. The system in place already achieves that goal without the brazenness of a statutory provision.

The Court in *Coker* also considered the findings of juries when it analyzed evolving standards of decency.¹⁶⁵ The Court mentioned the fact that nine out of ten juries in Georgia which heard a capital rape case did not impose a sentence of death.¹⁶⁶ The Court in *Coker* relied on *Gregg v. Georgia*¹⁶⁷ to state that “[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.”¹⁶⁸ The *Coker* Court went further than *Gregg* and also stated:

[T]hat it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury’s judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed.¹⁶⁹

In the state of Virginia, the jury has an “appropriate measure of choice,” and only one woman has received a sentence of death in the modern era.¹⁷⁰ The Court in *Coker* relied in part on both the actions of state legislatures and the decisions of juries. While the actions of legislatures are not as compelling as they

162. *Id.* at 586.

163. *Id.* at 594-96.

164. See DEATH PENALTY INFO. CTR., *supra* note 12 (listing thirty-eight states and the federal government as death penalty jurisdictions).

165. *Coker*, 433 U.S. at 596-97.

166. *Id.* at 597 (stating that “it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence”).

167. 428 U.S. 153 (1976).

168. *Coker*, 433 U.S. at 596-97 (citing *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)).

169. *Coker*, 433 U.S. at 596.

170. *Id.*; see VA. CODE ANN. § 19.2-264.4(D)-(E) (Michie 2000) (describing the role of the jury in a capital sentencing proceeding). The one woman was Winckler, whose death sentence was commuted by the trial judge. See *supra* note 118.

were in *Coker*, the jury decisions in Virginia are very compelling.¹⁷¹

The Court relied on evolving standards of decency again in *Enmund v. Florida*¹⁷² to hold that the Eighth Amendment does not permit the execution of a defendant who aids and abets a felony murder, but does not perform the actual killing.¹⁷³ In reliance on *Coker*, the *Enmund* Court looked to “the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter.”¹⁷⁴ At the time *Enmund* was decided, thirty-six jurisdictions authorized the death penalty, but only eight jurisdictions authorized its use on a felon who participated in a robbery that resulted in a felony murder, but who did not participate in the murder itself.¹⁷⁵ The Court held that this “small minority” of jurisdictions did not overshadow the fact that standards of decency had evolved in the remaining majority of death penalty jurisdictions.¹⁷⁶ The Court found that because American juries have overwhelmingly “repudiated imposition of the death penalty for crimes such as petitioner’s,” the conclusion that society at large had rejected such a penalty was proper.¹⁷⁷ The Court continued and stated:

The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die.¹⁷⁸

In the matter of female executions, less than *Enmund*’s small minority of jurisdictions still carry out death sentences, a mere six out of thirty-nine.¹⁷⁹ Further, in Virginia, the Court’s language regarding juries is actuated: not a single woman who has been convicted of capital murder has received a final sentence of death, not only in the past quarter century, but in the past ninety-one years.¹⁸⁰ In applying the *Enmund* analysis to Virginia, it is apparent that Virginia has determined that death is a cruel and unusual punishment for women, despite the gender-neutral language of its capital sentencing statutes.

The execution of women has always been limited; however, its dimunition

171. *Coker*, 433 U.S. at 597; see VA, CODE ANN. § 19.2-264.4(D)-(E) (describing the role of the jury in a capital sentencing proceeding).

172. 458 U.S. 782 (1982).

173. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

174. *Id.* at 788-89.

175. *Id.* at 789.

176. *Id.* at 792.

177. *Id.* at 794.

178. *Id.* at 796.

