

Is the Death Penalty Good for Women?

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As I write this essay in the summer of 2000, the death penalty is beginning to undergo a profound reexamination in this country. In particular, Americans are troubled by growing evidence that innocent individuals have been convicted and sentenced to death.¹ The issue of innocence, in conjunction with concerns about high reversal rates, prosecutorial misconduct, and inadequate provision of defense counsel, has caused one governor, a multitude of city councils, and legal organizations across the country to call for a moratorium on the death penalty.² In this essay, I suggest a different and particularly feminist reason for reexamining, and rejecting, the death penalty. The death penalty perverts society's response to the tragedy of a woman being raped and murdered by relying on a form of racism that is gendered in nature and by making the horrific nature of the crime of rape-murder a more important consideration in determining punishment than the individual characteristics of the person who committed it.

Rape-murder is an emotionally charged crime. It combines two terrifying violent crimes: rape, which the

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1. See, e.g., Jonathan Alter, *The Death Penalty on Trial*, Newsweek, June 12, 2000, at 24 (discussing Americans' changing views on the death penalty).

2. See Mark Hansen, *Death Knell for Death Row?*, A.B.A. J., June 2000, at 40 (reporting on efforts to adopt moratoriums against the death penalty across the country).

U.S. Supreme Court characterized as “[s]hort of homicide, . . . ‘the ultimate violation of self,’”³ and murder, which the Court again observed could always be “fairly characterize[d] . . . as ‘outrageously or wantonly vile, horrible and inhuman.’”⁴ As such, it is a crime that “cries out for punishment.”⁵ But it behooves us to ask whether the death penalty is the proper punishment.

In every state that has the death penalty, a defendant who commits a murder contemporaneous to a rape may be eligible for the death penalty.⁶ This is also true of murder that occurs during the course of other types of felonies, such as robbery or kidnapping. Even when a murder is statutorily eligible for the death penalty, prosecutors have broad discretion in deciding whether to seek the death penalty in a particular case.⁷ Yet, the emotional outrage that rape-murder evokes makes it more susceptible to being considered as an appropriate death penalty case.⁸

3. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (quoting U.S. Dept. of Justice Law Enforcement Assistance Administration Report, *Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies* 1 (1975)).

4. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980).

5. *McCullum v. North Carolina*, 512 U.S. 1254, 1254 (1994) (Blackmun, J., dissenting from denial of cert.) (quoting *State v. McCollum*, 433 S.E.2d 144, 165 (N.C. 1993) (Exum, C.J., concurring in part and dissenting in part)).

6. See Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 Ohio N.U. L. Rev. 689, 694 n.27 (2000) (listing state statutes).

7. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview With Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1643-44 (1998) (noting how prosecutorial discretion allows the race of the defendant or victim to influence the decision to seek the death penalty); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1181 (1998) (discussing the relationship between the race of prosecutors and their role in deciding to seek the death penalty).

8. Characteristics common to rape-murder are frequently cited as factors that make jurors more likely to impose the death penalty: the rape itself, the fact that the victim is usually a woman or child, and the presence of torture before death. See, e.g., David C. Baldus et al., *Equal Justice and the Death Penalty* 319-20 tbl. 52 (1990) (listing rape and physical torture among the top four factors that make imposition of the death penalty most likely); Crocker, *supra* note 6, at 697 n.17 (citing studies). As Elizabeth Rapaport observed, the greater risk of receiving a death sentence for rape-murder reflects our opprobrium at the crime, but it also underscores the devaluation of domestic homicides. See Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 Law & Soc'y Rev.

Prosecutors are effective at taking advantage of the emotion-laden aspects of rape-murder.⁹ As one prosecutor remarked about a rape-murder case, "It is the most revolting case I have ever seen. If there is going to be a death penalty, this is the kind of case to which it should apply."¹⁰ My analysis will show that this statement is borne out in several states across the country: the percentage of men on death row for rape-murder is remarkably high in light of the percentage of murders that are rape-murders in each of the states and nationwide.

Integral, however, to rape-murder appearing as the kind of crime that typifies the appropriateness of the death penalty are two features that reveal the death penalty's inherent flaws. First, rape-murder death penalty cases perpetuate a particularly gendered form of racism, one in which the overwhelming percentage of victims are white women, and African-American women victims are discounted.¹¹ Second, these cases underscore the inability

367, 380 (1991) ("It is congruent with patriarchal values, and offensive to feminist values, that violence against women belonging to others be more heavily sanctioned than violence against your own women.").

9. The death penalty is supposed to be based on reason and not emotion. See *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). However, prosecutors recognize the important, even if unspoken, role that jurors' feelings play in deciding whether to sentence a defendant to life imprisonment or death. See, e.g., Joan Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 *Wis. L. Rev.* 1345, 1396 (citing social science studies reporting that prosecutors' closing arguments focus on emotion).

10. Kiernan Nicholson, *Judges Say Killer Must Die*, *Denver Post*, May 28, 1999, at A-01.

11. I use "gendered racism" to refer to two phenomena of racial and sexual exploitation. First, the devaluation of the crime of rape-murder by white men of African-American women and second, the heightened valuation of the crime of rape-murder of white women particularly when committed by an African-American man. Other authors have used the term gendered racism when referring to lynching. See, e.g., Amii Larken Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 *UCLA Women's L.J.* 1, 2-3 (1993) (describing how lynching was about more than seeking "retribution for the alleged rape of a white woman by a Black man" and noting that "[t]he gendered racism of lynch ideology cast Black women as immoral and unworthy of respect which

of death penalty schemes to ensure that the death penalty is appropriate for the individual defendant, not just the crime.

In this article I examine the skewed representation of rape-murder in death penalty cases by analyzing how the criminal justice systems treat these cases in four states: Ohio, Florida, Colorado, and Oregon.¹² In Section I, I examine the prevalence of men convicted and sentenced to death for rape-murder as well as the race of, and relationship between, the defendants and their victims. Rape-murder is, most often, a vicious attack by a man against a woman.¹³ My analysis shows that in each of the

facilitated their sexual exploitation by white men.”). Still others have identified the connection between sexual and racial bias as sexual racism. See, e.g., Charles Herbert Stember, *Sexual Racism* ix (1976) (defining sexual racism as “the sexual rejection of the racial minority, the conscious attempt on the part of the majority to prevent interracial cohabitation” in support of his thesis that “the emotion surrounding the sex problem induces profound hostility toward blacks and places strong barriers in the way of achieving an integrated society”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1272-75 (1991) (discussing how anti-racist political analysis often ignores Black women’s experience of sexual violence and focuses on Black men as the victims of sexual racism). As Darren Lenard Hutchinson observed:

Much of the oppression and discrimination blacks have endured has been sexual in nature. The sexualized oppression directed at blacks, given a patriarchal social structure, has produced gendered effects—creating different experiences for black men and women. . . . [B]lack men are constructed as promiscuous, threatening to white women. . . . [B]lack women are often considered promiscuous and sexually aggressive “Jezebels.”

Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *Buff. L. Rev.* 1, 81-84 (1999); see also Dorothy Roberts, *Rape, Violence, and Women’s Autonomy*, 69 *Chi-Kent L. Rev.* 359, 367 (1993) (referring to the “racialized sexual mythology of slavery” that continues to inform rape law today). Both phrases (gendered racism and sexual racism) reflect what James Weldon Johnson saw: “At the core of the heart of the race problem is the sex problem.” Stember, *supra* at xi (citation omitted).

12. See *infra* note 25 and accompanying text (explaining basis for selecting these states).

13. Nationwide, 93 % of rape-murder victims are women, compared to 24 % of all murders. See James Alan Fox, *NACJD-Supplementary Homicide Reports, 1976-1997*, (visited Sept. 5, 2000) <<http://www.icpsr.umich.edu/NACJD/SDA/shr7697.html>>. This internet site contains the data in the F.B.I. Supplemental Homicide Reports (SHR) 1976-1997.

four states the women about whom the State is most concerned are white. In none of these states is a white man on death row for the rape-murder of an African-American woman, and very few white men have been sentenced to death for the rape-murder of any other woman of color.¹⁴

In Section II, I consider the significance of the statistical information. First, I argue that it reveals gendered racism. Historically, African-American men were sentenced to death for the rape of white women far more often than white men. Today, rape itself is no longer punishable by death,¹⁵ but rape-murder is. While the race of the defendants sentenced to death has changed somewhat, the race of the victims has not: the State still seeks to defend the honor of white women, not all women. This entrenched gendered racism alone should cause feminists to conclude that the death penalty is not good for women.

Second, I argue that over-representation of rape-murder cases on death row demonstrates how the facts of the crime overwhelm proper consideration of whether the death penalty is appropriate for the individual defendant. This problem is not unique to rape-murder cases, but these cases help to illuminate the issue. By emphasizing the facts of the crime over the character and background of the

The data is a compilation of monthly reports made by local law enforcement agencies across the country that consist of information about homicides, where known at the time of reporting, including the identification of numerous variables, such as race of victim and offender, relationship between victim and offender, and factual circumstances of the murder. See Lawrence A. Greenfield, U.S. Dep't of Justice, *Sexual Offenses and Offenders 27* (1997) [hereinafter 1997 *Sexual Offenses and Offenders Study*] (explaining the data collection process of the F.B.I. SHR). The website provides an online statistical data analysis program that allows visitors to access subsets of the data for individual states. My analysis of race and relationships for rape-murders comes from using this program.

14. See *infra* note 39 (identifying white men sentenced to death in Florida for the rape-murder of a woman of color).

15. See *Coker*, 433 U.S. at 592. The Court held that the rape of an adult woman could not be punished by death. *Id.* In recent years at least one prosecutor has sought the death penalty for the rape of a child. See *State v. Wilson*, 685 So.2d 1063 (La. 1996) (holding death penalty constitutional for the rape of a child under twelve).

defendant, the jury is encouraged to ignore factors such as a defendant's own mental and emotional impairments that may make the death penalty improper. Moreover, focusing on the crime allows us, as a society, to ignore the myriad forces, ranging from the defendant's own upbringing and development to societal attitudes about women, that contribute to his becoming a man who raped and murdered a woman.

The judicial system's treatment of rape, murder, and the death penalty allows us to consider important issues about the relationship between violent crimes against women and punishment for such crimes. This is an area that has not received much critical analysis by feminists. Most often, it has meant seeking harsher punishments for those who commit crimes of violence against women.¹⁶ As Martha Minow remarked:

To put it bluntly, feminists have pushed for greater retribution, including criminal prosecutions, for violence done to women and more caring, empathic responses to women who risk criminal charges for their own conduct. This pattern smacks not only of inconsistency but also of unreflective desires simply to advance what is good for women.¹⁷

The crime of rape-murder is one for which the greatest retribution—the death penalty—is available. I conclude, however, that this is one area where the greatest retribution is not good for women: using the death penalty to punish the crime of rape-murder reinforces gendered racism and masks our inability to address effectively some of the profound ills that plague our society.

16. See, e.g., Joan W. Howarth, Review Essay: Feminism, Lawyering, and Death Row, 2. S. Cal. Rev. L. & Women's Stud. 401, 412 (1992) (noting that "relatively little feminist work has focussed on punishment . . . except to reflect an uncritical attachment" to increased incarceration rates for crimes against women).

17. Martha Minow, Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice, 32 N.E. L. Rev. 967, 972 (1998).

I. TAKING ADVANTAGE OF RAPE-MURDER

Rape-murders comprise a small percentage of murders nationwide: only 1.1 percent.¹⁸ Yet, in several states, rape-murders comprise a disproportionately large segment of the crimes for which men are on death row.¹⁹ Moreover, identifying who the defendants and victims are in these rape-murder death row cases²⁰ shows disparities based on

18. See Fox, *supra* note 13. The percentage of rape-murders is a percentage of all reported murders with known circumstances. From 1976 to 1994 77 % of all murders were reported with known circumstances, 23 % were unknown. One of the known circumstances is "forcible rape," defined as "the carnal knowledge of a female forcibly and against her will." Assaults or attempts to commit rape by force or threat of force are also included; statutory rape (without force) and other sex offenses are excluded. See 1997 Sexual Offenses and Offenders Study, *supra* at 31.

The percentage of rape-murders may be somewhat higher than 1.1 percent because not all circumstances are known at the time of reporting. Furthermore, as one group of researchers pointed out, "[t]he number of sexual homicides occurring in a given year is difficult to assess for a number of reasons"; the sexual assault may not be reported as such, it may be undetected, or insufficient evidence may exist to substantiate whether a sexual assault took place. See Robert K. Ressler et al., *Sexual Homicide 1* (1988).

