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**THE DEATH PENALTY: MENTALLY ILL MEN ARE EXECUTED;
MENTALLY ILL WOMEN ARE COMMITTED**

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**THE DEATH PENALTY: MENTALLY ILL MEN ARE EXECUTED; MENTALLY ILL
WOMEN ARE COMMITTED**

AMY L. GREENBAUM

INTRODUCTION

Scott Wesley Buchholtz- Sanchez (“Baby Scott”) was born on June 30, 2009.¹ His mother, Otty Sanchez (“Otty”), was thirty-three years old.² She was studying to be a pharmacy technician.³ Baby Scott lived for just three and a half weeks.⁴ On July 25, 2009, Otty took a knife and dismembered Baby Scott.⁵ She chewed off three of his little toes, severed his head, and ripped out his brains; there is evidence that she even ate some of his brains.⁶ The scene was so gruesome that first responders could not even speak to each other; some were seen crying outside of the home.⁷ When interviewed by investigators, Otty revealed that the devil made her do it.⁸ Although she was found competent to stand trial, Otty was spared from the death penalty.⁹ Instead, she was committed to—and to date remains in—a mental institution.¹⁰

Andre Thomas (“Andre”) had a history of psychotic delusions.¹¹ He became a father when he was in ninth grade and married his girlfriend, Laura, when he was eighteen years old.¹²

¹ Robert Crowe et. al., *Texas Woman Accused of Beheading, Eating Infant Son*, SEATTLE PI (July 27, 2009, 10:00 PM), <http://www.seattlepi.com/national/article/Texas-woman-accused-of-beheading-eating-infant-1305342.php>.

² *Texas Mom Who Dismembered Baby Not Guilty by Reason of Insanity, will go to State Institution*, FOX NEWS (Jul. 1, 2010, 5:12 AM), <http://www.foxnews.com/us/2010/07/01/texas-mom-dismembered-baby-guilty-reason-insanity-committed-institution.html>.

³ *Warning Signs Missed in Baby Mutilation Case*, NBC NEWS (July 27, 2009, 6:51 PM), http://www.nbcnews.com/id/32185637/ns/us_news-crime_and_courts/t/warning-signs-missed-baby-mutilation-case/#.VmYMXHarTIU.

⁴ *Id.*

⁵ *Id.*

⁶ Mariela Rosario, *Texas Mother Kills Son, Eats Brain*, LATINA (July 29, 2009, 12:04 PM), <http://www.latina.com/lifestyle/news-politics/texas-mother-kills-son-eats-brain>.

⁷ *Warning Signs Missed in Baby Mutilation Case*, *supra* note 3.

⁸ *Id.*

⁹ *Mother Competent to Stand Trial for Allegedly Decapitating Baby*, FOX NEWS (Nov. 12, 2009), <http://www.foxnews.com/us/2009/11/12/mother-competent-stand-trial-allegedly-decapitating-baby/>.

¹⁰ *Texas Mom Who Dismembered Baby Not Guilty by Reason of Insanity, Will go to State Institution*, FOX NEWS (July 1, 2010), <http://www.foxnews.com/us/2010/07/01/texas-mom-dismembered-baby-guilty-reason-insanity-committed-institution/>.

¹¹ *Texas Inmate Gouges Out Eyes, Remains on Death Row*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/mental-illness-texas-inmate-gouges-out-eyes-remains-death-row> (last visited Dec. 11, 2015).

¹² Brandi Grissom, *Trouble in Mind*, TEXAS MONTHLY (Mar. 2013), <http://www.texasmonthly.com/articles/trouble-in-mind/>.

Unfortunately, just four months later, the pair separated.¹³ Laura moved into another relationship and had a daughter with that man two years later.¹⁴ Andre struggled with the voices in his head.¹⁵ He received no treatment and the symptoms only became worse when his relationship with Laura ended.¹⁶ When Andre was twenty-one, he visited Laura's home, kicked in the door, and stabbed Laura, pulling what he thought was her heart out of her body.¹⁷ He then marched into the children's room where his four-year-old son, Andre, Jr., and Laura's daughter, one-year-old Leyha, were sleeping.¹⁸ He held little Andre down and stabbed him repeatedly.¹⁹ He did the same to Leyha.²⁰ He then carved out the hearts of both children before stabbing himself and falling to the floor.²¹ When he realized that he was not dying, Andre got up, slipped the organs into his pocket, and walked home.²² He later called law enforcement to confess to the murders, stating that he "thought it was what God wanted [him] to do."²³ While being held in jail after the murders, Andre, after quoting a verse from the Bible, "reached into his right eye socket," "pulled out his eyeball," and ate it.²⁴ He was convicted and sentenced to death.²⁵ Although Judge Cathy Cochran agrees that Andre is "clearly crazy," she believes he is sane according to Texas law.²⁶ The Texas Court of Criminal Appeals denied his appeal. He has since appealed to a federal court and remains on death row today.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Brandi Grissom, *Trouble in Mind*, TEXAS MONTHLY (Mar. 2013), <http://www.texasmonthly.com/articles/trouble-in-mind/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Brandi Grissom, *Andre Thomas: Struggling to Maintain Sanity in Prison*, THE TEXAS TRIBUNE (Feb. 25, 2013), <http://www.texastribune.org/2013/02/25/andre-thomas-part-5/>.

²⁶ *Id.*

These horrific stories are just two of the many examples of the interaction of mental illness and the criminal justice system, which continues to rattle confidence in the system and challenge the fairness and accuracy of its implementation. Although there are many deficiencies in how the death penalty is levied in the United States, the disparate treatment of mentally ill defendants constitutes an arbitrary and capricious implementation of the death penalty in violation of the Eighth Amendment. Within the already disparate treatment of the mentally ill, there is yet another disturbing inequity: gender bias. To illustrate, “[t]hose who sit in judgment are hesitant to impose harsh sentences on women,”²⁷ especially women who suffer from mental illness and murder their children. Alternatively, men who suffer from mental illness are disproportionately more likely to receive the death penalty for committing the same or similar crime. This paper examines how the death penalty is disparate and inconsistent for women who face capital crimes. Specifically, this paper explores mental illness, and in particular, argues that the death penalty system treats mentally ill defendants differently, creating an endemic bias for women. This disparity causes the arbitrary implementation of the death penalty to be in violation of the Eighth Amendment.

“[F]emale offenders have always been treated differently from male offenders[.]”²⁸ In an overwhelming number of cases where men and women committed strikingly similar death penalty-eligible crimes, men were convicted and sentenced to death, while conversely, women were either spared from the death penalty or were committed to a mental institution.²⁹ For example, there

²⁷ Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U.J. GENDER SOC. POL'Y & L. 427, 453 (2000).

²⁸ Victor L. Streib, *Rare & Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 612 (2006).

²⁹ See *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Rubio v. State*, 241 S.W.3d 1 (Tex. Crim. App. 2007); *Yates v. State*, 171 S.W.3d 215, 220 (Tex. App. 2005); *Laney v. State*, 223 S.W.3d 656, 658 (Tex. App. 2007); *Husband Testifies in Case of Woman Who Cut Off Baby's Arms*, FOX NEWS (Feb. 14, 2006), <http://www.foxnews.com/story/2006/02/14/husband-testifies-in-case-woman-who-cut-off-baby-arms.html>.

have been 1,421 total death penalty executions in the United States since 1976.³⁰ Sixteen of those executions have been women;³¹ six of the sixteen occurred in Texas,³² the leading state for executions.³³

Part I will examine landmark cases that changed the way the death penalty is levied in the United States. It will spell out some of the problems that individuals with mental illness face in death penalty cases. It will also discuss some of the discrepancies surrounding evaluation methods used by mental health experts. Part I will conclude by discussing the types of mental illness most commonly seen in capital cases and how mental illness affects each phase of trial.

Part II will discuss notable landmark cases that have had an impact on mental illness and the death penalty. Part II will also examine the differences between competency and sanity. Additionally, it will explain the most common claims of mental illness in capital cases. It is estimated that 5% to 10% of defendants on death row suffer from mental illness.³⁴ Although it is difficult to determine how many mentally ill defendants have been executed, it is believed that at least 60 mentally ill defendants have been executed.³⁵ Finally, Part II will also discuss the problems a litigant may encounter when dealing with a death penalty charge.

