

Gender Discrimination in the U.S. Death Penalty System

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Abstract: Although the demographics on male versus female death-row prisoners suggest that males are the criminal justice system's primary targets, I argue that the system also discriminates against women. Utilizing contemporary feminist theories of gender, I argue that female prisoners are punished primarily for violating norms of gender correctness.

In 1972, the U.S. Supreme Court held, in Furman v. Georgia, that capital punishment, as applied in the United States, violated the U.S. Constitution. Each Justice concurring in the decision of the Court issued a different opinion about how the death penalty violated constitutionally protected rights of individuals. Therefore, the Court did not find capital punishment to be unconstitutional per se. Rather, in a five-to-four decision it found that the then- current practices, among other problems, violated the 8th and 14th Amendments, prohibiting cruel and unusual punishment and establishing equal protection under the law, respectively. The basis for the argument that the death penalty violated these amendments was that, prior to 1972, the death penalty was being applied arbitrarily and discriminatorily along the lines of “race, religion, wealth, social position, or class.”¹ No mention of discrimination on the basis of sex or gender was made in this opinion, but sex and gender have since come under protection

¹Furman v. Georgia, 408 U.S. 238, 242 (1972).

of the 14th Amendment.²

In 1976, the U.S. Supreme Court, in Gregg v. Georgia³, found that revisions made to death penalty laws had remedied the arbitrariness rejected by Furman. Thus, capital punishment was reinstated in the United States so long as each governing body took appropriate precautions against its arbitrary administration. In 1987, the U.S. Supreme Court met to decide the fate of yet another man sentenced to death in Georgia, who, with the support of the respected Baldus study⁴, alleged that race discrimination continued to pervade that state's death penalty system. In McCleskey v. Kemp, the majority of the Court accepted the conclusions of the Baldus study, finding that racial discrimination was still a common practice in capital trials, and acknowledged that a racially discriminatory -- and in this way arbitrary -- death penalty is an inevitable risk. The astounding result of the case is that despite its acknowledgment of the validity of the Baldus study, the Court found that the risk of discrimination is no longer grounds to abolish capital punishment.⁵ It is here, in the McCleskey decision, that the Court reveals its lack of concern for arbitrariness. If the Court is willing to peer into the genuinely capricious nature of a system, acknowledge it as such, and then continue to uphold its practice, one must wonder what other reasons the Court has for maintaining such a system.

²See Craig v. Boren, 429 U.S. 190 (1976).

³Gregg v. Georgia, 428 U.S. 153 (1976).

⁴The Baldus study was conducted by Professors David Baldus, Charles Pulaski, and George Woodworth and concluded that “black defendants who kill white victims have the greatest likelihood of receiving the death penalty.” See McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

⁵McCleskey v. Kemp, 481 U.S. 279, 309 (1987).

Although the Court has addressed the issue of arbitrariness almost exclusively in the context of race, discrimination based on gender is perhaps just as common. Nonetheless, gender discrimination continues to be ignored by the judicial process. In fact, the Supreme Court did not agree on the extent to which equal protection applied to gender until 1976 -- a delay which reveals the unique struggle of individuals to find protection under the law when discriminated against for stepping outside the bounds of gender roles. In this paper I analyze how gender discrimination is prevalent in the U.S. death penalty system, and how, in its reliance upon gender discrimination, capital punishment works as a social practice of oppression.

Gender Bias in Practice

One who considers 'gender' as the defining characteristics that naturally correspond to a two-sex system has fallen prey to an "incurable proposition."⁶ Suzanne Kessler and Wendy McKenna argue that Western society believes that "it is a fact that there are two genders; each person is a mere example of one of them; and the task of the scientist is to describe, as accurately as possible, the constant characteristics that define male and female, for all people and for all time."⁷ It is an incurable proposition when one's values and prejudices guide her investigations (scientific, philosophical, or otherwise) such that she always concludes what she previously believed to be true. This is the problem with the scientific evidence supporting the traditional belief in two genders and two sexes.⁸ The definition of gender is, then, a hotly contested issue. The traditional

⁶Kessler, Suzanne J. and Wendy McKenna. *Gender: An Ethnomethodological Approach*. The University of Chicago Press, Chicago. 1978. p. 4-6.

⁷p. 4-5. Ibid.