19. This is not different from felony-murder generally. Studies show that felony-murder represents a large percentage of those sentenced to death despite the relatively small percentage of homicides that are felony-murders. See, e.g., Samuel R. Gross & Robert Mauro, *Death and Discrimination* 45-46 (1989) (reporting that in three of the states studied, the felony-murder rate among those on death row was much greater than the felony-murder rate among all homicides in those states: in Georgia 80 percent compared to 17.5 percent; in Florida, 80 percent compared to 18.1 percent; and, in Illinois, 75 percent compared to 27.1 percent); David Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 *Stetson L. Rev.* 133, 138 (1986) ("More than 80% of the defendants on death row today became death eligible because they killed in the course of a contemporaneous offense, usually an armed robbery or rape."); Daniel Givelber, *The New Law of Murder*, 69 *Ind. L.J.* 375, 413-14 (1994) (citing studies finding similar results).

20. For purposes of consistency I use "rape-murder" to refer to a murder that occurs concurrent to a sexual assault. The crime of rape that constitutes the underlying felony making a murder eligible for the death penalty is referred to differently depending on the state. In Ohio for example, aggravated murder includes "caus[ing] the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing, or attempting to commit . . . rape." Ohio Rev. Code Ann. § 2903.01(B) (Anderson 1999). The rape statute prohibits "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." *Id.* §

their race and relationship, especially when we consider the rape-murder percentages in these states and nationwide. This Section sets out statistical information on rape-murder cases and examines what these numbers suggest about how the State takes advantage of societal prejudices and fears, especially with the emotionally laden crime of rape-murder, in seeking and obtaining the death penalty.

I first examined death row rape-murder cases in the state of Ohio.²¹ My analysis showed that the proportion of men on death row for rape-murder in Ohio was much greater than the proportion of sexual-assault murders to all murders nationwide and in Ohio.²² Within the category of

2907.02(A)(2). "Sexual conduct" is defined as:

[V]aginal intercourse between a male and female; anal intercourse, fellatio and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Id. § 2907.01(A). In Florida the death penalty applies to murder perpetrated in the course of a "sexual battery." Fla. Stat. Ann. § 782.04(2)(c) (West 2000) (defining murder); id. § 921.141(5)(d) (defining aggravating circumstances). In Colorado, murder in the first degree is a death eligible offense and includes committing sexual assault in the first or second degree or sexual assault on a child. Colo. Rev. Stat. Ann. § 18-3-102(1)(b) (West 2000). In Oregon aggravated murder is subject to the death penalty and it includes intentionally committing a homicide in the course of "any felony sexual offense in the first degree defined in this chapter." Or. Rev. Stat. § 163.095(2)(d) (1999) (defining aggravated murder and incorporating murder definitions in § 163.115(1)(b)(H)); id. §163.150 (death penalty statute applicable to aggravated murder).

21. Crocker, *supra* note 6.

22. At the time of my inquiry, the only information readily available was from the Greenfield study of sex offenders and offenses from 1976-1994. See 1997 Sexual Offenses and Offenders Study, *supra* note 18. The study analyzed the F.B.I. SHR and reported on sexual assault murders, among other matters. Sexual assault included "rape and other sexual offenses . . . includ[ing] sexual assault such as statutory rape, sodomy, and incest and attempts to commit these crimes." *Id.* at 28. The 1997 Study reported that, nationwide, sexual assault murders were 1.5 percent of all murders with known circumstances. *Id.* at 27. Murders with known circumstances were 78.5 percent of all murders. *Id.* at 28. Rape-murder cases constituted 12 percent of those on Ohio's death row. Crocker, *supra* note 6, at 699. Shortly before the article went to press, I learned of the NACJD online statistical data analysis program that enabled me to obtain data specific to Ohio. Using this program, I ascertained that from 1976-1994 sexual

rape-murder itself, the race and relationship percentages also showed skewed patterns. The proportion of African-American defendants on Ohio's death row was larger than the proportion of African-American offenders in sexual assault murders nationwide and within the state, and no white men were on death row in Ohio for the rape of an African-American woman.²³ Finally, rape-murders where the defendant and victim were strangers to each other were overrepresented when we consider the national and state percentages.²⁴ Thus, at each turn, the data on who was on death row in Ohio for what kinds of rape-murders did not reflect the reality of rape-murder, but rather racial inequities and fear of strangers. I argued that, despite the small numbers involved in the sample, these data began to show how the State misused the crime of rape-murder to obtain death sentences.

assault murders were 1 percent of murders with known circumstances in Ohio (93 of 9029) and rape-murders were 0.8 percent (75 of 9029).

23. Crocker, *supra* note 6, at 700-01. For sexual assault murders nationwide, where the race of offender and victim is known, the percentages are: 55 percent white offender/white victim, 24 percent African-American offender/African-American victim, 15 percent African-American offender/white victim, and 2 percent white offender/African-American victim (the remaining 4 percent are other racial combinations). 1997 Sexual Offenses and Offenders Study, *supra* note 18, at 30. For Ohio sexual assault murders, 1976-1994, where the race of the offender and victim is known (68 of 93 cases), the breakdown is: 56 percent white defendant/white victim, 30 percent African-American defendant/African-American victim, 12 percent African-American defendant/white victim, and 1.5 percent white defendant/African-American victim. For Ohio's death row rape-murder cases: 45 percent white defendant/white victim, 23 percent African-American defendant/African-American victim, 27 percent African-American defendant/white victim, 5 percent latino defendant/white victim, and 0 percent white defendant/African-American victim. Crocker, *supra* note 6, at 700-01. The Ohio rape-murder death row cases are, therefore, equally disparate from both the nationwide and state percentages.

24. Crocker, *supra* note 6, at 699. Nationwide sexual assault murders where the relationship of the offender and victim is known: 10.2 percent family/intimate, 50.6 percent acquaintance, and 39.2 percent stranger. 1997 Sexual Offenses and Offenders Study, *supra* note 18, at 38. Ohio's sexual assault murders where the relationship of the offender and victim is known (66 of 95 cases): 8 percent family/intimate, 67 percent acquaintance, and 26 percent stranger. Ohio's death row rape-murders cases: 9 percent family/intimate, 36 percent acquaintance, and 55 percent stranger. Crocker, *supra* note 6, at 699. The acquaintance and stranger percentages are almost the reverse of the national and state figures.

My continued investigation into rape-murder death row cases in other states supports what I observed in Ohio. An analysis of rape-murder cases in Florida, Colorado, and Oregon²⁵ shows that the crime of rape-murder is vastly overrepresented on each death row and that within the category of rape-murder racial and relational biases persist.²⁶ What emerges from this examination is a

25. I chose these states for different reasons. First, I thought it would be useful to contrast the northern state of Ohio to a southern state, especially because of the documented racial bias in the application of the death penalty in the South. See, e.g., Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 *Santa Clara L. Rev.* 433, 434-42 (1995) (citing numerous studies showing racial disparities in capital sentencing across the South and noting the connection between lynching and executions in the South). Second, Colorado and Oregon both have small death rows, six and twenty-seven respectively. See N.A.A.C.P. Legal Defense & Educational Fund, Inc., *Death Row U.S.A.*, Winter 2000, at 34, 51 [hereinafter *Death Row U.S.A.*]. I thought it would be instructive to see how many, if any, were rape-murder cases. As my analysis shows, men on death row for rape-murder are relatively more prevalent in Colorado and Oregon than either Ohio or Florida. Compare *infra* text accompanying notes 77 (Colorado 66 percent) and 87 (Oregon 48 percent) with *supra* text accompanying note 34 (Florida 20 percent) and note 22 (Ohio 12 percent). This is not a representative sample of all United States states.

26. For each state my analysis is based on considering rape-murder death row cases and the F.B.I. SHR data on rape-murders available through the NACJD website. These are not perfectly comparable for a number of reasons. First, for consistency, I analyzed the national and state rape-murder cases from 1976-1994, but some of the men on death row in each state may have committed their crimes after 1994. (In addition, the F.B.I. SHR database for Florida does not include data for the years 1988-91.) Second, the definition of rape used in the F.B.I. SHR is not necessarily the same as the statutory definition of rape/sexual battery/sex offense used in each state. Compare note 18 (stating the F.B.I. SHR definition of rape) and note 20 (listing statutory definitions that make rape a death eligible offense in each state). Third, whether a murder that involves rape is classified as such (even when the circumstances are known) is subject to a fair amount of discretion for both the police and prosecutor. See Michael L. Radelet & Glenn L. Pierce, *Prosecutorial Discretion in Homicide Cases*, 19 *L. & Soc'y Rev.* 587 (1995) (reporting on the effect of race in the decision of how to charge a homicide). Further, even if a murder is a rape-murder, the prosecutor has considerable discretion in whether to seek the death penalty. See *supra* note 7 and accompanying text. Finally, even if a prosecutor seeks the death penalty, the defendant may not be sentenced to death for a variety of reasons: he may plea bargain to a life sentence; he may be acquitted or convicted of a lesser included offense; or he may be sentenced to life. See Baldus, *supra* note 8, at 234 fig. 30 (providing chart showing the disposition of death eligible cases in Colorado from 1980-84, beginning with 171 indicted capital murder cases and ending with 4

pattern, even if not an intentional one,²⁷ of the pernicious perversion of the crime of rape-murder into an easy mark for the State to use to seek and obtain death sentences.

A. Rape-Murder in the State of Florida

The death penalty is a thriving enterprise in Florida, which has the third largest death row in the country and the third highest rate of executions.²⁸ The crime of rape-murder plays a major role in the State's death penalty activity. In this Section I analyze the race of and relationship between the defendants and the victims in Florida's rape-murder death row cases²⁹ and I consider that

death sentences). Despite the lack of comparability in many respects, it is nevertheless useful to look at this data to provide a context in which to evaluate the rape-murder populations on these states' death rows, and to consider how the State uses rape-murder as a death penalty case.

27. See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *Cornell L. Rev.* 1016, 1028 (1988).

As a society we have largely rejected gross stereotypes and blatant discrimination, but this has not rid us of racism. A burgeoning literature documents the rise of the 'aversive' racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously.

Id.

28. *Death Row U.S.A.*, supra note 25, at 24-25 (listing death row populations by state), 10 (listing executions by state).

29. My analysis is based on data from four sources: *Death Row U.S.A.*, supra note 25, (listing all individuals on death row as of Jan. 1, 2000); published court decisions; newspaper articles; and information from the Florida Capital Cases database, see supra note *. The Florida Capital Cases database contains information on all those sentenced to death in Florida since 1972, including those currently on death row, those who have been resentenced to life, acquitted or otherwise freed, died naturally, or were executed. This provided a broader range of cases to consider than that available in Ohio, where no such set of data is compiled.

In some instances it was difficult to obtain detailed information, such as where the defendant had been sentenced to death and is currently pending direct appeal review in the Florida Supreme Court. For example Lawrence Singleton, seventy-two years old, was sentenced to death for killing a prostitute. At the punishment phase the prosecutor introduced evidence of a gruesome rape that Singleton had been convicted of twenty years earlier where a fifteen-year-old was raped, her arms cut off, and left for dead. See Sue Carlton & Kathryn Wexler, *Police Serious About Store Clerks' Safety*, *St. Petersburg Times*, Feb. 24, 2000, at 1B. The newspaper reports did not specify if Singleton had raped the prostitute, so it was

in relation to data about rape-murder from the F.B.I. Supplemental Homicide Reports for Florida, 1976-1994, and my investigation of Ohio's death row rape-murder cases. The numbers show similar disparities to those in Ohio with one important difference: The percentage of men on death row for rape-murder as a percentage of all men on death row is substantially greater than in Ohio.³⁰ The most apparent reason for this difference is the breadth of aggravating circumstances that the State may present to the jury as it decides whether to recommend that the defendant be sentenced to life or death.

1. Race and Relationship

Race plays a disturbing role in the application of the death penalty in Florida,³¹ especially for African-American victims in rape-murder cases. In Florida, rape-murders are 0.9 percent of all murders with known circumstances from 1976 to 1994.³² The percentages for race of offender and

unclear if this was an example of a prosecutor introducing a prior violent felony of rape in a non-rape-murder case, or if the prosecutor was introducing additional evidence of rape in a rape-murder case. See *infra* notes 60 - 64 and accompanying text. Where the facts were unclear from the available information, I erred on the side of exclusion. Thus Singleton is not included as one of the Florida rape-murder cases.

30. Compare *supra* note 22 (Ohio 12 percent) with *infra* note 34 and accompanying text (Florida 20 percent).

31. Studies of Florida's death row consistently have found that race affects virtually every aspect of the death penalty system. See, e.g., Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 Fla. L. Rev. 1 (1991) (reporting results of own study of Florida death sentences 1976-1987 and summarizing prior studies documenting racial bias in who is sentenced to death in Florida); Radelet & Pierce, *supra* note 26 (documenting the role of race in how police and prosecutors in Florida characterize the seriousness of a homicide and cause it to be death-eligible or not); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981) (analyzing the quick change in race of defendant and victims in death penalty cases after the issue of racial bias was raised in court cases and noting the State's ability to manipulate who faces the death penalty).

