

## GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

SANDRA BABCOCK, NATHALIE GREENFIELD, AND KATHRYN ADAMSON\*

### ABSTRACT

*This article presents a comprehensive study of 48 persons sentenced to death between 1990 and 2023 who presented as women at the time of their trials. Our research is the first of its kind to conduct a holistic and intersectional analysis of the factors driving women's death sentences. It reveals commonalities across women's cases, delving into their experiences of motherhood, gender-based violence and prior involvement with the criminal legal system. We also explore the nature of the women's crimes of conviction, including the role of male co-defendants and the State's use of aggravating factors. Finally, we reveal for the first time the extent to which capital prosecutions are dominated by men—including judges, elected District Attorneys, defense attorneys, and juror forepersons—and explain why gender matters in determining who lives and who dies.*

*We present our data against the backdrop of prevalent theories that seek to explain both the rarity of women's executions and the reasons why certain women are singled out for the harshest punishment provided by law. We explain why those frameworks are inadequate to understand the role that systemic gender bias plays in women's capital prosecutions. We conclude by arguing for more nuanced research that embraces the complexities in women's capital cases and accounts for the presence of systemic and intersectional discrimination.*

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\* Sandra Babcock is a Clinical Professor of Law at Cornell Law School. Nathalie Greenfield is an Adjunct Professor of Law at Cornell Law School and an Associate Attorney and Mitigation Specialist at Phillips Black, Inc. Kathryn Adamson is a consultant with the Center on Gender and Extreme Sentencing and the Cornell Center on the Death Penalty Worldwide. The authors wish, first and foremost, to thank the women on death row who have shared their experiences with us. The authors are also very grateful to the numerous capital post-conviction lawyers who provided critical information and documents that allowed us to carry out this research. Thank you to our Cornell faculty colleagues, especially John Blume and Sheri Johnson, who provided valuable feedback. Thanks also to our excellent cohort of researchers and colleagues who helped us analyze our data and think through methodological questions, including Maci East, Jacqueline Groskaufmanis, Randi Kepecs, Paulina Lucio Maymon, Gabriela Markolovic, and Sofía López Cartagena.

# GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

## CONTENTS

INTRODUCTION .....	4
I. METHODOLOGY .....	6
II. SUMMARY OF FINDINGS .....	7
III. PREVAILING THEORIES ABOUT WOMEN ON DEATH ROW .....	9
A. <i>The Chivalry Theory</i> .....	9
B. <i>The Evil Woman Theory</i> .....	14
IV. CHARACTERISTICS OF WOMEN ON DEATH ROW .....	16
A. <i>Motherhood and Poverty</i> .....	17
B. <i>Gender-Based Violence</i> .....	18
C. <i>Poor Mental Health</i> .....	19
D. <i>Sexual Orientation and Gender Identity</i> .....	22
E. <i>Prior Criminal History</i> .....	22
V. GENDER OF TRIAL ACTORS .....	25
A. <i>Does Gender Matter?</i> .....	25
B. <i>Gender of Trial Actors in Women's Capital Cases</i> .....	30
VI. CHARACTERISTICS OF WOMEN'S CRIMES OF CONVICTION .....	32
A. <i>Crimes of Conviction</i> .....	32
B. <i>Victim Demographics</i> .....	38
C. <i>Aggravating Factors</i> .....	43
D. <i>Co-defendants</i> .....	49
VII. EMBRACING THE COMPLEXITY OF GENDER AND THE DEATH PENALTY .....	54
Appendix A: Data on Women on Death Row .....	58
Appendix B: Data on Courtroom Actors .....	59
Appendix C: Data on Characteristics of Women's Crimes of Conviction .....	60

## GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

INTRODUCTION

Women on death row are often a subject of fascination in the contemporary United States. In spite—or perhaps because—of the small number of death-sentenced women nationwide, countless column inches and titillating television broadcasts have fixated on their stories.<sup>1</sup> Public commentators cast women who kill as betrayers of the “fairer sex,” unfeminine “monsters,” and manipulative “murderesses” who defy gendered tropes of passivity and nurturing behavior.<sup>2</sup> This sensationalized coverage, however, has not advanced our understanding of condemned women’s backgrounds, crimes, and experiences in the legal system.

Only a handful of scholars have studied women on death row, and few have conducted empirical, intersectional research into the current death row population.<sup>3</sup> The limited previous scholarship on women’s capital cases has broadly sought to answer two questions: first, why are so few women sentenced to death compared to men? And second, what distinguishes the women who are sentenced to death—why *these* women?<sup>4</sup> Legal scholars’ attempts to answer these questions have fallen short, largely because they have relied on data that is anecdotal, inapposite, or incomplete.<sup>5</sup>

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<sup>1</sup> MARY WELEK ATWELL, *WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT* 7 (2nd ed. 2014).

<sup>2</sup> Scholars have documented how media coverage of women defendants focuses on gendered behaviors that make them, in society’s eyes, morally “blameworthy” for the offense. *See* Elizabeth K. Carll, *News Portrayal of Violence and Women*, 46 AM. BEHAV. SCIENTIST 1601 (2003); MARLIN SHIPMAN, *THE PENALTY IS DEATH: U.S. NEWSPAPER COVERAGE OF WOMEN’S EXECUTIONS* 6–10 (2002); Chimene I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 69–70, 78 (2002).

<sup>3</sup> Several scholars have conducted case studies or surveys of women sentenced to death in the United States, many of which focus primarily on the cases of women post-execution. *See, e.g.*, Jessica Sutton, John Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 ST. JOHN’S L. REV. 1053 (2021) [hereinafter Sutton, et. al., *Death by Dehumanization*]; Victor Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L. J. 101 (2006) [hereinafter Streib, *Rare and Inconsistent*]; Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 CUNY L. REV. 473 (2005) [hereinafter Mogul, *State’s Use of Homophobia*]; Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women’s Capital Cases*, 4 BUFFALO CRIM. L. REV. 967 (2001) [hereinafter Rapaport, *Staying Alive*]; DAVID BAKER, *WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY* (2015) [hereinafter BAKER, *WOMEN AND CAPITAL PUNISHMENT*]; ATWELL, *supra* note 1; KATHLEEN A. O’SHEA, *WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–98* (1999).

<sup>4</sup> *See, e.g.*, Victor Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. R. 845, 872 (1990).

<sup>5</sup> *See* Section III, *infra*, for a discussion of previous scholarship.

Our research charts a different course. We seek to understand how gender affects women's capital cases by examining the entire population of women on death row.<sup>6</sup> Our data-driven approach eschews reductive theories about condemned women and focuses instead on the facts of their pre-incarceration lives, the circumstances that led to their arrest and conviction, and the characteristics of those who participated in their capital trials. By focusing on women—as opposed to, for example, comparing a sample of women to death-sentenced men—we are able to explore how women experience the criminal justice system *as women*, not merely as comparators to the yardstick of men's experiences.<sup>7</sup>

This article continues a series of works exploring the gendered dynamics of women's capital cases from an intersectional perspective. Our first article on this topic, published in 2023, examined women's pre-incarceration histories of gender-based violence.<sup>8</sup> Here, we shift our lens to women's trials. We explore the characteristics of women on death row, the gender of legal actors involved in their capital trials, and the crimes for which they were condemned to die. In so doing, we aim to expose common themes that unite them, as well as the complexities that make each woman unique.

We begin the article by outlining our methodology and summarizing our key findings in Sections I and II, respectively. In Section III, we discuss and critique previous scholarship concerning women on death row. The next three sections present the results of our analysis: Section IV examines key characteristics of women on death row; Section V breaks down the gender of trial actors involved in women's capital prosecutions; and Section VI explores the characteristics of women's crimes of conviction, including the presence of co-defendants, the use of statutory aggravating factors, and victims' profiles. We close the article, in Section VII, by reflecting on both the patterns and nuances that our analysis reveals. We explain how our data undermine previous scholars' assumptions about the reasons why women are either spared from punishment or sentenced to death. We also urge scholars and the legal community to embrace the complexities at the heart of

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<sup>6</sup> As explained below, our complete dataset includes all women currently on death row who presented as women during their trials, as well as two women whose death sentences have been reversed.

<sup>7</sup> We note that other scholars have also adopted this approach in analogous contexts. See, e.g., Amanda Potts & Siobhan Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 INT. J. SEMIOTICS L. 21, 22 (2018) ("By focusing specifically on [women who kill in the English criminal system] . . . we have been able to explore the judicial narratives surrounding these women, *qua women*." [hereinafter Potts & Weare, *Gender Naming Strategies*]).

<sup>8</sup> See generally Sandra Babcock & Nathalie Greenfield, *Gender, Violence, and the Death Penalty*, 53 CAL. WEST. INT'L L. J 327 (2023).

women's cases, and to reject theories that fail to take into account the role that systemic, intersectional discrimination plays in determining how and why women are sentenced to die.

## I. METHODOLOGY

Our primary dataset consists of the trial transcripts of 48 people who were sentenced to death between 1990 and 2022<sup>9</sup> and who presented as women at their trials.<sup>10</sup> We also obtained the habeas corpus petitions of 28 women whose cases have advanced to that stage of the appellate process,<sup>11</sup> and gathered state and federal appellate decisions, where available.

From this dataset, we were able to identify basic demographic information for each person, including their race, age, year of sentence, and state of conviction. To obtain descriptive data on the women—including information relating to their status as parents, mental health, and histories of gender-based violence—we read pertinent portions of the trial transcripts, including expert testimony and the testimony of the women themselves. We reviewed the penalty phase transcripts to determine whether prosecutors introduced evidence of prior convictions and whether defense attorneys pointed to the absence of prior convictions as a mitigating factor.

We found data on the crimes, co-defendants, and aggravating factors present in each case by reviewing charging sheets, indictments, jury instructions, and trial testimony. Data on each defendant's relationship to the victim and basic demographic information about victims was also apparent from the trial testimony.

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<sup>9</sup> We selected this time period by reference to the women currently on death row in the United States. The oldest of those cases was prosecuted in 1990, and the most recent in late 2022.

<sup>10</sup> The seven transwomen we have identified all presented as men at the time of trial, and for this reason we do not discuss them here. Our dataset also includes one transman, who presented as a woman at the time of trial, and two cisgender women—Tiffany Cole and Michelle Sue Tharp—whose death sentences have been reversed. In 2023, after we began our research, Tiffany Cole was resentenced to life imprisonment in Florida and is no longer on that state's death row. Anne Schindler, *Jurors Spare Tiffany Cole Death Penalty in 2005 'Buried-Alive' Case in Jacksonville*, FIRST COAST NEWS (Aug. 23, 2023). The death sentence of Michelle Sue Tharp, sentenced to death in Pennsylvania in 2000, was overturned on September 24, 2014 by the Pennsylvania Supreme Court. *See Com. v. Tharp*, 627 Pa. 673, 719 (2014). As of January 3, 2024, however, she had not yet been resentenced, and remains at risk of being resentenced to death.

<sup>11</sup> We were able to obtain the habeas petitions of 28 of 30 women who had filed post-conviction appeals, sometimes from their post-conviction counsel, and sometimes by downloading them from online court dockets. For one woman for whom we lacked a habeas petition, we were nonetheless able to obtain appellate pleadings and a copy of a mental health expert's report submitted in post-conviction proceedings.

We occasionally referred to supplemental sources, such as contemporary media accounts, where we needed information beyond that contained in the trial transcript.

Our reliance on trial transcripts and court filings means that there are gaps in our data. Our engagement with defense attorneys representing women<sup>12</sup> has taught us that lawyers typically receive no training on conducting gender-sensitive representation.<sup>13</sup> As a result, they often fail to gather and present evidence of women's life experiences, including their histories of gender-based violence.<sup>14</sup> Moreover, defense attorneys did not always present comprehensive evidence of women's mental health at trial. In most of these cases, we reviewed expert testimony presented in post-conviction proceedings to supplement the trial record, but this was not possible in the cases of women who had not yet filed post-conviction appeals. Consequently, there are gaps in our data surrounding women's histories of abuse and attendant mental health consequences.

Our reporting on those data points should be treated as a baseline, rather than a precise measurement of the prevalence of those experiences among the women's death row population.<sup>15</sup>

## II. SUMMARY OF FINDINGS

This article explores three facets of women's capital cases: (1) the characteristics of women sentenced to death; (2) the gender of legal actors involved in their cases; and (3) the crimes for which they are convicted. Our analysis reveals that these cases are far from homogenous—no single theory can be brought to bear on them all. Yet our research also reveals some striking commonalities across women's cases.

Four experiences are nearly ubiquitous in the lives of women on death row: motherhood, exposure to gender-based violence, disability, and a lack of prior convictions for acts of violence. First, 85% of women in our dataset were mothers

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<sup>12</sup> The authors have collectively defended eighteen women under sentence of death in the United States, Malawi, Tanzania, and Kenya. They have also served as consultants to defense teams in dozens of other death penalty cases in the United States, Cameroon, Zambia, Pakistan, and Indonesia.

<sup>13</sup> See CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, DEFENDING WOMEN AND TRANSGENDER PERSONS FACING EXTREME SENTENCES: A PRACTICAL GUIDE 2 (2021) [hereinafter DEFENDING WOMEN], <https://deathpenaltyworldwide.org/wp-content/uploads/2021/10/Defending-Women-and-Transgender-Persons-Facing-Extreme-Sentences-3.pdf>.

<sup>14</sup> Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 376 (“in case after case, we observed that attorneys failed to present the ways in which violence has curtailed women's choices, compromised their mental health, and led them to make ill-fated decisions”).

<sup>15</sup> See *id.* at 352 (explaining that findings on gender-based violence drawn from women's trial transcripts represent the floor of women's experiences).

at the time of their arrest. Second, 96% are survivors of one or more forms of gender-based violence. Third, over 80% of women in our dataset have experienced debilitating mental health challenges connected to intellectual or psychosocial disabilities. Fourth, over 90% of the women in our dataset had no prior violent convictions. Indeed, 71% of the women had no prior convictions *at all*.

In their capital murder trials, one feature stands out above all others: women are largely prosecuted by men, defended by men, and judged by men. Of the women in our dataset, 96% were prosecuted under a male district attorney, 88% were tried before a male judge, and 69% were defended by all-male defense teams.

Turning to their crimes, we found that the 48 women in our dataset were overwhelmingly convicted of killing someone they knew, usually a family member. The two most common family-related crimes of conviction were the killing of a child and the killing of an intimate partner. Indeed, almost half of the women in our dataset were convicted of killing a child in their care, and a fifth were convicted of killing an intimate partner. Compared to their overall share of the death row population, women of color were disproportionately convicted of killing a child—including five of the six Latinx women in our dataset.<sup>16</sup> Only seven women in total were convicted of killing a stranger. In these cases, the presence of a male co-defendant—while high across all types of crimes—climbs to almost 90%.

Turning to the victims, almost two thirds of the women in our dataset were convicted of killing at least one woman or girl. But in all nine cases in which a woman was convicted of killing an intimate partner, her intimate partner was male. The victims' race tended to correspond with the defendants' race—perhaps due to the high number of family-related killings.

Further, nearly two-thirds of the women in our dataset had a co-defendant, almost all of whom were male. A high proportion of white women and Black women had co-defendants, while most Latinx women did not. A sizeable majority (61%) of the women in our dataset had a co-defendant who was an intimate partner, and trial testimony indicated that most intimate partner co-defendants were abusive.

We also found a correlation between the presence of male co-defendants and prosecutors' use of certain types of aggravating factors used to secure women's death sentences. For example, in each of the cases in which the state relied on an aggravating factor related to torture, mayhem, or the presence of a gun or deadly weapon, the woman had a male co-defendant. Similarly, women had male co-

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<sup>16</sup> Whereas around 40% of the women's death row population nationwide comprises women of color, they make up fully 50% of the women on death row for crimes involving the death of a child in their care. *See infra* Section VI.



defendants in 83% of cases in which the simultaneous commission of a violent felony (other than murder) was an aggravating factor.<sup>17</sup>

One of the most common aggravating factors invoked by prosecutors was that the woman committed the offense for financial gain. We noted the presence of this factor in one quarter of cases, around half of which involved the death of an intimate partner. Finally, we noted that where prosecutors relied on aggravating factors regarding multiple murders, these cases were overwhelmingly situations in which a woman was convicted of killing multiple children in her care.

### III. PREVAILING THEORIES ABOUT WOMEN ON DEATH ROW

Legal scholars have advanced two principal theories regarding women on death row. The first, which seeks to explain why so few women are on death row, is the “chivalry theory.” Proponents of the chivalry theory argue that women are sentenced to death (and executed) in small numbers because the legal system recoils at the notion of executing a woman, who is presumed to be “weak, passive, and in need of male protection.”<sup>18</sup> The second, which seeks to explain why certain women are singled out for capital punishment, is the “evil woman theory.” The evil woman theory posits that the legal system subjects women to the harshest punishment when they violate sex role expectations.<sup>19</sup> As we explain below, our research calls into question the foundations of both theories.

#### A. *The Chivalry Theory*

As of January 1, 2024, 52 women remain on death row in the United States—including 45 ciswomen and 7 transwomen—constituting slightly more

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<sup>17</sup> Cases falling into this category involved the following felonies: robbery, burglary, aggravated robbery, aggravated burglary, kidnapping, and rape. See Section VI for our full analysis and categorization of aggravating factors in women’s cases.