Part III will discuss how gender disparity is heightened by the mental illness intersection. Additionally, Part III will shed light on the arbitrariness of the death penalty due to the chivalry

³⁰ *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Dec. 2, 2015), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

³¹ *Id.*

³² *Women and the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/women-and-death-penalty> (last visited Dec. 11, 2015).

³³ *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Dec. 11, 2015) (since 1976, Texas has executed 531 death row inmates, and Oklahoma, the next leading state in executions, has executed 112 death row inmates since 1976).

³⁴ *Mental Illness and the Death Penalty*, ACLU, <https://www.aclu.org/mental-illness-and-death-penalty> (last visited Dec. 11, 2015).

³⁵ Jordan Smith, *Why Is It So Easy for States to Execute the Mentally Ill?*, THE INTERCEPT (May 20, 2015, 9:47 AM), <https://theintercept.com/2015/05/20/mentally-ill-executed/>.

theme, the mental illness view, and the views of the judge, the jury, and the public. This article concludes by discussing how the death penalty should be abolished because of the egregious deficiencies involved in its implementation, specifically the treatment of mentally ill capital defendants.

I. MENTAL ILLNESS AND THE DEATH PENALTY: A BIRD'S EYE OVERVIEW

A. How Furman Changed the Application of the Death Penalty

*Furman v. Georgia*³⁶ is a 1972 case that marks the modern era of the death penalty. Five Justices wrote separate concurring opinions in this highly controversial and polarizing case. In 263 pages, the Justices explored the inadequacies of the death penalty in the United States resulting in a plurality opinion that rocked the criminal justice system.³⁷ The opinion highlighted how, prior to *Furman*, states were administering the death penalty in a cruel and unusual way.³⁸ Indeed, in *Furman*, Justice Stewart compared the cruel and unusualness of the death penalty to being struck by lightning.³⁹ There was no solid definition of the death penalty prior to *Furman*; in fact, the guidelines varied from state to state.⁴⁰ However, *Furman* changed the way the states imposed the death penalty by forcing states to revamp their capital offense statutes.⁴¹ The purpose was to ensure that the death penalty was not imposed in a capricious or discriminatory manner.⁴² After *Furman*, there were no executions for four years while the states revamped their death penalty

³⁶ *Furman v. Georgia*, 408 U.S. 238, 238 (1972) (*Furman* noted many disparities in how the death penalty was being levied. For example, “[j]uries (or judges, as the case may be) have practically untrammelled discretion to let an accused live or insist that he die.” “For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.” “Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.”).

³⁷ *See id.*

³⁸ *See id.*

³⁹ *Id.* at 309.

⁴⁰ *Id.* at 240.

⁴¹ *See Furman*, 408 U.S. 238.

⁴² *See id.* at 294-95.

statutes to ensure they complied with *Furman*'s constitutional mandate.⁴³ The mandates, however, provided little guidance to the states.⁴⁴ However, even after *Furman*, inconsistency continued among the states with respect to issues like mental illness. It was clear that *Furman* did not abolish the death penalty. Instead, *Furman* gave states the opportunity to draft death penalty statutes that would pass constitutional muster.⁴⁵ Thereafter, states struggled to establish statutes that ensured the death penalty was not being carried out in a capricious or discriminatory manner.⁴⁶ *Gregg v. Georgia*⁴⁷ paved the way for guided discretionary statutes.⁴⁸ It established statutes requiring a bifurcated process and the findings of aggravating and mitigating circumstances.⁴⁹

Despite *Furman*, many issues continue to exist, partly because the states were left to their own, with little if any guidance from the Supreme Court when devising the new statutes. There are several cases that highlight how mental illness has been treated in death penalty cases. Some of the most notable cases that have had an impact on mental illness are *Atkins v. Virginia* and *Ford v. Wainwright*. In *Atkins*, a man with documented mental retardation faced the death penalty.⁵⁰ The Court in *Atkins* held that executing the mentally ill is considered cruel and unusual

⁴³ David A. Love, *40 Years After Furman, the U.S. Death Penalty Is In Disarray*, HUFFINGTON POST (June 29, 2012, 3:22 PM), http://www.huffingtonpost.com/david-a-love/abolish-death-penalty-_b_1629359.html.

⁴⁴ *Furman*, 408 U.S. at 240.

⁴⁵ John Anthony Dukes, Sr., *The Effect of Furman v. Georgia on State Death Penalty Legislation* 30 (2008) (unpublished PhD. Dissertation, University of South Carolina) (on file with University of South Carolina).

⁴⁶ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

⁴⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976) (This case was pivotal; it is one of the five "Death Penalty Cases," along with *Jurek v. Texas*, 428 U.S. 262 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Supreme Court upheld the death penalty statutes of Texas and Florida, and struck down the death penalty statutes of North Carolina and Louisiana. The court stated, "[t]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition[,] these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." . . . "[E]ach distinct system must be examined on an individual basis.").

⁴⁸ See *Gregg*, 428 U.S. at 220 (1976); see also Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 KAN L. REV. 1039, 1041 (1995).

⁴⁹ *Gregg*, 428 U.S. at 164.

⁵⁰ *Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002).

punishment.⁵¹ Justices Hassel and Koontz concluded that “the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of nine and twelve is excessive.”⁵² The Court reasoned that the execution of Atkins would not serve a deterrent or retributive purpose.⁵³ In *Wainwright*, prosecutors wanted to sentence a man with paranoid schizophrenia to death.⁵⁴ Psychiatrists testified that Ford was unable to assist in his defense due to his diagnosis.⁵⁵ The Court in *Wainwright* held that the Eighth and Fourteenth Amendments prohibit executing the insane.⁵⁶ The Court reasoned that “[a]lthough the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution.”⁵⁷ Despite these cases, we continue to execute the mentally retarded and the mentally ill. States are still free to devise their own formulas and have been doing so since *Furman*. Additionally, the death penalty statutes are distinctively different in each state, each implementing discrete procedures to convict and sentence a capital defendant, and each using different methods of executions.⁵⁸ Thus, despite the *Furman* mandates, there continues to be no uniformity within the states, or even within the various counties of a large state like Texas, in terms of the guidelines used to sentence someone to death and the methods of execution.

⁵¹ *Id.* at 321-22.

⁵² *Id.* at 310.

⁵³ *Id.* at 321.

⁵⁴ See *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁵⁵ *Id.* at 402-03.

⁵⁶ *Id.* at 418.

⁵⁷ *Id.* at 411.

⁵⁸ Niraj Chokshi, *How Each State Chooses to Execute its Death Row Inmates*, THE WASHINGTON POST (Apr. 30, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/04/30/map-how-each-state-chooses-to-execute-its-death-row-inmates/>.

Mental illness is an issue that plagues the criminal justice system. To fully understand the complexities of this issue, the following section explores the problems many mentally ill litigants face in the capital punishment process.

B. Mentally Ill Inmates Are Being Executed

A large number of death row inmates suffer from some type of mental illness.⁵⁹ Although there are difficulties in defining mental disorders, the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines a mental disorder as “a syndrome characterized by [a] clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.”⁶⁰

“[T]he execution of an insane person simply offends humanity.”⁶¹ However, the mentally ill are still being executed in the United States.⁶² Indeed, people—in most cases men—who suffer from mental illness are being found competent to stand trial, and in some cases, are being allowed to represent themselves at trial.⁶³ “[A] 1969 study conducted by Dr. Phillip Resnick found that when women mothers kill their [children], 68% are sent to mental hospitals and only 27% are sent to prison; when fathers kill their children, 72% go to prison and only 14% are hospitalized.”⁶⁴ The following sections discuss how mental illness affects each and every stage of capital punishment.

⁵⁹ Michael Mello, *Executing the Mentally Ill*, CRIMINAL JUSTICE MAGAZINE, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_22_3_executingmentallyill.authcheckdam.pdf (last visited Dec. 11, 2015).

⁶⁰ Eric R. Maisel, *The New Definition of a Mental Disorder*, PSYCHOLOGY TODAY (July 23, 2013), <https://www.psychologytoday.com/blog/rethinking-psychology/201307/the-new-definition-mental-disorder> (Mental disorders are not easily defined; there is no precise boundary for the definition of ‘mental disorder,’ and different situations may lead to different definitions. However, the DSM has made progress in updating the definition to ensure it is scientifically valid and clinically useful.).

