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Crossing the Line: Rape-Murder and the Death Penalty

PHYLLIS L. CROCKER*

I. INTRODUCTION

When a woman is raped and then murdered, it is among the most horrifying of crimes. It is also, often, among the most sensational, notorious, and galvanizing of cases. In 1964, Kitty Genovese was raped and murdered in Queens, New York.¹ Her murder sparked soul-searching across the country because her neighbors heard her cries for help and did not respond: it made us question whether we had become an uncaring people.² During the 1970s and 80s a number of serial killers raped and murdered their victims: including

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From 1989-94, I was a staff attorney at the Texas Resource Center in Austin, Texas, where I represented men on death row in their post-conviction appeals. Representing one of my clients, in particular, proved to be a significant challenge for me. This man was severely mentally disabled, and he had committed a brutal murder: neither factor distinguished him from many on death row. What disturbed me was that he had a history of physically abusing women, and he had raped and murdered his wife and niece. I came to the practice of criminal law as a feminist and encountered some difficulties squaring my feminist politics with who some of my clients were and what they had done. With this client, for example, my sympathies lay with the women who were abused, yet I was representing the man who killed one of those women.

In a previous article I wrote about how I could reconcile my anger at my client with my anger that this mentally disabled man had been sentenced to death. See Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981 (1998). I concluded that we must consider, simultaneously, the individual circumstances of the man—he was severely abused as a child, mentally retarded, and brain damaged—and the broader societal context in which the murder occurred: one in which we spend more money on death row cases than on shelters for battered women. See *id.* We could not blame the man for who he was and what he had done without taking responsibility ourselves for the conditions that led to this tragedy.

Aside from the history of abuse, however, I was still troubled by the murder my client committed. He was eligible for the death penalty because he raped his wife and niece. He did not just kill, he raped them and then he killed them. If he had just killed them he would not have been eligible for the death penalty because killing more than one person was not a capital murder at the time. So, I wanted to consider what difference the rape made to the imposition of the death penalty. This article begins my thinking about that issue.

1. See A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES ix (University of California Press 1999) (1964).

2. See *id.* at ix-x, xxiv-xxix.

Ted Bundy in Florida³ and William George Bonin, the "Freeway Killer," in Southern California.⁴ In the 1990s, the sexual assault-murder of seven-year-old Megan Kanka in New Jersey⁵ contributed to a firestorm of states passing sex offender notification statutes.⁶ Rolando Cruz was released from Illinois death row in 1995, after serving eleven years for a crime he did not commit: the rape and murder of ten-year-old Jeanine Nicarico.⁷ The crime itself sent shock waves through the Chicago metropolitan area and pressure to quickly solve it contributed to Cruz's arrest and conviction.⁸ In each instance the rape-murder terrified us and made us want to impose the severest of punishments.

Rape is a crime particular, overwhelmingly, to women.⁹ It is a violent invasion of a woman's body and her soul.¹⁰ It is fraught with the fear of death itself:¹¹ often a rapist says "shut up or I'll kill you,"¹² or "do as I say or I'll kill

3. See generally POLLY NELSON, *DEFENDING THE DEVIL: MY STORY AS TED BUNDY'S LAST LAWYER* 40, 257-59, 284 (1994) (describing rape-murders of young women Bundy was convicted and sentenced to death for in Florida, and other murders and abductions he was suspected of committing across the country).

4. See *Bonin v. Calderon*, 59 F.3d 815, 821 (9th Cir. 1995) (characterizing Bonin's sodomizing and strangling young boys between 1979-80 as "shockingly brutal murders").

5. See *State v. Timmendequas*, 737 A.2d 55, 64-66 (N.J. 1999) (stating that the jury convicted the defendant of murder and aggravated sexual assault, among other crimes, and sentenced the defendant to death).

6. See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 4 (1997); David G. Savage & Maura Dolan, *Sex Predator Law Faces High Court Challenge*, L.A. TIMES, Dec. 9, 1996, at A1. In California, the sexual assault murder of eleven-year-old Polly Klaas instigated the passage of the "three strikes and you're out" law. See Savage & Dolan, *supra* at A1; see generally Phipps, *supra* at 4.

7. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 478 (1996).

8. See *id.*

9. See generally DIANE CRAVEN, U.S. DEP'T OF JUSTICE, *SEX DIFFERENCES IN VIOLENT VICTIMIZATION* 1994, at 2 tbl.1 (1997) (reporting that of the 465,000 rape/sexual assaults in 1994, 432,100 of the victims were women (93%) and 32,900 (7%) were men).

10. See ANDREW HACKER, *TWO NATIONS* 184 (1992) (describing rape as "a malicious assault, intending physical and psychic harm"); Lynne Henderson, *Rape and Responsibility*, 11 LAW AND PHILOSOPHY 127, 175 (1992) (calling "all rape . . . a form of soul murder, a life-threatening and life-damaging experience").

11. See HACKER, *supra* note 10, at 184 (observing that "[r]apists cannot carry out their acts unless they are prepared to beat their victims into submission or threaten them with injury or death"); JAMES NEFF, *UNFINISHED MURDER: THE CAPTURE OF A SERIAL RAPIST* 340 (1995) (describing victims of a serial rapist as helping each other recover, "each one refusing to be just another rape victim, an 'unfinished murder,' a dead soul"); Deborah S. Rose, "Worse Than Death: Psychodynamics of Rape Victims and the Need for Psychotherapy," 143 AM. J. PSYCHIATRY 817, 818 (1986) ("Death threats occur in all types of rape. It is also common knowledge that rapists may also murder. Even if no threats are made, the victim is aware of the rapist's murderous rage.").

12. Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1087 (1986) (reporting a rapist saying "[p]ush over,

you."¹³ Women who have been raped have expressed the thought that they wish they had been killed.¹⁴ When a woman actually is raped and murdered, it is our worst fears come true.

The death penalty is supposed to be reserved for the most heinous murders.¹⁵ Committing rape, by itself a terrifying crime,¹⁶ in conjunction with committing a murder, seems to qualify as the type of crime one would identify as worthy of the extreme punishment of death.¹⁷ This essay explores the

shut up, or I'll kill you"); see also NANCY VENABLE RAINE, *AFTER SILENCE* 20 (1998) (quoting a rapist as saying "[s]hut up, you shut up, you bitch, or I'll kill you").

13. See NEFF, *supra* note 11, at 341-42 (reporting that a victim of a serial rapist told him that "she had lived in daily fear since the rape- . . . [the rapist] had promised he'd come back and kill her if she called the police"); Karl Turner, *Man Out on Bond Accused of Raping Two More Girls*, PLAIN DEALER (Cleveland), Jan. 5, 2000, at B1 (stating that a seventeen-year-old reported that a "[man] grabbed her by the throat, threw her to the floor and threatened to kill her if she resisted him").

14. See Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 223 (1987-88) ("My experience was not atypical, I think. Based on the stories of rape I have heard from other survivors, the feelings are similar. I thought I'd die; I wish I had died . . ."). Compare this to the U.S. Supreme Court's comparison of rape and murder: "[I]f life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

15. See generally *Godfrey v. Georgia*, 446 U.S. 420, 428-30 (1980).

16. Prior to 1977, the crime of rape of an adult woman was punishable by death. See *Coker*, 433 U.S. at 592. In *Coker*, the Court held that the death penalty was a disproportionate punishment for raping an adult woman. See *id.* The plurality opinion in *Coker* does not discuss the role of race in rape prosecutions and executions. See Dennis D. Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667, 1668 (1981) (noting that Justice Marshall, in concurrence, was the only Justice to acknowledge race discrimination as an issue in *Coker*). Nonetheless, the racially discriminatory application of the death penalty in rape cases was an obvious and deeply disturbing reality. See, e.g., *id.* at 1671-90 (speculating on why the Court ignored such solid evidence of race discrimination); Jennifer Wiggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105-17 (1983) (discussing the relationship between race and rape from slavery to the present); see generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) (discussing the legal strategy of the NAACP Legal Defense and Education Fund, Inc. to challenge the constitutionality of the death penalty, including race discrimination in rape cases).

From 1930-1967, 89% of the men executed for rape were African-American. See *id.* at 75. In contrast, for the same time period, of persons executed for all crimes, 53.5% were African-American. See *id.* A study of rape cases in eleven states from 1945-1965 documented racial discrimination. See generally Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1973, at 119. Wolfgang and Riedel considered "[o]ver two dozen possibly aggravating nonracial variables that might have accounted for the higher proportion of blacks than whites sentenced to death upon conviction of rape . . . Not one of these nonracial factors has withstood the tests of statistical significance." *Id.* at 132. They found that black defendants received a death sentence in 36% of cases where the victim was white; for all other racial combinations of defendants and victims the death penalty was imposed in only 2% of the cases. See *id.* at 129 tbl.2. Certainly this shows discrimination against black defendants, but, although unstated, it also shows discrimination against black victims.

17. Indeed, studies of factors that make jurors more likely to impose death dovetail with factors

validity of that conclusion by examining rape-murder as a category of death penalty cases, and by comparing the treatment of rape when it is the only crime to its treatment when it is the underlying felony in a felony-murder death penalty case.¹⁸

In Part One, I analyze how rape-murder cases compare to other death penalty cases in terms of the kinds of murders subject to death sentences, race, and the relationship between victim and defendant. I rely upon data about rape-murder cases based on men on Ohio's death row.¹⁹ I demonstrate that rape-murder death penalty cases both reflect common characteristics of other death penalty cases—disproportionately interracial and disproportionately between strangers—and reveal common characteristics of rape cases—that rape by a stranger is deemed worse than by an acquaintance, and rape of African-American women is largely ignored. The numbers alone begin to reveal how rape-murder is overused and misused as a death-eligible crime.

In Part Two, I show how differently rape is treated when we cross the line from circumstances in which rape is the only crime (a "solitary rape") to rape-murder. Issues that hamper rape prosecutions such as the credibility of the victim and myths about when, where, and between whom rapes occur, do not appear to be problematic in rape-murder cases. Even though the rape is what makes the murder a death-eligible offense,²⁰ it does not assume a greater

present in rape-murder cases: the victim is a woman or child, the crime itself involved torture or physical abuse, or the victim was made to suffer before the killing. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1555-57 (1998) (reporting results of a study in South Carolina that showed death penalty jurors were, or would be, more likely to impose death when the killing involved torture or physical abuse, the victim was made to suffer before death or was maimed or mutilated after death, and when the victim was a child or a woman); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1515 (1996) ("Researchers have found that extreme brutality, commission during another violent felony, and multiple murder were among the circumstances most highly correlated with capital sentences."). See also Eve Brank, et al., *Influence of Aggravating and Mitigating Factors in Capital Sentencing: A Nationwide Survey of U.S. Attorneys*, Paper presented at the joint meeting of the Eur. Assoc. of Psych. Law and the Amer. Psych. & Law Society, Dublin, Ireland (July 1999) (reporting that prosecutors and defense attorneys considered the presence of a felony murder and a female murder victim as two of the most significant predictors of a death sentence, and believed that jurors gave significant weight to the aggravating factor of rape).

18. See *infra* notes 23-31 (explaining felony-murder as a crime for which a defendant may be sentenced to death).

19. Nationwide information on all rape-murder death penalty cases is not readily available. Ohio's death row is a useful body to study because it is the sixth largest death row in the country, and since the reintroduction of the death penalty in 1981, only one person has been executed in Ohio. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *DEATH ROW U.S.A.* 9, 21-22 (Fall 1999). Thus, Ohio's death row is a fairly stable, albeit growing, data set.