<sup>18</sup> See, e.g., Steven F. Shatz & Naomi R. Shatz, *Chivalry is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 106 (2012) [hereinafter Shatz, *Chivalry is Not Dead*]; Victor Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO STATE L.J. 433 (2002) [hereinafter *Gendering the Death Penalty*]; see Streib, *Death Penalty for Female Offenders*, *supra* note 4. Two large scale empirical studies that examined the role of various factors in murder sentences concluded that the gender of the defendant either had no effect, or a negligible effect, on sentencing outcomes. B. Nakell & K. Hardy, THE ARBITRARINESS OF THE DEATH PENALTY 139–48 (1987); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.S. DAVIS L. REV. 1375, 1385 (1985). The conclusions of these authors should be treated with caution, however, given the relatively small numbers of women in their data sets.

<sup>19</sup> Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 513 (1990) [hereinafter Rapaport, *Some Questions*].

than two percent of the entire death row population.<sup>20</sup> Not only are women a tiny fraction of the overall death row population, but they tend to be executed at lower rates than men.<sup>21</sup> To explain the rarity of women's death sentences and executions, scholars have repeatedly argued that women capital offenders receive more lenient treatment than men because of societal attitudes that operate in favor of women in the criminal legal system.<sup>22</sup>

Some of these scholars have embraced the chivalry hypothesis based on historical case studies where decision-makers—typically judges and governors—refused to apply a death sentence based on paternalistic views of the female offender.<sup>23</sup> David Baker, whose historical study of women sentenced to death in the United States is the most comprehensive to date,<sup>24</sup> contests this interpretation of the historical record. Evidence of chivalry in capital cases, Baker argues, is “individualistic and contextual,” “sporadic and infrequent.”<sup>25</sup>

Other scholars have extrapolated from research in non-capital cases<sup>26</sup> to

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<sup>20</sup> See *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Dec. 23, 2023) (reporting a total death row population of 2,331 as of January 1, 2023).

<sup>21</sup> See Elizabeth Rapaport and Victor Streib, *Death Penalty for Women in North Carolina*, 1 ELON L. R. 65, 91 (2009) [hereinafter Rapaport & Streib, *Women in North Carolina*].

<sup>22</sup> See, e.g., Shatz & Shatz, *Chivalry is Not Dead*, *supra* note 18, at 106; Streib, *Gendering the Death Penalty*, *supra* note 18.

<sup>23</sup> See, e.g., Janice L. Kopec, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 WASH. & LEE CAP. DEF. J. 357 (2003); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427, 457 (2000).

<sup>24</sup> BAKER, WOMEN AND CAPITAL PUNISHMENT, *supra* note 3.

<sup>25</sup> *Id.* at 7. Baker concludes that “state governors have afforded clemency to female capital offenders historically when doing so has been politically expedient.” *Id.* Elizabeth Rapaport argues that the public rhetoric of governors in the modern era belies the chivalry hypothesis. In her words, “[t]he rhetoric of chivalry is untenable for the contemporary executive.” Rapaport, *Staying Alive*, *supra* note 3, at 968. Rapaport's research, however, does not determine whether a governor's public, gender-neutral rationale for clemency is merely a pretextual cover for a paternalistic reluctance to put a woman to death. In our view, existing data is insufficient to determine with any certainty whether women reap the benefits of paternalistic gender stereotypes in executive clemency decisions.

<sup>26</sup> A number of studies indicate that women in the criminal legal system receive more lenient sentences than similarly situated men. See, e.g., Melanie M. Holland & Ariane Prohaska, *Gender Effects Across Place: A Multilevel Investigation of Gender, Race/Ethnicity, and Region in Sentencing*, 11 RACE & JUST. 91 (2021) [hereinafter Holland & Prohaska, *Gender Effects*]; Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 185 (1994) [hereinafter Nagel & Johnson, *The Role of Gender*]. Scholars have pointed to a variety of factors that contribute to disparate sentencing; two

argue that women benefit from chivalric attitudes on the part of legal decision-makers.<sup>27</sup> Indeed, a significant body of research indicates that in non-capital cases, women receive more lenient sentences than men for the same crimes.<sup>28</sup> At the same time, this literature provides limited insight into the discretionary decision-making that goes into a prosecutor's decision to seek the death penalty and a jury's decision to impose it.

While we do not seek to disprove the chivalry theory in this article, we question many of the assumptions embraced by its most enthusiastic proponents. First and most important, proponents of the chivalry theory often fail to account for differences in sentencing outcomes based on race, class, sexual orientation, and other marginalized identities. As Linda Ammons observes, "Black women have never been placed on a pedestal."<sup>29</sup> Other scholars have demonstrated that gender nonconforming women, far from benefitting from chivalrous attitudes, are demonized on account of their sexual orientation or gender identity.<sup>30</sup> And Mary Atwell argues that chivalry is a privilege reserved for women that possess social status, unlike the great majority of women charged with capital murder.<sup>31</sup>

Among legal scholars, Victor Streib is perhaps the most oft-cited proponent of the chivalry thesis.<sup>32</sup> Streib argues that gender bias influences the outcomes of

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of the most significant are offense severity and prior criminal record. *Id.* at 187. In addition, some research indicates that some judges treat women differently because they are women. *Id.* at 188. Much of the research, however, has focused on sentencing for low-level offenses. Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. ANN. REV. RES. 91, 129 (1983) [hereinafter Nagel & Hagan, *Gender and Crime*]. Studies of women convicted of serious offenses show fewer sentencing disparities. *Id.* at 129.

<sup>27</sup> See, e.g., Shatz & Shatz, *Chivalry is Not Dead*, *supra* note 18, at 84 (citing Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 371 (2003)); Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 879 (citing RITA SIMON, WOMEN AND CRIME (1975)).

<sup>28</sup> See, e.g., Holland & Prohaska, *Gender Effects*, *supra* note 26; Nagel & Hagan, *Gender and Crime*, *supra* note 26, at 129.

<sup>29</sup> Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1036 (1994) [hereinafter Ammons, *Racial Imagery and Stereotypes*].

<sup>30</sup> See Sutton, et al., *Death by Dehumanization*, *supra* note 3; Mogul, *State's Use of Homophobia*, *supra* note 3.

<sup>31</sup> ATWELL, *supra* note 1, at 18 ("[W]omen who are charged with murder seldom carry the social status likely to inspire a paternalistic or chivalrous attitude.").

<sup>32</sup> Streib, *Rare and Inconsistent*, *supra* note 3, at 622–26; Streib, *Gendering the Death Penalty*, *supra* note 18; Streib, *Death Penalty for Female Offenders*, *supra* note 4. Streib documented the cases of every woman sentenced to death since 1632, and his research provides an invaluable inventory of

capital cases in numerous ways.<sup>33</sup> For example, he muses that when defense attorneys introduce mitigating evidence in cases of women capital offenders, it may hit “a particularly soft spot if the defendant is a woman or girl rather than a man or boy.”<sup>34</sup> Moreover, Streib proposes that when women are arrested with male co-defendants, juries and judges might believe that the woman is “involved in the crime because of her commitment to a husband or a lover,” resulting in “gender-bias mitigating against sentencing females to death.”<sup>35</sup> Yet while any of these factors *may* help persuade decisionmakers to spare a woman’s life in a given case, Streib and others have failed to examine the cases of women spared the death penalty to test this assumption against empirical data.

Streib concedes that some of the gender disparities in capital sentencing derive from the aggravating and mitigating factors that determine who is sentenced to death. For example, women charged with murder are less likely than men to have lengthy criminal records, or to have committed prior crimes of violence.<sup>36</sup> Our data support this conclusion.<sup>37</sup>

Elizabeth Rapaport contests Streib’s focus on chivalry as an explanation for the rarity of women’s death sentences. She argues that “[t]he fundamental reason why so few women murderers are death sentenced is that women rarely commit the

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names, crimes of conviction, and race of women executed over the course of more than two centuries. *See Death Penalty for Female Offenders*, *supra* note 4, at 849–873.

<sup>33</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 874. Streib ultimately argues not only that gender bias operates in favor of women, but that bias must be rectified by a series of measures. Streib, *Gendering the Death Penalty*, *supra* note 18, at 470. Among other things, he suggests that capital jurors be instructed not to consider the defendant’s sex at sentencing, *Rare and Inconsistent*, *supra* note 3, at 628; *Gendering the Death Penalty*, *supra* note 18, at 464–65, and that legislatures pass a “Gender Justice Act” that would permit men to challenge gender disparities in capital sentencing, *Gendering the Death Penalty*, *supra* note 18, at 467. Streib acknowledges that a few women could possibly benefit from such legislation, but he assumes that the great majority of beneficiaries would be men. *Id.*

<sup>34</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 877. In later articles, he doubles down on this point, stating that “[j]udges and juries generally are more likely to find sympathetic factors in the lives and backgrounds of women than of men in homicide cases, in part because female defendants may be less reluctant to expose these factors than are male defendants.” Streib, *Rare and Inconsistent*, *supra* note 3, at 619; *see also* Streib, *Gendering the Death Penalty*, *supra* note 18, at 463. His assumption that women charged with capital crimes are more willing than to disclose painful, intimate details about the trauma they have endured—particularly when that trauma resulted from sexual violence—is wholly unsupported.

<sup>35</sup> *Id.*

<sup>36</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 874. Streib argues that the jury’s consideration of an offender’s prior record in death-sentencing decisions is therefore more “burdensome” for men.

<sup>37</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 874.

kinds of murders that are subject to capital punishment.”<sup>38</sup> Most capital murder cases involve “predatory” murders, often involving strangers,<sup>39</sup> or murders committed in the course of certain enumerated felonies, such as robbery or rape.<sup>40</sup> Yet homicides committed by women rarely fall into these categories—a point that Streib concedes.<sup>41</sup> Instead, women are much more likely than men to kill persons who are known to them<sup>42</sup>—a conclusion supported by our data.<sup>43</sup>

Notwithstanding the lack of empirical data that supports the chivalry theory, it continues to surface in scholarship in this area.<sup>44</sup> In our view, scholars’

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<sup>38</sup> Rapaport, *Some Questions*, *supra* note 19, at 509 (noting that available data “does not support the proposition that female murderers have a substantial advantage over similarly situated male murderers in avoiding the death penalty”). *See also* Rapaport & Streib, *Women in North Carolina*, *supra* note 21, at 83 (“[W]omen commit only a small fraction of death penalty echelon homicides.”); Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N. U. L. REV. 581, 583 (2000) [hereinafter Rapaport, *Equality of the Damned*] (“It is the extremely low rate of participation in death penalty echelon crimes that most powerfully explains the low percentage of women on death row.”); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC’Y REV. 367 (1991).

<sup>39</sup> Rapaport & Streib, *Women in North Carolina*, *supra* note 21, at 83.

<sup>40</sup> *See* Samuel R. Gross & Robert Mauro, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 45–46 (1989) (noting that over 80% of the death sentences imposed in Florida and Georgia from 1976–80 involved felony murder charges); S. Ekland-Olsen, *Structured Discretion, Racial Bias and the Death Penalty*, 69 SOC. SCI. Q. 853, 859 (1988) (noting that from 1974–83, 72% of death sentences imposed in Texas involved the felonies of robbery, burglary, or aggravated sexual assault).

<sup>41</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 876. Streib opines that while these factors may lead to disparate sentencing results, any differential impact on women and men is largely “benign.” Streib, *Rare and Inconsistent*, *supra* note 3, at 619.

<sup>42</sup> Rapaport & Streib, *Women in North Carolina*, *supra* note 21, at 84 (citing Lawrence A. Greenfield & Tracy L. Snell, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *Special Report: Women Offenders* 4 (Dec. 1999)).

<sup>43</sup> Rapaport eventually succeeds in convincing Streib, in an article they co-authored, that while chivalry may play some role in explaining sex disparities among the death row population, “it is the gender patterning of crime and the societal ordering of offense seriousness among homicides that together operate powerfully to explain the sex ratio of those sent to death row.” *Id.* at 86. Rapaport additionally argues that consideration at sentencing of an offender’s prior convictions for crimes of violence is both “legitimate” and “legally relevant.” Rapaport, *Some Questions*, *supra* note 19, at 510.

<sup>44</sup> *See, e.g.*, Shatz & Shatz, *Chivalry is Not Dead*, *supra* note 18; Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1417–20 (1996) [hereinafter Carroll, *Images of Women*]. Shatz and Shatz argued that “chivalric norms” contributed to gender disparities in capital sentencing of women in California, based exclusively on the small numbers of women sentenced to death in the state, bolstered by the unsupported hypothesis that women are sentenced to death at a lower rate “because of chivalric attitudes on the part of prosecutors and

failure to subject the chivalry theory to meaningful critique indicates a troubling readiness to accept scholarship that reaffirms societal biases regarding gender.<sup>45</sup>

Recognizing these flaws, Atwell argues that assumptions about how men exercise chivalry to spare women's lives "ignore[] the larger context of gender and its relation to the legal system."<sup>46</sup> Moreover, the chivalry theory encourages facile conclusions about women in the criminal legal system generally, in a way that discounts the importance of in-depth research regarding their stories. While we cannot say that women never benefit from ingrained stereotypes about their inherent passivity or peaceable natures, we propose that current scholarship has failed to persuasively establish that women charged with capital crimes *as a group* receive more lenient treatment than similarly situated men.

### B. *The Evil Woman Theory*

The "evil woman" theory is a popular corollary to the chivalry thesis. It holds that "women whose criminal behavior violates sex-stereotypical assumptions about the proper role of women are treated *more* harshly than their male counterparts."<sup>47</sup> According to the evil woman theory, women who commit "shockingly 'unladylike' behavior"<sup>48</sup> fail to benefit from the "chivalrous" attitudes that exempt most women from capital sentences. In other words, "women who act so violently or in such gender-defying or forbidden ways are denied the sanctuary of their sex."<sup>49</sup> Instead, judges and juries punish them harshly not only for the crimes they committed, but for their violation of sex role expectations.<sup>50</sup>

Jenny Carroll argues that the evil woman theory explains why a disproportionate number of women executed over time have been women of color

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juries," who may hold them "to a lower moral standard when they transgress societal rules." Shatz & Shatz, *Chivalry is Not Dead*, *supra* note 18, at 105.

<sup>45</sup> Economist Julie Nelson has described a similar bias in scholarly research on gender and risk aversion. She concludes that economists' claims about gender and risk go "far beyond what can be justified" by existing data," revealing "considerable evidence of 'essentialist' prior beliefs, stereotyping, publication bias, and confirmation bias." Julie A. Nelson, *The Power of Stereotyping and Confirmation Bias to Overwhelm Accurate Assessment: The Case of Economics, Gender, and Risk Aversion*, 21 J. ECON. METHODOLOGY 211, 227 (2014).

<sup>46</sup> ATWELL, *supra* note 1, at 6.

<sup>47</sup> Nagel & Johnson, *The Role of Gender*, *supra* note 26, at 189.

<sup>48</sup> Streib, *Death Penalty for Female Offenders*, *supra* note 4, at 878.

<sup>49</sup> Carroll, *Images of Women*, *supra* note 44, at 1422.

<sup>50</sup> Rapaport, *Some Questions*, *supra* note 19, at 513.

and those from lower social classes.<sup>51</sup> Because women of color can never achieve “perfect womanhood,” they are denied the protection extended to “white, privileged womanhood.”<sup>52</sup> More broadly, she argues that for women living at the margins of society, “[t]he severity of their crimes, coupled with their social status, places them farthest from the center of traditional womanhood.”<sup>53</sup>

In her analysis of women executed between 1930 and 1987, Rapaport argues that there is little evidentiary support for the evil woman hypothesis. Rather, she argues, “the stories of the condemned women resemble the stories of condemned men.”<sup>54</sup> Rapaport’s data neither support nor refute the hypothesis that gender bias infuses sentencing decisions.<sup>55</sup> Rather, she draws from summaries of facts in appellate court decisions to conclude that the cases of women “offer little that distinguishes them from the similar cases of thousands of men who have suffered execution.”<sup>56</sup>

Yet, while we agree that both men and women on death row are demonized, our research indicates that the dehumanization of women is often deeply gendered.<sup>57</sup> Moreover, Rapaport fails to account for women’s experiences of oppression and violence—and the way those experiences are interpreted or dismissed by legal actors—as a means of understanding women’s capital cases. As Atwell has argued, we must look not only at the abuse women suffer, but how their

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<sup>51</sup> Caroll, *Images of Women*, *supra* note 44, at 1423.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1437.

<sup>54</sup> Rapaport, *Some Questions*, *supra* note 19, at 513.

<sup>55</sup> The persuasiveness of Rapaport’s arguments suffers from her reliance on appellate decisions that often fail to recount in detail the language used by courtroom actors, the quality of mitigating evidence that was presented, and the nature of witness testimony that can shed light on the facts that inform jurors’ decisions.

<sup>56</sup> Rapaport, *Some Questions*, *supra* note 19, at 528. Baker labels this reasoning “equality theory.” BAKER, WOMEN AND CAPITAL PUNISHMENT, *supra* note 3, at 9. We see Rapaport’s scholarship as a critique of prevalent theories, rather than a free-standing paradigm that explains why women are sentenced to die. Baker also suggests that the real reason certain women are sentenced to die is they have “challenged the sexist exploitation of white men.” *Id.* at 9–10. While this theory undoubtedly has merit as applied to certain historical periods, we find it reductive as applied to women sentenced to death in the modern era.