⁸p. 43, 77. Ibid.

definition, however, is sufficiently meaningful initially to assess discrimination in the death penalty system.

Even if one falls prey to the incurable proposition, one can recognize gender inequality in capital punishment. Timothy Kaufman-Osborn notes that Karla Faye Tucker and Judy Buenoño, executed in 1998, were "added to the list of thirty-nine women executed during the twentieth century."⁹ With their executions, the United States recorded, over a period of 350 years, 533 executions of women. He continues, "by way of comparison, there have been 19,161 confirmed executions of men during this same span. In sum, less than three percent of the persons executed since 1608 have been women."¹⁰ There are no women currently serving on the federal death row¹¹, and the total number of women on states' death rows is forty-seven.¹² Carolyn King, an inmate on Pennsylvania's death row, is the only woman to have an execution date set this year. Her execution was scheduled for May 13, 1999, and she was not executed. No further date has been set for her. By contrast, there are presently 3,565 men on death rows across the country¹³ with twenty-three impending

⁹ Kaufman-Osborn, Timothy V. "Introduction." *Signs* Symposium on Gender and the Death Penalty. forthcoming.

¹⁰Ibid.

¹¹Estes, Andrea. "Feds to seek death for VA nurse." Boston Herald. May 15, 1999.

¹² Death Penalty Information Center. <http://www.essential.org/dpic/womenstats.html> This figure is accurate as of June 1, 1999.

¹³Death Penalty Information Center. <http://www.essential.org/dpic/dpic5.html> This figure is accurate as of April 1, 1999.

executions among them.¹⁴ Seventy-seven men have already been executed in 1999.¹⁵ The disparity between the numbers of men and women executed and awaiting execution demonstrates a gross inequality that demands further exploration which ultimately proves what these numbers do not: that inequalities in the system adversely impact women.

In place of the traditional assumption that gender is a natural correspondent to a two-sex system, Renee Heberle offers the following interpretation: one's gender is "a set of norms and expectations constitutive of social relationships."¹⁶ Society punishes those who violate social norms and expectations generally, and therefore, Heberle argues that society often punishes an individual for stepping outside of her or his gender role. She continues:

it is clear that the death penalty does not sanction the most heinous crimes but, rather, participates in the management of certain hierarchies of power. With reference to women, once convicted of capital murder, some are more likely to land on death row than others not because they committed the worst crimes as defined by statutory law, but because they do not properly enact a feminine gender

14Rick Halperin. Amnesty International, Dallas, Texas.

15 Death Penalty Information Center.

<http://www.essential.org/dpic/dpicexec.html> This figure is accurate as of October 13, 1999.

16Heberle, Renee. "Disciplining Gender, Or, Are Women Getting Away with Murder?" *Signs* Symposium on Gender and the Death Penalty. forthcoming.

identity.¹⁷

Heberle's notion of gender expands the traditional understanding to grasp the multiplicity of possible performances of gender (e.g. masculine, feminine, heterosexual, homosexual, bi-sexual, transgendered, etc.). Through this view it is possible to comprehend the myriad ways in which gender discrimination is possible.

Heberle's theory is most interesting when one applies it to specific cases. She examines the difference between the punishments of two similarly situated women: Susan Smith of South Carolina and Darlie Lynn Routier of Texas. Though both killed their own children and tried to divert attention away from themselves by blaming kidnapers, their trials presented the two women's roles as mothers differently. Routier "is described as remote and cold while she insists on declaring her innocence; she is far removed from the image of the 'mother' her friends tried to argue she had been."¹⁸ She stepped outside of the gender role of 'mother' by killing her children. She stepped outside of the 'feminine' gender role by remaining strong and insisting cold-heartedly upon her innocence. Routier was punished as much for her violation of the gender roles society expects as she was for criminal homicide. Routier currently awaits execution on death row in Texas.

Susan Smith, by comparison, overstepped the boundaries of the engendered role 'mother' only by murdering her two children. With her sobbing confession to the police and her contrite appearance in court, however, it became clear that she was remorseful. Smith did not entirely reject her gender role of mother. Her remorse for her actions indicated a weakness of the will, while her quiet, mouse-like

17Ibid.

18Ibid.

appearances in court revealed a submissiveness that is also expected of women. Heberle notes that “Smith is described as vulnerable, cowardly, and distinctly inferior (feminine) in her ability to deal with the disappointment of life and love. She is described as childlike, but never as not motherly.”¹⁹ Thus, she was able to invoke the sympathy of her neighbors and receive a sentence subordinate to the ultimate.

