Chivalry is not Dead: Murder, Gender, and the Death Penalty

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INTRODUCTION

In his 1962 memoir, Clinton Duffy, the former warden of San Quentin Prison, tells a story about Eithel Spinelli, the first woman to be executed in California. In 1941 when Spinelli was on California’s death row, thirty male inmates at San Quentin prison sent a petition to Duffy:

A lengthy document, it said, among other things: that Mrs. Spinelli’s execution would be repulsive to the people of California; that no woman in her right mind could commit the crime charged to her; that the execution of a woman would hurt California in the eyes of the world; that both law and the will of the people were against the execution; that Mrs. Spinelli, as the mother of three children, should have special consideration; that California’s proud record of never having executed a woman should not be spoiled.

The signers offered to draw straws to take her place in the gas chamber. For Duffy, the petition by these hardened criminals, themselves slated for execution, confirmed the chivalrous reaction evoked by the prospect of executing a woman. Duffy, himself, “was sure that, for no other reason than her sex, her sentence would be commuted to life imprisonment.” The inmates’ reaction cannot be explained on the basis that Spinelli herself was a particularly attractive or sympathetic person. According to Duffy, Spinelli was the head of a criminal gang and apparently had directed the killing of a gang associate to prevent him from “talking” about

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1 San Quentin is the prison where executions in California take place.
3 Id. at 135-36.
4 Id. at 136.
6 DUFFY, supra note 2, at 134.
another gang murder. She was the “coldest, hardest character, male or female” Duffy had ever known and also utterly unattractive, “a hag, evil as a witch, horrible to look at.”

At the time of Spinelli’s execution, chivalric values regularly found expression in the law generally, in the administration of criminal justice, as well as in the application of the death penalty. In the intervening years, especially recently, chivalry in the law has come under attack. Thus, for feminist scholars, the story of the San Quentin inmates’ gallantry—their reluctance to see a female murderer executed—is reflective of archaic paternalism and gender stereotyping of women as the weaker, more passive sex. Do chivalric norms affect the administration of the present-day death penalty, as they apparently did in Spinelli’s time? While scholars have written about the significant gender-of-defendant disparities in death sentencing, this broader question has yet to be addressed. Using new empirical data drawn from a recent study of death sentencing in California, we explore whether chivalric norms might explain sentencing outcomes in death penalty cases, i.e., whether there is a discernible “chivalry effect,” and, if so, how such a result might challenge constitutional values.

Chivalry—when it emerged as a comprehensive code of conduct among knights in the High Middle Ages—incorporated a broad set of cultural norms. Chivalry was a response to a widespread concern with the lawless and violent behavior of knights at a time where there

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7 Id. at 136. That Spinelli was in fact executed despite the chivalric response may be explained by the fact chivalry does not protect all women equally and that Spinelli’s crime, her behavior, and even her appearance were altogether unfeminine. See Victor L. Streib, Death Penalty for Female Offenders, 58 U. CIN. L. REV. 845, 879 (1990); Joan W. Howarth, Executing White Masculinities: Learning From Karla Faye Tucker, 81 OR. L. REV. 183, 211 (2002) (“Most of the women charged with capital murder are not sufficiently feminine—because of poverty, mental illness, race, or the violent agency of the crime of which they are accused, to earn the full protection of womanhood through informal immunity from being charged as capital defendants.”).
8 See infra, Part I.
9 Shapiro, supra note 5, at 456-57.
10 Jenny E. Carroll, Note, Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice, 75 TEX. L. REV. 1413, 1418 (1997).
11 See infra, Part I.C.
12 The California death penalty provides an ideal vehicle to examine role of chivalry in the criminal law because of the sweeping discretion afforded prosecutors and juries in the death selection process and because of the availability of substantial empirical evidence on the operation of the scheme. See infra, Part II.
13 The term “chivalry” was used in other senses by medieval writers, see Richard Kaeuper, Chivalry and Violence in Medieval Europe 4 (1997), but our concern is with chivalry as a code of conduct.
14 Although there is no doubt that chivalry as an ideal took hold at some point in the High Middle Ages, its temporal and geographical scope is unclear and to the extent to which knights adhered to the code is unknown. John Fraser, America and the Patterns of Chivalry 38-39 (1982).
existed no state authority capable of controlling them. While gallantry, as expressed by the San Quentin inmates, was one of the three principal virtues of the chivalrous knight, even more important was honor. For the chivalrous knight, honor had an intimate relationship with violence, and the essence of chivalry was its regulation of knightly violence. “The vast and complex literature of chivalry celebrates knightly violence even as it attempts to reform or deflect it into channels where it would produce less social damage.” Thus, chivalry extolled the use of violence in certain circumstances, placing the highest value on winning honor with knightly prowess. Most honorable was the display of prowess during war, but honor could also be won through the use of violence in tournaments or private disputes. As one scholar of chivalry explains,

Only after reading scores of works of chivalric literature can we fully appreciate the utterly tireless, almost obsessional emphasis placed on personal prowess as the key chivalric trait. Not simply one quality among others in a list of virtues, prowess often stands as a one-word definition of chivalry in these texts. Consequently, violence was an accepted means for settling any dispute between knights, especially any perceived affront to honor, and violence might be precipitated by even apparently trivial affronts, e.g., an assertion of better lineage, a dispute over whose lady is fairer, a request for a knight’s name, or an answer to the question, “Why are you so sad?” Violence was also honorable when used to win a lady from another knight or to protect ladies.

Chivalry was a code of conduct for men because women could not earn honor through physical or martial prowess. By the same token, the killing of a woman could not be honorable because the killing of a woman would necessarily display a lack of gallantry. Chivalric literature was of two minds in its understanding of women, sometimes idealizing them as inspiring knights to great achievement and sometimes denouncing them as a distraction and impediment to real male concerns, but always judging them in terms of whether they brought honor to men. Insofar as chivalry addressed relations between men and women, “women seem to have been

15 KAEUPER, supra note 13, at 29 (“As Europeans moved into one of the most significant periods of growth and change in their early history, they increasingly found the proud, heedless violence of knights, their praise for settling any dispute by force, for acquiring any desired goal by force on any scale attainable, an intolerable fact of social life. Such violence and disorder were not easily compatible with other facets of the civilization they were forming.”).
16 F. J. C. Hearshaw, Chivalry and its Place in History, in CHIVALRY 1, 27-33 (Edgar Prestage ed., 1928). The third virtue was Christian piety. The chivalrous knight was required to believe all that the Church taught and to defend the Church. See generally, id. at 1-33; LEON GAUTIER, CHIVALRY 9-15 (1959). In our post-Reformation, secular state, that virtue seems not to exert significant influence on our culture and, in particular, on the administration of the death penalty.
17 KAEUPER, supra note 13, at 7-9.
18 Id. at 160.
19 Id. at 135 (citations omitted).
20 Id. at 139.
21 Id. at 226-27.
22 Id. at 213.
23 Id. at 211-12.
considered property . . . prizes to be won by knightly prowess or to be defended against the prowess of others."  

The custom and policy at the time were as follows: any knight meeting a damsel who is alone should slit his own throat rather than fail to treat her honourably, if he cares about his reputation. For if he takes her by force, he will be shamed forever in all the courts of all lands. But if she is led by another, and if some knight desires her, is willing to take up his weapons and fight for her in battle, and conquers her, he can without shame or blame do with her as he will.

Medieval society was divided into rigid classes, and chivalry was a class institution, restricting its code of honor and courtesy peculiarly to members of its own class. Consequently, the injunction against taking a damsel by force apparently applied only to damsels of the knightly class. The rules of chivalry were very clear that raping or otherwise harming a “lady” was unacceptable. Yet no such disapproval applied to the rape of peasant women. In short, chivalry demanded gallantry towards a certain subset of women, “ladies,” who embodied ideals and stereotypes of womanhood and femininity.

Chivalry enforced strict gender roles—because women could not achieve honor in the world and, in fact, would be in danger in the world, their place was in the home. Despite the gallantry demanded of knights towards ladies in general, chivalry had no solicitude for the knight’s wife. The honorable knight, as ruler of his home, was permitted to, in fact, expected to, physically punish his wife if she misbehaved. “[T]he ‘Age of Chivalry’ was a hard time for victims of domestic violence, when physically ‘chastising’ one’s wife was considered an honorable knight’s duty.”

These virtues of chivalry—honor and gallantry—become our standards for evaluating whether there exists a chivalry effect in the administration of the death penalty. In Part I, by way of background, we explore the role of chivalry in the law and the recent attacks on it. In particular, we review the evidence that chivalry has played a role in decisions of the Supreme Court, in the operation of the criminal justice system generally, and in administration of the death penalty. In Part II, we describe the operation of the California death penalty scheme and the current empirical research which is the subject of this article. This research examine cases where an adult defendant was found guilty of a first degree murder and was statutorily death-eligible (such murders being referred to as “capital murders”) to determine the existence of patterns in death sentencing. In Part III, we analyze disparities in the application of the death penalty in the case of three “gendered” forms of capital murder: gang murders, rape murders, and domestic violence murders. In Part IV, we examine disparities in sentencing outcomes by

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24 Id. at 226.
25 Id. at 227 (citing Chretien’s Lancelot).
26 Hearnshaw, supra note 16, at 31.
27 KAEUPER, supra note 13, at 290 (citing the writings of Andrew the Chaplain).
gender of defendant and gender of victim. We conclude that the disparities we identify can be explained by reference to chivalric norms and that when prosecutors and jurors are given unguided discretion to make life and death decisions, those deeply ingrained norms may play a significant role in determining who lives and who dies.

I. CHIVALRY IN THE LAW

Chivalry has exerted a powerful influence on American culture throughout the nation’s history, particularly in the South, where the pursuit and defense of honor has often justified violence, and where the modern death penalty has flourished. As a persistent element of American culture, chivalry was, until recently, an accepted feature of the law and legal institutions. In recent years, feminist scholars and lawyers have challenged the role of chivalric norms in constitutional interpretation, in criminal justice, and even in the use of the death penalty.

A. Chivalry and the Supreme Court

For most of this country’s history, the Supreme Court endorsed a chivalric view of women and women’s place in society, emphasizing the distinct roles that women and men were meant to occupy, in cases such as Bradwell v. State (1872), Muller v. Oregon (1908), and Hoyt v. Florida (1961). In Bradwell, the Court upheld Illinois’s refusal to allow women to practice law and explained: “The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother.” In Muller, the Court upheld a state law limiting the hours a woman could work, citing women’s “physical structure and performance of maternal functions” as justifying protective legislation. In Hoyt, the Court upheld a state law excusing women from jury service, because, as the “center of home and family life,” women had

31 See generally, FRASER, supra note 14. See also, Andrew Taslitz, Willfully Blinded: On Date Rape and Self-Deception, 28 Harv. J. L. & Gender 381, 407 (2005) (“[T]hough the term is rarely used, there is ample empirical evidence of a powerful ‘chivalry’ norm continuing in modern American culture.”).
33 The eleven states of the former Confederacy have conducted 73% of the post-Furman executions. Death Penalty Information Center, Facts About the Death Penalty available at http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited on February 17, 2011).
34 83 U.S. 130 (1872).
35 208 U.S. 412 (1908).
37 83 U.S. at 141.
38 208 U.S. at 421.
“special responsibilities” justifying relief from civic duties. Thus, in these cases and others, the Court expressed, and relied on, the chivalric view that a woman’s place was in the home, and that it was men’s job to engage in civic life and to protect women.

In the 1970s, in response to the critique of second-wave feminists, the Court’s views changed. In a string of cases addressing women’s participation in the public sphere, the Court held that discrimination—even “positive” discrimination—with regard to women was invidious and denied them their rightful place in society. The Supreme Court first articulated this principle in Reed v. Reed, where it held that a law that gave preference to men in the administration of estates violated the Equal Protection Clause. The Court found that, while there was a legitimate goal of reducing the workload of the probate courts, choosing administrators solely on the basis of their sex was not a rational way to accomplish that goal. Two years later, the Court emphasized that even laws that intended to benefit women are unconstitutional if they differentiate between the sexes. In Frontiero v. Richardson, writing for the Court, Justice Brennan explicitly rejected the reasoning of Bradwell, writing, “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” The Court reiterated this understanding in Mississippi Univ. for Women v. Hogan, holding “... if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”

The Court extended this anti-chivalric reasoning into the employment context in decisions under Title VII. In Dothard v. Rawlinson, the Supreme Court considered a challenge to an Alabama Department of Corrections regulation that established gender criteria for assigning correctional officers to “contact positions” in prisons. While holding for the state, the Court invoked the language of Frontiero to note that “[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”

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39 368 at 62.  
40 404 U.S. 71 (1971).  
41 404 U.S. at 76.  
42 Reed v. Reed, 404 U.S. 71, 76 (1971).  
46 433 U.S. at 325.  
47 433 U.S. at 335. The Court cited other employment discrimination cases where federal courts had struck down regulations that aimed to protect women from dangerous or “unfeminine” jobs. See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (“Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity. This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.”) (internal citations omitted); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) (“Men have
Union v. Johnson Controls\textsuperscript{48} the Supreme Court found that a workplace policy that excluded women of childbearing years from a job with exposure to lead violated Title VII. Justice Blackmun highlighted the paternalism of the rule in the opinion, stating “The bias in Johnson Controls’ policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”\textsuperscript{49} The Supreme Court seemed to be making clear that protectionist laws and practices that prevented women from making decisions about their participation in the workforce and civil society were unconstitutional.