<sup>57</sup> See CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, JUDGED FOR MORE THAN HER CRIME: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY 4 (2018) (noting that “women who are seen as violating entrenched norms of gender behavior are more likely to receive the death penalty”), <https://deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

experiences played out within a larger patriarchal framework,<sup>58</sup> to understand why women are sentenced to death.

In the end, the “evil woman” theory fails because it is overly simplistic.<sup>59</sup> It discounts the myriad factors that contribute to sentencing decisions in women’s cases, including prosecutorial discretion in charging decisions, the quality of the defense presentation of mitigating evidence, and systemic sex, racial, and other intersectional discrimination in the legal system.<sup>60</sup> We believe that women’s capital sentences are best explained by examining the events of their lives within a larger social context, *and* by analyzing how those experiences—and the women themselves—were treated within the legal system. Our research here serves as a first step toward this understanding.

#### IV. CHARACTERISTICS OF WOMEN ON DEATH ROW

As noted above, our dataset comprises the 48 people sentenced to death between 1990 and 2022 who presented as women at the time of their trials. Of these, twenty-eight (58%) are white; eleven (23%) are Black; six (13%) are Latina, two (4%) are Asian or Pacific Islander, and one (2%) is Native American.<sup>61</sup> California has the highest population of death-sentenced women—nineteen of the people in our dataset were convicted and sentenced there. Seven were condemned to death in Texas, five in Alabama, three in Florida, three in Arizona, and two in North Carolina. Louisiana, Ohio, Oklahoma, Pennsylvania, Idaho, Georgia, Mississippi, Tennessee, and Kentucky each have one woman on death row.<sup>62</sup> The

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<sup>58</sup> ATWELL, *supra* note 1, at 11–12.

<sup>59</sup> The notion that certain people are intrinsically evil and incapable of redemption undergirds the entire premise of capital punishment.

<sup>60</sup> ATWELL, *supra* note 1, at 231–35.

<sup>61</sup> We have identified each woman’s race based on data maintained by the Death Penalty Information Center, which is based on reporting by the NAACP Legal Defense and Education Fund. *Women*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/women> (last visited Mar. 6, 2023). We recognize, however, that this data does not capture the complexity of each woman’s racial identity. For example, one woman—who is identified as Black by the NAACP Legal Defense and Education Fund—has been identified in court pleadings as a person of Native American and African American descent. See *Keaton v. State*, No. CR-14-1570, 2021 WL 5984951, at \*17 n.7 (Al. Ct. Crim. App. Dec. 17, 2021).

<sup>62</sup> Transwomen are on death row in Ohio (2), Florida (1), California (2), Oregon (1) and North Carolina (1). There is one transman on death row in California. The 48 cases in our dataset comprise 47 cisgender women and one transman who presented as a woman at the time of trial. While recognizing shortcomings in our use of terminology, we will refer to those in the dataset as “women” throughout this article as we primarily analyze their trial experiences, and all presented as women at trial.



youngest woman in our dataset is 30 years old at the time of writing; the oldest, nearly 90. Two were only eighteen at the time of the offense for which they were condemned to die. The average age of the women at the time of the offense was 32 years old.<sup>63</sup>

Women on death row have diverse backgrounds and experiences, but the 48 cases we examined reveal a few striking commonalities. First, 85% of women in our dataset were mothers at the time of their arrest. Second, as we reported in an earlier article, nearly all are survivors of one or more forms of gender-based violence (GBV),<sup>64</sup> including sexual, physical, and psychological violence. Third, women on death row typically have no prior exposure to the criminal legal system prior to their arrest.

A. *Motherhood and Poverty*

The women in our dataset are overwhelmingly mothers. At 85%, the percentage of condemned women who are mothers is higher than in the state prison

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<sup>63</sup> By contrast, the average age of condemned men at the time of their arrest is 29 years old. *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> (last visited Feb. 4, 2024). This is consistent with state prison data, which shows that incarcerated women tend to be arrested at an older age than men. See Leah Wang, Wendy Sawyer, Tiana Herring, & Emily Widra, *Beyond the Count: A Deep Dive into State Prison Populations*, PRISON POL’Y INITIATIVE (2022) (noting that women in prison experience their first arrests later in life than men), <https://www.prisonpolicy.org/reports/beyondthecount.html>.

<sup>64</sup> Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 334. The United Nations Committee on the Elimination of Discrimination Against Women defines GBV as “violence which is directed against a woman because she is a woman or that affects women disproportionately.” Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, at 1, UN Doc CEDAW/C/GC/35 (July 26, 2017). As we note in our earlier article:

GBV is a broad term that includes a wide array of experiences. It encompasses sexual, physical, psychological, and socioeconomic harm; abuse from intimate partners, family members, and strangers; and violence that occurs in both public and private life. People of all genders can experience GBV. At the same time, the political, social, and cultural context of violence for discrete groups of victims differs. The GBV that affects women’s lives, for example, is deeply rooted in the social and cultural structures of patriarchy that disenfranchise and disempower women.

Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 342.

population as a whole.<sup>65</sup> The relevance of this finding is apparent for women whose crimes are related to their roles as mothers. As we describe in Section VI below, one third of the women in our dataset were condemned to death for killing children in their care.

Regardless of parental status, women—and in particular, women of color—are more likely than men to experience economic precarity.<sup>66</sup> Research has shown that “[i]ncarcerated women are more likely than men to be poor and commit crimes related to life histories of poverty, victimization, mental health issues, and substance abuse.”<sup>67</sup> The risk that women will live in poverty rises dramatically if they are single parents.<sup>68</sup> In 2020, nearly one-third of all families headed by a single mother lived in poverty.<sup>69</sup> When we consider that most of the people on death row nationwide are from poorer socio-economic backgrounds,<sup>70</sup> it is safe to suggest that most women on death row experienced economic precarity prior to incarceration. Nonetheless, further research is needed to test this proposition, including in-depth research to examine the link between motherhood, socio-economic status, and incarceration on death row.

## B. *Gender-Based Violence*

In 2023, we published the results of our analysis detailing the prevalence of GBV in the lives of women on death row. We found that “at least 96% of all women

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<sup>65</sup> Wendy Sawyer & Wanda Bertram, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2022*, PRISON POL’Y INITIATIVE (2022) (noting that 58% of women in U.S. prisons are mothers), [https://www.prisonpolicy.org/blog/2022/05/04/mothers\\_day/](https://www.prisonpolicy.org/blog/2022/05/04/mothers_day/).

<sup>66</sup> CTR. FOR AM. PROGRESS, THE BASIC FACTS ABOUT WOMEN IN POVERTY (2020), <https://www.americanprogress.org/article/basic-facts-women-poverty/>.

<sup>67</sup> Lisa Servon, Ava Esquier, & Gillian Tiley, *Gender and Financialization of the Criminal Justice System*, 10 SOC. SCIENCES 446 (2021) (citing studies).

<sup>68</sup> Yuan Chiao Lu, Regine Walker, Patrick Richard, & Moustafa Younis, *Inequalities in Poverty and Income between Single Mothers and Fathers*, 17 INT. J. ENVIRON. RES. PUBLIC HEALTH 135 (2020). We were not able to ascertain how many of the women on death row were single parents, and whether their income levels were adequate to support themselves and their children.

<sup>69</sup> Sarah Javaid & Jasmine Tucker, *National Snapshot: Poverty among Women and Families, 2021* (2021), <https://nwlc.org/wp-content/uploads/2021/11/NationalSnapshotFS-1.pdf>.

<sup>70</sup> See generally Stephen B. Bright, *Race, Poverty, the Death Penalty, and the Responsibility of the Legal Profession*, 1 SEATTLE J. SOC. JUST. 73 (2002); DEATH PENALTY INFO. CTR., REPRESENTATION: WHY POOR PEOPLE IN TEXAS END UP ON DEATH ROW AND FACE EXECUTION (Mar. 24, 2023), <https://deathpenaltyinfo.org/news/representation-why-poor-people-in-texas-end-up-on-death-row-and-face-execution>.

currently on death row have experienced GBV in their lifetimes.”<sup>71</sup> The great majority (89%) had endured either sexual violence,<sup>72</sup> physical violence, or both.<sup>73</sup> These numbers, however, fail to convey the depth and breadth of women’s experiences of interpersonal violence. Most women on death row have been repeatedly victimized, beginning in childhood and continuing through adolescence and adulthood.<sup>74</sup> They have been sexually abused as children, raped as teenagers, and controlled and beaten by intimate partners.<sup>75</sup> Thus, “women’s experiences of violence are rarely one-off events from which they can attempt to move on and heal.”<sup>76</sup> Instead, they experience “recurring and relentless” abuse that permeates their lives.<sup>77</sup> We found that women of color on death row were most likely to have been repeat victims of GBV: all Black, Latinx, Native, and Asian women currently on death row have experienced multiple forms of GBV.<sup>78</sup>

Further research is warranted to determine the prevalence and consequences of other common experiences we have documented in the lives of women on death row that are linked to GBV, including child marriage, early pregnancy, restrictions on reproductive choice, sex trafficking, and sex work. Many attorneys never ask their women clients about these topics.<sup>79</sup> As a result, our knowledge of women’s lives and the ways that gender discrimination has affected their pathways to incarceration is incomplete.

### C. *Poor Mental Health*

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<sup>71</sup> Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 358.

<sup>72</sup> This term encompasses “all forms of unwanted activity of a sexual nature,” including rape (vaginal, oral, and anal), molestation, and forced nudity. *Id.* at 351.

<sup>73</sup> *Id.* at 360.

<sup>74</sup> *Id.* at 359 (noting that of all the documented instances of GBV, 74% were “ongoing”).

<sup>75</sup> *See id.* at 359–68.

<sup>76</sup> *Id.* at 362.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 358.

<sup>79</sup> *See id.* at 2 (“[L]awyers around the world routinely misinterpret critical evidence and fail to uncover facts that are essential to effectively defend women.”); DEFENDING WOMEN, *supra* note 13 (noting how internalized gender bias can impede the development of trust between a woman and her attorney), <https://deathpenaltyworldwide.org/wp-content/uploads/2021/10/Defending-Women-and-Transgender-Persons-Facing-Extreme-Sentences-3.pdf>.

Prior research suggests that women on death row experience mental illness at a rate that equals or exceeds that of male death row prisoners.<sup>80</sup> In her examination of mental illness and intellectual disability among women on death row, Kathryn Farr found that in slightly more than half the cases of the women she studied (33 out of 59), experts testified that the defendant had either a low IQ, neuropsychological deficits, or a mental illness.<sup>81</sup> Yet, as Farr herself acknowledged, her study likely understated the prevalence of mental health challenges among women on death row.<sup>82</sup>

Our data indicate the prevalence of mental and intellectual disabilities in the women's death row population is significantly higher than Farr's research suggests. In addition to reviewing 48 trial transcripts, we obtained and reviewed the state or federal habeas petitions of 28 women who have progressed to these stages of their appeals. We then examined the trial and post-conviction evidence, including medical records and expert testimony, to identify evidence of the following: (1) below average IQ score or impairments in cognitive functioning; (2) mental illnesses (apart from trauma disorders) recognized in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR);<sup>83</sup> (3) post-traumatic stress disorder (PTSD) and other trauma-related disorders;<sup>84</sup> and (4) traumatic brain injury or other forms of organic brain dysfunction. We also

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<sup>80</sup> See Kathryn Farr, *Intellectual Disability and Mental Illness Among Women Sentenced to Death in the U.S.: Constitutional and Evidentiary Dilemmas*, 24 PUNISHMENT & SOC'Y 571, 576 (2022).

<sup>81</sup> *Id.* at 577.

<sup>82</sup> *Id.* at 578. Farr relied heavily on trial transcripts and secondary sources, and limited her dataset to cases in which mental health experts had testified at trial that the defendant lived with intellectual disability, mental illness (as defined by the Diagnostic and Statistical Manual of Mental Disorders) or brain damage. *Id.* at 578. Yet trial attorneys do not always present testimony from mental health experts, even in cases of women with deep histories of trauma, abuse, and mental illness. In the case of Michelle Sue Tharp, for example, trial counsel presented no mitigating evidence whatsoever, despite "readily available evidence documenting her brain damage, mental health disorders, low I.Q., childhood abuse, [and] domestic abuse by former boyfriends" and a mental health evaluation "that was in counsel's possession." *Com. v. Tharp*, 627 Pa. 673, 719 (2014).

<sup>83</sup> The Diagnostic and Statistical Manual of Mental Disorders, currently in its fifth edition, was developed by the American Psychiatric Association and sets forth diagnostic criteria widely accepted by the medical community. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, TEXT REVISION (2022) ("DSM-5-TR").

<sup>84</sup> Although PTSD is included in the DSM-5 as a mental disorder, the DSM-5 fails to include the full range of trauma disorders that occur among survivors of child abuse and other forms of gender-based violence. See BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE* 160–61 (2014) (noting the failure of the DSM-5 to include diagnostic criteria for "Developmental Trauma Disorder"). For this reason, we tracked expert testimony concluding that women were experiencing any form of trauma disorder, including PTSD.

examined lay testimony—including the testimony of the women themselves—to identify evidence of substance abuse disorders<sup>85</sup> that may not have been captured in expert testimony. This allowed us to identify evidence of poor mental health even in cases where trial counsel failed to present expert testimony.<sup>86</sup>

Using these criteria, we identified evidence of mental illness, substance abuse disorders, organic brain damage, or cognitive impairments in 40 of 48 cases (83%) of women in our dataset.<sup>87</sup> In cases where experts provided diagnoses of mental disorders included in the DSM, the most common diagnoses were PTSD or other trauma disorders (23 women) and depression (17 women).<sup>88</sup> Fifteen women had a substance abuse disorder prior to arrest; in all but one of these cases, experts diagnosed them as having a co-existing mental illness (13 women) or brain dysfunction (one woman).

In eight cases, experts determined that women had low intellectual functioning or other cognitive deficits. In each of these eight cases, experts simultaneously found evidence of either a mental illness or brain dysfunction.

Our data makes clear that the great majority of women on death row have experienced debilitating mental health challenges. Nevertheless, we believe that our data, like Farr's, understate the prevalence of poor mental health among women on death row. In 17 of the cases in our dataset, attorneys failed to present evidence from mental health experts at trial. In seven of these cases, experts retained by post-conviction lawyers diagnosed the women with psychosocial disabilities that had not previously been identified. In six of the remaining ten cases, women had not yet filed post-conviction appeals; in one case, we were unable to obtain the post-conviction pleadings.<sup>89</sup> The remaining three cases share a strategic approach: trial

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<sup>85</sup> Substance use disorder is “a treatable mental disorder that affects a person’s brain and behavior.” NATIONAL INSTITUTE OF MENTAL HEALTH, SUBSTANCE ABUSE AND CO-OCCURRING MENTAL DISORDERS, [https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health#:~:text=Substance%20use%20disorder%20\(SUD\)%20is,most%20severe%20form%20of%20SUD](https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health#:~:text=Substance%20use%20disorder%20(SUD)%20is,most%20severe%20form%20of%20SUD) (last visited Jan. 2, 2024).

<sup>86</sup> To be clear, our reliance on lay testimony was limited to identifying evidence of substance abuse disorders in cases where there was no expert testimony on the topic.

<sup>87</sup> Mental health experts testified at trial in 29 cases. In seven additional cases where no mental health experts testified at trial, post-conviction counsel submitted expert testimony in state or federal habeas corpus proceedings. In two additional cases, medical records containing diagnoses of mental health experts were either admitted as evidence or included in post-conviction appeals.

<sup>88</sup> According to trial and/or post-conviction testimony, thirteen of the fifteen women diagnosed with PTSD were sexually abused as children.

<sup>89</sup> Prevailing professional standards underscore the essential role that mental health experts play in capital proceedings. Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, HOFSTRAL R. 913, 956 (Rev. ed. 2003) (explaining that “mental health experts are essential to defending capital cases”).

counsel argued that their clients are innocent of the charges against them, and refrained from presenting evidence that the women have any mental or intellectual impairments.

D. *Sexual Orientation and Gender Identity*

Several scholars have documented the ways in which capital prosecutors exploit gender nonconforming women's perceived violation of heterosexual norms to demonize and dehumanize them.<sup>90</sup> Their research establishes that gender nonconformity is one axis in the overlapping vectors of discrimination that women on death row experience.<sup>91</sup> As Jessica Sutton and her co-authors explain, the identities of LGBTQ+ people "have been criminalized, pathologized, and used as justification for condemning them to death."<sup>92</sup>

In this article, we have not attempted to quantify the number of women on death row who identify within the LGBTQ+ umbrella. Gender identity and sexual expression occur along a spectrum,<sup>93</sup> and these identities are not always readily or accurately identifiable from trial transcripts. Thus, while we recognize the importance of this aspect of women's identities, we make no attempt to catalog the number of women who may identify themselves as queer.

E. *Prior Criminal History*

The overwhelming majority of women in our dataset (92%) had never been convicted of a crime of violence before they were arrested and charged with capital murder.<sup>94</sup> Of the 48 women in our dataset, 34 (71%) had no prior convictions at all.<sup>95</sup> This figure includes 95% of the women of color on death row.<sup>96</sup>

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<sup>90</sup> Sutton, et. al., *Death by Dehumanization*, *supra* note 3; Mogul, *State's Use of Homophobia*, *supra* note 3; Kathryn Farr, *Dehumanizing and Defeminizing Female Murderers: Depictions of Lesbians on Death Row*, 11 WOMEN & CRIM. JUST. 49 (2000).