Heberle’s theory, of punishment for violating gender norms, is particularly relevant in light of U.S. Attorney General Janet Reno’s recent approval of federal prosecutors’ requests to seek capital punishment for Kristen Gilbert. Gilbert has been indicted on four counts of murder and three counts of attempted murder and is suspected in connection with the deaths of numerous other patients under her care as a nurse at the Department of Veterans Affairs hospital in Northampton, Massachusetts.²⁰ Reno noted that she authorized federal prosecutors to seek the death penalty in this case because of Gilbert’s “alleged cruelty and cunning.”²¹ U.S. Attorney Donald K. Stern commented to the media that Gilbert’s murders were “heinous and premeditated; ‘The patients were murdered in their hospital beds by a nurse who used her position and her specialized knowledge to commit the crimes.’”²²

Though Gilbert has a well documented history of suicide attempts, “erratic and sometimes violent behavior,” and other socially deviant demands for attention, prosecutors are focusing on her abuse of the circumstances of her gendered role.²³ The media is portraying a mixed

19Ibid.

20Associated Press. “Former VA nurse charged with killing fourth patient; government to seek death penalty.” Boston Herald. May 14, 1999.

21Murphy, Shelley and B.J. Roche “Former nurse may face death penalty in hospital slayings” Boston Globe. May 15, 1999. A1.

22Ibid.

23Roche, B.J. “Suspect in VA hospital deaths had history of

image of Gilbert. Articles discuss her history of insecurity and other psychological disorders²⁴ and, at the same time, blame her as a “cold, calculating killer.”²⁵ U.S. Attorney Stern admits that the prosecution views the murders as “heinous” because of Gilbert’s betraying her gender role ‘nurse.’ The defense will be successful in protecting her life if the team is able to portray another equally gendered picture of Gilbert: one where she is a “fresh-faced,” young, passive, blond woman.²⁶ Barbara Cruikshank argues that there is indeed a strategic element to the portrayal of one’s client as either conforming to or in violation of gender norms.²⁷

Codifying Gender Discrimination

The majority of capital murders committed by women are domestic killings. It is important, therefore, to inquire into the prosecutorial practices for domestic murders to determine whether there exists any systemic bias that adversely affects women. Elizabeth Rapaport, in “The Death Penalty and the Domestic Discount” argues that there is a considerable difference between the treatment of women and men who kill in domestic relationships:

In six states studied, male domestic

psychiatric problems. Nurse threatened suicide, documents say.” Boston Globe. May 15, 1999. p. B5.

24Talbot, David. “Nurse accused in deaths has troubled history.” Boston Herald. May 16, 1999.

25Estes, Andrea. “Alleged murderer has long history of cruel acts.” Boston Herald. May 15, 1999.

26Roche, B.J. “Suspect in VA hospital deaths had history of psychiatric problems. Nurse threatened suicide, documents say.” B5.

27Cruikshank, Barbara. “Feminism and Punishment.” *Signs* Symposium on Gender and the Death Penalty. forthcoming.

killers comprised slightly less than twelve percent of death-sentenced males, while female domestic killers comprised almost half of all women sentenced to death in United States from 1978 to 1989. ...Almost half the women on death row killed family or intimates; a far smaller proportion of the men are domestic killers. Men and women are sent to death row for different sorts of domestic crimes: almost half the men killed in retaliation for a woman's leaving a sexual relationship, while this pattern was quite rare among the women; more than two-thirds of the women killed family or sexual intimates for pecuniary gain, while this motive was rare among the men.²⁸

The fact that women and men, on average, kill for different reasons establishes two kinds of domestic murders generally distinguishable by gender: murders connected to separation (homicides by men) and murders for economic advantage (homicides by women). That the proportion of female domestic murderers on death row far exceeds the proportion of male domestic murderers is an important distinction. In this distinction lies the bias of the law.