179. See DEATH PENALTY INFO. CTR., *supra* note 12.

180. See DEATH PENALTY FOR FEMALE OFFENDERS JANUARY 1, 1973, THROUGH DECEMBER 31, 2002, *supra* note 109.

has been even more pronounced in the last several decades. This gradual transformation manifests an evolving standard of decency—what was once an acceptable and proportionate method of punishment for women is now only rarely administered. The United States Supreme Court has held that evolving standards of decency and conventional norms are to be considered in the regulation of the death penalty. The fact that only six states have executed women in the past thirty years indicates that female executions have fallen beyond the pale of standard decency. The remaining thirty-three death penalty jurisdictions have essentially determined that execution is a cruel and unusual punishment for women. It is true that none of the death penalty jurisdictions limit their capital murder statutes to men; however, convictions of capital murder and sentences of death are limited almost exclusively to men. While capital murder statutes are not discriminatory on their face, the statistics support that they are discriminatory in practice. Because of this disparate application, women are benefitting from the justice system's silent consensus that, for them, execution is a cruel and unusual punishment. The death penalty in practice has extended the Eighth Amendment to offer broader protection to women. If men are not afforded the same protection, they have suffered a violation of their Fourteenth Amendment rights.

B. Equal Protection: Invidious Application

The first hurdle to surmount in making an Equal Protection argument under the Fourteenth Amendment is defining a legitimate suspect class. Historically, a gender classification that results in invidious discrimination has targeted or affected women rather than men. Nevertheless, the United States Supreme Court clarified that men, as well as women, can be members of a suspect class. In *Orr v. Orr*,¹⁸¹ the Court reviewed an Alabama alimony statute which provided that men, but not women, may be required to pay alimony in a divorce settlement.¹⁸² The Court found that Alabama could not justify a gender-biased statute in this instance and held the alimony statute unconstitutional.¹⁸³ In reaching its decision, the Court stated that “[t]he fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.”¹⁸⁴

Prior to *Orr*, the Court made the same finding regarding male gender classifications in *Craig v. Boren*.¹⁸⁵ An Oklahoma statute prohibited the sale of beer to men under the age of twenty-one and to women under the age of

181. 440 U.S. 268 (1979).

182. *Orr v. Orr*, 440 U.S. 268, 271 (1979) (holding a gender-biased alimony statute to be unconstitutional).

183. *Id.* at 283.

184. *Id.* at 279.

185. *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding a drinking age statute which distinguished between men and women to be unconstitutional).

eighteen.¹⁸⁶ The Court held that men between the ages of eighteen and twenty were subject to gender-based discrimination under this provision, and that Oklahoma's governmental objective was not sufficient to validate the denial of equal protection.¹⁸⁷ The Court determined that gender-biased statutes which discriminate against men must withstand intermediate scrutiny to avoid violating the Equal Protection clause.

However, this does not immediately create a suspect class of male death penalty defendants. All of the death states, including Virginia, have gender-neutral statutes; they do not discriminate on paper, although they do discriminate in application. The United States Supreme Court has, however, implied that even gender-neutral statutes must withstand scrutiny if they are discriminatory. The Court applied intermediate scrutiny to men in *Michael M. v. Superior Court*¹⁸⁸ and held that the government had a legitimate interest in discriminating against men.¹⁸⁹ California had passed a statutory rape law which only prohibited and punished men for the crime of statutory rape.¹⁹⁰ The Court held that California's governmental objectives were legitimate and, therefore, the discrimination was not unconstitutional.¹⁹¹ The Court also intimated that a gender-neutral statute that in effect only prosecutes men would not be any different than a gender-biased statute:

Petitioner contends that a gender-neutral statute would not hinder prosecutions because the prosecutor could take into account the relative burdens on females and males and generally only prosecute males. But to concede this is to concede all. If the prosecutor, in exercising discretion, will virtually always prosecute just the man and not the woman, we do not see why it is impermissible for the legislature to enact a statute to the same effect.¹⁹²

The petitioner in *Michael M.* faced a gender-biased statute and argued that the statute should have been gender-neutral.¹⁹³ He argued that if the state had an interest in targeting men, then prosecutorial discretion under a gender-neutral statute could fulfill the state's interest.¹⁹⁴ The Court answered this argument by stating that if the statute will have a gender-biased application, the bias could be

186. *Id.* at 192-93.