<sup>91</sup> Sutton, et. al., *Death by Dehumanization*, *supra* note 3, at 1054.

<sup>92</sup> *Id.*

<sup>93</sup> See Sabra L. Katz-Wise, *Sexual Fluidity and the Diversity of Sexual Orientation*, HARV. HEALTH PUB. (2022), <https://www.health.harvard.edu/blog/sexual-fluidity-and-the-diversity-of-sexual-orientation-202203312717>.

<sup>94</sup> See Appendix A, Table 1.1.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

Fourteen (21%) of the women in our dataset had prior adult convictions.<sup>97</sup> Of these, ten had one or more convictions for non-violent offenses—a category in which we include economic crimes, such as forgery and theft; driving offenses, such as DUIs; and drug offenses, such as selling or using controlled substances.<sup>98</sup> Only four women had a prior conviction for a crime of violence, and only one had multiple prior violent convictions.<sup>99</sup> None had previously been convicted of crimes involving the loss of life. Below, we analyze the criminal history of these 14 women in more detail.

i. Non-Violent Prior Convictions

Economic crimes—including theft, fraud, larceny, obtaining property by false pretenses, and forgery—constituted the single largest category of prior convictions for the few women with a criminal record. In total, 60% of the women with non-violent prior convictions had committed at least one economic crime.<sup>100</sup> For five of the six women, non-violent economic offenses were their only previous convictions. Drug offenses constituted the second largest category of non-violent convictions, followed by driving infractions.<sup>101</sup>

ii. Violent Prior Convictions

Only four of the 48 women in our dataset (8%) had a prior conviction for a crime of violence.<sup>102</sup> Two women had prior convictions for robbery or burglary, which we classified as a violent economic crime.<sup>103</sup> Another woman was convicted

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<sup>97</sup> See *id.* One woman was convicted of sex work and theft as a juvenile. She is not included in the prior convictions category.

<sup>98</sup> See *id.* One woman had a prior “unspecified conviction.” At trial, the parties stipulated that the conviction was not violent. We included it in the overall number of women with non-violent prior convictions, but not in the breakdown by crime.

<sup>99</sup> See *id.*

<sup>100</sup> See Appendix A, Table 1.2.

<sup>101</sup> Three women had a prior conviction for drug offenses, and two women had prior convictions for driving infractions.

<sup>102</sup> See Appendix A, Table 1.1.

<sup>103</sup> See Appendix A, Table 1.2. The Model Penal Code includes burglary and robbery as offenses against property, along with theft, forgery, and fraud. See M.P.C. §§ 220–224. Therefore, we also consider burglary and robbery to be economic crimes.

of child cruelty, and one was convicted of assault.<sup>104</sup> Only one of these women had multiple prior violent convictions.<sup>105</sup>

iii. Race and Prior Convictions

White women and Black women, at 43% each, accounted for the majority of women with prior convictions,<sup>106</sup> and white women made up the majority of the few women with violent priors.<sup>107</sup> Meanwhile, 95% of the women of color on death row had no prior violent criminal convictions.<sup>108</sup> To gain insight into whether certain categories of crime were more prevalent among women with different racial identities, we broke down all prior convictions by race.

Turning first to white women, 79% (or 22 women) had no prior convictions.<sup>109</sup> For the six white women with prior convictions, the majority had been convicted of economic crimes: two women had convictions for only non-violent economic crimes, two had convictions for violent economic crimes, one for a drug offense, and one for assault.<sup>110</sup> Overall, approximately 14% of white women on death row had a prior economic conviction.

On the whole, Black women had more non-violent prior convictions than white women. Our data reveal that nearly twice as many Black women in our dataset have been convicted of an economic crime compared to white women (27% of Black women compared to 14% of white women).<sup>111</sup> Of the eleven Black women on death row, five had no prior convictions, while six had at least one prior conviction.<sup>112</sup> Of these six women, five had a non-violent prior conviction in one of the following categories: economic crimes (3), drug offenses (2), and driving infractions (1).<sup>113</sup> Only one Black woman had a prior violent conviction, for child

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<sup>104</sup> See Appendix A, Table 1.2.

<sup>105</sup> Her multiple prior convictions were for robbery and burglary.

<sup>106</sup> See Appendix A, Table 1.1.

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See Appendix A, Table 1.2.

<sup>111</sup> Out of all Black women with a prior conviction, 50% had a non-violent economic conviction. See Appendix A, Table 1.1.

<sup>112</sup> See *id.*

<sup>113</sup> See Appendix A, Table 1.2.



cruelty.<sup>114</sup> Overall, nearly 91% of Black women on death row had no prior violent convictions.<sup>115</sup>

Nearly every Latinx woman on death row has no prior criminal record, and none have a violent criminal history.<sup>116</sup> Only one Latinx woman has any criminal record at all, and her sole crime was driving under the influence.<sup>117</sup> Of the two Asian women on death row, one had no prior convictions and the other had been convicted of a non-violent offense.<sup>118</sup> The one Native American woman on death row did not have any prior convictions.

A prior criminal history is one factor that legal decisionmakers use to evaluate whether the death penalty is warranted in a particular case.<sup>119</sup> Thus, a history of prior convictions—particularly violent ones—is relevant to a prosecutor’s decision to seek the death penalty, as well as the jury’s assessment of the defendant’s moral culpability. The absence of a violent criminal history in the lives of women in our dataset suggest that legal actors decide which women deserve the death penalty based on other criteria. As we expand on below, our analysis seeks to understand what these other criteria are and why these women are chosen to die.

## V. GENDER OF TRIAL ACTORS

### A. *Does Gender Matter?*

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<sup>114</sup> *See id.*

<sup>115</sup> *See* Appendix A, Table 1.1.

<sup>116</sup> *See id.*

<sup>117</sup> *See* Appendix A, Table 1.2.

<sup>118</sup> At trial, the parties stipulated that the woman had a non-violent prior conviction, but they did not specify what the conviction was for. *See* Appendix A, Table 1.1.

<sup>119</sup> Monic P. Behnken, et al., *Marked for Death: An Empirical Criminal Careers Analysis of Death Sentences in a Sample of Convicted Male Homicide Offenders*, 39 J. CRIM. JUST. 471, 472 (2011) (“[A] defendant’s criminal career contributes importantly to the totality of their capital case, and in circumstances where the prior record is extensive and violent the criminal career is an aggravating factor.”); Mark D. Cunningham & Alan M. Goldstein, *Sentencing Determinations in Death Penalty Cases*, 21 HANDBOOK OF PSYCH. 408 (2003) (discussing that the lack of a prior violent record is one of many relevant mitigating factors in capital cases).

*“When you walk into a courtroom and nobody looks like you, do you think you are going to get a fair shake?”*<sup>120</sup>

Over the years, several scholars have explored how the race of prosecutors, defense attorneys, and jurors affects the quality of justice received by Black defendants—especially, although not exclusively, in capital cases.<sup>121</sup> Alexis Hoag-Fordjour has argued that few Black defendants receive Black defense attorneys, and has explained why this matters in the context of a capital prosecution.<sup>122</sup> Other scholars have suggested that the dominance of white prosecutors in death penalty states increases the risk that racial bias will infect capital charging decisions.<sup>123</sup>

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<sup>120</sup> Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N. Y. TIMES (July 7, 2015), [https://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?\\_r=0](https://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=0).

<sup>121</sup> See Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1533–48 (2021) (arguing that Black defendants could benefit from culturally competent Black defense attorneys); Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 557 (reporting results of empirical study finding that white jury-eligible citizens were more biased than non-whites, and concluding that death-qualified jurors hold stronger implicit biases that is exacerbated by the exclusion of non-white jurors); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1231 (2009) (finding that implicit racial bias has the potential to affect judges’ attitudes toward defendants); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1555–56 (2004) (discussing the risk that implicit bias can affect the quality of capital defense lawyers’ representation); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817–20 (1998) (arguing that implicit bias may against Black defendants may affect white prosecutors’ charging decisions in capital cases); DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES?* (1998) (examining racial bias in the application of the death penalty and noting the overwhelming number of white prosecutors in death penalty jurisdictions), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-death-penalty-in-black-and-white-who-lives-who-dies-who-decides> [hereinafter DPIC, BLACK AND WHITE].

<sup>122</sup> Alexis Hoag, *Black on Black Representation*, *supra* note 121, at 1533–48.

<sup>123</sup> Pokorak, *Probing the Capital Prosecutor’s Perspective*, *supra* note 121, at 1817–20; DPIC, BLACK AND WHITE, *supra* note 121.

Their work has helped to explain the many ways in which race can affect the administration of the death penalty.<sup>124</sup>

By contrast, none of the existing studies of death sentenced women discuss the gender of courtroom actors. The lack of scholarly interest in the topic implies a certain indifference to the notion that the gender of courtroom actors *matters*. Yet there is good reason to believe that the gender of those who prosecute, defend, and judge women facing the death penalty affects the quality of justice that women receive.

We first consider the role of prosecutors. Existing scholarship on the impact of gender on prosecutorial decision-making is sparse.<sup>125</sup> Yet we know that in the general population, women are more apt than men to oppose the death penalty.<sup>126</sup> Elected District Attorneys have full power and discretion to determine their office policies with respect to capital prosecutions,<sup>127</sup> and history is replete with examples of prosecutors who have refused to bring capital charges based on their moral opposition to the death penalty.<sup>128</sup> Recent research indicates that prosecutor gender does affect the sentences women receive in non-capital cases. In a large-scale empirical study of federal criminal prosecutions, Stephanie Holmes Didwania demonstrated that prosecutors exhibit relative leniency toward defendants of the

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<sup>124</sup> See generally Catherine M. Grosso, Jeffrey Fagan, Michael Laurence, David Baldus, George Woodworth, & Richard Newell, *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 U.C.L.A. L. REV. 1394 (2019); David Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL. ART 11 (2005).

<sup>125</sup> Of the limited scholarship available on this question, see Stephanie Holmes Didwania, *Gender Favoritism Among Criminal Prosecutors*, 65 J. L. & ECON 77, 78 (2022) [hereinafter Didwania, *Gender Favoritism*].

<sup>126</sup> Adam Trahan, Andrekus Dixon, & Brooke Nodeland, *Public Opinion of Capital Punishment: An Intersectional Analysis of Race, Gender, and Class Effects*, 44 CRIM. JUST. REV. 452 (2018) (noting that women's support for capital punishment is generally 15 percentage points lower than men).

<sup>127</sup> Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. 3 (2013), <https://dpic-cdn.org/production/documents/pdf/TwoPercentReport.fl564408816.pdf?dm=1683576587>.

<sup>128</sup> See, e.g., *Citing Conflict With Florida Death-Penalty Ruling, Aramis Ayala Will Not Seek Re-Election As State Attorney*, DEATH PENALTY INFO. CTR. (2019), <https://deathpenaltyinfo.org/news/citing-conflict-with-florida-death-penalty-ruling-aramis-ayala-will-not-seek-re-election-as-state-attorney>; Bob Egelko, *DA Reduces Sentence of Only SF Death Row Inmate to Life with Possibility of Parole*, S. F. CHRON. (Jul. 7, 2020, 5:06 PM), <https://www.sfchronicle.com/bayarea/article/DA-reduces-sentence-of-only-SF-Death-Row-inmate-15392603.php>.

same gender.<sup>129</sup> In other words, when the prosecutor is a woman, a woman defendant is more likely to receive a shorter sentence.<sup>130</sup>

Research on juror gender is more robust. Women jurors, like women in the general population, tend to be less supportive of the death penalty overall.<sup>131</sup> At the same time, prospective jurors in capital cases are systematically excluded from serving on a jury unless they can affirm their willingness to impose a death sentence if warranted.<sup>132</sup> In theory, this should eliminate some of the gender disparities on attitudes toward capital punishment.<sup>133</sup> Yet there are other reasons to believe that juror gender does matter, particularly when it comes to evaluating women's moral culpability against the broader context of their life experiences.<sup>134</sup>

As we note above, the overwhelming majority of women on death row are survivors of gender-based violence, including rape and intimate partner violence.<sup>135</sup> We have also found that prosecutors frequently seek to discredit women defendants' accounts of such violence, resorting to long-debunked myths about victim behavior.<sup>136</sup> Research shows that women jurors are less likely than men to believe rape myths, and more likely to empathize with and believe in sexual assault victims.<sup>137</sup> Women are also more likely to be lenient with women charged with killing abusive partners, indicating their greater propensity to believe survivors of intimate partner violence.<sup>138</sup>

What about defense lawyers? In a capital case, defense counsel are responsible for investigating and presenting their clients' life history, including

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<sup>129</sup> Didwania, *Gender Favoritism*, *supra* note 125.

<sup>130</sup> *Id.* at 78. In a separate study that examined prosecutor demographics in federal death penalty cases, Robertson and Bell found that the gender of the prosecutor did not have a statistically significant impact on whether the death penalty was imposed—but the authors did not examine the question of same-gender favoritism. Jamie Reese Darling-Robertson & Lauren C. Bell, *Equal Justice under Law? Prosecutor Demographics and the Death Penalty*, 103 SOC. SCI. Q. 1295, 1301 (2022) [hereinafter Darling-Robertson & Bell, *Equal Justice Under Law*].

<sup>131</sup> See Vivian N. Rotenstein & Valerie P. Hans, *Gentlewomen of the Jury*, 29 MICH. J. GENDER & L. 243, 268 (2022) (citing studies); Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1358 (1994).

<sup>132</sup> See *id.* at 269.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 264–65.

<sup>135</sup> See *supra* Section IV.

<sup>136</sup> Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 374–75.

<sup>137</sup> See Rotenstein & Hans, *Gentlewomen of the Jury*, *supra* note 131, at 264–65.

<sup>138</sup> *Id.* at 267. At the same time, women jurors tend to be more supportive of child victims—a victim demographic that, as we note below, is prevalent among women's cases. *Id.* at 266.

evidence of abuse and trauma.<sup>139</sup> In the cases of women capital defendants, however, many attorneys fail to present evidence of their clients' experiences of sexual abuse, rape, and intimate partner violence.<sup>140</sup> If women played a leading role in more defense teams, would they be more likely to present that evidence? Although the answer to that question merits further study, research demonstrates that women are more comfortable discussing intimate experiences with other women.<sup>141</sup> This is particularly true for women and girls who wish to discuss experiences of sexual abuse, rape, intimate partner violence, and pregnancy issues.<sup>142</sup> Our experience defending women on death row supports this finding. Our women clients frequently express discomfort disclosing intimate details of their lives to men—particularly when it comes to experiences of sexual violence.<sup>143</sup>

Finally, we consider the relevance of the judge's gender in a woman's capital case. In one of the rare studies to examine the influence of judge gender on capital case outcomes, Songer and Crews-Meyer examined the voting behavior of state supreme court judges in capital cases from 1982-1993.<sup>144</sup> They found that women judges were "substantially more likely" to vote more liberally than their male colleagues in capital case appeals.<sup>145</sup> At the trial level, however, it is more difficult to assess the relevance of judge gender—primarily because of the limited role that judges play in the capital sentencing process.<sup>146</sup> In most states, judges in

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<sup>139</sup> American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1015–28 (2003).

<sup>140</sup> Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8, at 376.

<sup>141</sup> See, e.g., Sarah J. Landes, Jessica R. Burton, Kevin M. King, & Bryce F. Sullivan, *Women's Preference of Therapist Based on Sex of Therapist and Presenting Problem: An Analogue Study*, 26 COUNS. PSYCHOL. Q. 330 (2013).

<sup>142</sup> *Id.*; see also William E. Fowler, William G. Wagner, Allen Iachini, & J.T. Johnson, *The Impact of Sex of Psychological Examiner on Sexually Abused Girls' Preference for and Anticipated Comfort with Male Versus Female Counselors*, 22 CHILD STUDY J. 1 (1992).

<sup>143</sup> For further discussion of gender dynamics on defense teams, see DEFENDING WOMEN, *supra* note 13, at 8–9.

<sup>144</sup> Donald R. Songer & Kelley A. Crews-Meyer, *Does Gender Matter? Decision-Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000).

<sup>145</sup> *Id.* at 756.

<sup>146</sup> Nonetheless, it bears mention that a well-designed study found that women judges are less likely than male judges to impose a term of incarceration on female offenders. Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOCIAL FORCES 1163, 1177 (1999) [hereinafter Steffensmeier & Hebert, *Women and Men Policymakers*]. Moreover, the authors found that women judges are more likely to consider the contextual backdrop for an offender's behavior, including prior record, childcare responsibilities, and the defendant's social history. *Id.* at 1185. At the same time, the authors found

capital cases are obliged to impose the sentence recommended by the jury. Of the states where women in our dataset were condemned to death, only two—Alabama and Florida—permitted judges to override a jury’s life-or-death decision.<sup>147</sup> One of the women in our dataset was convicted by an Alabama jury that subsequently recommended a sentence of life without parole; the judge overrode that decision and imposed a death sentence.

