

## GENDER, VIOLENCE, AND THE DEATH PENALTY

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## INTRODUCTION

For centuries, women facing capital punishment have been caricatured as “black widows,”<sup>1</sup> “witches,”<sup>2</sup> and “monsters.”<sup>3</sup> The sensationalist media coverage that often accompanies their trials and executions obscures the complexity of their lives and the experiences that led to their arrest and prosecution. At the same time, because the number of women facing the death penalty around the world is relatively small, their pathways to incarceration and experiences in the legal system have received far less attention than those of men.<sup>4</sup>

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1. MARY WELEK ATWELL, *WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT* 110 (2nd ed. 2014) (describing the case of Betty Lou Beets).

2. Around the world, hundreds of thousands of women were executed for “witchcraft” from the 1400s through the 1600s. DAVID BAKER, *WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY* 68 (2015). Even beyond the 1600s, the cultural stigma of labeling women as “witches” continues—as recently as 2020, a woman facing the death penalty in Nebraska was called “the Iowa witch” in news coverage of her trial. Alex Lang, *Iowa “Witch,” 26, Got Sexual Pleasure from Killing and Torture, Prosecutors Say at Her Murder Trial*, KNEWZ (Sept. 30, 2020), <https://knewz.com/bailey-boswell-loofe-murder/>.

3. See ATWELL, *supra* note 1, at 181 (describing the case of Aileen Wuornos).

4. In 2004, the ACLU concluded that “[n]early all” scholarship on the application of the death penalty had focused on men. AM. C. L. UNION, *THE FORGOTTEN POPULATION: A LOOK AT DEATH ROW IN THE UNITED STATES THROUGH THE EXPERIENCES OF WOMEN* 1 (Dec. 2004), <https://www.aclu.org/report/forgotten-population-look-death-row-united-states-through-experiences-women>. Since then, several authors have conducted case studies or surveys of women sentenced to death in the United States, most of which focus primarily on the cases of women post-execution. See, e.g., 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 (2022); Jessica Sutton, John Mills, Jennifer Merrigan & Kristin Swain, *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced*

This article is the first in a series that will systematically explore how gender has affected the criminal proceedings of women currently on death row. For this inaugural article, we have undertaken the first—and, to our knowledge, only<sup>5</sup>—comprehensive analysis of gender-based violence (“GBV”) in the lives of all women currently on death row, examining the prevalence of GBV and how it has shaped the lives and affected the criminal prosecutions of women facing execution. Our research reveals, for the first time, that almost every woman on death row in the United States has experienced GBV. Indeed, the great majority have experienced more than one incident of GBV in their lifetime.<sup>6</sup> Our findings align with previous studies demonstrating

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*Women and LGBTQ Prisoners*, 95 ST. JOHN’S L. REV. 1053 (2021); BAKER, *supra* note 2; ATWELL, *supra* note 1; Victor Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L. J. 101 (2006); 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); 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).

5. While several scholars have examined the relevance of gender in women’s cases through historical surveys or case studies (*see supra* note 4), we have not found any studies conducting a systematic analysis of the role of gender-based violence in the lives of all women currently under sentence of death. Scholars such as Victor Streib and Elizabeth Rapaport have also explored why few women are sentenced to death as compared to men. *See, e.g.*, Victor Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO STATE L.J. 433 (2002); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC’Y REV. 367 (1991) [hereinafter Rapaport, *Gender Discrimination*]. Rapaport’s research in particular shattered the myth that the low numbers were attributable to the “chivalrous” treatment women allegedly experienced in the criminal legal system. *See* Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21<sup>st</sup> Century*, 26 OHIO N. U. L. REV. 581, 583 (2000) (“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, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 508–09 (1990) (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”). The focus of our research is different. Rather than explaining why women are sentenced to death at lower rates than men, we seek to shed light on women’s experiences prior to and during their capital prosecutions.

6. As explained in Part V, our research reveals that at least forty-six of the forty-eight people on death row who presented as women at trial have experienced GBV. Of these forty-six women, forty-one experienced more than one incident of gender-based violence before their incarceration.

that women's pathways to incarceration are paved with physical, sexual, and psychological abuse.<sup>7</sup>

Our research further shows that both in the United States and around the world, defense attorneys frequently fail to present evidence of GBV in women's capital trials. When they do introduce such evidence, they fail to fully explain the nature of their clients' victimization and the harm they have suffered as a result.<sup>8</sup> Moreover, prosecutors frequently rely on gendered tropes to discredit women's accounts of violence such as childhood sexual abuse, rape, and intimate partner violence.<sup>9</sup> Consequently, those who sentence women to die rarely comprehend the extensive trauma that the women have endured throughout their lives, and how that trauma relates to their legal and moral culpability.<sup>10</sup>

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7. As Sue Osthoff has observed, "[o]ur country's jails and prisons are filled with battered women." SUE OSTHOFF, *When Victims Become Defendants: Battered Women Charged with Crimes*, in WOMEN, CRIME, AND CRIMINAL JUSTICE: ORIGINAL FEMINIST READINGS 232 (Claire Renzetti & Lynne Goodstein eds., 2001). See also CATHY MCDANIELS-WILSON & JOANNE BELKNAP, *The Extensive Sexual Violation and Sexual Abuse Histories of Incarcerated Women*, in COMPANION READER ON VIOLENCE AGAINST WOMEN 77 (Claire M. Renzetti, Jeffrey L. Edleson & Raquel Kennedy Bergen eds., 2012); MEDA CHESNEY-LIND & LISA J. PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN & CRIME* 105–06 (2nd ed. 2004) edition. See generally Angela Browne, Brenda Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L J. L. & PSYCHIATRY 301 (1999); 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) [hereinafter Chesney-Lind, *Female Delinquency*] (citing studies finding high rates of physical and sexual abuse among girls in the juvenile justice system); Meda Chesney-Lind & Noelle Rodriguez, *Women Under Lock and Key: A View from the Inside*, 63 PRISON J. 47 (1983).

8. See *infra* Part V.

9. *Id.*

10. Our research has implications not only for women on death row, but for women incarcerated for other extreme sentences such as life imprisonment. Many of the women currently serving sentences of life without parole were originally charged with capital crimes, and either pleaded guilty or were sentenced to life after trial. See, e.g., *Ohio Mom Pleads Guilty in Execution-Style Killings of 8 Members of a Family*, ASSOC. PRESS (Sept. 11, 2021, 7:32 AM), <https://www.nbcnews.com/news/us-news/ohio-mom-pleads-guilty-execution-style-killings-8-members-family-n1278981>; *Nebraska Narrowly Avoids Sending First-Ever Woman to Death Row as 3-Judge Panel Splits on Sentence for Bailey Boswell*, DEATH PENALTY INFO. CTR.

We hope that through our research, criminal legal system actors can begin to develop much-needed knowledge and understanding of women capital defendants' experiences of GBV. In the course of our research, we have become accustomed to fielding questions about the significance of focusing on women's experiences. Our capital defense colleagues correctly point out that large numbers of men on death row have likewise experienced neglect, physical abuse, and sexual violence.<sup>11</sup> So why are women's experiences of violence deserving of specific attention when men also experience violence and trauma?

The answer to this question is twofold. First, because the great majority of scholarship relating to the death penalty focuses on the experiences of men,<sup>12</sup> women's experiences of violence have been largely silenced.<sup>13</sup> Second, it is a false equivalence to suggest that men and women experience violence in the same way. For example, girls are far more likely than boys to be victims of child sexual abuse and

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(Nov. 17, 2021), <https://deathpenaltyinfo.org/news/nebraska-narrowly-avoids-sending-first-ever-woman-to-death-row-as-3-judge-panel-splits-on-sentence-for-baily-boswell>. While other scholars have found that women facing non-capital sentences also experience high rates of GBV, much of their groundbreaking work has focused on qualitative interviews with small numbers of incarcerated women serving sentences of varying lengths. Gilfus, *supra* note 7, at 85 (finding a majority of twenty women interviewed had experienced an "overwhelming amount of violence as children and adults"); Chesney-Lind & Rodriguez, *supra* note 7, at 52 (finding that sixteen women interviewed had suffered an "astonishing amount of severe child abuse"). One large-scale study of women incarcerated in New York found that 75% experienced "severe" physical violence from intimate partners, and 70% experienced "severe" physical violence from a caretaker as children. Browne, Miller & Maguin, *supra* note 7, at 312–13. Further research is needed to determine whether women facing forms of extreme sentences beyond the death penalty suffer levels of violence comparable to those we found in the death-sentenced population.

11. See Alex Hannaford, *Letters from Death Row: The Biology of Trauma*, TEX. OBSERVER (June 27, 2015, 1:35 PM), <https://www.texasobserver.org/letters-from-death-row-childhood-trauma/> (describing the physical and emotional abuse endured by men on death row in Texas); David Lisak & Sara Beszterczey, *The Cycle of Violence: Life Histories of 43 Death Row Inmates*, 8 PSYCH. OF MEN & MASCULINITY 118 (2007) (finding that severe and multiple forms of abuse were endemic" in the cases of 43 men).

12. See, e.g., Hannaford, *supra* note 11; Lisak & Beszterczey, *supra* note 11.

13. Chesney-Lind, *Female Delinquency*, *supra* note 7, at 5 ("[T]he extensive focus on disadvantaged males in public settings has meant that girls' victimization and the relationship between that experience and girls' crime has been systematically ignored.").

their abuse tends to last longer, leading to more severe trauma.<sup>14</sup> Moreover, violence against girls and women takes place within a patriarchal society where women are subjected to discrimination and oppression.<sup>15</sup> Thus, “unlike boys, girls’ victimization and their response to that victimization is specifically shaped by their status as young women.”<sup>16</sup>

We begin this article with an explanation of our methodology in Part I. Part II offers a summary of our key findings on the omnipresent, yet minimized, experiences of GBV in the lives of women on death row. Part III contextualizes our research by providing a global overview of women on death row, and Part IV then lays out the legal and theoretical framework for our analysis of GBV. Part V examines the prevalence of GBV in the lives of women facing capital punishment in the United States and analyzes how various legal actors addressed those experiences during their capital trials. Finally, Part VI engages in a comparative analysis of the cases of women facing the death penalty around the world.

Our focus is on women’s experiences of violence in a criminal legal system created by, and designed for, men. By shedding light on these issues, we ultimately seek to reduce the risk that women are condemned to die as a result of trials that not only fail to consider their experiences, but perpetuate myths about the effects of GBV on women’s lives.

## I. METHODOLOGY

Our dataset consisted of the trial transcripts of each of the forty-eight people on death row who presented as women at trial.<sup>17</sup> We searched these transcripts for references to the defendant’s experiences of GBV, collecting information from attorneys’ legal arguments, the evidence presented to jurors, and statements from the presiding

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14. *Id.* at 21.

15. *Id.* at 23–24.

16. *Id.* at 23.

17. Of this number, forty-seven individuals are cisgender women and one is a transgender man who presented as a woman at the time of trial. This data is accurate as of January 2023.

judge.<sup>18</sup> We then organized the trial transcript data according to pre-defined categories, as we explain in detail in Part V. Where available, we also reviewed further court documents, such as state and federal post-conviction petitions, to supplement our understanding of the information gathered from trial transcripts. All of the data presented in this article is therefore gathered from information presented to courts and jurors.<sup>19</sup>

Our reliance on trial transcripts and court filings is by nature limited. A number of factors contribute to gaps in our data. First, as we explain in Part V, defense attorneys routinely fail to present evidence of women's experiences of GBV at trial. This is attributable in part to attorneys' lack of familiarity with GBV and their failure to understand its relevance to their client's case, as well as women's emotional difficulties in speaking with their legal teams about traumatic events. As a result, much of the violence that women endure remains hidden at trial.

Second, our reliance on a written record means that we fail to capture non-verbal cues, which are often critical to discerning how courtroom actors behave.<sup>20</sup> Our previous experience defending women on death row<sup>21</sup> leaves us with little doubt that that careful, comprehensive, trauma-informed interviews<sup>22</sup> would yield vast amounts of data

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18. Part V explains how we identified and categorized these experiences. *See infra* Part V.

19. In one case where no court documents were available, we interviewed a member of the woman's defense team, who informed us about the experiences of GBV that were presented to the jury.

20. *See* OSTHOFF, *supra* note 7, at 234 (“[t]he beliefs about battered women are communicated subtly *and* openly, deliberately *and* unconsciously, via innuendo, an attitude, the physical stance or the tone of voice of a defense attorney, prosecutor, judge, or witness[.]”).

21. The authors have defended fifteen women under sentence of death in the United States, Malawi, and Tanzania. They have also consulted in dozens of other death penalty cases in the United States, Cameroon, Zambia, Kenya, Pakistan, and Indonesia.

22. Many large-scale studies on the prevalence of sexual and physical violence among incarcerated women have relied on flawed questioning methods that lead women to underreport their experiences of violence. *See* Browne, Miller & Maguin, *supra* note 7, at 304–07. As Gilfus explains, many surveys “only ask a few general screening questions to determine victimization.” Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration 2*, VAWNET APPLIED

on women's experiences that are not present in the written record.<sup>23</sup> For this reason, we do not purport to present a complete picture of each woman's life prior to incarceration, nor do we believe that we have captured every incident of GBV in their lives. Indeed, we are confident that women on death row have experienced more violence than our data shows, and that further research would continue to expose the depth and breadth of GBV in their lives.

## II. SUMMARY OF FINDINGS<sup>24</sup>

Our research shows, for the first time, that the overwhelming majority of women currently on death row in the United States were victims of severe and prolonged gender-based abuse before their incarceration. At least 96% of the women currently on death row experienced GBV before they were incarcerated. Of these women, almost 90% experienced at least one incident of sexual or physical violence, and over 80% experienced at least one form of psychological violence.

Child abuse is strikingly prevalent in the life histories of the women currently on death row—over 80% of women who experienced GBV suffered one or more forms of violence while they were under the age of eighteen. The perpetrators of all forms of GBV were mostly people they knew. At least 79% of the women who experienced GBV were abused by a family member, and 74% experienced harm at the hands of a current or former intimate partner.

For women of color, these findings are even more stark. All but one of the Black women currently on death row in the United States endured multiple and repeated forms of GBV before their incarceration; most also experienced abuse as a child. Further, every single Latina, Native, and Asian woman currently on death row experienced

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RSCH. F. 1, 2 (Dec. 2002), [https://vawnet.org/sites/default/files/assets/files/2017-08/AR\\_Incarceration.pdf](https://vawnet.org/sites/default/files/assets/files/2017-08/AR_Incarceration.pdf).

23. One large-scale study of women incarcerated in New York, which relied on carefully designed qualitative interviews, found that 75% experienced "severe" physical violence from intimate partners, and 70% experienced "severe" physical violence from a caretaker as children. Browne, Miller & Maguin, *supra* note 7, at 312–13.

24. See Part V below, for a discussion of the data analysis explaining and elaborating on these core findings.



multiple incidents of GBV, and this population almost uniformly experienced child abuse.

Our survey of global data indicates that many women sentenced to death around the world have also experienced severe gender-based violence. While we cannot estimate the prevalence of those experiences because of the scarcity of data,<sup>25</sup> case studies show that women have been sentenced to death for crimes that are intrinsically linked to their victimization at the hands of their abusers.<sup>26</sup> In many countries—particularly those with a mandatory death penalty—courts fail to account for women’s experiences of abuse when sentencing them to death.<sup>27</sup>

Our findings indicate that the inescapable and overwhelming presence of GBV in women capital defendants’ lives acts as a pathway to their death sentences. Yet by the time they are charged with capital crimes, they are no longer viewed as “victims” or “survivors.”<sup>28</sup> Instead, their experiences of violence are papered over in a system that views them solely as perpetrators. By neglecting to consider the impact of GBV, courts risk punishing women for actions that are the direct consequence of their trauma. Given the high prevalence

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25. Global studies of women facing the death penalty are scarce. The Cornell Center on the Death Penalty Worldwide (“CCDPW”) has conducted the only global study of the role of gender in capital sentencing. CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, JUDGED FOR MORE THAN HER CRIME: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY (2018) [hereinafter CCDPW, JUDGED FOR MORE THAN HER CRIME], <https://deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>. In 2021, CCDPW published a second report analyzing the cases of women facing the death penalty for drug offenses. See CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, “NO ONE BELIEVED ME:” A GLOBAL STUDY OF WOMEN FACING THE DEATH PENALTY FOR DRUG OFFENSES (2021) [hereinafter CCDPW, NO ONE BELIEVED ME], <https://deathpenaltyworldwide.org/wp-content/uploads/2021/10/No-One-Believed-Me-A-Global-Overview-of-Women-Facing-the-Death-Penalty-for-Drug-Offenses.pdf>.

26. See CCDPW, JUDGED FOR MORE THAN HER CRIME, *supra* note 25, at 11–12 (discussing the cases of Noura Hussain, Alice Nungu, and Li Yan). In 2018, the CCDPW reported that women were “sentenced to death for killing their abusers in Taiwan, Morocco, Uganda, Jordan, Malawi, Nigeria, and China.” *Id.* at 11.

27. See *infra* Part VI.

28. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75, 77 (2008) (“The battered woman who fights back simply is not a victim in the eyes of many in the legal system.”).

of GBV, it is imperative that defense lawyers, prosecutors, and judges understand the causes and effects of GBV, as well as its relevance to the crimes for which women are capital charged and sentenced.

### III. OVERVIEW OF WOMEN ON DEATH ROW

#### A. *United States*

Women continue to comprise a small fraction of those who are sentenced to death; as of January 2023, they constituted slightly more than 2% of the entire death row population.<sup>29</sup> Fifty-three women remain on death row in the United States, a number that has remained relatively constant over the last fifteen years, even as the number of men on death row has decreased.<sup>30</sup> Of these, forty-seven are cisgender women, six are transgender women, and one is a transgender man who presented as a woman at trial.<sup>31</sup> Of the forty-seven ciswomen, twenty-eight (60%) are white, ten (21%) are Black, six (13%) are Latina, two (4%) are Asian or Pacific Islander, and one (2%) is Native American. Of the transwomen, five (75%) are White and one (25%) is Black; and the transgender man is Black.<sup>32</sup>

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29. According to the Death Penalty Information Center, the total death row population as of April 1, 2022, was 2,414. *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Mar. 27, 2023).

30. See ATWELL, *supra* note 1, at xi (noting that “at the end of 2006, 58 women and more than 3,000 men resided on the death rows of the 38 states that have capital punishment”). Since 2006, eleven states have abolished the death penalty, and as of April 2022, the number of men on death row dropped to 2,414. See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Mar. 27, 2023); *Death Row*, *supra* note 29.

31. To our knowledge, these are the only openly transgender people on death row at the time of writing. We included the transgender man in our data for this article as he presented as a woman at the time of trial, thus falling within the parameters of our research.

32. We 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. 27, 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—was 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 (Ala. Crim. App. Dec. 17, 2021).

California has the highest population of death-sentenced ciswomen, at nineteen. Seven ciswomen are on death row in Texas, five in Alabama, three in Florida, two in North Carolina, and three in Arizona. Louisiana, Ohio, Oklahoma, Idaho, Pennsylvania, Georgia, Idaho, Mississippi, Tennessee, and Kentucky each have one ciswoman on death row.<sup>33</sup>

All of the women on death row in the United States were convicted of murder. Scholars have long noted that homicides committed by men and women follow different patterns:<sup>34</sup> Women are much less likely to kill, but when they do, they tend to kill people with whom they had a prior relationship.<sup>35</sup> Our data is consistent with these findings. Of the forty-seven ciswomen currently on death row, forty-one (87%) had a prior relationship with the deceased. Twenty-five (53%) were convicted of killing family members. Only six (13%) were convicted of killing a stranger, and in each of these cases, the women were prosecuted alongside male co-defendants.<sup>36</sup> This is consistent with research findings that when women commit violent crimes with male co-defendants, “they tend to be involved in more serious, ‘gender atypical’ offences.”<sup>37</sup>

In our dataset, thirty-one (66%) of the ciswomen on death row were convicted alongside co-defendants. In 90% of these cases, there were one or more male co-defendants. More than half (57%) of the male co-defendants were intimate partners. Only sixteen ciswomen (34%) had no co-defendants.