\textit{J.E.B. v. Alabama ex rel. T.B.}\textsuperscript{50} may be the high water mark of the Supreme Court’s refusal to allow government actions to be based on gender stereotypes. J.E.B. was a paternity action prosecuted by the state of Alabama on behalf of the mother against J.E.B., the putative father. During jury selection, the state, not irrationally, used its peremptory strikes to remove all the male jurors, assuming that they would identify with the putative father, while, conversely, J.E.B. used his strikes to remove female jurors. Because the jury \textit{venire} was two-thirds women, the state succeeded in empanelling an all-female jury, which found against J.E.B.. The Court found the state’s actions unconstitutional. The Court pointed out the history of excluding women from juries, and noted that this exclusion was based on stereotypes of women as too fragile for the duties of civic life.\textsuperscript{51} The Court was forceful in rejecting reliance on stereotypes, even those stereotypes that might be based on a “shred of truth.”\textsuperscript{52} The Court held that distinguishing between men and women based on stereotypes about the differences between the sexes violates the Constitution, stating: “Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”\textsuperscript{53} Thus, even though the reliance on gender stereotypes in this case worked to the mother’s advantage, the Court understood that such reliance would, in the end, disadvantage women.\textsuperscript{54}

always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.”\textsuperscript{54}

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\item \textsuperscript{48} 499 U.S. 187 (1991).
\item \textsuperscript{49} 499 U.S. at 197.
\item \textsuperscript{50} 511 U.S. 127 (1994).
\item \textsuperscript{51} 511 U.S. at 131-32.
\item \textsuperscript{52} 511 U.S. at 140.
\item \textsuperscript{53} J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 130-31 (1994)
\item \textsuperscript{54} The Court’s progress towards elimination of chivalry in its legal reasoning in cases involving women’s entrance into, and acceptance in, various aspects of the public sphere has not been a smooth road, nor one embraced by all members of the court. For example, in \textit{United States v. Virginia}, 518 U.S. 515 (1996), although the majority held, that the Virginia Military Institute’s (VMI) policy of excluding women from admission violated the constitutional guarantee of equal protection, Justice Scalia’s dissent was, in part, a eulogy for the vanishing role of chivalry in our culture. In arguing that VMI should have been allowed to exclude women from admission, Scalia extolled the value of the “manly ‘honor’” that he believed VMI stood for. \textit{Id.} at 601. He quoted from VMI’s “Code of a Gentleman,” the chivalric rules by which the students at VMI were expected to conduct their lives:
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Despite this apparent progress, chivalry has continued to play a role in cases involving access to, and control over, women’s bodies. For example, in *Michael M. v. Superior Court*, the Court upheld California’s gender-specific statutory rape law (which criminalized sex with underage girls, but not sex with underage boys) by finding that it served the government interest of preventing teenage pregnancy because “males alone can ‘physiologically cause the result which the law properly seeks to avoid.’” In upholding the gendered law, the Court reinforced stereotypes about women, men, and sex—that, when it comes to sex, the male is the aggressor and the female the passive victim, and, consequently, females need the protection of the state. Feminist critics of California’s law and the Court’s holding have argued that “[t]he state restricts the young woman’s sexual behavior for reasons related to sexist notions of what makes females valuable. The state does not merely restrict the young woman’s freedom; it also treats her sexuality as a thing that has a value of its own and must be guarded.”

*Michael M.* can be viewed as just one link in a chain of cases in which the Court has reinforced chivalric sex stereotypes by failing to acknowledge how the state’s regulation of matters involving women’s physical bodies reifies gender stereotypes. The chain runs from *Roe v. Wade* (which treated abortion as a “purely physiological phenomenon” rather than examining the potential sex discrimination inherent in abortion regulation), through *Geduldig v. Aiello* and *General Electric Co. v. Gilbert* (holding that pregnancy discrimination is not sex discrimination), to the Court’s recent and troubling decision in *Gonzales v. Carhart* (upholding federal regulation of late-term abortions as serving the government’s interest in protecting women).

Without a strict observance of the fundamental Code of Honor, no man, no matter how “polished,” can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.  

*Id.* at 602. After reciting the Code of a Gentleman, Scalia lamented “I do not think any of us, women included, will be better off for its destruction.”  

*Id.* at 603.  

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56 *Id.* at 457 (quoting *Michael M. v. Superior Court*, 601 P.2d 572, 575 (Cal. 1979)). This statement is baffling; it is axiomatic that males alone cannot cause pregnancy.  
58 410 U.S. 113 (1973).  
63 According to Reva Siegel, the Court’s apparent reliance on gender stereotypes in this area occurs because “[t]he Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender.” Reva Siegel, *Reasoning from the Body: A Historical Perspective on*
In Carhart, as justification for banning on an abortion procedure thought by many physicians to be safer for their patients than alternative procedures, the government argued that abortion causes serious mental health problems for women, and thus is harmful to women who choose it.\textsuperscript{64} The Act was thus positioned, in part, as a public health measure to protect women from psychological harm.\textsuperscript{65} Justice Kennedy, writing for the court, endorsed this view, relying on affidavits from women “who claimed to have been coerced into and harmed by abortion.”\textsuperscript{66} Justice Kennedy echoed the theme used by the proponents of the Act, questioning a woman’s capacity to make rational decisions with the observation that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”\textsuperscript{67} In addition to endorsing a view that women cannot make rational health care decisions for themselves, the Court also implied that women’s true or most important identity role was that of a mother, with Justice Kennedy explaining that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”\textsuperscript{68}

Thus, the Carhart majority relied upon two chivalric themes—that women are emotional and cannot be trusted to make rational decisions as to their interests (and therefore need the protection of men, in the guise of the state) and that a woman’s true calling is motherhood—and thereby resurrected a reliance on chivalry that the Court had seemed to reject in other contexts. As Justice Ginsburg charged in dissent: “This way of thinking reflects notions about women’s place in the family and under the Constitution—ideas that have long since been discredited. . . . this Court has repeatedly confirmed that ‘[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society . . . .’”\textsuperscript{69}

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\textit{Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 264-65 (1992); see also Franklin, supra note 59 at 128.}
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\textsuperscript{64} Reva B. Siegel, \textit{The Right’s Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument}, 57 DUKE L. J. 1641, 1642 (2008) [hereinafter \textit{The Right’s Reasons}].


\textsuperscript{66} \textit{The Right’s Reasons, supra note 64}, at 1642.

\textsuperscript{67} 550 U.S. at 159.

\textsuperscript{68} 550 U.S. at 159. Reinforcing the idea that women’s one true calling is motherhood, Justice Kennedy ignored the fact that the women he was referring to were precisely women who did not want to become mothers and who did not consider the fetus they carried to be a child. \textit{See} Manian, supra, n. 65 at 225 (“\textit{Carhart’s} portrayal of women evokes a century-old societal view of femininity [and] reflects a gender-stereotyped view of women’s nature.”).

\textsuperscript{69} 550 U.S. at 185, \textit{quoting in part} Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992). At least one author, however, has argued that the majority’s woman-protective argument is in fact merely an extension of feminist arguments, raised in the context of abortion, rape, and domestic violence, regarding women’s psychological trauma. Jeannie Suk points out that \textit{Roe} also relied on the spectre of psychological harm to women—in that case from carrying to term an unwanted pregnancy—as a justification for making abortion legal. Jeannie Suk, \textit{The Trajectory of Trauma: Bodies and Minds of Abortion Discourse}, 110 COLUM. L. REV. 1193 (2010).
B. Chivalry and Criminal Justice

In the modern state, the criminal law replaced the chivalric code as the regulator of violent behavior. Although it was not always the case, the laws of all states now explicitly prohibit honor-based killings. For example, dueling was illegal at the common law, but it was an acceptable custom in the early nineteenth century and persisted up to the Civil War, especially in the South. Well into the twentieth century, a number of states treated as a justifiable homicide a different kind of “honor” killing—the killing by a husband of one caught in the act of adultery with his wife. All such laws have been repealed. Nonetheless, in its regulation of violent crime, the criminal law has continued to recognize and apply chivalric norms, in particular in regard to defenses to homicide—self-defense and heat of passion—and in regard to crimes committed primarily against women—rape and domestic abuse.

1. Self-defense

The law of self-defense (and defense of another) makes justifiable a homicide where the defendant kills under the reasonable belief that the defendant (or another) is going to suffer an imminent deadly attack by an aggressor. The theory of the defense is that, if a life is to be lost, better that it be the life of the aggressor than the life of the innocent defendant. Despite the obvious correctness of this utilitarian logic, at least two aspects of the defense echo chivalric values.

First, the general rule, and the rule in California, is that the defense applies even when the defendant could safely have retreated from the encounter and thereby avoided the loss of life. The “no-retreat” rule serves no utilitarian purpose, so it can only be justified on the basis of what Dan Kahan refers to as the “true man” doctrine. That doctrine holds that the true man cannot be expected suffer the loss of dignity and honor that would result from fleeing his assailant because the virtue of the true man is worth more than the life of an aggressor. This doctrine is a product of chivalric values:

The judicial proponents of the “true man” doctrine—which constituted a sharp break with English common law—were located in the South and West. By virtue of the slave culture in the former and the frontier culture in the latter, both of

72 The following discussion focuses on California law because the study referred to in Parts II and III was done in California, but California law is not unrepresentative of the law generally.
74 LaFave, supra note 73 at § 10.4(f); People v. Holt, 153 P.2d 21, 24 (Cal. 1944).
these regions had inherited rich systems of honor that put a premium on physical displays of courage and on violent reactions to slights.\textsuperscript{76} To critics of this “true man” doctrine, it was just those chivalric values that did not belong in the criminal law:

The feeling at the bottom of the [rule] is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife’s paramour; the feeling which would compel a true man to kill the ravisher of his daughter.\textsuperscript{77}

Second, although the defense is in theory gender-neutral, feminists have argued that, as applied, it is a man’s defense and of little use to women. Most clearly this is the case with regard to the “imminence” element of the defense. Men, because of their generally greater size and strength and/or because of their acculturation and experience with violence,\textsuperscript{78} are far more likely than women to be able to respond successfully to the threat of immediate deadly force.\textsuperscript{79} Thus, when women kill in response to a threatened or actual attack (or a series of threatened or actual attacks)—most often in the context of domestic abuse—the killing may occur during a period of relative calm when the woman can gain the upper hand, \textit{e.g.}, when the attacker is asleep.\textsuperscript{80} Men, on the other hand, often can—and are raised to believe they should—respond to threats immediately with physical violence.

2. \textit{Heat of Passion}

The heat of passion defense mitigates murder to voluntary manslaughter when the defendant has killed in the heat of passion upon adequate provocation.\textsuperscript{81} At the common law there were a limited number of categories of adequate provocation: adultery by a spouse, mutual combat, assault to oneself, a close friend or family member, or unlawful arrest.\textsuperscript{82} Under modern codes, and in California, provocation is no longer limited to specific categories but extends to

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\item[76] Id. at 432-33.
\item[77] Joseph H. Beale, Jr., \textit{Retreat from a Murderous Assault}, 16 HARV. L. REV. 567, 577, 581 (1903).
\item[78] See State v. Wanrow, 559 P.2d 548, 558 (Wash. 1977) (“In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.”).
\item[79] Relying on research in the natural and social sciences disclosing gender differences in the processing of emotions by the brain—in particular, that, in a stressful situation, men reach emotional clarity quickly, while women wrestle with emotional complexity—Katharine K. Baker has argued that self-defense and heat of passion are gendered defenses. Katharine K. Baker, \textit{Gender and Emotion in Criminal Law}, 28 Harv. J. Law & Gender 447 (2005). “As long as men react immediately, thoughtlessly, and without emotional struggle, their violent acts are minimized or excused.” Id. at 460.
\item[80] For that reason, some activists and scholars have sought to expand the doctrine of self-defense to cover such situations through the use of “battered women’s syndrome.” \textit{See infra}, notes 106-107, 112 and accompanying text.
\item[81] LAFAVE, \textit{supra} note 73, at §§ 15.2, \textit{et seq.}
\item[82] Id. at § 15.2(b).
\end{footnotes}
any conduct that would provoke the reasonable person. Even more clearly than self-defense, the defense is based on chivalric norms.

From its origins in English common law, the theory of the heat of passion defense was that the defendant’s intentional killing was mitigated by the victim’s affront to the defendant’s honor. The case of \textit{R v. Mawgridge} is usually cited as the leading common law case on the defense. There, Chief Justice Holt explained why each of the categories or provocation recognized by the law constituted an affront to the defendant’s honor partially justifying the killing, and he went so far as to acknowledge that the law “may seem hard” for making such killings a crime at all. In sum, the provocation-based defenses “partially excused men for behaving in accord with outdated notions of masculinity and honor.” A defense based on affronts to honor is of course a gendered defense because “honor violence” has always been sanctioned for men, not women, and the heat of passion defense has always been used far more by men than by women.

More recently, many American courts have tended to recast the defense as an excuse defense, along the lines of the Model Penal Code’s reduction to manslaughter of killings resulting from “the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.” The result in these courts has been to focus less on the nature of the provoking incident and whether it would be an affront to the honor of a reasonable man and more on the intensity of the defendant’s emotion and its psychological effects. Consistent with that approach, the California Supreme Court has expanded the defense by holding that the provocation may be sufficient to invoke the defense even if not falling within the four categories of provocation recognized at the common law, so long as the defendant’s reason was “disturbed or obscured by passion such as would ‘render ordinary men of average disposition liable to act rashly or without due deliberation and reflection’.”

Even this expanded defense, divorced of its roots in “honor violence” remains deeply gendered. As explained by Joshua Dressler,

\begin{footnotesize}
\footnote{See id.}
\footnote{(1707) 84 Eng. Rep. 1107 (K.B.).}
\footnote{Id. at 1115.}
\footnote{Henry F. Fradella, \textit{From the Legal Literature}, 42 CRIM LAW BULL. 775 (2006).}
\footnote{“The origins of the provocation defense are deeply gendered; it was created for and has always been used far more by men than women.” Caroline Forell, \textit{Gender Equality, Social Values And Provocation Law In The United States, Canada And Australia}, 14 AMER. U. J. OF GENDER, SOCIAL POLICY AND LAW 27, 31 (2006); See also, SAMUEL PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 147-55 (1998) (arguing that provocation-based defenses permit outdated, sexist views about gender roles to control the legal system in a manner that systematically discriminates against women).}
\footnote{Model Penal Code § 210.3.}
\footnote{PILLSBURY, supra note 87, at 131.}
\footnote{People v. Berry, 556 P.2d 777 (Cal. 1976) (quoting People v. Valentine, 169 P.2d 1, 12 (Cal. 1946)).}
\end{footnotesize}
The provocation defense itself is a male-oriented doctrine. That is, while women are often the victims of provoked killings or the stimulus for them (e.g., a party in a sexual triangle, a “seduced” young daughter, or a rape victim whose mistreatment stirs retaliation), men are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter.