Apart from sentencing, judges make key decisions throughout capital proceedings that can have a critical effect on the outcome of a case. For example, judges decide which evidence can be admitted at trial, whether experts have the requisite qualifications to testify, and whether the trial venue should be changed where pretrial publicity threatens to prejudice the jury against the defendant.<sup>148</sup> Moreover, judges can help push the prosecution to settle a case for a sentence less than death through informal status conferences and discussions in chambers. These off-the-record discussions can be enormously influential in determining prosecutorial discretion.<sup>149</sup>

#### B. *Gender of Trial Actors in Women’s Capital Cases*

With these thoughts in mind, we examined women’s trial transcripts to identify the gender<sup>150</sup> of the following key actors: (1) the elected District Attorney; (2) trial prosecutors; (3) defense attorneys; (4) judges; and (5) jury forepersons.<sup>151</sup>

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that women judges tended to impose harsher sentences than male judges for certain groups of offenders, most notably Black defendants with a prior criminal record. *Id.*

<sup>147</sup> EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 4 (2011), <https://eji.org/wp-content/uploads/2019/10/death-penalty-in-alabama-judge-override.pdf>.

<sup>148</sup> The authors are aware of no studies that examine whether the gender of a judge affects these discretionary decisions.

<sup>149</sup> Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 327 (2016) (reporting that prosecutors accept a judge’s input as an “alternative route to settlement”).

<sup>150</sup> We identified the gender of most courtroom actors by noting in the transcripts whether judges referred to them as “Ms.” or “Mr.” or as “she” or “he.” For the judges themselves, we relied on names combined with internet searches where a judge’s sex was not apparent from the name alone. This approach is consistent with that taken by other scholars. *See, e.g.,* Didwania, *Gender Favoritism*, *supra* note 125, at 86. We recognize, however, that gender is a complicated construct, and that the use of gendered honorifics may not accurately capture each person’s gender identity. Where the gender of judges was not immediately apparent from the trial transcripts alone, we conducted Google searches to obtain additional information. We were unable to gather reliable data on the racial identity of all courtroom actors.

<sup>151</sup> We lacked sufficient data to identify the gender composition of many juries, so we do not attempt to estimate the number of women who served as jurors (but not as forepersons). Data on jury

Perhaps unsurprisingly, we found that the overwhelming majority of courtroom actors in capital cases are men.<sup>152</sup>

We first looked at the sex of elected District Attorneys in the counties where women were prosecuted. We found that in 96% of the cases (46 of 48) in our dataset, male district attorneys were ultimately responsible for the decision to seek the death penalty.<sup>153</sup> That number rises to 100% when we look solely at the 45 ciswomen who were on death row as of January 1, 2024. Although there was more gender diversity among the prosecutors who represented the state at trial, a sizeable majority were men. In 56% of the cases (27 of 48) in our dataset, the prosecuting team was exclusively male. In 31% of the cases (15 of 48), men and women prosecutors appeared in court. In 13% of the cases (6 of 48), the state was represented by an all-women team.

As for defense attorneys, 69% (33 of 48) of the women in our dataset had all-male defense teams. In 12 cases, there was at least one female defense attorney on the defense team. Only two women had all-female defense teams.<sup>154</sup>

Turning to judges, we found that 88% (42 of 48) of the women in our dataset were tried in courtrooms where male judges presided.<sup>155</sup> Women judges presided over just six cases. We were able to identify the gender of the jury forepersons in

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forepersons was easier to obtain, as in many cases judges would address the jury foreperson at the time the verdict was delivered.

<sup>152</sup> As of 2022, 62% of all lawyers in the United States were male. WOMEN IN THE LEGAL PROFESSION, AM. BAR. ASS'N, <https://www.abalegalprofile.com/women.php> (last visited Jan. 4, 2022). Men make up an even larger percentage of trial lawyers. See AM. BAR FOUND., FIRST CHAIRS AT TRIAL, MORE WOMEN NEED SEATS AT THE TABLE: A RESEARCH REPORT ON THE PARTICIPATION OF WOMEN LAWYERS AS LEAD COUNSEL AND TRIAL COUNSEL IN LITIGATION 13 (2015), [https://www.americanbar.org/content/dam/aba/administrative/women/first\\_chairs\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/first_chairs_final.pdf). A 2015 report by the ABA noted that 67% of all attorneys appearing in criminal cases in the Northern District of Illinois were men. Among attorneys appearing at trial, 79% were men. *Id.*

<sup>153</sup> In the United States, prosecutors have discretionary power to determine whether death should be a sentencing option in any capital jury trial. See Darling-Robertson & Bell, *Equal Justice Under Law*, *supra* note 130, at 1296.

<sup>154</sup> One woman represented herself, so there are only 47 cases in which women were represented by counsel.

<sup>155</sup> The percentage of male judges in these cases is higher than the current national average, which may in part be attributable to the era in which many women were prosecuted. As of 2022, women made up 33% of state court judges in courts of general jurisdiction. NAT'L ASS'N OF WOMEN JUDGES, THE AMERICAN BENCH (2022), <https://www.nawj.org/statistics/2022-us-state-court-women-judges>. In 1992, by contrast, women made up only 10% of all judges at the state and local level. Steffensmeier & Hebert, *Women and Men Policymakers*, *supra* note 146, at 1164. The women in our dataset were prosecuted between 1989 and 2023, and the majority of their trials took place between 1989 and 2010.

41 cases.<sup>156</sup> In 63% (26 of 41) of those cases, male jurors were chosen as forepersons.

Combining these factors, our analysis reveals that 85% of the women in our dataset were condemned to die in capital prosecutions dominated by men: in these cases, at least three of the five legal actors we examined were men. Nearly two-thirds of the women (63%) had one or fewer women among the legal actors we examined. Nearly a quarter (23%) had no women at all among the legal actors we examined: they were prosecuted by men, defended by men, and judged by men. Not a single woman in our dataset was convicted and sentenced in a courtroom where women were represented among all of the legal actors involved in her case.

At the very least, the predominant role of men in the prosecution of women capital defendants raises troubling questions about equity and fairness. Existing studies suggest that gender diversity matters in assessing the decision making of courtroom actors.<sup>157</sup> There are few legal settings where this diversity is more important than when deciding whether a person should live or die.

## VI. CHARACTERISTICS OF WOMEN'S CRIMES OF CONVICTION

If those prosecuting, defending, and sitting in judgment over women on death row are overwhelmingly male, what do the profiles of women, their co-defendants, and those they are accused of killing look like? This section will present an overview of the crimes and aggravating factors that underlie women's death sentences. We start with the crimes themselves: what are women convicted of and who are the victims? We then delve into the demographics of these victims to deepen our understanding of the relationships between the women and those they are accused of killing, before examining the aggravating factors that prosecutors relied on to secure women's death sentences. Finally, we turn to the role of co-defendants, examining their gender and relationships with the women charged. The data presented in this section, like those presented in sections IV and V, reveal stark patterns that illuminate common characteristics of women's crimes.

### A. *Crimes of Conviction*

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<sup>156</sup> In the remaining seven cases, the transcripts lacked any identifying information for the foreperson, and the judge did not refer to them in a way that allowed us to determine the foreperson's gender.

<sup>157</sup> Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 884 (2023) ("Compared to homogeneous juries, diverse juries engage in more robust and vigorous deliberation.").



We begin our analysis of women's crimes of conviction by looking at who women are convicted of killing. Did they know the victim? How do women's relationships with the victims affect the crimes with which they are charged? And are there commonalities among these crimes? By digging into the characteristics of women's crimes of conviction, we sought to understand more about the patterns shaping their incarceration on death row.

i. Data gathering

To understand the crimes that led to women's capital sentences, we turned to their trial transcripts and the state's charging instruments. We collected data along a number of axes, namely: the offense with which each woman was charged and the relevant state statutory framework, the state's theory of the crime, and the relationship of the woman to the victim(s). Categorizing the relationships between women on death row and the deceased person in each case enabled us to deepen our analysis. We grouped women's crimes among the following four categories:

- Crimes involving a family member, including partners

Seeing early in our research that women's offenses largely involve people with whom they had a prior relationship,<sup>158</sup> we gathered data on the nature of these relationships. In particular, we were interested in familial relationships, given women's frequent centrality to the family unit and prevalent negative stereotypes about women who fail to abide by their societally-prescribed familial roles.<sup>159</sup> We thus noted all crimes in which the victim shared any kind of familial bond with the defendant.<sup>160</sup> This category includes children who are family members, which has some overlap with our close analysis of child death cases below.

In analyzing crimes involving a family member, we further unpacked the nature of the offenses by grouping them according to the victims. We noted crimes involving the death of an intimate partner, crimes involving immediate family members, and crimes involving the death of people with other familial relationships to the defendant.

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<sup>158</sup> See *infra* notes 157-79 and accompanying text.

<sup>159</sup> See, e.g., Carol Gilligan, *Reply: On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS: J. WOMEN IN CULTURE & SOC'Y 324, 330 (1986); Chiara Mussida & Raffaelo Patimo, *Women's Family Care Responsibilities, Employment and Health: A Tale of Two Countries*, 42 J. FAM. & ECON. ISSUES 489, 489 (2021).

<sup>160</sup> Our categorization of familial bonds includes relationships through ancestry (e.g. parent-child relationships) and intimate partnership (e.g. spousal relationships), as well as other family relationships (e.g. where the victim was the mother of the defendant's intimate partner).

- Crimes involving a child

Scholars have long noted gendered tropes around maternity that permeate all aspects of society and affect how we view women's roles as mothers.<sup>161</sup> As others have noted, the treatment of women in the criminal legal system is subject to these same stereotypes about motherhood.<sup>162</sup> As such, we noted where the crime involved the death of a child, as well as the relationship between the child and the defendant.

We classified as "child" death cases all those in which the deceased person was below the age of 18.<sup>163</sup> Here, too, we drew upon subcategories to further delineate the relationships at stake by noting crimes that involved a child in the woman's care at the time of the child's death, and crimes involving the woman's own child.

- Crimes involving an acquaintance (non-family member)

In this category, we noted offenses that involved someone with whom the woman defendant had a prior relationship but who was not a family member. Such relationships include neighbors, clients, and friends.

- Crimes involving a stranger

Finally, we noted all crimes in which the defendant and the deceased person had no prior relationship.

Given the importance of adopting an intersectional lens when analyzing women's cases,<sup>164</sup> we compared data regarding women's racial identities across these four broad categories of crimes. We also noted the prosecuting states,

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<sup>161</sup> See Patricia Easteal et al., *How are Women Who Kill Portrayed in Newspaper Media? Connections with social values and the legal system*, 51 WOMEN'S STUD. INT'L F. 31, 32 (2015).

<sup>162</sup> See *id.*; Siobhan Weare, 'The Mad', 'The Bad', 'The Victim': Gendered Constructions of Women Who Kill Within the Criminal Justice System, 2 LAWS 337 (2013); Potts & Weare, *Gendered Naming Strategies*, *supra* note 7.

<sup>163</sup> We have included here all crimes that resulted in the death of a person below the age of 18, which is the age at which many jurisdictions regard a person as an adult. We recognize that using the age of 18 as the upper limit to denote a "child" can be problematic, but adopt the term in line with the current state of international law, and for ease of classifying and analyzing our data. We also include in this category one case in which a woman was convicted of conduct that resulted in the death of a fetus, as the death of the fetus was prominent in the woman's trial. For more on the issues around using the age of 18 as the limitation of childhood, see generally Robert Kinscherff et al., *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers*, HARV. MED. SCH. & MASS. GEN. BRIGHAM 1 (2022).

<sup>164</sup> See *supra* Section IV.

counties, and the presence of co-defendants when collecting data on the crimes so as to better examine the combination of factors affecting women's capital prosecutions.

ii. Analysis

a. Crimes involving a family member

The great majority of women in our dataset were convicted of killing someone they knew. In over 85% of their cases, they had a prior relationship with the deceased person.<sup>165</sup> Moreover, a majority of these crimes involve family members. Over half of women—56%, or 27 of 48 women—were convicted of killing someone with whom they had a familial relationship.<sup>166</sup>

The racial breakdown of these 27 women loosely tracks the racial breakdown of women on death row nationwide: 59% (16 women) are white and 41% (11) are women of color, including four Black people, five Latinx women, one Asian woman and one Native American woman.<sup>167</sup> Notably, though, almost every Latinx woman on death row is convicted of killing a family member—a figure that is disproportionately large compared to the figure for the female death row population as a whole.<sup>168</sup>

The familial relationships in these 27 cases encompass intimate partners, parents, children, and non-immediate family members, such as a parent-in-law. Most common are crimes in which the woman is convicted of killing her own child: 14 of 27 women fall into this category. Of these, 50% of cases involve white defendants and 50% involve defendants of color,<sup>169</sup> a figure that exceeds the 42% of women of color presently on death rows nationwide.

Intimate partners are the second most prominent category of victims among family deaths. Nine women on death row were convicted of killing a current or former intimate partner, 67% of whom are white and 33% of whom are people of color.<sup>170</sup> Less common among women's crimes of conviction are crimes involving

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<sup>165</sup> See Tables Appendix C, Table 3.1.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* See *supra*, notes 62-64 and accompanying text for the racial breakdown of women on death row.

<sup>168</sup> 83% of Latinx women were convicted of killing a family member, compared to 56% of the total women's death row population. See Appendix C, Table 3.1.

<sup>169</sup> This figure represents seven women of color: three Black women, three Latinx women, and one Asian woman. See Appendix C, Table 3.2.

<sup>170</sup> See Appendix C, Table 3.1. The three women of color include one Black woman, one Latinx woman, and one Asian woman.

non-immediate family members, which make up four of the 27 women convicted of killing a family member.

The presence of co-defendants is noteworthy when looking at these crimes. As noted below, most of the women on death row had at least one male co-defendant, and women convicted of crimes involving family members are no exception. Of the 27 women at issue, slightly over half (52%) were convicted alongside at least one male co-defendant and under half (44%) had no co-defendants.<sup>171</sup> These numbers are reversed, however, in the cases of women convicted of killing an intimate partner. Just over half (56%) of women in intimate partner crimes acted alone, while a third had at least one male co-defendant.<sup>172</sup> and the remainder had at least one female co-defendant.

#### b. Crimes involving children

Almost half of the women in our dataset—22 of 48—were convicted of a crime that resulted in the death of a child or children. Sixteen of these 22 women—comprising one-third of the female death row population—were convicted of killing a child for whom they had caregiving responsibilities at the time of the child's death.<sup>173</sup> Narrowing this category further still, we see that 14 of these women were convicted of killing their own child.<sup>174</sup> There are many women of color among these cases. Women of color account for 50% of the women on death row for crimes involving the death of a child in their care,<sup>175</sup> and 50% of the women on death row for filicide.<sup>176</sup>

The presence of Latinx women on death row for child death cases is particularly high. Latinx women were almost uniformly prosecuted in connection with the death of a child: five of the six Latinx women currently on death row were convicted of killing a child, including four for killing a child in their care.<sup>177</sup> By

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<sup>171</sup> See Appendix C, Table 3.3. The remaining woman had female co-defendants.

<sup>172</sup> See *id.* The remaining woman had at least one female co-defendant.

<sup>173</sup> See Appendix C, Table 3.2.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> One Latinx woman was convicted of killing a child for whom she had no caregiving responsibilities. See *id.* We understand that our sample size is often small as we report these figures, but nevertheless find them noteworthy. Our dataset includes all of the women sentenced to death since 1990, so we do not report data from a representative sample but rather from the entire pool of death-sentenced women. We understand that it is not always possible to draw conclusions from analysis of small datasets and we do not attempt to do so here. Rather, we highlight patterns and observations that future scholarship can delve into further.

way of comparison, less than half of the white women in our dataset (12 of 28 white women) were convicted of killing a child.<sup>178</sup>

In line with patterns that we have observed throughout the women's death row population, as we explain below, most women condemned for the death of a child had male co-defendants. Almost 60% of the women on death row for killing a child had at least one male co-defendant, and one had both male and female co-defendants.<sup>179</sup> Under half of the women had no co-defendants.<sup>180</sup>

c. Crimes involving an acquaintance

In addition to examining the prevalence of crimes involving family members or children among the women's death row population, we gathered data on women convicted of killing someone known to them, but with whom they had no familial relationship. Such crimes are less common among our dataset. Of the 48 women, 14 were convicted of killing an acquaintance.<sup>181</sup>

d. Crimes involving a stranger

Finally, we turn to crimes that resulted in the death of a stranger. Only seven of the 48 cases we examined involved the death of a stranger.<sup>182</sup> The defendants in these cases almost uniformly had male co-defendants—only one was convicted of acting alone.<sup>183</sup> While the presence of male co-defendants is high across all types of crimes for which women are sentenced to death, it climbs to almost 90% in cases involving the death of a stranger.

The presence of Black women among these cases is high. Of the seven cases involving the death of a stranger, three involve a Black defendant and four involve a white defendant.<sup>184</sup> Moreover, nearly all of cases in which the victim was a stranger involve white victims—six of the seven cases had at least one white victim and four had a white, female victim.<sup>185</sup> All three of the cases with Black defendants

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<sup>178</sup> *See id.*

<sup>179</sup> Thirteen of the 22 women who were convicted for killing a child had at least one male co-defendant. *See* Appendix C, Table 3.3.

<sup>180</sup> Nine of the 22 women who were convicted of killing a child had no co-defendants. *See id.*

<sup>181</sup> *See* Appendix C, Table 3.1.