20. This is one of the principle constitutional requirements articulated by the U.S. Supreme Court. A death penalty statute must narrow the category of murders for which a person may be sentenced to death. See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). If a jury finds that the defendant committed one of

significance than in solitary rape cases, nor prompt a more careful scrutiny of the evidence that allegedly supports the charge. Indeed, the facts of the rape almost become inconsequential in light of the murder. This disregard of rape reveals unsettling truths about the treatment of women, rape, and the death penalty.

My thesis is that the inclusion of rape as an underlying felony that makes a defendant eligible for the death penalty does not signify a greater consideration of or appreciation for the experience of rape; rather, the underlying felony of rape merely serves as a convenient crime that expands the reach of the death penalty. This trivializes the experience of rape, and does so at the expense of a defendant's life. What makes this use of rape especially pernicious is that it exploits our visceral outrage at rape-murder to justify the death penalty. It belies the fundamental principle that application of the death penalty must be based on reason, not emotion.²¹

II. RAPE-MURDER AS A CATEGORY OF DEATH PENALTY CASES

Rape-murder is a small category of the murders that are eligible for the death penalty.²² In the many studies that have been done on the death penalty, whether focused on the role of race or some other characteristic of death sentences, rape-murder has not been isolated for examination as a separate phenomenon. In this section I begin to rectify that omission. First, I consider the place of rape as an underlying felony in felony-murders eligible for the death penalty. Second, I analyze studies on the use and application of the death penalty, both about the type of murders most commonly subject to the death penalty and the race and relationship of the victim and offender. Finally, I relate that general information to what we know about rape-murders, drawing on both national statistics and data based on Ohio's death row population. This analysis suggests that rape-murder death penalty cases reflect skewed patterns of application, some distinct to sexual assaults and

these identified aggravated murders, then, and only then, may the jury consider whether the defendant should be sentenced to life imprisonment or death. *See id.* at 972-73.

21. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (characterizing the jury as making a "reasoned moral response" about the appropriateness of the death penalty) (emphasis omitted)); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

22. LAWRENCE A. GREENFIELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 27 (1997) [hereinafter 1997 SEXUAL ASSAULT MURDER STUDY] (reporting that from 1976-94 sexual assault murders accounted for approximately 2% to less than 1% of all murders with known circumstances). Even this small percentage of sexual assault murders is greater than those sexual assault murders for which a person may be sentenced to death. *See infra* note 44 and accompanying text (comparing the Ohio definition of rape and the study's definition of sexual assault).

others similar to those found among death penalty cases as a whole. These patterns reflect more about our fears as a society than the actualities of murders. In the case of rape-murder they perpetuate myths that cling to the crime of rape.

A. Rape as an Underlying Felony in Felony-Murder

Rape is one of the traditional categories of crimes that support the use of the felony-murder rule.²³ As the Model Penal Code Commentary observes, "rape or deviate sexual intercourse by force or threat of force," like robbery, arson, burglary, and kidnapping, is a felony that portends "violence to the person."²⁴ Thus, in many states, under the law of felony-murder, the intent to commit the felony provides sufficient intent for the commission of the murder.²⁵ As such, the presence of a felony such as rape, concurrent to the commission of a murder, makes the crime subject to more severe punishment. Every state that has the death penalty identifies felony-murder as a circumstance that makes the defendant death-eligible.²⁶ In every state some form of rape or sexual assault of an adult woman is one of the enumerated felonies.²⁷

23. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 625 (2d. ed. 1986).

24. MODEL PENAL CODE § 210.6(3) commentary at 137 (1980); see also LAFAVE & SCOTT, *supra* note 23, at 623 (these felonies "involve a danger to life"). An interesting question arises as to the identity of "the person." Historically, rape was considered a violation of a man's property—either a daughter prior to marriage, or a wife after marriage. See Amicus Brief of the American Civil Liberties Union, et al., *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), reprinted in 97 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1976 TERM SUPPLEMENT 843, 863-68 (Philip B. Kurland & Gerhard Casper eds., 1978). This suggests that "the person" to whom the violence is done, in the Model Penal Code formulation, is not the woman but the father or husband to whom the woman belonged. This backward notion of who was injured may find continued expression in the results in death penalty cases where a man murders a woman with whom he was intimate, especially in cases of "retaliatory post-separation executions and of the last beating . . ." Rapaport, *supra* note 17, at 1508. Rapaport characterizes this as a "domestic discount" that is based on "a value orientation in which masculine rage at women who reject or challenge their household authority is legitimate and greeted with empathy" rather than seen as among the worst cases of lethal violence. *Id.*

25. James R. Acker & C.S. Lanier, *The Dimensions of Capital Murder*, 29 CRIM. L. BULL. 379, 391 (1993) (stating that in 18 death penalty states, a person convicted of felony murder where there is no requirement of separate intent to commit the murder may be sentenced to death).

26. James R. Acker & C.S. Lanier, "Parsing This Lexicon of Death": *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107, 121-22 (1994) ("Statutes do so either through the definition of capital murder or through sentencing circumstances . . .").

27. ALA. CODE §§ 13A-5-40(a)(3), 13-5-49(4) (2000); ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West 2000); ARK. CODE ANN. § 5-10-101(a)(1) (Michie 1999); CAL. PENAL CODE §§ 189, 190.2(a)(17)(C) (West 2000); COLO. REV. STAT. ANN. §§ 18-3-102(1)(b), 16-11-103(5)(g) (West 1999); CONN. GEN. STAT. ANN. §§ 53a-54c, 53a-54b, 53a-46a(i)(1) (West 1999); DEL. CODE ANN. tit. 11, §§ 636(a)(2), 4209(e)(1)(j) (1999); FLA. STAT. ANN. §§ 782.04(1)(a)(2)(c), 941.121(5)(d) (West 1999); GA. CODE ANN. §§ 16-5-1(c),

B. Common Characteristics of Murders in which Death Sentences are Imposed

Studies of those on death row show that three primary features distinguish the murders for which a defendant is likely to be sentenced to death. The predominant categories are felony-murder, murder by a stranger, and interracial murders where the defendant is African-American and the victim is white. In each category, the percentage of individuals on death row is disproportionately large compared to the corresponding percentage of murders in that group overall. The common ground these characteristics share is a fear of the stranger, in a non-intimate setting.²⁸

The single most common type of murder represented on death row is felony-murder. Despite the fact that felony-murders constitute a relatively small percentage of all homicides, studies document that defendants convicted of felony-murder form the largest group on death row throughout the

17-10-30(b)(2) (1999); IDAHO CODE §§ 18-4003(d), 19-2515(h)(7) (1999); 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1999); IND. CODE ANN. §§ 35-42-1-1(2), 35-50-2-9(b)(1)(f) (West 1999); KAN. STAT. ANN. § 21-3439(a)(4) (1998); KY. REV. STAT. ANN. § 523.025(2)(a)(2) (Banks-Baldwin 1999); LA. REV. STAT. ANN. § 14.30(A)(1) (West 2000); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (West 2000); MD. ANN. CODE art. 27, §§ 410, 413(d)(10) (1999); MISS. CODE ANN. §§ 97-3-19(2)(e), 99-19-101(5)(d) (1999); MO. ANN. STAT. § 565.032(2)(11) (West 2000); MONT. CODE ANN. §§ 45-5-102(1)(b), 46-18-303(1)(a)(vi), 46-18-303(4) (1999); NEB. REV. STAT. § 28-303(2) (1999); NEV. REV. STAT. § 200.030(1)(b) (1997); N.H. REV. STAT. ANN. § 630:1(I)(e) (1999); N.J. STAT. ANN. §§ 2C:11-3(a)(3), 2C:11-3(c)(4)(g) (West 1999); N.M. STAT. ANN. §§ 30-2-1(A)(2), 31-20A-5(B) (Michie 1999); N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney 1999); N.Y. CRIM. PROC. § 400.27(3) (McKinney 1999); N.C. GEN. STAT. §§ 14-17, 15A-2000(e)(5) (1999); OHIO REV. CODE ANN. §§ 2903.01(B), 2929.04(A)(7) (Anderson 1999); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1999); OR. REV. STAT. §§ 163.115(1)(b)(H), 163.095(2)(d) (1998); 42 PA. CONS. STAT. ANN. § 9711(d)(6) (West 2000); S.C. CODE ANN. § 16-3-20(C)(a)(1)(a) (Law Co-op. 1999); S.D. CODIFIED LAWS § 22-16-4 (Michie 1999); TENN. CODE ANN. §§ 39-13-202(a)(2), 39-13-204(i)(7) (1999); TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1999); UTAH CODE ANN. § 76-5-202(1)(d) (1999); VA. CODE ANN. § 18.2-31(5) (Michie 1999); WASH. REV. CODE ANN. §§ 9A.32.030(1)(c), 19.95.020(11)(b) (West 1999); WYO. STAT. ANN. §§ 6-2-101(a), 6-2-102(h)(xii) (Michie 1999).

28. Daniel Givelber posited that the "new goal [for death penalty laws] seems to be to execute those whose conduct appears most frightening to the reasonable person." *The New Law of Murder*, 69 IND. L.J. 375, 378 (1994). Felony murder, as a death eligible crime, furthers this goal because "the paradigmatic victim of a premeditated killing is an intimate, and the paradigmatic victim of a felony murder is a stranger." *Id.* at 387. See also Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 559 (1990). The death penalty

is used primarily to reinforce and solemnize the code of conduct governing relations among persons who do not warm themselves at the same hearth; the sanction is largely reserved for predatory murder, the kind of crime men (and women) fear that male strangers will inflict upon themselves and their families.

Id.

country.²⁹ For example, in one study of murder patterns in capital sentencing, Samuel Gross and Robert Mauro reported that while felony homicides were approximately 17-27% of all homicides, they represented 75-80% of those on death row.³⁰ Other studies report comparable findings.³¹

The relationship between the offender and the victim is also critical to whether a defendant is sentenced to death. According to Bureau of Justice statistics for 1997, 48% of all murders and nonnegligent manslaughters were committed by relatives or acquaintances, and only 14% were committed by strangers.³² Yet, the cases in which a defendant is most likely to be sentenced to death are where the defendant and victim are strangers.³³ Again, Gross and Mauro found that only 17-22% of homicides were of strangers, but on death row 50-70% of the victims were strangers to the defendants.³⁴

Finally, the race of the victim is a powerful determinant of whether a defendant will be sentenced to death. The Baldus study of the interrelationship between race and the death penalty in Georgia in the 1970s concluded that a black person who killed a white person was seven times more likely to be sentenced to death than a white person who killed a black person.³⁵ Other studies have documented that this is especially true in felony-

29. See Givelber, *supra* note 28, at 413-14 (citing studies).

30. See SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION* 45 (1989). Gross and Mauro studied the death penalty patterns in eight states from 1976-1980. In Georgia, felony murders were 17.5% of all homicides, but 80% of those on death row; in Florida, 18.1% compared to 80%; in Illinois, 27.1% compared to 75%. See *id.*

31. See David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138 (1986) ("More than 80% of the defendants on death row today became death eligible because they killed in the course of a contemporaneous offense, usually an armed robbery or rape . . ."); Givelber, *supra* note 28, at 413-14 (explaining a study in New Jersey from 1983-1991, among others).

32. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1998, at 290-91 tbl.3.133. In 38% of the murders and nonnegligent manslaughters, the relationship between the victim and the offender was unknown. See *id.*

33. See GROSS & MAURO, *supra* note 30, at 46-48; see also Rapaport, *supra* note 17, at 1517 (reporting that in her study of four states, only 12% of men [compared to 48% of women] on death row were there for killing an intimate). Cf. Givelber, *supra* note 28, at 415-16 ("Who the victim is, whether a prior relationship existed with the killer, and whether the victim is a woman or a child are also relevant factors").