Of course, as long as males are defendants in criminal homicide prosecutions more often than women, men are the primary beneficiaries of all criminal law defenses. But having said this, if ever the criminal law follows “boys’ rules,” it does here. Consider, first, that men are far more prone to violence than are women. Both daily experience and crime statistics support this claim.

What is important here, however, is not simply that the average male is more susceptible to violent loss of self-control than is the average woman. It is also necessary to consider how men and women respond to affronts, i.e., to provocations. Women usually submit stoically to their victimization or deny their status as victims by blaming themselves (“I deserve this treatment”); men are more likely to characterize themselves as victims of injustice, or to think that their self-worth has been attacked, and to act offensively as a result. One glance at the common law categories of “adequate provocation” shows that the defense has served a male interest, by mitigating the predominantly male reaction of retaliating for affronts and other “injustices.”

3. Rape

Rape has always been acknowledged as among the worst of the violent crimes. However, consistent with chivalric norms, only certain cases of rape have historically been punished by our legal system. The law of rape has always been schizophrenic, characterized, on the one hand by severe condemnation and extreme penalties and on the other hand by the exclusion of spouses from those protected by the rape laws, a tolerance of “acquaintance” rape and trial rules (requiring corroboration of the victim’s testimony, permitting evidence of the woman’s prior sexual conduct or reputation for chastity, and authorizing cautionary jury instructions which impugn the victim’s credibility) making difficult the conviction even of “stranger” rapists.

This treatment of rape reflects chivalric attitudes regarding sexual violence. As noted above, medieval writings on knightly love laid out detailed rules for knights’ proper interactions with women of their own class—for example, if a man came across a woman alone he should sooner die than dishonor her. The rules of chivalry were very clear that raping or otherwise harming a “lady” was unacceptable. Yet no such disapproval applied to the rape of peasant

92 See Coker v. Georgia, 433 U.S. 584, 597 (1977) (“[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . . Short of homicide, it is the ‘ultimate violation of self.’”).
93 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 290-91 (1975) (citing the writings of Chretien de Troyes).
women, or to the sexual abuse by a knight of his wife. In the modern history of rape law, race, social class, and sexual behavior of the victim have all historically influenced the degree of outrage over her rape. Particularly in the South, fear of black men raping white women was a driving force behind capital rape laws. Rape of a black woman, on the other hand, was not a crime for much of our nation’s history. Thus although rape has long been seen as a particularly awful crime, it is only a certain kind of rape—namely the rape of a chaste, white woman by a stranger—that has been punished harshly by the criminal law.

In recent years, the feminist movement has succeeded in many respects in bringing changes to the law of rape. In California, for example, the legislature enacted a spousal rape statute and rape shield laws (protecting the victim from questioning about her prior sexual conduct), and the California Supreme Court held that the prosecution need not prove the victim’s physical resistance in order to sustain a rape charge. Nevertheless, in practice, rape victims still face hurdles to being treated equally to victims of non-gendered crimes. “The problem . . . is that when a man rapes a woman in circumstances that do not fit the stereotype of a rape, which is most of the time, the woman’s credibility will be suspect.”

4. Domestic Violence

In the 1970s and 1980s, at the height of the women’s rights movement, feminists also brought domestic violence to the fore and criticized the gender bias and reluctance to intervene in “domestic matters” exhibited by the state, the police, and the courts. Again, advocates were successful in changing laws and practices. In California, for example, legislation was passed increasing penalties for domestic violence, requiring certain police response in domestic violence cases, and mandating domestic violence training for court employees. The legislature also sought to protect battered women by making expert testimony regarding “battered women’s syndrome” admissible in a criminal case, and the California Supreme Court has recognized “battered women’s syndrome” as a mitigating or even excusing factor in a

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94 Id. at 290 (citing the writings of Andrew the Chaplain).
98 CAL. PEN. CODE § 262 (West 2010)
99 CAL. EVID. CODE §§ 782, 1103(c) (West 2010).
100 People v. Barnes, 721 P.2d 110 (Cal. 1986).
101 Crocker, supra note 97 at 708.
103 See, e.g., CAL. PEN. CODE §§ 273.5, 243(e)(1) (West 2010).
104 See CAL. PEN. CODE § 836(c) (West 2010).
105 See CAL. GOV. CODE § 68555 (West 2010).
106 CAL. EVID. CODE § 1107(a) (West 2010).
killing by a victim of domestic violence. 107 Throughout the country states have adopted civil and criminal protection orders that could exclude the abuser from the family home. 108

Nevertheless, the responses to domestic violence have not been wholly emancipatory for women. For example, police mandatory arrest policies, prosecutor’s “no-drop” policies, 109 and court- or probation department-imposed criminal protection protection, 110 adopted to prevent coercion of the domestic violence victim by the abuser have raised hurdles to victims of domestic violence being treated as fully equal under the law. Such policies deny victims of domestic violence agency, under the chivalric and paternalistic assumption that women cannot make the “right” decisions for themselves about whether they need state intervention in their violent relationships. 111 Rather than recognizing the many reasons survivors of domestic violence may choose to stay in their relationships despite such violence, or the reasons they may want to end those relationships privately, without police or court involvement, these policies assume a childlike naiveté on the part of women and transfer control over women’s private lives to the state, allowing the state to take steps to end women’s intimate relationships.

A defendant’s use of battered women’s syndrome evidence in a murder case is similarly problematic. 112 While such evidence can help the factfinder to understand the psychological effects of being in a battering relationship and thereby explain the defendant’s conduct, such syndrome evidence has pathological implications that can compromise a defendant’s claim that

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108 Suk, supra note 102 at 15 (“The protection order was to be a legal tool that would transform the home from a wife’s prison into her fortress. It would ban the husband from the space in which his power over her found expression.”).
109 Mandatory arrest policies require police to arrest one or both individuals when they respond to domestic violence calls. “No drop” policies require prosecutors who handle domestic violence cases to prosecute them despite any requests by the victim to drop the charges.
110 Recently, criminal courts have begun to routinely issue orders of protection in cases involving domestic violence, whether or not the victim wants such an order in place, and regardless of the relationship between the parties. See Suk, supra note 102, at 42-50. State departments of probation and parole have also developed policies making such orders conditions of supervised release. See e.g., Moller v. Dennison, 47 A.D. 3d 818 (N.Y. App. Div. 2d Dep’t 2008), lv. denied 10 N.Y.3d 708 (2008); Dawson v. State, 894 P.2d 672, 680 (Alaska App. 1995); People v. Jungers, 127 Cal. App. 4th 698 (Cal. App. 4th Dist. 2005). These provisions impose a “de facto” divorce on couples who have experienced domestic violence, even over the explicit objections of the “victim” that the policies purport to protect. Suk, supra note 102, at 42; Williams v. New York State Division of Parole, 71 A.D.3d 524, 525 (1st Dep’t 2010), lv. denied 15 N.Y.3d 710 (2010).
111 “Perpetrators no longer are able to manipulate the system by coercing the victim into dropping the charges; control has been shifted from the perpetrator to the government.” Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 YALE J. L. & FEMINISM 3, 16 (1999).
112 For a discussion of how battered women’s syndrome developed and became accepted into the law within a feminist discourse on trauma, see Suk, supra note 69.
she acted as a reasonable person and the killing was a justified response to finding herself held hostage by an individual with physical, financial, and/or social power over her.

C. Chivalry and the Death Penalty

Chivalric norms may affect the choice of crimes to which the death penalty is applied or the treatment of the sexes as defendants or victims murder cases. In the past, the issue of chivalry and the death penalty has been raised with regard to rape and the death penalty and women as defendants in murder cases.

1. Rape and the Death Penalty

Chivalry, rape, and the death penalty have a linked history in the United States, and the feminist critique of the death penalty as a punishment for rape begins with the epidemic of lynchings—primarily in the South and primarily of African American men—in the late nineteenth and early twentieth centuries. It is estimated that there were 4,743 deaths by lynching between 1882 and 1968, with the overwhelming majority occurring between 1889 and 1918. Lynchings were a form of unofficial capital punishment, adjudication of guilt and execution by groups lacking the formal authority for either. The victims were usually black, the executioners usually white. The line between a lynching and an official execution could be thin. The participants in lynchings often included the very same people who, in their official capacities, administered the criminal justice system. Official trials and executions in the South could take place astonishingly fast, so fast as to closely resemble lynchings, when a case carried racial implications. . . . At its peak, lynching was much more common than official capital punishment. Lynchings, at least for sexual assault, enjoyed substantial public support among whites and virtually never resulted in prosecution of any of the responsible parties. Lynching was, in its heyday, a substitute for the death penalty and a precursor of the modern death penalty.

Although lynchings were first and foremost a vehicle for racial oppression, the justifications given for the practice were seen by feminists to oppress women as well. The myth which supported the lynchings was that the lynching victims were guilty of rape or other sexual

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114 Id.
116 See HORTENSE POWDERMAKER, AFTER FREEDOM 389 (1939) (citing a 1930s study showing sixty-four percent of whites thought that lynching for rape was justifiable).
117 Donald Dripps, The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution, 18 J. CONTEMP. LEGAL ISSUES 469, 499 n.132 (2009) (“less than 1% of lynchings in period 1900-1930 resulted in conviction of any responsible individual”).
118 As the lynchings diminished in the mid-twentieth century, the number of legal executions increased, and the “high-lynching” states (including all the states of the former Confederacy) became the “high-execution” states in the post-Furman era. See ZIMRING, supra note 113, at 89-114.
behavior toward a (white) woman, and the lynchings were justified in chivalric terms as necessary to redeem the woman’s honor.\footnote{Jacquelyn Dowd Hall, Revolt Against Chivalry 145-46 (1979).} In her biography of Jessie Daniel Ames, the leader of Association of Southern Women for the Prevention of Lynching (“ASWPL”) in the 1930s, Jacquelyn Dowd Hall explained the dilemma for women posed by lynching:

The lynch mob in pursuit of the black rapist thus represented the trade-off implicit in the code of chivalry, for the right of the southern lady to protection presupposed her obligation to obey. The connotations of wealth and family background attached to the position of the lady in the antebellum South faded in the twentieth century, but the power of “ladyhood” as a value construct remained. The term denoted chastity, frailty, graciousness. . . . Internalized by the individual, this ideal regulated behavior and restricted interaction with the world. If a woman passed the tests of ladyhood, she could tap into the reservoir of protectiveness and shelter known as southern chivalry. . . . Together the practice of ladyhood and the etiquette of chivalry functioned as highly effective strategies of control over women’s behavior as well as powerful safeguards of caste restrictions.\footnote{Id. at 151-52.}

Ames’s response on behalf of the ASWPL was to rebel against “the crown of chivalry which has been pressed like a crown of thorns on our heads.”\footnote{Id. at 167.} While Ames and her supporters did not reject the norms of ladyhood outright, they sought to “strike down the apologetics of lynching by disassociating the image of the lady from its connotations of female vulnerability and retaliatory violence.”\footnote{Id. at 194.} They attacked the paternalism inherent in the justification for lynching, arguing that “the presumptive tie between lynching and rape cast white women in the position of sexual objects–ever threatened by black lust, ever in need of rescue by their white protectors.”\footnote{Id. Lillian Smith, a post-World War II civil rights leader described the ASWPL campaign against lynching in these terms: “The lady insurrectionists . . . said calmly that they were not afraid of being raped; as for their sacredness, they could take care of it themselves; they did not need the chivalry of lynching to protect them and they did not want it.” Id. at 196.}

When lynching died out after 1930, use of the death penalty for rape cases grew.\footnote{As the lynchings diminished, and the “high-lynching” states (including all the states of the former Confederacy) became the “high-execution” states in the post-Furman era. See Zimring, supra note 113, at 89-114.} From 1930 until the \textit{Furman} decision in 1972, 455 men were executed for rape in the United States, almost 90\% of them African Americans.\footnote{433 U.S. 584 (1977).} Feminists continued to oppose use of the death penalty for rape. In \textit{Coker v. Georgia},\footnote{U.S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION REPORTS (1930-1976).} Ruth Bader Ginsburg (now Justice Ginsburg) was the lead attorney on an amicus brief for the American Civil Liberties Union and others, including a
number of women’s organizations. The brief argued that the death penalty for rape was a product of chivalry:

The death penalty for rape should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to a crippling “chivalric protection.” It is part of the fabric of laws and enforcement practices surrounding rape which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.\footnote{Brief Amici Curiae American Civil Liberties Union et al., Coker v. Georgia, 433 U.S. 584, at *6 (1977). See also Rayburn, supra note 95, at 1126 (“the only way to guarantee exclusive control of [women] by husbands was to threaten the ultimate punishment: death.”).}

Although the Court in \textit{Coker} held that the death penalty was a disproportionate punishment for rape of an adult woman and therefore was unconstitutional under the Eighth Amendment, the Court did not address the “chivalry” argument.