<sup>182</sup> *See* Appendix C, Table 3.1.

<sup>183</sup> *See* Appendix C, Table 3.3.

<sup>184</sup> *See* Appendix C, Table 3.1.

<sup>185</sup> *See* Appendix C, Table 4.3.

had white victims. We discuss these findings more fully and the victim demographics across our dataset in section IV B below.

In summary, the crimes for which women were sentenced to death overwhelmingly involve people known to them. Most of the women on death row were convicted of crimes resulting in the death of a family member and, in overlapping ways, were largely sentenced to death for killing children. Between the large number of crimes involving family members and those involving acquaintances, it is clear that women's prior relationships are important in understanding their offenses.<sup>186</sup> This is particularly the case for Latinx, Asian, and Native American women, 100% of whom are convicted of crimes involving a person known to them.<sup>187</sup> Comparing the racial identities of women condemned for these crimes to their proportion of the women's death row population nationwide, we see that Latinx women were almost uniformly sentenced to death for crimes involving the deaths of children, and Black women were disproportionately sentenced to death for crimes involving the death of a stranger as compared to their share of the death row population. Further analysis will be essential to unpack the factors motivating these patterns.

#### B. *Victim Demographics*

Next, we turn to the victims in women's death penalty cases. Previous scholarship makes clear the importance of examining who dies in capital murder cases because "the characteristics of the victim determine a murderer's punishment[.]"<sup>188</sup> Research has repeatedly established that prosecutors pursue death sentences against people accused of killing certain categories of victims at higher rates than others.<sup>189</sup> Female victims' lives appear to be valued more highly

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<sup>186</sup> Previous scholarship has highlighted that women convicted of murder often kill those known to them. See, e.g., Rapaport, *Equality of the Damned*, *supra* note 38, at 583; Rapaport, *Some Questions*, *supra* note 19, at 508–09; Mary E. Gilfus, *From Victims to Survivors to Offenders: Women's Routes of Entry and Immersion into Street Crime*, 4 WOMEN & CRIM. JUST. 63 (1992); Meda Chesney-Lind, *Girls' Crime and Woman's Place: Toward a Feminist Model of Female Delinquency*, 35 CRIME & DELINQ. 5, 22 (1989). Our findings reveal that these patterns hold true when examining the cases of women on death row nationwide in the modern era.

<sup>187</sup> See Appendix C, Table 3.1.

<sup>188</sup> Caisa Royer et al., *Victim Gender and the Death Penalty*, 82 UMKC L. REV. 429, 429 (2014).

<sup>189</sup> See *id.* at 460–63; Scott Phillips, Laura P. Haas & James E. Coverdill, *Disentangling Victim Gender and Capital Punishment: The Role of Media*, 7 FEMINIST CRIMINOLOGY 130, 131 (2012) [hereinafter Phillips et al., *Disentangling Victim Gender*]; DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 141 (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY]; Judith Kavanaugh-Earl, et al., *Racial Bias and the Death Penalty*, RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIM. JUST. SYS. 147 (Michael J. Lynch, E. Britt Patterson & Kristina K. Childs eds.,

than other victim demographics, a phenomenon that is referred to as the “female victim effect.”<sup>190</sup> Race also matters. Multiple scholars, for example, have shown that prosecutors nationwide pursue death sentences disproportionately against Black defendants accused of killing white people, particularly white women or girls.<sup>191</sup>

Separately, we have already begun to see the relevance of looking at victim data in women’s cases, as our analysis of women’s crimes of conviction revealed the importance of examining relationships with the victim in each case.<sup>192</sup> We therefore continue our analysis by exploring the gender and race of the victims in the 48 cases that comprise our dataset, as well as looking at the number of deaths in each case.

i. Data gathering

We collected data on the victims in women’s cases from their trial transcripts, pleadings (where available), and other publicly-available sources online. Relying primarily on the transcripts, we gathered basic demographic information about the victims—specifically their gender, race, and age—as well as the number of victims in the case and the relationships between victim(s) and defendant. We then compared this information with our demographic data on women on death row and their co-defendants.

ii. Analysis

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2008); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 205–06 (2006); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 830–34 (2008); Marian R. Williams, Stephen Demuth, and Jefferson E. Holcomb, *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-related Victimization, and Jury Decision-making*, 45 CRIMINOLOGY 865, 865–75 (2007) (collecting studies).

<sup>190</sup> Royer et al., *Victim Gender and the Death Penalty*, *supra* note 188, at 429. See also BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY*, *supra* note 189, at 157; Phillips et al., *Disentangling Victim Gender*, *supra* note 189, at 131; Jefferson E. Holcomb, Marian R. Williams & Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877, 898–99 (2004).

<sup>191</sup> See BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY*, *supra* note 189, at 141; Songer & Unah, *The Effect of Race, Gender, and Location*, *supra* note 189, at 205; Phillips, *Racial Disparities in the Capital of Capital Punishment*, *supra* note 189, at 830; Scott Phillips & Trent Steidley, *A Systematic Lottery: The Texas Death Penalty, 1976 to 2016*, 51 COLUM. HUM. RTS. L. REV. 1041, 1049, 1062 (2020).

<sup>192</sup> See *supra*, Section VI.B and accompanying text.

## a. Gender and race of victims

Women on death row in the United States are primarily condemned to die for killing women and girls. Almost two thirds of the women in our dataset were convicted of killing a female victim (30 of 48 women, or 63%). In 23 of these cases the victims were female only, and a further seven cases had both male and female victims. Moreover, white victims dominate these cases. In almost two thirds of the cases with female victims, the defendant received her sentence for killing a white person.<sup>193</sup> The high number of female victims—particularly white, female victims—may suggest that women defendants are not immune from the female victim effect.<sup>194</sup>

Breaking down victims' genders across the types of crimes in women's cases provides further information about victims' demographics. The gender of victims in cases of family member homicides is mixed, though it is mostly male. Of the 27 cases in which a woman is convicted of killing a family member,<sup>195</sup> 16 had male victims only, eight had female victims only, and three had both male and female victims.<sup>196</sup> The higher number of male victims holds true in cases in which a woman is convicted of killing her child, meaning that more women are sentenced to death for killing their sons than their daughters.<sup>197</sup>

Similarly, male victims dominate intimate partner deaths. In all nine cases in which a woman was convicted of killing an intimate partner, the partner was male.<sup>198</sup> The nine intimate partner victims in these cases were primarily white.<sup>199</sup> In two such cases, the woman was also convicted of killing her children alongside her male partner.<sup>200</sup>

Given the high prevalence of family-related murders among women's cases, we might expect to see some correlation between the racial profiles of the defendants and those of the victims. This appears to be broadly true. In two thirds

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<sup>193</sup> Of the 30 cases involving at least one female victim, 19 involved a white victim compared to just five involving a Black victim. A further six involved a Latinx victim, and two involved Asian victims. *See* Appendix C, Table 4.1.

<sup>194</sup> Further empirical research is necessary to test this hypothesis, which is beyond the scope of this article.

<sup>195</sup> *See* Appendix C, Table 3.1.

<sup>196</sup> *See* Appendix C, Table 4.2.

<sup>197</sup> *See id.*

<sup>198</sup> *See id.*

<sup>199</sup> Seven of the intimate partners were white men, one was a Latinx man, and one was a Black man. *See id.*

<sup>200</sup> *See* Appendix C, Table 4.3.



of cases in our dataset, the victims were white (31 of 48 cases). In 22 of these cases—that is, 70% of them—the defendant was also white. A similar figure emerges when we look at the number of women of color convicted of killing a person of color. Under half of the cases in our dataset involved victims of color (21 of 48 cases).<sup>201</sup> In 15 of these cases—so 71% of them—the defendant was also a person of color. Put differently, in cases in which the victim is white, the defendant is typically white, and in cases where the victims are people of color, the defendant is generally a person of color, too.

It is important to note, however, that the race of the defendant and the race of the victim do not necessarily correspond when both are people of color. In the 15 cases in which both the defendants and the victims were people of color, the race of the victim and defendant correspond in 12 cases, leaving three cases with victims and defendants of color who have different racial identities.<sup>202</sup> In these three remaining cases, the defendant did not have a familial relationship to the victim.<sup>203</sup>

Unsurprisingly, there is a high correlation of victim race to defendant race among child death crimes. Of the 16 cases in which a woman was convicted of killing a child in her care, nine involve white children. Seven of the defendants in these cases are white, and two are women of color convicted of killing a white child—one Black woman and one Latinx woman.<sup>204</sup> Similarly, five cases in which a woman killed a child in her care involve Latinx victims, and the defendant is also Latinx in four of these cases.<sup>205</sup> Cases in which the children were Black and Asian follow suit—in the two cases involving Black girls in the defendant's care, the defendants were also Black, and the sole case involving Asian children in the defendant's care, the defendant was Asian and she was convicted of killing her sons.

The high proportion of family member cases does not fully explain the relationship between victim race and defendant race among the women's death row population, however, and further research should still examine the racial dynamics at play in these cases. First, not all cases involve family members so analysis of the relationship between defendant race and victim race in women's cases must account for factors beyond familial relationships. Second, the number of cases involving victims of color in our dataset is disproportionate to the share of the death row

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<sup>201</sup> The overlap between the figures of white victims and victims of color arises because some cases involved both victims who were white and victims who were people of color.

<sup>202</sup> See Appendix C, Table 4.4.

<sup>203</sup> Two cases involve the killing of a stranger, and one involves the killing of a neighbor.

<sup>204</sup> See Appendix C, Table 4.5.

<sup>205</sup> The remaining defendant is a white woman convicted of killing a Latinx child. The children in three of these cases were boys and the remaining two were girls. See *id.*

population that women of color occupy. For example, 23% of cases involved the killing of a Latinx person when Latinx women comprise just 13% of the death row population, while 65% of women's cases involved the killing of a white person when white women comprise 58% of the death row population.<sup>206</sup> Though we might expect family members—particularly children—to be of the same race as the defendant in many cases and therefore racial profiles to largely correspond, these figures suggest that there is no one-size-fits-all model. Rather, more nuance and contemplation of racial dynamics is necessary when examining women's cases.

#### b. Number of victims

The number of victims in each case and their relationship to the defendant bears close attention.<sup>207</sup> First, it must be noted that women's cases generally involve a single victim. In 69% of the cases in our dataset, a woman was convicted of killing one victim.<sup>208</sup> High proportions of the white, Black, and Latinx women on death row fall into the single victim category—namely, 20 white women, eight Black women, and five Latinx women. Notably, these figures represent all but one of the Latinx women (who, we will recall, are overwhelmingly convicted of killing children), and three quarters of Black women. In the remaining 15 cases, women were convicted of killing more than one person.<sup>209</sup> All three of the Asian and Native American women on death row are convicted of killing multiple people.

Taking a closer look at the 33 single-victim cases reveals that most of the victims in these cases are family members or other acquaintances. Seven of the nine intimate partner deaths in our dataset fall in this category, along with nine cases of a woman killing her own child, four cases involving another family member victim, and all 10 cases of a woman killing an acquaintance in our dataset.<sup>210</sup> Only three of the single-victim cases concern crimes in which a woman killed a stranger. We have noted above the high correlation of male co-defendants with stranger victims, and these three cases are no exception—all have a male co-defendant.<sup>211</sup>

Turning to cases with multiple victims, our data reveal that where women kill multiple people, they tend to either kill strangers or multiple members of their

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<sup>206</sup> See Appendix C, Table 4.1; *supra*, Section VI and accompanying text.

<sup>207</sup> We explore states' reliance on multiple victims as an aggravating factor below. See *infra*, Section VI.C and accompanying text.

<sup>208</sup> This represents 33 of 48 cases. See Appendix C, Table 4.6.

<sup>209</sup> Eight cases involved two victims, five cases involved three victims, one case had four victims, and one case had six victims. See Appendix C, Table 4.6.

<sup>210</sup> See Appendix C, Table 4.7.

<sup>211</sup> See Appendix C, Table 4.8.

immediate family, such as their children and intimate partners. Four of the 15 multiple-victim cases concern crimes in which a woman killed strangers, and three of these four women had male co-defendants. The remaining 11 cases primarily concern the killing of multiple members of her immediate family, for example a woman killing both of her children, or her intimate partner and child.<sup>212</sup>

Moreover, our findings continue to suggest that there is a relationship between the crime a woman is convicted of and the presence of male co-defendants. Almost 60% of the women convicted of killing multiple victims had a male co-defendant.<sup>213</sup> Notably, though, in each of the remaining seven cases in which a woman killed multiple people and did *not* have a co-defendant, the woman was convicted of killing multiple members of her family, particularly her children.

### C. *Aggravating Factors*

Not all cases of first-degree murder trigger capital prosecutions. Even in states that retain the death penalty, prosecutors must prove the existence of certain circumstances to justify the imposition of a death sentence.<sup>214</sup> In other words, there are certain factors that enhance the penal sanctions that flow from a murder case. In the capital context, these are often referred to as “aggravating factors.”

Prosecutors present aggravating factors to argue that a murder is particularly egregious and that the defendant and the offense are the “worst of the worst.”<sup>215</sup> In this way, the state uses aggravating factors to mark out murders for which it believes the use of the ultimate penalty is justified. We have seen above that women generally do not have prior convictions—much less violent prior convictions—that

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<sup>212</sup> The 11 non-stranger victims in the multiple-victim category break down as follows: seven family member cases, six of which include child victims, and two of which include both their child/children and partner, and 4 acquaintance cases. *See* Appendix C, Table 4.9.

<sup>213</sup> This represents eight of 15 women, or 57%.

<sup>214</sup> Aggravating factors are relevant to sentencing in most states—if a defendant is convicted of murder, the state presents aggravating circumstances to persuade the jury that death is the appropriate penalty and the defendant can present mitigating circumstances that weigh in favor of a life sentence. Texas has a different system. In Texas, the state charges a defendant with capital murder based on a penal statute that sets forth certain factors (for example, the murder of a police officer) that make a particular homicide a capital crime. *See* 5 Tex. Pen. Code § 19.03. Once a defendant is convicted of capital murder, the jury has a specific set of questions to answer to determine whether death will be the penalty. *See* Tex. Code Crim. Proc. § 37.071.

<sup>215</sup> Under domestic and international law, the death penalty can only be imposed for the very worst crimes, a standard that is often referred to as the “worst of the worst.” *See* Corinna Barrett Lain, *Three Observations About the Worst of the Worst, Virginia-Style*, 77 WASH. & LEE L. REV. ONLINE 469 (2021).

might lead the state to seek out the harshest punishment. What, then, does the state rely on to secure death sentences for these women?

In tracking the aggravating factors presented in each case, we sought to understand what, in the eyes of the state, makes these women deserving of death. Are there commonalities among the aggravating factors that the state has used to secure women's death sentences? Do the aggravating factors reflect the patterns that we observe in women's crimes of conviction? What, if any, is the relationship between gender, race, and the state's use of aggravating factors? While our data analysis cannot definitively answer the last of these questions, and limited prior research has tackled the issue of aggravating factors in women's cases at all,<sup>216</sup> we present an overview of the aggravating factors presented in the case of every woman on death row as a starting point in understanding how and why prosecutors secure death sentences against women.

i. Data gathering

We collected every aggravating factor that the state sought to prove in women's trials, looking primarily to the jury instructions at the penalty phase to gather such information. In Californian cases, where the state must prove both "special circumstances" and, later, aggravating factors, we focused on the "special circumstances" as they most closely shed light on the prosecution's rationale for seeking the death penalty. We adapted our methodology for the seven cases in Texas, as Texas defines capital murder by statute, setting forth certain categories of homicides as death-eligible.<sup>217</sup> In these cases, we gathered data by looking the facts

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<sup>216</sup> One of the only studies we have found on the topic analyzes 35 women's cases from the 1990s to determine whether there are disparities along racial lines in states' uses of aggravating factors in women's cases. See Kathryn Farr, *Aggravating and Differentiating Factors in the Cases of White and Minority Women on Death Row*, 43 CRIME & DELINQ. 260 (1997). Farr found that in her sample size, murders by women of color were less aggravated than murders by white women, and that the most aggravated cases involved white women killing multiple victims. Our analysis below deepens these findings by looking across the entire population of women sentenced to death between 1990 and 2022 and examining how the aggravating factors intersect with victim profiles and women's crimes of conviction.

<sup>217</sup> At the penalty phase of each case, Texas additionally requires that juries answer three questions: (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02 of the Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken; and (3) if the jury answers the previous two questions in the affirmative, whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence

the state used to justify the capital murder charge. For ease of reference, we will refer to all such information as “aggravating factors.”

In each woman’s case, we noted all statutory aggravating factors presented by the state. Each state sets forth a broad pool of aggravating factors that prosecutors may use to secure a death sentence, and these vary in terminology and scope across the states. We therefore synthesized the data by grouping the factors according to their common themes. For example, Texas, Pennsylvania, and Arizona all consider the death of a child to be an aggravating factor—a child under 10 in the case of Texas,<sup>218</sup> under 12 in the case of Pennsylvania,<sup>219</sup> and under 15 in the case of Arizona.<sup>220</sup> We therefore grouped these three aggravating factors together under the label “Victim—child.”