⁶¹ *Ford*, 477 U.S. at 407.

⁶² *Mental Illness and the Death Penalty*, *supra* note 34; Mello, *supra* note 59.

⁶³ *Panetti*, 551 U.S. at 936.

⁶⁴ Jim Goad, *20 Moms Who Killed Their Kids*, THOUGHT CATALOG (Apr. 4, 2014), <http://thoughtcatalog.com/jim-goad/2014/04/20-moms-who-killed-their-kids/>.

For example, in order for the crime to qualify for capital murder, the actor must form the specific intent to kill.⁶⁵ Most capital crimes are specific intent crimes, i.e., the defendant must specifically intend to kill the victim.⁶⁶ Many mentally ill individuals lack the ability to form the specific intent to kill due to delusions, false beliefs, or hallucinations, and therefore cannot form the specific intent required to meet the standard in a death-eligible crime.⁶⁷ Moreover, there is a high likelihood that a mentally ill individual would give a false confession to a murder.⁶⁸ Furthermore, he or she would likely have difficulty in understanding what his or her *Miranda* rights are and whether or not to waive those rights.⁶⁹ Finally, there are many cases where a mentally ill defendant is deemed competent to stand trial.⁷⁰

C. Competency v. Sanity

Competency and sanity are two different legal definitions that can apply to defendants suffering from mental illness.⁷¹ Due process “prohibits the criminal prosecution of a defendant who is not competent to stand trial.”⁷² A judge determines competence before trial commences.⁷³ The judge does so via a competency hearing in which the judge will review competency

⁶⁵ *Mental Illness and the Death Penalty*, *supra* note 34.

⁶⁶ Patrick S. Metze, *Death and Texas: The Unevolved Model of Decency*, 90 NEB. L. REV. 240, 250 (2011).

⁶⁷ *Mental Illness and the Death Penalty*, *supra* note 34; Nicky Boatwright, *Mad, Not Bad: Special Needs Defendants*, ADVANCE CRIMINAL LAW COURSE 2 (2014); J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court’s Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 473 (2012).

⁶⁸ *Mental Illness and the Death Penalty*, *supra* note 34.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ruth Lee Johnson, *The Difference Between Competency and Sanity*, PSYCHOLOGY TODAY (Nov. 13, 2014), <https://www.psychologytoday.com/blog/so-sue-me/201411/the-difference-between-competency-and-sanity> (Competency and sanity play different roles in capital cases. A defendant’s competency determines whether the defendant can understand legal proceedings he or she is facing. A defendant’s sanity “determines whether the defendant [can] be held responsible for his criminal actions.” Therefore, a defendant “can be [deemed] legally competent and [] legally insane” in the same proceeding.).

⁷² *Medina v. California*, 505 U.S. 437, 439 (1992).

⁷³ Johnson, *supra* note 71.

assessments prepared by mental health professionals.⁷⁴ At the competency hearing, the judge will determine whether a defendant has the capacity to understand the legal proceedings against him and whether the defendant can effectively communicate with his attorney and “assist in the preparation of his defense.” A person is deemed “incompetent to stand trial if the person does not have (1) sufficient present ability to consult with the person’s lawyer with a reasonable degree of rational understanding; or (2) a rational, as well as factual, understanding of the proceedings against the person.”⁷⁵ If the defendant is deemed incompetent, he or she is typically committed to a mental institution where mental health professionals will attempt to rehabilitate the defendant’s mental state to the competency standard.⁷⁶ Once a defendant is committed, the decision to release the defendant rests in the hands of the hospital.⁷⁷ Historically, defendants suffering from mental illness have been found competent to stand trial.⁷⁸

Sanity, on the other hand, must be raised and proved beyond a reasonable doubt by the defense.⁷⁹ Moreover, it is determined by the jury at the conclusion of trial.⁸⁰ Generally, a defendant must be deemed legally insane rather than profoundly mentally ill in order to meet an insanity defense.⁸¹ There are two methods used to test for insanity: the M’Naghten test and the American Law Institute (“ALI”) test.⁸² Under the M’Naghten test, the defendant must prove that he “was unable to understand what he was doing at the time of the crime due to [a] ‘defect of reason or disease of the mind,’” or, if the defendant knew what he was doing, he could not

⁷⁴ Brian R. Boch, *Fourteenth Amendment – The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 CRIM. L. & CRIMINOLOGY 883, 884-85 (1994).

⁷⁵ Boatwright, *supra* note 67.

⁷⁶ *Mental Illness and the Death Penalty*, *supra* note 34.

⁷⁷ Dillard, *supra* note 67, at 484.

⁷⁸ *Mental Illness and the Death Penalty*, *supra* note 34.

⁷⁹ Johnson, *supra* note 71.

⁸⁰ *Id.*

⁸¹ Dillard, *supra* note 67 at 506, 511.

⁸² *Id.*

comprehend that what he was doing was wrong.⁸³ Under the ALI test, the defendant must prove that he lacks the “capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as a result of a mental disease or defect.”⁸⁴

To determine the possibility of mental illness in a defendant, attorneys can order a psychiatric evaluation if the client shows signs of mental illness or incompetence.⁸⁵ Then, defense attorneys can utilize that information for mitigation purposes or prepare for an insanity defense.⁸⁶ Consequently, police officers, prosecutors, defense attorneys, and judges are typically not trained to recognize the symptoms of a mentally ill capital defendant.⁸⁷ Indeed, key players in the criminal justice system have deluded themselves in believing that they know mental illness when they see it, a misconception that carries lethal consequences for the mentally ill capital defendant.⁸⁸

D. Problems Mentally Ill Litigants Face in Death Penalty Cases

There are problems in all phases of legal proceedings for litigants facing the death penalty.⁸⁹ For example, a defendant who suffers from mental illness is more susceptible to give a false confession due to police pressure.⁹⁰ “Interrogation tactics are designed to mislead.”⁹¹

⁸³ *Mental Illness and the Death Penalty*, *supra* note 34.

⁸⁴ *Mental Illness, Your Client and the Criminal Law*, TEX. APPLESEED 2 (Feb. 2015), https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf.

⁸⁵ *Mental Illness, Your Client and the Criminal Law*, Texas Appleseed 2 (Feb. 2015), https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf.

⁸⁶ *American Bar Association Death Penalty Due Process Review Project, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, ABA 46 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

⁸⁷ *Id.*

⁸⁸ Andrew E. Taslitz, *Mental Health and Criminal Justice*, CRIMINAL JUSTICE MAGAZINE (2007), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_22_3_mentalhealth_crimjustice.authcheckdam.pdf.

⁸⁹ *See Mental Illness and the Death Penalty*, *supra* note 34.

⁹⁰ *See id.*

⁹¹ William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health and Status: Vulnerability to Police Interrogation Tactics*, CRIMINAL JUSTICE MAGAZINE (2007), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_22_3_mentalhealthstatus.authcheckdam.pdf.

Therefore, defendants may see the interrogator as the sympathetic good guy.⁹² The interrogation tactics are generally difficult for any suspect and can sometimes last hours or even days.⁹³ Such tactics only become more difficult for an individual with impaired cognitive ability and processes.⁹⁴ For example, individuals with mental illness may exhibit characteristics that mimic deception or guilt such as avoiding eye contact and anxiety.⁹⁵

*Miranda v. Arizona*⁹⁶ addressed four cases in which the defendants were interrogated by law enforcement or prosecutors without being given notice of their legal rights prior to questioning.⁹⁷ In one case, the defendant gave a verbal admission.⁹⁸ In the other three cases, defendants subsequently signed a written confession.⁹⁹ The Court in *Miranda* stated, “there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”¹⁰⁰ The Court expressed the importance of safeguards in the interrogation process to counter compelling suspects to speak.¹⁰¹ A mentally ill defendant may not fully understand the importance of *Miranda* warnings,¹⁰² nor may the defendant be able to knowingly, voluntarily, and intelligently waive them.¹⁰³ Mentally ill defendants generally exhibit characteristics of “impulsivity, deficits in cognitive processing, suggestibility, delusions, and extreme compliance.”¹⁰⁴ To illustrate, individuals with mental

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁹⁷ *Id.* at 445.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Miranda*, 384 U.S. at 467.