32. The number is small—124 of 13,755. See Fox, *supra* note 13. It may be artificially small because Florida numbers are not included for four of the nineteen years. Still, the percentage is close to the national percentage of 1.1. See *supra* note 18.

victim, where known, are: 60 percent white offender/white victim, 18 percent African-American offender/African-American victim, 21 percent African-American offender/white victim, and 1 percent white offender/African-American victim.³³

Men convicted and sentenced to death for rape-murder are 20 percent of all men on death row in Florida.³⁴ The percentages for race of defendant and victim in these rape-murder death row cases are: 58 percent white offender/white victim, 13 percent African-American offender/African-American victim, 20 percent African-American offender/white victim, and 0 percent white offender/African-American victim.³⁵

The most noteworthy difference is the low representation of African-American victims: 19 percent of rape-murders across the state, 1976-1994,³⁶ but only 13

33. The number of cases is 79 of 124. See Fox, *supra* note 13. Because we are dealing with such a small number, the percentages represent very small numbers in some instances: forty-seven white offender/white victim, fourteen African-American offender/African-American victim, seventeen African-American offender/white victim, and one white offender/African-American victim. The F.B.I. SHR uses the categories white, black, American Indian, and Asian-Pacific Islander. It does not identify ethnicity apart from race. Thus, offenders and victims who are Hispanic will not appear in the state or national numbers. See Baldus, *supra* note 7, at 1717 n.151 (discussing and citing sources that consider the problems with racial and ethnic categorizations).

Because the numbers are missing for four of the nineteen years, it may be helpful to consider the national data. Nationwide the percentages for the race of defendant and victim in 1976-94 rape-murders are: 54 percent white offender/white victim, 23 percent African-American offender/African-American victim, 18 percent African-American offender/white victim, and 2 percent offender/African-American victim. See Fox, *supra* note 13. The remaining 3 percent are other race combinations, each less than 1 percent. *Id.*

34. There are 80 men on Florida's death row for rape-murder. See list on file with author.

35. The numbers are: forty-six white defendant/white victim; ten African-American defendant/African-American victim; sixteen African-American defendant/white victim; and, zero white defendant/African-American victim. The sum of the percentage is 91. The remainder are: one white defendant/Hispanic victim (1.25 percent), two African-American defendant/Hispanic victim (2.25 percent), three Hispanic defendant/white victim (3.75 percent), one Hispanic defendant/Hispanic victim (1.25 percent), one white defendant/"other" victim (1.25 percent). The Florida Capital Cases database uses the designations W/B/H/O.

36. This number reflects cases where the race of both the offender and victim

percent of those on death row for rape-murder.³⁷ The overall state percentage of African-American victims is composed of both white and African-American offenders (1 percent and 18 percent respectively), while the death row percentage of African-American victims is composed of only African-American offenders because not a single white defendant is on death row in Florida for the rape-murder of an African-American victim. When we consider the sex of the victims and defendants, this means no white man is on Florida's death row for the rape-murder of an African-American woman.³⁸ Ohio also had no white men on death row for the rape-murder of a African-American woman. But in Florida it is even more striking because the available data cover all men who have been sentenced to death since 1972, including those who were later sentenced to life, acquitted or otherwise freed, died or were executed. Of that group, not one white man received the death sentence for raping and murdering a African-American woman.³⁹ In a southern state, the similarities to the era of

are known (79 of 124 cases). See Fox, *supra* note 13. The percentage of African-American victims among all cases where the race of the victim is known (123 of 124) is much higher—26 percent. *Id.*

37. Another way of looking at this difference is that about one in five Florida rape-murders, where the victim and offender race is known, involves an African-American victim, but only about one in eight rape-murder cases on Florida's death row involves an African-American victim.

38. These figures seem to comport with findings Radelet & Pierce reported in 1991. See Radelet & Pierce, *supra* note 31. They found that "those suspected of killing white women are over 5 times more likely to be [sentenced to death] than those suspected of killing black women." *Id.* at 25 (9.7 percent and 1.8 percent respectively). Furthermore, a black man suspected of killing a white woman was fifteen times more likely to be condemned than a black man who is suspected of killing a black woman. *Id.* (24.4 percent and 1.6 percent respectively).

39. It is true that two white men are currently on death row for the rape-murder of two non-white women, one Hispanic (Mike Mansfield) and one designated "other" (Warfield Wike). See data from the Florida Capital Cases database on file with author. Also, one white man who died on death row, George South, was convicted of raping and murdering a Hispanic woman. *Id.* So, I cannot say that the rape-murder by a white man of any non-white woman has been ignored completely by the State. Still, that number is so very small, especially in a state with a sizable Hispanic population, that it should not bring comfort to anyone. See U.S. Census Bureau, Statistical Abstracts of the United States 34 (1999) [hereinafter U.S. Census Bureau] (listing population of those of Hispanic origin in Florida, in 1998, at 2,243,000, fifteen percent of the total

slavery are palpable.⁴⁰

The relationship between the defendant and the victim for Florida death row rape-murder cases is also skewed. Rape-murders in Florida, where the relationship is known, fall into the following categories: 4 percent family/intimate, 50 percent acquaintance, and 46 percent stranger.⁴¹ The percentages for Florida death row rape-murder cases are different: 6 percent family/intimate, 29 percent acquaintance, and 65 percent stranger.⁴² The most striking difference is between acquaintance and stranger rape-murders: The percentage of Florida rape-murder death row cases involving an acquaintance is about one half of the state and nationwide percentages, and the stranger percentage is larger by nearly a half. This is a graphic demonstration of what others have noted about death penalty cases generally: they reflect our fear of strangers, not those who harm us the most.⁴³ So too, the overrepresentation of stranger rape-murders, and underrepresentation of acquaintance rape-murders,

population of 14,916,000).

40. During the time of slavery in this country, it was not illegal to rape an African-American woman slave. See Thomas D. Morris, *Southern Slavery and the Law 1619-1860*, 305 (1996) (noting that under state laws, "no white could rape a slave woman" and if states criminalized rape by slaves at all, they specified that the victim had to be a white female); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 *N.C. L. Rev.* 969, 1056-57 (1992) (noting that "[t]he law simply did not criminalize the rape of slave women") (citation omitted). For example, in *George (a slave) v. State*, 37 *Miss.* 316, 320 (1859), the Mississippi Supreme Court held that the common law did not apply to slaves and statutory law did not "embrace[] either the attempted or actual commission of rape by a slave on a female slave." See Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *Harv. Women's L. J.* 103, 118 (1983) (discussing case). See also Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 *Wis. L. Rev.* 1003, 1025 n.104 (discussing slave women's lack of protection from rape and battery).

41. This is based on 72 of 124 cases. See Fox, *supra* note 13. Nationally, rape-murders, where the relation is known are: 1 percent family/intimate; 52 percent acquaintance; and, 47 percent stranger. *Id.*

42. The numbers are: five family/intimate; twenty-three acquaintance; fifty-two stranger.

43. See, e.g., Givelber, *supra* note 19, at 412-14; Rapaport, *supra* note 8 at 380.

suggests the tenacious misconception that “real rape” is committed by a stranger,⁴⁴ and thus is the kind we should most severely punish.

2. Aggravating Circumstances

Apart from the racial and relational biases present in the Florida rape-murder cases, the most remarkable feature of these cases is their sheer number. Of the 393 men currently on death row in Florida, eighty are there for a crime that included rape and murder.⁴⁵ That is 20 percent—greater than the percentage in Ohio (12 percent) and greater by far than the Florida percentage of rape-murders among all murders (0.9 percent). It is slightly higher (23 percent) if we include those on death row for whom the underlying murder did not involve rape, but the State presented evidence of the rape of another woman at another time as an aggravating circumstance at the punishment phase.⁴⁶ Comparing the role rape plays in a

44. See, e.g., Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1092 (1986) (identifying “real rape” as one where “[a] stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse” and as one that the law recognizes as a serious crime, even though “most cases deviate in one or many respects from this clear picture”).

Fear of rape by strangers also may be tinged with racism. As Dorothy Roberts observed, “Women’s fear of strangers on the street is complicated by the deeply embedded image of the dangerous Black man. In the South, a Black man’s glance at a white woman signified a threat of rape.” Roberts, *supra* note 11, at 378. The most familiar example of the power of this fear is that of Emmitt Till, a fourteen-year-old African-American boy who was lynched because he whistled at, and/or propositioned a white woman in Mississippi in 1954. See Stephen J. Whitfield, *A Death in the Delta* (1988) (discussing different versions of what Till did, his subsequent death by being beaten, shot, and drowned, the acquittal of those charged with his murder, and the reverberations of his lynching in Mississippi and America).

45. This number is based on analyzing the four sources referred to *supra* note 29, in particular, the direct appeal decisions of the Florida Supreme Court. These eighty cases are ones in which the prosecution established that the defendant committed murder and sexual battery as part of the same criminal episode. Most often that means that a woman was both raped and murdered, but it also includes cases where one person was murdered and another sexually battered. See, e.g., *Cole v. State*, 701 So.2d 845, 848-49 (Fla. 1997) (stating that the defendants beat and stabbed a man to death and raped his sister).

46. This represents nine additional defendants. This includes two types of

rape-murder death penalty case in Ohio and Florida sheds light on the difference death penalty statutes make on what jurors may consider and how they may exercise their discretion when making their punishment decision.

In Ohio a defendant must be convicted of an aggravated murder with a death penalty specification in order to be eligible to be sentenced to death.⁴⁷ Both the aggravated murder and the specification must be proved beyond a reasonable doubt.⁴⁸ The aggravated murder may either be premeditated murder or murder in the course of an enumerated felony, including rape.⁴⁹ The death penalty specifications are limited to facts directly related to the murder, including a rape that is concurrent to the murder.⁵⁰ At the punishment phase the jury must weigh the death penalty specification it found at the guilt phase against the mitigating circumstances presented by the defendant.⁵¹ The nature and circumstances of the murder itself may be considered by the jury only if they are mitigating.⁵²

The jury may consider the rape of the murder victim as a factor at punishment only if the State charged rape as a death specification in the indictment and the jury found that the prosecution proved rape beyond a reasonable

cases, one, where no one was raped in relation to the murder, and the other, where the State did not charge the defendant with rape, but some suggestion of it was made during the guilt phase. See *infra* note 64 and accompanying text.

47. See Ohio Rev. Code Ann. § 2929.04(A).

48. See Ohio Rev. Code Ann. § 2929.04(B).

49. See Ohio Rev. Code Ann. § 2903.01(A) (prior calculation and design); *id.* § 2903.01(B) (purposefully causing death while committing, attempting to commit or fleeing the commission or attempt to commit a felony). Three relatively new, additional forms of aggravated murder are: purposely causing the death of a person under thirteen years of age; purposefully causing the death of another while under detention for a felony conviction; and purposely causing the death of a law enforcement officer. *Id.* at § 2903.01(C)-(E) (2000 Supp.).

50. See Ohio Rev. Code Ann. § 2929.04(A).

51. See Ohio Rev. Code Ann. § 2929.04(B).

52. *Id.* See *State v. Wogenstahl*, 662 N.E.2d 311, 321 (Ohio 1996) (reiterating that "the nature and circumstances of the offence" may only enter into the statutory weighing process on the side of mitigation) (quoting Ohio Rev. Code Ann. § 2929.01(B)).

doubt at the guilt phase.⁵³ Evidence of rape of someone other than the victim of the rape-murder may come in at the guilt phase only if the State joined a separate rape charge with the rape-murder charge⁵⁴ or if it is relevant to establish a pattern or distinctive characteristic of the rape.⁵⁵ In either situation, the evidence of other rapes cannot be an aggravating circumstance that the jury may consider at the punishment phase.

In contrast, in Florida, the breadth of aggravating circumstances that the State may present as the basis for a jury to recommend a sentence of death allows for the presentation of a wealth of rape-related evidence. That evidence may play a significant role in explaining why the defendant was sentenced to death.

At the guilt phase the State must prove the defendant guilty of a capital felony which may be premeditated murder or felony murder, including the felony of sexual battery.⁵⁶ At the punishment phase, the jury renders an advisory sentencing opinion as to whether the defendant should be sentenced to life or death based on considering "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist."⁵⁷

53. See Ohio Rev. Code Ann. § 2929.04(A).

54. See, e.g., *State v. Benner*, 533 N.E.2d 701, 703-05 (Ohio 1988) (stating that the indictment charged the defendant with 22 counts including aggravated murder of two victims and rape of two others).

55. See Ohio Evid. R. 404(B) (Banks-Baldwin 1995); see, e.g., *State v. Durr*, 568 N.E.2d 674, 677 (Ohio 1991) (stating that testimony at trial included reference to the defendant being arrested for two unrelated rapes).

56. See Fla. Stat. Ann. § 921.141 (setting forth criteria for sentencing a person to death); *id.* § 782.04 (defining murder that constitutes a capital felony). As in Ohio, the State may present evidence of other sexual batteries if they are sufficiently similar. See *Duckett v. State*, 568 So.2d 891, 895 (Fla. 1990) (affirming introduction of testimony by two women that the defendant, a police officer, picked them up in his patrol car while on duty and tried to make passes at them, but finding harmless error in the introduction of third woman's testimony because the sexual contact was consensual, in case where the defendant was charged with picking up a young girl, sexually assaulting, and killing her); *Rivera v. State*, 561 So.2d 536, 537-38 (Fla. 1990) (finding no error in state introducing, at guilt phase, testimony about the defendant sexually assaulting, choking, and trying to kill another young girl because sufficient similarities existed).