187. *Id.* at 204, 210.

188. 450 U.S. 464 (1981).

189. *Michael M. v. Superior Court*, 450 U.S. 464, 472-73 (1981) (upholding a statutory rape law which only prohibited the unlawful conduct of men). For a gender classification to withstand intermediate scrutiny it must bear a substantial relationship to "important governmental objectives." *Id.* at 468-69 (quoting *Craig*, 429 U.S. at 197).

190. *Id.* at 466.

191. *Id.* at 479.

192. *Id.* at 474 n.9.

193. *Id.*

194. *Id.*

plainly written into the statute.¹⁹⁵ Even though the Court upheld the gender discrimination in *Michael M.*, the Court's language supports the premise that it is the discrimination itself—not just the language of the statute—that must survive intermediate scrutiny. If the Court's words are applied to Virginia's capital punishment system, then the distinction between a gender-neutral or a gender-biased statute becomes less important. Whether Virginia's system by its statutory terms punishes only men or whether prosecutorial discretion targets only men becomes irrelevant. The discrimination is constitutional only if it withstands intermediate scrutiny.

Men can be considered a suspect class and gender discrimination can occur even when the statute in question is gender-neutral. Virginia has bestowed, in practicality, an Eighth Amendment protection upon female homicide offenders. This practice is revealed by the fact that even when women commit capital crimes they are rarely charged with capital murder, and when they are charged, they never receive a final sentence of death. Virginia has, therefore, determined that the death penalty is a cruel and unusual punishment for women. Because Virginia has not conferred this protection to men, it has engaged in gender classification. Intermediate scrutiny requires that gender classifications serve important governmental objectives and that they be substantially related to meeting those objectives.¹⁹⁶ This analysis would require Virginia to offer a governmental objective for executing male capital offenders and not female capital offenders. Presumably, Virginia would argue that men perpetrate more capital murders and therefore require a harsher penalty than female offenders. In *Michael M.*, the Court upheld the rationale that men sometimes require greater deterrence.

1. *Distinguishing Michael M. v. Superior Court*

Gender discrimination in Virginia's capital system is distinguishable from *Michael M.* California's objective for gender discrimination in *Michael M.* was to prevent teenage pregnancy.¹⁹⁷ The state reasoned that even in statutory rapes where the female is willing, the female bears the cost of the activity and does not need an extra deterrent.¹⁹⁸ Men, however, do not suffer the same way through the hardships of pregnancy; therefore, it furthers a legitimate state interest to impose a legal penalty on men alone in this situation.¹⁹⁹ The Court found that California's objective of preventing teen pregnancy was legitimate.²⁰⁰ The Court also agreed with the state that women already face a possible penalty for engag-

195. *Michael M.*, 450 U.S. at 474 n.9.

196. *Craig*, 429 U.S. at 197.

197. *Michael M.*, 450 U.S. at 471.

198. *Id.* at 473.

199. *Id.*

200. *Id.* at 472-73.

ing in underage sex, while men do not.²⁰¹ The Court concluded that punishing only men for statutory rape was sufficiently related to the state's objective.²⁰²

The objective of Virginia's capital murder statute is to prevent certain kinds of murder. No doubt, this objective is legitimate. To meet this objective, Virginia creates a classification. Men can be sentenced to death; women cannot. California had a reason for its classification, namely that women already face a harsh penalty for their actions while men do not. This reasoning does not apply in capital murder. When a woman commits capital murder she does not face any consequences outside of the law that a man does not also suffer. There is then no reason to add a legal penalty to men which is not imposed on women. If a capital sentence is not necessary to deter a woman from committing capital murder, it is not necessary to deter a man. Even though Virginia's objective of preventing certain types of murder is legitimate, its means of only punishing men is not substantially related. The Court's ruling in *Michael M.* creates a double-edged sword for the gender classification inherent in Virginia's capital system. The Court upheld the enforcement of a penalty against only male offenders, but it upheld that enforcement to support a substantial relationship drawn much closer than any Virginia might offer.