34. See GROSS & MAURO, *supra* note 30, at 46-48. In addition, Gross and Mauro found that the likelihood of a death sentence for the defendant is increased where the victim is a woman. See GROSS & MAURO, *supra* note 30, at 50. See also Garvey, *supra* note 17, at 1556-57 (reporting that a "sizable majority" of jurors would be more likely to sentence a defendant to death when the victim was a child, and the percentage of jurors who did find the fact that the victim was female aggravating increased from 4.2% to 21.3%); Givelber, *supra* note 28, at 416 n.215.

35. See *McCleskey v. Kemp*, 481 U.S. 279, 327 (1987) (Brennan, J., dissenting). The Court rejected the relevance of the Baldus findings because they did not identify whether McCleskey had been the victim of discrimination. See *id.* at 292-97. Yet, as Daniel Givelber notes, no investigator disputes the finding

murder cases: a black defendant who kills a white victim during the course of a felony is "most likely to receive the death penalty."³⁶ In part this is true because prosecutors are more likely to charge a felony concurrent to a murder when the defendant is black and the victim is white.³⁷

C. Rape-Murder on Ohio's Death Row

One hundred ninety men are on Ohio's death row.³⁸ Twenty-two of those men were convicted of felony-murder where the underlying felony was rape or attempted rape.³⁹ Although statistically this may not be a large enough

that a racial disparity exists in the application of the death penalty. *See supra* note 28, at 417. *See also* David C. Baldus et. al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1659 (1998) (citing U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990)) (reporting ongoing discrimination in the application of the death penalty, consistent with findings in studies of other states across the country). *Indeed*, studies dating back to the 1960's document the unequal racial application of the death penalty. *See, e.g.*, Wolfgang & Riedel, *supra* note 16, at 132 (reporting that their study of twelve southern states from 1945-1965 showed that "if the defendant is black and the victim is white, the defendant is about eighteen times more likely to receive the death penalty than when the defendant is in any other racial combination of defendant and victim"). As with the results of the Baldus study, the U.S. Court of Appeals for the Eighth Circuit rejected the relevance of Wolfgang's study because it did not directly address whether the petitioner had been subjected to discrimination. *See Maxwell v. Bishop*, 398 F.2d 138, 147-48 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

36. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1119 (1990). *See also id.* at n.40; GROSS & MAURO, *supra* note 30, at 89.

37. *See Rosen, supra* note 36, at 1117, 1118 n.39.

38. OHIO PUBLIC DEFENDER OFFICE, DEATH PENALTY PROPORTIONALITY STATISTICS 1 (1999). These are the men currently on death row who were sentenced to death between 1983 and 1998. *See id.*

39. *See id.* In Ohio, in order for the death penalty to be a possible sentence, a person must be charged and convicted of aggravated murder with a specification. OHIO REV. CODE ANN. § 2929.04(A) (Banks-Baldwin 1997). There are five types of aggravated murder:

purposely, and with prior calculation and design, caus[ing] the death of another[;] . . . purposely caus[ing] the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape[;] . . . purposely caus[ing] the death of another who is under thirteen years of age at the time of the commission of the offense[;] . . . [being] under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention . . . [and] purposely caus[ing] the death of another[;] . . . [and,] purposely caus[ing] the death of a law enforcement officer . . .

Id. at § 2903.01(A)-(E) (2000 Supp.). Death penalty specifications include committing the aggravated murder for hire, aggravated murder of a law enforcement officer, and aggravated murder while committing or attempting to commit specified felonies, including rape, when the offender was the principal offender or committed the aggravated murder with prior calculation and design. *Id.* at § 2929.04(A)(1)-(9). A

sample from which to draw final conclusions, it is a viable place to begin considering the significance of rape-murder within the death penalty context.

For this analysis I compared information on the twenty-two men to results from a nationwide study of sexual assault murders.⁴⁰ This is, admittedly, an imperfect comparison for a number of reasons. First, I compare nationwide to state data:⁴¹ information on the number of murders and sexual assault murders in Ohio is not readily available.⁴² Second, the nationwide study's definition of sexual assault murder is much more inclusive than what constitutes rape-murder in Ohio.⁴³ Thus, not all sexual assault murders could be classified as eligible for the death penalty. Even if they could, prosecutors have wide discretion in deciding whether to seek the death penalty, when the murder is death-eligible. Still further, when a prosecutor seeks the death penalty, it does not mean the defendant will be sentenced to death.⁴⁴ Nonetheless, even with all of these caveats, it is instructive to look at these two data sets side-by-side because they shed light on how the State uses the death penalty.

As an initial matter, the percentage of Ohio rape-murder death penalty cases is disproportionately large when we consider the percentage of sexual assault murders nationally. It is striking that while, nationwide, sexual assault murders represented only 1.5% of all murders with known circumstances,⁴⁵

defendant may be charged and convicted of more than one specification. *See, e.g.*, *State v. Scudder*, 643 N.E.2d 524, 528 (Ohio 1994) (noting that the jury convicted Scudder of all charges and specifications: two aggravated murder counts with "death penalty specifications that the murder had occurred during the commission of a kidnapping and attempted rape"). The Appendix contains a brief description of the crime, victim and defendant in each of Ohio's twenty-two rape-murder death row cases.

40. *See* 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 27-30. The Study is based on sexual assault murders from 1976-1994 as reported to the FBI by local law enforcement agencies. *Id.* at 27. The Study defines sexual assault as "including rape and other sexual offenses . . . includ[ing] sexual assault such as statutory rape, sodomy, and incest and attempts to commit these crimes." *Id.* at 28.

41. In addition, the nationwide study covers slightly different years, 1976-1994, and the information for men on Ohio's death row covers those convicted and sentenced to death between 1983 and March 1999. *See* OHIO PUBLIC DEFENDER OFFICE, *supra* note 38.

42. Since presenting this paper at the Ohio Northern University Law Symposium, a new source of data became available that provides information about sexual assault murders in Ohio. *See* James Alan Fox, *NACJD-Supplementary Homicide Reports, 1976-1997* (visited Sept. 5, 2000) <<http://www.icpsr.umich.edu/NACJD/SDA/shr7697.html>>. This site allows one to obtain state specific data based on the same data set used in the 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22. I incorporate data from this site at *supra* notes 46, 48, 58 and 62.

43. Compare the 1997 SEXUAL ASSAULT MURDER STUDY definition of sexual assault, *supra* note 22, and the Ohio definition of rape, *infra* note 105.

44. *See infra* text accompanying note 63 (discussing ways in which a rape-murder conviction may result in a sentence less than death).

45. *Id.* at 27. These percentages are based on estimated numbers: there were an estimated 317,925 murders with known circumstances from 1976-1994, this is 78.5% of all murders. Of those, an estimated 4,807 were sexual assault murders. *Id.* at 28. For details about how the number of murders and known

rape-murders constituted approximately 12% of those persons on Ohio's death row.⁴⁶ In other respects the Ohio cases reflect some of the same kinds of disparities found in the broader death penalty studies discussed above concerning the relationship and race of the victim and offender.

The data on the relationship between the victim and the offender is consistent with my earlier observation that rape-murder death penalty cases, as with death penalty cases generally, reflect our fear of strangers and, as with rape cases generally, perpetuate our myths about rape. The 1997 Sexual Assault Murder Study found that the relationship between victim and offender in sexual assault murders was 10.2% family/intimate, 50.6% acquaintance, and 39.2% stranger.⁴⁷ For the twenty-two men convicted of rape-murder on Ohio's death row, the relationship between victim and offender was 9% family/intimate, 36% acquaintance, and 55% stranger.⁴⁸

The striking feature in considering these two studies is the difference between the rape-murders where strangers are involved. Among nationwide sexual assault murders it is 39%; among Ohio's death row rape-murders it is 55%. This is consistent with the findings of other death penalty studies that reveal where the victim and offender are strangers, the death penalty is much more likely to be imposed, again disproportionately to its rate in the general population.⁴⁹

It is noteworthy, not only that the stranger percentage is significantly larger, but that the acquaintance percentage is so much smaller: 51% in the 1997 Sexual Assault Murder Study but only 36% on Ohio's death row. One of the persistent myths about rape is that "real rape" occurs when the victim and offender are strangers, not acquaintances.⁵⁰ The nationwide statistics on

circumstances is arrived at, see *id.* at 27-28.

46. The exact percentage is 11.6. See OHIO PUBLIC DEFENDER OFFICE, *supra* note 38, at 1; see also *infra* app.

Based on the newly available data, from 1976 to 1994, 1% of the murders in Ohio were reported by law enforcement agencies as sexual assault murders (93 of 9029) and, as a subset, .08% of the murders were rape-murders. See Fox, *supra* note 42. As with the 1997 SEXUAL ASSAULT MURDER STUDY, these percentages are based on murders with known circumstances.

47. 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 38 fig.31. The Study compared these figures to all murders 1976-1994: family 22.9%, intimate 6.3%, acquaintance 50%, stranger 20.9%. See *id.* at 38. The Study concluded that sexual assault murders were twice as likely to involve strangers as murders. See *id.* at 30. For both, the percentages are based on where the relationship between the offender and victim is known (273,958 of all murders and 3,154 of all sexual assault murders). See *id.* at 30.

48. See *infra* app. The newly available information about reported sexual assault murders in Ohio shows that where the relationship between the offender and victim is known (66 of 93 cases), the percentages are: 8% family/intimate, 67% acquaintance, and 26% stranger. See Fox, *supra* note 42. These Ohio percentages are fairly consistent with the national percentages, and thus equally disparate from the Ohio rape-murder death row cases.

49. See *supra* note 33 and accompanying text; see also *supra* note 34 and accompanying text.

50. See Estrich, *supra* note 12, at 1092 (observing that the kind of rape that the law recognizes as

sexual assault murders do not support this myth; however, it is worth considering whether the difference in stranger and acquaintance rape-murders between the 1997 Sexual Assault Murder Study and Ohio's death row rape-murder cases reflect the view that stranger rape-murder is worse, and thus more deserving of death.⁵¹

In terms of race and sex of victim and offender the Ohio death row rape-murder statistics are in some ways fairly consistent with the 1997 Sexual Assault Murder Study, with two significant exceptions in the area of race. First, as to the sex of the victim, the Ohio death row rape-murder statistics roughly mirror the 1997 Sexual Assault Murder Study. In the national study, 82% of the victims were female and 18% were male.⁵² In Ohio, 91% were female and 9% were male.⁵³ While perhaps unremarkable by itself, the parallel here becomes more significant in light of the discrepancies in the race category.

The 1997 Sexual Assault Murder Study reported the following association between race of victim and offender: 55% white offender/white victim, 24% black offender/black victim, 15% black offender/white victim, and 2% white offender/black victim.⁵⁴ Thus, close to 80% of the sexual assault murders were intraracial.⁵⁵ The Ohio death row rape-murder statistics are fairly similar because about 70% were intraracial rape-murders: 45% white defendant/white victim; and 23% black defendant/black victim.⁵⁶ The Ohio statistics are most different within the category of interracial rape-murder: 27% black defendant/white victim, 5% latin defendant/white victim,

a serious crime is "real rape," where "[a] stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in [sexual] intercourse"); Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 165 (1997) (noting how feminist legal scholars "have demonstrated, convincingly, that the American legal system has historically and systematically minimized the seriousness of rape, in part characterizing rape between strangers as 'real rape,' rape in the true sense, while dismissing rapes between all other persons as less serious"). See generally *infra* notes 80-104 and accompanying text (discussing rape myths).

51. What I do not know, but need to know to make a firm statement about this, are the numbers of rape-murders in Ohio and the relationship of the victim and offender, in which cases the prosecutor sought the death penalty, and in which of those the death penalty was imposed. Prosecutorial and juror discretion are key but hidden factors that affect which defendants end up on death row, and for which murders.