57. Fla. Stat. Ann. § 921.141(2)(b). The Florida Supreme Court has interpreted this provision to require that the State establish the existence of an

The judge, “[n]otwithstanding the recommendation of a majority of the jury,” must then weigh the aggravating and mitigating circumstances and decide whether to sentence the defendant to life or death.⁵⁸

The aggravating circumstances that the jury and judge may consider are much broader than those permitted in Ohio. Two aggravating circumstances allow the State to present evidence of rape that the jury did not consider at the guilt phase: prior violent felony convictions and that the murder was “heinous, atrocious, or cruel.”⁵⁹

A prior felony conviction must “involv[e] the use or threat of violence to the person.”⁶⁰ This allows evidence of a

aggravating circumstance by proof beyond a reasonable doubt. *Swafford v. State*, 533 So.2d 270, 277 (Fla. 1988) (“Aggravating circumstances must be proved beyond a reasonable doubt.”).

58. Fla. Stat. Ann. § 921.141(3). In order for a judge to override a jury recommendation of a life sentence, “the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). In several rape murder cases the Florida Supreme Court reversed the trial court’s refusal to follow the jury recommendation of a life imprisonment. See, e.g., *McCrae v. State*, 582 So.2d 613 (Fla. 1991) (finding a “reasonable basis” for jury life sentence recommendation based on evidence that the defendant suffered from temporal lobe epilepsy and probably experienced a seizure at the time of sexually battering and murdering an elderly woman, his condition improved with treatment in prison, and testimony about his good character); *DuBoise v. State*, 520 So.2d 260, 266 (Fla. 1988) (reversing trial court override of jury life sentence recommendation based on nonstatutory mitigating evidence such as the fact that the co-defendants had not been apprehended, the defendant acted under the influence of his brother, a co-defendant, the defendant was young (18), had a low I.Q., and a “deprived family background”).

59. Fla. Stat. Ann. § 921.141(5)(b), (h). Many states include a comparably worded aggravating factor. James R. Ackers & C. S. Lanier, “Parsing This Lexicon of Death”: Aggravating Factors in Capital Sentencing Statutes, 30 *Crim. L. Bull.* 107, 125 (1994) (reporting that seventeen of thirty-seven states have a heinous atrocious or cruel factor and that in some states, 60-80 percent of the death sentences were based on this as an aggravating factor). “Heinous, atrocious, or cruel” may be an avenue for the race of the victim to influence the jury’s decision. See, e.g., Kristie R. Blevins, *Patterns of Aggravating and Mitigating Circumstances: An Examination of Tennessee’s Death Row* 79 and 102 tbl. 6 (2000) (unpublished master’s thesis on file with the author) (showing that in Tennessee death penalty trials, 1977-1998, the jury found “heinous atrocious or cruel” more frequently when the victim was white than when the victim was African-American (59 percent versus 39 percent of the cases)).

60. Fla. Stat. Ann. § 921.141(5)(b) (“The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to a

rape to factor in the punishment decision in a variety of ways. The State may present evidence of a prior rape conviction unrelated to the rape-murder for which the defendant was convicted.⁶¹ Or, the "prior felony conviction" may be a contemporaneous sexual battery of a separate victim in the same criminal episode as the murder.⁶² Even if the defendant was not convicted of rape-murder, the State may introduce evidence of prior rape convictions.⁶³ This may include cases in which some suggestion, but apparently no charge, of sexual battery was made at the guilt phase, but prior rape convictions then serve to legitimate the unproven, yet suspected, rape.⁶⁴

person.").

61. See, e.g., *Long v. State*, 610 So.2d 1268, 1270-71 (Fla. 1992) (describing testimony about two prior sexual battery convictions introduced by the State); *Tompkins v. State*, 502 So.2d 415, 418 (Fla. 1987) (noting that the State presented testimony of three witnesses that the defendant had been convicted of sexual battery and kidnapping on two separate occasions after the victim here had disappeared); see also *Kimrough v. State*, 700 So.2d 634, 636 (Fla. 1997) (listing sexual battery as the basis for the trial court finding the aggravating circumstance of prior violent felony); *Barwick v. State*, 660 So.2d 685, 689 (Fla. 1995) (same); *Schwab v. State*, 636 So.2d 3, 7 (Fla. 1994) (same).

62. See, e.g., *Whitfield v. State*, 706 So.2d 1, 3 (Fla. 1997) (noting that the trial court found the contemporaneous sexual battery of another victim in case to constitute the prior violent felony aggravator); *James v. State*, 695 So.2d 1229, 1236 (Fla. 1997) (holding that in double homicide, the sexual assault and murder of one victim constituted proof of a prior violent felony that aggravated the murder of the other victim).

63. See, e.g., *Coney v. State*, 653 So.2d 1009, 1011-13 (Fla. 1995) (describing punishment phase testimony by victim of sexual battery by the defendant that occurred sixteen years earlier, in case where the defendant was convicted of first-degree murder for torching his homosexual lover in prison); *Thompson v. State*, 553 So.2d 153, 155 (Fla. 1989) (affirming death sentence where the defendant was convicted of kidnapping, beating, shooting, and throwing victim overboard at sea and punishment phase evidence including the defendant's 1950 rape conviction); *Rose v. State*, 461 So.2d 84, 87 (Fla. 1984) (permitting presentation, at punishment phase, of prior conviction for breaking and entering with intent to commit rape in case where the defendant was convicted of kidnapping and first-degree murder of an eight-year-old girl).

64. *Chandler v. State*, 702 So.2d 186, 191-92 (Fla. 1997) (allowing testimony about the defendant raping a woman on a boat in the Gulf of Mexico in a case where three women were strangled or drowned on a boat in the Gulf with the defendant; the women were found nude from the waist down but the State made no charge of sexual battery); *Alvord v. State*, 322 So.2d 533, 535-40 (Fla. 1975) (permitting punishment phase testimony about prior rape of a child in a case where the evidence showed the presence of semen in the vagina of one of the three

Most broadly, the jury may find the aggravating circumstance that the murder was "heinous, atrocious, or cruel."⁶⁵ Florida juries are instructed that:

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.⁶⁶

Rape-murder may readily fit this description either because of the manner of death or the facts of the rape.⁶⁷ For example, over one-third of the rape-murders involved strangling the victim to death.⁶⁸ As the Florida Supreme Court has consistently recognized, one may "infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable."⁶⁹ The details of the concurrent rape are also subject to classification as heinous, atrocious,

women murdered, but the court described the murder as occurring in the course of a burglary).

65. Fla. Stat. Ann. § 921.141(5)(h).

66. *Hall v. State*, 614 So.2d 473, 478 (1993) (holding that this instruction is not unconstitutionally vague because the terms are defined). Previously, the U.S. Supreme Court found a comparable aggravator of "wicked, evil, atrocious or cruel" unconstitutionally vague because none of the terms were defined. *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992).

67. At least 81 percent of the rape-murder cases (sixty-five of eighty) included a finding of "heinous, atrocious, or cruel." The percentage may be higher because in some cases I was not able to ascertain the particular aggravating circumstances found by the trial court due to the case pending on direct appeal and the most readily available information was from newspaper articles.

68. Forty-one percent of the eighty cases included strangulation as the manner of death. In comparison, 23 percent of the victims were shot to death, 15 percent were stabbed, and the remaining 20 percent were beaten, drowned, or the manner of death was unknown. This is consistent with studies of sexual homicide that note the prevalence of strangulation as a manner of death. See, e.g., Don Grubin, *Sexual Murder*, 165 *Brit. J. of Psychiatry* 624, 627 (1994) (reporting that in a study of twenty-one men who sexually attacked and murdered women, 67 percent (fourteen) of the victims were strangled).

69. *Tompkins v. State*, 502 So.2d 415, 421 (Fla. 1987).

or cruel. For example, in one case the trial court found that “the evidence showed that the Defendant with his penis literally ripped [the victim’s] vagina apart while he raped her.”⁷⁰ The trial court concluded that “if any crime meets the definition of heinous atrocious or cruel, it is this case.”⁷¹ Indeed, in approximately one-quarter of rape-murder cases, the Florida Supreme Court specifically relied on the facts of the sexual battery when discussing just how heinous, atrocious, or cruel the murder was.⁷²

The broad range of Florida’s aggravating circumstances affords the State a multitude of ways to introduce evidence of rape for the jurors and judge to consider in making their decision about whether the defendant should live or die. Unlike Ohio’s death penalty statute, which keeps the jury focused on the aggravating circumstances it found beyond a reasonable doubt, the Florida statute allows the sentencers to consider the incendiary nature of the rape for which the defendant was convicted, or evidence of other rapes that may be far afield from the rape-murder. The breadth of the Florida aggravating circumstances permits jurors’ emotional responses to rape, and their racial biases, especially those connected to rape,⁷³ to influence, whether consciously or

70. *Carroll v. State*, 636 So.2d 1316, 1320 (Fla. 1994).

71. *Id.*

72. The number is twenty-three of eighty. See, e.g., *Banks v. State*, 700 So.2d 363, 366 (Fla. 1997) (finding the heinous, atrocious, or cruel aggravator supported by evidence that the defendant sexually assaulted a ten-year-old girl for twenty minutes before shooting her); *Hoskins v. State*, 702 So.2d 202, 206 (Fla. 1997) (citing evidence that the defendant attacked and raped an eighty-one-year-old woman with “sufficient force to tear her perineum” as supporting the finding of heinous, atrocious, or cruel); *Mendyk v. State*, 545 So.2d 846, 847-50 (Fla. 1989) (affirming heinous, atrocious, or cruel based on facts including that prior to killing the victim, the defendant “tied each of her legs to the legs of a saw horse, and sexually tortured her by several means, including inserting a broom handle in her vagina”); *Quince v. State*, 414 So.2d 185, 187 (Fla. 1982) (holding “severe beating, wounding, raping, and manual strangulation of an eighty-two-year-old, frail woman easily qualified as heinous”).

73. See, e.g., Andrew Hacker, *Two Nations* 180 (1992) (“Of all the offenses black men may commit, a sexual assault on a white victim stirs deeply primal fears.”); Roberts, *supra* note 11, at 378 (noting how the “deeply-embedded image of the dangerous Black man” continues to affect women’s fears of strangers);

not,⁷⁴ their punishment phase decision.

B. Rape-Murder in Colorado and Oregon

Colorado and Oregon have distinctly smaller death rows than do Florida and Ohio, but in some ways they provide the starkest evidence of the ways the State exploits the crime of rape-murder. In both states the common wisdom is that it is “hard” to get on death row; therefore, the crime must be truly egregious.⁷⁵ Rape-murder appears to embody this description.

Colorado has only six men on death row.⁷⁶ Four of them, 66 percent, were convicted and sentenced to death for a first-degree murder that included raping the victim.⁷⁷ Yet, in Colorado, rape-murders are only 1.5 percent of all murders with known circumstances from 1976-1994.⁷⁸ The very high representation on Colorado’s death row suggests that the State is not only aware of, but correct about, the outrage the crime of rape-murder engenders. Indeed, in the first six months after Colorado changed from jury to judge sentencing in death penalty cases, the State sought

Wriggins, *supra* note 40, at 113-18 (analyzing how racism affects black men charged with and convicted of raping white women). See also *infra* notes 109-18 and accompanying text (discussing court decisions that recognize the power of racial bias in rape-murder cases).

74. See Johnson, *supra* note 27, at 1028 (discussing pervasiveness of unconscious racism).

75. In both states experts have indicated that only the worst cases receive the death penalty. See Richard Perez-Pena, *The Death Penalty: When There’s No Room for Error*, N.Y. Times, Feb. 13, 2000, sec. 4 at 3. (noting that in Colorado, prosecutors rarely seek the death penalty “in part, experts say, because they believe that the Colorado Office of the Public Defender will defeat all but the strongest cases”); Brad Cain, *Death Penalty Foes Optimistic They’ll Make Oregon’s Fall Ballot*, AP Newswires, April 2, 2000 (quoting head of Oregon Crime Victims United stating, “[a]nd it’s also a fact that it’s very difficult to get a death penalty conviction in this state”).

76. *Death Row U.S.A.*, *supra* note 25, at 31.

77. See *People v. Harlan*, 8 P.3d 448, 459 (Colo. 2000) (Robert Harlan); Julia C. Martinez, *Panel Oks Change in Death-Penalty System*, Denver Post, Feb. 4, 2000, at A17 (Francisco Martinez); *id.* (William Neal); *State v. Rodriguez*, 794 P.2d 965 (Colo. 1990) (Frank Rodriguez).