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33. Transwomen are on death row in Ohio (2), Florida (1), California (2), and North Carolina (1). There is one transman on death row in California.

34. See Rapaport, *Gender Discrimination*, *supra* note 5, at 370–71.

35. Jill Theresa Messing & John W. Heeren, *Domestic Homicide and the Death Penalty*, 4 FEMINIST CRIMINOLOGY 170, 173 (2009) (“Analysis of several works reveals that a high proportion of women (currently and historically) are sentenced to death for domestic homicide.”).

36. In at least three of those cases, the male co-defendants were violent intimate partners. See *People v. Coffman*, 96 P.3d 30, 52 (Cal. 2004); *People v. Daveggio*, 415 P.3d 717 (Cal. 2018); *People v. Thornton*, No. RIF-096679 (Cal. Super. Ct. Apr. 19, 2001).

37. Susie Hulley, *Defending ‘Co-offending’ Women: Recognising Domestic Abuse and Coercive Control in ‘Joint Enterprise’ Cases Involving Women and their Intimate Partners*, 60 HOWARD J. 580, 582 (2021). See also Sarah Becker & Jill A. McCorkel, *The Gender of Criminal Opportunity: The Impact of Male Co-offenders on Women’s Crime*, 6 FEMINIST CRIMINOLOGY 79, 99–100 (2011).

*B. Global Overview*

In 2018, the Cornell Center on the Death Penalty Worldwide published the first global report on women sentenced to death.<sup>38</sup> Although exact figures were “impossible to obtain”<sup>39</sup> because of a paucity of data, the authors of the Cornell report estimated there were at least 500 women sentenced to death around the world, representing less than 5% of the world’s death row population.<sup>40</sup> In most of the countries profiled, women constituted 1% to 6% of the death row population.<sup>41</sup> Even in Thailand, the country with the highest known ratio of women to men, women made up only 16% of prisoners condemned to death.<sup>42</sup>

Current data indicates that substantially more women are on death row. In Malaysia alone, 129 women were on death row as of late 2022.<sup>43</sup> As of late 2021, seventy-five women were sentenced to death in Egypt.<sup>44</sup> In Iran, where approximately fifteen women are executed

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38. See JUDGED FOR MORE THAN HER CRIME, *supra* note 25.

39. *Id.* at 4. Amnesty International, which publishes an annual report documenting death sentences around the world, noted in 2021 that it was only able to ascertain the numbers of women sentenced to death in six countries. AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2021 13 (2022), <https://www.amnesty.org/en/documents/act50/5418/2022/en/>.

40. We have found very little data on transgender persons who are sentenced to death around the world. In many countries, transgender persons are at risk of extreme violence and oppression. As a result, “[i]nformation about the lived realities of . . . trans and gender non-conforming persons around the world is, at best, incomplete and fragmented.” MAI SATO & CHRISTOPHER ALEXANDER, STATE-SANCTIONED KILLING OF SEXUAL MINORITIES: LOOKING BEYOND THE DEATH PENALTY 11 (2021). See also CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, ET AL., PRIMER ON TRANSGENDER PRISONERS FACING THE DEATH PENALTY, [https://worldcoalition.org/wp-content/uploads/2021/06/Trans-Rights-and-Death-Penalty-Factsheet\\_V1.0.pdf](https://worldcoalition.org/wp-content/uploads/2021/06/Trans-Rights-and-Death-Penalty-Factsheet_V1.0.pdf) (last visited Mar. 27, 2023).

41. JUDGED FOR MORE THAN HER CRIME, *supra* note 25, at 24-33.

42. FIDH, THAILAND: ANNUAL PRISON REPORT 2022 16 (2022), <https://www.fidh.org/IMG/pdf/thailande791angweb.pdf>.

43. Lucy Harry, *Foreign Women Bear the Brunt of Malaysia’s Harsh Drug Laws*, 360 (Sept. 5, 2022, 11:20 AM), <https://doi.org/10.54377/18b4-c059>.

44. THE ADVOCS. FOR HUM. RTS, EGYPT’S COMPLIANCE WITH THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: THE DEATH PENALTY 3 (2021), <https://www.theadvocatesforhumanrights.org/Res/AHR%20Egypt%20CEDAW%20DP%20.pdf> (citing data published in The Egypt

each year,<sup>45</sup> it is safe to assume that the numbers of women awaiting execution are substantially higher.<sup>46</sup> In Iraq, approximately 8,000 people were under sentence of death as of late 2021;<sup>47</sup> using a conservative estimate of 2% of the total, that amounts to at least 160 women.<sup>48</sup> Based on these numbers, together with other available data, we believe 1,000 is a conservative estimate of the number of women on death row around the world.<sup>49</sup> Many more women are in pretrial

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Death Penalty Index, a database compiled by Reprieve, the Egyptian Commission for Rights and Freedoms, and a data research center based in Cairo).

45. THE WOMEN'S COMM. OF THE NAT'L COUNCIL OF RESISTANCE OF IRAN, LIST OF WOMEN EXECUTED IN IRAN SINCE 2007 (2022), <https://women.ncr-iran.org/2022/10/10/executions-of-women/>; *Iranian women at risk as execution numbers rise*, FR. 24, (Dec. 15, 2021, 11:07 AM), <https://www.france24.com/en/live-news/20211215-iranian-women-at-risk-as-execution-numbers-rise>.

46. Once a person is sentenced to death in Iran, they may be held for “months, years, or decades” before they are executed. IRAN HUMAN RTS., *Input on “The Imposition of the Death Penalty and Its Impact” to Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 3* (2022), <https://www.ohchr.org/sites/default/files/2022-06/imposition-death-penalty-iran.pdf>.

47. AMNESTY INT'L, *supra* note 39, at 13.

48. Available reports indicate that many women on death row are charged in connection with the military campaign against the Islamic State. *See* Margaret Coker & Falih Hassan, *A Ten-Minute Trial, a Death Sentence: Iraqi Justice for Isis Suspects*, N. Y. TIMES (Apr. 17, 2018), <https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html>; Nathalie Greenfield, Note, *Prosecute or Protect? International Criminal Responsibility and the Recruitment of Isis Brides*, 54 CORNELL INT'L L. J. 291, 294 (2021).

49. CCDPW, which tracks the numbers of women on death row, is one source of data—even though CCDPW's data is incomplete. *See Database*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/database/> (last visited Mar. 27, 2023). Adding the figures in the database to numbers estimated above, we reach a total of 665 women. This figure does not include any numbers for countries with some of the largest death rows in the world, including China, Iran, Vietnam, Saudi Arabia, and Kenya.

detention on capital charges.<sup>50</sup> In Kenya alone, 597 women were detained on capital charges in late 2022.<sup>51</sup>

Estimating the number of women executed around the world is similarly difficult. Amnesty documented the executions of twenty-four women in 2021, although that is almost certainly an underestimate.<sup>52</sup> China and Iran are the world's leading executioners, but neither country publishes data on executions.<sup>53</sup> One human rights group documented sixty executions of women in Iran between 2018 and 2022,<sup>54</sup> a number that far exceeds that of other countries throughout the world.<sup>55</sup>

The crimes for which women are sentenced around the world vary, but according to the Cornell report, “[m]ost women have been sentenced to death for the crime of murder, often in relation to the killing of family members in a context of gender-based violence.”<sup>56</sup> After

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50. In the United States, for example, our data indicates that at least eighty-five women are currently charged with capital offenses. Many of these are likely to plead guilty in exchange for a lesser sentence. RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SARAGE, *IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING*, at iii (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> (noting that roughly 90% of all criminal cases never proceed to trial because of plea bargaining).

51. WORLD COAL. AGAINST THE DEATH PENALTY, *Reflecting on the Links Between the Death Penalty and Gender-Based Violence* (Nov. 25, 2022), <https://icj-kenya.org/news/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>. These women are not yet sentenced to death, and we therefore do not include them in our estimated total of death sentences. Nevertheless, the sheer number indicates that there are potentially dozens of women who were already condemned to death.

52. AMNESTY INT’L, *supra* note 39, at 10.

53. *Id.* at 13.

54. THE WOMEN’S COMM. OF THE NAT’L COUNCIL OF RESISTANCE OF IRAN, *supra* note 45. These figures seem consistent with those reported by other organizations. According to Iran Human Rights, 170 women were executed in Iran from 2010–2021. *See Iranian women at risk as execution numbers rise, supra* note 45.

55. China is the world’s leading executioner, but accurate data on executions is impossible to obtain, and we have found no data at all on the numbers of women executed in recent years. *See* AMNESTY INT’L, *supra* note 39, at 6.

56. CCDPW, *JUDGED FOR MORE THAN HER CRIME, supra* note 25, at 4; EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS, *WORLD DAY AGAINST THE DEATH PENALTY: WOMEN SENTENCED TO DEATH: AN INVISIBLE REALITY* 8 (2021), [https://eipr.org/sites/default/files/reports/pdf/world\\_day\\_against\\_the\\_death\\_penalty\\_0.pdf](https://eipr.org/sites/default/files/reports/pdf/world_day_against_the_death_penalty_0.pdf) (noting that most women who committed murder were accused of killing first-degree relatives such as husbands) [hereinafter EIPR, *WOMEN SENTENCED TO DEATH*].

murder, drug offenses are the most common reason why women are sentenced to death.<sup>57</sup> Other crimes for which women are sentenced to death include terrorism-related offenses, prostitution, brothel keeping, blasphemy, kidnapping, armed robbery, witchcraft, and offenses against sexual morality.<sup>58</sup>

Globally, only scattered data exists regarding the number of women on death row prosecuted alone or alongside male defendants. The Cornell Center on the Death Penalty Worldwide concluded that women sentenced to death for drug offenses often transported drugs “under the influence or pressure of a male partner, who typically suffered fewer or no criminal consequences.”<sup>59</sup>

#### IV. GENDER-BASED VIOLENCE: THEORETICAL AND LEGAL FRAMEWORKS

##### A. *The International Legal Framework*

Gender-based violence (GBV) is ubiquitous in all cultures. It affects women of all racial, ethnic, and social backgrounds, in all parts of the world. 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.”<sup>60</sup> We adopt the UN’s definition of GBV while further recognizing that GBV also includes violence directed against transgender and gender nonconforming persons on the basis of their gender identity and expression.<sup>61</sup>

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57. CCDPW, JUDGED FOR MORE THAN HER CRIME, *supra* note 25, at 12.

58. *Id.* at 13–14.

59. CCDPW, NO ONE BELIEVED ME, *supra* note 25, at 6.

60. 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) [hereinafter CEDAW, GR 35].

61. The Council of Europe is one of the few international bodies that expressly recognizes that GBV affects gender minorities outside of the male/female gender binary and includes violence against transgender and gender nonconforming persons in their definition of GBV. See Council of Europe, Explanatory Notes to the Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS No. 210 (Jan. 8, 2014); *What is Gender-Based Violence?* COUNCIL OF

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.<sup>62</sup> 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.<sup>63</sup> Recognizing these social and political forces, the Inter-American Commission on Human Rights has explained that GBV is "one of the clearest manifestations of patriarchal culture in which a woman's body and her sexuality are not hers to control."<sup>64</sup>

Domestic, regional, and international tribunals thus recognize GBV as "one of the most extreme and pervasive forms of [gender-based] discrimination."<sup>65</sup> A woman's right to be free from GBV is so

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EUROPE, <https://www.coe.int/en/web/gender-matters/what-is-gender-based-violence> (last visited Mar. 27, 2023).

62. See *What is Gender-Based Violence?*, *supra* note 61.

63. See *id.* ("Gender-based violence is based on an imbalance of power and is carried out with the intention to humiliate and make a person or group of people . . . subordinate."). In this way, as we note in the Introduction, "girls' victimization and their response to that victimization is specifically shaped by their status as young women." Chesney-Lind, *Female Delinquency*, *supra* note 7, at 21.

64. Inter-Am. Comm'n H.R., *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OEA/Ser.L/V/II., Doc. 63, at xiv (2011), <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf>.

65. Jessica Lenahan (Gonzales) et al. v. U.S., Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 110 (2011). International human rights law likewise enshrines women, transgender, and gender nonconforming people's human rights to live free from discrimination and harm on the basis of their gender. See U.N. Convention on the Elimination of Discrimination Against Women art. 5, 6, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights art. 3, Dec. 19, 1966, 999 U.N.T.S. 171 (protecting women's right to equality, which gender-based violence threatens); International Covenant on Civil and Political Rights, General Comment No. 28 art. 3 (The Equality of Rights Between Men and Women), ¶¶ 8, 11, 22, March 29, 2000, U.N. Doc. HRI/GEN/1/Rev.9; *Opuz v. Turkey*, Eur. Ct. H.R., App. No. 33401/02, ¶¶ 96, 145, 184–89 (2009); CEDAW, GR 35, *supra* note 60, ¶ 1; U.N. Comm. on Human Rights, Commission on Human Rights Res. 2003/45: Elimination of Violence against Women, E/CN.4/RES/2003/45 (Apr. 23, 2003); Assembly of the African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) art. 3, July 11, 2003; African Charter on the Rights and Welfare of the Child art. 21, Nov.



widely accepted among the international community that it has become a norm of customary international law.<sup>66</sup>

Violations of this core human right have devastating consequences for women's physical health, mental health, and socioeconomic prospects.<sup>67</sup> As discussed in Part V, women who experience violence are at an increased risk of mental health challenges such as post-traumatic stress disorder, anxiety, and depression, are more likely to engage in substance abuse, and are more likely to retreat from public life, exacerbating their social isolation and marginalization.<sup>68</sup> The costs and consequences of GBV can last for generations, as children who witness or suffer from GBV are more likely to become both victims and abusers later in their lives.<sup>69</sup>

Criminalized women—especially criminalized women of color—are routinely left out of high-level discussions on the consequences of GBV.<sup>70</sup> Yet their experiences of abuse can also lead women to vio-

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29, 1999, OAU Doc. CAB/LEG/24.9/49 (prohibiting child marriage); UN Convention on the Rights of the Child art. 19, 34, Nov. 20, 1989, G.A. Res. 44/25 (prohibiting violence against children and protecting children from sexual abuse).

66. See CEDAW, GR 35, *supra* note 60, ¶ 2.

67. See *Gender-Based Violence, Health and the Role of the Health Sector*, WORLD BANK 3 (2009), <http://web.worldbank.org/archive/website01213/WEB/IMAGES/AAGGBVHE.PDF>; Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 THE LANCET 1331, 1331 (2002).

68. See Robin Mason & Susan E. O'Rinn, *Co-occurring Intimate Partner Violence, Mental Health, and Substance Use Problems: A Scoping Review*, 7 GLOBAL HEALTH ACTION 1, 13 (2014); Susan Lagdon et al., *Adult Experience of Mental Health Outcomes as a Result of Intimate Partner Violence Victimization: A Systematic Review*, 5 EUROPEAN J. PSYCHOTRAUMATOLOGY 1, 2–3. See generally CLAUDIA GARCIA-MORENO ET AL., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN (2005).

69. *Consequences and Costs*, UN WOMEN (Oct. 31, 2010), <https://www.endvawnow.org/en/articles/301-consequences-and-costs-.html>.

70. See Lizzy Davis, *Women in Prison Falling Through Gaps in Feminist Funding, Report Finds*, THE GUARDIAN (Dec. 9, 2021, 1:30PM EST), <https://www.theguardian.com/global-development/2021/dec/09/women-in-prison-ignored-by-feminist-funders-that-find-them-less-marketable-says-ngo-head> (noting that feminist organizations fail to support incarcerated women); Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), <https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non> (noting that Black women and girls are incarcerated for their responses to GBV because they are not seen as victims). Incarcerated women are also commonly left out of criminal justice reform

lence. The vast majority of women who use violence do so to defend themselves or their children, or to prevent an attack upon themselves or their children.<sup>71</sup> But even when women act violently against someone who is not their abuser, their acts are often attributable to the violence and trauma they previously experienced.<sup>72</sup> When such acts of violence result in a woman's incarceration, experiencing GBV becomes a pipeline to prison.

*B. The Intersection of Gender-Based Violence  
and Marginalized Identities*

Women's different marginalized identities influence their likelihood of experiencing GBV and their access to resources and treatment in the aftermath of abuse.<sup>73</sup> Race, class, sexual orientation, gender identity and expression, and other factors subject women to multiple and intersecting forms of discrimination.<sup>74</sup>

Women belonging to racial and ethnic minorities are victimized at higher rates than white women. In the United States, for example, the prevalence of gender-based violence is highest among women of color: Approximately 44% of Black women and 46% of Native American

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efforts, often due to their comparatively small numbers. See Ronnie K. Stephens, *Incarcerated Women Get Left Out of Most Justice Reform Conversations*, INTERROGATING JUST. (Apr. 28, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/incarcerated-women-justice-reform/>. As a result, few advocacy groups support women who face extreme sentences such as death and life without parole.

71. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 64 (2012) [hereinafter GOODMARK, A TROUBLED MARRIAGE].

72. Shannon M. Lynch et al., *Women's Pathways to Jail: The Roles and Intersections of Serious Mental Illness and Trauma*, Bureau of Justice Assistance, U.S. DEP'T JUST., Sept. 2012, at vi, [https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women\\_Pathways\\_to\\_Jail.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women_Pathways_to_Jail.pdf).

73. The CEDAW Committee recognizes that intersectional discrimination both "increases the risk of violence and heightens the adverse consequences of violence when it occurs." Comm. on the Elimination of Discrimination against Women, Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, at 48, U.N. Doc. CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015).

74. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150–52 (1989).

women will endure sexual abuse in their lifetimes, compared to 35% of white women.<sup>75</sup> Black women are particularly vulnerable to violence, especially where that violence comes from an intimate partner.<sup>76</sup> For example, Black women are three times more likely to die at the hands of a current or former partner than women of other racial identities.<sup>77</sup> When we also consider that Black women have less access to anti-violence intervention programs,<sup>78</sup> are more likely to distrust the police, and are consequently less able to seek help from state and nonprofit resources to protect them from harm,<sup>79</sup> a dangerous picture emerges. As the National Black Women's Justice Institute explains, "Black women are arrested and incarcerated more often because Black women's survival strategies are criminalized, including self-defense or being forced to engage in illegal activities by intimate partners or others who have harmed them physically and emotionally."<sup>80</sup>

State actors also respond with greater hostility to women of color once they are involved in the criminal legal system. Women are routinely disbelieved when recounting experiences of gender-based violence, and marginalized racial identities combine with gender to compound the discrimination that women of color receive from law en-

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75. Michele R. Decker et al., "You Do Not Think of Me as A Human Being": Race and Gender Inequities Intersect to Discourage Police Reporting of Violence Against Women, 96 J. URB. HEALTH 772, 773 (2019).

76. *When Men Murder Women: An Analysis of 2018 Homicide Data*, VIOLENCE POL'Y CTR. 3 (Sept. 2020), <https://vpc.org/studies/wmmw2020.pdf>.

77. *See id.*

78. Roberta K. Lee et al., *Intimate Partner Violence and Women of Color: A Call for Innovations*, 92 AM. J. PUB. HEALTH 530, 532 (Apr. 2002); Robert L. Hampton et al., *Evaluating Domestic Violence Interventions for Black Women*, 16 J. AGGRESSION, MALTREATMENT & TRAUMA 330–53 (2008); Linda L. Ammons, *Mules Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1019 (1995).

79. Trevariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women*, NAT'L BLACK WOMEN'S JUST. INST. (Sept. 23, 2021), <https://www.nbwji.org/post/extreme-sentences-disproportionately-impact-and-harm-black-women>.

80. *See id.*

forcement and criminal legal system actors.<sup>81</sup> These authorities are more likely to treat Black women's crimes as "violent," compared to women of other racial groups.<sup>82</sup> They are less likely to view Black survivors as sympathetic or in need of help.<sup>83</sup> Black girls are routinely "adultified," meaning that society responds to and treats Black girls as though they are adults.<sup>84</sup> As a result, Black girls are perceived as needing less protection and nurturing than white girls, are seen as less innocent than their white peers, and are therefore criminalized for behaviors for which white girls, in particular, would receive leniency.<sup>85</sup> All of these factors increase the likelihood that Black girls and women receive criminal convictions, which consequently increases their risk of receiving harsher sentences than comparable women in other racial groups.<sup>86</sup>

Scholarship consistently shows that race is a critical factor affecting pathways to incarceration for people of color.<sup>87</sup> It is clear that in

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81. See Ammons, *supra* note 78, at 1019; ANDREA RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017) (examining how women of color experience race-based discrimination from the police); NAT'L ORG. OF WOMEN, *BLACK WOMEN AND SEXUAL VIOLENCE 2* (2018), <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> (explaining that Black women are less likely to be believed when reporting sexual violence); Carrie Bettinger-Lopez et al., *Identifying and Preventing Gender and Intersectional Bias in Law Enforcement Responses to Domestic and Sexual Violence*, VAWNET (Jan. 14, 2022), <https://vawnet.org/sc/identifying-and-preventing-gender-and-intersectional-bias-law-enforcement-responses-domestic-and> (noting that race-based discrimination is ingrained in the criminal legal system). See also Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 72–89 (2013) (highlighting the discrimination that transgender women face from the police and court systems) [hereinafter Goodmark, *Transgender People*].

82. Dennis Schrantz & Jerry McElroy, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, SENT'G PROJECT 1, 18 (Oct. 2000).

83. NAT'L ORG. OF WOMEN, *supra* note 81, at 2.

84. Rebecca Epstein, Jamilia J. Blake & Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, GEO. L. CTR. ON POVERTY & INEQ. 1, 4 (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>.

85. See *id.* at 1, 8.

86. See Mason, *supra* note 79.

87. See MICHELLE ALEXANDER, *THE NEW JIM CROW : MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 105–122 (2012) (explaining the role of race in the

the cases of women of color, however, race- and gender-based discrimination are inseparable. Each amplifies the effects of the other to place women of color at a heightened risk of harm, a heightened risk that state authorities will minimize and disbelieve this harm, and a heightened risk of being criminalized for their response to harm.<sup>88</sup> The result is a system that underprotects Black women as victims and overpenalizes them as perpetrators.

Migrant women are another group at a heightened risk of harm. Linguistic barriers, financial precarity, and lack of familiarity with a country's structures of support can leave foreign national women vulnerable to abuse.<sup>89</sup> Undocumented women and women who are reliant on a partner for their own or their children's immigration status are trapped in power structures that increase their risks of experiencing abuse—particularly socioeconomic abuse in the form of control over their finances and right to work, and psychological harm such as threats of being reported to immigration authorities.<sup>90</sup> Moreover, immigration status can lead women to be reluctant to seek support from external organizations for fear of jeopardizing their right to remain in

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criminal legal system's treatment of people of color); Williams C. Itheme, *Assessing the Roles of Race and Profit in the Mass Incarceration of Black People in America*, 16 AGE HUM. RTS. J. 148, 159–170 (2021) (tracing the links between racial discrimination and mass incarceration in the United States); Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> (tracking racial disparities in policing and prison systems).

88. See Decker et al., *supra* note 75, at 773.

89. See CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, DEFENDING WOMEN AND TRANSGENDER PERSONS FACING EXTREME SENTENCES: A PRACTICAL GUIDE 24, 52, (2021), <https://deathpenaltyworldwide.org/wp-content/uploads/2021/10/Defending-Women-and-Transgender-Persons-Facing-Extreme-Sentences-3.pdf>. [hereinafter, DEFENDING WOMEN].

90. See Catalina Amuerdo-Dorantes & Esther Arenas-Arroyo, *Police Trust and Domestic Violence: Evidence from Immigration Policies*, IZA INST. LAB. ECON. DP No. 12721, 2, 2–3 (2019); *Gender-Based Violence and Exploitation*, INT'L ORG. FOR MIGRATION, <https://emm.iom.int/handbooks/gender-and-migration/gender-based-violence-and-exploitation> (last visited Mar. 6, 2023); Nathalie Greenfield, *Silent Suffering: When Domestic Violence and Immigration Status Intersect*, THE F WORD (Sept. 20, 2017), <https://thefword.org.uk/2017/09/silent-suffering-when-domestic-violence-and-immigration-status-intersect/>.

the country.<sup>91</sup> Again, the result is a population at extreme risk of harm and with little ability to seek support.

Other marginalized identities also affect women's vulnerability to GBV. Women with disabilities, for example, are subjected to high rates of sexual violence, and women with intellectual and developmental disabilities are particularly vulnerable to abuse.<sup>92</sup> LGBTQ+ identified women, particularly transgender women, face some of the highest rates of violence worldwide.<sup>93</sup> Low-income women are also more likely to experience GBV than more affluent women.<sup>94</sup> Global economic conditions affect violence against all of these groups, as rates of GBV increase during times of economic or social hardship.<sup>95</sup> This phenomenon has played out most recently during the initial outbreak of the COVID-19 pandemic: As cities and countries went into lockdown, rates of gender-based violence increased and women became trapped in dangerous homes with their abusers.<sup>96</sup> Where marginalized women are at increased risk of GBV, they are also more likely to experience the devastating consequences of gendered abuse—including criminalization and incarceration.

#### V. GENDER-BASED VIOLENCE IN WOMEN'S CAPITAL CASES IN THE UNITED STATES

This article represents the first comprehensive examination of gender-based violence in the lives of the forty-eight women currently

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91. See Amuerdo-Dorantes & Arenas-Arroyo, *supra* note 90, at 1–2.

92. UN General Assembly, Convention on the Rights of Persons with Disabilities: General Comment No. 3 (2016) on Women and Girls with Disabilities ¶¶ 3–6, U.N. doc. CRPD/C/GC/3 (Nov. 25, 2016).

93. *TMM Update Trans Day of Remembrance 2020*, TRANSGENDER EUROPE AND CARSTEN BALZER (Nov. 11, 2020), <https://transrespect.org/en/tmm-update-tdor-2020/>.

94. GOODMARK, A TROUBLED MARRIAGE, *supra* note 71, at 73.

95. Deborah Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, *BYU L. REV.* 387, 406 (2007).

96. See UN WOMEN & WOMEN COUNT, MEASURING THE SHADOW PANDEMIC: VIOLENCE AGAINST WOMEN DURING COVID-19, at 3–5 (2021) <https://data.unwomen.org/sites/default/files/documents/Publications/Measuring-shadow-pandemic.pdf>; Patrick Bashizi B. Murhula et al., *The COVID-19 Pandemic and Its Impact on Gender-Based Violence: A Global Review and Analysis*, 16 *INT'L J. CRIM. JUST. SCI.* 84, 93 (2021).

on death row.<sup>97</sup> Our analysis seeks to understand the range of women's experiences of GBV, the evidence presented about these experiences, and how that evidence was received in court. We do not seek to weigh the strength of evidence regarding GBV or draw conclusions as to any woman's legal or moral culpability. Rather, we aim to understand the information that was presented to the judges and juries making life or death decisions about these forty-eight women.<sup>98</sup>

*A. The Prevalence of Gender-Based Violence in the Cases of Women Currently Sentenced to Death*

*1. Classifying Data*

We reviewed each trial transcript for discrete incidents of GBV and we termed each incident, or series of incidents, an "event" of gender-based violence. An event therefore refers to both a single experience of violence, such as a rape, and continuous experiences of violence, such as regular beatings throughout childhood.<sup>99</sup> For each event, we gathered data on the type of GBV it represents, the frequency with which the event happened in the woman's life, the woman's age at the time of the event, and the person who harmed her. We explain each of these classifications below.

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97. As noted in Part I, forty-eight people presented as women at the time of their trial, including one transgender man. We routinely refer to this group as "women" throughout this section, as this is how they presented during trial, but we acknowledge that one person no longer identifies as such.

98. As noted in Part I, the information that we can glean from trial transcripts necessarily understates the range and severity of women's experiences of GBV.

99. We adopted such a definition of "events" because of the way in which information about GBV is presented in women's trial transcripts. While sometimes it was possible to identify discrete episodes of violence, our review of trial transcripts revealed that experiences of GBV were frequently referred to in continuous terms. Examples include a witness who testified that a woman's partner routinely raped her without giving any indication as to how many times such violence occurred in the woman's life, or a defense attorney who argued in their closing statement that their client was routinely beaten throughout her childhood. In these cases, it was not possible for us to track discrete incidents of violence and we therefore termed these continuous experiences of violence "events." As we explain below, it is therefore important to understand our presentation of "events" as an undercount that reflects only the floor of women's experiences of GBV.

*a. Types of GBV*

Gender-based violence includes many forms of abuse that harm women physically, sexually, psychologically, and economically. We looked for abuse across all types of GBV during our trial transcript review and classified events according to the type of harm a woman experienced.

Our categories were informed by extensive review of the standards and nomenclature adopted by intergovernmental organizations, anti-violence organizations, and scholars. These groups routinely differentiate between different forms of GBV because, contrary to the common assumption that all violence is physical, gendered abuse exists across a spectrum of harm.<sup>100</sup> The Council of Europe's Istanbul Convention, one of the preeminent legal instruments protecting women's human right to be free from GBV, mentions ten different forms of violence, only one of which is physical violence,<sup>101</sup> and the Council of Europe then classifies these ten forms of violence into groups, depending on the type of harm inflicted.<sup>102</sup> Although different organiza-

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100. See CEDAW, GR 35, *supra* note 60, ¶ 14; GENEVA: INTER-AGENCY WORKING GROUP ON REPRODUCTIVE HEALTH IN CRISES, *Chapter 8: Gender-Based Violence*, in INTER-AGENCY FIELD MANUAL ON REPRODUCTIVE HEALTH IN HUMANITARIAN SETTINGS: REVISION FOR FIELD REVIEW (2010), [https://www.ncbi.nlm.nih.gov/books/NBK305149/pdf/Bookshelf\\_NBK305149.pdf](https://www.ncbi.nlm.nih.gov/books/NBK305149/pdf/Bookshelf_NBK305149.pdf); Lilia Giugni et al., *Can Education Stop Abuse?* GENPOL: GENDER & POL'Y INSIGHTS, 12–15 (2018), [https://gen-pol.org/wp-content/uploads/2018/03/GenPol-policy-paper\\_Can-Education-Stop-Abuse.pdf](https://gen-pol.org/wp-content/uploads/2018/03/GenPol-policy-paper_Can-Education-Stop-Abuse.pdf).

101. *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, COUNCIL OF EUROPE (2011), <https://rm.coe.int/168008482e> (last visited Mar. 28, 2023). The forms of GBV specifically prohibited by the Convention are: psychological violence (Art. 33), stalking (Art. 34), physical violence (Art. 35), forced marriages (Art. 37), sexual violence, including rape (Art. 36), female genital mutilation (Art. 38), forced abortion and forced sterilization (Art. 39), sexual harassment (Art. 40), aiding or abetting and attempt (Art. 41), unacceptable justifications for crimes, including crimes committed in the name of so-called honor (Art. 42).

102. See *Types of Gender-Based Violence*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/gender-matters/types-of-gender-based-violence> (last visited Mar. 28, 2023).



tions adopt different classifications, all recognize the distinct characteristics of sexual, physical, psychological, and economic harm.<sup>103</sup>

Following this approach, we reviewed trial transcripts for the following types of GBV:

- Sexual abuse:
  - This includes all forms of unwanted activity of a sexual nature.<sup>104</sup> Examples of such abuse include rape (vaginal, oral, and anal), molestation, and forced nudity.
- Physical abuse:
  - This includes violence of a physical nature.<sup>105</sup> Examples include beating, whipping, and choking.
- Psychological abuse:
  - This is an expansive category that refers to forms of abuse that leave mental and emotional scars on a woman.<sup>106</sup> Examples include receiving death threats, being isolated from friends and family, and witnessing physical violence between parents.
- Socioeconomic abuse:
  - This includes forms of abuse that have a financial impact on women.<sup>107</sup> Examples include situations in which a woman has no control over her finances because a partner controls her income, withholds financial support, or restricts her ability to work. We also included homelessness as a result of escaping other forms of violence in this category, as well as living in unstable housing.

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103. See *id.*; CEDAW, GR 35, *supra* note 60, ¶ 14; *Forms of Gender-Based Violence*, East African Community, <https://www.eac.int/gender/gbv/forms-of-gbv>, (last visited Mar. 28, 2023); Giugni et al., *supra* note 100, at 12–15.

104. See National Sexual Violence Resource Center, *What is Sexual Violence: Fact Sheet*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER (2010), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Factsheet\\_What-is-sexual-violence\\_1.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_What-is-sexual-violence_1.pdf).

105. See *Physical Violence*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/gender-matters/physical-violence> (last visited Mar. 28, 2023).

106. See *Physiological Violence*, COUNCIL OF EUR., <https://www.coe.int/en/web/gender-matters/psychological-violence> (last visited Mar. 28, 2023).

107. See *Socioeconomic Violence*, COUNCIL OF EUR., <https://www.coe.int/en/web/gender-matters/socio-economic-violence> (last visited Mar. 28, 2023).

- Other forms of abuse:
  - Here we included events that sit outside of the previous four categories, such as child marriage.<sup>108</sup>

Some forms of violence fall into multiple categories. For example, repeated beatings can have both physical and psychological effects on a woman. In such instances, we classified discrete events by one form of violence only—the form of violence that the event most clearly manifests—to avoid duplication in our findings. Beatings, therefore, are always classified as physical abuse. In this way, there is further reason to understand our findings as a baseline in describing experiences of violence among women on death row.

Advocates' collective understanding of these forms of violence is still developing. Psychological abuse, in particular, is a rapidly evolving field of research.<sup>109</sup> The concept of coercive control encapsulates psychological abuse.<sup>110</sup> Coercive control refers to the constellation of behaviors an abuser uses to restrain his partner's liberty and monitor her behavior, including non-physical means such as intimidation, surveillance, degradation, shaming, and isolation.<sup>111</sup> This concept recognizes that structures of power and control are at the root of GBV. Women who endure abuse routinely report that non-physical forms of abuse are the most effective forms of control and leave the longest-lasting scars.<sup>112</sup> Many studies from the medical and social science fields now document how verbal abuse, isolation, and living in fear of harm have nefarious effects on women's psychological health in relat-

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108. See *Types of Gender-Based Violence*, *supra* note 102.

109. Sarah Dokkedahl et al., *The Psychological Subtype of Intimate Partner Violence and Its Effect on Mental Health: Protocol for a Systematic Review and Meta-analysis*, 8 SYSTEMATIC REVIEWS 198, 198–99 (2019); GOODMARK, A TROUBLED MARRIAGE, *supra* note 71, at 199 (explaining the myriad harms that make up intimate partner abuse, including emotional, psychological, economic, spiritual, and reproductive harm).

110. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 977 (1995) (“the coercive control framework shifts the emphasis to restrictions on ‘liberty,’ highlighting a class of harms that extends beyond psychological or physical suffering to fundamental human rights”).

111. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 71, at 35–36.

112. See Dokkedahl et al., *supra* note 109, at 198–99.

ed ways to the harm caused by physical and sexual forms of violence.<sup>113</sup>

Courts' understanding of these concepts is also evolving. As legal actors, including judges, develop a greater understanding of how control and power are critical motivating factors behind GBV, they increasingly recognize non-physical and non-sexual forms of abuse that assert power and control over women's lives.<sup>114</sup> The concept of coercive control, for example, has recently seen courtroom recognition. In a seminal 2019 case, a British court became one of the first worldwide to recognize the concept of coercive control and its psychological impact on women in abusive relationships, drawing on evolving medical and social science research to reach its conclusion.<sup>115</sup> Our categories therefore reflect current understandings of GBV across anti-violence and intergovernmental organizations, while acknowledging that the legal field would benefit from further education about different forms of gendered violence.

#### *b. Frequency*

We also documented the frequency of each event of GBV in women's lives to better understand how GBV affects their lives and to build a more comprehensive picture of women's stories. We classified the frequency of events as follows:

- Once:
  - This category refers to events that happened a single time—for example, a woman who is molested

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113. *See id.*; GOODMARK, A TROUBLED MARRIAGE, *supra* note 71, at 35–36; Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107 (1990).

114. *See, e.g.*, R v. Challen, [2019] EWCA (Crim) 916, (appeal taken from Eng. and Wales).

115. *See id.* In *Challen*, the appellate court quashed Ms. Challen's conviction for the murder of her husband and ordered a retrial based on information presented at the appellate stage of the coercive abuse that Ms. Challen suffered at her husband's hands. The United Kingdom made coercive control a criminal offense in 2015, but this case acknowledged, for the first time, the effects of coercive control in defense of a crime, though it did not formally recognize coercive control as a defense to murder. *Id.* *See also* Tony Storey, *Coercive Control: An Offence But Not a Defence: R v Challen [2019] EWCA Crim 916, Court of Appeal*, 83 J. CRIM. L. 513, 513–15 (2019).

by a stranger on public transport. We classified events by different perpetrators separately because they represent different experiences of GBV. Thus, a situation in which a woman is molested by a stranger and a year later is molested by another stranger was documented as two events of GBV, each occurring once.

- Twice:
  - This category refers to events that occurred twice; for example, if a woman is molested twice by the same person. We included this category to capture violence that occurs more than once but is not frequent enough to be termed “ongoing,” as described below.
- Ongoing:
  - This category refers to events that happened more than twice in a woman’s lifetime. Examples include a girl who is molested routinely by her uncle throughout her childhood, a girl who witnesses her father hit her mother for many years, or a woman who is beaten multiple times by the same partner. This classification therefore means that each event termed “ongoing” in fact represents many discrete incidents of GBV.
- Undetermined:
  - We classified events as “undetermined” when the transcript or court document did not make clear how frequently it occurred in the woman’s life.

*c. Age*

We categorized events of GBV by the woman’s age at the time of the event, where known. Research in the social sciences has demonstrated that experiences of violence during childhood have severe and prolonged effects on mental health throughout a person’s life.<sup>116</sup> International law also recognizes that girl-children are particularly vulnerable to human rights violations—including GBV—and accords

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116. BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE* 151–57 (2014); Melissa S. Jones et al., *Life As She Knows It: The Effects Of Adverse Childhood Experiences On Intimate Partner Violence Among Women Prisoners*, 85 *CHILD ABUSE & NEGLECT* 68, 76 (2018).

them specific protections because of their age, degree of development, and consequent inability to “personally ensure the respect of their rights.”<sup>117</sup> As such, our research sought to understand the prevalence of GBV in women’s lives as children.

Under international law, a person is a child until they turn eighteen years old.<sup>118</sup> We therefore adopted this classification of children, and classified women’s ages for each event of GBV as either under the age of eighteen (“child”), or eighteen-years and above (“adult”).<sup>119</sup> In some cases, a woman’s age was unknown or unclear. We classified the age for these events as “unknown.”