52. See 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 29.

53. See *infra* app. The 9% figure represents two boys ages 10 and 12. See *infra* app. The fact that nationally a greater percentage of males are victims of sexual assault murder than are represented among the Ohio death row rape-murder cases suggests another way in which women are given greater preference as rape-murder victims. Compare *id.*, with 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 29.

54. 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 30 (noting that the remaining 4% are victims and offenders of other races).

55. See *id.*

56. See *infra* app.

and 0% white defendant/black victim.⁵⁷ The percentage of black defendant/white victim on Ohio's death row is much larger than the percentage in the 1997 Sexual Assault Murder Study.⁵⁸ This closely parallels the finding of other death penalty studies that blacks are most likely to be sentenced to death when the victim is white, especially in felony-murder cases.⁵⁹

A pivotal issue here is not only the race of the defendant but the race of the victim. The Baldus study found not only that black defendants were at a significantly higher risk overall than whites for being sentenced to death, but that when the victim was black, both white and black defendants were at a lower risk, with white defendants the least likely to receive the death penalty.⁶⁰ The Ohio rape-murder cases starkly reflect that same result.⁶¹ It is difficult to believe that since the death penalty was reinstated in Ohio in 1981, not one white defendant/black victim rape-murder has occurred that could be considered a death penalty case.⁶² We can assume that such murders have occurred, but we do not know at what stage the rape-murder of a black woman by a white man was deemed unworthy of the death penalty: whether the prosecutor decided not to indict as such, the prosecutor indicted but the jury voted to recommend life, or an appellate court reversed the death sentence.⁶³ In any event, it suggests a vicious perpetuation of the view that the rape of a black woman, by a white man, is not a serious crime.⁶⁴

57. See *infra* app. The Latino designation appears in the Ohio Public Defender Report. I do not know the defendant's race. For the entire population of Ohio's death row, only 2% are a white defendant/black victim. See OHIO PUBLIC DEFENDER OFFICE, *supra* note 38, at 1.

58. Compare 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 30, with app. Based on the newly available data, the race of the offender and victim is known in 68 of the 93 reported sexual assault murder cases in Ohio. See Fox, *supra* note 42. The breakdown is 56% white offender/white victim, 30% black offender/black victim, 12% black offender/white victim, and 1.5% white offender/black victim. See Fox, *supra* note 42. Once again, the Ohio percentages are fairly consistent with the 1997 Sexual Assault Murder Study and disparate from the Ohio rape-murder death row cases.

59. See *supra* notes 35-37 and accompanying text.

60. See *supra* note 35 and accompanying text.

61. See *infra* app.

62. Based on the newly available data, for reported sexual assault murder cases in Ohio from 1976-1994, the race of the offender and the victim is known in 68 of 95 cases. See Fox, *supra* note 42. In those 68 cases, 1.5% (1) were white defendant/black victim. See *id.* This is similar to the national percentage of 2% white offender/black victim. See 1997 SEXUAL ASSAULT MURDER STUDY, *supra* note 22, at 22.

63. The apparent disregard for the rape-murder of an African-American woman by a white man is also visible in rape cases. See, e.g., Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 594-95 (1997) (noting one study in which white men received lesser sentences for raping black women than black men received for raping white women, and commenting that "men of all races who are convicted of raping black women are sentenced less severely than men convicted of raping white women").

64. In colonial and antebellum America, it was, in general, not a crime to rape a black woman. See

D. Conclusion

Rape-murder is recognized in every jurisdiction as a death-eligible murder. Although the number of men on Ohio's death row convicted of rape-murder is relatively small, characteristics about their crime, race, and relationship to the victim provide valuable insights into the place of rape-murder among death penalty cases. On the one hand, rape-murder cases reflect disparities similar to other death penalty cases: they are disproportionately represented on death row; many more defendants in the rape-murder cases were strangers to their victims than in sexual assault murder cases nationwide; many more black defendants are on Ohio's death row for the rape-murder of a white victim than in sexual assault murder cases nationwide; and no white defendants are on Ohio's death row for the rape-murder of a black victim. These statistics reflect what others have observed about death penalty cases: they reveal a fear of strangers, and also discrimination against blacks. They show that the death penalty is reserved for that which we fear most—felony-murders by strangers—and not that which actually happens most often and presents the greatest threat. They also

THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860*, at 305 (1996) (noting that if state laws criminalized rape by slaves, they specified that the victim had to be a white female, and "no white could ever rape a slave woman"); Wiggins, *supra* note 16, at 118. See also A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1056-57 (1992) (noting that it was not necessary to declare that rape of a slave woman was not a crime because "[t]he law simply did not criminalize the rape of slave women") (citation omitted). Although the laws in some states began to change at the end of the nineteenth century, rape of a black woman was still not considered as serious a crime as the rape of a white woman. For example, when Georgia first changed its law, rape of a white woman by a black man was punished by death, and rape of a white woman by a white man was subject to a prison term of two to twenty years, but rape of a black woman by a white man was only punishable "by fine and imprisonment at the discretion of the court." MELTSNER, *supra* note 16, at 321-22 n.2 (noting that the law again changed after the Civil War: while the new law was race neutral—punishment for rape was death or a term of years—everyone knew that the death penalty was meant only for blacks who raped white women). See also Wiggins, *supra* note 16, at 119-21 (describing how the legal system continued to deny the rape of black women). That disparity continues into the present. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1277 (1991) (concluding that "Black women who are raped are racially discriminated against because their rapists, whether Black or white, are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women"); Wiggins, *supra* note 16, at 121-23 (noting that judges and juries impose lighter sentences on defendants who rape black women and police treat black rape victims differently than white victims); Baker, *supra* note 63, at 594-97 (discussing how changes to the rules of evidence may still result in disparate racial treatment of black victims).

consistently show a high degree of disparate treatment of black defendants, and even more of black victims.⁶⁵

More particularly, in the context of rape-murder, the disparities suggest troubling and yet persistent fallacies that surround rape. They suggest that stranger rape is more real than rape by an acquaintance, and thus more deserving of the harshest punishment of death. The fact that the percentage of black defendant/white victim rape-murder cases on Ohio's death row is substantially larger than the percentage of black defendant/white victim sexual assault murders nationwide perpetuates white patriarchal views that white women deserve greater protection from black men and greater vindication than black women. Finally, the absolute absence of any white man on Ohio's death row for the rape-murder of a black woman too easily and eerily harkens back to the pre-Civil War days when rape of a black woman was not even a crime.

If the application of the death penalty in rape-murder cases reflected any kind of real appreciation for the experience of rape, the relational and race disparities would not exist. The "violence to the person"—which is supposed to justify certain felonies making a murder more egregious and thus subject to greater penalties—is not any less if the offender is known to the victim or if the defendant is white and the victim black. The numbers, therefore, begin to show that the inclusion of rape as a crime that makes a murder eligible for the death penalty says less about the experience of rape and more about the manipulations of the death penalty in general.

III. THE SIGNIFICANCE OF RAPE IN RAPE-MURDER CASES

When a man rapes a woman concurrent to murdering her, he becomes eligible for the death penalty.⁶⁶ Rather than facing, at most, a sentence of life imprisonment for murder,⁶⁷ he may face the most extreme punishment of death. Under the U.S. Supreme Court's death penalty jurisprudence, death, as a punishment, is qualitatively different from all other punishment, and therefore, should be accorded greater protections and more careful scrutiny.⁶⁸

65. See, e.g., Stephen L. Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420, 444 (1988) (noting that when a black defendant is 22 times more likely to be sentenced to death for killing a white person than a black person, it "might indeed be a problem for the black murderer, but that possibility pales beside what should be obvious: the massive discrimination against black victims").

66. See, e.g., OHIO REV. CODE ANN. §§ 2903.01(B), 2929.02(A) (Banks-Baldwin 1997).

67. See, e.g., *id.* § 2929.02(B) (stating that the maximum punishment for murder is life in prison).

68. See *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case.") (quoting *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977) (White, J., concurring)); *Lankford v. Idaho*, 500 U.S. 110, 127 (1991) ("Petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have

In light of this, one might anticipate a heightened examination of the aggravating circumstance that makes a defendant eligible for the death penalty. In this section, I examine whether that expectation is borne out when the aggravating circumstance is rape or attempted rape. First, I consider the way rape is treated as a crime unto itself in the criminal justice system by looking at recurring issues that arise in rape cases, including myths about rape and questions about the victim's credibility. I then compare how these same issues are treated when the rape is an underlying felony in a felony-murder death penalty case.

I conclude that the consideration given to the crime of rape in a death penalty case is the opposite of what one would expect. In a rape case, questions are raised about whether the victim consented, how much force the offender used or threatened to use, what was the relationship between the victim and offender, and how that relationship may have affected either's perceptions of what happened.⁶⁹ Whether the state will prosecute is a serious question⁷⁰ that often depends on the assessment of the victim's credibility.⁷¹ When the crime crosses the line from rape to rape-murder, the response of the legal system is quite different, and little question exists as to whether the state will prosecute.⁷² The primary question is whether the State will seek the death penalty. Issues about consent, force, and relationship do not have the same significance. Much less is required in order to prove that a rape or attempted rape occurred.

The relevance of these differences is two-fold. First, it reveals a profound distinction in the way a woman's story is heard in the criminal justice system. When 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.⁷³ For women who survive being raped, this should

malfunctioned in this case.”).

69. See Henderson, *supra* note 14, at 200-06 (discussing the “consent-force-resistance conundrum”). See also notes 79-104 and accompanying text (discussing issues affecting the victim's credibility).

70. See *infra* notes 74-76 and accompanying text (noting low conviction rate and comparing prosecution of rape to murder); see also *infra* notes 79-104 and accompanying text (discussing factors that influence the decision to prosecute).²

71. See *infra* note 79 and accompanying text.

72. See JACOB PEREZ, U.S. DEP'T OF JUSTICE, TRACKING OFFENDERS 1990, at 5 tbl.6 (1994) (documenting that for eleven states reporting, 90% of all homicide arrests were prosecuted, resulting in 71% convicted).

73. Silence is a complicated phenomenon in rape cases. Women may be silent in that they do not report being raped for fear of being disbelieved or blamed. See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 24 (1999); Henderson, *supra* note 14, at 199 (“[T]he woman who does speak may confront opprobrium from or may be silenced by friends, family, and colleagues.”). When a woman finally does speak, the veracity of her speech is challenged. See TASLITZ, *supra* at 24 (“[I]f she

trouble us. The validity of their experience should not hinge on whether they are alive or dead. Second, the different treatment of rape reveals that the supposed gravity accorded the crime of rape as a factor that makes a murder death eligible, is absent. Pivotal issues for establishing rape as a solitary crime fade away when the rape accompanies a murder. The act of rape loses its force as a violation of a woman and instead serves as a convenient means to trigger the death penalty.

A. Rape as a Solitary Crime

Rape is one of the most difficult types of crime to prosecute.⁷⁴ According to a 1993 report by the Majority Staff of the Senate Committee on the Judiciary, 84% of reported rapes never result in convictions⁷⁵ and less than one-half of the persons arrested for rape are convicted.⁷⁶ Several factors contribute to these numbers: a woman may not report being raped;⁷⁷ she may find the criminal prosecution process too oppressive to endure through completion;⁷⁸ or when she does, police, prosecutors, judges, or jurors may not consider her story credible.⁷⁹ Tenacious myths about rape inform each of

speaks, she will face skepticism[, and] . . . if she is silent, the silence will be evidence that any later speech is not credible.”). As Taslitz observes, a woman who is raped “will be judged by the cultural themes of silence and voice, not by the natural psychological reactions to rape or an informed understanding of its causes and circumstances.” *Id.*

74. See generally MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 1, 34 (Comm. Print 1993) (noting that rape is often considered harder to prosecute than murder).