78. The number is 46 rape-murders of 2,980 murders with known circumstances. See Fox, *supra* note 13. There were 3,514 murders in total. *Id.*

the death penalty in six cases, all of which involved a defendant who had committed a rape either contemporaneous to the murder or previously.⁷⁹ Two of the six defendants were sentenced to death, both of whom were convicted of a rape that occurred as part of the same criminal episode as the murder.⁸⁰

The demographics of the victims and the four men convicted and sentenced to death for rape-murder are no less disturbing than those of Ohio and Florida. Every single one of the victims was a white woman.⁸¹ The defendants are of different races: two hispanic, one African-American, and one white.⁸² In three of the cases the defendant and victim were strangers, and in the fourth, the three murder victims were former girlfriends of the defendant.⁸³ It begins to look like the death penalty is an available punishment for raping and murdering white women, stranger or not, regardless of the defendant's race.⁸⁴

79. See Martinez, *supra* note 77, at A17. In four of the cases the rape was contemporaneous to the murder (Martinez (D.), Martinez (F.), Riggan, Salmon), in one the rape of one woman was in addition to the first-degree murder of three other women all in the same month (Neal), and in the remaining one, the rapes were prior to the first-degree murder of a woman, and the defendant was serving sentences of 216 years for these prior rape convictions (Richardson). *Id.*

80. *Id.* (Martinez (F.) (gang rape and murder of fourteen-year-old young woman); Neal (rape of woman in the same month and in the same room as murder of three other women)).

81. The mother of one of the victims was Hispanic and her father white. Interviews with defense attorneys in Colorado (June and July 2000).

82. *Id.*; see also Death Row U.S.A., *supra* note 25, at 31.

83. The relationship of victim and offender (where known) for 1976-94 Colorado rape-murder cases is: 11 percent family/intimate, 48 percent acquaintance, and 41 percent stranger. See Fox, *supra* note 13. Once again, the percentage of stranger rape-murder death row cases greatly outstrips the actual percentage in the state.

84. One might be tempted to discount the significance of these racial disparities in Colorado because the percentage of people of color is relatively small in that state. Indeed, in 1998, the most recent year for which information is available, approximately 92 percent of the population in Colorado was white. U.S. Census Bureau, *supra* note 39, at 34. Nonetheless, African-Americans were both offenders and victims in Colorado rape-murder cases. From 1976-1994, for those rape-murders in which the race of offender and victim is known (28 of 46), the breakdown is: 68 percent white offender/white victim, 11 percent African-American offender/African-American victim, 14 percent African-American

Similar results are present in Oregon. Twenty-seven men are on death row in Oregon,⁸⁵ thirteen of them for rape-murder.⁸⁶ They are 48 percent of Oregon's death row; not as high as the percentage of rape-murders on Colorado's death row, but still extraordinarily high when we consider that of all murders with known circumstances in Oregon, 1976-1994, only 2.5 percent were rape-murders.⁸⁷ Of the thirteen, all but one of the defendants are white,⁸⁸ and all of the victims are white.⁸⁹ Given the relatively high rates of death sentences for African-American men who raped and murdered white women in Ohio and Florida, it is surprising that none are on death row in Oregon.⁹⁰ But it is not surprising that all of the victims are white women.⁹¹ That bias has appeared in each

offender/white victim, and 7 percent white offender/African-American victim. Despite the small number, it is still worth recognizing that the small percentage of people of color in Colorado does not explain away the dearth of women-of-color victims in rape-murder cases on death row.

85. Death Row U.S.A., *supra* note 25, at 51.

86. List on file with author.

87. This represents 50 of 2,026 murders with known circumstances, out of 2,428 total murders. See Fox, *supra* note 13.

88. See Death Row U.S.A., *supra* note 25, at 51. One of the defendants (Marco Montez) is of dual race, his father was hispanic and his mother Native-American. Interview with Montez's defense attorney (July 2000).

89. Interviews with defense attorneys in Oregon (June and August 2000).

90. The paucity of men of color among those convicted of rape-murder on Oregon's death row is not inconsistent with the rest of Oregon's death row. Only four of the twenty-seven men are non-white: one is Native-American, two are hispanic, and one is African-American. Death Row U.S.A., *supra* note 25, at 51.

As with Colorado, the population of Oregon is overwhelmingly white: 93.5 percent in 1998. U.S. Census Bureau, *supra* note 39, at 34. From 1976-1994 in rape-murder cases where the race of offender and victim is known (39 of 50), the breakdown is: 77 percent white offender/white victim, 2.5 percent African-American offender/African-American victim, 5 percent African-American offender/white victim, and 2.5 percent white offender/African-American victim. See Fox, *supra* note 13. Additional cases involve white offenders and victims of other races: 8 percent white offender/American-Indian victim; 2.5 percent white offender/Asian-Pacific Islander victim; 2.5 percent white offender/"other" victim. *Id.*

91. In 1976-1994 Oregon rape-murders where the race of both the offender and victim are known, 18 percent were victims of color (7 of 39 cases). *Id.* Of these victims of color, 86 percent were female (6 of 7). *Id.* Even though this represents a small number, it seems noteworthy that it is such a large percentage. As with Colorado, the absence of women of color as victims of men on

of the four state's death row rape-murder cases.

Relational biases are also evident in Oregon's rape-murder death row cases. As in all three other states, cases in which the defendant and victim were strangers are overrepresented when we consider state rape-murder figures: 46 percent of Oregon rape-murder death row cases, 26 percent of Oregon's rape-murders, 1976-1994. Oregon rape-murder cases are also underrepresented where the defendant and victim were acquaintances: 39 percent of Oregon rape-murder death row cases, 63 percent of Oregon's rape-murders, 1976-1994.⁹² At the least, these numbers confirm the proclivity to subject strangers to the harsher punishment of death, even though they are not the greatest threat.

C. Conclusion

The data on the race of and relationship between defendant and victim in rape-murder death row cases in four states across the country show remarkable similarities. In each state the prosecution recognizes the worth of rape-murder cases in seeking and obtaining death sentences. Proportionately, there are vastly more men on death row for rape-murder in each state than there are rape-murders among all murders in those states or nationwide. In each state the victims of men convicted of rape-murder on death row are much more likely to have been strangers to the defendants than in rape-murders generally, in the state or in the nation. In Ohio and Florida, proportionately more African-American men are on death row for the rape-murder of white women than commit those crimes in those states or nationwide. In each state the victims of men convicted of rape-murder on death row are primarily, if not exclusively, white women. African-American women, and other women of color, seem

death row for rape-murder should not be dismissed merely as a function of the relatively small percentage of people of color in the population.

92. These percentages are based on rape-murders where the relationship is known. *Id.*

to disappear from the calculus of what counts as a most serious murder worthy of the death penalty. It appears that the value of prosecuting rape-murder as a death penalty case is infused with a racism that is gendered in nature.

II. REJECTING THE DEATH PENALTY FOR RAPE-MURDER

The racist application of the death penalty and the inability of the system to ensure proper evaluation of the appropriateness of the death penalty for each individual defendant are two of the many problems cited as reasons to oppose the death penalty. Both are issues that have special resonance for feminism in light of how the State manipulates the death penalty as a punishment for rape-murder. In this Section I consider the significance of the racial disparities in rape-murder death row cases identified in Section I. I conclude that when the State has been able to seek the death penalty for a crime involving rape, it has done so in ways that discount African-American women and rely on sexual myths about African-American men. Moreover, throughout the last one hundred years, women have identified the interaction of racial and sexual biases about rape as reasons to oppose the lethal punishment of men be it in the form of lynching or the death penalty. Finally, the strikingly high rate at which the death penalty is sought and imposed in rape-murder cases shows how the State effectively maintains focus on the crime. This prevents proper consideration of the appropriate punishment for the particular defendant, and it distracts us from acknowledging broader issues, such as mental illness, sexism, and racism, that are inexorably part of these cases.

A. The Interaction of the Death Penalty, Rape, and Racism

Prior to 1977, when the death penalty was still an

available punishment for the crime of rape,⁹³ the death penalty was used overwhelmingly against African-American men convicted of raping white women.⁹⁴ This was true as a legal matter in the criminal justice system as well as outside of the legal system where African-American men were often lynched under the pretext of having raped a white woman.⁹⁵ Lynching African-American men for the rape of white women no longer occurs as it once did⁹⁶ and rape is no longer punishable by death, but the gendered and racist use of the death penalty when rape is present, persists in modern times.

Rape is a crime of sexual violence that is intimately connected with myths about race.⁹⁷ Dorothy Roberts noted that the criminal law enforces a racial construction of rape, one that focusses on the rape of white women by African-American men, and devalues the rape of African-American

93. See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty an unconstitutional punishment for rape of an adult woman).

94. See *infra* notes 100-03 and accompanying text (discussing racist use of death penalty against African-American men convicted of rape).

95. See *infra* notes 123-29 and accompanying text (discussing lynching).

96. By this I mean the spectacle lynchings that occurred from the late 1800's through the 1950s. See Grace Elizabeth Hale, *The Making of Whiteness: The Culture of Segregation in the South, 1890-1940*, 202-03 (1998) (describing spectacle lynchings as public lynchings, generally from 1890-1940, that were "attended by thousands, captured in the papers by reporters who witnessed the tortures and photographed for those spectators who wanted a souvenir and yet failed to get a coveted finger, or, or fragment of bone" and noting that these events were about more than killing a person, "spectacle lynchings were about making racial difference in the new South, about ensuring the separation of all southern life into whiteness and blackness. . . ."); Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* 176-77 (1997) (describing the public display of lynching). I cannot say categorically that no lynchings of any kind still occur. See, e.g., Wiggins, *supra* note 40, at n.27 (discussing the 1981 case of an African-American man beaten, strangled, and hung from a tree for apparently socializing with white women or being mistaken for someone who was married to a white woman, noting that three white men were arrested but never indicted for the murder). I thank Emma Coleman Jordan for insight into the distinction between spectacle lynchings and less circus-like lynchings.

97. See, e.g., Crenshaw, *supra* note 11, at 1270-71 (observing that in considering rape, "certain gender expectations for women intersect with certain sexualized notions of race, notions that are deeply entrenched in American culture"); Roberts, *supra* note 11, at 364 ("American society has always defined rape in terms of race. . . . [I]n America, rape's racial and sexual origins are inseparably intertwined.").

women, especially by white men.⁹⁸ She observed that this construction of rape relies on a “racialized sexual mythology arising from slavery” where African-American women were sexual objects and African-American men were predators who threatened the virtue of white women.⁹⁹

The application of the death penalty to the crime of rape reflected and reinforced these racial and sexual myths. In a comprehensive study of racial discrimination in the imposition of the death penalty in rape cases in the South from 1945 to 1965, Marvin E. Wolfgang and Marc Riedel documented the disproportionate application of death to African-American defendants for the rape of white women.¹⁰⁰ They found that while 36 percent of African-

98. Roberts, *supra* note 11, at 367. See also Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 *Harv. L. Rev.* 563, 594-97 (1997) (discussing racial bias in the criminal justice system against both African-American men and women and noting “[t]he disparate treatment of the black rapist and the legal indifference to black women victims helps solidify a belief that rape is only heinous if a black man rapes a white woman.”); Crenshaw, *supra* note 11, at 1265-82 (exploring how “racism and patriarchy have shaped conceptualizations of rape” especially with respect to the experience of African-American women); Wriggins, *supra* note 40, at 103, 140 (examining “the historical legacy of the racist social meaning of rape and its consequences” and concluding that “the legal system’s treatment of rape both has furthered racism and has denied the reality of women’s sexual subordination”).

99. Roberts, *supra* note 11, at 365. See also Ammons, *supra* note 40, at 1025-56 (noting how the legacy of slavery contributes to how African-American women, today, are devalued in the law, especially when they are physically beaten or sexually assaulted); Wriggins, *supra* note 40, at 104-23 (discussing mistreatment of African-American men and women with respect to rape during slavery and how that mistreatment persists today).

100. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 *Annals Am. Acad. Pol. & Soc. Sci.* 119 (1973). This study was described as “one of the most definitive pieces of research ever done on capital punishment.” See Dennis D. Dorin, “Two Different Worlds” *Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 *J. Crim. L. & Criminology* 1667, 1669 (1981) (quoting *Capital Punishment in the United States* xvii (Hugo Bedau & Chester M. Pierce, eds., 1976)). William Maxwell, an African-American sentenced to death for rape in Arkansas, presented the Arkansas portion of Wolfgang and Riedel’s study in support of his claim that his sentence was the result of race discrimination. See *Maxwell v. Bishop*, 398 F.2d 138, 141 (8th Cir. 1968). Both the federal district court and the appellate court rejected Maxwell’s contention on the ground that the study did not pertain to his particular case. *Id.*

American defendants convicted of raping white women were sentenced to death, only 2 percent of defendants in all other racial combinations were sentenced to death.¹⁰¹ Thus African-American defendants who were convicted of raping white women were sentenced to death approximately eighteen times more often than any other racial combination.¹⁰² By examining a series of non-racial variables Wolfgang and Riedel analyzed whether this disparity was attributable to race. They concluded that “in none of the seven states carefully analyzed can it be said that any of the nonracial factors account for the statistically significant and disproportionate number of blacks sentenced to death for rape.”¹⁰³ Thus, for rape, the death penalty was applied overwhelmingly to condemn African-American men for violating white women.