Women who are married as children face high rates of victimization.<sup>120</sup> Though tolerated—and even legalized—in many countries,

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117. Villagrán Morales et al. v. Guatemala (Case of the “Street Children”), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 185 (1999). See INTER-AM. COMM’N, VIOLENCE AND DISCRIMINATION AGAINST WOMEN AND GIRLS, OEA/Ser.L/V/II, doc. 233 ¶ 11 (2019) (“On this score, it must be noted that pre-teenage and teenage girls continue to be invisible regarding the specific issues and vulnerabilities faced by them, and their special protection needs are not recognized. Their rights and the particular challenges faced by them go unnoticed under the ageless category of “women,” which does not take into consideration their special needs of protection due to their condition of growth and development; or they remain invisible under the categories of “children,” “adolescents” and “young people,” which do not take gender and the issues they face into account, precisely because of their condition as female and structural situations of violence and discrimination against women.”).

118. See G.A. Res. 44/25, Article 1, (Nov. 20, 1989).

119. We recognize that using the term “adult” to describe all people eighteen years and above is problematic but adopt the term in line with the current state of international law, and for ease of classifying and analyzing our data. Much developing social science and neurobiological research makes clear that people in the late stages of adolescence have similar vulnerabilities and immaturities as younger adolescents under the age of eighteen. Indeed, maturation of brain structure, brain function, and brain connectivity continues throughout the early twenties, which means that the underdeveloped decision-making, self-control, and emotional processing we have come to associate with people under the age of eighteen continues beyond their transition into “adulthood.” For this reason, several scholars and experts argue that the Supreme Court’s rationale for excluding persons under the age of eighteen from capital punishment, set forth in *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to those in late adolescence. 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).

120. Early marriage can expose girls to sexual violence by thrusting them into relationships with adults, who often expect sexual acts from their young brides for

child marriage is encompassed within the umbrella of GBV under international law because of its adverse consequences on women's health and socioeconomic liberty.<sup>121</sup> We therefore sought to track women's ages at the time of marriage in our trial transcript review, but this information was routinely unavailable. Our analysis of child marriage in the dataset is therefore incomplete and will require further research.

#### *d. Perpetrators*

Studies documenting experiences of GBV in the general population demonstrate that women are most at risk of violence from people that they know.<sup>122</sup> We therefore tracked the perpetrators of each event of GBV by their relationship to the woman (for example, father, neighbor, and boyfriend). We also tracked the gender of the perpetrator (male, female, or unknown). We subsequently created four categories of perpetrator, to synthesize our findings:

- Family:
  - Here, we included all perpetrators of GBV with a familial connection to the woman, such as parents, grandparents, stepparents, uncles, aunts, and cousins.

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which they are neither physically nor emotionally prepared. *See generally* Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644 (2006); Commonwealth Secretariat, *Judicial Bench Book on Violence Against Women in Commonwealth East Africa* 289 (2017), <https://commonwealthsaysnomore.org/wp-content/uploads/2020/09/Judicial-Bench-Book-on-VAW-in-East-Africa-EB.pdf>.

121. *See* U.N. Comm. on the Rights of the Child, The Right of the Child to Freedom from All Forms of Violence, U.N. Doc. CRC/C/GC/13 ¶¶ 16, 29, 72 (2011) (prohibiting violence against children and protecting children from sexual abuse); Org. of African Unity [OAU], Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Art. 21 ("Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory."); APDF et al. v. Mali, App. No. 046/2016, Afr. Ct. H.P. Rights, ¶¶ 71–78 (May 11, 2018) (finding child marriage a "harmful practice" in violation of Article 21 of the African Charter and Article 6(b) of the Maputo Protocol).

122. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. WOMEN'S L. J. 53, 71–73 (2017) [hereinafter Goodmark, *Should Domestic Violence Be Criminalized?*].

ins. We did not include intimate partners such as husbands, ex-husbands, girlfriends, or boyfriends in this category. As explained below, we tracked partners separately.

- Partner:
  - This category includes all current and former intimate partners, whether or not the woman was in a legally recognized relationship with the partner. Women's spouses, former spouses, boyfriends, girlfriends, long-term sexual partners, and former sexual partners were all included in this category.
- Acquaintance:
  - This category includes all perpetrators who were known to the woman but where the relationship with the perpetrator did not fall into either of the two above categories. Perpetrators classified as an "acquaintance" included neighbors, babysitters, friends of the woman's parents or partner, classmates, and teachers.
- Stranger:
  - We classified as "strangers" all perpetrators who the woman did not know at the time of the abuse.

Having separate categories for partners and other family members enabled us to track intimate partner violence in the lives of women on death row. Intimate partner violence, also sometimes referred to as domestic violence, is abuse that occurs between people currently or formerly in an intimate partnership.<sup>123</sup> An "intimate partnership" refers to spouses, boyfriends, girlfriends, sexual partners, and other forms of intimate relationship.<sup>124</sup> Intimate partner violence is unlike any other form of violence because of where it happens and from whom it stems. As Leigh Goodmark, a leading scholar on this form of abuse explains, intimate partner abuse routinely happens behind closed doors, often in the home, and is about enforcing control within a deeply personal relationship.<sup>125</sup>

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123. See generally *Chapter Two: Defining Domestic Violence*, in GOODMARK, A TROUBLED MARRIAGE, *supra* note 71, at 29–53.

124. *Id.*

125. See Goodmark, *Transgender People*, *supra* note 81, at 55 (explaining that "intimate partner abuse is in large part about controlling and enforcing gender norms

We further noted when a woman's abuser was a co-defendant in legal proceedings arising out of the offense for which she was sentenced to death. We cross-categorized perpetrators of violence who fell into this category to deepen our understanding of the relationship between women, their abusers, and their incarceration on death row. For example, where a woman's partner abused her and was a co-defendant in the offense for which the woman was sentenced to death, we classified the perpetrator of abuse as both "partner" and "co-defendant."

## 2. *Research Findings*<sup>126</sup>

### a. *Prevalence of GBV*

We identified experiences of GBV in forty-six of the forty-eight transcripts of people who presented as women during their capital trials. Moreover, at least forty-one women currently on death row have endured multiple events of GBV throughout their lives. Only five of the women's transcripts recorded a single event of GBV. This means that at least 96% of all women currently on death row have experienced GBV in their lifetimes, with at least 85% experiencing multiple forms of physical, sexual, psychological, and socioeconomic violence.<sup>127</sup>

Our data documents experiences of GBV in the lives of all but one of the women of color currently on death row.<sup>128</sup> Latina, Asian, Native, and mixed-race women have uniformly experienced gendered abuse. Moreover, every single one of these women have experienced multiple events of GBV in her lifetime—the five women whose tran-

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within relationships); Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 5 *BYU L. REV.* 1183 (2015) (discussing intimate partner abuse by police officers, which routinely happens in the home).

126. This section presents original analysis of voluminous data. For information on the numerical findings we present here, see Tables 1.1–4.2. Further information is on file with the authors.

127. For the purposes of this article, we take the evidence of GBV presented during women's trials at face value. *See supra* notes 97–98 and accompanying text.

128. The one woman of color about whom we have no data represented herself at trial. Her transcript is bereft of mitigating information. As noted below, the lack of data does not mean that this woman did not experience GBV, but rather that we do not know whether she experienced GBV.



scripts presented information about a single event of GBV are white. Our research thus reveals that multiple and repeated experiences of violence are the norm for Black, Latina, Asian, and Native women sentenced to death.

In two cases, women's trial transcripts were bereft of data on GBV, and we did not have any information from post-conviction petitions. One woman represented herself at trial and did not introduce any mitigating evidence, which is typically the vehicle through which life history information—including GBV—comes before a jury. The other woman's trial attorneys similarly did not present any evidence of GBV, and no post-conviction investigation was conducted. The lack of data on these two women does not mean that they have not experience GBV; rather, we simply do not know at this time whether they have experienced GBV. For that reason, our "dataset" in the discussion that follows refers to the forty-six transcripts where data on GBV exists.

Regarding the events of violence themselves, we noted 388 events of GBV across our dataset. While already a substantial figure, our total number of events represents far greater than 388 episodes of violence across the forty-six women's lives—over 74% of our documented events of GBV are "ongoing." As noted above,<sup>129</sup> the category of "ongoing" events encompasses violence that occurred continuously over a period of time, such as repeated beatings by a parent throughout childhood. The prevalence of "ongoing" violence therefore has important implications for our data as a whole: Since three quarters of our 388 events are continuous episodes of violence, our dataset in fact represents a prevalence of violence that is far greater than the numbers we report here.<sup>130</sup>

*b. Types of GBV<sup>131</sup>*

Sexual, physical, and psychological abuse dominate the forms of violence that the forty-six women experienced. At least 74% of the women in our dataset have experienced sexual violence in their life-

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129. See *supra* note 116 and accompanying text.

130. The frequency of ongoing abuse reinforces our understanding of this data as an incomplete picture of GBV in women's lives. The reality is that women experience abuse on a scale far greater than we describe. See *supra* Part I.

131. See *infra* Tables 1.1–1.2.

times, 83% have experienced physical violence, and 85% have experienced psychological violence. These figures overlap in many cases, with women experiencing multiple forms of violence in different categories. For example, over 89% of the women have experienced *either* sexual or physical violence, and over 67% have experienced *both* sexual and physical violence.<sup>132</sup>

The graph below illustrates the number of women who have experienced sexual, physical, and psychological abuse:

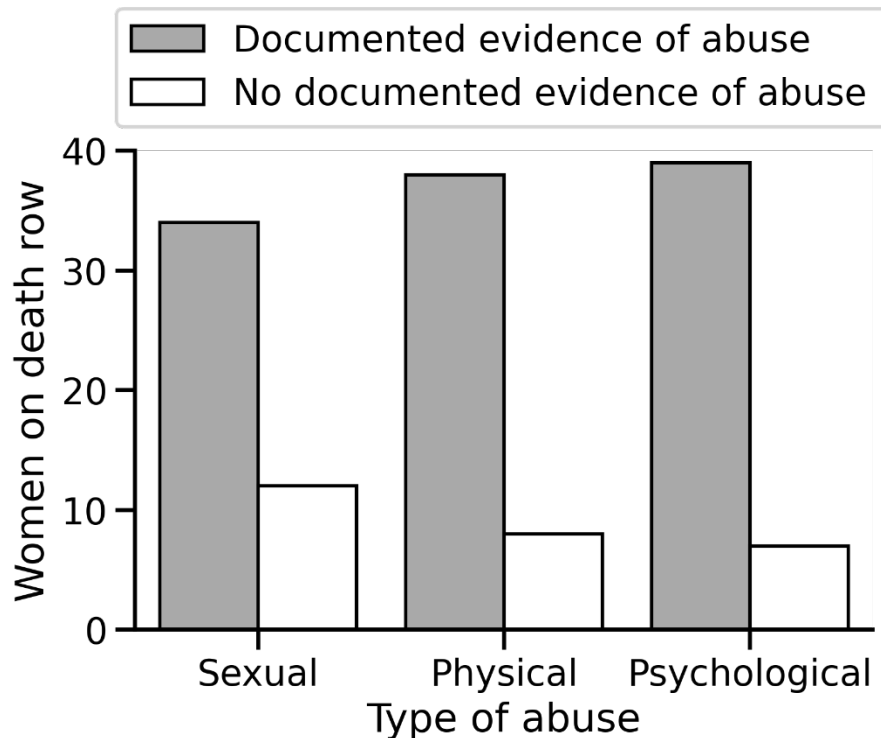


FIGURE 1: PREVALENCE OF ABUSE

These exceedingly high rates of sexual, physical, and psychological abuse are also present among women of color in our dataset. At least 80% of Black women and 83% of Latina women on death row

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132. Forty-one of the forty-six women whose transcripts reveal experiences of GBV have endured either physical or sexual violence, and thirty-one have experienced both sexual and physical violence.

have experienced sexual violence, and 70% of Black women and 83% of Latina women have experienced physical violence.<sup>133</sup> The number of women of color who have experienced psychological violence is particularly high, at 90%, and includes all ten Black women for whom we have data.

Sixteen women, more than one third of our dataset, have experienced socioeconomic abuse in their lifetimes. Over half are women of color. Though less common than sexual, physical, or psychological abuse, socioeconomic abuse remains widespread. Living under the financial control of a partner and housing insecurity leave their mark on women experiencing these forms of abuse. One woman, for example, was forced to move homes twenty-six times over a period of thirteen years before her incarceration.<sup>134</sup> The constant uprooting of her life left her with no stability and limited connections with others outside of her immediate family unit.

Our research reveals that at least three women were legally married as children, though this statistic does not capture the far greater number of girls in common law marriages and serious relationships whose older partners expected sexual contact from them when they were still children.<sup>135</sup> The three women in child marriages uniformly experienced further sexual, physical, and psychological abuse in their lives; these three women had some of the highest rates of GBV across our dataset.

When we examine the 388 events of GBV that we observed across the dataset, a more nuanced picture emerges. Almost 40% of these events are psychological violence, with sexual and physical abuse making up most of the remaining events in almost equal proportions. This means that sexual and physical violence occur with slightly less fre-

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133. We did not document any events of sexual abuse in the transcripts of the two Asian women on death row. In one of these two transcripts, we documented physical violence. The transcript of the only Native woman on death row revealed both sexual and physical violence.

134. First Subsequent App. for Writ of Habeas Corpus at 12, Ex Parte Lucio, No. WR-72, 702–05 (Tex. Crim. App. Apr. 18, 2022).

135. See, e.g., *infra* notes 319–29 and accompanying text for the discussion of the case of Janeen Snyder.

quency than psychological violence throughout women's lives but have touched nearly every single woman currently on death row.<sup>136</sup>

*c. Frequency of GBV*<sup>137</sup>

Not only have the vast majority of women on death row experienced multiple forms of abuse in their lifetimes, but the abuse that dominated their lives occurred repeatedly.<sup>138</sup> Nearly every woman on death row—over 93% of the women in our dataset—has experienced ongoing abuse. This figure is even higher for women of color, with 95% experiencing ongoing abuse, including all Black, Asian, and Native women for whom we have data, and 83% of the Latina women. This means that women's experiences of violence are rarely one-off events from which they can attempt to move on and heal. Rather, this abuse is recurring and relentless, permeating women's lives and leaving them in its inescapable shadow.

Notably, the frequency of abuse varies among perpetrator categories. One-off attacks are more frequent among strangers—of the twenty events committed by a stranger in our dataset, fifteen occurred once and just four were ongoing events of abuse in which the same stranger repeatedly abused the woman.<sup>139</sup> In one case, for example, a woman's father took her to a drug house as a child, where she was repeatedly raped by a stranger.<sup>140</sup>

The inverse is true among family members and partners, who rarely commit one-off attacks but rather engage in ongoing, repeated abuse. Of the 198 events of GBV that family members committed, 80% were classified as ongoing, while just 14% were a single event. As regards the 116 events of partner abuse, 84% were ongoing while

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136. See *supra* note 132. At least 89% (41 of 46) of the women about whom we have data have experienced sexual or physical abuse. All but three of the women of color (16 of 19) and all but two of the white women (25 of 27) have experienced either sexual violence, physical violence, or both sexual and physical violence. *Id.*

137. See generally, *infra* Tables 2.1–2.2.

138. As noted above, over 74% of the 388 events of GBV in our dataset are “ongoing” abuse. Our other categories, 20% of events happened once, just under 1% occurred twice, and the remaining 5% of events are of undetermined frequency.

139. The remaining one event was of undetermined frequency.

140. Information on file with authors.

only 13% were a single event. Our findings thus indicate that for many women on death row, home was a place of omnipresent danger.

*d. Age*<sup>141</sup>

The vast majority of the women currently on death row experienced violence as children. At least 83% of the women in our dataset experienced one or more acts of GBV before the age of eighteen. They also tended to experience multiple incidents of violence as children. Moreover, almost two-thirds of the total events that we documented represented experiences of GBV against girl-children.<sup>142</sup> Thus, our research reveals that child GBV is the single most common form of violence that women on death row experience.

These experiences are even more prevalent in the cases of women of color. At least 89% of women of color in our dataset experienced violence as children, including 90% of Black women, 83% of Latina women, and 100% of Asian and Native women.

Many women also experienced violence at the age of eighteen or older. At least 80% of the women in our dataset experienced one or more forms of GBV when they were eighteen or older, a figure that is almost identical for women of color, at 79%. The chart below demonstrates the proportions of women who have experienced violence below the age of eighteen, at age eighteen or older, and at unknown ages:

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141. *See generally, infra* Tables 3.1–3.2.

142. Of the 388 events we documented, 238 (61%) reflect abuse to women below the age of eighteen, while 128 (33%) reflect abuse to women aged eighteen and older. The remaining events include fetal abuse and events in which the age of the woman was unclear.

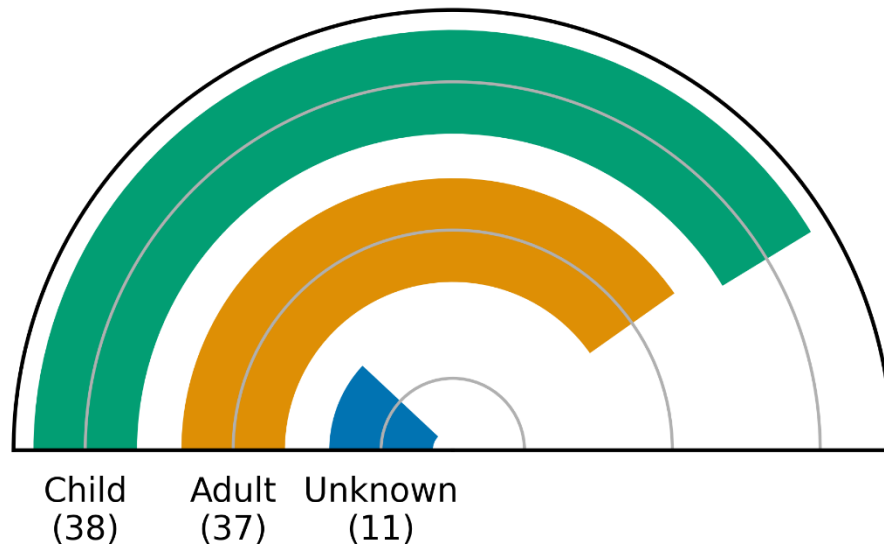


FIGURE 2: AGE AND PREVALENCE OF GBV

Our findings become more nuanced when disaggregating the types of abuse that women experience by age. Sexual violence was more prevalent in women's lives under the age of eighteen, as compared to violence experienced later in life. The most common forms of violence that the women experienced as children were sexual, physical, and psychological violence in roughly equal proportions. Thirty women experienced at least one form of sexual violence, thirty-one experienced physical violence, and thirty-one experienced psychological violence. For women aged eighteen and over, physical and psychological violence became more prevalent: Twenty-four women experienced at least one form of physical violence as an adult, thirty experienced psychological violence, and seventeen experienced sexual violence.

This disaggregated data, too, aligns with scholarship connecting childhood experiences of violence to the likelihood of abuse later in life. Of the seventeen women who experienced sexual violence aged eighteen or older, 82% had also experienced childhood sexual violence; of the twenty-four women who experienced physical violence aged eighteen or older, 75% also experienced childhood physical violence; and of the thirty women who experienced psychological violence aged eighteen or older, 77% also experienced psychological violence in childhood. This figure aligns with the many studies demonstrating that

women who experience abuse as children are more likely to experience abuse as adults.<sup>143</sup>

The implications of our research at the intersection of age and GBV are critical—all attorneys representing women facing the death penalty should anticipate that their client has likely experienced GBV as a child. Attorneys should also be familiar with the myriad and complex mental health consequences of experiencing GBV at a young age and their implications for women’s behavior.<sup>144</sup>

*e. Perpetrators*<sup>145</sup>

Families are dangerous environments for many women; this holds true for women on death row. At least 79% of the women in our dataset have experienced abuse from a family member during their lifetime. Similar rates of family-based GBV occur among women of color, with 74% of all women of color experiencing GBV from a family member. Parents are the most frequent perpetrators of this familial violence—almost three quarters (73%) of the family-based GBV that we observed was from a parent or step-parent.<sup>146</sup> Other family members also have a harmful presence in the lives of women facing death: Eleven women in our dataset experienced GBV at the hands of a grandparent and seven from an uncle or aunt.