¹⁰¹ *Id.*

¹⁰² *Mental Illness and the Death Penalty*, *supra* note 34.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

illness or intellectual disability may be over compliant, often responding to interrogators by telling them what they want to hear in an attempt to cease questioning.¹⁰⁵ Exploiting such characteristics may lead to false or involuntary confessions.¹⁰⁶ Additionally, interrogators may mislead defendants about the nature of the evidence against them, often confusing the mentally ill.¹⁰⁷ Moreover, some individuals with mental illness have no short-term memory.¹⁰⁸ As a result, they would lack the ability to premeditate first degree murder.¹⁰⁹ Individuals suffering from mental illness often lack confidence and can easily sway with the persistent techniques of law enforcement investigators.¹¹⁰ A challenge that mentally ill defendants face is that not only do they have to prove their mental impairment, they “must present evidence of ‘police overreaching’” to render the *Miranda* waiver or confession involuntary.¹¹¹

E. Mental Health Experts: Alarming Discrepancies

Individuals with mental illness experience disabilities that a mental health expert can take into consideration for purposes of competency or sanity. However, the courts do not specify specific standards for mental health experts.¹¹² The complexities of the issues that surround capital cases require mental health experts to examine a wide range of psychological issues and demand “specialized expertise, care[,] and consideration.”¹¹³

¹⁰⁵ Follette, *supra* note 93.

¹⁰⁶ *Mental Illness and the Death Penalty*, *supra* note 34; AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 419.

¹⁰⁷ Follette, *supra* note 93.

¹⁰⁸ Taslitz, *supra* note 90.

¹⁰⁹ *Id.*

¹¹⁰ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 419.

¹¹¹ *Id.* at 414.

¹¹² Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, AMERICAN JOURNAL OF FORENSIC PSYCHIATRY (1994), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1994_mental_health.authcheckdam.pdf.

¹¹³ *Id.*

Disturbingly, at least one prosecutor's office in Texas does not use mental health experts to testify in capital cases.¹¹⁴ In other jurisdictions, mental health experts have offered false testimony.¹¹⁵ For example, one Texas jurisdiction repeatedly used Dr. George Denkowski, a psychologist who had been reprimanded for using non-standard and unscientific methods in his evaluations.¹¹⁶ In at least one case, Dr. Denkowski inflated a defendant's scores in order to conclude that the defendant did not suffer from mental retardation.¹¹⁷ The American Association on Intellectual and Developmental Disabilities organization publicly cautioned mental health professionals against using Dr. Denkowski's unrecognized methods.¹¹⁸ Two defendants that were examined by Dr. Denkowski have been executed, fourteen more remain on death row.¹¹⁹ Texas prosecutors have also hired Dr. Richard Coons, a forensic psychiatrist "whose methodology [has been] found to be unreliable" by the courts.¹²⁰ Dr. Coons has been found to rely on factors that other mental health professionals do not rely on.¹²¹ Furthermore, he has never verified the accuracy of his predictions.¹²²

False or inaccurate testimony is widespread in capital cases, not with just medical experts, but also with other key players in the legal process. For instance, the credibility of A.P. Merillat, a Texas investigator with the Special Prosecution Unit, has been condemned by the courts after it was discovered that he gave false testimony in several capital cases.¹²³ Merillat's testimony

¹¹⁴ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 423.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 424.

¹¹⁸ *Id.* at 423.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 425.

¹²¹ *Id.*

¹²² AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 425.

¹²³ Maurice Chammah, *Prison-Crime Witness Now on the Defensive*, N.Y. TIMES (Sept. 27, 2012), <http://www.nytimes.com/2012/09/28/us/in-texas-a-p-merillat-deals-with-false-testimony-ruling.html>.

“helped send [fifteen people] to death row.”¹²⁴ Two of those death sentences were converted to life sentences.¹²⁵ In another one of those cases, Manuel Velez, a death row inmate who had spent nine years in prison—four on death row—was released after it was discovered that Merillat gave false testimony at Velez’s trial.¹²⁶

F. Mental Health and the Bifurcation Process

There is a bifurcated process in capital trials in the United States: the guilt or innocence phase, and the sentencing phase.¹²⁷ This process is one of the “safety nets” imposed by the Court in *Gregg v. Georgia*.¹²⁸ During the sentencing phase, aggravating factors are presented by the prosecution.¹²⁹ Mitigating evidence may be presented by the defense in an attempt to receive a life verdict versus death.¹³⁰ Mitigating evidence can include anything that the defense can use to persuade the jury to choose life.¹³¹ However, most jurors do not have experience in dealing with mental illness.¹³² Nor are jurors instructed that mental illness is a mitigating factor as opposed to an aggravating factor.¹³³ Indeed, jurors do not receive any instructions regarding mental illness and how such evidence should be evaluated.¹³⁴ Therefore, “jurors often misunderstand the relationship between mental illness and mitigating factors.”¹³⁵ For example, if the defense attempts to present evidence that the defendant was abused as a child, jurors might see that a reason to vote for death, versus life.¹³⁶

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Mental Illness and the Death Penalty*, *supra* note 34.

¹²⁸ *See Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

¹²⁹ Dillard, *supra* note 67, at 501.

¹³⁰ Dillard, *supra* note 67, at 501; *Mental Illness and the Death Penalty*, *supra* note 34.

¹³¹ Dillard, *supra* note 67, at 501.

¹³² *Mental Illness and the Death Penalty*, *supra* note 34.

¹³³ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 431.

¹³⁴ *Id.* at 433.

¹³⁵ *Mental Illness and the Death Penalty*, *supra* note 34.

¹³⁶ *Id.*

There are other challenges that mentally ill litigants face in a capital case. Mentally ill individuals can suffer from a variety of positive, negative, and cognitive symptoms.¹³⁷ Some of these symptoms may cause the defendant to distrust their attorneys, making it difficult for the defendant to assist in his own defense.¹³⁸ In some instances, such as in the Scott Panetti case, defendants fire their attorneys because of false delusions or beliefs that the attorney is in a conspiracy with law enforcement.¹³⁹ Moreover, un-medicated or overly medicated defendants may exhibit bizarre or freakish behavior at trial.¹⁴⁰ Such behavior may frighten the jury and may lead them to conclude that the defendant is unsympathetic to the victim.¹⁴¹

Despite the problems and difficulties mentally ill defendants face, they continue to be executed in this country in violation of the spirit and the essence of *Furman*.¹⁴² For example, Kelsey Patterson suffered from paranoid schizophrenia at twenty-seven years of age.¹⁴³ He was institutionally committed on several occasions throughout his adult life.¹⁴⁴ A jury sentenced him to death for the murder of two people, and he was executed.¹⁴⁵ Additionally, James Colburn was diagnosed with paranoid schizophrenia at the age of seventeen.¹⁴⁶ One psychiatric assessment showed that Colburn was “experiencing auditory and visual hallucinations” the week before he

¹³⁷ Boatwright, *supra* note 67.

¹³⁸ *Mental Illness and the Death Penalty*, *supra* note 34.

¹³⁹ *Mental Illness and the Death Penalty*, *supra* note 34; *Executing the Insane: The Case of Scott Panetti*, TEXAS DEFENDER SERVICES, <https://vimeo.com/95295025>. (last visited Dec. 13, 2015).

¹⁴⁰ *Mental Illness and the Death Penalty*, *supra* note 34; *See Executing the Insane: The Case of Scott Panetti*, *supra* note 139.

¹⁴¹ *Mental Illness and the Death Penalty*, *supra* note 34.

¹⁴² *Id.*

¹⁴³ Dan Malone, *Cruel and Inhumane: Executing the Mentally Ill*, AMNESTY INTERNATIONAL MAGAZINE (Mar. 27, 2007), <http://www.amnestyusa.org/node/87240>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Execution Report: James Colburn*, TEXAS EXECUTION INFORMATION CENTER, <http://www.txexecutions.org/reports/301.asp>. (last visited Dec. 12, 2015).

murdered a woman.¹⁴⁷ Colburn was deemed sane at the time of the crime.¹⁴⁸ He was sentenced to death and was executed.¹⁴⁹ Similarly, Manuel “Manny” Babbitt suffered from Post-Traumatic Stress Disorder.¹⁵⁰ He fought in Vietnam; family testified that he was never the same after his military service.¹⁵¹ Babbitt was convicted of killing a woman, was sentenced to death, and was executed.¹⁵²

G. Most Common Types of Mental Illnesses in Capital Cases

As noted above, mental illness can affect a person’s interpretation of reality.¹⁵³ Consequently, mental disorders impede a defendant’s ability to help in his or her representation.¹⁵⁴ Mental disorders hinder a defendant’s ability to fully understand the importance of the legal proceeding before him or her.¹⁵⁵ Defendants with mental illness face many challenges at all stages of their legal proceedings. Furthermore, approximately “five to ten percent of all death row inmates suffer from a severe mental illness.”¹⁵⁶ This section discusses most commonly found mental disorders in capital murder cases that cause delusions, hallucinations, and irrational thinking.