75. *Id.* at 29.

76. *Id.* at 11 (reporting that “over half of all rape prosecutions are either dismissed before trial or result in an acquittal”).

77. See *id.* at 34 & n.25 (reporting that a conservative estimate is that at least 84% of rapes are not reported). African-American women are even less likely to report rapes. See BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN 374 (1994) (citing Gail Elizabeth Wyatt, *The Sociocultural Context of African-American and White American Women's Rape*, 48 J. SOC. ISSUES 77, 86-88 (1992)).

78. See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1030 (1991) (observing that “the experience of a trial is grueling and frequently provokes responses in the victim similar to those caused by the actual rape”); see also Henderson, *supra* note 14, at 199 (noting that distrust of white-dominated law enforcement, among other factors, may cause black women to not prosecute).

79. See, e.g., TASLITZ, *supra* note 73, at 6 (noting that “[w]ith rape, the victim’s truthfulness is almost always challenged”); Susan Estrich, *Palm Beach Stories*, 11 L. & PHIL. 5, 14 (1992) (“Today’s debate, on the radio, in the newspaper, and in the courtroom, is about when women should be believed—and about what we need to know about the woman before we can decide whether to believe her.”). Cf. Crenshaw, *supra* note 64, at 1270 (observing that rape law reform such as harsher sentences and changes in evidentiary rules “do not challenge the background cultural narratives that undermine the credibility of Black women”).

these occurrences. In particular, misconceptions about the circumstances of rape and the relationship between, and race of, the victim and offender may affect judgments about whether the crime of rape was committed.⁸⁰

For centuries, the words of Lord Matthew Hale infused the criminal justice system's view of rape: A charge of rape is "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."⁸¹ This admonition was incorporated into jury instructions across the country.⁸² The warning was built on, and reinforced, cultural myths about women and rape: a woman invites rape by her words or actions, if she had resisted she would not have been raped, and "no" means "yes".⁸³

The myths of rape reflect a stereotype of the "typical" rape: a stranger jumps out of the bushes, at night, overcomes the woman's resistance, and rapes her.⁸⁴ The stereotype is rife with inaccuracies. First, an often unspoken

80. See *supra* notes 47-64 and accompanying text.

81. Torrey, *supra* note 78, at 1027 (quoting 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (R.H. Small ed., 1847)).

82. As Torrey notes, "[f]ortunately, all the state courts recently confronting the issue of whether such an instruction is mandatory have found it not required." Torrey, *supra* note 78, at 1045. But, the Model Penal Code still states that the trial court should instruct jurors that due to the emotional involvement of the rape victim, her testimony should be evaluated with special care. See *id.* at 1046. Despite efforts to reform rape laws and change attitudes about rape, as Lynne Henderson notes, "feminists have not successfully challenged this male innocence/female guilt story of heterosexuality in our culture, which enables men to rape without being held responsible for their actions." Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 131 (1992).

83. See Henderson, *supra* note 14, at 224 (noting that rape myths include "all women want to be raped; no woman can be raped against her will; women who are raped 'ask for it'; and finally, 'if you are going to be raped, you might as well enjoy it.'"); Torrey, *supra* note 78, at 1015. Collecting rape myths:

women mean "yes" when they say "no"; women are "asking for it" when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures "out to get men"; if a woman says "yes" once, there is no reason to believe her "no" the next time; women who "tease" men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; women derive pleasure from victimization.

Id.

84. See ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 103 (1984) ("The paradigm instance of a good rape is the so-called blitz, or stranger-on-stranger, rape. Here the victim is proceeding with her business as usual when, for no apparent reason, she is pounced upon by a rapist. He appears out of the blue, does his 'thing,' and disappears."); Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993) (describing the cultural stereotype of rape as "a stranger jumping out from a place of hiding and violently raping a physically resisting woman"); Estrich, *supra* note 12, at 1092 (referring to traditional rape

part of the myth is that the stranger is black and the woman is white.⁸⁵ Not only does this run counter to the national figures that show that the majority of rapes are intraracial,⁸⁶ but it ignores the rape of black women.⁸⁷ Second, it defines "real rapes" as happening between strangers. Although stranger rapes constitute a significant portion of rapes, they do not account for even half of all rapes.⁸⁸ The stereotype disregards rape as a crime when it is committed by an intimate or an acquaintance.⁸⁹ Third, the circumstances of the rape are limited to the outdoors when the woman is minding her own business. Other situations, such as a woman being at home, or especially those in which a woman might be engaging in "non-traditional" behavior, such as meeting a man at a bar, are outside the parameters of a "typical" rape.⁹⁰ Finally, the

as "[a] stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse"). In the myth about the "typical rape" the man is crazy. See Henderson, *supra* note 82, at 132 (describing the cultural stereotype as including a "psychopathic armed stranger"); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 891 (1996) (noting that "[e]normous amounts of cultural resources are deployed to maintain" the image of "the violent, half-crazed rapist hiding in the bushes"). As Katharine K. Baker and others have noted, however,

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

Baker, *supra* note 63, at 582-83. See also Torrey, *supra* note 78, at 1022-25 (discussing how attitudes of rapists and "normal" men are similar).

85. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 81 (1987) (describing the "white male archetype of rape" as consisting of two factors: "they are by a stranger, and they are by a Black man"); Henderson, *supra* note 82, at 132 ("The cultural stereotypes of rape are that rape is either committed by psychopathic armed strangers or by black men, by definition 'strangers' if they rape white women.").

86. For 1973-87, 73% of raped white women were raped by white men and 84% of raped black women were raped by black men. See CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 10 tbl.21 (1991). These percentages are even starker when broken down by race and relationship: for nonstranger rapes, 83% were white victim/white offender, and 91% were black victim/black offender; for stranger rape 60% were white/white and 77% black/black. See *id.* at 10 tbl.22.

87. See *id.* at 8 (noting that "Black women were significantly more likely to be raped than white women").

88. See CRAVEN, *supra* note 9, at 5 (reporting that strangers account for 32%, friends and acquaintances account for 40%, and intimates account for 24% of all rapes and sexual assaults).

89. See Bachman & Paternoster, *supra* note 84, at 572 (concluding that "[i]n spite of legal reforms, then, a strong 'acquaintance discount' continues to exist for those who rape"); Henderson, *supra* note 14, at 196 (criticizing the use of "non-traditional" to describe rapes that do not fit the "'stranger in the bushes'" type of rape, because such rapes "are all too traditional"). See also Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 679-94 (1999) (exploring cultural and legal barriers that make prosecutions of date rape so difficult).

90. See TASLITZ, *supra* note 73, 39 (describing factors that increase victim responsibility as

woman is expected to resist her attacker, and bear signs of the struggle. This runs counter to the evidence that most women are not physically injured apart from the rape itself,⁹¹ and with cruel irony, contradicts the stereotype that women are supposed to be docile.⁹²

The problem then, 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,⁹³ the woman's credibility will be suspect. If the woman knows the man,⁹⁴ if she had been drinking,⁹⁵ if the rape takes place in her home,⁹⁶ if the woman is black,⁹⁷ if she cannot demonstrate sufficient resistance,⁹⁸ she will have a harder time establishing the validity of her experience. To begin with, these misconceptions will influence the number of women who report rape. A woman may blame herself for allowing the rape to happen,⁹⁹ or she may not

including that the woman was attractive, that she consumed alcohol, or that she went to a bar); Baker, *supra* note 63, at 589 ("Jurors seem to assume that women must live within very rigid norms of appropriate sexual conduct. These norms include proscriptions on drinking, dressing in certain manners, and leaving home on her own."); Iglesias, *supra* note 84, at 882-83 (reporting results on a study that found nonconformist behavior, including "drinking, drug use, or sexual activity outside marriage led jurors to doubt defendants' guilt").

91. See Baker, *supra* note 63, at 611 ("Seventy percent of rape victims report no physical injury and another twenty-four percent report only minor physical injury."); Sarah E. Ullman, *Does Offender Violence Escalate When Rape Victims Fight Back?*, 13 J. INTERPERSONAL VIOLENCE 179, 190 (1998) (noting that studies do not support the view that most rapes "result in serious physical injury or death"). See also Henderson, *supra* note 82, at 157 ("If the victim has no bruises, broken bones, or physical injuries, it is hard for men to 'see' the violence.").

92. Cf. Henderson, *supra* note 14, at 204 (explaining the cultural belief that "the proud female fighting to the utmost . . . is a particular vision of female 'virtue'—as opposed to the 'fallen' whore. If the victim does not fight, then she must be a fallen whore who consented.").

93. See *supra* notes 84-92 and accompanying text.

94. See CRAVEN, *supra* note 9, at 5 (strangers account for only 32% of rapes).

95. See, e.g., TASLITZ, *supra* note 73, at 39 (noting that studies show that rape is less believable when a woman has been drinking alcohol).

96. See Estrich, *supra* note 12, at 1092 (observing that when a rape occurs in a bedroom instead of an alley, it may not be considered rape in the criminal justice system).

97. See Crenshaw, *supra* note 64, at 1278-80 (noting that black women are believed less by jurors than white women; they are "judged by who they are, not by what they do"); Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 SEX ROLES 213, 224 (1992) (concluding that in a study of all white respondents, black victims of date rape were "seen as less truthful and more responsible than a white victim").

98. See, e.g., Estrich, *supra* note 12, at 1143 (observing that when a woman is raped by an intimate, she is also expected to show greater physical injury than if she had been raped by a stranger); Henderson, *supra* note 14, at 204-06 (discussing problems with how a woman's resistance has become important in rape cases: it focuses on a male standard of resistance, it ignores the role of fear, and it imposes a standard that will not apply in all cases).

99. See Baker, *supra* note 89, at 683-84 (observing that victims of date rape reflect the beliefs of many in society that they were responsible for the rape); Carole J. Sheffield, *Sexual Terrorism*, in GENDER VIOLENCE 110, 121-22 (Laura L. O'Toole & Jessica R. Schiffman eds., 1997) (discussing victim, offender,

consider the attack to be rape because, even though it was unwanted and by force, it was not by a stranger.¹⁰⁰ If a woman reports a rape, these same misperceptions may affect how police, prosecutors, judges, and jurors react to the charge.¹⁰¹ For example, although acquaintance rapes are the largest single category of rapes,¹⁰² prosecutors are still most reluctant to prosecute this type of rape.¹⁰³ If a rape case goes to trial, the defense may again focus on these issues as ones that make the woman not credible.¹⁰⁴

At every turn, the prosecution of the crime of rape is hampered by fallacies. For a woman to persist in wanting to prosecute, she must have a credible voice that can pierce others' reluctance to believe her. A prosecutor must believe she has a strong enough case to overcome the virtually inevitable departures from the "typical" rape experience, be they the circumstances surrounding the rape, the relationship between the victim and the offender, or the race of the two individuals.

and societal views that a woman is to blame for being raped). Note also how the myth of "stereotypic rape" suggests that women will be safe if they "avoid dark alleys and take other appropriate steps to reduce their vulnerability to the depraved and deranged who are stalking the streets, usually at night." Iglesias, *supra* note 84, at 894. Thus, if she does not, she has no one but herself to blame.

100. See, e.g., Estrich, *supra* note 12, at 1166 (noting that in three studies women reported "forced sex" on dates, but did not consider it rape).