The statistics on those sentenced to death in Florida, Ohio, Colorado, and Oregon for rape-murder echo some of the racial disparities Wolfgang and Riedel found for rape.¹⁰⁴ Looking at African-American defendant/white victim cases as an overall percentage of the rape cases in which the death penalty was imposed in the Wolfgang and Riedel study, they comprise 86 percent of those sentenced to

101. Wolfgang & Riedel, *supra* note 100, at 129 tbl. 2. The article focused on race discrimination against African-American defendants, so the races of the defendants and victims in the “other” category are not specified. However, in the Maxwell litigation, data specific to Arkansas showed that no white man was convicted of raping an African-American woman. See Maxwell, 398 F.2d at 144 (summarizing evidence presented to the federal district court). Apart from this one piece of information, I am unable to identify how many, if any, of the victims were African-American women. It is unlikely, however, that many, if any, of the victims were African-American women given that, for the most part, raping an African-American woman was not a crime in the South until after the Civil War. See *supra* note 40 (discussing slavery rape laws). The unspoken rule, after the Civil War, was that, with the crime of rape, the death penalty was reserved for African-American men who raped white women. See Michael Meltsner, *Cruel and Unusual Punishment: The Supreme Court and Capital Punishment* 321 n.2 (1973) (citing the experience in Georgia); Wriggins, *supra* note 40, at 106-07 (noting that post-Civil War statutes were race neutral but the treatment of African-Americans in individual cases was not).

102. Wolfgang & Riedel, *supra* note 100, at 130.

103. *Id.* at 132.

104. I am indebted to Jeffrey J. Pokorak for causing me to consider this comparison.

death.¹⁰⁵ The Florida figures show that African-American defendants convicted of the rape-murder of white women are approximately 20 percent of those sentenced to death.¹⁰⁶ The rates are similar in two of the other states: in Ohio 27 percent of the rape-murder/death row cases are African-American defendant/white victims, in Colorado, 25 percent,¹⁰⁷ but in Oregon, 0 percent.¹⁰⁸ These percentages show a sizable drop from the Wolfgang and Riedel findings. The apparent overt racism against African-American defendants in cases involving rape has diminished, but not vanished.

Even though the percentage of African-American men sentenced to death for rape-murder is lower today than it was for raping a white woman, issues of racism persist in the cases. For example, in a Florida case, an all white jury convicted Johnny L. Robinson, an African-American, of the sexual battery, kidnapping, robbery, and murder of a white woman.¹⁰⁹ At the punishment phase the prosecutor elicited testimony from the defendant's medical expert that Robinson told him he had sexual encounters with several other white individuals, who were presumably female.¹¹⁰ The trial court denied the defense attorney's objection to this line of questioning, but the Florida Supreme Court vacated the death sentence, finding that this was a deliberate attempt to inject racial bias and prejudice into the case.¹¹¹ The court acknowledged that discrimination

105. Wolfgang & Riedel, *supra* note 100, at 129 tbl. 2 (reporting that 132 men were sentenced to death for rape, 113 of whom were black defendants for rape of a white victim).

106. This is sixteen of the eighty men on death row for rape-murder. I have not analyzed other factors that might contribute to these numbers as Wolfgang and Riedel did. I rely on the conclusion they and many others across the country have made about the persistence of racial bias in death penalty system. See Baldus, *supra* note 19, at 1654-62 (summarizing studies' findings of racial disparities death sentences imposed across the country).

107. Three of the four men on death row for rape-murder are men of color. See *supra* note 82.

108. Only one of the thirteen men on death row for rape-murder is a man of color. See *supra* note 88.

109. *Robinson v. State*, 520 So. 2d 1, 7 (Fla. 1988).

110. See *id.* at 6.

111. *Id.* On remand, Robinson was resentenced to death. See *Robinson v.*

based on race exists in our culture and concluded:

The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction.¹¹²

Conversely, concern about appealing to racial bias in rape-murder cases may not be sufficient to exclude racist imagery from being presented, or alluded to, at trial. In Robert Harlan's case, the Colorado Supreme Court acknowledged that it was troubled by the apparent racial dimensions of the trial.¹¹³ Harlan, an African-American, had kidnapped, raped, and murdered a white woman. In rebuttal at the punishment phase, the State called five women, each of whom testified to sexual misconduct by Harlan. Each woman was white. The Colorado Supreme Court conceded that, especially with a jury that had no African-American members, this "may have echoed a subconscious and pernicious racist image of African-American males as sexual predators preying on Caucasian women."¹¹⁴ Nonetheless, the court concluded that because the jury was instructed not to consider race, the prosecution did not rely on a racially-based argument, and the killing was brutal, no error occurred.¹¹⁵ The court affirmed Harlan's death sentence.

In both cases, the prosecution sought to bolster its argument that the defendant should be sentenced to death by appealing to the presumed racial prejudices of the juries. In each case it was not just a generalized racial bias that the State invoked, but one specifically steeped in our American history, the "racialized sexual mythology arising

State, 574 So.2d 108 (Fla. 1991) (affirming new death sentence).

112. Robinson, 520 So. 2d at 7.

113. State v. Harlan, 8 P.3d 448, 499 (Colo. 2000).

114. Id. at 500.

115. Id.

from slavery”¹¹⁶ in which African-American men are an ever-present threat to white women. The Florida and Colorado Supreme Courts each recognized that this racial prejudice could improperly infect the defendant’s trial. Regrettably, however, each also thought that a jury instruction to disregard the issue of race would be sufficient to protect the defendant’s rights. Given the tenacity of racial prejudice, especially in the context of an African-American man convicted of raping and murdering a white woman,¹¹⁷ it seems implausible that jurors could so readily dismiss the personal biases that the prosecution had called to the fore.¹¹⁸

Gendered racism is apparent not only in the prosecution of African-American men charged with the rape-murder of white women, but also in the overall percentage of men of all races on death row for crimes involving the rape of white women. In Florida, 78 percent of the victims of defendants on death row for rape-murder are white women.¹¹⁹ The Ohio percentage of white women victims is similar—72 percent. Colorado and Oregon are much higher: in both states 100 percent of the victims of men on death row for rape-murder were white women. These percentages are not all that different from the 86

116. Roberts, *supra* note 11, at 365.

117. See *supra* note 73 and accompanying text (discussing the connection between racial bias and rape).

118. Cf. Johnson, *supra* note 27, at 1027 (concluding that unconscious racism is ignored in the criminal justice system because of ignorance, fear, and denial); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 *Law & Hum. Behav.* 337, 353 (2000) (finding that in study on the relationship between racial bias and jury instruction comprehension, with mostly white participants, “those who sentenced a Black defendant were significantly more likely to undervalue, disregard, and even improperly use mitigating evidence as opposed to those who sentenced a white defendant,” especially when the defendant and victim were of different races).

119. See *supra* note 35 (reporting the percentage of white victims of white, African-American, and Hispanic defendants). In two cases (Juan Chavez and Mark Schwab) the victims were white males, both young boys ages nine and eleven. See list on file with author. In one case, the defendant was white, in the other Hispanic. *Id.* So the total number of cases involving white female victims is sixty-three out of eighty.

percent of white rape victims of African-American defendants that Wolfgang and Riedel documented. While we do not know the percentage of African-American victims in the Wolfgang and Riedel study,¹²⁰ it is nonetheless stunning that still today there is not one white man on death row in any of the four states for the rape-murder of an African-American woman.

These statistics and cases suggest that a form of the racialized sexual mythology of rape Roberts observed¹²¹ exists in rape-murder death penalty cases. While the percentages have shifted in terms of who the defendants are on death row for murder cases involving rape, they have not changed materially in the percentage of white victims. The rape-murder of African-American women is virtually ignored and the notion of defending white womanhood persists.

B. Women's Historical Opposition

The confluence of racial and sexual bias that permeates crimes involving rape is not new. Even before the racist application of the death penalty to the crime of rape began in the 1940s, the charge of rape served as a vehicle to terrorize the African-American community.¹²² After the Civil War, lynching of African-American men for the supposed rape of white women became a frequent

120. See *supra* note 100. However, Wolfgang and Riedel refer to the findings of a study of Florida sentences for rapes, 1940-1965, that documented that no white offender convicted of raping a black female was sentenced to death. See Wolfgang & Riedel, *supra* note 100, at 125.

121. See *supra* note 99 and accompanying text.

122. See, e.g., Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950*, 4-13 (1980) (reporting that 72.7 percent of recorded lynchings, from 1882 to 1968, were of African-Americans (3,446 out of 4,743)); *id.* at 8 (discussing how lynching and mob violence "reminded all black people of white America's determination to impose its will and authority in a biracial society"); Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape, and Racial Violence 328, 330 in *Powers of Desire: The Politics of Sexuality* (Ann Snitow et al. eds., 1983) ("Like whipping under slavery, lynching was an instrument of coercion intended to impress not only the immediate victim but all who saw or heard about the event.").

occurrence.¹²³ In 1892, Ida B. Wells, an African-American journalist, asserted that “[to] palliate this record . . . and excuse some of the most heinous crimes that ever stained the history of a country, the South is shielding itself behind the plausible screen of defending the honor of its women.”¹²⁴ Indeed, the South appealed to the North to suspend its judgment of southern lynchings on the ground of protecting “its women.”¹²⁵ Yet, as Wells was first to document, in 1894 only one-third of those lynched had been charged with rape, “to say nothing of those of that one-third who were innocent of the charge.”¹²⁶ By the 1930s, studies had

123. Zangrando, *supra* note 122, at 4 (explaining that protecting white womanhood became the most popular reason given for lynching African-American men). See also Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* 27-28 (1984) (“The charge [of raping a white woman] was leveled so consistently against Black men, and came from such impeccable sources, that the whole nation seemed to take it for granted. Not only *Harper’s* but other scholarly and reputable magazines and newspapers wrote about the ‘new crime.’”).

124. Ida B. Wells-Barnett, *Southern Horrors* 14, in *On Lynchings* (Arno Press and The New York Times 1969) (1892); Zangrando, *supra* note 122, at 4 (“Because it fit their racist beliefs and provided a convenient explanation, whites created the myth that lynching was a necessary protection for white womanhood.”). See also Hall, *supra* note 122, at 335 (“The ‘southern rape complex’ functioned as a means of both sexual and racial suppression.”) (citation omitted). The Governor of South Carolina once stated, during a gubernatorial campaign, “the one crime that warrants lynching, and Governor as I am, I would lead a mob to lynch the negro who ravishes a white woman.” Whitfield, *supra* note 44, at 3.

125. Wells-Barnett, *supra* note 125, at 13 (quoting Bishop Fitzgerald as stating, those “who condemn lynching express no sympathy for the *white* woman in the case”).

126. *Id.* at 14. What constituted “rape” was questionable:

With the Southern white man, any mesalliance existing between a white woman and a colored man is sufficient foundation for the charge of rape.

The Southern white man says that it is impossible for a voluntary alliance to exist between a white woman and a colored man, and therefore, the fact of an alliance is proof of force.

Ida B. Wells-Barnett, *A Red Record* 11, in *On Lynchings*, *supra* note 124. See also Jacquelyn Dowd Hall, *Revolt Against Chivalry: Jessie Daniel Ames and the Women’s Campaign Against Lynching* 154 (1979) (noting that “popular opinion [and] very often in law [presumed] that any white woman having intercourse with a black man had been ‘raped’” and that this was used to justify lynchings and legal executions). In addition, “[l]ynching could be triggered by offenses as trivial as failure to observe the racial courtesy of moving aside to let a white woman pass.” Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty and the Paradox of Feminist History*, 3 *J. Gender*,

confirmed that the primary motivation for lynching African-American men was “greed not women’s honor.”¹²⁷

Within the category of lynchings because of rape, the concern was protecting *white* women’s honor. As Wells observed, when it was a white man who raped a African-American woman, “very scant notice is taken.”¹²⁸ Thus the rape of a woman was treated differently depending on the race of both the victim and the offender: rape of a white woman became a justification for lynching an African-American man, and rape of an African-American woman by a white man became an act to ignore, or for which to blame the woman.¹²⁹

After Wells instigated an anti-lynching campaign in the 1880s,¹³⁰ over the decades women have opposed the idea that the “destruction of men’s lives served to protect and honor women.”¹³¹ In the early 1900s, African-American women’s clubs made the anti-lynching campaign a priority, emphasizing “shaming white society into accepting moral responsibility for its continued devaluation of Black life

Race & Just. 545, 558 (2000).