Men who kill in domestic situations are more likely to have killed their victim after she left the relationship. The nature of these killings is

28Rapaport, Elizabeth. "The Death Penalty and the Domestic Discount." *The Public Nature of Private Violence*. Eds. Martha Albertson Fineman and Roxanne Mytkitiuk. Routledge, New York. 1994. p. 225.

predatory and premeditated.²⁹ The classic separation case is one where the woman leaves her domestic partner, moves in with her parents or a friend, and the former husband/lover follows her and kills her. The man often stays at the site of the murder until the police arrive and turns himself in while saying that he would "do it again."³⁰ Because there is often no other felony committed (e.g. robbery), the statutory aggravator used to make the defendant's crime death-eligible is the "cruelty, heinousness, brutality" clause standard to many capital statutes.³¹ But "whether enshrined in traditional doctrine" or as "the impetus to new doctrine" the courts have resisted prosecuting these predatory killings as seriously as other capital cases.³² The courts will often excuse the killing "finding mitigation in the pain and anger that are certainly experienced by the separation murderer."³³ Even when the separation murderer kills other family members, either in place of, or in addition to, his lover, the judicial system perceives the victims as "members of his family who were causing him extreme emotional trauma" and treats such a case as no "more brutal than the average run of murders where no death penalty was imposed."³⁴ This bias is what Rapaport calls the domestic discount.

The crimes of female domestic murderers are not minimized as frequently. Rapaport points out that "women who have killed for

29p. 226. Ibid.

30p. 227. Ibid.

31See Official Code of Georgia:§ 17-10-30 (b)(7)(1998).

32Rapaport, Elizabeth. "The Death Penalty and the Domestic Discount." p. 227, 228.

33p. 227. Ibid.

34p. 228. Ibid.

economic advantage... dominate female domestic death row.”³⁵ When women kill for monetary gain, their motive equates their murder with the most common capital murder in this country: the convenience store robbery gone awry. The sex of the perpetrator in the domestic robbery/killing is usually female, whereas the sex of the perpetrator in the convenience store robbery/killing is usually male. A domestic murder is between two intimates, but the convenience store robbery is between strangers. These are the only differences, in the political eye, between these two cases. Whereas the system is relatively lenient toward the male domestic killer for his motive, emotional trauma, the female domestic killer is prosecuted more harshly for hers. Robbery is a statutory aggravator that is not easily mitigated. Rapaport notes that “current law holds it to be more heinous to kill for gain than to kill a spouse or child in anger. From a feminist point of view, the privileging of robbery murder but not domestic murder as among the most serious homicides expresses the male orientation of the law of homicide.”³⁶ This bias also expresses the upper-middle class perspective of lawmakers: those who have the scarce resources want to punish those who try to take them away by means other than what the upper-middle class defines as appropriate. The difference between the treatment of female and male domestic killers reveals discrimination against women in the death penalty system.

An Incurable Problem?

More precisely, the disparate treatment of female and male domestic killers demonstrates the discriminatory impact against women the death penalty system imposes. Regardless of whether the system intentionally targets women in the unfair administration of the death

35p. 225. Ibid.

36Kaufman-Osborn, Timothy V. “Introduction.” *Signs* Symposium on Gender and the Death Penalty. forthcoming.

penalty, systemic bias does have an adverse impact on women as a class. ‘Impact’ discrimination against women is demonstrated in all the examples of gender discrimination presented here. When comparing the gender role performances of different women subject to capital prosecution, it may not be the intent of the law to punish women more severely for not being “good mothers,” but the death penalty, as applied, discriminates in just this way. Similarly, it may be neither the letter nor the intent of the law to punish female nurses who kill more severely than any other woman who kills, but the system of capital punishment currently practiced by the federal government seems to be making this unfair distinction in the Kristen Gilbert case. When comparing male to female domestic killers, again, it may not be the intent of the law to do so, but the specific facts surrounding domestic homicides typically committed by men are viewed simply as less egregious than the specific facts surrounding domestic homicides typically committed by women. These examples show that, although women numerically represent a small population of death row inmates, gender bias is at least one of the reasons that they are there at all.

I present these inequalities for discussion, not in a call to equalize the treatment of men and women in a system that I believe degrades all of humanity, but in an attempt to demonstrate the essential, unjustifiable conflict within the structures of domination that compose the political and legal framework of the U.S. death penalty system. Gender discrimination is an exercise of power that produces a culture that performs gender roles as desired by the ruling body. If such enforcement is intrinsic to the death penalty system, coercion cannot be avoided by executing more women generally and more male domestic killers specifically. A system that is inherently flawed cannot legitimately mete out the ultimate punishment.