2. *Distinguishing McCleskey v. Kemp*

An element that cannot be ignored in a discussion of disparate gender application of the death penalty is the United States Supreme Court's treatment of disparate racial application of the death penalty. The Court in *McCleskey v. Kemp*²⁰³ held that statistical evidence of racial disparities does not support an inference of racism in individual cases.²⁰⁴ The defendant in *McCleskey* was a black man charged with killing a white police officer.²⁰⁵ He contested his conviction largely in reliance on the Baldus study, which indicated racial bias in capital sentencing.²⁰⁶ The Court insisted that the defendant prove purposeful discrimination in his specific case; the defendant in *McCleskey* could not.²⁰⁷ However, statistics indicate a more severe gender disparity than racial disparity. As of the year 2000, African-Americans made up 12.3 % of the total population and yet they made up 35 % of the modern era executions, 288 out of 838.²⁰⁸ In terms

201. *Id.*

202. *Id.*

203. 481 U.S. 279 (1987).

204. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (holding that statistical evidence is not enough to support an inference of discrimination in a specific case).

205. *Id.* at 283.

206. *Id.* at 292.

207. *Id.* at 293-96.

208. Statistics were tallied by the United States Census Bureau at http://www.census.gov/population/cen2000/atlas/black_a.pdf; DEATH PENALTY INFO. CTR., RACE OF DEFENDANTS EXECUTED SINCE 1976, at <http://www.deathpenaltyinfo.org/dpicrace.html> (last updated Mar. 20, 2003).

of gender though, men make up only 49.1 % of the population, yet they account for more than 99 % of modern day executions.²⁰⁹ This amounts to a racial discrepancy of about 24 %, but a gender discrepancy of about 68 %. Since 1976, Virginia has executed eighty-seven men and zero women. The Court in *McCleskey* refused to make statistical inferences in capital cases; nevertheless, this kind of statistical disparity can be a compelling starting point.

The Court in *McCleskey* refused, even in the face of compelling evidence, to conclude that one group was being adversely affected by the system without proof of individual discrimination in each individual case. Perhaps if the argument were posited from a different angle, a gender argument could be more compelling. The racial challenge failed because it could not show that the state was purposely discriminating against one group. If the gender argument is phrased in terms of a denial of benefits it could be more persuasive.

Female offenders are granted benefits and protections that men are denied. Prosecutorial discretion results in fewer women being charged with capital murder than could be and more women receiving plea arrangements for capital crimes. Even when women are tried for capital offenses, they appear to benefit from mitigators that stereotypically apply to them and to be protected from statutory aggravators that stereotypically do not. Finally, most juries view women as less dangerous and more open to rehabilitation than their male counterparts. This perception provides them with the benefit of almost always receiving a life sentence over a death sentence; men are denied this benefit. If these were benefits that the legal system could simply confer upon men, a remedy would be available to solve the Equal Protection violation; the courts could provide the same benefits and protections to both genders. Realistically, these intangible benefits cannot be given to men. Because the capital system bestows benefits upon women that ultimately award them life over death, and because these benefits cannot be given to men, the Virginia death penalty statute is invidiously applied in violation of the Equal Protection clause and is unconstitutional.

C. Equal Protection: Invidious Classification

The United States Supreme Court held in *Skinner v. Oklahoma*²¹⁰ that when a penalty is applied to two classes of offenders differently and the intrinsic offense is the same, an Equal Protection violation has occurred.²¹¹ At issue in *Skinner* was a statute that required the sterilization of felons who had been

209. See UNITED STATES CENSUS BUREAU, STATE AND COUNTY QUICKFACTS, PEOPLE QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 18, 2003); DEATH PENALTY INFO. CTR., *supra* note 7.

210. 316 U.S. 535 (1942).

211. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that Oklahoma's sterilization statute violates the Equal Protection clause).

convicted of a felony two or more times.²¹² However, the statute included an exception for certain felonies such as embezzlement, revenue fraud, and political offenses.²¹³ The Court pointed out that under this statute an embezzler who appropriates his employer's funds three times will not face sterilization, yet a chicken thief who raids a chicken coop three times will be sterilized.²¹⁴ The intrinsic offense, the taking of property, is the same, yet both offenders face wholly different penalties.²¹⁵ The Court treated this distinction with great seriousness because the penalty was so great. The Court described the penalty of sterilization as follows:

The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. *There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.* He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.²¹⁶

Like sterilization, the penalty of death causes irreparable injury and obliterates the possibility for redemption. Death also forever deprives the defendant of the basic liberty to continue his life. Because of these very concerns, the Court in *Skinner* applied strict scrutiny to the state's classification of crimes.²¹⁷ An argument can be made that under *Skinner*, classifications that attach to the implementation of the death penalty should also be subject to strict scrutiny.

Clearly, *Skinner* dealt with classifications in offenses rather than gender. However, the application of the death penalty in Virginia essentially amounts to two different penalties for the same intrinsic offense. Most of the capital murder convictions in Virginia are for some type of felony murder.²¹⁸ Of the eighty-seven men executed since 1981, fifty-three men were sentenced to death for felony murder.²¹⁹ By reviewing newsworthy cases from the year 2001, it appears

212. *Id.* at 536.

213. *Id.* at 537.

214. *Id.* at 538-39.

215. *Id.* at 539.

216. *Id.* at 541 (emphasis added).

217. *Skinner*, 316 U.S. at 541.

218. *See infra* note 219.

219. Since 1976, thirty-two men have been executed in Virginia pursuant to VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery"). *See generally* Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986); Akers v. Commonwealth, 535 S.E.2d 674 (Va. 2000); Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996); Chandler v. Commonwealth, 455

that women commit a broad range of homicides; they do not, however, typically commit felony murder in the commission of a robbery, a sex offense, or an abduction. Women in Virginia are more likely to murder a family member than to commit murder in the course of a robbery.²²⁰ This is not to say that all

S.E.2d 219 (Va. 1995); *Joseph v. Commonwealth*, 452 S.E.2d 862 (Va. 1995); *Graham v. Commonwealth*, 459 S.E.2d 97 (Va. 1995); *Fry v. Commonwealth*, 463 S.E.2d 433 (Va. 1995); *Chichester v. Commonwealth*, 448 S.E.2d 638 (Va. 1994); *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994); *Dubois v. Commonwealth*, 435 S.E.2d 636 (Va. 1993); *King v. Commonwealth*, 416 S.E.2d 669 (Va. 1992); *Yeatts v. Commonwealth*, 410 S.E.2d 254 (Va. 1991); *Quesinberry v. Commonwealth*, 402 S.E.2d 218 (Va. 1991); *George v. Commonwealth*, 411 S.E.2d 12 (Va. 1991); *Savino v. Commonwealth*, 391 S.E.2d 276 (Va. 1990); *Stout v. Commonwealth*, 376 S.E.2d 288 (Va. 1989); *Watkins v. Commonwealth*, 385 S.E.2d 50 (Va. 1989); *Bennett v. Commonwealth*, 374 S.E.2d 303 (Va. 1988); *Mackall v. Commonwealth*, 372 S.E.2d 759 (Va. 1988); *Turner v. Commonwealth*, 364 S.E.2d 483 (Va. 1988); *Correll v. Commonwealth*, 352 S.E.2d 352 (Va. 1987); *Townes v. Commonwealth*, 362 S.E.2d 650 (Va. 1987); *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987); *Pope v. Commonwealth*, 360 S.E.2d 352 (Va. 1987); *Wise v. Commonwealth*, 337 S.E.2d 715 (Va. 1985); *Boggs v. Commonwealth*, 331 S.E.2d 407 (Va. 1985); *Edmonds v. Commonwealth*, 329 S.E.2d 807 (Va. 1985); *Peterson v. Commonwealth*, 302 S.E.2d 520 (Va. 1983); *Bunch v. Commonwealth*, 304 S.E.2d 271 (Va. 1983); *Clanton v. Commonwealth*, 286 S.E.2d 172 (Va. 1982); *Briley v. Commonwealth*, 273 S.E.2d 48 (Va. 1980); *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979).