¹⁴⁷ *Case Study: James Colburn*, TEXAS COALITION TO ABOLISH THE DEATH PENALTY, <http://tcadp.org/wp-content/uploads/2010/06/James-colburn-Case-Study.pdf>. (last visited Dec. 12, 2015).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Mental Illness and the Death Penalty*, *supra* note 34.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Description of Mental Illness*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty#midescription>. (last visited Dec. 13, 2015).

¹⁵⁴ Dillard, *supra* note 67, at 501.

¹⁵⁵ *Mental Illness and the Death Penalty*, *supra* note 34.

¹⁵⁶ *Id.*

i. Schizophrenia

Schizophrenia “is a chronic, severe[,] and disabling brain disorder”¹⁵⁷ Schizophrenia is a life-long condition with symptoms becoming greater when not medically treated.¹⁵⁸ People who suffer from schizophrenia experience false beliefs about other individuals plotting against them or their family.¹⁵⁹ They can experience auditory hallucinations where they hear voices or noises from people, beings, or things that are not there.¹⁶⁰ Indeed, they often have difficulty distinguishing reality from their hallucinations.¹⁶¹ They often have a belief of being much greater and powerful than they actual are.¹⁶² Investigators are trained to look for certain characteristics when interviewing suspects.¹⁶³ The symptoms of schizophrenia might mimic the behavior of someone who is guilty of a crime.¹⁶⁴ For example, it is not uncommon for someone with schizophrenia to avoid eye contact.¹⁶⁵ Furthermore, he or she may have problems interacting with people, including investigators.¹⁶⁶ These symptoms, which are common for someone with schizophrenia might trigger negative or deceptive behavior in the eyes of an investigator.¹⁶⁷

Someone with schizophrenia can also experience psychotic delusions. Psychotic delusions refer to a condition where the person experiences beliefs that appear normal to them but are not

¹⁵⁷ Boatwright, *supra* note 67.

¹⁵⁸ *Consequences of Non-Treatment*, TREATMENT ADVOCACY CENTER, <http://www.treatmentadvocacycenter.org/key-issues/consequences-of-non-treatment> (last visited Dec. 12, 2015).

¹⁵⁹ Boatwright, *supra* note 67.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Christian Nordqvist, *Paranoid Schizophrenia: Causes, Symptoms and Treatments*, MEDICAL NEWS TODAY (May 27, 2015), <http://www.medicalnewstoday.com/articles/192621.php>.

¹⁶³ John Bowden, *Quickly Read, Analyze, and Interpret Body Language*, POLICE ONE (Jan. 30, 2014), <http://www.policeone.com/investigations/articles/6783886-Quickly-read-analyze-and-interpret-body-language/>.

¹⁶⁴ *Id.*

¹⁶⁵ Boatwright, *supra* note 67.

¹⁶⁶ *Id.*

¹⁶⁷ Bowden, *supra* note 165.

part of reality.¹⁶⁸ Although delusions can originate from hallucinations, the two terms are not interchangeable.¹⁶⁹ Delusions involve a fixed belief of which can be plausible or bizarre.¹⁷⁰ One of these beliefs can be that the person has a special relationship with God in which they can receive direct messages.¹⁷¹ The cause of psychotic delusions is relatively unknown, although research has shown some relation to genetics.¹⁷²

The symptoms of schizophrenia can also affect a defendant's understanding of his or her *Miranda* warnings. For example, symptoms include being unable to process information to make decisions, difficulty in focusing, and retention of information recently learned. This would be a problem when a mentally ill person is being read his or her *Miranda* warnings. Without having the cognitive ability to fully understand the *Miranda* warnings, there is a possibility that the mentally ill person would provide a false or coercive confession.¹⁷³ To illustrate, in *Garner v. Mitchell*¹⁷⁴, even though law enforcement read Garner his *Miranda* warnings, and even though Garner said he understood and waived those rights, mental health evaluations determined that he “lacked capacity to waive his *Miranda* [warnings].”¹⁷⁵

ii. Intellectual Disability

Intellectual Disability is the term for what used to be called Mental Retardation.¹⁷⁶ “Intellectual Disability is a disability characterized by significant limitations in both intellectual

¹⁶⁸ *Delusional Disorder*, PSYCHOLOGY TODAY, <http://www.psychologytoday.com/conditions/delusional-disorder>. (last visited Dec. 12, 2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rashmi Nemade & Mark Dombeck, *Positive Symptoms of Schizophrenia: The Psychotic Dimension*, THERAPY HOUSE, http://www.thetherapyhouse.org/poc/view_doc.php?type=doc&id=8809 (last visited Nov. 20, 2016).

¹⁷² Elea Carey, *Psychosis*, HEALTHLINE, <http://www.healthline.com/health/psychosis#Causes> 4. (last visited Dec. 12, 2015).

¹⁷³ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88 at 419.

¹⁷⁴ *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009).

¹⁷⁵ *See id.*; Aimee Kaempf & Debra A. Pinals, *Competence to Waive Miranda Rights*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW ONLINE (Sept. 2008), <http://www.jaapl.org/content/36/3/400.full>.

¹⁷⁶ Boatwright, *supra* note 67.

functioning and in adaptive behavior, [to include] many everyday social and practical skills.”¹⁷⁷ The severity of a person’s Intellectual Disability can be measured by his or her IQ.¹⁷⁸ An IQ between fifty and fifty-five means that a person has a mild Intellectual Disability; an IQ between thirty-five and fifty-five means that a person has a moderate Intellectual Disability; an IQ between twenty and forty means that a person has severe Intellectual Disability; and an IQ below twenty means that a person’s Intellectual Disability is profound.¹⁷⁹ It is difficult to recognize the characteristics of someone with an Intellectual Disability; he or she may not exhibit behavior any different than the majority of society.¹⁸⁰ For that reason, persons with an intellectual disability may be disadvantaged when it comes to dealing with the criminal justice system.¹⁸¹ To illustrate, they may be embarrassed about their disability and as a result, may not disclose the disability when being questioned by authorities.¹⁸² They may state that they understand their *Miranda* warnings when in fact they do not.¹⁸³ They may become overwhelmed in police presence and may give misunderstood responses to law enforcement, possibly telling officers what the defendant thinks the officers want to hear.¹⁸⁴ They may become confused about the facts of the crime and may even give a false confession.¹⁸⁵ Such disadvantages make it more likely for someone with an intellectual disability to be wrongfully convicted in a capital crime.¹⁸⁶

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, THE ARC (Aug. 2009), <http://www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Davis, *supra* note 182.

iii. Postpartum Disorders

In many cases, women who kill their young children have experienced psychotic episodes.¹⁸⁷ Some of these episodes are the result of postpartum disorders.¹⁸⁸ Postpartum psychiatric disorders are divided into three categories: (1) postpartum blues, (2) postpartum depression, and the most severe type, (3) postpartum psychosis.¹⁸⁹ Under the postpartum blues category, women generally experience anxiety or irritability starting several days after delivery.¹⁹⁰ No treatment is required for postpartum blues because, aside from the unsettling feeling, it does not typically affect day-to-day functioning.¹⁹¹ In some cases, however, postpartum blues can develop into more serious disorders, especially if the woman has a history of depression.¹⁹² In general, postpartum depression emerges two to three months after delivery.¹⁹³ Symptoms of postpartum depression can include symptoms such as “tearfulness, loss of interest in usual activities, feelings of guilt, feelings of worthlessness, poor concentration, and suicidal thoughts.”¹⁹⁴ Other disorders such as obsessive-compulsive disorder and panic attacks have also been reported in women with postpartum depression.¹⁹⁵ Above all, some women experience perturbing and intrusive thoughts to harm their child.¹⁹⁶ The most severe form of the three

¹⁸⁷ Allie Townsend, *The Shaquan Duley Murder Case: Why Moms Snap*, TIME (Aug. 18, 2010), <http://content.time.com/time/nation/article/0,8599,2011630,00.html>.