2. Gender and the Death Penalty

The chivalry hypothesis would suggest that women as defendants would be favored by the criminal justice system, i.e., that they would be convicted of lesser crimes or receive lesser sentences than similarly situated men. Recent studies have shown that, at all stages of the criminal judicial process, female defendants are treated more leniently than men\footnote{Sergio Herzog & Shaul Oreg, \textit{Chivalry and the Moderating Effect of Ambivalent Sexism}, 42 \textit{Law \\& Soc’y Rev.} 45, 47 (2008); Shapiro, supra note 5, at 452.} and that in homicide cases, in particular, male offenders generally receive longer sentences than female offenders.\footnote{Edward L. Glaeser \\& Bruce Sacerdote, \textit{Sentencing in Homicide Cases and the Role of Vengeance}, 32 \textit{J. Legal Studies} 363, 371 (2003).} An earlier study concluded: “A review of the post-1975 literature suggests that the chivalry hypothesis is now wholly accepted.”\footnote{Ilene H. Nagel \\& John Hagan, \textit{Gender and Crime: Offense Patterns and Criminal Court Sanctions, in 4 Crime and Justice, an Annual Review of Research} 113 (M. Tonry \\& N. Morris eds. 1983).}

Studies of gender and the death penalty have, for the most part, focused on gender of the defendant and have consistently found that women are sentenced to death and executed at significantly lower rates than men.\footnote{Victor L. Streib, \textit{Rare and Inconsistent: The Death Penalty for Women}, 33 \textit{Fordham Urb. L. J.} 609, 621-22 (2006) [hereinafter \textit{Rare and Inconsistent}]. The conclusion is based on the number of women arrested for murder by jurisdiction, rather than the number of arrests, prosecutions or convictions for capital murder. \textit{Id.} at 620.} As of 2006, women accounted for 2\% of death sentences imposed at trial level, 1.5\% of persons on death row, and only 1\% of those executed.\footnote{\textit{Id.} at 620.} A study of the death penalty applied to women from 1973-2005 found that at every stage of the process female defendants appear to be diverted away from the death penalty at a greater rate than men. While 10\% of people arrested for murder are women, only 2\% of death sentences imposed at
trial are imposed upon women, and women account for only 1.1% of persons actually executed. “[M]ales arrested for murder [are] six times more likely to be sentenced to death than [are] females arrested for murder.” Many scholars have posited that the reason for this discrepancy is chivalric beliefs. The theory, affirmed by studies of people’s attitudes towards women offenders, argues that women are “are stereotyped as weak and passive, creating and continuing men’s protective attitude toward women.” That any women at all are in fact executed is explained by the fact that those women did not fit the stereotype feminine role because they were women of color or lesbians or had in some way rejected the prescribed wife-and-mother role.

Dissenting from the conclusion that chivalry explains the scarcity of women sentenced to death, Elizabeth Rapaport is one of the few researchers to argue in favor of other explanatory factors. While acknowledging that “there are deep cultural inhibitions against the deliberate killing of women” and that male murderers are substantially more likely to be death sentenced than female murderers, she has argued that “[t]he fundamental reason why so few women murderers are death sentenced is that women rarely commit the kinds of murders, particularly felony-murders, that are subject to capital punishment.” Rather, she argues that when women murder, they overwhelmingly murder family members, and domestic murder is rarely treated as seriously by the criminal justice system as stranger murder.

As we shall see, the empirical data from California calls into question most the basis for these contentions.

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134 Id. at 3 of 23.
135 Victor L. Streib, Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary, 63 Ohio St. L.J. 433, 442 (2001).
136 See Herzog & Oreg, supra note 128, at 47-51 (reviewing the development of chivalry theory); cf. Rare and Inconsistent, supra note 80, at 628 (finding no pattern or rational explanation of the gender discrepancies in the application of the death penalty).
137 See Herzog & Oreg, supra note 128, at 66.
138 Shapiro, supra note 5, at 456.
141 Id. at 503.
142 Id. at 505. Rapaport asserted that male murderers are “twenty times” more likely to be death sentenced, but that figure, based on death sentences from a single year (1986) when only three women were sentenced to death, is clearly exaggerated. Compare Streib, supra note 135 at 442.
143 Id. at 509-10. This argument contains a significant ambiguity: it is not clear whether Rapaport is arguing that women do not commit the kinds of murders that are, by statute, capital murders, or do not commit the kinds of capital murders that usually result in a death sentence.
144 Of course, what Rapaport may be noticing is simply that chivalric values influence voters and legislatures as well as judges and juries—leading them to discount domestic violence and
The chivalry hypothesis would suggest that crimes against women would be more harshly punished than similar crimes against men. At least in the case of homicide, there is a general consensus that, regardless of the gender of the offender, killing a woman results in a longer sentence than killing a man.\textsuperscript{147} This disparity exists even in forms of homicide where intent of the offender plays no role, such as vehicular homicide.\textsuperscript{148} Three empirical studies primarily focused on race of victim disparities in death sentencing have noted that the odds of a death charge and/or death sentence are significantly higher if the victim is a woman rather than a man.\textsuperscript{149} However, scholarship discussing the issue of women as victims in capital cases has focused almost exclusively on rape-murder, and has documented that it is punished more severely than other forms of murders.\textsuperscript{150}

Despite the apparent solicitude for women reflected in the heavy use of the death penalty in rape-murder cases, Phyllis Crocker argues that making rape-murderers death eligible manages to de-emphasize women and incorporate chivalric stereotypes rather than emphasize the abhorrent nature of the crime of rape.\textsuperscript{151} Crocker’s studies of the application of the death penalty to rape-murder have found that whether a homicide preceded by sexual assault is punished by the death penalty depends on certain attributes of the crime: whether the defendant and victim were strangers and the races of the defendant and victim.\textsuperscript{152} As Crocker points out, if the death penalty were being used to punish the experience of rape—the violence and harm the victim suffers—it would not matter whether the defendant was a stranger or an acquaintance, black or white.

exclude domestic murders from the list of capital murders. \textit{See infra}, notes 175-78 and accompanying text.
\textsuperscript{145} \textit{See infra}, Part IV.

\textsuperscript{146} Rapaport also contends that male murderers are more likely to have prior convictions for violent crimes, making them better candidates for a death sentence. \textit{Id.} at 510. She offers no evidence for this assertion other than the fact that men commit more than 95\% of violent crimes. However, if women commit approximately 5\% of violent crimes and approximately 5\% of capital murders, \textit{see infra}, notes 268-71 and accompanying text, as a statistical matter, the female murderer is no less likely than the male murderer to have committed prior violent crimes.\textsuperscript{147} Glaeser & Sacerdote, \textit{supra} note 55, at 375. Of course, as has been noted with sentencing discrepancies based on the gender of the offender, the \textit{type} of woman in question plays a role. Offenders who kill women who do not conform to traditional ideas of femininity and womanhood, such as prostitutes, do not receive sentences that are as long as those who kill “stereotypical” women victims. \textit{Id.} at 373.

\textsuperscript{148} \textit{Id.} at 376.


\textsuperscript{151} Crocker, \textit{supra} note 97 at 693.

\textsuperscript{152} \textit{Id.} at 703.
Instead, the death penalty is deployed to strongly condemn rapes that fit the stereotypical definition of “real” rape, which focuses on the identities of the participants rather than the nature of the crime. Further, Crocker illustrates that once a rape is part of a rape-murder, the stereotypes and evidentiary hurdles attendant to simple rape trials evaporate, and defendants who have committed murder are found to have committed rapes on scarce evidence. While at first blush this might appear to be a victory for feminists, it again illustrates the ways in which the criminal justice system discounts the agency of women. As Crocker puts it “[w]hen a woman is alive to testify about the rape, her credibility is questioned. In a rape-murder case, when the woman is dead, her inability to speak speaks for her; her silence, when dead, is more powerful than her voice when alive.”

In stark contrast to rape-murder, domestic violence murders rarely are prosecuted as capital crimes in most states. Because domestic violence murders often are seen as heat of passion murders or (if the victim of the domestic violence is the killer) the product of “battered women’s syndrome,” the killer may not be prosecuted for murder at all. Even when a domestic violence murderer is convicted of first degree murder and is death-eligible, a death sentence is rarely imposed. This leniency toward domestic violence murderers is particularly troubling in light of the fact that women are much more likely to be murdered by intimate partners than under other circumstances. As was noted earlier, consistent with the culture of chivalry, spousal violence was traditionally either condoned or ignored by the law as a private matter between the partners.

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The last forty years have seen a frequently successful struggle against chivalry in the formal law and in the administration of the law. Nevertheless, the successes have not been complete, and, despite much progress, chivalric norms appear to remain deeply embedded in our culture, continuing to influence decision-making at all levels of the legal system. It should come

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153 Id. at 710-15. Crocker discusses cases from Ohio where defendants were given the death penalty for rape-murders in which the rapes fell outside the stereotyped “real” rape of stranger on unsuspecting female victim. For example, she discusses a case in which the victim was drunk and/or high and voluntarily walked with the defendant into the woods; and another case where the only evidence supporting the rape charge was a witness who had said the defendant intended to kill the victim because “she would tell” (though what she would tell was never established).

154 Id. at 704.


156 Dana M. Britton, *Feminism in Criminology*, 571 ANNALS 57, 64 (2000).

157 See JONATHAN SIMON, *GOVERNING THROUGH CRIME* 181 (2007) (discussing how spousal violence has been “sheltered” by the courts under a privacy doctrine).
as no surprise, therefore, if chivalry affects the most profound decision that prosecutors and
durers make, the decision to seek and impose the death penalty.

II. THE CALIFORNIA DEATH PENALTY SCHEME: VIRTUALLY UNFETTERED DISCRETION

In the 1972 landmark decision of Furman v. Georgia, the Supreme Court held that the
death penalty, as then administered in the United States, violated the Eighth Amendment.
Although there was no majority opinion in Furman, all five justices in the majority focused on
the infrequency with which the death penalty was imposed, with Justices Stewart and White,
in particular, emphasizing that the relative infrequency of its application created the risk that it
would be arbitrarily applied. Subsequently, the Court cited to the opinions of Justices Stewart
and White as embodying the Furman holding, and, in Zant v. Stephens, the Court held that,
to meet the Furman concern about the risk of arbitrary enforcement, the states, by statute, were
required to “genuinely narrow,” by rational and objective criteria, the death-eligible class. The
Court later explained the point of the Furman/Zant rule as follows:

As the types of murders for which the death penalty may be imposed become
more narrowly defined and are limited to those which are particularly serious or
for which the death penalty is particularly appropriate . . . [juries] will impose the
death penalty in a substantial portion of the cases so defined. If they do, it can no

158 408 U.S. 238 (1972).
159 See 408 U.S. at 248 n.11 (Douglas, J., concurring); 408 U.S. at 291-95 (Brennan, J.,
concurring); 408 U.S. at 309-10 (Stewart, J., concurring); 408 U.S. at 313 (White, J., concurring);
408 U.S. at 354 n.124, 362-63 (Marshall, J., concurring). It was the justices’ understanding that
only 15-20% of death-eligible murderers were being sentenced to death. This was the figure
cited by Chief Justice Burger, writing for the four dissenters, and he based his estimate on four
sources. 408 U.S. at 386 n.11 (Burger, C.J., dissenting). Justice Powell, also writing for the four
dissenters, cited similar statistics. See id. at 435 n.19 (Powell, J., dissenting). Justice Stewart, in
turn, cited to the Chief Justice’s statement as support for his conclusion that the imposition of
death was “unusual.” 408 U.S. at 309 & n.10. Subsequently, in Gregg v. Georgia, 428 U.S. 153
(1976), the plurality reiterated this understanding: “It has been estimated that before Furman less
than 20% of those convicted of murder were sentenced to death in those States that authorized
160 Justice Stewart found that the death sentences at issue in Furman were “cruel and unusual”
because, of the many persons convicted of capital crimes, only “a capriciously selected random
handful” were sentenced to death. 408 U.S. at 309-10. Justice White concluded that, “the death
penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no
meaningful basis for distinguishing the few cases in which it is imposed from the many cases in
which it is not.” 408 U.S. at 313.
163 Id. at 877.
longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its significance as a sentencing device. Thus, the Court seemed to say that the measure of an constitutional death penalty scheme was whether death was imposed on a “substantial portion” of those who were death-eligible, i.e., whether the scheme produced a higher than pre-Furman death sentence rate. While the Supreme Court was insisting that death penalty schemes be narrowly drafted so that the death penalty is in fact imposed on a substantial portion of the death-eligible class, California was proceeding in the opposite direction.

A. The California Death Penalty Scheme

Six years after Furman, the present California death penalty scheme was enacted through the 1978 Briggs Death Penalty Initiative. According to its author, State Senator John V. Briggs, the initiative was intended to “give Californians the toughest death-penalty law in the country.” By “the toughest death penalty law,” the proponents meant the law “which threatens to inflict that penalty on the maximum number of defendants.” That “toughest death-penalty law” has since been expanded by voter initiatives on three occasions since 1978 and is the broadest death penalty scheme in the country.