101. See TASLITZ, *supra* note 73, at 40 (noting studies that show biases and stereotypes about rape influence jurors); Estrich, *supra* note 12, at 1171 (identifying three crime-related factors that influence the decision to prosecute: "the relationship of victim and offender; the amount of force and resistance; and the existence of corroborating evidence"); Henderson, *supra* note 14, at 198-99 (noting that the "most determinative factor for many prosecutors" is whether they will be able to get a conviction, and that will be influenced by what their constituents view as rape); Torrey, *supra* note 78, 1028-61 (describing how rape myths permeate the criminal justice system from grounds for police finding rape complaints "unfounded" to juror and judge biased attitudes about the credibility of the rape victim).

102. See *supra* note 88.

103. See Baker, *supra* note 89, at 690 (discussing problems associated with proving date rape cases where "[u]nlike stranger rapes, date rape trials are nothing but credibility contests"); Annette Fuentes, *Crime Rates are Down... But What About Rape?*, MS., Nov.-Dec. 1997, at 22 (noting that prosecutor zeal for prosecuting rape cases diminishes with date rape or when the victim was using drugs or alcohol).

104. See TASLITZ, *supra* note 73, at 23-24 (noting that the most common defense tactics are: to reveal inconsistencies in the victim's testimony; to focus on the delay in reporting the rape; to reveal a prior sexual relationship with the defendant; and to undermine the victim's character by noting facts like drinking); Torrey, *supra* note 78, at 1059 (observing that while undermining the victim's credibility is common in many criminal trials, it is more prevalent in rape cases: the victim "becomes a pseudo-defendant"); cf. Baker, *supra* note 63, at 584-85 ("The defense has a harder time impugning victim credibility when there is evidence of injury extrinsic to the rape itself, when the victim is raped by a stranger, or when the victim is sexually inexperienced.").

B. Rape as the Underlying Felony in a Rape-Murder Death Penalty Case

In a rape-murder or attempted rape-murder death penalty case, the myths and stereotypes that plague rape cases seem to become unimportant. Cases are prosecuted that would appear problematic as rape cases, and the lines become blurred between rape,¹⁰⁵ attempted rape,¹⁰⁶ or a lesser degree of sexual assault¹⁰⁷ that would not trigger the death penalty. Both ignoring rape myths and blurring the lines between types of sexual assault facilitate the imposition of the death penalty.

The circumstances surrounding several of the Ohio rape-murder death row cases are ones which, arguably, would cause concern about the credibility of the woman in a solitary rape case. In two cases the woman was reported to be drunk and was with an acquaintance;¹⁰⁸ in one the woman, thirty-one weeks pregnant, went to her brother's home looking for marijuana, and left with the defendant who offered to get some for her;¹⁰⁹ in another, a fourteen-year-old girl snuck out of the house, after midnight, to join in a celebration of the defendant's birthday.¹¹⁰ The circumstances of each case are significantly

105. See OHIO REV. CODE ANN. § 2907.02(A)(2) (Banks-Baldwin 1997) ("No person shall engage in sexual conduct with another when the offender purposefully compels the other person to submit by force or threat of force."). Sexual conduct with a person under the age of thirteen also constitutes rape. See *id.* § 2907.02(A)(1)(b). "Sexual conduct" is defined as:

vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Id. § 2907.01(A).

106. "A criminal attempt is an act that is a substantial step in a course of conduct planned to culminate in the commission of the crime. A substantial step is one that strongly corroborates the actor's criminal purpose." *State v. Powell*, 552 N.E.2d 191, 198 (Ohio 1990) (citing *State v. Woods*, 357 N.E.2d 1059, syllabus para. 1 (Ohio 1976)). Thus, evidence of a purpose to have sex with the victim and the act of making the victim remove her clothes is sufficient evidence of an attempt to commit rape. See *id.*

107. See, e.g., OHIO REV. CODE ANN. § 2907.05(A) (Banks-Baldwin 1997) (Gross sexual imposition prohibits sexual contact with another when, among other possibilities, "[t]he offender purposefully compels the other person . . . to submit by force or threat of force"). "Sexual contact" is "any touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person." *Id.* § 2907.01(B).

108. See *State v. Biros*, 678 N.E.2d 891, 895 (Ohio 1997) (white defendant/white victim); *State v. Benner*, 533 N.E.2d 701, 704 (Ohio 1988) (white defendant/white victim).

109. See *State v. McGuire*, 686 N.E.2d 1112, 1115 (Ohio 1997) (white defendant/white victim).

110. See *State v. Scudder*, 643 N.E.2d 524, 526 (Ohio 1994) (African-American defendant/white victim).

outside of the parameters of the stereotypical rape case.¹¹¹ Yet, because each woman was not only raped but also murdered, those discrepancies did not seem to matter.

The facts of *Benner*¹¹² demonstrate how rape myths disappear in the face of murder and a potential death sentence. Glen Benner, a white man, was convicted and sentenced to death for the rape and/or kidnapping of Cynthia Sedgwick, a white woman.¹¹³ Testimony at trial showed that Sedgwick met Benner at a concert at Blossom Music Center, an outdoor music venue.¹¹⁴ Witnesses testified that Sedgwick was “‘tipsy’” or “‘fairly drunk or high’.”¹¹⁵ Sedgwick and Benner were seen talking to each other during the concert.¹¹⁶ After the concert, witnesses saw them walk out to the woods that surround Blossom.¹¹⁷ Benner had his arm around Sedgwick and then picked her up and carried her.¹¹⁸ A week later Sedgwick’s decomposed body was found in the woods, a knotted bra and socks around her body.¹¹⁹ The coroner could not establish how she died due to the state of decomposition.¹²⁰ However, a co-worker testified that Benner told him he “‘raped [a woman] . . . and then choked her to death’.”¹²¹

Consider the rape separate from the rape-murder. This may seem callous, but it is necessary to see how the murder and death penalty infect our view of the rape. If Sedgwick had lived, and charged Benner with rape, numerous facts would cast doubt on her story: she was drunk or high, she talked to Benner during the concert, and she walked into the woods with him after the concert, with his arm around her. Arguably, Benner could be characterized as an acquaintance rather than a stranger, with whom she voluntarily went into the woods. All of this would lead to questions about her perception of force, especially given that she was drunk. Yet, none of these questions about

111. Eight of the defendants were convicted of raping children under the age of eighteen as victims. See *infra* app. (Bies, ten-year-old boy; Broom, fourteen-year-old girl; Durr, sixteen-year-old girl; Gumm, ten-year-old boy; Hill, twelve-year-old boy; Phillips, three-year-old girl; Powell, seven-year-old girl; Scudder, fourteen-year old girl). The rape of young children is also outside the scope of the “typical” rape.

112. 533 N.E.2d at 704-06.

113. See *id.* at 706, 717. Benner was also convicted and sentenced to death for the rape-murder of another woman, a neighborhood acquaintance, and sentenced to terms of years for rapes of two other women. See *id.*

114. See *id.* at 704.

115. *Id.* at 704.

116. See *id.* at 704.

117. See *Benner*, 533 N.E.2d at 704.

118. See *id.*

119. See *id.*

120. See *id.* at 712-13 n.3, 716.

121. *Id.* at 704.

Sedgwick arose because she was not only raped, but raped and murdered:¹²² She could not speak for herself.¹²³ If she could, it might weaken the prosecution's case that she was raped.¹²⁴

The trial court decision sentencing Benner to death also demonstrates how the murder skews the consideration of the rape. In Ohio, the sentencer is required to weigh the aggravating circumstance—here, rape—against the mitigating circumstances.¹²⁵ The Ohio Supreme Court precedents are clear that the nature and circumstances of the murder may be considered only as mitigating.¹²⁶ Nonetheless, the three-judge sentencing panel considered “the

122. The defendant argued on appeal that the state did not prove rape or kidnapping. *See id.* at 716. The Ohio Supreme Court rejected this claim relying largely on the defendant's confession to the co-defendant. The court further noted that even if rape was not established, “kidnapping to engage in sexual activity against the victim's will” was proven, again relying on the co-defendant's testimony that the defendant told him he put his hand in her vagina and the “circumstances of forcible restraint and violence showed that the sexual activity was against her will.” *Id.*

123. In several rape-murder cases the defendants raised a defense that takes advantage of the victim's inability to speak, the defense of consent. In solitary rape cases it is typical for the defendant to argue that the woman consented to the sex, thus no rape occurred. When this defense is made in a rape-murder death penalty case, it appears shameless: the woman cannot counter the defense, she is dead. In *State v. Cooley*, Richard Cooley argued that he did not rape Wendy Offredo, rather “she not only consented to [oral and vaginal intercourse] . . . but offered herself to him.” 544 N.E.2d 895, 904 (Ohio 1989) (white defendant/white victim). The Ohio Supreme Court found this “patently unreasonable:” “Cooley claims that after being kidnapped, threatened with a knife, and raped by [a co-defendant], Wendy sat on Cooley's lap, rubbed his genital area, and invited him to have sex with her.” *Id.* One can imagine the derision this defense would face in a solitary rape case. Here, where we know the rape ends in murder, it seems even worse. This type of defense seeks to take advantage of the myth that women invite sex so it cannot constitute rape. *See also infra* app. (Mason, an African-American, claimed the sex with his white victim was consensual; Smith, an African-American, claimed the African-American victim offered sex in payment for drugs for boyfriend); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 L. & SOC'Y REV. 19, 34-35 (1993) (observing that defense expert's characterization of the rape as “gentle” was an “absurd idea [that] render[s] oxymoronic the very idea of rape itself”). Reasonably, a defendant would seek to show that the rape did not occur because without the aggravating circumstance he would not face the death penalty. Yet, in light of the murder, a defense based on consent appears manipulative.

124. On the other hand, Sedgwick's story might be strengthened by the evidence that Benner raped two other women and raped and murdered yet another. *See Benner*, 533 N.E.2d at 706. As Estrich observed “[o]ur willingness to credit a woman's claim of sexual abuse changes dramatically when other women recount similar abuses by the same man.” Estrich, *supra* note 79, at 13. In three of the other Ohio rape-murder cases the prosecution presented evidence of other sexual assaults. *See infra* app. (Broom, Cooley, and Hill).

125. *See Benner*, 533 N.E.2d at 720 (Wright, J., concurring in part and dissenting in part).

126. *See id.* at 717. The death penalty statute states that the sentencer “shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and . . . [a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death.” OHIO REV. CODE ANN. § 2929.04(B) (Banks-Baldwin 1997). *See also State v. Wogenstahl*, 662 N.E.2d 311, 319-22 (Ohio 1996) (reaffirming and restating that only the aggravating circumstance may be weighed against the mitigating circumstances; the nature and circumstances of the offense may be considered at sentencing only as

brutal and depraved manner in which the Defendant strangled or attempted to strangle his victims[.]”¹²⁷ On appeal to the Ohio Supreme Court, Justice Wright dissented on the ground that consideration of the manner of the murders was improper.¹²⁸ Consistent with the statutory directive, only the circumstances of the rape should have been weighed. Yet, for the three-judge sentencing panel and the Ohio Supreme Court, the circumstances of the murder overwhelmed any proper evaluation of the rape as it affected the appropriateness of the death penalty.

The court displayed a similar disregard for the real sufficiency of the rape evidence in *State v. Durr*.¹²⁹ Durr, an African-American, was convicted and sentenced to death for the rape-murder of Angel Vincent, a sixteen-year-old white woman.¹³⁰ Vincent’s decomposed body was found three months after she was killed.¹³¹ She was wearing a sweater that was pulled up above her breasts, and tennis shoes.¹³² The only other evidence of rape was that the defendant’s girlfriend testified that she saw the victim tied up in the back of the defendant’s car the night the victim disappeared.¹³³ The girlfriend testified that the defendant told her he was going to “‘waste’ [the victim] . . . because ‘she would tell’.”¹³⁴ As the court admits, the defendant never said what the victim was “going to tell.”¹³⁵ The court concluded that this evidence constituted “highly probative circumstantial evidence” of rape.¹³⁶ Yet, for the court to have reached this conclusion, it must have assumed that the defendant feared the victim would “tell” that he had raped her.