¹⁸⁸ *Id.*

¹⁸⁹ *Postpartum Psychiatric Disorders*, MGH CENTER FOR WOMEN’S MENTAL HEALTH, https://womensmentalhealth.org/specialty-clinics/postpartum-psychiatric-disorders/?doing_wp_cron=1448556664.6662681102752685546875. (last visited Dec. 12, 2015).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

postpartum psychiatric disorders is postpartum psychosis.¹⁹⁷ This disorder can emerge as early as 48 hours after delivery.¹⁹⁸ Postpartum psychosis presents symptoms similar to bipolar illness and puerperal psychosis with a manic episode.¹⁹⁹ Women will typically experience “restlessness, irritability, and insomnia.”²⁰⁰ Women can often become depressed, erratic, or confused with delusional beliefs centered on their infant.²⁰¹ Moreover, women can experience auditory hallucinations instructing the mother to harm her child.²⁰² In the most extreme cases, infanticide or suicide may occur.²⁰³

II. MENTAL ILLNESS AND GENDER DISPARITY

A. *Men v. Women on Death Row*

“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.”²⁰⁴ The conviction rate and death row population for women is minimal.²⁰⁵ Statistics show that men are more likely to receive the death penalty than women.²⁰⁶ There have been 1,421 total death penalty executions since 1976 in the United States.²⁰⁷ Just sixteen of those executions have

¹⁹⁷ *Postpartum Psychiatric Disorders*, MGH CENTER FOR WOMEN’S MENTAL HEALTH, https://womensmentalhealth.org/specialty-clinics/postpartum-psychiatric-disorders/?doing_wp_cron=1448556664.6662681102752685546875. (last visited Dec. 12, 2015).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

²⁰⁴ *Furman*, 408 U.S. at 365 (Marshall, J., concurring).

²⁰⁵ *Arbitrariness*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/arbitrariness> (last visited Nov. 18, 2016).

²⁰⁶ *Facts About the Death Penalty*, *supra* note 30 (last updated Nov. 17, 2016).

²⁰⁷ *Facts About the Death Penalty*, *supra* note 30.

been women.²⁰⁸ Today, women make up less than 2% of the total death row population.²⁰⁹ In Texas alone, 246 of the 252 inmates currently on death row are men, and only six inmates are women.²¹⁰ Some states have never executed a woman. For example, despite having executed 20 people since 1976 and having 14 people currently on death row, Indiana has never executed a woman.²¹¹ In 2010, Virginia executed its first woman in almost a century.²¹²

Gender disparity is heightened by the mental illness intersection. *Atkins* demonstrates that executing the mentally ill is considered cruel and unusual punishment.²¹³ The Court in *Atkins* did not differentiate between a mentally ill man and a mentally ill woman. Furthermore, in the *Furman* case, the Court noted the immense evidence that the death penalty was notoriously applied towards men rather than women.²¹⁴ *Wainwright* demonstrates that Eighth and Fourteenth Amendments prohibit executing the insane.²¹⁵ Similarly, the Court in *Wainwright* did not differentiate between a mentally ill man or woman. So why the disparate impact of the death penalty between men and women?

²⁰⁸ *Facts About the Death Penalty*, *supra* note 30 (last updated Nov. 17, 2016).

²⁰⁹ *Gender and Racial Statistics of Death Row Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html (last updated Nov. 2, 2016).

²¹⁰ *Case Summaries for Current Female Death Row Inmates*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/case-summaries-current-female-death-row-inmates> (last visited Nov. 18, 2016).

²¹¹ *Case Summaries for Current Female Death Row Inmates*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/case-summaries-current-female-death-row-inmates>. (last visited Dec. 12, 2015).

²¹² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²¹³ *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring).

²¹⁴ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

²¹⁵ Victor L. Streib, *Sentencing Women to Death*, CRIM. JUST. MAG. (2001), http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_16_1_streib.html.

B. Women who commit infanticide are rarely executed.

“Women on death row today are rare.”²¹⁶ Women who kill their children are almost never executed for it.”²¹⁷

i. Chivalry Theme

The death penalty scheme is grossly flawed.²¹⁸ Society’s view of chivalric values may explain the disparate outcomes in capital cases.²¹⁹ For example, in 1941, at San Quentin State Prison, “[t]hirty male inmates offered to draw straws so that one of them would be sent to the gas chamber” in place of Eithel Spinelli, a woman who had murdered a gang member.²²⁰ The inmates felt that the execution of a woman—a mother of three children—was repulsive to society.²²¹ Women who are found guilty of capital murder rarely receive the death penalty.²²² Because of the societal view and stereotype that women are weaker and more passive than men, prosecutors and juries may hesitate to vote for the death penalty.²²³ The chivalry view presents evidence to suggest that women are favored by the criminal justice system.²²⁴ Women are looked upon like children, “less rational and less able to make appropriate decisions[.]”²²⁵ The same simplistic view held true, for example, when women could not practice law or even sit on a jury.²²⁶ Consequently, men are held to a higher moral standard when it comes to societal decency.²²⁷ Moreover, juries are

²¹⁶ Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. LAW J. 433, 458 (2002).

²¹⁷ Steven F. Shatz and Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER LAW & JUST. 64, 91 (2012).

²¹⁸ *Id.* at 65.

²¹⁹ Shapiro, *supra* note 27, at 456-57.

²²⁰ Shapiro, *supra* note 27, at 456-57.

²²¹ Shatz, *supra* note 217, at 65.

²²² Shatz, *supra* note 217 at 64.

²²³ *See id.*

²²⁴ *See id.*

²²⁵ Shatz, *supra* note 217, at 106.

²²⁶ Janice L. Kopec, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 CAP. DEF. J. 353, 355 n.9 (2003).

²²⁷ *See* Shatz, *supra* note 217, at 106.

sympathetic to the future dangerousness of women offenders.²²⁸ In Texas, providing evidence of future dangerousness can be an aggravating factor in determining whether the death penalty is appropriate.²²⁹ However, jurors tend to either identify or sympathize with women defendants.²³⁰ Even in non-capital cases, women typically receive less harsh sentences.²³¹ To illustrate, in one criminal case, the judge admitted that it was difficult to send a woman to prison.²³² In that case, the judge stated, “I keep thinking . . . Hey! She’s somebody’s mother!”²³³ However, laws that favor a particular gender are “unconstitutional if they differentiate on the basis of sex.”²³⁴

ii. The Mental Illness View

Women who kill their infants are generally found to suffer from some type of postpartum psychiatric disorder.²³⁵ However, woman who commit infanticide are rarely executed.²³⁶ Capital punishment is arguably reserved for the most heinous of homicides.²³⁷ This section points out that judges and juries tend to rationalize the murder of an infant by its mother as being due to mental illness or emotional disturbance.²³⁸ Indeed, a woman’s mental illness is often the center issue in an infanticide case.²³⁹ For example, Andrea Yates, Deanna Laney, and Dena Schlosser were each found not guilty by reason of insanity for the brutal murder of their children.²⁴⁰ Each woman was

²²⁸ See *id.*

²²⁹ Meghan Shapiro, *An Overdose of Dangerousness: How Future Dangerousness Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions it Supports*, 35 Am. J. Crim. L. 145, 146 (2008).

²³⁰ See Shatz, *supra* note 217, at 107.

²³¹ Shapiro, *supra* note 27, at 453.

²³² *Id.* at 453 n.210.

²³³ *Id.*

²³⁴ Shatz, *supra* note 217, at 71.

²³⁵ Cheryl L. Meyer, *Mothers Who Kill Often Give Warnings*, WOMEN’S E-NEWS (June 27, 2001), <http://womensenews.org/story/commentary/010627/mothers-who-kill-often-give-warnings>.

²³⁶ Streib, *supra* note 216.

²³⁷ *Id.* at 459.

²³⁸ See *id.* at 462.

²³⁹ See Meyer, *supra* note 235.