The other primary category of abusers in women’s lives is their partners. At least 74% of the women in our dataset have experienced abuse from a current or former intimate partner, including 63% of all women of color.<sup>147</sup>

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143. Melissa S. Jones et al., *supra* note 116; VAN DER KOLK, *supra* note 116, at 148–49, 151–57.

144. *See infra* notes 162–201 and accompanying text.

145. *See generally infra* Tables 4.1–4.2.

146. Of the 198 recorded events of GBV by a family member, 145 were inflicted by a woman’s mother, father, stepmother, or stepfather.

147. This figure remains similar across racial groups—at least 60% of Black women and 67% of Latina women on death row experienced abuse from a partner. The slightly lower prevalence of intimate partner violence (“IPV”) among women of color in the data in no way suggests that women of color on death row experience lower rates of IPV, but rather that such violence is hidden to a greater extent among women of color than among the population of women on death row as a whole. As explained in Part IV, women of color are more likely to experience GBV—including

Women's abusers vary with their age. Abuse by family members occurs throughout women's lives before their incarceration but is concentrated during childhood. Over 85% of the events of GBV in our dataset that were committed by a family member occurred during childhood.<sup>148</sup> Just 3% of the events committed by family members occurred after the woman had turned eighteen.<sup>149</sup>

We see the inverse with partner abuse. Although there are some instances of partner abuse during childhood, it is largely concentrated after a woman turns eighteen. The data revealed that partners were the perpetrators of abuse in just under one third (30%) of the events in our dataset, with 87% of these events occurring after the woman turned eighteen. These findings reveal that family members predominantly perpetrate child abuse whereas intimate partner violence typically occurs later in a woman's life.

The figure below shows the distribution of abuse from family members, partners, acquaintances, strangers, and unknown perpetrators among all events in our dataset:

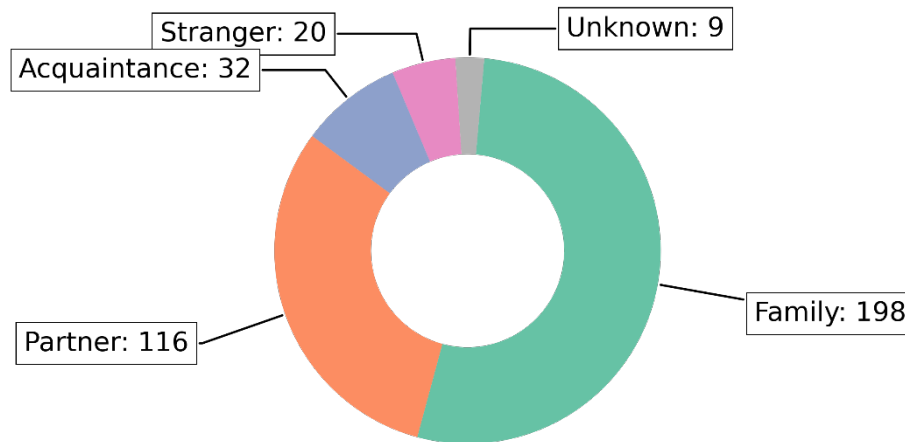


FIGURE 3: PERPETRATORS OF ABUSE

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partner violence—but less likely to seek support or tell anybody when violence occurs. *See supra* notes 74–80 and accompanying text.

148. Slightly over half (51%) of the total events of GBV that we observed were committed by a family member, and of these events, 85% occurred during childhood.

149. The woman's age was unknown in the remaining events of family abuse.



The type of abuse women experience also varies by perpetrator. Family members and partners alike abuse women sexually, physically, and psychologically. The most common form of abuse that we observed from family members is psychological abuse, followed by physical and then sexual abuse in roughly equal proportions.<sup>150</sup> Socio-economic violence is less prevalent in instances of family member abuse.<sup>151</sup> Regarding the events of partner violence, the breakdown of abuse categories differs: Here, psychological and physical abuse are the most common forms of violence, and we observed events of sexual abuse with less frequency.<sup>152</sup>

Women on death row experience abuse from people they know more often than from strangers, but when they do experience stranger abuse, that abuse is predominantly sexual in nature. We observed twenty events of GBV committed by a stranger in our dataset, over 80% of which involved sexual violence. Stranger abuse—and, therefore, stranger sexual abuse—is concentrated in a few women's cases: The twenty events of stranger abuse occurred in thirteen women's cases. Our findings thus align with the extensive research showing that women are mostly at risk of harm from people known to them.<sup>153</sup>

The presence of co-defendants as abusers in women's lives is noteworthy, too. At least seven of the women currently on death row, including three women of color, experienced GBV at the hands of an abuser who later became their co-defendant. All but two of these women experienced multiple and prolonged forms of violence from the co-defendant. Our findings on co-defendant abuse suggest that the

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150. Of the 198 events of GBV committed by a family member, 46% included psychological abuse, 29% included physical abuse, and 22% included sexual abuse.

151. Just 5% of the events of family member GBV included socioeconomic abuse.

152. Of the 116 events of abuse by a partner in our dataset, 42% included psychological abuse, 35% included physical abuse, and 17% included sexual abuse. We suspect that the lower frequency of sexual abuse from partners that we observe in our dataset is driven by sociological factors and mental health consequences that lead women to hide their experiences of sexual abuse, rather than accurately reflecting experiences of partner sexual abuse among women on death row. See Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1053–54 (1995).

153. See Goodmark, *Should Domestic Violence Be Decriminalized?*, *supra* note 122, at 71–73.

hierarchies of power and control that underpin all acts of GBV may have played a role in these women's offenses.<sup>154</sup> While all events of GBV are relevant to the offense itself, abuse by a woman's co-defendant is particularly pertinent to her culpability, as we explain in Part V Section B.

Finally, the data reveals that perpetrators of GBV are overwhelmingly men. Every single woman on death row who has experienced violence in her lifetime has been harmed at least once by a man. Further, men harmed women in over 75% of the total events in our dataset and dominated each category of abusers—particularly abuse by partners, where men carried out every event of intimate partner violence that we recorded. Further, 67% of events of familial violence involved men;<sup>155</sup> 88% of events of abuse by an acquaintance involved men; and 85% of events of stranger abuse involved men. While we recognize that people of all genders can cause GBV—and particularly acknowledge that people of all genders can perpetrate partner violence<sup>156</sup>—our data reveals that the women currently on death row have overwhelmingly experienced harm at the hands of men in their lives.

### 3. *The Mental Health Consequences of GBV*

Recognizing the staggering presence of GBV in the lives of women sentenced to death is essential to understanding their stories holistically. It is also critical to ensuring the just treatment of women in the criminal legal system because of the relationship between GBV and

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154. See Hulley, *supra* note 37, at 582.

155. To clarify, this does not mean that 67% of perpetrators of familial violence were men, as some of these events involved both male and female perpetrators. The same applies to the equivalent statistics for abuse by acquaintances and strangers.

156. Heteronormative stereotypes about intimate partnerships harm queer women by hiding the intimate partner abuse that they experience when in fact, “domestic violence within LGB relationships is twice as prevalent as in heterosexual relationships.” Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER, L. & JUST. 198, 200 (2012). Further, transgender people are uniquely vulnerable to domestic violence due to “social and legal rules governing gender identity [that] contribute to an abuser’s ability to isolate [their] victim,” as well as “conscious and unconscious transphobia of service providers.” *Id.* at 198.

mental health. Experiencing GBV causes many women to develop trauma, depressive disorders, and substance dependence.<sup>157</sup> These mental health challenges affect women's pathways to incarceration and their ability to tolerate certain conditions of confinement in ways that are distinct from men.<sup>158</sup> The mental health of women on death row merits a thorough examination that is far beyond the scope of this article. We will touch briefly on the subject here, however, because any discussion of GBV is incomplete without acknowledging the severe ramifications of abuse on women's health, and the resulting impact on their interactions with the criminal justice system.

*a. The Link Between GBV and Poor Mental Health*

Researchers draw a clear link between GBV and poor long-term mental health.<sup>159</sup> GBV is a form of trauma, and a woman's experiences of GBV are traumatic events that can lead to severe emotional and psychological distress throughout her life.<sup>160</sup>

The trauma of experiencing GBV manifests in many ways. One of the most common forms of psychological distress that can develop from experiences of GBV is post-traumatic stress disorder ("PTSD").<sup>161</sup> Indeed, one study found that "one of the most consistently reported risk factors for PTSD is being female."<sup>162</sup> The risk of developing PTSD and

157. See *infra* notes 159–80 and accompanying text.

158. See Margaret Hayes, *The Life Pattern of Incarcerated Women: The Complex and Intertwined Lives of Trauma, Mental Illness, and Substance Abuse*, 11 J. FORENSIC NURSING 214 (2015); Lynch et al., *supra* note 72; Marie Karlsson & Melissa Zielinski, *Sexual Victimization and Mental Illness Prevalence Rates Among Incarcerated Women: A Literature Review*, 21 TRAUMA, VIOLENCE & ABUSE 326 (2020).

159. See, e.g., Mazeda Hossein et al., *Gender-based Violence and Its Association with Mental Health Among Somali Women in a Kenyan Refugee Camp: A Latent Class Analysis*, 75 J. EPIDEMIOLOGY CMTY. HEALTH 327, 327 (2021); Rachel Pain, *Collective Trauma? Isolating and Commoning Gender-Based Violence*, 29 J. FEMINIST GEOGRAPHY 1788, 1788–79 (2022).

160. JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 2–3 (1997); VAN DER KOLK, *supra* note 116, at 23–24, 192–93.

161. Lori Haskell, *Women, Abuse and Trauma Therapy: An Information Guide for Women and Their Families*, CTR. FOR ADDICTION AND MENTAL HEALTH 1–2 (2004), <https://www.camh.ca/-/media/files/guides-and-publications/women-and-abuse-en.pdf>.

162. Rebecca M. Shansky, *Sex Differences in PTSD Resilience and Susceptibility: Challenges for Animal Models of Fear Learning*, 1 NEUROBIOLOGY OF

other trauma-related illnesses is heightened for women who experience abuse as children.<sup>163</sup> Moreover, trauma is cumulative: Repeated exposure to traumatic events exacerbates their impact and leads to heightened symptoms.<sup>164</sup> This risk of experiencing trauma-related mental distress like PTSD is magnified, therefore, in the cases of women on death row—particularly for women with marginalized identities—due to the multiple and repeated forms of violence experienced throughout their lifetimes.

The trauma of GBV can also lead women to develop depressive disorders. Public health studies show that across U.S. society, women are twice as likely as men to develop Major Depressive Disorder (“MDD”),<sup>165</sup> and incarcerated women who endured GBV are at heightened risk of severe depression, self-harm, and suicide.<sup>166</sup> The prevalence of GBV among women on death row suggests that this population is particularly likely to experience psychological distress related to depression.

Substance dependence is also common among women who endured GBV.<sup>167</sup> Women survivors who misuse substances often do so as a form of self-medication for the mental health consequences of abuse.<sup>168</sup> Women with trauma and depression stemming from abuse frequently experience emotional outbursts, feelings of despair, numbness, and—in the cases of women experiencing PTSD—flashbacks

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STRESS 60, 60 (2014). PTSD is not the only trauma-related illness that women experience. As Van der Kolk pointed out, many victims of child abuse do not meet the criteria of PTSD, but nevertheless suffer debilitating symptoms as a result of their trauma. VAN DER KOLK, *supra* note 116, at 159–61.

163. VAN DER KOLK, *supra* note 116, at 148–49, 151–57.

164. Lynch et al., *supra* note 72.

165. Soraya Seedat et al., *Cross-national Associations Between Gender and Mental Disorders in the World Health Organization World Mental Health Surveys*, 66 ARCHIVES GEN. PSYCHIATRY 785, 785 (2009). See also Ronald C. Kessler, *Epidemiology of Women and Depression*, 74 J AFFECTIVE DISORDERS 5 (2003).

166. See Lynch et al., *supra* note 72.

167. See *id.*

168. See Mason & O’Rinn, *supra* note 68, at 13; Lagdon et al., *supra* note 68, at 2–3.

and nightmares.<sup>169</sup> Substance use can be a response to these behaviors.<sup>170</sup>

We note here that criminal defense lawyers have often draw upon the concept of “Battered Women’s Syndrome” (“BWS”) to defend women accused of killing their abusive partners.<sup>171</sup> This concept evolved in recognition of the psychological distress that women experience when they endure intimate partner violence. BWS is classified as a psychiatric condition<sup>172</sup> that connects a woman’s experiences of violence and her “deteriorating psychological state” to her “incapacity to perceive or utilize alternatives to [violence].”<sup>173</sup> While helpful in recognizing that a woman’s experiences of GBV inform her culpability, we refrain from using the BWS framework and its associated terminology because it no longer reflects experts’ current understanding of how GBV affects women.<sup>174</sup> Critically, BWS fails to account for the impact of psychological abuse on women experiencing GBV. The BWS framework suggests that a batterer’s physical acts—such as beatings and rape—affect a woman psychologically and make it difficult for her to regain control in a relationship, and divides abuse into three phases: tension building, violence, and contrition.<sup>175</sup> This reductionist model ignores the enormous impact that non-physical abuse

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169. Dale Vernor, *PTSD is More Likely in Women than Men*, National Alliance on Mental Illness, NAMI: BLOG (Oct. 8, 2019), <https://www.nami.org/Blogs/NAMI-Blog/October-2019/PTSD-is-More-Likely-in-Women-Than-Men>.

170. See Mason & O’Rinn, *supra* note 68, at 13; Lagdon et al., *supra* note 68, at 2–3.

171. See Stark, *supra* note 110.

172. BWS falls under the umbrella of PTSD. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION (DSM-V-TR) (2013).

173. Stark, *supra* note 110, at 974.

174. See generally *id.*

175. *Id.* at 975–76. Lenore Walker first proposed the three phases in her 1979 book, *The Battered Woman*. Under Walker’s theory, the tension building phase refers to the buildup of minor abusive incidents (such as emotional threats and verbal outbursts) in which the woman is hyper-vigilant to her abuser’s cues and changes her behavior accordingly. The acute battering phase refers to the release of the buildup in the previous phase, culminating in severe physical violence. The contrition phase completes the cycle and refers to the aftermath of physical violence, in which the abuser is remorseful. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

has on a relationship, denies women agency in abusive relationships, and fails to appreciate that abuse—especially psychological abuse—is frequently ongoing, even if experiences of physical violence wax and wane.

A more appropriate model is the coercive control framework, which focuses broadly on the ways in which an abuser restricts a woman's liberty. As previously noted,<sup>176</sup> this framework acknowledges the impact of structural inequality on women's liberty and the systemic nature of women's oppression,<sup>177</sup> thereby highlighting a class of harm "that extends beyond psychological or physical suffering to fundamental human rights."<sup>178</sup> Emphasizing an abuser's patterns of coercion and control by restricting a woman's liberty acknowledges the toll of coercive relationships on a woman—even if she experiences no physical abuse—and the impact of constant coercive pressure devoid from the temporal patterns of BWS's three phase approach.<sup>179</sup>

The mental health consequences of GBV are critical to understanding a woman's legal and moral culpability. Traumatic experiences can isolate an individual from those around her, affect her causal and logical reasoning, and diminish her ability to form the intent to commit a crime.<sup>180</sup> Even if experiences of GBV do not establish a defense to a crime, they may explain a woman's participation in an act of violence—giving jurors a reason to vote for life over death.

#### *b. Symptoms and Presentation of Mental Distress*

Symptoms of mental distress can also affect a woman's interactions with the criminal legal system. Responses to trauma and trauma-related mental health challenges vary, and include behavioral, physical, biological, emotional, cognitive, and other reactions.<sup>181</sup> Some of

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176. See *supra* notes 110–15 and accompanying text.

177. See Elizabeth Schneider, *The Violence of Privacy*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 36 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994).

178. Stark, *supra* note 110, at 976. See Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 28–33 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994).

179. See *id.*

180. See *DEFENDING WOMEN*, *supra* note 89.

181. See *id.* at 18.

the most common symptoms include dissociation, memory lapses, emotional numbing, and hyperarousal.<sup>182</sup>

Dissociation refers to feelings of detachment from everyday life.<sup>183</sup> A woman with dissociative behaviors may feel as though she is not living in reality, that she is an observer to herself and her environment, and may feel disconnected from her own thoughts and feelings.<sup>184</sup> Relatedly, a woman with dissociative amnesia may forget autobiographical details or memories.<sup>185</sup> These symptoms have important consequences for women in the criminal justice system as they can lead women to shut off or dissociate when asked about experiences of trauma that are relevant to their culpability.<sup>186</sup> Dissociative amnesia may also lead an abused woman to disavow a previous narrative given to a law enforcement officer, her attorney, or even a court.<sup>187</sup>

Memory lapses are also common among abused women experiencing trauma and depression. Trauma affects a woman's ability to recall memories, have confidence in herself and her memories, and recount memories in a linear fashion.<sup>188</sup> It can lead women to experience memory "in the form of sensations, flashes, and images, often with little or no story," rendering it difficult to communicate the experiences to a listener.<sup>189</sup> As a result, a woman experiencing trauma may struggle to offer a cohesive and internally consistent narrative, which has important implications for criminalized women. In courtrooms and police stations, state actors look for internal and external consistency in the testimony of the person they are interrogating.<sup>190</sup> An

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182. See Center for Substance Abuse Treatment, *Understanding the Impact of Trauma*, in TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES (2014), <https://www.ncbi.nlm.nih.gov/books/NBK207191/>.

183. See DEFENDING WOMEN, *supra* note 89, at 20.

184. Bethany L. Brand et al., *Assessing Trauma-Related Dissociation in Forensic Contexts: Addressing Trauma-Related Dissociation as a Forensic Psychologist, Part II*, 10 PSYCH. INJ. & L. 298, 299 (2017).

185. See DEFENDING WOMEN, *supra* note 89, at 20.

186. Brand et al., *supra* note 184, at 303.

187. See DEFENDING WOMEN, *supra* note 89, at 20.

188. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 410–411, 420 (2019).

189. *Id.* at 411.

190. See DEFENDING WOMEN, *supra* note 89, at 21.

abused woman may be unable to conform to these expectations, leading uninformed interlocutors to label her a liar, manipulator, or untrustworthy source of information about her own life.<sup>191</sup>

The symptoms of trauma—notably emotional numbing and hyperarousal—can also affect a woman’s demeanor in the courtroom or before law enforcement. A woman who responds to trauma through emotional numbing may recount her experiences in a flat, uninvolved, or matter-of-fact tone.<sup>192</sup> She may appear callous, cold, or unremorseful when discussing details of her alleged crime, leading criminal legal system actors to be suspicious of her behavior.<sup>193</sup> On the other hand, a woman experiencing hyperarousal—that is, the “anxious posture of alertness and reactivity to an imminent danger”—may appear paranoid or overemotional, which can also damage her credibility.<sup>194</sup>

The consequences for women of interacting with a criminal legal system that is neither gender-sensitive nor trauma-informed can be fatal, as we explain below.

*B. The Treatment of Gender-Based Violence by  
Legal Actors in the United States*

Our research reveals that women’s experiences of GBV are routinely misunderstood, minimized, dismissed, or ignored by prosecutors and defense attorneys alike.<sup>195</sup> Defense attorneys often fail to uncover and present evidence of their clients’ experiences of gender-based violence.<sup>196</sup> Even when they learn that women have been sexually abused, raped, or beaten, they rarely explain the full extent of their clients’ victimization and its consequences for their mental and physical health.<sup>197</sup> Prosecutors, in turn, frequently rely on long-

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191. *Id.*

192. Mary Malefyt Seighman, Erika Sussman & Olga Trujillo, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys*, NAT’L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH 1, 15 (2011) <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookMay282012.pdf>.