127. 2 Blanche Weisen Cook, Eleanor Roosevelt, 1933-38, 178 (1999) (citing studies produced under the auspices of the Southern Commission of the Study of Lynching); see also Giddings, *supra* note 123, at 26-27 (discussing the economic motive behind lynchings); Zangrando, *supra* note 122, at 8 tbl. 3 (reporting causes of lynching from 1882-1968—rape was the third highest, after homicides and “all other causes”); *id.* at 8-11 (discussing economic, social, and political explanations of lynchings).

128. Ida B. Wells, On Lynching 74, in *Words of Fire*, (Beverly Guy-Sheftall ed., 1995) (noting that “when the tables are turned [it] is a matter of small moment when the negro woman is the accusing party.”); Giddings, *supra* note 123, at 31 (“[A]s Wells stated publicly, ‘The rape of helpless Negro girls, which began in slavery days, still continues without reproof from church, state or press.’”).

129. Barnard, *supra* note 11, at 11-12 (“White men blamed their [Black women] victims and were exonerated for their crimes.”); Wriggins, *supra* note 40, at 119-21 (discussing how post-Civil War law continued to deny that African-American women were raped). Cf. Hall, *supra* note 126, at 156 (“Recoiling with ‘horror and madness’ from the image of sexual relations between white women and black men, white men regarded their own sexual crossing of the color line as ‘welcome attention’ to black women.”)

130. Barnard, *supra* note 11, at 13-20; Hall, *supra* note 126, at 149.

131. ACLU et al., Brief of Amici Curiae, *Coker v. Georgia* (1977), in 97 *Landmark Briefs and Arguments of the Supreme Court of the Untied States: Constitutional Law* 843, 861 (Philip B. Kurland and Gerhard Casper eds., 1978) [hereinafter *Amici Brief*].

through lynching and rape.”¹³² Finally, albeit late, in 1930, through the Association of Southern Women for the Prevention of Lynching, many white women joined the cause,¹³³ acknowledging that:

[p]ublic opinion has accepted too easily the claim of lynchers and mobsters that they were acting *solely in the defense of womanhood*. . . Women dare no longer permit the claim to pass unchallenged nor allow themselves to be the cloak behind which those bent upon personal revenge and savagery commit acts of violence and lawlessness.¹³⁴

132. Barnard, *supra* note 11, at 27; *id.* at 23-27 (discussing the Clubwomen’s anti-lynching strategy). African-American clubwomen later joined forces with the NAACP which became the principal organization fighting lynching. *Id.* at 27-31 (discussing the creation of the NAACP and the role of African-American women). See generally Mary Jane Brown, *Eradicating This Evil: Women in the American Anti-Lynching Movement 1892-1940* (2000) (presenting a history of African-American and white women activists involved in anti-lynching campaigns).

133. From 1932 to 1936, over 43,000 white women signed pledges against lynching. Hall, *supra* note 126, at 180 tbl. 3. Hall observed that the many years of struggle against lynching that black women had engaged in made the creation of the Association possible. *Id.* at 165. Even then it was not easy: “For decades, black women had filled the front ranks of the fight against lynching. They had developed an analysis of the relationship between racial violence and sexual exploitation that the white ASWPL adopted only haltingly and with mixed feelings.” *Id.* As Emma Coleman Jordan observed, “Perhaps a more balanced explanation of the role of white women in the anti-lynching campaign would confirm the contradiction of their willingness to accept all of the benefits of white supremacy, even as they battled lynching.” Jordan, *supra* note 126, at 556.

Even though many white women eventually opposed lynching, other white women were complicit in African-American men being lynched. As Jordan reminds us:

The history of rape would not be complete without an exploration of the abuse of rape accusations by white women who used their power as whites to terrorize black men, women and children. White women aided and abetted lynching actively by direct participation in the utilization of lynch mobs. They precipitated lynching passive-aggressively by falsely crying rape, staying home and letting their husbands go out to defend their honor with racial barbarity.

Id. at 570-71 (citations omitted); Hodes, *supra* note 96, at 178-97 (discussing the “agency of white women” in charging rape to cover up illicit relationships with African-American men); see also Hall, *supra* note 122, at 340 (noting that “Ida B. Wells-Barnett was threatened with death and run out of town for proclaiming that behind many lynchings lay consensual interracial affairs”).

134. Hall, *supra* note 126, at 194 (quoting ASWPL, *A New Public Opinion of*

In 1976, when the U.S. Supreme Court was considering whether to hold the death penalty an unconstitutional punishment for the crime of rape, several national women's organizations joined with the A.C.L.U. and the Center for Constitutional Rights, as amici, to argue that the punishment was cruel and unusual under the Eighth Amendment.¹³⁵ The brief pointed to both racial and sexual bias. It argued, "the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society, and gross racial injustice created in part out of that patriarchal foundation."¹³⁶

The concerns that animated women in the early 1900s to fight against lynching, and the women in the 1970s to object to the death penalty for the crime of rape, are equally valid today. The State still may seek to invoke racial bias against African-American men to bolster its case when white women are the victims. And, it is only white women's honor that is sought to be vindicated by the application of the death penalty in rape-murder cases, not all women's. Thus, rape-murder death penalty cases reflect a gendered racism that has persisted over time whenever rape has been part of the calculus. We should, as did the women in the early 1900s and in the 1970s, repudiate the State's misuse of rape-murder in furtherance of the death penalty.

Lynching). As Hall noted, "it represented an acceptance of accountability for a racist mythology that white women had not created but that they nevertheless served, a point hammered home by black women's admonitions that 'when Southern white women get ready to stop lynching, it will be stopped and not before.'" See Hall, *supra* note 122, at 338 (citations omitted).

135. Amici Brief, *supra* note 131, at 843 (The National Organization for Women Legal Defense and Education Fund, The Women's Law Project, The Center for Women Policy Studies, The Women's Legal Defense Fund, and Equal Rights Advocates, Inc.).

136. *Id.* at 871 (citing, among other sources, the Wolfgang and Riedel study).

C. The Predominance of the Facts of the Rape-Murder at Sentencing

In at least four states in this country rape-murders constitute a remarkably high percentage of the murders for which men are on death row.¹³⁷ I suggest that this is not an accident: prosecutors understand the power that the facts of an emotion-laden crime such as rape-murder have on sentencers. Constitutionally, sentencers are supposed to consider not only the aggravating circumstances of the murder but also the mitigating circumstances including the defendant's individual character and background in deciding whether to sentence him to life imprisonment or death.¹³⁸ This dual requirement is intended to ensure both consistency, by limiting the crimes that make a defendant eligible for the death penalty, and fairness, by requiring the jury to consider the defendant's human frailties.¹³⁹ Far

137. See *supra* Sections I A and B.

138. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (holding that the sentencer may "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any circumstance of the offense") (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (finding the Georgia death penalty statute constitutional in part because it required the jury to consider "the particularized nature of the crime and the particularized characteristics of the individual defendant").

139. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members a of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. Whether both fairness and consistency can be fulfilled constitutionally is a source of intense disagreement on the Court. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1151-52 (1994) (Blackmun J., dissenting from denial of cert.) (discussing other Justices' recognition of a "'tension' between the need for fairness to the individual and the consistency promised in *Furman*"); *Walton v. Arizona*, 497 U.S. 639, 656, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (finding irreconcilable the Court's requirements that death penalty statutes provide for both consistency through narrowing aggravating circumstances and fairness through allowing broad mitigating circumstances and

too often, however, the latter does not occur. Studies document that many jurors make up their minds on the proper punishment for the defendant while hearing evidence about the defendant's guilt.¹⁴⁰ The crime of rape-murder is especially susceptible to this premature decisionmaking because it combines many of the factors that make the imposition of the death penalty more likely such as the rape itself, the fact that the victims are women or children, and the involvement of torture before death.¹⁴¹

The facts of rape-murder may overwhelm proper consideration of mitigating circumstances that would support a life sentence. This is certainly problematic in an individual case because it means that the defendant's frailties, such as mental illness, long-term impairments from childhood abuse, or mental retardation, are not given due regard. The dominance of the crime also prevents us from acknowledging the connection between the individual defendant's circumstances and broader societal ills.

The tension between giving full consideration to the crime and to the defendant's human frailties is exemplified by an unusual published exchange between Justices Blackmun and Scalia, prompted by Justice Blackmun's announcement that he would no longer find the death penalty constitutional. In a written dissent to the denial of certiorari in *Callins v. Collins*, Justice Blackmun concluded that he "no longer shall tinker with the machinery of death" because it was "virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in

concluding that he would no longer "vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted").

140. Williams J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 *Cornell L. Rev.* 1476, 1495 (1998) (reporting that in eleven states studied, almost one-half of jurors decided what punishment was appropriate before the penalty phase began).

141. See *supra* note 8.

the affirmative.”¹⁴² This was a significant statement by Justice Blackmun because he was one of the Justices who had upheld the constitutionality of the death penalty in 1976.¹⁴³ In *Callins*, almost twenty years later, he concluded, “It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life’s understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.”¹⁴⁴

Justice Scalia, in response, criticized Justice Blackmun for, among other matters, the case he chose in which to announce his changed view.¹⁴⁵ Justice Scalia characterized *Callins* as “one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly.”¹⁴⁶ He suggested that it would have been more difficult to find the death penalty unconstitutional in a more brutal murder such as in *McCollum v. North Carolina*¹⁴⁷ where an “11-year-old girl [was] raped by four men and then killed by stuffing her panties down her throat.”¹⁴⁸

McCollum, however, proved to demonstrate Justice Blackmun’s conclusion that the death penalty cannot be fairly applied. True, the facts of the rape-murder were horrifying, but, as Blackmun noted, “there is more to the story.”¹⁴⁹ *McCollum* was mentally retarded, and only nineteen years old.¹⁵⁰ Moreover, of the four individuals involved in the crime, *McCollum* was the only one convicted of murder and sentenced to death despite the fact that “[h]e was not the one who initiated the rape, the one who

142. *Callins*, 510 U.S. at 1145 (Blackmun J., dissenting from denial of cert.).

143. *Id.* at 1147.

144. *Id.* at 1145-46.

145. *Id.* at 1142 (Scalia, J., concurring in cert. denial).

146. *Id.*

147. 512 U.S. 1254 (1994).

148. *Callins*, 510 U.S. at 1142.

149. *McCollum*, 512 U.S. at 1254.

150. *Id.* (noting that the jury that sentenced *McCollum* to death found seven mitigating factors including that he was mentally retarded, easily influenced by others, and under a mental and emotional disturbance at the time of the crime).

proposed the murder, or the one who actually committed the murder.”¹⁵¹ Thus the full facts of McCollum’s case, those of his individual characteristics as well as the circumstances of the crime, showed that the system does not “accurately and consistently determine which defendants most ‘deserve’ to die.”¹⁵²

This tension between considering mitigating circumstances or only the facts of the crime is present in other rape-murder cases.¹⁵³ In one of the Florida cases, *Hall v. State*,¹⁵⁴ Chief Judge Barkett dissented from the Florida Supreme Court’s decision upholding Hall’s death sentence. Barkett maintained that while the crime was heinous, Hall was not among the most culpable of murderers:

A young woman, seven months pregnant, was raped, beaten and shot to death. The horrible nature of the crime is uncontroverted, and it is certainly among the types of offenses for which the death penalty may be imposed. However, Freddie Lee Hall is not among the most culpable of murderers. Hall’s judgment, thought processes, and actions are unquestionably affected by his mental retardation. He cannot understand right from wrong in the way that most members of our society do, and while he should spend the rest of his life in prison, he should not be executed.¹⁵⁵

151. *Id.* See also Gretchen Engel, *Even Brutal Cases Show Death Penalty Is Unconstitutional*, N. Y. Times, Feb. 27, 1994, § 4 (Editorials/Letters), at 14 (explaining sentences of the other participants: one was convicted only of rape, the other two were not tried because they were juveniles).

152. *McCollum*, 512 U.S. at 1254.

153. See e.g., *State v. Cooley*, 544 N.E.2d 895, 919 (Ohio 1989) (finding aggravating circumstances of rape and kidnapping outweighed mitigating evidence of mental disorder, severe childhood abuse, and other factors that “suggest[ed] that Cooley may have been less responsible for his acts than were most people”); *State v. Benner*, 533 N.E.2d 701, 720 (Ohio 1988) (Wright, J., dissenting) (dissenting on ground that the majority did not find error in three-judge sentencing panel considering the “brutal and depraved manner” in which the defendant killed the victims, when, by statute, the nature and circumstances of the offence may be only considered as mitigating).

154. 614 So. 2d 473 (Fla. 1993).

155. *Id.* at 481-82. Barkett recounted Hall’s other difficulties in addition to his

The majority of the court found that the aggravators, including that the crime was heinous, atrocious, or cruel (discussed supra in Section I), outweighed the mitigators for this "cruel, cold-blooded murder."¹⁵⁶

While the tension between considering mitigating circumstances and the facts of the crime is not unique to rape-murder cases,¹⁵⁷ it is noteworthy that Justice Scalia chose a rape-murder as the type of case with which to challenge Justice Blackmun's repudiation of the death penalty. It speaks to the power of the crime of rape-murder itself to make jurors, and us as a community, ignore individual frailties, be they mental retardation, lasting impairments from childhood abuse, or mental illness.