²⁴⁰ *Yates Found Not Guilty by Reason of Insanity*, CNN (Dec. 31, 2007)

http://www.cnn.com/2007/US/law/12/11/court.archive.yates8/index.html?_s=PM:US; Laney, 223 S.W.3d at 658; Tasha Tsiaperas, *Irving Mom Who Killed Kids Found Not Guilty by Reason of Insanity*, DALL. MORNING NEWS

committed to a mental institution.²⁴¹ Alternatively, Scott Panetti, Andre Thomas, and John Allen Rubio were each sentenced to death for capital homicide.²⁴² In the above mentioned cases, each defendant was suffering from some type of mental illness.²⁴³ Similarly, each defendant experienced voices at the time of the murders.²⁴⁴ In the cases where the parent murdered his or her children, the facts were strikingly similar. Thomas and Rubio both suffered from delusions at a young age.²⁴⁵ Laney was also deemed to suffer from delusions.²⁴⁶ When Rubio murdered his children, he believed he was fighting the evil that was in them.²⁴⁷ Yates thought Satan was talking to her and believed that she was saving her children from eternal damnation.²⁴⁸ In each case, the murder was brutal and horrific; the victims were innocent and vulnerable. In each case, although the facts and circumstances were similar, the disposition was not. In each case, all the men received the death sentence and all the women were found not guilty by reason of insanity and were committed to a mental institution.²⁴⁹

(Sept. 8, 2014, 10:36 PM), <http://www.dallasnews.com/news/crime/headlines/2014/09/08-irving-mom-who-killed-kids-found-not-guilty-by-reason-of-insanity>.

²⁴¹ *Yates Found Not Guilty by Reason of Insanity*, *supra* note 239; *Laney*, 223 S.W.3d at 658; Tsiaperas, *supra* note 239.

²⁴² *Panetti v. Quarterman*, 551 U.S. 930, 935 (2007); *Thomas v. State*, 2008 Tex. Crim. App. Unpub. LEXIS 733, at * 1 (Tex. Crim. App. Oct. 8, 2008); *Rubio v. State*, 241 S.W.3d 1,2 (Tex. Crim. App. 2007).

²⁴³ *Panetti*, 551 U.S. 936-37; *Thomas*, 2008 Tex. Crim. App. Unpub. LEXIS 733 at *55; Ildfonso Ortiz, *Psychiatrists: Rubio Suffers From Schizophrenia*, THE BROWNSVILLE HERALD (July 21, 2010, 12:00 AM), http://www.brownsvilleherald.com/article_301434ae-504e-560c-bb32-5b8915cc3d79.html.

²⁴⁴ Meg Kissinger, *Madness, Murder, and Shattered Lives*, J. SENTINEL (Nov. 1999), <https://news.google.com/newspapers?nid=1683&dat=19991128&id=E7caAAAIBAJ&sjid=by8EAAAIBAJ&pg=3455,7065357&hl=en>; *Thomas*, 2008 Tex. Crim. App. Unpub. LEXIS 733 at *8; Ortiz, *supra* note 242..

²⁴⁵ See *Thomas*, 2008 Tex. Crim. App. Unpub. LEXIS 733 at *56; Ortiz, *supra* note 242.

²⁴⁶ John Springer, *In Interview, Mother Details Delusions that Spurred her to Kill Sons*, CNN (Apr. 1, 2004, 4:11 PM), <http://edition.cnn.com/2004/LAW/04/01/laney/>.

²⁴⁷ *Rubio*, 241 S.W.3d at 7.

²⁴⁸ *Yates v. State*, 171 S.W.3d 215, 218 (Tex. App. 2005).

²⁴⁹ *Yates Found Not Guilty by Reason of Insanity*, *supra* note 239; Tsiaperas, *supra* note 239; *Panetti*, 551 U.S. at 937; *Thomas*, 2008 Tex. Crim. App. Unpub. LEXIS 733 at *1; *Rubio*, 241 S.W.3d at 2.

iii. Instances Where Women Are Executed

In rare cases, there are women, however, on death row in the United States that are executed.²⁵⁰ Professor Victor L. Streib describes the type of woman that is generally given the death penalty.²⁵¹ She will typically have some of the same qualities as a typical male litigant.²⁵² For example, she displays “unladylike behavior,” falls outside the accepted norm what society deems a “feminine woman,” and, in many cases, is a lesbian.²⁵³ In these cases, the woman appears to offend society with her behavior.²⁵⁴ Indeed, it has been suggested that prosecutors will attempt to defeminize defendants by portraying them as lesbians to make her have the same qualities as a typical male.²⁵⁵ Mental illness is generally not a presented issue in these cases.

iv. Judge and Jury Views and Public Opinion

The death penalty statutes are vague and do not eliminate a person’s beliefs and perceptions.²⁵⁶ As a result, many of the key players are susceptible to acting on feelings and emotions which results in disparate outcomes between men and women.²⁵⁷ Such an approach disadvantages men who suffer from mental illness because it is often unlikely that the jury will sympathize with him for killing a young and innocent victim.²⁵⁸ In a woman/mother’s case, evidence shows that the jury tends to associate the murder of a young and innocent victim—often the mother’s child—to deep-rooted mental issues.²⁵⁹ The Equal Protection Clause of the

²⁵⁰ Shapiro, *supra* note 27, at 458.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 458-59.

²⁵⁴ *Id.* at 458.

²⁵⁵ *Id.* at 459 n.244.

²⁵⁶ *Id.* at 466.

²⁵⁷ *Id.*

²⁵⁸ *See* Streib, *supra* note 216, at 458-59.

²⁵⁹ *Id.*

Fourteenth Amendment requires equal protection of the laws.²⁶⁰ The fact that the district attorney alone makes the decision of whether to seek the death penalty can be based on his or her feelings or emotions.²⁶¹ Moreover, jurors are generally unwilling to “impose a . . . death sentence on any such convicted woman.”²⁶² Because of this, women experience preferential treatment.²⁶³ In some cases, the idea of incarcerating a woman is more demeaning for a woman than for a man.²⁶⁴ Indeed, juries tend to acknowledge emotional disturbances in women who kill.²⁶⁵ During trial, women are usually able to manifest their emotional side to the jury.²⁶⁶ Juries can usually sympathize with a woman’s background as compared to a man’s background.²⁶⁷ Even judges sympathize with women; there is evidence that judges are more lenient when sentencing female defendants.²⁶⁸ In the cases of mental illness, in addition to suffering from the condition, there is the stereotypical view that women are weak and passive.²⁶⁹ This adds to the jury’s sympathy with the woman defendant.

“The Supreme Court and the states have worked for years attempting to create a fair system.”²⁷⁰ For example, there is a bifurcated process in capital cases.²⁷¹ In the first process, the jury hears the evidence and determines guilt or innocence.²⁷² In the second process, the jury is

²⁶⁰ U.S. Const. amend. XIV, § 1.

²⁶¹ See Jonathan DeMay, *A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 780 (1999).

²⁶² Shapiro, *supra* note 27, at 461.

²⁶³ *Id.* at 451-52.

²⁶⁴ *Id.* at 457.

²⁶⁵ *Id.* at 469.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 466.

²⁶⁸ Shatz, *supra* note 217, at 83-84.

²⁶⁹ *Id.* at 84.

²⁷⁰ Shapiro, *supra* note 27, at 468.

²⁷¹ Sam Kamin & Jeffrey J. Pokorak, *Death Qualification and True Bifurcation: Building on the Massachusetts Governor’s Council’s Work*, 80 IND. L.J. 131, 135 (2005).

²⁷² Penny J. White, *He Said, She Said, and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U.L. REV. 387, 399 (2006).

charged with determining whether or not to seek the death penalty.²⁷³ The same jury may sit through both processes.²⁷⁴ Prior to being selected as a juror, the juror is death qualified.²⁷⁵ Death qualification is a jury selection process where potential jurors are questioned about their views on capital punishment in order to determine whether they can follow the law and can consider all sentencing options.²⁷⁶ For example, if the case involves an interracial crime, questions about racial bias may be asked to the potential juror.²⁷⁷ In cases where a woman kills her child, questions about the juror's views regarding a woman's emotional disturbance should be asked in order to uncover gender bias. Even if jurors that sit on a woman's capital case are death-qualified, the overwhelming evidence shows that jurors are still partial to a woman who suffers from mental illness and kills her child.²⁷⁸

There are several factors that the district attorney considers when deciding whether to seek the death penalty.²⁷⁹ Public opinion is one of the factors considered.²⁸⁰ Like the jury, the public tends to sympathize with a mother, especially a mother who kills her child.²⁸¹ Society naturally tries to rationalize why she committed such a heinous act and often concludes that she must have not been in her right mind.²⁸² This is crucial information to the district attorney. If this is in fact what the public is thinking, the district attorney may be unlikely to be successful in his or her

²⁷³ *Id.* at 396-97.