193. *Id.*

194. Epstein & Goodman, *supra* note 188, at 421.

195. *See infra* Part V(B)(1)–(2)

196. *See infra* notes 244–46 and accompanying text.

197. *See infra* notes 212–233 and accompanying text.



debunked stereotypes to discredit women's accounts of childhood sexual abuse, rape, and intimate partner violence.<sup>198</sup>

Sue Osthoff, a leading expert on intimate partner violence, has asserted that misconceptions about abused women “are held, to a lesser or greater extent, by all the ‘actors’ in a legal case: judges, defense attorneys, prosecutors, and jurors—all of whom bring their own biases and beliefs into any trial.”<sup>199</sup> Our research indicates that these misconceptions and biases affect the presentation and consideration of all forms of GBV, including intimate partner violence, childhood sexual abuse, and rape.<sup>200</sup>

### 1. *Treatment of Gender-Based Violence by Defense Teams*

Trial attorneys have two principal aims when defending a person charged with a capital crime: (1) to present all viable defenses at the culpability phase of trial to prevent a conviction for capital murder; and (2) if the client is convicted, to investigate and present mitigating evidence at the penalty phase to prevent the imposition of a death sentence.<sup>201</sup> Because evidence of guilt is often substantial, capital defense trainings underscore the attorney's duty to conduct a careful, thorough mitigation investigation with the assistance of properly trained and qualified investigators and experts.<sup>202</sup> The American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which reflect prevailing professional norms for capital defense teams,<sup>203</sup> note that “penalty phase preparation requires extensive and generally unparalleled investigation into [the client's] personal and family history,” beginning with “the mo-

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198. See *infra* Part V(B)(2).

199. OSTHOFF, *supra* note 7, at 232.

200. See *infra* Part V(B)(2)(b).

201. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, HOFSTRA L. R. 913, 1047 (Rev. ed. 2003) [hereinafter “Am. Bar Ass'n, *Guidelines*”] (noting counsel's obligations at both the guilt and penalty phases of trial); *id.* at 1060 (noting counsel's duty to present mitigating evidence).

202. *Id.* at 1021 (“Counsel's duty to investigate and present mitigating evidence is now well established.”).

203. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). ABA guidelines are “well-defined norms” that are “guides to determining what is reasonable” in evaluating the effectiveness of trial counsel under the Sixth Amendment.

ment of conception.”<sup>204</sup> In the context of a capital case, “any meaningful explanation for capital violence must begin with the structure of the lives of those who commit it.”<sup>205</sup>

In capital cases of women, the explanation for the woman’s role in a violent crime almost invariably begins with her experiences of violence in the home.<sup>206</sup> As we demonstrate above, the violence that women experience is frequently layered and cumulative, encompassing childhood abuse by family members, assaults by strangers, and beatings by intimate partners. Yet 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. Perhaps one explanation is that capital defense lawyers—most of whom are male<sup>207</sup>—rarely receive specialized training in the defense of women clients.<sup>208</sup> Consequently, many do not know how to speak to a woman about her sexual history, intimate relationships, and experiences of violence. Defense attorneys’ ability to delve into these topics may be constrained by discomfort, ignorance, or bias.<sup>209</sup> Moreover, because GBV in U.S. society is normalized,<sup>210</sup> defense counsel may minimize the impact of women’s experiences of sexual or physical violence.<sup>211</sup>

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204. Am. Bar Ass’n, *Guidelines*, *supra* note 201, at 1022.

205. Craig Haney, *Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559 (1995).

206. DEFENDING WOMEN, *supra* note 89, at 27.

207. 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.* As of 2022, 62% of all lawyers in the United States were male. WOMEN IN THE LEGAL PRO., AM. BAR. ASS’N, <https://www.abalegalprofile.com/women.php> (last visited Mar. 30, 2023).

208. *See* DEFENDING WOMEN, *supra* note 89, at 2.

209. *See id.*

210. Heather Hlavka, *Normalizing Sexual Violence*, GENDER & SOC. BLOG (Apr. 9, 2014), <https://gendersociety.wordpress.com/2014/04/09/normalizing-sexual-violence/>.

211. *See* DEFENDING WOMEN, *supra* note 89, at 2.

In some of the court transcripts we reviewed, defense witnesses testified about a few isolated episodes of abuse.<sup>212</sup> Even in those cases, attorneys frequently failed to present in-depth accounts of the violence women have experienced and its cumulative impact. This is just the sort of “half-baked” explanation that capital jurors frequently reject.<sup>213</sup> As one leading expert explains,

What matters much more than the presence or absence of one or another specific damaging experience or condition of life is their additive impact and the way in which they interact with each other to compound the effect. For many capital defendants, these experiences have combined with each other like a bad mix of toxic chemicals to make some lives a very bitter pill to swallow, or to swallow and survive.<sup>214</sup>

The case of Erica Sheppard, a Black woman on death row in Texas, illustrates the additive impact of damaging life experiences.<sup>215</sup> Ms. Sheppard was sexually abused as a child, subjected to multiple rapes during her adolescence, and was savagely and repeatedly beaten by her intimate partner in her teens.<sup>216</sup> Judge Carolyn King of the Court of Appeals for the Fifth Circuit described Ms. Sheppard’s life history as so “horrific,” “traumatic,” and “abusive” that it could have persuaded a jury to spare her life.<sup>217</sup> Yet, Ms. Sheppard’s court-appointed attorney presented only “isolated snippets” of the “extensive abuse

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212. See *infra* notes 223 (Mississippi v. Chamberlin), 231 (California v. Carrington Vol. 72), 233 (California v. Carrington Vol. 73), 241 (Florida v. Allen Vol. XIII), 242 (Florida v. Allen Vol. XII), 293 (California v. Coffman & Marlow), 304 (People v. Bell), 319 (California v. Snyder), 332 (California v. Connell), 387 (Republic v. Chausiku Nchama Magoiga, Marwa Chacha Makore).

213. John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1039 (2008).

214. Haney, *supra* note 205, at 600.

215. Cornell Ctr. on the Death Penalty Worldwide, *Erica Sheppard: A Teen-aged Victim of Domestic Violence and Discrimination*, CORNELL L. SCH., <https://deathpenaltyworldwide.org/advocacy/erica-sheppard-a-teenaged-victim-of-rape-domestic-violence-and-discrimination/> (last visited Mar. 30, 2023).

216. *Id.*

217. Sheppard v. Davis, 967 F.3d 458, 474–79 (5th Cir. 2020) (King, J., dissenting).

and trauma” that characterized her life before the offense.<sup>218</sup> In response, the prosecution ridiculed Ms. Sheppard’s account of the assaults she had endured from her former partner: “Any bruises, any scratches? Any fear? She was not physically abused; but even if she was, what kind of excuse is that?”<sup>219</sup> The jury sentenced her to death.<sup>220</sup>

Defense counsel for Lisa Jo Chamberlin, who was sentenced to death in Mississippi, similarly failed to present extensive evidence that Ms. Chamberlin was a victim of childhood rape and intimate partner violence.<sup>221</sup> Although a defense mental health expert briefly mentioned Ms. Chamberlain’s experiences of GBV, counsel failed to present multiple lay witnesses who witnessed her abuse.<sup>222</sup> As a result, the prosecution was able to discredit the expert’s testimony, asserting that the accounts of Ms. Chamberlain’s sexual abuse, physical abuse, and intimate partner violence were fabricated.<sup>223</sup>

Celeste Carrington,<sup>224</sup> who is on death row in California, survived a childhood rife with violence, neglect, and extreme poverty.<sup>225</sup> Carrington experienced constant sexual violence throughout childhood and adolescence, including repeated rape by Carrington’s father,<sup>226</sup> multiple gang rapes by a group of men in the neighborhood,<sup>227</sup> and sexual assault at school.<sup>228</sup> Carrington became pregnant at the age of fourteen.<sup>229</sup> Defense counsel presented no evidence of the rapes at tri-

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218. *Id.* at 472–73.

219. Statement of Facts Vol. 27 at 9, *Sheppard v. Texas*, No. 668, 505 (D. Tex. Mar. 3, 1995).

220. *Sheppard v. Davis*, 967 F.3d at 462.

221. Memorandum of Law in Support of Petition for Writ of Habeas Corpus at 118–124, *Chamberlin v. Epps*, No. 2:11-CV-00072-CWR (S.D. Miss. Oct. 1, 2012).

222. *Id.*

223. Direct Examination Transcript at 928, *Mississippi v. Chamberlin*, No. 04-715CR (D. Miss. Aug. 4, 2006) [hereinafter *Chamberlin Transcript*].

224. Carrington is a trans man, although he presented as a woman at trial. We use his last name only, as he does not use the honorific “Ms.”

225. Petition for Writ of Habeas Corpus at 62, *Carrington v. Johnson*, No. 3-10-CV-04179-RS (N.D. Cal. Mar. 1, 2013).

226. *Id.* at 35.

227. *Id.* at 37.

228. *Id.*

229. *Id.* at 36.

al, and only scant evidence of the physical neglect and sexual abuse Carrington endured.<sup>230</sup> The prosecution capitalized on the lack of evidence, arguing that the defense engaged in “an incredible exaggeration” of the deprivation and abuse, and stating flatly that “it’s not true.”<sup>231</sup> Although Carrington had informed a neuropsychiatrist retained by the defense about episodes of sexual abuse, the prosecution dismissed this as “self-reported,” stating there was “not one scintilla of evidence” to support Carrington’s account of sexual violence.<sup>232</sup> The defense did not contest this characterization, and in arguing that Carrington’s life should be spared, defense counsel did not even mention these repeated instances of sexual victimization.<sup>233</sup>

The case of Margaret Allen, on death row in Florida, illustrates the pernicious effects of intersectional discrimination—including racial bias and profound ignorance about the consequences of gender-based violence. Ms. Allen, a Black woman, was repeatedly raped and viciously assaulted throughout her life.<sup>234</sup> Her parents whipped and beat her; her mother once held her head underwater in the bath when she was seven years old.<sup>235</sup> Multiple family members sexually assaulted Ms. Allen when she was a child.<sup>236</sup> As a teenager, she suffered a

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230. *Id.* at 63–67, 68.

231. Reporter’s Transcript on Appeal Vol. 72 at 6713, *California v. Carrington*, No. C-29739 (Cal. App. Dep’t Super. Ct. July 27, 1994) [hereinafter *Carrington Transcript* Vol. 72].

232. *Id.* at 6703–04.

233. Reporter’s Transcript on Appeal Vol. 73 at 6723–87, *California v. Carrington*, No. C-29739 (San Mateo Cnty. Sup. Ct. July 27, 1994). The defense briefly referenced the testimony of a psychiatrist, Dr. Woods, who testified regarding Carrington’s “environment.” *Id.* at 6780. With regard to the sexual violence Carrington endured, the defense merely stated:

And this was offered as was discussed earlier for—not for the truth of the matter, because obviously sexual abuse is not usually a crime that is committed with witnesses, but [Dr. Woods] listened to this testimony, this statement that was made to him about this. It supported his conclusions and it was significant to him in rendering the conclusions that he did render.

*Id.*

234. Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus at 11, 20–26, *Allen v. Secretary*, No. 6:19-cv-296-PGB-DCI (M.D. Fla. 2022) (unpublished) [hereinafter *Allen Habeas Petition*].

235. *Id.* at 21–22.

236. *Id.* at 23.

“cerebral accident” that her family characterized as a stroke.<sup>237</sup> At least three of her intimate partners beat her badly enough that she was hospitalized.<sup>238</sup> One of them choked her, beat her while she was pregnant, and hit her in the head with a hammer.<sup>239</sup> Another partner beat Ms. Allen so severely that when her aunt visited her in the hospital, “she was unrecognizable, had injuries to her face, could not get out of bed, and could not speak.”<sup>240</sup> Another held a pistol to her head and beat her with it.<sup>241</sup> Hospital records documented that she was once admitted with “human bites and facial and head trauma.”<sup>242</sup> A neuropsychiatrist at trial testified that Ms. Allen sustained multiple traumatic head injuries resulting in brain damage.<sup>243</sup>

At trial, the jury heard no evidence of the childhood abuse she endured, and only a glancing mention that Ms. Allen had “been a victim of some sexual abuse” or a “possible sexual assault” at an undefined point in her life.<sup>244</sup> Her aunt testified briefly about some of the episodes of intimate partner violence she endured.<sup>245</sup> In his abbreviated closing argument at the penalty phase, the defense *did not even mention* Ms. Allen’s victimization by her intimate partners, nor did he refer to her sexual abuse.<sup>246</sup> Instead, he argued that she should not be put to death because of her “lifestyle,” because she was “living in the hood, so to speak.”<sup>247</sup> Rather than describing the mental health consequences of GBV, the defense repeated a theme introduced by the

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237. *Id.* at 26.

238. *Id.* at 20–23.

239. *Id.* at 20–21.

240. *Id.* at 21–22.

241. Transcript of Jury Trial Proceedings Vol. XIII at 1882–83, Florida v. Allen, No. 05-2005-CF-048260-AXXX-XX (Fla. Cir. Ct. Sept. 23, 2010) [hereinafter Allen Transcript Vol. XIII].

242. Transcript of Jury Trial Proceedings Vol. XII at 1745, Florida v. Allen, No. 05-2005-CF-048260-AXXX-XX (Fla. Cir. Ct. Sept. 23, 2010).

243. *Id.* at 1816.

244. *Id.* at 1745; Allen Transcript Vol. XIII, *supra* note 241, at 1883.

245. Allen Transcript Vol. XIII, *supra* note 241, at 1880–86.

246. Defense counsel mentioned at several points that Ms. Allen was beaten, but did not mention who inflicted the beatings, and did not say anything about the impact of the violence she endured, beyond the fact that she had brain damage. *Id.* at 1944.

247. *Id.* at 1936.

prosecution,<sup>248</sup> and stated that she grew up in a “culture” of “drugs, thugs and violence”<sup>249</sup> that was responsible for her character development.<sup>250</sup>

The word “thug” is a racially loaded term that in the view of one scholar, is “the new N-word.”<sup>251</sup> Originally used by the prosecution to describe Ms. Allen’s lifestyle, the phrase “drugs, thugs and violence” was an explicit invocation of Ms. Allen’s connection to a dangerous Black community.<sup>252</sup> Similarly, the term “hood,” much like the word “ghetto,” conjures up a non-white neighborhood that is “impoverished, chaotic, lawless, drug-infested, and ruled by violence.”<sup>253</sup>

Ms. Allen’s case illustrates that defense attorneys, like prosecutors, can infect a woman’s trial with intersectional bias. The defense attorney’s failure to explain why Ms. Allen’s experiences of childhood abuse, rape, and intimate partner violence were mitigating was in itself a complete dereliction of his duty to defend her. As a Black woman, Ms. Allen was less likely to be viewed as a victim of violence.<sup>254</sup> Given this reality, the lawyer’s failure to comment on her experiences signaled their irrelevance and cast further doubt on her credibility as a victim. In addition, his use of coded language invoked racist, dehumanizing stereotypes that increased the likelihood of a death sentence.<sup>255</sup>

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248. *Id.* at 1930.

249. *Id.* at 1934, 1943–44.

250. *Id.* at 1943–44.

251. All Things Considered, *The Racially Charged Meaning Behind the Word “Thug,”* NPR (Apr. 30, 2015, 5:25 PM), <https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug> (quoting Columbia English professor John McWhorter).

252. Allen Transcript Vol. XIII, *supra* note 241, at 1878–79, 1930, 1940.

253. Elijah Anderson, *The Iconic Ghetto*, 624 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (2012), <https://journals.sagepub.com/doi/pdf/10.1177/0002716212446299> (“For both blacks and whites, the term ghetto is almost always pejorative.”).

254. See Ammons, *supra* note 78, at 1019; NAT’L ORG. OF WOMEN, *supra* note 81, at 2 (explaining that Black women are less likely to be believed when reporting sexual violence).

255. See Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations*, 86 FORDHAM L. REV. 3091, 3103–04 (2018). Numerous scholars demonstrate that racial bias is endemic in the application of the death penalty. See, e.g., Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide”*, 45 L. & SOC’Y REV. 69 (2011); David C.

## 2. *Treatment of Gender-Based Violence by Prosecutors*

When defense teams do introduce evidence of women's experiences of GBV, our research shows that prosecutors use a range of tactics to discredit women's accounts and minimize the relevance of the violence they endured. Each of these tactics ultimately seeks to reduce empathy for women who are victims of GBV and increase the likelihood that jurors will condemn them to death. First and foremost, prosecutors aim to discredit women's accounts of violence by accusing them of fabricating or exaggerating their experiences.<sup>256</sup> Second, where they are unable to completely discredit women's accounts, prosecutors argue that the women did not behave as a victim should and therefore are not "legitimate" victims.<sup>257</sup> Along these lines, prosecutors sometimes claim that women invoke their experiences of violence as form of emotional manipulation to excuse their own violent behavior.<sup>258</sup> Third, prosecutors seek to minimize women's experiences of violence, often by arguing that the women themselves were complicit in their abuse.<sup>259</sup>

The trial transcripts of women on death row contain many examples of these discrediting tactics, but the language reflected in a transcript only captures a portion of what legal actors communicate at trial.<sup>260</sup> As Osthoff notes, "beliefs about battered women are communicated subtly *and* openly, deliberately *and* unconsciously, via innuendo, an attitude, the physical stance or the tone of voice of a defense attorney, prosecutor, judge, or witness."<sup>261</sup> Nevertheless, the transcripts reflect how, in case after case, prosecutors have invoked mis-

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Baldus and George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

256. *See infra* note 294.

257. *See infra* note 298.

258. *See infra* note 300.

259. *See infra* note 294 and accompanying text (describing prosecutor's argument in the case of Cynthia Coffman).

260. OSTHOFF, *supra* note 7, at 234.

261. *Id.*



leading stereotypes of abused women to distinguish most women defendants from “worthy” victims of gender-based violence.<sup>262</sup>

*a. Discrediting Women’s Experiences  
of Violence for Lack of Corroboration*

For decades, advocates for victims of rape and domestic violence underscored the unfair burden that is placed on child and adult victims of violence to produce corroboration of their abuse in criminal prosecutions of their abusers.<sup>263</sup> The reality is that in most cases of sexual and intimate partner violence, there are no witnesses to the crime apart from the victim and the abuser.<sup>264</sup> Abusers commonly pressure or threaten their victims not to tell others about the abuse.<sup>265</sup> Most women—and, especially, women of color—fail to report their victimization to the police, for a multitude of reasons that have been explained in depth by multiple scholars and advocates.<sup>266</sup> In addition, women victims of intimate partner violence often minimize or conceal their injuries from others out of fear or shame.<sup>267</sup>

Nonetheless, our research shows that prosecutors in capital cases sometimes encourage juries to dismiss testimony regarding women’s experiences of abuse unless there is documentation of the abuse.<sup>268</sup>

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262. See *infra* note 298.

263. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 978 (2004) (noting that the corroboration requirement was based on a set of “false assumptions”); *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365 (1972) (noting “sustained criticism” by feminists and prosecutors that led New York to modify legislation requiring corroboration of a rape victim’s testimony to sustain a conviction).

264. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“[C]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”); OSTHOFF, *supra* note 7 at 237 (“for many women, abuse is not documented”).

265. Elizabeth L. Jeglic, *Why Children Don’t Tell Anyone About Sexual Abuse*, PSYCH. TODAY BLOG (Feb. 28, 2022), <https://www.psychologytoday.com/us/blog/protecting-children-sexual-abuse/202202/why-children-don-t-tell-anyone-about-sexual-abuse>.