Since 1976, fourteen men have been executed in Virginia pursuant to VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2002) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration”). See generally *Wilson v. Greene*, 155 F.3d 396 (4th Cir. 1998); *Patterson v. Commonwealth*, 551 S.E.2d 332 (Va. 2001); *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996); *Barnabei v. Commonwealth*, 477 S.E.2d 270 (Va. 1996); *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994); *Chabrol v. Commonwealth*, 427 S.E.2d 374 (Va. 1993); *Satcher v. Commonwealth*, 421 S.E.2d 821 (Va. 1992); *O’Dell v. Commonwealth*, 364 S.E.2d 491 (Va. 1988); *Tuggle v. Commonwealth*, 334 S.E.2d 838 (Va. 1985); *Clozza v. Commonwealth*, 321 S.E.2d 273 (Va. 1984); *Coleman v. Commonwealth*, 307 S.E.2d 864 (Va. 1983); *Justus v. Commonwealth*, 283 S.E.2d 905 (Va. 1981); *Waye v. Commonwealth*, 251 S.E.2d 202 (Va. 1979); *Mason v. Commonwealth*, 254 S.E.2d 116 (Va. 1979).

Since 1976, two men have been executed in Virginia pursuant to VA. CODE ANN. §§ 18.2-31(4) and (5). See generally *Wright v. Commonwealth*, 450 S.E.2d 361 (Va. 1994); *Fitzgerald v. Commonwealth*, 292 S.E.2d 798 (Va. 1982).

Since 1976, two men have been executed in Virginia pursuant to VA. CODE ANN. § 18.2-31(4) and VA. CODE ANN. § 18.2-31(1) (defining capital murder as “[t]he willful, deliberate, and premeditated killing of any person in the commission of abduction . . .”). See generally *Cardwell v. Commonwealth*, 450 S.E.2d 146, 148-49 (Va. 1994); *Strickler v. Commonwealth*, 404 S.E.2d 227, 229-30 (Va. 1991).

Ronald Hoke was executed for the crimes of capital murder pursuant to VA. CODE ANN. §§ 18.2-31(1),(4) and (5). See generally *Hoke v. Commonwealth*, 377 S.E.2d 595, 596-97 (Va. 1989).

Everett Mueller was executed for the crimes of capital murder pursuant to VA. CODE ANN. §§ 18.2-31(5) and (1). See generally *Mueller v. Commonwealth*, 422 S.E.2d 380, 383 (Va. 1992).

220. In the year 2001, women were charged with or sentenced to at least thirteen murders in which the victim was a family member or a boyfriend. See Mike Allen, *Bassett Woman Charged in 4-Year-Old Son’s Death Charge is Second-Degree Murder*, ROANOKE TIMES, Apr. 3, 2001, at B4; Mark Bowes, *Woman Charged in Husband’s Death; She Said She Suffered From Domestic Abuse*, RICH. TIMES-DISPATCH, Oct. 28, 2001, at B7, 2001 WL 8011224; Jay Conley, *Moneta Woman Charged With Killing Mother*, ROANOKE TIMES, Nov. 10, 2001, at B3, 2001 WL 25129285; Alan Cooper, *Woman Gets 22 Years for Killing Half Sister*, RICH. TIMES-DISPATCH, Apr.20, 2001, at B3, 2001 WL 5321170; Tad