²⁷⁴ *Lockhart v. McCree*, 476 U.S. 162, 180 (1986).

²⁷⁵ *Death Qualification*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/deathqualification>. (last visited Dec. 13, 2015).

²⁷⁶ *Id.*

²⁷⁷ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, *supra* note 88, at 46.

²⁷⁸ *Streib*, *supra* note 216, at 458.

²⁷⁹ Brian Palmer, *Capital Decision: James Holmes' Prosecutors Will Seek the Death Penalty. How Do They Decide That?*, SLATE (Apr. 2, 2013, 3:17 PM), http://www.slate.com/articles/news_and_politics/explainer/2013/04/james_holmes_faces_execution_how_do_prosecutors_decide_whether_to_seek_death.html.

²⁸⁰ *Id.*

²⁸¹ *Shapiro*, *supra* note 27, at 453.

²⁸² *Shatz*, *supra* note 217, at 65.

decision to seek the death penalty. On the other hand, if a man has murdered his child, society has a different rationalization. Certainly the man did not have a rational or sympathetic reason for murdering his child. Rather, the public opinion is that it is an evil and premeditated act.²⁸³ In that case, the district attorney would likely be successful in seeking the death penalty.

III. CONCLUSION

The death penalty is arbitrary and capricious. It “discriminat[es] against certain offenders and victims.”²⁸⁴ Events in pre- and post-*Furman* show that it cannot be universally applied perfectly. Despite the attempt to implement constitutional guidelines, the death penalty is still flooded with seemingly recalcitrant issues. Whether there are issues of race, age, gender, or mental illness, the death penalty is applied at the discretion of fallible humans, and the mistakes abound. Of all the deficiencies in the administration of the death penalty, mental illness remains one of the most egregious. It is unconstitutional to execute someone who did not commit the crime in his or her own volition, but it still happens.²⁸⁵ In some cases, the defendant was experiencing a psychotic episode or uncontrollable compulsion, or had a break in reality when the crime was being committed.²⁸⁶ The Supreme Court mandates that defendants must have a rational understanding that they are being executed for the crime they committed. Nevertheless, in some cases, such as in the Scott Panetti case,²⁸⁷ the defendant may not know or understand why he or she is being executed.²⁸⁸ In both cases, the “mentally ill . . . [should] not . . . be judged by the same rules as

²⁸³ Streib, *supra* note 216, at 462.

²⁸⁴ *Id.* at 433.

²⁸⁵ *Mental Illness and the Death Penalty*, *supra* note 34.

²⁸⁶ Boatwright, *supra* note 67.

²⁸⁷ *See Panetti v. Quarterman*, 551 U.S. 930(2007).

²⁸⁸ *Executing the Mentally Retarded Even as Laws Begin to Shift*, DEATH PENALTY INFORMATION CENTER (Aug. 7, 2000), <http://www.deathpenaltyinfo.org/node/659>; Brandy Grissom, *Case of Texas Killer Puts Spotlight on Executing the Mentally Ill*, THE DALLAS MORNING NEWS (Sept. 22, 2015, 11:11 PM), <http://www.dallasnews.com/news/state/headlines/20150922-case-of-texas-killer-puts-spotlight-on-executing-the->

the mentally fit.”²⁸⁹ In these cases, the outcome is unfair for those suffering from mental illness, especially when the defendant’s diagnosis prevents him or her from knowing what is right or wrong.

In terms of gender bias, a woman has a better chance of avoiding the death penalty, especially when she has killed her own child. Furthermore, she has a better chance of avoiding the death penalty if she fits the stereotype that women are weak and passive. The jury and judges are likely to sympathize with these type of women. As a result, they are more likely to recognize her mental illness and the effect that it had on the crime. The death penalty standard is broken. Furthermore, it is not applied equally between men and women who commit capital crimes. Therefore, if the death penalty cannot be applied perfectly, then it should not be applied at all.

Death is final. In fact, it is so final that a last statement from the inmate is often recorded if he or she wishes to give one.²⁹⁰ The death penalty is not perfect. Indeed, in many cases, even as the inmate lays still on the gurney, he or she will go to their death proclaiming their innocence in their last statement.²⁹¹ Since 1973, there have been a total of 156 exonerations of death row inmates that included complete acquittal, charges dismissed, or a complete pardon.²⁹² Moreover, false confessions and unreliable informants have led to wrongful convictions.²⁹³ Consequently,

mentally-ill. (Scott Panetti believes he is being executed so that he would not report prison corruption and to “stop him from preaching the gospel.”).

²⁸⁹ Marianne C. Kastrup, *Psychiatry and the Death Penalty*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Dec. 4, 1988), <http://www.ncbi.nlm.nih.gov/pubmed/3236345>.

²⁹⁰ See *Executed Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, www.tdcj.state.tx.us/death_row/dr_executed_offenders.html. (last visited Dec. 13, 2015).

²⁹¹ *Id.* (Offender Gregory Wright, TCDJ #999253 stated, “I have done everything to prove my innocence. Before you is an innocent man.” Offender Cary D. Kerr, TCDJ# 999449 stated, “To the State of Texas, I am an innocent man.” Offender Steven Woods, TCDJ #999427 stated, “You’re not about to witness an execution, you are about to witness a murder. . . . I never killed anybody, ever.”).

²⁹² *Facts About the Death Penalty*, *supra* note 30.

²⁹³ *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions>. (last visited Dec. 13, 2015); *Incentivized Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/informants>. (last visited Dec. 13, 2015).

roughly 7% of executions fail, leaving the defendant to feel severe pain to die a slow and agonizing death.²⁹⁴ “The burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society.”²⁹⁵ Justice Harry A. Blackmun struggled with the issues in the death penalty for over twenty years.²⁹⁶ He, too, has deduced that the death penalty process is a failed one.²⁹⁷ Indeed, he ultimately announced in *Callins v. Collins*, “[f]rom this day forward, I no longer shall tinker with the machinery of death.”²⁹⁸

Many who advocate on behalf of the death penalty agree that the death penalty is imposed on the poor, on minorities, and on the mentally ill. Several notable public figures have also recently commented on the future of the death penalty. For example, Pope Francis denounced the death penalty during his 2015 visit to the United States.²⁹⁹ Additionally, the late Justice Antonin Scalia stated that he “would not be surprised” if the death penalty was found unconstitutional.³⁰⁰ Furthermore, there are external factors such as the skill of the attorney, the race of the victim, and the feelings of the judge and jury that can have an impact on a defendant’s conviction and sentence. Moreover, it is not clearly and publicly recognized that the death penalty is racially biased as well. Because of the egregious deficiencies involved in applying the death penalty, especially against the mentally ill, it should be abolished.

²⁹⁴ Austin Sarat, Robert Henry Weaver & Heather Richard, *Bad Drugs, Veins and Policy: Oklahoma Fits a Pattern of Botched U.S. Executions*, THE GUARDIAN (May 2, 2014), <http://www.theguardian.com/commentisfree/2014/may/02/oklahoma-botched-executions-us-history-clayton-lockett>.

²⁹⁵ *Furman v. Georgia*, 408 U.S. 238, 365-66 (1972).

²⁹⁶ Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES (Feb. 23, 1994), <http://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html?pagewanted=all>.

²⁹⁷ *Id.*

²⁹⁸ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

²⁹⁹ Ariane de Vogue, *Pope Francis and the Future of the Death Penalty*, CNN POLITICS (Sept. 24, 2015, 3:24 PM), <http://www.cnn.com/2015/09/24/politics/pope-francis-death-penalty-future/>.

³⁰⁰ *Statements on the Death Penalty by Supreme Court Justices*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/statements-death-penalty-supreme-court-justices>. (last visited Dec. 13, 2015).