California starts with a very broad definition of first degree murder, and then enumerates thirty-two special circumstances that make a first degree murderer death-eligible, i.e., make the murder “capital murder.” Plainly, the extensive list of special circumstances

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165 Initiative Measure Proposition 7 (approved Nov. 7, 1978).
169 Amended Declaration of David C. Baldus (dated 2/18/20), Ashmus v. Wong, Civ. No. C93-00594-TEH (N.D. Cal.) 36. (“[T]he rate of death eligibility among California homicide cases is the highest in the nation by every measure. This result is the product of the number and breadth of special circumstances under California law.”). In fact, the California scheme is so broad that the death sentencing rate among death-eligible cases is 66% lower than the death sentencing rate in pre-Furman Georgia. Baldus, supra, at 25-26; See also, Tuilaepa v. California, 512 U.S. 967, 994 (Blackmun, J., dissenting) (noting that California’s special circumstances create “an extraordinarily large death pool.”); Symposium, Report of Governor’s Council on Capital Punishment, 80 IND. L.J. 1, 9 (2005) (citing California and Illinois as having exceptionally broad definitions of death-eligibility).
170 There are twenty-one categories of first degree murder. CAL. PEN. CODE § 189.
171 California Penal Code § 190.2(a), lists thirty-three special circumstances—twenty-two numbered special circumstances, one of which (felony-murder) has twelve sub-parts—but the California Supreme Court has held unconstitutional on vagueness grounds the “heinous,
atrocious or cruel” circumstance (§ 190.2(a)(14)). See People v. Superior Court (Engert), 647 P.2d 76, 77-78 (Cal. 1982), accord, People v. Wade, 750 P.2d 794, 804 (Cal. 1988)). The statute provides:

The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

1. The murder was intentional and carried out for financial gain.
2. The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.
3. The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.
4. The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.
6. The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
7. The victim was a peace officer . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer . . . or a former peace officer . . ., and was intentionally killed in retaliation for the performance of his or her official duties.
8. The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.
9. The victim was a firefighter . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.
10. The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding.
11. The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a
federal prosecutor’s office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase “especially heinous, atrocious, or cruel, manifesting exceptional depravity” means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery …
(B) Kidnapping …
(C) Rape …
(D) Sodomy [under various circumstances, e.g., by force or threats, upon a minor, while in prison]
(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years …
(F) Oral copulation [under various circumstances, e.g., by force or threats, upon a minor, while in prison]
(G) Burglary …
(H) Arson …
(I) Train wrecking …
(J) Mayhem …
(K) Rape by instrument …
(L) Carjacking …
(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.
covers almost all forms of first degree murder. Virtually all first degree murders are either premeditated killings or felony-murders. Most premeditated murders are capital murders under California’s unique lying in wait special circumstance\(^{172}\) (making death-eligible a murderer who intentionally kills his victim by surprise and from a position of advantage). As for felony-murder, currently, all but one of the thirteen felonies (torture) which may be the basis for a first degree felony-murder conviction are also special circumstances,\(^{173}\) and California is one of only a handful of states where a defendant would be death-eligible for an unintentional, even wholly accidental, killing during a felony.\(^{174}\)

The most significant category of commonly occurring first degree murders not expressly covered by the special circumstances are domestic violence murders.\(^{175}\) Of course, many domestic violence killings do not result in a murder conviction at all. Men, in particular, have been able to make use of the heat of passion defense to negate malice and reduce the killing to voluntary manslaughter.\(^{176}\) Similarly, victims of domestic violence who kill their abusers have been able to use “battered women’s syndrome” to prove self-defense or imperfect (unreasonable) self-defense, reducing the crime to voluntary manslaughter.\(^{177}\) Still, some domestic violence killings do result in first degree murder convictions, and, even in the absence of a special circumstance explicitly covering domestic violence murders, many such murders are made capital murders by one or more existing special circumstances, e.g., lying in wait (if, for

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(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. . . .

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . ., and the murder was carried out to further the activities of the criminal street gang.

\(^{172}\) \textit{CAL. PENAL CODE} § 190.2(a)(15) (West 2010).

\(^{173}\) \textit{Compare} \textit{CAL. PENAL CODE} § 189 \textit{with} § 190.2(a)(17) (West 2010).


\(^{175}\) For purposes of this article, we employ the definition of a domestic violence used by the California legislature:

“Domestic violence” means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, “cohabitant” means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

\textit{CAL. PEN. CODE} § 13700 (West 2010).

\(^{176}\) \textit{See} \textit{People v. Berry}, 556 P.2d 777 (Cal. 1976).

\(^{177}\) \textit{See supra} notes 106-107 and accompanying text.
example, the defendant killed a sleeping spouse), financial gain (if one spouse killed another to collect life insurance), burglary (if the defendant entered an ex-girlfriend’s house to kill her) or torture (if the defendant inflicted pain on the ex-spouse before the killing). 178

The breadth of capital murder in California gives extraordinary discretion to prosecutors and juries to select defendants for death, and that discretion is not otherwise limited. Prosecutors have unfettered discretion in their decisions to seek the death penalty in capital murder cases. 179 After a defendant has been found to have committed first degree murder and a special circumstance has been found true at the guilt phase of a capital trial, juries, at the penalty phase, are accorded virtually unlimited discretion in their sentencing decisions. They are instructed to consider a list of eleven factors in making their penalty choice and told to weigh the aggravating factors against the mitigating factors in reaching their decision (although they are not told which factors are aggravating or mitigating). 180 The jurors are not required to agree on aggravating and mitigating factors, and they do not have to make findings in support of, or otherwise explain, their penalty decision. 181 And, although the California Supreme Court ostensibly will engage in individual proportionality review, 182—potentially a post hoc limitation on prosecutors’ and juries’ exercise of discretion—in the well over five hundred appeals it has decided under the 1978 Death Penalty Law, the court has never found a death sentence to be disproportionate.

The California death penalty scheme is unique, not only for its breadth, but for fact that it is a product of direct democracy, unmediated by the legislature or the courts. The legislature has had no role in the enactment or repeated expansions of the 1978 death penalty law, and, with the exception of its 1982 decision holding unconstitutional the “heinous, atrocious, or cruel” special circumstance, 183 the California Supreme Court, has taken no role in limiting death-eligibility. 184

The California death penalty scheme is also uniquely dysfunctional. That was the opinion given three year ago by former Chief Justice Ron George in his testimony before the California Commission on the Fair Administration of Justice, 185 and that was also the opinion of

179 See, e.g., People v. Ramirez, 139 P.3d 64, 117 (Cal. 2006); People v. Gray, 118 P.3d 496, 543 (Cal. 2005).
180 See CAL. PENAL CODE § 190.3 (West 2010).
181 See People v. Solomon, 234 P.3d 501, 539 (Cal. 2010).
182 See, e.g., People v. Lenart, 88 P.3d 498, 609-610 (Cal. 2004); People v. Lawley, 38 P.3d 461, 508-509 (Cal. 2002).
183 People v. Superior Court (Engert), 647 P.2d 76, 77-78 (Cal. 1982).
184 In 1983, the court, in Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983), interpreted § 190.2 to require proof of intent to kill for a special circumstances finding, but, less than four years later, that interpretation was held to be erroneous and Carlos was overruled in People v. Anderson, 742 P.2d 1306 (Cal. 1987).
the Commission itself.\textsuperscript{186} In the thirty-three years between the reinstatement of the death penalty in 1977 and the end of 2010, over 900 defendants were sentenced to death,\textsuperscript{187} but only 13 were executed.\textsuperscript{188} More than six times as many inmates died of natural causes or suicides during that time.\textsuperscript{189} As of the end of 2010, there were 713 prisoners on death row,\textsuperscript{190} the largest death row in the country. Executions in California are so infrequent that they cannot serve a penological purpose. Even those scholars who contend that the death penalty has a deterrent effect, concede that it cannot deter when executions are as infrequent as they are in California.\textsuperscript{191} Nor can the death penalty serve a retributive purpose when few are sentenced to death and most of those selected as the “worst of the worst” are never executed.\textsuperscript{192}

To the extent that prosecutors or jurors are aware of these facts, their respective decisions to seek and impose the death penalty may not be based on an expectation that an execution will actually result. Instead, they might intend “to ‘send a message’ of extreme disapproval for the defendant’s acts.”\textsuperscript{193} Even so, the prosecutors’ and jurors’ choices among defendants for their “messages” would seem to be just as valid an expression of their values as a sentence they believe will be effected. Given the virtually unfettered discretion accorded to prosecutors and jurors to make those choices, California offers an ideal laboratory for exploring the expression of contemporary cultural values in the administration of the death penalty.

\textbf{B. The Current Study}

\textsuperscript{186} Id. at 119.
\textsuperscript{188} CDCR, \textit{Inmates Executed 1978-Present}, available at http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Feb. 18, 2011). One other prisoner sentenced to death was executed in another state.
\textsuperscript{190} CDCR, \textit{Condemned Inmate Summary List}, supra note 187.
\textsuperscript{192} See \textit{Furman v. Georgia}, 408 U.S. 238, 311 (1972) (White, J. concurring).
To test how prosecutors and juries use their virtually unfettered discretion, we examined 1299 cases of defendants convicted of first degree murder during the three-year period 2003-2005. The cases were identified and the data gathered by means of a defense subpoena in a capital case. The defendant in that case challenged the constitutionality of the California death penalty under the Eighth Amendment because of its overbreadth and subpoenaed pre-sentence reports (“PSRs”) for all defendants convicted of first degree murder during the period, in order to present empirical evidence in support of his challenge. Because the quality of the information contained in the PSRs varied from county to county and because many of the PSRs were produced with substantial redactions, the information was supplemented by means of appellate decisions where available. In 117 of the 1299 cases, the defendant committed the murder while a juvenile and, therefore, was not death-eligible. In the remaining cases, we categorized the case as “capital murder” where a special circumstance was admitted or found true or where a special circumstance could have been found beyond a reasonable doubt, by the factfinder. In 182 cases, we found that the murder was not a capital murder, i.e., based on the facts contained in the PSR and appellate opinion, if any, there was no substantial evidence to permit an appellate court to uphold a special circumstances finding. Of the remaining 1000 cases we classified as capital murder cases, a special circumstance was found in 509 cases and could have been found based on the facts set forth in 491 cases. Thus, 84.6% of the adult first degree murder cases were factually capital cases. In 55 of the 1000 capital cases (5.5%), the defendant was sentenced to death.

194 We refer to “juries” as the sentencers because, although in theory a defendant could waive a jury at the penalty phase of a capital case, in fact this is almost never done, and was not done in any case that went to a penalty phase in the current study. The study is based on sentencing outcomes, so no distinction is made between prosecutors and juries, i.e., we do not attempt to separately analyze prosecutors’ charging decisions. In fact, there is reason to assume that the decisions of prosecutors and juries are closely aligned since the main factor driving the decision whether to seek the death penalty is the prosecutor’s assessment of the likelihood of obtaining a death verdict. See Dashka Slater, The Death Squad (1992), reprinted in NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 316, 317 (3d ed. 2009) (quoting a leading death penalty prosecutor in California). In any case, the actions of both prosecutors and juries are expressions of prevailing cultural norms.

195 The PSRs were produced under a court protective order prohibiting the disclosure of confidential information. We do not cite to any individual cases in this article with the exception of the cases resulting in a death sentence (which were identified independently of the PSRs).

196 There were some defendants for whom no PSR was produced and some PSRs that did not provide sufficient usable information, but we estimate that the 1299 cases represent 98-99% of the first degree murder cases (and all of the death cases) during the period.

197 CAL. PEN. CODE §190.5 (West 2010).

198 In making this latter determination, we applied two principles: (1) we treated as controlling a factfinder’s determination that no special circumstance was proved, unless that determination was made by a jury and there was overwhelming evidence of jury nullification; and (2) where no finding was made, we determined, by reference to appellate decisions on similar facts, whether an appellate court would have upheld such a special circumstances finding had such a finding been made.
The following graph sets forth this distribution of cases.

![California First Degree Murder Convictions 2003-2005](image)

We examined the data to determine if there were disparities in death sentencing outcomes correlated with certain types of capital murder and/or with the gender of the defendants and victims. The present study is, in certain respects, both more comprehensive and more precise than prior studies addressing gender disparities in other jurisdictions. It is more comprehensive in that we examined the different ways in which chivalric norms might affect death sentencing and more precise, in that (as was true of the two earlier California studies described below) our data is derived from cases in which the defendant was death-eligible rather than more general arrest or homicide data. Some of our findings have to be viewed with caution for two reasons. First, the number of death sentences in the study is relatively small, creating a significant margin of error as to some findings. Second, the sentence in any given case may be determined by factors other than the nature of the crime or the gender of the parties, e.g., legitimate factors such as the quality of the witnesses and other evidence or the past record of the defendant or illegitimate factors such as the race of the victim or the location of the killing. At the same time, to the extent our findings in the current study suggest the existence of a “chivalry effect,” such findings tend to be corroborated by the general evidence of the role of chivalric norms in American society, by the findings of other researchers, and, in particular, by data drawn from two earlier studies of the California death penalty—a study based on a sample of 404 first degree murder appeals decided in the period 1988-1992 (“Appellate Study”) and a study of 473 first-degree murder appeals.

199 See supra Part I.C.

200 Our hope is that our findings will spur further empirical research exploring a possible chivalry effect in the death penalty.

201 The Appellate Study was based on all published murder appeals for the five-year period and all unpublished murder appeals decided by the First Appellate District of the Court of Appeal, one six appellate districts.
degree murder cases for murders committed in Alameda County during the period 1978-2001 ("Alameda Study").

III. THE DEATH PENALTY AND PARTICULAR KINDS OF MURDERS

Although the sweep of the special circumstances in California make the overwhelming majority of adult first degree murderers death-eligible, certain kinds of murders, as measured by death sentences, are considered by prosecutors and jurors to be more aggravated than others. Previous California studies have established that two classes of capital murders are considered more highly aggravated—i.e., they produce a significantly higher death sentence rate—than other commonly occurring types of capital murder. First are the cases where the defendant has murdered more than one person: prior murder or multiple murder (hereafter “multiple murder”). Second are the cases where the defendant intentionally inflicted or attempted to inflict additional serious physical or psychological harm beyond the killing itself: torture, rape or other sexual assault, mayhem or kidnapping (hereafter “additional-injury murder”). By contrast, two other categories of commonly-occurring capital murders rarely produce death sentences in the absence of a more aggravating special circumstance: the theft-related felony-murders (robbery, burglary, carjacking) and what might be termed “ordinary premeditated murders” (lying in wait, drive-by shooting). The current Study confirms


203 See Shatz, supra note 201, at 739-44. A substantial majority of the murders in the current study were committed post-1999.

204 CAL. PENAL CODE § 190.2(a)(2) (West 2010).

205 CAL. PENAL CODE § 190.2(a)(3) (West 2010).

206 CAL. PENAL CODE § 190.2(a)(18) (West 2010).


210 Certain other kinds of murders identified by the special circumstances may be considered equally aggravating, but they occur so infrequently in the cases, e.g., murder for financial gain (CAL. PENAL CODE § 190.2(a)(1) (West 2010)) or murder of a peace officer (CAL. PENAL CODE § 190.2(a)(7) (West 2010)) that their effect cannot be measured.