266. NAT’L ORG. OF WOMEN, *supra* note 81, at 2 (explaining that Black women are less likely to be believed when reporting sexual violence).

267. See Waits, *supra* note 152, at 1053–54.

268. See *infra* notes 269–77 and accompanying text.

For example, in the case of Melissa Lucio, a woman charged with capital murder in Texas in connection with the death of her daughter,<sup>269</sup> the prosecution suggested that Ms. Lucio's account of childhood sexual abuse was false because it was not "verified."<sup>270</sup> When a defense expert testified that Ms. Lucio told the expert of the abuse, the prosecutor suggested that the expert should have interviewed Ms. Lucio's abusers to corroborate her account.<sup>271</sup>

In the case of Lisa Chamberlin, sentenced to death in Mississippi, the prosecution scoffed at evidence that Ms. Chamberlin had been sexually assaulted by her half-brother as well as her fourth-grade teacher.<sup>272</sup> Although a psychologist testified that she had interviewed several witnesses who confirmed Ms. Chamberlin's account, the prosecutor dismissed them as "aunts and best friends," and repeatedly asked if any police report was filed in the case.<sup>273</sup> After the same psychologist testified that Ms. Chamberlin had been beaten by her stepfather, the prosecutor asserted that the only source of that information was "a brat named Lisa."<sup>274</sup> When the psychologist explained that one of Ms. Chamberlin's childhood friends had corroborated her account, the prosecution clarified that she was "a lesbian friend"—implying that her sexual orientation made her less credible.<sup>275</sup> The prosecutor then asked the psychologist—without objection—if she had inquired whether Ms. Chamberlin had "any other [sexual] propensities."<sup>276</sup> The prosecution's implication that Ms. Chamberlain was possibly a lesbian reflects another common tactic used to pathologize gender nonconforming women.<sup>277</sup>

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269. Liliana Segura & Jordan Smith, *As Execution Looms, Mounting Evidence Points to Melissa Lucio's Innocence*, THE INTERCEPT (Apr. 17, 2022, 4:00 AM), <https://theintercept.com/2022/04/17/melissa-lucio-clemency-execution/>.

270. Reporter's Record Vol. 38 at 32; *State v. Lucio*, No. 07-CR-885-B (D. Tex. July 10, 2008).

271. *Id.* at 33–34.

272. Chamberlin Transcript, *supra* note 223, at 919.

273. *Id.*

274. *Id.* at 928.

275. *Id.*

276. *Id.*

277. See Sutton et al., *Death by Dehumanization*, *supra* note 4, at 1053 (describing how the identities of LGBTQ+ people "have been criminalized, pathologized, and used as justification for condemning them to death").

*b. Invoking Debunked Stereotypes of Battered Women*

We also found that prosecutors rely on stereotypes of “battered women” to discredit women’s accounts of violence. “Real” victims, according to prosecutors, are those who are helpless, passive, and innocent.<sup>278</sup> As Osthoff has observed, this archetypal victim is a white woman who “cowers in the corner,” who has never fought back or done drugs, and is a “fabulous mother.”<sup>279</sup> Yet most victims of intimate partner violence live complicated lives.<sup>280</sup> As noted above, rates of mental illness and drug addiction are higher among women who are victims of gender-based violence.<sup>281</sup> Women charged with violent crimes, by definition, can never live up to the imaginary ideal of a powerless victim who deserves empathy and compassion.<sup>282</sup>

Perhaps the most egregious example of such discrediting tactics is found in the case of Cynthia Coffman, convicted of capital murder in California after a joint trial with her intimate partner, James Marlow.<sup>283</sup> At trial, Ms. Coffman presented evidence that Marlow repeatedly beat her, anally raped her, cut off her hair, and threatened to cut out one of her eyes.<sup>284</sup> He tattooed on her buttocks, “Property of Folsom Wolf,” a reference to his nickname.<sup>285</sup> Ms. Coffman testified that Marlow “threaten[ed] to kill her, forced her to consume four pills he told her were cyanide, extinguished a cigarette on her face and stabbed her in the leg, rendering her unconscious for a day and unable to walk for two days.”<sup>286</sup> Witnesses corroborated incidents of coercion and abuse.<sup>287</sup> One witness testified that Ms. Coffman would always sit at Marlow’s feet.<sup>288</sup> When Marlow wanted Ms. Coffman to do some-

278. OSTHOFF, *supra* note 7, at 235.

279. *Id.*

280. See LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* 9 (2023) (noting that victims of violence often do not conform to popular stereotypes of victims).

281. See *supra* note 157 and accompanying text.

282. Goodmark, *supra* note 28, at 91.

283. *People v. Coffman and Marlow*, 96 P.3d 30, 42 (Cal. 2004).

284. *Id.* at 22.

285. *Id.*

286. *Id.*

287. *Id.* at 25.

288. *Id.*

thing for him, he would clap, and she would comply with his wishes.<sup>289</sup> The same witness also saw Ms. Coffman lying on the floor of the bedroom she was sharing with Marlow, “naked and crying;” the next day, there were scratches on Ms. Coffman’s face and bruises around her neck.<sup>290</sup>

Ms. Coffman’s lawyers also presented the testimony of a prominent expert on the mental health consequences of intimate partner violence, Dr. Lenore Walker.<sup>291</sup> Dr. Walker, a clinical and forensic psychologist, testified that Ms. Coffman was “credible” and that she suffered from “battered woman’s syndrome” and symptoms of posttraumatic stress disorder.<sup>292</sup>

Despite Ms. Coffman’s detailed account of abuse and the unusual amount of corroboration, the prosecution argued in closing arguments at the guilt phase of her trial that she was not a “legitimate” battered woman.<sup>293</sup> The prosecutor told the jury that Ms. Coffman was “trying to exploit a defense that is very emotional and creates a lot of sympathy in hoping you’ll buy it.”<sup>294</sup> He dismissed the evidence of corroboration: “I mean, we have one woman in Kentucky that kind of sees her crying, naked on the floor. We have, you know, the stabbing incident, and . . . that’s it.”<sup>295</sup> When she was arrested, the prosecution argued, she had “hardly any injuries.”<sup>296</sup> Finally, he argued, Ms. Coffman possessed a “violent temper” and “fights back”<sup>297</sup>—contrary to “legitimate” victims of domestic violence.<sup>298</sup>

After the jury convicted Ms. Coffman, the prosecution argued that she should be sentenced to death, suggesting that Ms. Coffman had simply invented the evidence of her abuse to “exploit” the jury.<sup>299</sup> Ms.

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289. *Coffman and Marlow*, 96 P.3d at 25.

290. *Id.*

291. *Id.*

292. *Id.*

293. Reporter’s Transcript of Oral Proceedings Vol. 59 at 10654, *State v. Coffman and Marlow*, No. SCR-45400 (Cal. Super. Ct. Mar. 8, 1989) [hereinafter *Coffman Transcript*].

294. *Id.*

295. *Id.* at 10655.

296. *Id.*

297. *Id.* at 10658.

298. *Id.* at 10653.

299. *Coffman Transcript* Vol. 76 at 13508–09.

Coffman, he argued, introduced “the battered woman thing” to invoke their sympathy.<sup>300</sup> He distinguished her from one of Marlow’s former wives, who “clearly” “fits into that category [of battered women’s syndrome].”<sup>301</sup> In sum, he argued, “Miss Coffman’s defense team is hoping that the genuine repulsion we all feel towards that kind of a crime will somehow wash over into Mr. Marlow and make her seem better. And I think they are trying to exploit that in this battered woman syndrome stuff.”<sup>302</sup>

In the case of Christine Bell,<sup>303</sup> on death row in California, witnesses testified at trial that at least two of Ms. Bell’s partners beat her and threatened to kill her.<sup>304</sup> One witness saw Ms. Bell’s boyfriend kicking her and dragging her by the hair in the parking lot of the massage parlor where she worked.<sup>305</sup> The same man beat her up in the massage parlor<sup>306</sup> and poured liquid “drano” down her throat.<sup>307</sup> He raped her.<sup>308</sup> He “bit her all over her body, [and] broke her arm.”<sup>309</sup> Ms. Bell’s co-defendant, a man with whom she was in a relationship, once put a gun to her head and threatened to blow her head off.<sup>310</sup>

Experts testified that Ms. Bell had post-traumatic stress disorder<sup>311</sup> and suffered from battered women’s syndrome. On cross-examination, the prosecution sought to undermine the expert’s opinion that Ms. Bell was a “battered woman,” arguing that she used men as “sugar daddies.”<sup>312</sup> The attorney for Ms. Bell’s co-defendant—the same man who once put a gun to her head—also cross-examined the

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300. *Id.* at 13508.301. *Id.* at 13509.302. *Id.*

303. Christine Bell is not her real name. We have assigned a pseudonym to this woman at the request of her defense team.

304. Reporter’s Daily Transcript of Proceedings Vol. 30 at 6476–77, 6492, 6537, *People v. Bell*, No. 134147A-B (Cal. Super. Ct. Mar. 28, 2002) [hereinafter *Bell Transcript*].305. *Id.* at 6476.306. *Id.*307. *Id.* at 6492, 6537.308. *Bell Transcript* Vol. 31 at 6569.309. *Bell Transcript* Vol. 30 at 6477.310. *Bell Transcript* Vol. 39 at 8551.311. *Bell Transcript* Vol. 31 at 6612.312. *Bell Transcript* Vol. 38 at 8302.

expert.<sup>313</sup> The attorney characterized battered woman syndrome as “blame the guy for the woman’s behavior.”<sup>314</sup> The lawyer continued: “[I]t is a blame game . . . [that] became fashionable in the 1970s.”<sup>315</sup> In closing, the prosecutor dismissed the testimony about the violence Ms. Bell endured in her intimate relationships, stating that “she didn’t have a batterer and she isn’t a wife”—falsely suggesting that a woman cannot meet the diagnostic criteria of “battered woman syndrome” if she is not married.<sup>316</sup>

One of the most pernicious myths about women victims of intimate partner violence is that they are free to leave their partner. Scholars and victims’ rights advocates alike, however, have long known that victims who seek to leave abusive partners risk greater harm—even death—than those who stay.<sup>317</sup> Nonetheless, this knowledge has not stopped prosecutors from misinforming capital case juries that women’s decisions to stay with abusers belies their claimed status as victims.<sup>318</sup> The case of Janeen Snyder, on death row in California, provides a textbook example of this tactic.

Janeen Snyder was raped for the first time when she was only thirteen years old.<sup>319</sup> Shortly thereafter, she met Michael Thornton, who, at age thirty-seven, presented himself as a surrogate father.<sup>320</sup> When Ms. Snyder was fourteen years old, she moved in with Thornton, his wife and daughter.<sup>321</sup> Thornton raped her for the first time when she was fourteen.<sup>322</sup> He raped her vaginally, orally, and anally, including while she was in restraints.<sup>323</sup> The prosecution sought to minimize

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313. *Id.* at 8313–30.

314. *Id.* at 8314.

315. *Id.* at 8315.

316. Bell Transcript Vol. 39 at 8453.

317. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991) (noting that “[a]t the moment of separation or attempted separation . . . the batterer’s quest for control often becomes most acutely violent and potentially lethal”).

318. See *infra* text accompanying notes 324–29.

319. Transcript Vol. 58 at 10711–12, *People v. Snyder*, No. RIF-096679, (Cal. Super. Ct. May 15, 2006) [hereinafter *Snyder Transcript*].

320. *Snyder Transcript* Vol. 52 at 9607.

321. *Snyder Transcript* Vol. 51 at 9428.

322. *Snyder Transcript* Vol. 58 at 10782.

323. *Snyder Transcript* Vol 58 at 10780–83.

these acts of sexual violence, characterizing Ms. Snyder as someone who was “sexually active” at an “inappropriate” age.<sup>324</sup> When a witness testified about one of the rapes, the prosecution sought to characterize it as consensual, saying that the fifteen-year-old Ms. Snyder was “willing to sell herself” to Thornton, who was twenty-three years older, for a “business opportunity.”<sup>325</sup> During the years they were together, Thornton also physically assaulted Ms. Snyder. He burned her with a cigarette, beat her, held a gun to her head, and strangled her.<sup>326</sup> In arguing that Ms. Snyder should be sentenced to death, the prosecution dismissed the evidence of intimate partner violence.<sup>327</sup> The prosecution stated that Ms. Snyder “did not try to get away from him,”<sup>328</sup> and that Thornton “was heavy-handed, but she loved him.”<sup>329</sup>

*c. Minimizing Women’s Experiences of Violence*

Our research revealed that when prosecutors could not completely discredit women’s accounts of GBV, they often sought to minimize them, as in the case of Janeen Snyder, discussed above.<sup>330</sup> We found multiple examples of this tactic. In the case of Grace Connell,<sup>331</sup> a woman of color who was sentenced to death in California, the prosecutor sought to downplay evidence that when she was eleven-year-old child, she was repeatedly raped by a man who was twice her age.<sup>332</sup> As an eleven-year-old, Ms. Connell was incapable of consenting to sexual intercourse, and the perpetrator committed a felony punishable by a minimum of six years in prison.<sup>333</sup> Nevertheless, the prosecutor characterized Ms. Connell as a “mature 11-year-old” who engaged in

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324. Snyder Transcript Vol. 59 at 10945.

325. Snyder Transcript Vol. 59 at 10934.

326. Snyder Transcript Vol. 58 at 10832.

327. Snyder Transcript Vol. 60 at 11205–06.

328. *Id.* at 11205.

329. *Id.* at 11206.

330. *See supra* text accompanying notes 319–29.

331. Grace Connell is not her real name. We have assigned a pseudonym to this woman at the request of her defense team.

332. Reporter’s Transcript, at 1957, *People v. Connell*, (No. F-14-073) (Modoc Cty. Cal. Jan. 5, 2017) [hereinafter Connell Transcript].

333. CAL. PENAL CODE § 288.5.

a “consensual relationship” with the perpetrator.<sup>334</sup> “It’s not the same as forcible rape,” the prosecutor argued.<sup>335</sup> “So my objection to this whole rape narrative is we need to call what happened to the defendant what it actually is. It is consensual intercourse with an older man.”<sup>336</sup>

The prosecution’s narrative of “consensual intercourse” between an eleven-year-old and a twenty-two-year-old was even more pernicious because girls of color tend to be “adultified.” This encouraged the jury to think of Ms. Connell as a willing participant in her own victimization, rather than an innocent child who was deserving of protection. The prosecution also minimized the mental health consequences of Ms. Connell sexual abuse.<sup>337</sup> In fact, the prosecution argued, it was not “the traumatic offense the defense wants us to think it is.”<sup>338</sup> Discounting expert testimony that Ms. Connell was in fact traumatized by the rapes,<sup>339</sup> the prosecution argued she suffered little long-term consequences because she did not have any “sexual dysfunction” and because “she didn’t become a prostitute.”<sup>340</sup>

In the capital murder trial of Christine Bell, described above, prosecutors similarly minimized testimony that Ms. Bell was a victim of child sex trafficking.<sup>341</sup> According to witness testimony, Ms. Bell was, by varying accounts, eleven, fourteen,<sup>342</sup> sixteen,<sup>343</sup> and seventeen-year-old<sup>344</sup> when she began working as a “prostitute.”<sup>345</sup> One witness, who was the owner of a massage parlor where Ms. Bell worked, testified that when Bell was sixteen, Bell’s father would bring

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334. Connell Transcript, *supra* note 332, at 1957.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 1820–21. An expert witness testified that the perpetrator sexually abused Ms. Connell for a period of three years, from the ages of eleven to thirteen. *Id.*

340. Connell Transcript, *supra* note 332, at 1957.

341. Bell Transcript Vol. 3 at 8462.

342. *Id.* at 8306.

343. Bell Transcript Vol. 30 at 6473.

344. Bell Transcript Vol. 31 at 6665.

345. Bell Transcript Vol. 30 at 6485.



her to work and collect her earnings.<sup>346</sup> The same witness saw Ms. Bell’s father having sex with her when she was still a teenager.<sup>347</sup> Although a child cannot consent to be trafficked,<sup>348</sup> the prosecution argued in closing that Ms. Bell “chose to become a prostitute because of the excitement and intrigue.”<sup>349</sup>

The cases profiled here are not unique. Our review of women’s trial transcripts indicates that the truly exceptional cases are those in which defense teams present extensive evidence of women’s experiences of violence, accompanied by thoughtful and nuanced expert testimony. These cases are vanishingly rare. Capital prosecutors who refrain from invoking harmful stereotypes of women victims of violence are likewise exceptional. These transcripts indicate that many women on death row have never had an opportunity to share their experiences of victimization with the juries that condemned them to die.

## VI. GENDER-BASED VIOLENCE IN THE CASES OF WOMEN SENTENCED TO DEATH AROUND THE GLOBE

The experiences we observe in the cases of women sentenced to death are not confined to the United States. Our review of available data indicates that experiences of GBV are widespread among women facing the death penalty around the world.<sup>350</sup> Here, we summarize some of the emerging research on women, violence, and the death penalty worldwide.

### A. *Gender-Based Violence and Intersectional Discrimination*

Little is known about the lives of women on death row around the world.<sup>351</sup> Published court decisions are difficult to access, and few death penalty scholars have written about the cases of women world-

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346. *Id.* at 6475.

347. *Id.* at 6475–76, 6488.

348. See U.S. DEPT. OF JUSTICE, CHILD SEX TRAFFICKING, <https://www.justice.gov/criminal-ceos/child-sex-trafficking> (last visited Mar. 30, 2023); 18 U.S.C. §1591; CAL. PENAL CODE § 236.1(c).

349. Bell Transcript Vol. 3 at 8462.

350. See *infra* Part IV.

351. CCDPW, JUDGED FOR MORE THAN HER CRIME, *supra* note 25, at 4.

wide.<sup>352</sup> Although accounts of individual women's cases do not allow us to generalize about women's experiences, research by the Cornell Center on the Death Penalty Worldwide suggests that many have experienced GBV.<sup>353</sup> In 2018, Cornell documented cases of women sentenced to death for killing abusive partners in Taiwan, Uganda, Morocco, Jordan, Malawi, Nigeria, and China.<sup>354</sup> In China, which has the largest death row in the world by far, one expert estimated that up to half of all women were condemned to die for killing family members.<sup>355</sup> In Iran, where the most documented executions of women have been carried out, the majority have been convicted of killing a husband or intimate partner.<sup>356</sup> In Kenya and Uganda, experts report that a large number of women awaiting possible death sentences have been charged with murder "in the context of gender-based violence."<sup>357</sup> Cornell's research indicates that women sentenced to death for non-homicide offenses also experience high rates of GBV.<sup>358</sup> In a follow-up study focusing on women sentenced to death for drug offenses, the Cornell Center found that "past trauma from abusive relationships affects the trajectories of many women who traffic drugs."<sup>359</sup>

As in the United States, women in other countries with multiple marginalized identities face intersecting forms of bias. The Cornell study noted that "[y]outh, forced and/or child marriage, mental illness or intellectual disability, migrant worker status, poverty, and race and ethnicity are all factors that increase the risk that a woman will be sen-

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352. One of the few scholars that studied women condemned to death is Lucy Harry; she examined the cases of women on death row in Southeast Asia. See Lucy Harry, *Rethinking the Relationship between Women, Crime and Economic Factors: The Case-Study of Women Sentenced to Death for Drug Trafficking in Malaysia*, 10 MPDI: LS. (2021), <https://www.mdpi.com/2075-471X/10/1/9>.

353. CCDPW, JUDGED FOR MORE THAN HER CRIME *supra* note 25 at 11.

354. *Id.*

355. *Id.*

356. *Iranian women at risk as execution numbers rise*, *supra* note 45.