We also saw common themes running through the aggravating factors. Many of the aggravating factors coalesced around the victim’s vulnerabilities, the motive for the crime, the manner in which the crime was committed, or a second crime that was committed alongside the murder. We categorized our data in accordance with these themes, as follows:

Aggravating factors referring to motives:

- Motive – financial gain
  - The motive for the offense was pecuniary gain.
- Motive – interfere with law enforcement
  - The crime was committed during an attempt to interfere with or avoid arrest or prosecution.

Aggravating factors referring to the manner of the crime:

- Manner – torture
  - The murder was committed in a manner that inflicted torture. This includes the California-specific aggravating factor of a crime that was committed by means of “mayhem.”
- Manner – HAC
  - The murder was especially heinous, atrocious, or cruel.
- Manner – arson
  - The defendant committed the crime by arson.

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of life imprisonment without parole rather than a death sentence be imposed. *See* Tex. Code Crim. Proc. § 37.071. As these questions are posed in every capital case, we focused on the elements of the capital crimes themselves to determine the factors that distinguished each case.

<sup>218</sup> *See* 5 Tex. Pen. Code § 19.03.

<sup>219</sup> *See* 42 Pa. C.S. § 9711(d)(16).

<sup>220</sup> *See* Ariz. R.S. § 13-751(5)(b)(7).

## GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

- Manner – poison
  - The defendant used poison.
- Manner, weapon – gun
  - The defendant used a gun.
- Manner, weapon, other deadly weapon
  - The defendant used a deadly weapon.

Aggravating factors referring to a crime committed alongside the murder:

- Crime – robbery, burglary, or kidnapping
  - The crime was committed in the course of a robbery, burglary, attempted robbery or burglary, or kidnapping.
- Crime – rape
  - The crime was committed in the course of a rape.

Aggravating factors referring to victims:

- Victim – child
  - The deceased person was a child.
- Victim – elderly or disabled
  - Groups factors that refer to the vulnerability of the deceased person due to advanced age or disability.
- Victim – officer
  - The deceased person was a law enforcement officer.

Aggravating factors referring to the scope of harm:

- Multiple – multiple murders
  - The defendant committed multiple murders during the commission of the offense.
- Multiple – harm to multiple people:
  - The defendant created a risk of harm to more than one person.

Aggravating factors referring to the defendant's criminality or level of planning:

- Previous serious offense
  - The defendant was previously convicted of a serious offense or felony.
- Premeditated
  - This groups all aggravating factors that refer to the offense having been calculated, premeditated, or involved lying in wait.
- Continuing threat to society

- Where an aggravating factor was that the defendant constitutes a continuing threat to society.

*ii. Analysis*

States around the country employed a range of aggravating factors to secure death sentences against the 48 women in our dataset. One of the most common aggravating factors is that the woman committed the offense for financial gain. We noted the presence of this factor in one quarter of the trials of women on death row.<sup>221</sup> Moreover, in just under half of these cases, the woman was convicted of killing her intimate partner for pecuniary gain.<sup>222</sup> We observed the financial gain aggravating factor in a variety of different states and against women of disparate racial backgrounds.

Our analysis also revealed that certain factors correlate closely with the presence of male co-defendants. This was predominantly the case for aggravating factors relating to the manner of killing, the presence of a weapon, or other crimes. As regards the manner of killing, in the cases of 14 of the 48 women on death row, the state argued that their offenses were especially heinous, atrocious, or cruel. All of these cases involved the death of someone known to the woman.<sup>223</sup> The fourteen women had a male co-defendant in over half of the cases in which the state argued that the murder was especially heinous, atrocious, or cruel (eight of 14 cases, or 57%).<sup>224</sup>

Other aggravating factors grouped by the manner of the crime correlate with male co-defendants even more starkly. In eight of the cases, the state argued the crime was aggravated because the victim was tortured and in every one of these cases, the woman acted alongside a male co-defendant.<sup>225</sup> A similar pattern emerges when we look at the presence of weapons. In all of the cases in which the state argued that the woman should receive death because of the presence of a gun or deadly weapon, the woman had a male co-defendant, though it must be noted that

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<sup>221</sup> The financial gain aggravating factor was used in 12 of 48 cases in our dataset. *See* Appendix C, Table 5.1.

<sup>222</sup> *See id.*

<sup>223</sup> Six involved the death of a child, four involved intimate partners, four more resulted in the death of an acquaintance, and one involved the killing of a family member who was neither a child nor intimate partner.

<sup>224</sup> *See* Appendix C, Table 5.1.

<sup>225</sup> *See id.*

this is not a commonly employed aggravating factor against women.<sup>226</sup> We further observed two cases in which the state relied on a woman's use of poison or arson as an aggravating factor, neither of which involved male co-defendants.<sup>227</sup>

As regards other crimes used as aggravating factors, the presence of a male co-defendant remains high. The state relied on aggravating factors relating to the murder being committed in the course of a robbery, burglary, or kidnapping in 21 of 48 cases, over 80% of which had male co-defendants. Aggravating factors relating to burglary or robbery were present in 13 cases, all but two of which had a male co-defendant, and aggravating factors relating to kidnapping were present in eight cases, six of which saw a woman charged alongside a male co-defendant. States relied on aggravating factors relating to rape far less frequently. In just two cases, the state argued that jurors should choose death because the crime was committed in the course of a rape, and in both of these cases the woman had a male co-defendant.<sup>228</sup>

Aggravating factors relating to victim profiles were uncommon in our dataset. Despite the high presence of child death cases among the women's death row population, few states employed an aggravating factor relating to the deceased person's young age. We observed the presence of aggravating factors relating to the death of a child in only 10% of cases, a surprisingly small figure given the high number of child death cases in our dataset and one that is perhaps explained by the fact that only seven states in which women in our dataset were sentenced to death list the death of a child as a statutory aggravating factor.<sup>229</sup>

Rather, in child death cases, states more commonly relied on aggravating factors regarding multiple murders. In nine of the 48 women's cases, the state cited the deaths of multiple victims as an aggravating factor, seven of which are cases in which a woman was convicted of killing children. In two cases, the sole aggravating factor presented to secure a death sentence was that there were multiple murders,

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<sup>226</sup> See *id.* Weapons were the basis of aggravating factors in just three cases, all of which were in California.

<sup>227</sup> See *id.*

<sup>228</sup> See Appendix C, Table 5.1.

<sup>229</sup> These seven states are: Arizona, Florida, Louisiana, Ohio, Pennsylvania, Tennessee, and Texas. See Robert Dunham, *The Use of the Death Penalty for Killing A Child Victim*, DEATH PENALTY INFO. CTR. (Aug. 16, 2017) <https://deathpenaltyinfo.org/stories/use-of-the-death-penalty-for-killing-a-child-victim>. We note that aggravating factors relating to victim profiles were sparsely used in women's cases overall. As well as five cases involving a child death aggravating factor, we observed just one case in which the state argued that the murder was aggravated because the victim was old or disabled, and a further one case in which the state proffered that the murder was aggravated because the victim was a law enforcement officer. See Appendix C, Table 5.1.



and both of these were child death cases—namely, a mother killing her children.<sup>230</sup> The use of this aggravating factor reflects that women’s cases involving multiple deaths are predominantly cases in which a woman is convicted of killing children in her care, as explored above.<sup>231</sup>

Finally, we observed that aggravating factors relating to the defendant’s prior criminality or level of planning appeared sporadically. States relied on aggravating factors referencing premeditation in nine cases, most of which were in California—one of the only states to have this aggravating factor—and on factors relating to a previous serious offense in just three cases.<sup>232</sup>

#### D. *Co-defendants*

Finally, we analyze the presence of co-defendants in the women’s cases. Co-defendants play a key role in many capital cases.<sup>233</sup> Scholars who have examined the role and treatment of co-defendants in men’s capital cases have found that they often receive disparate treatment for similar crimes, including

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<sup>230</sup> The remaining two cases in the “multiple murders” group are robbery cases resulting in multiple deaths.

<sup>231</sup> See *supra*, Section VI.B.

<sup>232</sup> See Appendix C, Table 5.1. In these three cases, the “serious offense” aggravating factor typically referred to an event that occurred during or around the commission of the murder, and for which the jury produced a guilty verdict in the guilt phase of the woman’s trial. For example, one woman was convicted of murder and child abuse in the guilt phase, and the child abuse conviction was then used to support an aggravating factor of “prior serious offense” in the penalty phase of trial.

Aggravating factors relating to premeditation, planning, or lying in wait appear in the statutory regimes of just five states, only three of which have women on their death rows. See Cal. Penal Code § 190.2(a)(15); Fla. Stat. 921.141(6)(i); Indiana Ind. Code § 35-50-2-9(b)(3); Mont. Code Ann. § 46-18-303(1)(a)(iv); Ky Stat. Ann. § 21-6224(f)(2).

<sup>233</sup> Dario N. Rodriguez & Melissa A. Berry, *Sensitizing Jurors to Eyewitness Evidence Using a Counterfactual Mindset Induction*, 34 APPLIED COGNITIVE PSYCH. 768 (2020) (conducting a study on multiple-defendant trials and finding that the presence of multiple defendants increased conviction rates overall relative to single-defendant trials); Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 JUST. Q. 949, 964 (2001) (explaining that in many cases a co-defendant’s testimony is the only evidence implicating the defendant and such testimony may be unreliable because co-defendants are incentivized to cooperate with the prosecution out of fear of the death penalty); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1566 (1998) (discussing how codefendants often turn on one another in exchange for a lesser sentence); James B. Haddad & Richard G. Agin, *A Potential Revolution in ‘Bruton’ Doctrine: Is ‘Bruton’ Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant’s Confession as Evidence against a Defendant Although the Confrontation Clause Would Allow Such Use?*, 81 J. CRIM. L. & CRIMINOLOGY 235 (1990) (discussing the admission of co-defendant confessions in the defendant’s trial).

reduced sentences<sup>234</sup>—particularly when they agree to testify as a prosecution witness.<sup>235</sup> To date, little research has focused on co-defendants in women's cases.<sup>236</sup> Our data reveals that most women on death row commit their crimes in the company of others—usually men.

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<sup>234</sup> Such research highlights that arguably less culpable defendants at times receive harsher sentences than their counterparts. See Ursula Bentele, *Multiple Defendant Cases: When the Death Penalty Is Imposed on the Less Culpable Offender*, 38 RUTGERS L. REC. 119 (2010-2011) (explaining that a more culpable co-defendant is incentivized to cooperate with the prosecution to receive a lighter sentence, casting doubt on the reliability of accomplice testimony in a defendant's case); Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities among Codefendants*, 53 MONT. L. REV. 75 (1992); Ryan Scott Reynolds, *Equal Justice Under Law: "'Post-Booker,' Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity between Codefendants' Sentences?'*, 109 COLUM. L. REV. 538 (2009); John H. Blume & Megan E. Barnes, *'Nothing Compares 2 U: 'I A Response to Beyond Compare: A Codefendant's Prison Sentence As A Mitigating Factor In Death Penalty Cases*, 71 FLORIDA L. REV. F. 160 (2020).

<sup>235</sup> Thomas Alan Hendricks, *The Right of Confrontation and the Use of Non-Testifying Codefendant's Confessions: Constitutional Law in Microcosm*, 26 U. MIAMI L. REV. 755 (1971); Martin D. Litt, *Commentary by Co-Defendant's Counsel on Defendant's Refusal to Testify: A Violation of the Privilege Against Self-Incrimination?*, 89 MICHIGAN L. REV. 1008 (1991) (discussing the effect of co-defendant's counsel's comment contrasting the defendant's decision to remain silent and the co-defendant's decision to testify); Eric Lotke, *Sentencing Disparity among Co-Defendants: The Equalization Debate*, 6 FED. SENT'G REP. 116 (1993).

<sup>236</sup> Stephen Jones, *Partners in Crime: A Study of the Relationship between Female Offenders and their Co-Defendants*, 8 CRIMINOLOGY & CRIM. JUST. 147 (2008) (looking at 50 women sentenced to prison in England); Dorinda Welle & Gregory Falkin, *The Everyday Policing of Women with Romantic Codefendants*, 11 WOMEN & CRIM. JUST. 45 (2000) (conducting an ethnographic study of women in drug treatment programs who had intimate partner co-defendants); Charlotte Barlow, *Coercion and Women Co-Offenders: A Gendered Pathway into Crime*, POL'Y PRESS (2016). One scholar, who has written extensively about women's capital cases, hypothesized that women may receive more lenient treatment than male co-defendants. Streib, *supra*, Section III.A. Testing that hypothesis is beyond the scope of this article. Jurors in capital sentencing proceedings are permitted to consider a wide range of circumstances in determining which sentence to impose, including individual characteristics and the circumstances of the offense. Chelsea Creo Sharon, *The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L.L. REV. 223 (2011) (explaining that "the number and breadth of [] aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states."); Dennis J. Devine & Christopher E. Kelly, *Life or Death: An Examination of Jury Sentencing with the Capital Jury Project Database*, 21 PSYCH., PUBLIC POL'Y & L. 393 (explaining that juries can consider multiple aggravating factors, including aspects of the crime as well as the defendant's characteristics, prior record, and moral culpability); Valerie P. Hans, John H. Blume, et al., *The Death Penalty: Who Should Decide Who Dies?* 12 J. EMPIRICAL LEGAL STUD. 70, 77 (explaining that the list of statutory aggravating factors in Delaware is long). To determine whether women or their male co-defendants are treated more harshly for analogous conduct, researchers would need to consider a variety of factors, including the facts of the offense, the backgrounds of each offender, the quality of legal

i. Data gathering

To understand the role of co-defendants in women's cases in our dataset, we turned to their trial transcripts. We began by defining co-defendant broadly—as any individual charged in connection with the woman's capital crime. This definition includes not only individuals who had joint trials with the women in our dataset, but also individuals who were charged with non-capital crimes and individuals who pleaded guilty.

We first reviewed women's trial transcripts to ascertain whether they acted alone or in tandem with others, and to determine the type of relationship they had with their co-defendants. We obtained information on co-defendants' sentences from the women's transcripts, from co-defendants' trial transcripts (where available), and from court records. We found demographic data in transcripts and post-conviction pleadings. Where necessary, we conducted internet searches to supplement our data.

While gathering this data, we classified the co-defendants into categories to allow for more nuanced analysis, using the following four relationships:

- Co-defendants who were in an intimate partner relationship

Many of the women were in intimate partnerships with their co-defendants. Understanding the prevalence of intimate partner abuse in women's lives from previous research,<sup>237</sup> we also reviewed the women's transcripts and any post-conviction pleadings for evidence that the co-defendant was abusive.

- Co-defendants who had a parent-child relationship

Given the focus on motherhood in many of the women's trials, we tracked parent-child co-defendant relationships.

- Co-defendants who had a familial relationship

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representation that each co-defendant received, and the teams of plea bargains that provide for lesser sentences. Our focus here is on the relationship between women and their co-defendants.

<sup>237</sup> See Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8.

We also categorized co-defendants who were family members more broadly. To eliminate any overlap between categories, we excluded here co-defendants who were children and intimate partners.

- Co-defendants who were acquaintances

Our final category included women who had co-defendants with whom they had a prior relationship but who were not members of their family or intimate partners. This category included co-defendants who were co-workers, neighbors, and friends. We found that every woman with a co-defendant knew her co-defendant, so we have not included a separate category for strangers.

ii. Analysis

Almost two-thirds of women in our dataset had a co-defendant—and almost all of those co-defendants were male.<sup>238</sup> Of these women, over a third (37%) had multiple co-defendants.<sup>239</sup> Additionally, nearly all of the women with a co-defendant had at least one male co-defendant, and over 80% of them had only male co-defendants.<sup>240</sup> We also looked at the sentences received by women's co-defendants: 38% of the women's co-defendants received the death penalty<sup>241</sup>—all of whom were male.<sup>242</sup>

Turning to co-defendants' relationships with the women, our analysis reveals that the most prevalent type of co-defendant was an intimate partner. Of the women with co-defendants, 63% had a co-defendant who was an intimate partner—

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<sup>238</sup> See Appendix C, Table 6.1.

<sup>239</sup> See *id.*

<sup>240</sup> Of the women with co-defendants, 93% had at least one male co-defendant and 83% only had male co-defendants. See *id.*

<sup>241</sup> This excludes two co-defendants who were juveniles at the time of the killing, making them ineligible for the death penalty. Further, we make no representations as to how many co-defendants were eligible for the death; we merely state how many co-defendants did receive the death penalty and their gender.

<sup>242</sup> We are unable to draw any conclusions as to why roughly two-thirds of women's co-defendants received lesser sentences. There are myriad possible explanations, including: (1) they were less culpable; (2) they had better legal counsel; (3) they offered to testify against the woman if the prosecution dropped the death penalty. We therefore raise this datapoint not to argue that women were treated unfairly (although it is possible they were). Instead, we suggest that further research is warranted to identify the role of each co-defendant in the crime and at the women's trial.

and all of these were male.<sup>243</sup> In more than half of the cases involving an intimate partner co-defendant, trial testimony or other evidence indicated that the partner was abusive.<sup>244</sup> Such a finding is important given our previous research documenting how prosecutors frequently dismiss evidence of intimate-partner violence in such cases.<sup>245</sup>

Another prominent category of co-defendants were acquaintances. Nearly half of women with co-defendants (47%, or 14 women) had co-defendants who were acquaintances—almost all of whom were male.<sup>246</sup> Additionally, 10% of women had a co-defendant who was their child and 10% had a familial relationship with their co-defendant that was not a parent-child relationship.<sup>247</sup> Unlike acquaintance and intimate partner co-defendants, there were far more female familial co-defendants in this category.<sup>248</sup>

Finally, we analyzed the women's co-defendants based on the women's race. We found that almost 70% of white women and Black women on death row

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<sup>243</sup> See Appendix C, Table 6.2.