women who kill in Virginia are victims of abusive relationships or act in self-defense.²²¹ Women in Virginia have committed violent homicides, but because their murders typically lack an accompanying felony, they escape capital murder charges. For example, Shirley Elaine Phillips soaked her husband in gasoline while he was asleep in their bed and lit him on fire.²²² Phillips was charged with second-degree murder.²²³ Latasha May Keen struggled with an eighty-two year old man and then hit him in the head with a shotgun at least twelve times, cut him nine times with a blade, and stabbed him six times.²²⁴ Keen was convicted of second-degree murder and sentenced to a total of twenty-three years, ten of which were suspended.²²⁵ Men are not the sole perpetrators of violent homicides; they simply commit more of the homicides that Virginia has deemed to be death worthy. Because men are overwhelmingly the perpetrators of felony murder, which is the most common death offense in Virginia, and women offenders typically commit domestic homicides, a non-death offense, the *Skinner* error has occurred. The same intrinsic offense is met with very different penalties.

The *Skinner* analysis then considered whether the government has a compelling interest to justify its classification. This analysis would force the Commonwealth of Virginia to argue that the killing of another person during the

Dickens, *Woman Pleads No Contest in Killing of Boyfriend*, ROANOKE TIMES, Mar. 24, 2001, at B1, 2001 WL 5360934; Tad Dickens, *Woman Pleads No Contest In Killing of Boyfriend*, ROANOKE TIMES, Mar. 24, 2001, at B1, 2001 WL 5360938; Tad Dickens, *Virginia Woman Will Serve 10-Year Sentence*, ROANOKE TIMES, Aug. 30, 2001, at B1, 2001 WL 25122548; Noreen Gillespie, *Woman Gets 28 Years in Slaying*, RICH. TIMES-DISPATCH, June 9, 2001, at B2, 2001 WL 5325636; Chris L. Jenkins, *Wife Charged With Murder in Death of Husband*, WASH. POST, May 20, 2001, at T03, 2001 WL 17629700; Lou Misselhorn, *Local Prosecutors: Daughter, Boyfriend Killed Mom*, THE VIRGINIAN-PILOT, Sept. 18, 2001, at B3, 2001 WL 26275587; Shay Wessol, *Guilty Plea Entered in Fake Suicide Case*, ROANOKE TIMES, Feb. 14, 2001, at B2, 2001 WL 5357202; Patrick Wilson, *Wife Admits Setting Man on Fire*, VIRGINIA FIRE CHIEF'S ASSOC. ONLINE, Nov. 8, 2001, http://www.sfcav.org/2001_wifeseetsfire11.htm; *Woman Charged With Husband's Death*, RICH. TIMES-DISPATCH, Nov. 28, 2001, at B7, 2001 WL 5340486; THE ASSOCIATED PRESS, *Woman Convicted of Murder Hits Officer; Faces Additional Felony Charges* (Nov. 17, 2001) (on file with author).

221. Five of the instances cited *supra* note 220 contained allegations of abuse. Tad Dickens, *Virginia Women Will Serve 10-Year Sentence*, ROANOKE TIMES, Aug. 30, 2001, at B1, 2001 WL 25122548; Tad Dickens, *Woman Pleads No Contest In Killing of Boyfriend*, ROANOKE TIMES, Mar. 24, 2001, at B1, 2001 WL 5360938; Noreen Gillespie, *Woman Gets 28 Years in Slaying*, RICH. TIMES DISPATCH, June 9, 2001, at B2, 2001 WL 5325636; Shay Wessol, *Guilty Plea Entered in Fake Suicide Case*, ROANOKE TIMES, Feb. 14, 2001, at B2, 2001 WL 5357202; Patrick Wilson, *Wife Admits Setting Man on Fire*, VIRGINIA FIRE CHIEF'S ASSOC. ONLINE, Nov. 8, 2001, www.sfcav.org/2001_wifeseetsfire11.htm.

222. Patrick Wilson, *Wife Admits Setting Man on Fire*, VIRGINIA FIRE CHIEF'S ASSOC. ONLINE, Nov. 8, 2001, www.sfcav.org/2001_wifeseetsfire11.htm.