It is difficult to imagine that the limited evidence in *Durr* would be deemed sufficient to support a rape conviction in a solitary rape case. Indeed, the court’s holding that the evidence established that Durr raped the victim

mitigating circumstances).

127. *Benner*, 533 N.E.2d. at 720 (Wright, J., concurring in part and dissenting in part) (“[T]he three-judge panel improperly weighed and ‘consider[ed]’ as relevant to the aggravating circumstances the testimony and evidence relating to the brutal and depraved manner in which the Defendant strangled or attempted to strangle his victims, the frequency of his attacks, his seeming indifference and lack of remorse for the trail of death and broken lives he left behind, simply to satisfy his sexual gratification and to avoid apprehension’.”).

128. *See id.*

129. 568 N.E.2d. 674 (Ohio 1991).

130. *See id.* at 676-78, 686.

131. *See id.* at 676-77.

132. *See id.* at 677.

133. *See id.* at 682.

134. *Id.* at 677.

135. *Durr*, 568 N.E.2d at 677.

136. *Id.* at 682 (stating that the court could reverse only “where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence”) (citation omitted). Justice Brown concurred in the court’s opinion but did “not believe the evidence [was] sufficient to support a conviction of rape.” *Id.* at 686 (Brown, J., concurring).

sounds like the kind of speculation that the court earlier had condemned in *State v. Heinish*.¹³⁷ In *Heinish*, the court refused to speculate whether the evidence showed attempted rape (requiring attempted sexual conduct) or gross sexual imposition (requiring sexual contact by force).¹³⁸ The evidence showed that the victim's jeans were partly unzipped and pulled down, and her shirt was pulled up.¹³⁹ Her shoes, jacket, and underwear were missing.¹⁴⁰ In addition, saliva was found on the outside of her jeans, near her crotch.¹⁴¹ The saliva was tested and determined to be in the same blood grouping as the defendant's, but 32% of Caucasians are also in this group.¹⁴² Despite the court's reluctance to do so, it found that this evidence was not enough to support a finding of attempted rape.¹⁴³ In dissent, Justice Resnick disagreed.¹⁴⁴ In particular, Justice Resnick placed more weight on the blood evidence: She conceded that 32% of Caucasians are "type A secretors," as was *Heinish*, but noted that neither the victim nor her boyfriend was.¹⁴⁵ The combination of the saliva stain near the victim's crotch with her clothing in disarray or missing "constitutes a substantial step in attempting to commit rape."¹⁴⁶ The line, then, between the majority and the dissent appears to have more to do with the identification of the perpetrator than whether the evidence was sufficient to establish attempted rape or gross sexual imposition.

The decision in *Heinish* does not square with the holding in *Durr*. In *Heinish*, the evidence of saliva near the victim's crotch and her clothing being pulled off was not enough for attempted rape, but in *Durr*, missing clothing and a non-specific threat were enough to establish rape. In both cases, the conclusions about the sufficiency of the evidence of rape do not appear to have much to do with the actual evidence of rape.

C. Conclusion

When a defendant becomes eligible for the death penalty because he commits a murder in the course of a rape, the commission of the rape itself assumes less, rather than more, significance. Even though the rape is what makes the murder more serious, and thus deemed potentially worthy of a more severe punishment than murder alone, the circumstances of the rape become

137. 553 N.E.2d 1026, 1035 (Ohio 1990).

138. *Id.*

139. *See id.* at 1029.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See Heinish*, 553 N.E.2d at 1035.

144. *Id.* at 1037 (Resnick, J., concurring in part and dissenting in part).

145. *Id.*

146. *Id.* at 1038.

inconsequential. As this part shows, this is in complete contradistinction to how the facts surrounding a solitary rape are viewed in the criminal justice system.

The prosecution of rape cases must overcome the myth that rapes occur only between interracial strangers, outdoors, and at night. Moreover, the credibility of the victim is a paramount concern. These factors do not appear to negatively affect the prosecution of rape-murder death penalty cases. Deviations from the myths and stereotypes seem insignificant; the woman's silence, because she is dead, speaks more forcefully about the crime than if she were still alive. Moreover, in rape-murder cases the lines establishing the sufficiency of evidence for rape, attempted rape, and lesser degrees of sexual assault are often hard to discern. What is deemed sufficient evidence of rape in a rape-murder case, arguably, would not be sufficient in a rape case.

One might be tempted to applaud the way the circumstances of rape are considered in rape-murder cases. As one would hope in all rape cases, the myths do not play a prominent role, and the crime is found to exist even when the admissible evidence is scant. But the context in which these developments occur silence that applause. When a defendant's life is at stake, it cannot be acceptable that standards of proof are cast aside¹⁴⁷ or that myths which hinder rape prosecutions are conveniently ignored. Crossing the line from rape to rape-murder should not blind us to the way the death penalty perverts the law and discounts a woman's experience of rape.

IV. CONCLUSION

Rape-murders are a small portion of the murders for which defendants are sentenced to death, yet they illuminate disturbing truths about the death penalty in the criminal justice system. The death penalty is applied disproportionately to murders by strangers and to murders of whites. Rape-murders in Ohio reflect the same disparities: more strangers and more white victims. Thus, the use of the death penalty does not reflect the reality of murder or rape-murder but serves to reinforce and substantiate our fear of strangers and racially discriminatory values. This distortion is compounded in rape-murder cases by the ease with which courts are willing to find that a rape occurred. Myths and stereotypes that afflict rape cases are ignored when the case crosses the line into rape-murder. Ironically, proving the extreme case of rape-murder appears easier than proving the every day occurrence of rape. This might cause us to ask why, if it is possible to ignore myths in one

147. See *State v. Apanovitch*, 514 N.E.2d 394, 406 (Ohio 1987) (Brown, J., concurring in part and dissenting in part) (noting, in a rape-murder case, that while the court may find circumstantial evidence sufficient to uphold a conviction "even upon a record with as many holes as this one" imposing the death penalty requires greater certainty).

context, this does not occur in solitary rape cases. The reason, I suggest, is that the different treatment does not reflect a better understanding of rape, but an exploitation of rape as an emotionally-laden crime that facilitates the application of the death penalty.

Rape-murders are emotionally outraging crimes. The application of the death penalty to this class of felony-murders takes advantages of that fact. It counts on jurors' fears and outrage, not their "reasoned moral response[.]"¹⁴⁸ to validate its use. In doing so it reveals the essential arbitrary and capricious nature of the death penalty.

148. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis omitted).

Appendix¹⁴⁹

1. *Anthony Apanovitch*. State v. Apanovitch, No. 49772, 1986 WL 9503 (Cuyahoga Co. Ct. App. Aug. 26, 1986), *aff'd*, 514 N.E.2d 394 (Ohio 1987). Apanovitch, a twenty-nine-year-old white man, was convicted and sentenced to death for aggravated murder with specifications of rape and burglary. Apanovitch was acquainted with the victim, Mary Ann Flynn, a white nurse midwife, because he had agreed to paint her house. Flynn was strangled to death with a bed sheet, she was badly beaten and bruised, her hands were bound behind her back, and sperm was found in her mouth and vagina. Witnesses testified Flynn said she was afraid of Apanovitch.
2. *Glen Benner*. State v. Benner, No. 12664, 1987 WL 15078 (Summit Co. Ct. App. July 22, 1987), *aff'd*, 533 N.E.2d 701 (Ohio 1988). Benner, a twenty-three-year-old white man, was convicted and sentenced to death for three counts of aggravated murder with specifications of kidnapping and/or rape. The two victims, Tina Sedgwick and Trina Bowser, were both white women. Sedgwick was a stranger whom Benner met at an outdoor music concert, and Bowser was a neighborhood acquaintance. Sedgwick's body was found in the woods at the concert venue, a knotted bra and socks tied together near her body. Bowser was found in the trunk of her car, underwear and bra tied around her neck, and the car was on fire. Sperm was found in her anus and vagina. The prosecution presented evidence of two other rapes committed by Benner at the guilt phase.
3. *Michael Bies*. State v. Bies, No C-920841, 1994 WL 102196 (Hamilton Co. Ct. App. Mar. 30, 1994), *aff'd*, 658 N.E.2d 754 (Ohio 1996). Bies, a twenty-year-old white man, was convicted and sentenced to death for aggravated murder with specifications including attempted rape and kidnapping. His co-defendant, Darryl Gumm, number 10 *supra*, was acquainted with the victim, a ten-year-old white boy named Aaron Raines. Bies and Gumm offered Raines ten dollars to help them move scrap metal and once in the building tried to have sex with him. When Raines resisted, Bies and Gumm hit him with pipe and concrete, kicked him, and left him in the basement.
4. *Kenneth Biros*. State v. Biros, 678 N.E.2d 891 (Ohio 1997). Biros, a thirty-three-year-old white man, was convicted and sentenced to death for aggravated murder with specifications of attempted rape and aggravated

149. All facts are taken from the Ohio appellate and supreme court opinions affirming each defendant's conviction and death sentence and from OHIO PUBLIC DEFENDER OFFICE, DEATH PENALTY PROPORTIONALITY STATISTICS 1 (1999).

robbery. He was also convicted of other related crimes. The victim, a white woman named Tami Engstrom, was a stranger to Biros. Engstrom and Biros were at a bar where Engstrom passed out either because she was sick or drunk; Biros agreed to drive her home. In his confession he stated that during the drive he touched her leg, she pushed him away, tried to get out of the car and fell, hitting her head on train tracks. Engstrom's body was found naked and mutilated: her head and one breast were cut off, her right leg was cut off above the knee, her torso was cut open and her anus, rectum, and most of her sexual organs were missing and never recovered. The Ohio Supreme Court held that the sexual mutilation was an attempt to conceal evidence of a rape or attempted rape.

5. *Rommell Broom*. State v. Broom, No. 51237, 1987 WL 14401 (Cuyahoga Co. Ct. App. July 23, 1987), *aff'd*, 533 N.E.2d 682 (Ohio 1988). Broom, a twenty-eight-year-old African-American man, was convicted and sentenced to death for aggravated murder with specifications of rape and kidnaping. The victim, fourteen-year-old Trina Middleton, an African-American, was a stranger. Broom tried to grab three young girls on the street, two got away and called their mothers. Trina did not get away; her body was found two hours later, she had been stabbed seven times in the chest and abdomen, her rectum and vagina contained sperm. The prosecution presented evidence that Broom had kidnaped another young African-American girl and had spent time in jail for "being involved with a little girl."
6. *Sean Carter*. Sean Carter, an African-American, was convicted of and sentenced to death for raping, robbing, and murdering his adoptive grandmother, also African-American. Carter's direct appeal is pending before the Ohio Supreme Court. My information on the case is based on a telephone conversation with one of his direct appeal lawyers.
7. *Richard Wade Cooley*. State v. Cooley, No. 12943, 1987 WL 31921 (Summit Co. Ct. App. Dec. 23, 1987), *aff'd*, 544 N.E.2d 895 (Ohio 1989). Cooley, a nineteen-year-old white man, was convicted and sentenced to death on two counts of aggravated murder each with three specifications, including rape. He was also convicted of other related crimes. Cooley and a friend threw rocks off a bridge onto the victims' car and forced themselves into the car. The victims, two white women named Wendy Offredo and Dawn McCreery, were strangers to the two men. Both women were raped, beaten, choked, and strangled to death. Cooley's friend, a juvenile, received a life sentence.
8. *Wiley Davis*. State v. Davis, No. 64270, 1995 WL 348426 (Cuyahoga Co. Ct. App. June 8, 1995), *aff'd in part and rev'd in part*, 666 N.E.2d 1099 (Ohio 1996). Davis, a thirty-two-year-old African-American man, was convicted and sentenced to death on two counts of aggravated

murder each with three specifications, including attempted rape. The victim, Amy Perkins, a white woman, was a stranger whom Davis kidnapped in a downtown parking lot. She was shot in the head and thrown from the car, naked and unconscious. The Ohio Supreme Court held that the evidence of attempted rape was insufficient.