211 CAL. PENAL CODE § 190.2(a)(17)(A) (West 2010).


214 CAL. PENAL CODE § 190.2(a)(15) (West 2010).


216 These four categories of special circumstances encompass fourteen of the current thirty-two special circumstances. The remaining eighteen special circumstances combined appear in less
both aspects of these findings. As compared with an overall death sentence rate of 5.5% for all death-eligible first degree murderers, the death-sentence rate for multiple murder defendants was 16.4%, and for additional-injury murder defendants, it was 19.0%. On the other hand, for murders not also falling within the first two categories, the death-sentence rate was 2.0% for theft-related felony-murders and 0.7% for ordinary premeditated murders.

![Death Sentence Rate by Special Circumstances Categories](image)

Against this background, we examine three kinds of murders which may shed light on the chivalry question. As to each, in order to avoid the distortion created by aggravating effect of multiple murder, we limit our consideration to cases with a single victim and no prior murder conviction of the defendant. In each case, we compare the death sentence rate for that kind of murder with the overall death sentence for single-victim capital cases in the study: 3.4%.

### A. Gang Murders

The rise in gang violence in recent decades prompted the addition of the “gang motive” special circumstance in 2000. That circumstance makes death-eligible a defendant convicted of first degree murder who “intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang.” In the current study, “gang motive” was the most commonly occurring special circumstance, appearing in 31.5% of all cases and in 33.9% of the capital cases. Gang murder is a “gendered” crime. In the study, while women constituted about 5.1% of the death-eligible murderers, they constituted only 3.3% of the gang murderers. The gender disparity is less than 10% of the cases, and almost always with a circumstance or circumstances from the four categories.

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217 These categories are not discrete, and in cases with both multiple murder and additional injury special circumstances the death sentence rate was 37.5%.
218 CAL. PENAL CODE § 190.2(a)(22) (West 2010).
219 Adults committing a gang murder before 2000 and juveniles were not death-eligible.
even greater with regard to the victims of gang murders—the victims of gang murders are disproportionately men. Overall, in single victim capital cases in the study, women were the victims in 21.6% of the cases; in gang murder cases, women were the victims in only 6.7% of the cases, less than one-third the rate in capital murder cases generally. In short, gang murder cases are usually cases about men killing men.

The facts of the hundreds of gang motive murders are depressingly repetitive, tending to follow one of three patterns. In one version, in the manner of the Jets and the Sharks in *West Side Story*, gang members in one gang agree with members of a rival gang to confront each other. *People v. Sanchez* is a case in that mode. There the two defendants, members of rival gangs, were convicted of first degree murder when one defendant and a fellow gang member drove to the house of the other rival-gang defendant, and after the car made several passes in front of house with the defendants engaging in provocative conduct, on the third pass, the defendants opened fire on each other killing an innocent bystander. In the second version, the members of one gang plan and carry out an attack on members of rival gang (or persons they suppose to members of a rival gang) in retaliation for an offense believed to have been committed by that gang. For example, in *People v. Shabazz*, the defendant learned of the location of a car believed to have been used in a drive-by shooting by a rival gang, went to the location, and, on finding a rival gang member in the car, opened fire, killing the rival’s companion. In the third version, typified by *People v. Medina*, an unplanned encounter between gang members (in *Medina*, at a party) leads from a verbal confrontation to a fistfight to a shooting.

The California Supreme Court, relying on the testimony of police gang experts, has referred to gang violence as being the product of gangs’ “code of honor,” and the Court has described the genesis of the violence as follows:

> [G]ang members view behavior that disrespects their gang as a challenge and a “slap in the face” which must be avenged. Gang members perceive that, if no retaliatory action is taken in the face of disrespectful behavior, the challenger and others will view the gang member and the gang itself as weak. . . . [V]iolence is used as a response to disrespectful behavior and disagreements and as a means to gain respect.

Scholars who have studied street gangs confirm the views of the court, noting that there is an expressive aspect to gang violence; it is meant to send a message to rival gangs and the community at large about the power of the gang. In gang culture, honor and respect are achieved through violence and only through violence. If a gang member suffers an insult, his honor and

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221 130 P.3d 519 (Cal. 2006).
222 209 P.3d 105 (Cal. 2009).
223 For first-hand accounts of life in California gangs, see *Cupcake Brown, A Piece of Cake* 105-37 (2006); *Stanley Tookie Williams, Blue Rage, Black Redemption* 78-210 (2004).
status are at stake, and the only way to save face is to retaliate with violence. Violence, then, is meant to “defend the ‘honor of males; to secure and defend the reputation of their local area and the honor of their women,” and, as such, is deeply tied to notions of masculinity.

Thus, gang rules of conduct can be seen as the modern incarnation of chivalry. As one early study of gangs described gang violence: “[g]ang violence fundamentally was the result of neighborhood peer groups fighting over turf, defending their neighborhood play areas in ways that mimicked war and romantic tales of feudal rivalries.” Mirroring knightly violence, gang violence is deployed to define and defend territorial boundaries, to achieve power through the vanquishing of rival gangs and the taking of their territories, and above all to defend and protect the honor of the gang and gang members. Again like knightly violence, gang violence also is a means to address personal affronts, even trivial affronts. Just as the chivalric knight might respond with violence to a request for his name, so a gang member might respond violently to the question, “Where are you from?” Indeed, in the world of gangs, as was true in the world of knights, death encountered while serving the gang may even be a path to honor and glory.

Despite the sheer number of gang murders in California and the grip that gang violence has on many communities, gang murders almost never result in a death sentence. Of the fifty-five death-sentenced defendants in the study, only six had a proved or provable gang motive special circumstance, and five of the six had committed multiple murders. Thus, in the single victim gang murder cases, there was only one defendant sentenced to death (0.3%), and that case was altogether atypical because the defendant was convicted of intentionally killing a police officer to effect an escape from custody. It would seem that, consistent with chivalric norms,

228 Id. at 398. The focus here is on the conduct of the gang members. The complex psychological, economic and social factors that cause persons to join gangs is beyond the scope of this article.
229 Id. at 371-72.
230 See supra, note 20 and accompanying text.
231 People v. Medina, 209 P.3d at 111.
232 In the words of The Notorious B.I.G.—perhaps one of the most famous casualties of gang violence—“you’re nobody til somebody kills you.” You’re Nobody, Life after Death (Bad Boy Records 1997). The idea that dying to defend one’s honor, or to defend or protect others is admirable, has also been a recurring theme in the popular imagination of knighthood. See e.g., Joe Darion & Mitch Leigh, The Impossible Dream, Man of La Mancha (1964) (describing the requirements of a knight as: “to be willing to march into hell for a heavenly cause.”).
233 See Cop Killer Gets Death; Daryle Black’s Murderer to be Executed, Long Beach Press-Telegram (May 10, 2003) at A1. The extraordinarily low death sentence rate for single-victim gang murders cannot be explained on the hypothesis that a higher percentage of gang murder cases involve multiple victims. In fact the percentage of gang murder cases that are multiple
when violence occurs between men in the context of defending the honor of groups or individuals, and when such violence is expected and normalized within that context, society, as represented by prosecutors and juries, is less outraged by the resulting deaths.

While the extraordinarily low death sentence rate for gang murders strongly suggests a societal tolerance for “honor violence” and is consistent with such tolerance expressed in other aspects of the criminal law, other factors may be at work. The low death sentence rate may be due in part to the fact that the victims in gang murders are overwhelming men and, as we discuss below, the death penalty is far more likely to be imposed for murder of a woman than murder of a man. Other characteristics of the victims may also contribute to the low death sentence rate. Victims of gang violence are more likely to be racial minorities and to be living in the more marginal communities where gangs operate, and the victims may be, or may be perceived as being, themselves participants in the gang culture. Consequently, prosecutors and juries may deem such victims less worthy of the “protection” of the death penalty. However, such other factors, even though suggesting that a societal tolerance for honor violence may not be the only explanation for the treatment of gang murders, does not refute the chivalry hypothesis. To the extent the death penalty is imposed according to the gender of the victim, that is an expression of chivalric values. Similarly, disparities in the use of the death penalty based on the race and class of the victims recalls the rigidly class-based distinctions in medieval times defining to whom the knight owed a duty of protection. In sum, whether the failure to employ the death penalty in gang murder cases is due entirely to society’s tolerance for honor violence or, instead, to certain characteristics of the victims, that failure strongly suggests a chivalric effect.

B. Rape Murders

The data in the current study confirm what others have asserted: rape murder is the crime most likely to result in a death sentence. In single-victim rape murder cases, the death sentence rate was 31.7%, almost nine times the rate for single-victim capital cases generally (3.4%). This strikingly disproportionate use of the death penalty in rape murder cases, marking rape murderers as the “worst of the worst,” appears even more noteworthy in light of the fact that murderers in this category may or may not have actually committed a rape—an attempt is enough—and may or may not have intended, or even foreseen, the death. Rape murder is, of course, the quintessential “gendered” crime. While in theory in California the crime could be committed by a woman against a man (if she were to kill him in the course of trying to obtain sex from him by force or threats) or by a woman against a woman (if she aided a man to commit the crime) or by a man against a man (if the defendant killed another man to facilitate the rape of a woman), in murder cases is 11.2%, significantly lower than the percentage for non-gang murder cases, 16.0%.

234 See supra, notes 73-91 and accompanying text.
235 See infra, notes 282-89 and accompanying text.
236 Interestingly, this pattern holds true even when the victim is an innocent bystander, and has not assumed the risks of gang life. See, e.g., People v. Shabazz, 209 P.3d 105 (Cal. 2009), People v. Sanchez, 130 P.3d 519 (Cal. 2006).
virtually all cases, the crime is committed (and, in every case in the study, was committed) by a man against a woman.\textsuperscript{237}

Setting aside for the moment the critique of rape and rape-murder prosecutions as determined by class and race bias—likely itself a product of chivalric norms which defined only certain “ladies” as deserving of the knight’s protection—the question is whether simply the disproportionate use of the death penalty itself can be explained as a chivalry effect. How extraordinary the 31.7% death sentence rate is may best be appreciated by comparing death sentences for single victim rape murders and for multiple murders. There is a virtually universal consensus that, if there is to be a death penalty, defendants who kill more than one victim should be death-eligible—that they are clearly among the worst of the worst. All the recent proposals to reform and narrow the death penalty would retain multiple murder as a death-eligibility factor. For example, the Governor’s Commission in Illinois recommended the reduction of death-eligibility factors in Illinois from twenty to five, including multiple murder.\textsuperscript{239} The Massachusetts Governor’s Council on Capital Punishment, called upon to draft a “model” death penalty law, would have created a death penalty scheme with only six death-eligibility factors, including multiple murder.\textsuperscript{240} Finally, that was the position of the non-governmental bipartisan Constitution Project, which would have retained multiple murder as one of only five death-eligibility factors.\textsuperscript{241} There is no similar consensus regarding rape murder. In fact, all three of the above reform proposals would not have included rape murders as capital crimes.

California prosecutors and jurors disagree completely and their view more likely represents general cultural norms. The various commissions were dominated by legal or criminal justice professionals, and, therefore, they were not representative bodies. Further, they were obliged to issue reports explaining their recommendations, making them less willing to attempt a rational defense of archaic values. In California, the death sentence rate for rape murders is almost twice that for defendants guilty of multiple murder generally, and more than three times the death sentence rate for defendants who kill “only” two victims.\textsuperscript{242} That California prosecutors and jurors would see killing one person in the course of a rape or

\textsuperscript{237} In one case in the study, \textit{People v. Morales}, the defendant in a rape murder case killed four victims, including a man. See \textit{Whittier Murderer of 4 Family Members Gets Death}, Los Angeles Times (Aug. 24, 2005).
\textsuperscript{238} See supra notes 93-97 and accompanying text.
\textsuperscript{242} Only when defendants have killed three or more victims does the death sentence rate exceed the death sentence rate for single victim rape murder cases. The death rate for rape murders is also substantially higher than for other forms of capital murder which some might think are particularly heinous, e.g., murder of a child or murder for financial gain (contract murders or murders to collect life insurance).
attempted rape as so much more heinous than killing two people is on its face remarkable\textsuperscript{243} and requires an explanation.

Feminist scholars have long argued that rape should not be viewed as a sexual act, but as an especially aggravated form of violence and dominance perpetrated primarily by men against women in an assertion of power.\textsuperscript{244} It has been analogized to torture,\textsuperscript{245} and, both United States courts and international courts have held rape to be torture under international law.\textsuperscript{246} Torture is a special circumstance under California law\textsuperscript{247} and requires proof that the defendant intended to torture and kill the victim and inflicted an extremely painful act upon a living victim.\textsuperscript{248} The death sentence rate in single-victim torture murder cases in the study was 9.0%, less than one-third the death sentence rate for single-victim rape murder cases. Again, that California prosecutors and jurors would see killing a woman in the course of a rape or attempted rape as so much more heinous than intentionally killing her after inflicting other forms of torture on her is again remarkable and also requires an explanation.

The explanation in chivalric times would have been clear. Rape (and therefore rape-murder) had a dimension that distinguished it from other crimes: it was not simply a crime against the woman victim, but was also, perhaps even primarily, a crime against the honor of the man who was her protector (her husband or her father)\textsuperscript{249} because it was a crime against the man’s property.

The historical origin of the death penalty for rape lies in the long standing view of rape as a crime of property where the aggrieved was not the woman but her

\textsuperscript{243} To the extent this hierarchy of values is based on comparative harms inflicted on victims, prosecutors and jurors seem to think that rape + death is worse than death + death, or, in other words that rape is a fate worse than death, a position that has been strongly disputed by some feminist scholars. In praising the feminist movement for changing societal ideas about rape, Susan Jacoby has written “But the most important change brought about by the women’s movement is abandonment of the antediluvian notion that rape is ‘a fate worse than death.’ Nothing is worse than death . . . .” Susan Jacoby, Thank Feminists for Rape Reforms, BALTIMORE SUN, 11A (Aug. 13, 2002), \textit{quoted in} Rayburn, \textit{supra} note 95, at 1119.