223. *Id.*

224. Alan Cooper, *Woman Sentenced in Death of Neighbor*, RICH. TIMES-DISPATCH, Mar. 8, 2001, at B5, 2001 WL 5317484.

225. *Id.*

commission of a robbery, rape, or abduction is more detrimental to society than the killing of a family member and, therefore, requires greater deterrence. However, the nature of a felony murder already draws a harsher penalty which could afford extra deterrence. The offender will face punishment for first-degree murder and the underlying offense. If the Commonwealth tries to argue that felony murder is significantly more prevalent than domestic homicide and thus has a greater detrimental effect on society, the Commonwealth would be factually correct. During the year 2000, 468 murders occurred in Virginia.²²⁶ One hundred and twenty-nine of these murders involved family violence.²²⁷ Assuming that a large percentage of the remaining 340 murders were committed in the course of a felony, the state could argue that felony murder is more prevalent than domestic homicide. However, this does not account for the damage done to entire families that suffer from the loss of both the victim and the offender. The Commonwealth's argument that felony murder has a greater detrimental impact on society than domestic homicide is tenuous at best. One could argue that domestic homicide creates a deeper impact on society than felony murder because it disrupts and often destroys the family.

The final part of the strict scrutiny test demands that the state's means are narrowly tailored to their objective. If Virginia's objective in punishing felony murder with a capital sentence is to deter criminals from murdering innocent people while in the commission of other offenses, then its means are not narrowly tailored. Like the sterilization at issue in *Skinner*, the death penalty irreparably deprives particular criminals of the basic right, namely, the right to life. Yet, the statute does not imply that such drastic deterrence is necessary for a similar intrinsic offense—domestic homicide. In both offenses, a murder takes the life of an innocent victim. The Commonwealth then finds that a prison term is adequate to deter domestic homicide, but that death is necessary to deter felony murder. This creates two different penalties for the same intrinsic offense and violates *Skinner*. If life imprisonment is an adequate deterrent for domestic homicide, then the death penalty for felony murder is not sufficiently narrowly tailored to meet the Commonwealth's objective of deterring the murder of innocent people. The statute creates an invidious classification in violation of the Equal Protection clause.

226. VIRGINIA STATE POLICE: CRIME STATISTICS, MURDER/NONNEGLIGENT MANSLAUGHTER OFFENDERS BY AGE, GENDER, AND RACE 12, at http://www.vsp.state.va.us/Crime_in_Virginia_2000.pdf (last visited Mar. 18, 2003).

227. VIRGINIANS AGAINST DOMESTIC VIOLENCE: DV FACTS, at www.vadv.org/facts.html (last visited Mar. 18, 2003).

The lesson of *Skinner* lies in the fact that drastic punishments which have irreparable effects upon defendants require careful scrutiny and application. When the application of an extreme punishment is mired in questionable classifications and distinctions created by the state, that punishment should fall beyond the pale of acceptability. State sterilization is no longer practiced in any context and whenever a revitalization is attempted, the same problem of the state determining which crimes and criminals are deserving of such an extreme punishment quashes its use. Like sterilization, the death penalty in Virginia irreparably robs particular classes of defendants of a fundamental right based upon state determinations of which degrees of the same crime are arguably more detrimental to society. Like the use of sterilization, the use of capital punishment in Virginia should be considered too inequitable for further use.

IV. Conclusion

The United States continues to defy international opinion by asserting that the death penalty is an appropriate punishment in extreme cases. Yet, American society grimaces at the prospect of executing a woman, even for atrocious crimes. This perplexing dynamic is particularly apparent in Virginia because it is a state that regularly carries out the executions of its male offenders and uniformly spares the lives of its female offenders. Death penalty jurisdictions must reconcile the fact that they are cavalier with the lives of offending males, while they are appalled by the notion of taking the lives of offending females. American society has progressed to a level of decency that practically prohibits the execution of women. At this juncture, states must decide if they will reconcile their discriminatory systems by including male offenders in this circle of decency or if they will settle for regression and remedy the situation with a rash of female executions.