Many of the men who are sentenced to death suffer from mental and emotional impairments.¹⁵⁸ The few studies conducted of men on death row found that they often have extensive neurological damage, psychological difficulties, and histories of extreme childhood abuse.¹⁵⁹ As

mental retardation. As the trial court found, "he suffers from organic brain damage, has been mentally retarded all of his life, suffers from mental illness, suffered tremendous emotional deprivation and disturbances throughout his life, suffered tremendous physical abuse and torture as a child, and has learning disabilities and a distinct speech impediment that adversely affected his development." *Id.* at 479-80. The childhood abuse Hall suffered included:

[His] mother tied him in a 'croaker' sack, swung it over a fire, and beat him; buried him in the sand up to his neck to 'strengthen his legs'; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks.

Id.

156. *Id.* at 479.

157. See, e.g., Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 334-35 (1983) (explaining that in all death penalty cases, the punishment phase inquiry is "whether the defendant, notwithstanding his crimes, is a person who should continue to live").

158. Based on twenty years of studying the lives and background of capital defendants, Professor Craig Haney concluded that a "nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile.'" Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 580 (1995).

159. See Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*,

with Henry Lee McCollum and Freddie Lee Hall, these impairments may contribute to a person's lack of judgment, inability to consider alternative courses of action, and inappropriate, often violent, behavior.¹⁶⁰ This may be especially true in tense and volatile situations such as those involving rape and murder.¹⁶¹ The import of these mental and emotional deficiencies in the death penalty

143 Am. J. Psychiatry 838 (1986) (reporting findings of study of 15 individuals on death row); Marilyn Feldman et al., Filicidal Abuse in the Histories of 15 Condemned Murderers, 14 Bull. Am. Acad. Psychiatry & L. 345 (1986) (reporting incidence of extreme childhood abuse among same 15 individuals); Dorothy Otnow Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am. J. Psychiatry 584 (1988) (reporting findings on juveniles on death row). See also Pamela Y. Blake et al., Neurologic Abnormalities in Murders, 45 Neurology 1641 (1995) (finding extensive evidence of severe childhood abuse, brain damage, and mental illness among study of 31 murderers). See generally Haney, *supra* note 158, at 600-01 (describing social histories of capital defendants and noting, "[m]any capital defendants have led lives that are the criminogenic equivalent of being born into hazardous waste dumps").

While the exact number of those on death row who are mentally retarded is not known, experts believe that about 10% of the 3,600 on death row are mentally retarded. Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. Times, Aug. 7, 2000, at A1 (citing James Ellis, Professor of Law at the University of New Mexico and leading expert on mental retardation).

160. See, e.g., Dorothy Otnow Lewis, From Abuse to Violence: Psychophysiological Consequences of Maltreatment, 31 J. Am. Acad. Child & Adolescent Psychiatry 383, 388 (1992) (concluding that a history of childhood abuse, mental impairments and brain damage create a "matrix for violence" because the person's ability to make rational judgments, understand consequences and make appropriate choices is fundamentally altered); see also Blake, *supra* note 159, at 1646 (observing that the "interaction of abuse, paranoia, and neurologic dysfunction provides the matrix of violence"); Phyllis L. Crocker, Childhood Abuse and Adult Murder: Implications for the Death Penalty, 77 N.C. L. Rev. 1143, 1156-76 (1999) (discussing long term effects of childhood abuse and how it may contribute to the commission of murder for which a person may be sentenced to death).

161. Dorothy Otnow Lewis et al., Toward a Theory of the Genesis of Violence: A Follow-Up Study of Delinquents, 28 J. Am. Acad. Child & Adolescent Psychiatry 431, 436 (1989) (explaining the interactive effects of impairments and noting how a stressful environment will "increase the risk and severity of adult violent criminality"); Blake, *supra* note 159, at 1646 ("[A] normal psychological development caused by long-standing exposure to severe abuse, together with paranoia and an impaired ability to deal with frustrating environmental factors due to [brain damage], may provide an explanation of the commission of a homicidal act.").

context is not that they excuse the defendant's commission of the crime, but that they explain his conduct in a way that enables the sentencer (and us) to see that he should not be sentenced to death.

It is especially important in rape-murder cases for feminists to acknowledge the import of an individual defendant's impairments. Rape-murder is the kind of case in which we might readily be inclined to blind ourselves to the character and background of the individual defendant and focus on the facts of the crime.¹⁶² These are horrible crimes: Rape-murder is so closely related to rape¹⁶³ that, to the extent we have been or fear being raped, we may identify, personally, with the victim.¹⁶⁴ We may believe, therefore, that the severest punishment is the only appropriate response.¹⁶⁵

I suggest that even in the context of rape-murder, we must be willing to step back from the horrifying nature of the crime and consider the individual defendant and the culture in which he was raised and lived. Defendants who are convicted of and sentenced to death row for rape-murder are among those who were severely physically or sexually abused as children, or were mentally retarded or

162. See, e.g., Bonner & Rimer, *supra* note 159, at A14 (quoting a Texas District Attorney who refused to believe clemency was appropriate for a mentally retarded man because of "the heinous nature of the crime. . . . Here's a woman abducted off the street, kidnapped, raped and stabbed 20 times.").

163. Women often report that the rapist told them to be quiet or he would kill her. See, e.g., Nancy Venable Raine, *After Silence* 20 (1998) (reporting rapist saying "Shut up, you shut up, you bitch, or I'll kill you"); Estrich, *supra* note 44, at 1087 (stating that rapist said, "Push over, shut up, or I'll kill you").

164. See Wriggins, *supra* note 40, at 130 ("[T]he fear and threat of rape influences many women who are never actually raped.").

165. Indeed, the very availability of the death penalty as a punishment may foster this belief: One might argue that we show disrespect for the victim of rape-murder if we do not impose the most stringent sentence. But see Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *Fordham Urb. L.J.* 1599, 1599-1601 (2000) (discussing differing responses of victims' families to whether the defendant should be sentenced to death or life imprisonment). The problem with the argument is that it ignores flaws that exist with the death penalty, including those that directly relate to victims. For example, it ignores the racial and gender biases that permeate the application of the death penalty to rape-murder cases.

mentally ill.¹⁶⁶ The difficulties in judgment and behavior that they suffered due to these impairments persisted, unabated,¹⁶⁷ into adulthood and undoubtedly affected them during the commission of the crime.¹⁶⁸

As each defendant lived with his own personal dysfunctions, he lived in a society where women are raped on a daily basis.¹⁶⁹ I do not mean to suggest a direct

166. See, e.g., *Cole v. State*, 701 So.2d 845, 852-53, & n.5 (Fla. 1997) (referring to mitigating evidence of mental incapacity, and physical and psychological childhood abuse, all discounted by the trial court); *Bogle v. State*, 655 So.2d 1103, 1105 (Fla. 1995) (reporting mitigating evidence including physical and mental childhood abuse, drug use encouraged by father, personality disorder, and mental disturbance at the time of the crime); *Doyle v. State*, 460 So.2d 353, 358 (Fla. 1985) (Overton, J., concurring in part and dissenting in part) (reciting mitigating evidence including low I.Q., borderline mental retardation, and organic brain deficits). The existence of these types of impairments is often a reason Florida Supreme Court vacates death sentences on appeal. See *infra* note 58 (discussing examples).

The question is sometimes raised as to how I might feel about a defendant who committed rape-murder (or any other death-eligible murder) who did not have any impairments. Based on my experience representing men on death row for five years, and my continued work in the area, I find this possibility to be virtually non-existent. See Welsh White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 2 U. Ill. L. Rev. 323, 342 (1993) (reporting a capital defense attorney as stating about mitigating evidence, "If the attorney did not find it, it was because he 'didn't look hard enough.'").

167. See Haney, *supra* note 158, at 574-78 (discussing the effects of the failure of juvenile institutions and adult prisons to address trauma and mental impairments); cf. Abby Stein & Dorothy Otnow Lewis, *Discovering Physical Abuse: Insights from a Follow-Up Study of Delinquents*, 16 *Child Abuse & Neglect* 523, 523 (1992) (discussing how adults deny or minimize their own childhood abuse).

168. See *infra* notes 158-61 and accompanying text (discussing how impairments contribute to acts of violence).

169. The act of rape alone shows profound contempt for a woman. It is compounded by the poor treatment women who are raped receive in our criminal justice system. While in theory we condemn rape, we do not do enough to protect women from it, either within our culture or legal system. See, e.g., Majority Staff of Senate Comm. on the Judiciary, 103d Cong., *The Response to Rape: Detours on the Road to Equal Justice 2* (1993) (reporting on how the criminal justice system fails victims of rape, noting that "98% of the victims of rape never see their attacker caught, tried, and imprisoned"). The poor treatment of rape victims is part of the continuum of how badly women are treated by our courts and in our culture. See, e.g., Linda L. Ammons, *Dealing With The Nastiness: Mixing Feminism And The Criminal Law In The Review Of Cases Of Battered Incarcerated Women: A Tenth Year Reflection*, 4 *Buff. Crim. L. Rev.* 891 (2001) (discussing progress that has been made, and not made, in how battered women

connection between mental impairments and crimes of violence against women. Indeed, much progress has been made in establishing that men who rape women are not “crazy” but more normal than we might like to know.¹⁷⁰ The connection that exists among these forces is that they are all part of the mix that contribute to how the defendant thinks and behaves.

As a matter of deciding whether the defendant is guilty of committing the rape-murder we may not want to let any of these factors alter our judgment about his degree of criminal responsibility.¹⁷¹ As a matter of determining punishment, however, we should be willing to consider as mitigating how the circumstances of rape and murder itself,¹⁷² as well as circumstances of the defendant’s

are treated).

170. See Baker, *supra* note 98, at 582.

[M]ost rapists are not crazy. Most men who commit sexual assault suffer from no diagnosable mental disorder. They rape in conformity with, rather than in deviance from, social norms. Thus what is distinctive about rape is not that rapists are crazy and recidivistic, but that everyone assumes that rapists are crazy and recidivistic.

Id. Diana Scully & Joseph Marolla, “Riding the Bull at Gilley’s”: Convicted Rapists Describe the Rewards of Rape 109, 124 in *Confronting Rape and Sexual Assault* (Mary E. Odem & Jody Clay-Warner eds., 1998) (concluding, based on study of convicted rapists, that “it is not necessary to resort to pathological motives” to explain rape, instead, rape “can be viewed as the end point in a continuum of sexually aggressive behaviors that reward men and victimize women”); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 *U.C. Davis L. Rev.* 1013, 1022-25 (1991) (discussing studies that show rapists are not mentally deviant but similar to “normal” men); see also Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 *Vand. L. Rev.* 869, 891 (1996) (remarking that “enormous amounts of cultural resources are deployed to maintain” the image of “the violent, half-crazed rapist hiding in the bushes”).

171. See Hall, 614 *So.2d* at 482 (Barkett, J., dissenting); but see Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 *N.C. L. Rev.* 731 (1996) (exploring how social environmental factors may affect a person’s mental functioning and serve as the basis for an excuse to criminal liability).

172. For example, in a rape-murder case, death by strangulation may suggest less premeditation or greater impulsiveness. As the Florida Supreme Court recognized, “[i]t is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which

background and current mental and emotional impairments, affected his behavior. On a broader scale, we need to acknowledge how aspects of our culture, be they a lack of respect for women or lack of concern for those who are mentally impaired, infiltrate the commission of rape-murder. When we ignore how the defendant became a man who raped and murdered a woman, and only focus on the bare facts of the crime, we fail to acknowledge the dire consequences of the uncaring nature of our society.¹⁷³

III. CONCLUSION

The death penalty is not good for women. In the case of rape-murder, it is used most often to vindicate the honor of white women, not women of color. This was true historically for the crime of rape and continues to be true today for rape-murder. The racial and sexual biases about rape continue to infuse how it is treated in the criminal justice system: the State is able to rely on sexual and racial myths about African-American men and white women, and discount the rape-murder of African-American women. Moreover, the overly high representation of men convicted and sentenced to death for rape-murder row in Ohio, Florida, Colorado, and Oregon attests to the potency of this emotionally laden crime. Outrage at the crime of rape-murder distracts sentencers, and us as a society, from adequately considering the individual defendant's background and probable mental impairments. The

triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." Doyle, 460 So.2d at 358. As a matter of punishment this could make the defendant less worthy of death. I thank Margery Malkin Koosed for suggesting this possibility.

173. Craig Haney observed that the social histories of death row defendants are:

much more about *us*, about our priorities as a society, about the bitter fact that we somehow feel more comfortable expending scarce resources on the process of killing than on the task of creating lives worth living. These social histories seem to say much more about these things than they do about individual human evil and abject depravity.

Haney, *supra* note 158, at 609.

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application of the death penalty to a defendant may act as a salve in an individual case, but it is a ruse that allows us to ignore the deep social problems that contributed to who the individual defendant is and to his raping and murdering a woman.