9. *Darryl Durr*. State v. Durr, No. 57140, 1989 WL 147626 (Cuyahoga Co. Ct. App. Dec. 7, 1989), *aff'd*, 568 N.E.2d 674 (Ohio 1991). Durr, a twenty-five-year-old African-American man, was convicted and sentenced to death for aggravated murder with three specifications, including rape. He was also convicted of other related crimes. Durr was friends with the victim, Angela Vincent, a sixteen-year-old white young woman. Vincent's decomposed body was found three months after she was killed. She was wearing only a pink sweater pulled up over her breasts, and tennis shoes. After Durr was arrested for two other unrelated rapes, his girlfriend told the police what she knew about Vincent's disappearance: she saw Vincent tied up in the back seat of Durr's car the night she was killed, Durr told his girlfriend that he was going to "waste" Vincent because she would "tell," later he told his girlfriend that he had strangled Vincent to death.
10. *Darryl Gumm*. State v. Gumm, Nos. C-920907, B-925608, 1994 WL 44411 (Hamilton Co. Ct. App. Feb. 16, 1994), *aff'd*, 653 N.E.2d 253 (Ohio 1995). Gumm, a twenty-six-year-old white man, was convicted and sentenced to death for aggravated murder with a specification of attempted rape. Gumm, co-defendant of Bies, number 3, *infra*, was acquainted with the victim, ten-year-old Aaron Raines. Gumm stated in his confession that Bies killed Raines.
11. *Jerome Henderson*. State v. Henderson, No. C-850557, 1987 WL 5479 (Hamilton Co. Ct. App. Jan. 14, 1987), *aff'd*, 528 N.E.2d 1237 (Ohio 1988). Henderson, a twenty-six-year-old African American man, was convicted and sentenced to death on two counts of aggravated murder with two specifications, including attempted rape (the charge was rape). Henderson was a stranger to the victim, an African-American woman named Mary Acoff. Acoff was found nude, her throat slashed thirteen times, semen in her vagina. One of the issues on appeal was whether the evidence was sufficient to prove rape or attempted rape. The Court held that evidence was sufficient for attempted rape because it showed that Henderson "purposefully took a substantial step toward committing the rape;" Acoff's body was nude, blood dripped onto her body while she was prone, a blood smear was on her breast, and semen was on Henderson's coat.
12. *Danny Lee Hill*. State v. Hill, Nos. 3720, 3745, 1989 WL 142761 (Trumbull Co. Ct. App. Nov. 27, 1989), *aff'd*, 595 N.E.2d 884 (Ohio 1992). Hill, an eighteen-year-old African-American man, was convicted

and sentenced to death for aggravated murder with specifications including rape. He was also convicted of other related crimes. The victim was a stranger, a twelve-year-old white boy named Raymond Fife. Fife was found in a field across from a grocery store, nude except for his shoes and socks, his underwear tied around his neck. He died from his injuries two days later: bruises, abrasions, severe blows to his head, second and third degree burns on his face, neck and shoulders. He had teeth marks on his penis, damage to his anus and rectum, and his bladder had been perforated by a stick. At the guilt phase the prosecution presented evidence that Hill had raped two women, one of whom testified that Hill bit her and threatened to stick a knife up her rectum. Hill stated in his confession that he was present but that a man named Combs committed the crimes against Fife. Combs received a life sentence.

13. *Maurice Mason*. State v. Mason, No. 9-94-45, 1996 WL 715480 (Marion Co. Ct. App. Dec. 9, 1996), *aff'd*, 694 N.E.2d 932 (Ohio 1998). Mason, a thirty-year-old African-American man, was convicted and sentenced to death for aggravated murder with a specification of rape. Mason and the victim, nineteen-year-old Robin Dennis, a white woman, were friends. Dennis's body was found in an abandoned barn, two days after she was killed. She was six weeks pregnant. She had been strangled, her body was naked except for clothing tangled around her ankles, and she had semen in her vagina. The day she was killed, she and her husband had been partying with friends, including Mason. Her husband passed out drunk. She and Mason left the party to get a television that Mason was trading with Dennis's husband for a Colt revolver. Mason testified at trial that he and Dennis had had an affair, and that the day she was killed they had consensual sex. The Ohio Supreme Court found the evidence was sufficient to prove forcible rape.
14. *Dennis McGuire*. State v. McGuire, No. CA95-01-001, 1996 WL 174609 (Preble Co. Ct. App. April 15, 1996), *aff'd*, 686 N.E.2d 1112 (Ohio 1997). McGuire, a white man, was convicted and sentenced to death for aggravated murder with a specification of rape. The victim, Joy Stewart, a white, twenty-two-year-old woman, was a stranger to McGuire. Stewart was thirty-one weeks pregnant. She met McGuire when she went to her brother-in-law's looking for marijuana. McGuire told her he could get some for her, and they left together. McGuire took her to the woods, anally raped her, and strangled her to death. In a detailed statement to the police, McGuire said that Stewart's brother-in-law had committed the crime.
15. *Ronald Phillips*. State v. Phillips, No. C.A. 16487, 1994 WL 479164 (Summit Co. Ct. App. Aug. 31, 1994), *aff'd*, 656 N.E.2d 643 (Ohio 1995). Phillips, a nineteen-year-old white man, was convicted and

sentenced to death for aggravated murder with a specification, apparently one of rape. The victim was Sheila Marie Evans, a three-year-old white child who was the daughter of a woman Phillips dated and with whom he occasionally lived. Phillips had previously beaten and raped the child. She died from blunt force trauma; the medical evidence showed that she had been beaten extensively, and there was evidence of acute anal penetration. Evans's mother was convicted of child endangering.

16. *Tony Powell*. *State v. Powell*, No. C-870091, 1988 WL 85906 (Hamilton Co. Ct. App. Aug. 17, 1988), *aff'd*, 552 N.E.2d 191 (Ohio 1990). Powell, a nineteen-year-old African American man, was convicted and sentenced to death for aggravated murder with a specification of attempted rape (the charge was rape). The victim was a stranger, seven-year-old African-American Trina Dukes. Powell approached three children on the street, and asked one of them, Trina, to come upstairs with him. The other two children went for help. Powell made Trina take off her clothes. When they heard Trina's grandfather calling for her, Trina screamed and Powell threw her out the fourth floor window. She died the next day. On appeal, Powell argued that the evidence was insufficient to establish attempted rape, but the court rejected that argument on the ground that, in addition to removing her clothing, he told the police that he was going to have sex with her.
17. *Lawrence Reynolds*. *State v. Reynolds*, No. 16845, 1996 WL 385607 (Summit Co. Ct. App. July 10, 1996), *aff'd*, 687 N.E.2d 1358 (Ohio 1997). Reynolds, a twenty-seven-year-old white man, was convicted and sentenced to death for aggravated murder with four specifications, including attempted rape. The victim, Loretta Foster, a sixty-seven-year-old white woman, was Reynolds's neighbor. He had painted her basement, and she had told friends that she was afraid of him. Foster was found unclothed: her bra was torn and her tee-shirt pulled up over her breasts, her slacks and pantyhose removed. She was strangled to death. Although there was no evidence of sexual contact, Reynolds told at least one person that he had tried to rape her.
18. *Martin Rojas*. *State v. Rojas*, No. C-880332, 1990 WL 95353 (Hamilton Co. Ct. App. July 11, 1990), *aff'd*, 592 N.E.2d 1376 (Ohio 1992). Rojas, a twenty-nine-year-old Latino man, was convicted and sentenced to death for aggravated murder with three specifications including rape. He was also convicted of other related crimes. The victim, Rebecca Scott, was a white woman, whom Rojas had met at church. Scott had been trying to help Rojas stop using drugs and alcohol, but Rojas wanted them to be in a relationship. The day before Rojas killed Scott, she made them go to a lay minister in the church because Rojas had been hitting her. The next day Scott told Rojas she did not want to see him. He convinced her to have dinner with him, and he lay in wait outside her apartment. When

she came outside, he grabbed her and pulled her back into her apartment. Rojas raped her twice and stabbed her to death.

19. *Kevin Scudder*. State v. Scudder, No. 91AP-506, 1992 WL 302432 (Franklin Co. Ct. App. Oct. 20, 1992), *aff'd*, 643 N.E.2d 524 (Ohio 1994). Scudder, a twenty-seven-year-old African-American man, was convicted and sentenced to death for two counts of aggravated murder with specifications of attempted rape and kidnapping. The victim, a fourteen-year-old white woman named Tina Baisden, was a friend of Scudder's. Scudder and some friends picked Tina up at midnight and went for a drive. On the way home, Scudder insisted on Tina being the last one left in the car with him. Tina told one of the men she was afraid of Scudder, and he gave her a pocket knife to protect herself. Tina was found with forty-six stab wounds, her pants to her ankles, her underwear to her mid thighs, and bloody hand and finger smears on her legs and inner thighs. At first Scudder claimed that they had been attacked by two black hitchhikers, and that they had taken and killed Tina.
20. *William Smith*. State v. Smith, No. C-880287, 1990 WL 73974 (Hamilton Co. Ct. App. June 6, 1990), *aff'd*, 574 N.E.2d 510 (Ohio 1991). Smith, a thirty-year-old African-American man, was convicted and sentenced to death on two counts of aggravated murder with specifications of rape and robbery. The victim, Mary Virginia Bradford, a forty-six-year-old African-American woman, was a stranger to Smith. She was stabbed ten times, nude from the waist down, and had sperm in her vagina and on her abdomen. In his confession Smith claimed that Bradford offered to have sex with him as payment for cocaine her boyfriend took from him, and that he stabbed her in a struggle after they had sex. The Ohio Supreme Court found that the evidence showed Bradford was stabbed after she had been raped.
21. *David Steffen*. State v. Steffen, No. C-830445, 1985 WL 4301 (Hamilton Co. Ct. App. Dec. 11, 1985), *aff'd*, 509 N.E.2d 383 (Ohio 1987). Steffen, a twenty-two-year-old white man, was convicted and sentenced to death for aggravated murder with specifications of rape and aggravated burglary. Steffen was a stranger to the victim, a white nineteen-year-old woman named Karen Range. He was a door-to-door salesman who made a call at Range's parent's home. He raped Range in the bathroom, beat her, and cut her throat.
22. *Andre Williams*. State v. Williams, No. 89-T-4210, 1995 WL 237092 (Trumbull Co. Ct. App. Mar. 24, 1995), *aff'd in part and rev'd in part*, 660 N.E.2d 724 (Ohio 1996). Williams, a twenty-one-year-old African-American man, was convicted and sentenced to death on three counts of aggravated murder each with three specifications including attempted rape (the charge was rape). The victim, Katherine Melnick, was a white woman, who was a stranger to Williams. Williams broke into the

Melnick's home, assaulted, robbed, and killed George Melnick, Katherine's husband. Katherine was severely beaten, but had no memory of the attack; her underwear was found on the floor next to her, but no semen was found. Williams told some friends he got on top of Katherine and "tried to get some," he told others he had raped her.