\textsuperscript{244} See generally SUSAN BROWNMILLER, AGAINST OUR WILL 377, et seq. (1975); Martha Chamallas, Lucky The Sequel, 80 Ind. L.J. 441, 461-67 (2005) (discussing the sex/violence dichotomy).

\textsuperscript{245} See NANCY VENABLE RAINIE, AFTER SILENCE 257 (1998).

\textsuperscript{246} Zubeda v. Ashcroft, 333 F.3d 463, 472-73 (3d Cir. 2003); Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002); \textit{see also} Bonita C. Meyersfield, Reconceptualizing Domestic Violence in International Law, 67 ALB. L. REV. 371, 394-95 (2003) (discussing decisions of international tribunals recognizing rape as a form of torture). Congress has also defined torture to include rape. \textit{See, e.g.,} Torture Victims Relief Act of 1998, 22 U.S.C. § 2152(3) (2010).

\textsuperscript{247} California Penal Code § 190.2(a)(18).

\textsuperscript{248} People v. Jennings, 237 P.3d 474, 498 (Cal. 2010).

\textsuperscript{249} KAEUPER, \textit{supra} note 13, at 211.
husband or father. In the Southern states this view coalesced with a tradition which valued white women according to their purity and chastity.\textsuperscript{250} The excessive use of the death penalty to punish rape murders reflects a societal view that “elevates [women’s] chastity to the very essence of their identity.”\textsuperscript{251} These views concerning the special harms caused by rape, and thus by rape-murder, found voice in the Chief Justice’s dissent in \textit{Coker v. Georgia},\textsuperscript{252} where he wrote: “Rape . . . is destructive of the human personality. The remainder of the victim’s life may be gravely affected, and in turn may have a serious detrimental effect upon her husband . . . .”\textsuperscript{253} Thus, while attempting to enunciate the harms that women suffer after being raped, the Chief Justice seemed to conflate the experience of the victims with the effect rape has on the men to whom rape victims “belong.” The same views explain why, until recently, the law did not recognize spousal rape as a crime\textsuperscript{254} and may explain why, even today in California, spousal rape murder is not a capital crime.\textsuperscript{255}

The extraordinary disparity in the employment of the death penalty in single victim rape murder cases—almost nine times the overall rate for single victim cases, almost twice the rate for multiple murder cases, and more than fifteen times the rate for single victim theft-based felony-murder cases—may have less to do with the relative heinousness of rape-murder compared to other forms of capital murder and more to do with outdated notions about honor, violence and sex.

C. Domestic Violence Murders

In contrast to rape-murderers, domestic violence murdererers seldom are sentenced to death. As noted above, this result is first of all a product of the fact that the voters, in enacting (and amending) the 1978 death penalty law, did not make killing an intimate partner, or even killing a spouse during a rape, a special circumstance.\textsuperscript{256} Yet even when the domestic violence murderers are death-eligible under one of the existing special circumstances, they are sentenced to death at a lower-than-average rate. In the current study, the death sentence rate in single victim domestic violence capital murders was 2.6%, below the 3.4% death sentence rate for

\textsuperscript{250} Brief of Amici Curiae American Civil Liberties Union et al., \textit{supra} note 127 at *6. \textit{See also} Rayburn, \textit{supra} note 95, at 1126 (“the only way to guarantee exclusive control of [women] by husbands was to threaten the ultimate punishment: death.”).

\textsuperscript{251} Rayburn, \textit{supra} note 95, at 1155.


\textsuperscript{253} 433 U.S. at 612 (Burger, C.J., dissenting).

\textsuperscript{254} Morgan Lee Woolley, \textit{Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues}, 18 HASTINGS WOMEN’S L. J. 269, 269 n.1 (2007) (noting that it was not until 1993 that marital rape became a crime in all fifty states).

\textsuperscript{255} \textit{See supra} note 178. The exception for spousal rape-murder is consistent with chivalric norms—as the ruler of his household a man was entitled to sexual access to his wife, so the concept of spousal rape had no meaning.

\textsuperscript{256} Thus, while the non-violent burglar who has a fatal car accident while escaping with the loot is guilty of a special circumstances murder and is therefore death-eligible (\textit{see e.g.}, \textit{People v. Weddle}, 2 Cal.Rptr.2d 714 (Ct. App. 1991), the husband who rapes and intentionally kills his wife is not.
single-victim capital murders. The numbers are small, but the data from the Appellate Study is similar: a death sentence rate of 4.7% for single-victim domestic violence murderers as against an overall single-victim death sentence rate of 8.5%. The data from the current study confirm that domestic violence murders are disproportionately excluded at all levels, first by the voters’ definition of death-eligibility and then by the prosecutors’ and juries’ selections. Single victim domestic violence murders constituted 12.8% of all first degree murders in the current study, 9.3% of the capital murders, and 6.9% of the death sentences. Although the absolute numbers and the disparities are not substantial, they are notable because, as to victims, domestic violence murder is a “gendered” crime. In the current study, more than 66% of the victims in single-victim domestic violence capital murders were women, as against an overall rate for women victims in single-victim capital murder cases of 21.6%. Yet, even though, as we discuss below, the death penalty is substantially more often imposed in female victim cases than in male victim cases, the death penalty is “underemployed” in domestic violence cases.

This relative tolerance extended to domestic violence murderers—consistent with the chivalric norm that the knight was the unquestioned master of his household—is troubling in light of the fact that women are much more likely to be murdered by intimate partners than under other circumstances. As was noted earlier, spousal violence was traditionally either condoned or ignored by the law as a private matter between the partners. Cases from around the country demonstrate the patriarchal views that judges (mostly male) have regarding domestic violence and even domestic violence murder. One aspect of this patriarchal belief can be a sense of identification with the defendant on the part of the judge. For example, in one 1995 case, that may not be typical, but reflects the persistence of chivalric norms, a man had been arrested four times for domestic violence against his ex-wife, and the judge had sentenced him to a total of one eight-hour domestic violence program. The man killed his wife the day he completed the program, and when the judge was asked why he hadn’t taken the four previous incidents of violence seriously he stated that, having gone through a divorce himself, he identified with the defendant and why he was angry. The fact that the death penalty is rarely seldom in cases of domestic violence murder highlights that—whether the discounting is done by the voters, the prosecutor, or the jury—society does not condemn the murder of a present or past intimate partner to the same degree as it does the murder of any other victim.

Another reason for the tolerance shown towards domestic violence murderers may be a misguided belief on the part of voters, prosecutors and juries that the victim of a domestic violence murder is somehow partly responsible for her own death. This view holds that women provoke or instigate domestic violence against themselves. For example, one judge certainly

257 See infra, Part IV.B.
258 Britton, supra note 156, at 64.
259 See SIMON, supra note 157, at 181 (discussing how spousal violence has been “sheltered” by the courts under a privacy doctrine).
261 Id. at 1066-67.
262 Id.
held this belief in a case where a man tracked down his wife who was trying to flee their abusive marriage, and shot her five times in the face. The judge sentenced the man to a minimal sentence, which he served on the weekends. The judge reasoned that the victim “provoked” her husband by not telling him she was leaving.263 Even if the victim did nothing that a prosecutor or jury may believe “provoked” the murder in that moment, these decision-makers may believe that simply by being involved with an abusive man a woman has some responsibility for her own murder. As we discuss below, the decision making process for capital jurors is often deeply personal, and jurors are more likely to impose a death sentence when they feel personally threatened by the defendant.264 In cases of domestic violence, jurors may feel that they would never get themselves into a situation where they were being abused, or that if they were in an abusive relationship they would have the sense to leave before it turned deadly, and thus they have trouble identifying with the victim. This deep misunderstanding of the dynamics of domestic violence—the manipulation by the abuser, the time taken to break down the victim’s feelings of self worth265 and avenues of escape, and the power and control that the abuser wields over the victim—may be another reason juries find domestic violence victims to be less worth the application of the death penalty than victims of stranger crimes.

* * *

The sentencing results for these three “gendered” types of murder—gang-murder, rape-murder, and domestic violence-murder—are set out below:

<table>
<thead>
<tr>
<th>Death-Sentence Rates in Single-Victim First Degree Capital Murder Cases</th>
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<tr>
<td>Overall</td>
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<tr>
<td>3.4%</td>
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263 Id., at 1066.
264 See infra Part IV.A.
These three kinds of murders highlight the ways in which the California death penalty is applied in accordance with chivalric ideas. The dichotomy Justice Ginsburg once noted, whereby “women [are] viewed both as the property of men and as entitled to a crippling ‘chivalric protection’” leads to disproportionate death sentences when murder is accompanied by the gender-based crimes of rape and domestic violence. When murder occurs as part of a culture where violence is used to maintain certain power structures and social controls, such as gang violence or domestic violence, the severity of those murders tends to be discounted. Although society may decry gang violence, the role of such violence appears to be understood, and, even when the victim is an innocent bystander, prosecutors and juries seem to refrain from imposing the death penalty, perhaps because they understand the role this violence plays in the community. Similarly, although the feminist movement has made great strides in pushing the law to recognize and punish domestic violence, chauvinistic ideas about men’s right to punish their wives remain deeply entrenched in both our legal and lay society. These three particular kinds of murder shed light on the parallels between chivalric culture and our current society, indicating that in contexts where gender plays a salient role in crime, we may still adhere to medieval views on the interplay between gender and violence.

IV. THE DEATH PENALTY AND GENDER

The disparities in death sentencing for “gendered” murders form the background for a discussion of the broader issue of gender and the death penalty. This section examines whether there are gender-of-defendant and/or gender-of-victim disparities in the administration of the death penalty and, if so, whether those disparities are consistent with a chivalry effect.

A. Gender of the Defendant

The data in the current study confirm the most well-known aspect of the relationship of gender to the death penalty, that women murderers are sentenced to death at a significantly lower rate than men. There were fifty-one women convicted of capital murder (5.1% of defendants convicted of capital murder), and only one, Anna Rodriguez, was sentenced to death. She was convicted of killing her husband by poisoning him, thus plainly violating chivalric norms in terms of her choice of victim (a lady should not be killing her “lord and master”) and her choice of means (killing by stealth is dishonorable because it denies the victim the opportunity to defend himself), thus making her a likely candidate for a death sentence. While these numbers in the current study are probably too small to prove the existence of a gender of defendant disparity, when combined with the numbers from the earlier studies, they confirm the findings of previous

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266 Brief of Amici Curiae American Civil Liberties Union et al., supra note 127, at *11.
267 See, supra note 236.
269 At the common law, the wife who killed her husband was regarded as having committed a crime worse than murder.

[S]he not only breaks through the restraints of humanity and conjugal affections, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason …

W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 445 (1769).
researchers. Taking the three California studies together, women constitute roughly 5% of the defendants convicted of first degree murder and death-eligible. The three studies encompassed 245 death sentences, and only three of the 245 defendants sentenced to death (1.2%) were women.271

Two reasons suggest themselves for why death-eligible women guilty of capital murders are so infrequently sentenced to death, both of them consistent with chivalric norms. The simple explanation is that women are sentenced to death at a lower rate than men because of chivalric attitudes on the part of prosecutors and juries. Because women are stereotyped as weak, passive, and in need of male protection, prosecutors and juries seem reluctant to impose the death penalty upon them.272 In this sense women are treated by the criminal justice system as almost like children—considered less rational and able to make appropriate decisions, they are conversely held to a lower moral standard when they transgress societal rules. Some authors argue that “the relative dependence of women on men translates into a diminished culpability and an increased possibility of rehabilitation” in the eyes of prosecutors and juries.273 Of course, some women are sentenced to death, and that too can be explained in chivalric terms because those women tend to be women who do not fit traditional notions of femininity, such as prostitutes, lesbians, and women of color, who do not benefit from this attitude of chivalry.274

The second reason relates to the role that “future dangerousness” plays in the death penalty decision. Studies of decision-making by capital juries indicate that a major factor in their decision-making is whether they believe the defendant, if allowed to live, will pose a danger to others.275 Some states, including the two highest execution states—Texas and Virginia—expressly make future dangerousness an aggravating factor, but the Supreme Court has assumed that juries consider the issue even in states, like California, that do not identify it as an issue for the jury.276 Studies of capital juries by the Capital Jury Project have confirmed that assumption. Even in cases where the state does not place the future dangerousness of the defendant at issue, jurors still consider future dangerousness in making their sentencing decisions.277 Jurors not only consider the issue, but place unwarranted weight on it because they “grossly underestimate how long capital murderer[s] not sentenced to death stay in prison.”278

270 See supra notes 128–46 and accompanying text.
271 The number is less than the total of death cases from the three studies because there were six cases that appeared in both the Appellate and Alameda studies.
272 Shapiro, supra note 5, at 456. This theory has been suggested as the reason for the low rates of women tried, convicted, and sentenced for crimes in general. See Herzog & Oreg, supra note 128, at 47.
273 Carroll, supra note 10, at 1418.
274 Herzog & Oreg, supra note 128, at 48–49.
277 Id.
In considering future dangerousness, jurors seem primarily to consider whether the defendant could be a danger to them personally, rather than what the likelihood would be that the defendant would pose harm to someone else.\(^{279}\) One consequence is that jurors tend to identify with victims who were killed by strangers, rather than by acquaintances,\(^{280}\) and with victims who were themselves “innocent,” rather than engaging in risky or illegal behavior.\(^{281}\) Women defendants are likely to be physically smaller and weaker than most men, and their appearance, coupled with cultural assumptions about women’s capacity for violence means that even women who have committed capital murder will be perceived as less dangerous to the jurors personally than male defendants committing similar crimes.