<sup>244</sup> We do not test the credibility of these allegations here, but merely note that in several cases, multiple witnesses testified about the co-defendant's abusive behavior. To gather this evidence, we reviewed the trial transcripts, looking for any lay testimony or expert testimony relating to the co-defendant abusing the female defendant. Where the trial transcript did not contain testimony regarding the co-defendant's treatment of the female defendant, we then turned to post-conviction documents. We reviewed post-conviction briefs and court opinions to determine if any evidence of gender-based violence was uncovered at these later stages of investigation. Where we did not uncover evidence of abuse in the trial transcript or post-conviction documents, we classified the co-defendant as "not abusive." Since post-conviction investigation has not yet begun in some of the woman's cases, our data may understate the prevalence of abusive co-defendants.

<sup>245</sup> See Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8; Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019) (examining how the legal system discount the credibility of women survivors of intimate partner violence); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman—When She Fights Back*, 20 YALE J. L. & FEMINISM 75 (2008) (discussing how the legal system often discounts narratives of women survivors who do not conform to the stereotypical image of a battered woman); Carol Jacobson, Kammy Mizga and Lynn D'Orio, *Battered Women, Homicide Convictions and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L. J. 31 (2007) (discussing how legal decisionmakers discount women's stories of abuse and suggesting that women survivors of intimate partner violence who kill their abusive partners receive harsher sentences than other women who kill).

<sup>246</sup> See Appendix C, Table 6.2.

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

had co-defendants, but two thirds of Latinx women did not.<sup>249</sup> For white women, the majority had an intimate partner co-defendant, over half of whom were abusive.<sup>250</sup> Conversely, most Black women did not have an intimate partner co-defendant, though one had an abusive, intimate partner co-defendant.<sup>251</sup> Finally, both Latinx women with co-defendants had abusive, intimate partner co-defendants.<sup>252</sup>

## VII. EMBRACING THE COMPLEXITY OF GENDER AND THE DEATH PENALTY

Our research underscores the failure of current theoretical approaches on gender and the death penalty to capture the nuances of women's capital cases. Previous scholars have theorized about why there are so few women on death rows nationwide and why these women have been singled out for the ultimate punishment, but have not systematically analyzed the women's backgrounds and courtroom experiences—both necessary prerequisites to being able to understand the factors underlying women's death sentences. Our research, instead, begins with these two avenues of research and, at its core, asks: who are the women on death row?

Our analysis reveals a number of inextricably gendered characteristics of women's cases. First, women frequently come into contact with the criminal legal system for the first time during their capital trials, and they enter the system bearing the physical and psychological scars of gender-based violence. Second, abused and traumatized women are thrust into male dominated courtrooms to be prosecuted, judged, and defended by people who do not reflect them but, rather, often share the gender of their abusers. Our previous research has explained that experiences of gender-based violence are deeply intertwined with women's offenses yet are routinely dismissed in their trials.<sup>253</sup> The confluence of these factors raises a number of questions. Does the gender of elected prosecutors matter with regard to the discretionary decision to see the death penalty—particularly when their discretion

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<sup>249</sup> 68% of white women and 73% of Black women had co-defendants, while 67% of Latinx women did not have co-defendants. *See* Appendix C, Table 6.1.

<sup>250</sup> *See* Appendix C, Table 6.2. Often defense attorneys fail to present women's experiences of gender-based violence in court proceedings. *See* Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8. Because we have gathered our data from trial transcripts and court filings, the data here likely understates the number of women with abusive, intimate-partner co-defendants as their defense attorneys may not have investigated the co-defendant for abuse or presented such information at trial.

<sup>251</sup> *See* Appendix C, Table 6.2.

<sup>252</sup> *See id.*

<sup>253</sup> *See* Babcock & Greenfield, *Gender, Violence, and the Death Penalty*, *supra* note 8.

often depends on a subjective assessment of case facts? How does the gender of courtroom actors affect how prosecutors and defense teams tell women's stories of abuse and, indeed, understand women's backgrounds? Do these narratives change when women are at the helm of the prosecuting or defense teams? Does juror gender matter? And does gender matter in juries' assessments of women's moral culpability? How do racial, socioeconomic, and other identities further affect these dynamics? These are questions that we leave to future research.

As for women's crimes of conviction themselves, the prevalence of intimate partner, child, and family victims is notable. That only seven women out of the 48 cases we examined were convicted of killing a stranger lends credence to Elizabeth Rapaport's proposal that women's crimes of conviction are important when contemplating the comparatively small number of women on death row nationwide, as the common capital crimes that she and other scholars outline frequently involve strangers.<sup>254</sup> Even so, Rapaport's proposal is incomplete—as our analysis has revealed, women's backgrounds and their relationship to their crimes of conviction cannot be ignored.

Finally, women's relationships with co-defendants matter. The high number of male co-defendants, particularly intimate partner co-defendants, among the women in our dataset suggests that these relationships cannot be divorced from the circumstances of the crime itself—all the more so in the large number of cases in which there is evidence of abuse from the co-defendant. The strong correlation between the presence of male co-defendants, on the one hand, and the state's reliance on aggravating factors related to an underlying felony, torture, or the use of a weapon, on the other, only serves to highlight the relevance of male co-defendants to any analysis of women's offenses. No previous scholarship has sought to understand this connection, however. The importance of these gendered co-defendant dynamics, how they interact with other facets of women's identities, and how they play out to influence women's convictions and sentences are areas that require further study. The available data for now, though, makes clear that a simplistic framework of chivalric norms and gender-transgressive women does not adequately advance our understanding of why women are sentenced to death.

Instead, we propose that researchers embrace the nuances of women's stories and situate them in the larger context of the women's death row population. While we have observed patterns in our data, we recognize that statistics and figures do not capture women's lived realities in all their color. Indeed, the variability of the information we have gathered on women's complex backgrounds, their crimes of conviction, their relationships with victims and co-defendants alike, as well as the racial and gendered undercurrents of those relationships, all reiterate that the women facing the death penalty do not fall into neat boxes. We encourage scholars

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<sup>254</sup> Rapaport & Streib, *Women in North Carolina*, *supra* note 21, at 83.

and advocates alike to recognize the patterns we have outlined while accepting the complexity that comes from looking at the death row population as a whole.

Another missing element in current research is how women's stories are presented to decision-makers, and how those stories play out in the broader patriarchal framework of the criminal legal system and society as a whole. As Mary Atwell recognizes, a plethora of factors contribute to women's convictions and death sentences—from prosecutorial charging decisions to the defense team's strategy<sup>255</sup>—and it is important for scholars to interrogate the impact of gender, race, and other identities on each of these factors. Analyzing individual women's cases devoid from their broader context, or turning a blind eye to cases that challenge a dominant theory, leads too readily to facile conclusions about women and their sentences.

To understand why women are sentenced to death—and, indeed, to protect women's constitutional rights to bias-free proceedings—we must comprehend women's experiences, the way in which those experiences affect their interactions with the legal system, and how the legal system views those experiences. This necessitates a systematic approach; when we eschew the “individualistic,” “sporadic[,] and infrequent”<sup>256</sup> analysis of women's cases prevalent in much previous scholarship, the chivalry and evil woman theories are revealed as too simplistic an answer to the questions they seek to answer. It is time to retire these theories and for scholars to shake off the shackles of societal biases when examining women's cases. Denying the nuances in women's cases erases the complexity of their stories and the myriad ways in which gender may be weaponized to secure their convictions and sentences. With a fresh approach in mind, we will better be able to understand how gender shapes women's backgrounds and their interactions with the criminal legal system

## CONCLUSION

We began this article by noting the lack of empirical, intersectional research into the cases of women on death row in the United States. We begin to address that gap here. By analyzing women's trial transcripts and post-conviction records, we shed light on the women's backgrounds and the factors affecting their incarceration on death row. We simultaneously recognize that understanding who these women are, in the full complexity of their lives, far exceeds what any court document can convey.

New avenues for research naturally arise from our analysis here. With respect to the women themselves, we need to better understand how their pre-

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<sup>255</sup> See Atwell, *supra* note 1.

<sup>256</sup> BAKER, WOMEN AND CAPITAL PUNISHMENT, *supra* note 3, at 7.



incarceration lives were shaped by intersectional discrimination. No scholar has examined in depth the dynamics of gender and poverty in the lives of women capital defendants, nor has anyone explored how the experiences of women of color diverge from those of white women. Closer examination of the role of women's co-defendants—and, in particular, the relationship between women and their male codefendants—will help us understand how these factors affect women's capital proceedings.

A fine-grained analysis of the language employed by various courtroom actors in women's trials is also necessary to assess how possible gender bias is expressed during trial. Such forensic linguistic analysis will also shed light on the extent to which courtroom actors understand and convey critical concepts, such as gender-based violence, in women's proceedings. Moreover, further research on those representing women will provide insights into the quality of representation they receive, which in turn can provide practical guidance to legal teams. We believe such research to be essential if scholars are to overcome the limitations of previous studies. Indeed, it is through rigorous, nuanced, and women-centered research that scholars will be able to conceive of alternative theories and frameworks through which to understand and analyze the cases of women on death row.

**Appendix A: Data on Women on Death Row****Table 1.1: Number of women and frequency of prior convictions**

*Note: The table counts the number of women with each type of prior convictions—not the number of convictions per woman.*

	White Women	Black Women	Latinx Women	Asian Women	Native American Women
No prior convictions	22	5	5	1	1
Any prior conviction	6	6	1	1	0
Only non-violent prior convictions	3	5	1	1	0
No prior or only non-violent prior	25	10	6	2	1
Violent prior convictions	3	1	0	0	0

**Table 1.2: Women and type of prior conviction**

*Note: Because some women had more than one type of prior conviction, the numbers below may not match the number of women in our dataset. Furthermore, one Asian woman had an unspecified, non-violent prior conviction and, therefore, is not counted in the below table.*

	White Women	Black Women	Latinx Women	Asian Women	Native American Women
Non-violent economic crimes	3	3	0	0	0
Drug offenses	1	2	0	0	0
Driving infractions	0	1	1	0	0
Violent economic crimes	2	0	0	0	0
Assault	1	0	0	0	0
Child cruelty	0	1	0	0	0

**Appendix B: Data on Courtroom Actors****Table 2.1: Gender of elected prosecutors, judges, and jury forepersons**

*The data corresponds to the number of women's cases in which the courtroom actor described was a man/woman/of unknown gender.*

	Elected prosecutor	Judges	Jury foreperson
Men	46	42	26
Women	2	6	15
No data available	0	0	7

**Table 2.2: Gender of trial prosecutors**

	All male team	All women team	Mixed gender team
Number of women's cases	27	6	15

**Table 2.3: Gender of trial defense lawyers**

*Note: one woman defended herself at trial and had no defense team, so we have not counted her in this table.*

	All male team	All women team	Mixed gender team
Number of women's cases	33	2	12

**Appendix C: Data on Characteristics of Women's Crimes of Conviction****Table 3.1: Women's crimes of conviction**

*Numbers refer to the number of women with crimes of conviction falling into the listed categories. There is some overlap where a case has victims belonging to multiple categories—in such situations, the woman is included in each category. E.g., if a woman is convicted of killing her husband and her neighbor, she is included in both “Killing a family member” and “Killing an acquaintance (non-family)”*

	White Women	Black Women	Latinx Women	Asian Women	Native Women	Total
Killing someone known to the woman	24	8	6	2	1	41
Killing a family member	16	4	5	1	1	27
Killing intimate partner	6	1	1	1	0	9
Killing non-immediate family member	2	0	1	0	1	4
Killing an acquaintance (non-family)	11	5	1	1	1	19
Killing a stranger	4	3	0	0	0	7

**Table 3.2: Crimes of conviction involving children**

	White Women	Black Women	Latinx Women	Asian Women	Native Women	Total
Killing a child	12	4	5	1	0	22
Killing a child in her care	8	3	4	1	0	16
Killing her own child	7	3	3	1	0	14

**Table 3.3: Crimes of conviction and co-defendants**

## GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

*Note: some women had both male and female co-defendants so there is overlap between the two middle columns.*

	Women with a co- defendant	Women with at least one male co- defendant	Women with at least one female co- defendant	Women with no co- defendant
Killing someone known to the woman	25	23	5	16
Killing a family member	15	14	2	12
Killing an intimate partner	4	3	1	5
Killing a child	13	13	1	9
Killing a stranger	6	6	0	1

**Table 4.1: Gender and race of victims**

*Note: the race refers to the number of cases where there was at least one victim of that race. In cases with multiple victims, the victims may have different racial profiles so may appear across more than one column of the table.*

		At least one female victim	Just female victim(s)	Male and female victim(s)	Just male victim(s)
Number of cases		30	23	7	18
Race of victim	W	19	13	6	12
	B	5	5	0	1
	L	6	4	2	5
	A	2	1	1	1
	N	0	0	1	0

**Table 4.2: Victim gender with crimes of conviction**

*As above, the numbers refer to the number of cases with the corresponding victim profile.*

	Just female victim(s)	Just male victim(s)	Male and female victim(s)
Family member victims (all family)	8	16	3

# GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

Intimate partners	0	9	0
Child victims (all children)	10	9	3
Child in the defendant's care	6	9	1
Defendant's own child	5	8	1

**Table 4.3: Victim race with crimes of conviction**

	White	Black	Latinx	Asian	Native
Intimate partners	7	1	1	0	0
Child victims (all children)	14	2	6	2	0
Child in the defendant's care	9	2	5	1	0
Defendant's own child	9	2	3	1	0
Strangers	6	0	2	1	0

**Table 4.4: Race of victim and defendant**

	Race of defendant					
		W	B	L	A	N
Race of victim	W	22	6	1	1	1
	B	2	4	0	0	0
	L	4	2	5	0	0
	A	0	1	0	2	0
	N	0	0	0	0	1

**Table 4.5: Race of victim and defendant in cases where victim is a child in defendant's care**

	Race of defendant					
		W	B	L	A	N
Race of victim	W	7	1	0	1	0
	B	0	2	0	0	0
	L	1	0	4	0	0
	A	0	0	0	1	0

GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

	N	0	0	0	0	0
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**Table 4.6: Number of victims**

		One victim	More than one victim	Two victims	Three victims	Four victims	Six victims
Number of cases		33	15	8	5	1	1
Race of defendant	W	20	8	5	2	1	0
	B	8	3	2	1	0	0
	L	5	1	0	1	0	0
	A	0	2	1	1	0	0
	N	0	1	0	0	0	1

**Table 4.7: Relationship to victim in single victim cases**

	Stranger	Family member	Intimate partner	Own child	Non-family acquaintances
Number of cases	3	20	7	9	10

**Table 4.8: Co-defendants in single victim cases**

	Had a co-defendant	At least one male co-defendant	At least one female co-defendant	Solely male co-defendant	No co-defendant
Number of cases	23	21	2	19	10

**Table 4.9: Relationship to victim in multiple victim cases**

	Stranger	Family member	Intimate partner	Own child	Non-family acquaintances
Number of cases	4	7	2	5	4

**Table 4.10: Co-defendants in multiple victim cases**

GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

	Had a co-defendant	At least one male co-defendant	At least one female co-defendant	Solely male co-defendant	No co-defendant
Number of cases	8	8	1	7	7

**Table 5.1: Aggravating factors**

Group theme	Category	Number of cases	Number of cases with male co-defendant
Motive	Financial gain	12	6
Motive	Interfere with prosecution/arrest	3	3
Victim	Child	5	3
Victim	Old or disabled	1	1
Victim	Officer	1	1
Manner	Torture	6	6
Manner	HAC	14	8
Manner	Mayhem	2	2
Multiple	Multiple murders	9	3
Multiple	Harm to multiple people	1	1
Crime	Robbery or burglary	13	11
Crime	Kidnapping	8	6
Crime	Rape	2	2
Weapon	Gun	1	1
Weapon	Deadly weapon	2	2
Weapon	Poison	1	0



# GENDER MATTERS: WOMEN ON DEATH ROW IN THE UNITED STATES

Weapon	Arson	1	0
-	Previous serious offense	3	3
-	Premeditated	9	5
-	Continuing threat to society	2	1

**Table 6.1: Number of women and co-defendants**

*Note: The one Native American woman in our dataset did not have a co-defendant.*

	White Women	Black Women	Latinx Women	Asian Women
Women with co-defendants	19	8	2	1
Women with multiple co-defendants	8	3	0	0
Women with at least one male co-defendant	19	6	2	1
Women with at least one female co-defendant	3	2	0	0
Women with at least one co-defendant facing death penalty	11	4	2	0
Women with abusive co-defendant	9	1	2	0

**Table 6.2: Relationship with co-defendants**

*Note: Because some women had more than one co-defendant, the numbers below may reflect more than one category of co-defendants per woman.*

	White Women	Black Women	Latinx Women	Asian Women
Women with an intimate partner co-defendant	14	3	2	0
Women with a co-defendant who is their child	1	2	0	0
Women with familial co-defendant (not parent-child)	2	1	0	0
Women with acquaintance co-defendant	9	4	0	1