357. *Reflecting on the links between the death penalty and gender-based violence*, WORLD COAL. AGAINST THE DEATH PENALTY (Nov. 25, 2022), <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

358. CCDPW, *No One Believed Me*, *supra* note 25, at 6.

359. *Id.*

tenced to death.”<sup>360</sup> Migrant women, in particular, are overrepresented on death rows in many countries.<sup>361</sup>

A recent study of women executed in the Kingdom of Saudi Arabia illustrates the link between capital punishment, citizenship, and economic precarity.<sup>362</sup> Of the thirty-one women executed from 2010 to 2021, twenty-three (74%) were foreign women—a number that “significantly exceeds” the proportion of foreign nationals in the Saudi population.<sup>363</sup> Of these, a majority were domestic workers, who are “susceptible to trafficking and frequently suffer financial, physical, sexual and emotional abuse, exploitation, overwork, forced confinement, food deprivation and other forms of torture and ill-treatment.”<sup>364</sup> Of the nine women currently on death row in the United Arab Emirates, eight are foreign nationals.<sup>365</sup> Similarly, in Malaysia, approximately 90% of all women sentenced to death are foreign nationals; by contrast, only 39% of the male death row population is made up of foreign nationals.<sup>366</sup> Like the migrant workers on death row in Saudi Arabia, foreign migrant women in Malaysia experience economic precarity and discrimination.<sup>367</sup> In these countries, as in many others in Southeast Asia and the Persian Gulf, foreign nationality serves as a form of “cultural racism.”<sup>368</sup>

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360. *Id.* (noting that foreign nationals, many of whom are migrant workers, are overrepresented among people sentenced to death for drug offenses).

361. Lucy Harry, *Beyond Arbitrary: How the Mandatory Death Penalty for Drug Trafficking Disproportionately Affects Foreign National Women*, UNIV. OF OXFORD: FAC. OF L. BLOGS (Mar. 8, 2022), <https://blogs.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2022/03/beyond-arbitrary-how-mandatory-death-penalty-drug>.

362. EUROPEAN SAUDI ORG. FOR HUM. RTS. & REPRIEVE, BLOODSHED AND LIES: MOHAMMED BIN SALMAN’S KINGDOM OF EXECUTIONS 17, 24 (2023), <https://reprise.org/wp-content/uploads/sites/2/2023/01/Bloodshed-and-Lies-Mohammed-bin-Salmans-Kingdom-of-Executions.pdf>.

363. *Id.* at 19.

364. *Id.* at 20.

365. See DEFENDING WOMEN, *supra* note 89, at 52.

366. Harry, *supra* note 361.

367. *Id.*

368. See Heng Leng Chee, Brenda S.A. Yeoh & Wan Teng Lai, *Ties That Bind, Lines That Divide: Bangladeshi Labour Migrants, Malaysian Spouses, and the New Contours of Racialization*, 45 ETHNIC & RACIAL STUDS. 677 (2022).

*B. Treatment of Gender Based Violence by Legal Actors*

Globally, women victims of GBV face significant challenges in presenting evidence of their victimization.<sup>369</sup> Capital defense attorneys outside of the United States typically receive no funds for investigation.<sup>370</sup> In many countries, attorneys spend little time with their clients prior to trial.<sup>371</sup> Yet experts advise that detained women may only share sensitive information with attorneys who spend enough time with them to develop a relationship of trust.<sup>372</sup> Moreover, as in the United States, most defense attorneys around the world are male, and detained women may not feel comfortable disclosing their experiences of violence—especially those that are sexual in nature—to men.<sup>373</sup>

Even where legal teams present such evidence, prosecutors and courts are apt to discount its significance.<sup>374</sup> In Egypt, prosecutors typically ignore women's experiences of GBV and discrimination in their

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369. See EIPR, WOMEN SENTENCED TO DEATH, *supra* note 56, at 6 (describing women's challenges in proving they acted in self-defense in the course of domestic or sexual violence).

370. See, e.g., SANDRA BABCOCK & ELLEN WIGHT, *The Mandatory Death Penalty in Malawi: The Unrealized Promise of Kafantayeni*, in 1 THE INT'L LIBR. OF ESSAYS ON CAP. PUNISHMENT 191–92 (Peter Hodgkinson & Kerry Ann Akers eds., 2018) (noting the difficulty of conducting mitigation investigations and lack of resources for experts in Malawi).

371. CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, REPRESENTING INDIVIDUALS FACING THE DEATH PENALTY: A BEST PRACTICES MANUAL 13, 15 (2017), <https://deathpenaltyworldwide.org/publication/representing-individuals-facing-the-death-penalty-a-best-practices-manual/>.

372. See DEFENDING WOMEN, *supra* note 89, at 23.

373. See *id.* at 8 (“Being female is not synonymous with providing gender-sensitive and culturally-competent legal representation, but clients may be more comfortable disclosing certain facts to a female member of the team.”). The UN General Assembly called on States to take “active steps to ensure that, where possible, female lawyers are available to represent female defendants.” G.A. Res. 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems., No. A/Res/67/187 ¶52(b) (Mar. 28, 2013).

374. *Death Penalty Disproportionately Affects the Poor*, U.N. Rights Experts Warn, U.N. (Oct. 6, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E> (noting that “it is extremely rare for domestic abuse to be treated as a mitigating factor”); CCDPW, NO ONE BELIEVED ME, *supra* note 25, at 6 (“courts routinely fail to take into account the impact of trauma and gender-based violence in determining the appropriate sentence for women”).

charging decisions.<sup>375</sup> In mandatory death penalty jurisdictions such as Tanzania, Nigeria, Ghana, Iran and Malaysia, a woman's experience of childhood sexual abuse, rape, and intimate partner violence are considered irrelevant to a court's sentencing decision, which is automatically imposed upon conviction of certain crimes.<sup>376</sup> In those jurisdictions, intimate partner violence would only be relevant to guilt-phase defenses such as provocation or self-defense.<sup>377</sup> As our case study below illustrates, however, women face a high burden in establishing that their use of lethal force was justifiable.<sup>378</sup>

### C. *The Case of Chausiku Magoiga*

Chausiku Magoiga was sentenced to death in Tanzania for killing her husband after he attacked her with a hammer and threatened to kill her.<sup>379</sup> She is a survivor of child marriage and severe intimate partner violence that led directly to the homicide for which she was condemned to die.<sup>380</sup>

Ms. Magoiga married her husband when she was only fifteen years old.<sup>381</sup> She bore the first of her four children while she was only

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375. EIPR, WOMEN SENTENCED TO DEATH, *supra* note 56, at 13 (“Most of the time, the prosecution ignores the circumstances around the incident including domestic and physical violence, and discrimination that women are subjected to from various angles.”).

376. According to the online database of the Cornell Center on the Death Penalty Worldwide, there are more than thirty countries with a mandatory death penalty for crimes ranging from murder to apostasy. *See* CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/database/#/3/3> (last visited Mar. 30, 2023).

377. CCDPW, JUDGED FOR MORE THAN HER CRIME, *supra* note 25, at 4, 8.

378. In Tanzania, for example, a defendant is only entitled to acquittal based on self-defense if their use of lethal force was both “reasonable” and “necessary” to protect life or limb from imminent threat. Penal Code of Tanz. § 18(c), Sept. 28, 1945, amended by Act No. 2 of 2016.

379. Supplementary Memorandum of Appeal at 1, *Magoiga v. Republic*, No. 297 of 2020 [hereinafter *Magoiga* Supp. Mem.].

380. Gender-based violence and intimate partner violence is widespread in Tanzania. *See Tanzania Gender Based Violence Assessment*, WORLD BANK GROUP (2017); Seema Vyas & Henrica A.F.M. Jansen, *Unequal Power Relations and Partner Violence Against Women in Tanzania: A Cross-Sectional Analysis*, 18 BMC WOMEN'S HEALTH 3 (2018).

381. *Magoiga* Supp. Mem., *supra* note 379, at 3.

seventeen.<sup>382</sup> Ms. Magoiga's husband, Nchama Mwita, beat her relentlessly throughout the sixteen years of their marriage.<sup>383</sup> As Ms. Magoiga testified at trial, Mr. Mwita routinely inflicted "events of cruelty" upon her, including "assaults, beatings and insults."<sup>384</sup> He once threatened to kill her and slashed her with a machete; the wound was so deep that her intestines protruded from the gash in her stomach.<sup>385</sup> At trial, Ms. Magoiga showed the court scars from one of Mr. Mwita's machete attacks.<sup>386</sup>

Mr. Mwita was also violent to the couple's children.<sup>387</sup> At trial, Ms. Magoiga detailed how Mr. Mwita stabbed her son with a knife and "set [him] on fire using a match box."<sup>388</sup> He broke another son's hand,<sup>389</sup> and beat their daughter to the point that she suffered a fistula.<sup>390</sup> Ms. Magoiga's account of her violent marriage was corroborated by her daughter, Happiness, who testified at trial.<sup>391</sup> According to court filings, on November 9, 2017, Mr. Mwita came home drunk and said that he was going to kill her.<sup>392</sup> After waiting until their children went to bed, he began to beat her with a hammer.<sup>393</sup> Ms. Magoiga wrenched away the hammer and struck her husband, a blow that ultimately killed him.<sup>394</sup>

At trial, Ms. Magoiga admitted killing her husband, but stated that she had no intent to kill, and that she killed in self-defense.<sup>395</sup> She tes-

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382. *Id.*

383. *Id.*

384. *The Republic v. Chausiku Nchama Magoiga, Marwa Chacha Makore*, Crim. Session Case No. 51 of 2019 (Musoma) (unreported), at 9 [hereinafter *Magoiga Judgment*].

385. Trial testimony of DW1, Trial Transcript at 67, *The Republic v. Chausiku Nchama Magoiga, Marwa Chacha Makore*, Crim. Session Case No. 2 of 2020 (Musoma) (unreported) [hereinafter *Magoiga Transcript*].

386. *Id.* at 71.

387. *Id.* at 66–67.

388. *Id.*

389. *Id.*

390. *Id.* at 67.

391. *Magoiga Transcript*, *supra* note 385, at 22.

392. *Magoiga Judgment*, *supra* note 384, at 9.

393. *Id.*

394. *Id.* at 9–10.

395. *Id.* at 2, 13.

tified extensively and in painful detail to the abuse she endured at Mr. Mwita's hands throughout their marriage. The prosecution never contested Ms. Magoiga's testimony that Mr. Mwita threatened to kill her.<sup>396</sup> Nor did the prosecution challenge any of Ms. Magoiga's detailed explanations of her husband's longstanding abuse, including his drunken aggression on the night of the offence. Nonetheless, the Tanzanian High Court found Ms. Magoiga guilty of murder and sentenced her to death. The court's legal analysis of Ms. Magoiga's actions makes no mention of Mr. Mwita's threat to kill Ms. Magoiga or his previous violent attacks.<sup>397</sup> Because Tanzanian law provides that the death penalty is automatically imposed in all cases of murder,<sup>398</sup> the Court accorded no weight to her uncontested history of intimate partner violence in sentencing her to death.

Ms. Magoiga's lawyers are appealing her conviction, and they are relying on a court case from Kenya that breaks new ground in recognizing the mitigating value of women's experiences of intimate partner violence. In *State v. Truphena Ndonga Aswani*, a woman was charged with murder—a capital offense—for killing her intimate partner.<sup>399</sup> After considering the abuse she suffered at the hands of the deceased, the Kenyan High Court convicted her of manslaughter and sentenced her to one day of prison.<sup>400</sup> In reaching its decision, the Court considered the evidence that the deceased previously threatened to kill Ms. Ndonga Aswani and physically abused her so severely that she had to seek medical treatment. Citing international law and scholarship characterizing physical abuse as a form of “cumulative terror” or “murder by instalment [sic],”<sup>401</sup> the Court found that a non-custodial sentence was the appropriate outcome to “enable [the defendant] to be counselled to overcome the traumatic experience.”<sup>402</sup>

The Kenyan court's judgment is unique in its consideration of legal scholarship, international law, and social science research regard-

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396. *Id.* at 12–14.

397. *See id.*

398. Penal Code of Tanz. § 26, Sept. 28, 1945, amended by Act No. 2 of 2016.

399. *State v. Truphena Ndonga Aswani*, Crim. Case No. E011 OF 2020 (Siaya) (unreported), <http://kenyalaw.org/caselaw/cases/view/208842/>.

400. *Id.* at 7.

401. *Id.* at 4 (citing Loraine Patricia Eber, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L. J. 895 (1981)).

402. *Id.* at 7.

ing the consequences of intimate partner violence. Its recognition that victims of GBV need healing, rather than penal sanctions, may hopefully serve as a model for courts not just in East Africa, but around the world.

Meanwhile, the African Court on Human and Peoples' Rights is poised to consider the case of Jenecia Philemon, a Tanzanian woman who was condemned to death by a court that gave no weight to her partner's repeated violent assaults and socio-economic violence in sentencing her to death.<sup>403</sup> Ms. Philemon's lawyers have argued that the court's failure to consider her experiences of GBV violated international human rights law.<sup>404</sup> Other courts are considering women's claims that their lawyers failed to defend them competently. For example, the Inter-American Court on Human Rights is considering the cases of four women who were sentenced to death in the United States after their trial lawyers failed to present evidence of their histories of abuse.<sup>405</sup> Ultimately, these cases and others may give rise to a new global norm that obliges lawyers to present women victims' experiences of abuse and obliges courts to consider them.

#### CONCLUSION

Our findings are clear and unequivocal. Women facing the death penalty in the United States and around the world have been sentenced to death without consideration of the violence, terror, and trauma that have shaped their lives. Defense attorneys and prosecutors alike misunderstand and mischaracterize the nature of gender-based violence in the trials of women facing capital charges. Courts, in turn, turn a blind

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403. Submission on Jurisdiction, Admissibility and Merits for Jenecia Philemon, *Philemon v. Tanzania* (Afr. Ct. Hum. People's Rts. Sept. 1, 2020).

404. *Id.* at 59–63.

405. Petition Alleging Violations of the Human Rights of Lisa Montgomery by the United States of America, Precautionary Measures No. 1048–20, Inter-Am. Comm'n H.R. (Nov. 5, 2020); Petition Alleging Violations of the Human Rights of Erica Sheppard by the United States of America, Precautionary Measures No. MC-551-21, Inter-Am. Comm'n H.R. (June 15, 2021); Petition Alleging Violations of the Human Rights of Christa Pike by the United States of America, No. 14.754, Inter-Am. Comm'n H.R. (Nov. 16, 2020); Petition Alleging Violations of the Human Rights of Melissa Lucio by the United States of America, No. 15.047, Inter-Am. Comm'n H.R. (Dec. 20, 2021).



eye to the gendered suffering that often shapes women's pathways to incarceration and execution.

Still, there is much that we do not know. This article merely begins to expose the extent to which women on death row are victims of both personal and institutional violence. More research into the experiences of women of color is urgently needed. And until countries and human rights organizations begin to document the experiences of women facing the death penalty around the world, their stories will remain untold.

We hope that the information we have presented will galvanize lawyers to educate themselves about the spectrum of violence that women experience, and to tell those stories in a way that is informed and nuanced. They must also learn to identify negative gender stereotypes and object when prosecutors invoke them. Judges and prosecutors, in turn, must receive training in implicit bias and gender stereotypes. Countries with a mandatory death penalty must reform their laws to allow for the consideration of women's experiences of GBV in sentencing proceedings. We must recognize, however, that none of these measures will prevent bias from infecting the capital prosecutions of women. As studies on racial bias have shown, discrimination in the application of the death penalty is virtually impossible to eradicate.<sup>406</sup> Because legal systems around the world were created by men, for men, an alternative vision is needed—one that, as a solitary Kenyan judge recognized, must be founded on healing for victims of gender-based violence.

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406. See Lynch & Haney, *supra* note 255; Baldus & Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, *supra* note 255.

## APPENDIX: DATA TABLES

Each set of tables corresponds to the four categories across which we gathered data: type of abuse, age, perpetrator, and frequency. For each category, there are two tables—the first sorts the data by the number of events across our dataset, and the second sorts the data by the number of women who experienced the form of abused described.

- Total number of events observed: 388.
- Total number of women about whom we have data: 46.
- Total number of women of color (WOC) about whom we have data: 19. Of which:
  - Black women: 10
  - Latina women: 6
  - Asian women: 2
  - Native women: 1

TABLE 1.1: TYPE OF ABUSE BY NUMBER OF EVENTS

*Note: some events constitute multiple forms of abuse so are listed in multiple categories (for example, a woman who is beaten and raped in one event of GBV has experienced both physical and sexual violence).*

	Sexual	Physical	Psycho-logical	Socio-economic	Other
Number of events observed	109	116	151	22	18

TABLE 1.2: TYPE OF ABUSE BY NUMBER OF WOMEN

	Sexual	Physical	Psycho-logical	Socio-economic	Other
Number of women experiencing the type of abuse	34	38	39	16	18
Number of WOC	14	14	17	9	5
Of B	8	7	10	5	3

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which	L	5	5	5	3	2
	A	0	1	1	1	0
	N	1	1	1	0	0

TABLE 2.1: FREQUENCY BY NUMBER OF EVENTS

		Once	Twice	Ongoing	Undetermined
Number of events observed		77	3	288	20
Of which	Family	27	1	158	12
	Partner	15	0	98	3
	Acquaintance	14	1	16	1
	Stranger	15	0	4	1
	Unknown	4	1	3	1

TABLE 2.2: FREQUENCY BY NUMBER OF WOMEN

		Once	Twice	Ongoing	Undetermined
Number of women abused		29	3	43	15
Number of WOC abused		11	0	18	5
Of which	B	7	0	10	2
	L	2	0	5	3
	A	1	0	2	0
	N	1	0	1	0

TABLE 3.1: AGE BY NUMBER OF EVENTS

*Note: some events occurred on an ongoing basis across the “under 18”/“18 and above” categories so are listed in both categories (for example, a woman whose mother beats her weekly between the ages of 15 and 19).*

		Under 18	18 and above	Unknown age
Number of events observed		237	128	29
Of	sexual	78	24	10

which:	physical	62	44	12
	psychological	94	53	8
	socioeconomic	12	11	0

TABLE 3.2: AGE BY NUMBER OF WOMEN

		Under 18	18 and above	Unknown age
Number of women abused		38	37	11
Of which	sexual	30	17	8
	physical	31	24	6
	psychological	31	30	5
	socioeconomic	11	8	0
Number of WOC abused		17	15	5
Of which	B	9	9	2
	L	5	4	1
	A	2	1	0
	N	1	1	1

TABLE 4.1: PERPETRATOR BY NUMBER OF EVENTS

*Note: some events were committed by both male and female perpetrators, so the gender breakdown does not necessarily add up to the number of events.*

		Family	Partner	Acquaintance	Stranger	Unknown
Number of events observed		198	116 (of which co-defendant: 29)	32	20	9
Of which	male	130	116	28	17	-
	female	94	0	3	0	
	unknown gender	2	0	3	3	

TABLE 4.1.1: PERPETRATOR, AGE, AND TYPE OF ABUSE  
BY NUMBER OF EVENTS

		Family	Partner	Acquaintance	Stranger	Unknown
Breakdown by age	under 18	169	20	27	12	4
	18+	6	101	2	6	4
	unknown	18	4	3	2	1
Breakdown by type	sexual	44	20	23	16	4
	physical	57	41	7	3	2
	psychological	91	49	2	1	2
	socioeconomic	10	7	1	1	0

TABLE 4.2: PERPETRATOR BY NUMBER OF WOMEN

		Family	Partner	Acquaintance	Stranger	Unknown
Number of women abused		36 (of which parents: 34)	34 (of which co-defendant: 7)	17	13	8
Number of WOC abused		14	12	6	7	6
Of whom	B	7	6	2	4	4
	L	5	4	2	3	3
	A	1	1	1	0	0
	N	1	1	1	0	0