**B. Gender of the Victim**

Although, in past studies, more attention has been paid to gender of defendant disparities, and gender of victim disparities have only been noted in passing in studies focused on other issues,\(^{282}\) the gender of victim disparities found in the present study are striking. Women were the victims in 21.9% of the single-victim capital cases. In those cases, the death sentence rate was 10.9%, more than three times the overall death sentence rate in single-victim cases, and seven times the rate when men were the victims, 1.5%. The earlier California studies also reflect significant gender of victim disparities, although not of the same order as the most recent study. In the Appellate Study, the comparable figures were 14.0% for female victim cases and 5.7% for male victim cases. In the Alameda Study, the figures were 18.4% for female victim cases and 5.7% for male victim cases.\(^{283}\)

This gender of victim disparity is produced in part, but only in part, by the high death sentence rate for rape murders (where all the victims were women) and the low death sentence rate for gang murders (where the victims were disproportionately men). When rape murders are excluded from consideration, the death sentence rate in the current study for female victim cases is 4.9% compared to 1.5% in male victim cases. The disparity also persists in the earlier California studies when rape murders are excluded. In the Appellate Study, the death sentence rate for female victim cases was 10.3%, as against the 5.7% for male victim cases, and, in the Alameda Study, the comparable figures were 17.5% and 5.7%. Excluding the gang murder cases among with the rape murder cases further reduces the gender of victim disparity in the current study, but the disparity remains substantial. Excluding both rape murder and gang murder cases,


\(^{280}\) *Id.* at 359.

\(^{281}\) *Id.* 364.

\(^{282}\) See supra note 149 and accompanying text.

\(^{283}\) As to what might explain the apparent increase in the gender-of-victim disparity over time, two factors should be noted: (1) the percentage of first degree murder convictions based on gang killings has increased significantly, and, as the current study shows, men are disproportionately the victims in gang killings, where the death penalty is rarely imposed; and (2) there has been a substantial decline in the absolute number, and the percentage, of capital case defendants sentenced to death, which may exaggerate disparities as use of the death penalty becomes more narrowly focused on particular kinds of murders, e.g., rape murder.
a death sentence was imposed in 5.6% of the female victim cases and only 2.1% of the male victim cases.\textsuperscript{284} If all three gendered crimes identified earlier are excluded, the respective death sentence rates were: 7.9% in female victim cases and 2.0% in male victim cases. These figures are set out in the following chart.

![Death Sentence Rates in Single-victim Capital Cases By Gender of Victim](chart.png)

If the death penalty in fact has any deterrent effect, it offers little “protection” to the women victims of domestic violence, but disproportionate “protection” to women killed by strangers.\textsuperscript{285} Again, studies of capital juries’ decision-making offer some explanation for these results. Although jurors interviewed by the Capital Jury Project claimed that the victim’s gender was irrelevant to their decisions,\textsuperscript{286} in actual cases, they were more likely to return a verdict of death if the victim was female.\textsuperscript{287} Reasons for this may be that the perceived or assumed

\textsuperscript{284} There is no comparable data from the earlier California studies on gang murders.

\textsuperscript{285} By “strangers” we mean persons other than current or former intimate partners.

\textsuperscript{286} Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1556 (1998); Sundby, supra note 279, at 347 (finding that only 5% of jurors said they would be much more likely to vote for death if the victim were female). At least some jurors, however, recognized that they found the murder of women to be more troubling than the murder of men. One female juror described her process in deciding how bad the case she sat on was this way: “I thought about a scale—the cliche of thinking about Manson, but that kind of crime, that kind of mass murder, serial murder involving children or women as the worst. I don’t know why that seems to me—children in particular and, unfairly, women before men.” Sundby, supra note 279, at 368.

\textsuperscript{287} Sundby, supra note 279, at 357.
innocence or helplessness of the victim plays a significant role in the jurors’ decisions, as well as the degree to which the victim was seen as not having in any way engaged in risky behavior. Presumably jurors felt that female victims, except in the case of domestic violence, were more innocent and less to blame for the violence committed against them. These factors fit with chivalric stereotypes about women’s helplessness and need for male protection and help explain why California, like medieval society, punishes less severely male on male violence or male on female violence within the home (which may be seen as the male’s prerogative or for which the female victim may be seen as partly to blame) than stranger (usually male) violence toward the innocent and helpless female.

* * *

The data establishes that there are disparities in death-sentencing by both the gender of the defendant and the gender of the victim, with the gender of the victim having an even greater affect on penalty outcomes than the gender of the defendant, and, as noted, these disparities cannot be explained away by the nature of the murders. This treatment of women as less culpable and less to be feared when they murder and as weak and more in need of society’s protection when they are victims is the essence of chivalry.

CONCLUSION

As noted above, chivalry has had a powerful influence on American culture and law. In light of that history, the empirical evidence reflecting a tolerance for honor killings (as reflected in the negligible use of the death penalty in gang killings), a grossly disproportionate use of the death penalty for rape-murderers and its scant use for domestic violence murderers, and the substantial disparities in death-sentencing based on the gender of defendants and gender of victims strongly suggest a chivalry effect is at work in the application of the California death penalty.

In Furman, the Supreme Court held that the death penalty, as then administered, was unconstitutional because there was too great a risk that it was being imposed in an arbitrary

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288 Id. at 352.
289 Id. at 364.
290 This pattern replicates the pattern consistently found in studies of race and the death penalty, from the seminal study of the Georgia death penalty by Professor Baldus and others (the basis for the constitutional challenge in McCleskey v. Kemp, 481 U.S. 279 (1987)) to the recent study by the American Bar Association in eight states which found: “Every state studied appears to have significant racial disparities in its capital system, particularly those associated with the race of the victim.” American Bar Association, State Death Penalty Assessments: Key Findings (2008), available at http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc. That both the race of the victim and the gender of the victim seem to have a substantial effect on death sentencing raises the troubling possibility that who is the victim may matter to prosecutors and juries as much, or more, than the nature of the crime or the character of the defendant.
291 See supra, Part I.
fashion because only 15-20% of those convicted of capital murder were actually being sentenced to death and the standardless selection of those 15-20% would inevitably be arbitrary. \(^{293}\) The promise of *Furman* and succeeding cases was that the modern death penalty would be administered in a rational, non-arbitrary manner, \(^{294}\) that capital punishment would “be imposed fairly, and with reasonable consistency, or not at all.” \(^{295}\) Even prior to the present study, there was evidence that, in California, the promise of *Furman* was not being met. In a study of homicides committed in the 1990s, Michael Radelet and Glenn Pierce \(^{296}\) found statistically significant disparities in imposition of the death penalty based on race of victim and on the location of the homicide. The death penalty was substantially more likely to be imposed for the killing of a non-Latino white victim than for the killing of an African-American or Latino, \(^{297}\) and the highest death sentencing rates occurred in counties with “the highest proportion of non-Hispanic whites in their population and the lowest population density.” \(^{298}\) The present study, with a death sentence rate (5.5%), significantly below that found unconstitutional in *Furman*, reveals additional substantial disparities in the administration of the death penalty, disparities which can be explained as resulting from chivalry on the part of prosecutors and jurors. A death penalty scheme in which death sentences are imposed according to a medieval code of honor is surely not a fair and rational scheme.

Such a scheme also runs counter to the promise of *J.E.B.* that the law should not be administered on the basis of “invidious, archaic, and overbroad” gender stereotypes. \(^{299}\) The present study confirms what earlier studies have shown: that the death penalty is imposed on women relatively infrequently and that it is disproportionately imposed for the killing of women. Thus, the death penalty in California appears to be applied in accordance with stereotypes about women’s innate abilities, their roles in society, and their capacity for violence. Far from being gender neutral, the California death penalty seems to allow prejudices and stereotypes about violence and gender, chivalric values, to determine who lives and who dies. \(^{300}\)

Although at least some of the death sentencing disparities documented here have been recognized as long ago as the execution Ethel Spinelli, the courts have paid scant attention.

\(^{293}\) *See* 408 U.S. at 309, n.10 (Stewart, J., concurring); *id.* at 386, n.11 (Burger, C.J., dissenting); *id.* at 435-36 n.19 (Powell, J., dissenting).


\(^{297}\) *Id.* at 37.

\(^{298}\) *Id.* at 38.


\(^{300}\) To say that a death penalty scheme administered on the basis of gender stereotypes violates the promise of *J.E.B.* is not to say that a defendant would succeed with an Equal Protection challenge to the scheme. The defendant making such a challenge would have the same problem as Warren McCleskey had in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the difficulty of proving that either the prosecutor or the jurors in his or her case was acting with discriminatory intent.
Only once has the issue even been mentioned in the Supreme Court. In *Furman*, Justice Marshall raised a warning flag about discrimination by gender of the defendant:

> There is . . . overwhelming evidence that the death penalty is employed against men and not women . . . . It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.”

For Justice Marshall, the discrimination in favor of woman was, like racial discrimination, an insupportable outcome of “committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases.” Justice Marshall’s concern has not found voice in later cases. In fact, in *McCleskey v. Kemp*, Justice Powell, writing for the majority, offered as a reason for rejecting McCleskey’s claim that a complex statistical study proved a substantial risk of racial bias in capital sentencing that “the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.” Justice Powell thus made clear his view that to consider gender disparities in the death penalty was an extreme to which the Court would never go.

Recently, and apparently for the first time, the California Supreme Court addressed a “chivalry” challenge to a defendant’s death sentence. In *People v. Carasi*, the male defendant, Carasi, and his girlfriend, Lee, were charged with the double murder of Carisi’s mother and his former girlfriend, and the prosecution sought the death penalty against both defendants. The prosecution’s evidence was that the defendants had plotted the murders, lured the women victims to a parking garage, and then stabbed the victims to death. Both defendants moved for severance on several occasions, and one of Carasi’s arguments was that a joint trial with a female co-defendant would inevitably put him at a disadvantage at the penalty phase because of “misplaced chivalry” by the jury. As the United States Supreme Court has recognized, the issue of relative culpability can be a “critical issue” in the penalty phase of a death penalty case. Nevertheless, the motions were denied, and both defendants were convicted of first degree murder, and the special circumstances were found true. At the joint penalty phase, Carasi was sentenced to death, and the jury was unable to agree as to Lee (who was subsequently sentenced to life without possibility of parole). On appeal, the California Supreme Court dismissed Carasi’s “chivalry” challenge out of hand. The court found no reason to believe that chivalry might have affected the result because Carasi had offered “only generalized assumptions about cultural stereotypes and gender biases in criminal cases” to justify his claim, because there was evidence in the record that could have justified the different outcomes, and because the jury was instructed to consider each defendant individually “based solely on the evidence applicable to that defendant.”

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301 *Furman*, 408 U.S. at 365 (1972) (Marshall, J., concurring) (internal citations omitted).
302 *Id.*
304 *Id.* at 316-17.
305 190 P.3d 616 (Cal. 2008).
307 It is not clear whether the court rejected the defendant’s claim because it found that the mere fact of gender of defendant disparities in the application of the death penalty failed to establish
that there was a risk of gender bias in sentencing or because proving a risk of gender bias was insufficient if the defendant could not prove gender bias in his case.


Justice Powell voiced this concern about McCleskey’s challenge: “Given . . . safeguards already inherent in the imposition and review of capital sentences, the dissent’s call for greater rationality is no less than a claim that capital punishment system cannot be administered in accord with the Constitution.” Id. at 313 n.37.

See supra, notes 113-127 and accompanying text.


See Remarks of Sister Helen Prejean, in Ronald J. Tabak, Symposium: The Death Penalty, Religion & the Law: Is our Legal System’s Implementation of Capital Punishment Consistent with Judaism or Christianity? 2002 RUTGERS J. OF LAW & RELIGION 31, 35 (noting that victims seek, and judges impose, the death penalty to honor victims). Recently, California Supreme Court Justice Moreno asserted in a concurring opinion that the purpose of a penalty phase “is not to honor the victim but to decide whether the defendant should receive a death sentence,” People v. Verdugo 236 P.3d 1035, 1073-74 (Cal. 2010), but no other justice joined him in that position. See also People v. Kelly, 171 P.3d 548, 565 (Cal. 2007) (Moreno, J. conc. & dis.) (criticizing the victim impact evidence on the ground that “the punishment phase of a criminal trial is not a memorial service for the victim”) (quoting Salazar v. State, 90 S.W.3d 330, 335-36 (Tex. 2002)). Professor Susan Bandes argues that this concern to vindicate the interests of the victims’ families has been dressed up in therapeutic terms.

The theme of closure has reframed the entire death penalty debate. For many years, support for the death penalty was premised on its deterrent function. More recently, the weight of empirical evidence has rendered the deterrence rationale increasingly tenuous. Retribution, the major alternative rationale, has always been a harder sell. Retribution at one time sounded too close to revenge, and made people uncomfortable. The language of healing and closure has provided a way to soften the retribution rationale. If the death penalty can help survivors heal, then retribution can be viewed as therapy rather than bloodlust. Thus the notion of closure provides a rationale for our continuing commitment to the capital system. At the same time, the perceived requisites of closure have fueled changes in the structure of the capital system, including victim impact statements, truncated
The death penalty calls upon the prosecutor and the jurors to make an awesome decision: whether another human being should be put to death. In California, that decision, first by the prosecutor, then by the jurors, is essentially unconstrained by legal standards and calls for the prosecutor, and then the jury, to make a moral/emotional choice. It should not be surprising, that, lacking other guidance, prosecutors and juries may fall back on the deeply ingrained cultural values and stereotypes to make that decision. Despite a half-century struggle against chivalry in the law, at least in the death penalty, chivalry appears to be alive and well.

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appeals, and broadened categories of death eligibility. In this way the feedback loop perpetuates itself. We have promised survivors that the system can give them closure, and capital punishment is now compelled by our promise of closure. Susan Bandes, *Victims, Closure, and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 26 (2009).