SEX ON TRIAL

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Abstract

On January 21, 2025, the U.S. Supreme Court recognized in *Andrew v. White* that the State's introduction of sexualizing evidence in a woman's capital trial may violate due process. In Brenda Andrew's case, prosecutors presented evidence about her sexual relationships, clothing, and style of underwear as proof that she was guilty of capital murder. Our research, supported by a grant from the National Science Foundation, reveals for the first time that the prosecution's tactics in Brenda Andrew's case were far from unique. Based on a systematic review of the trial transcripts of every woman currently on death row in the United States, we demonstrate that capital prosecutors routinely weaponize women's sexuality in ways that are legally questionable and culturally regressive in order to secure punitive outcomes. We document cases across multiple states in which prosecutors discuss women's bodies, underwear, intimate relationships, and sexual experiences in their capital trials as proof of their immoral and criminal mindset. In so doing, the State encourages jurors to convict and condemn women based on their violation of gendered moral codes.

We present our findings against a historical backdrop of women's criminal prosecutions in the United States and Europe. The prosecutorial tactics we document are modern-day echoes of sex-shaming tactics commonplace in the prosecution of women for witchcraft and other offenses dating back hundreds of years. Although such tactics have been documented by historians and social scientists in isolated case studies, this paper is the first

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to conclude that the sexualization of women capital defendants is an ongoing and pervasive problem that undermines the quality of justice women receive. We conclude with a call for systemic reform—including legislation—to limit the ways in which prosecutors can invoke irrelevant evidence of women's sex lives in criminal proceedings.

INTRODUCTION

On January 21, 2025, the U.S. Supreme Court recognized in *Andrew v. White* that the State's introduction of sexualizing evidence in a woman's capital trial may violate due process.[1] Brenda Andrew, the only woman on death row in Oklahoma, had been convicted and sentenced to death for the murder of her husband.[2] The Court summarized the evidence introduced to secure her conviction and death sentence:

> [T]he prosecution elicited testimony about Andrew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. . . . In its closing statement, the prosecution again invoked these themes, including by displaying Andrew's "thong underwear" to the jury, by reminding the jury of Andrew's alleged affairs during college, and by emphasizing that Andrew "had sex on [her husband] over and over and over" while "keeping a boyfriend on the side."[3]

Media coverage[4] and commentary[5] failed to recognize an extraordinary aspect of the *Andrew* decision: never before had the Court found that sex-stereotyping evidence could

1 Andrew v. White, 604 U.S. 86, 87 (2025). The authors are counsel for Ms. Andrew.

2 Sandra Babcock, Valena Beety & Susan Sharp, *Why Has Brenda Andrew Been on Death Row for Two Decades? It Has Everything to Do with Sex*, OKLAHOMAN (July 13, 2023), https://www.oklahoman.com/story/opinion/2023/07/13/guests-is-brenda-andrew-on-death-row-for-adultery/70404140007/ [https://perma.cc/U4NS-2URY].

3 *Andrew*, 604 U.S. at 88–89. The Court remanded Ms. Andrew's case and instructed the Court of Appeals to determine "whether a fair-minded jurist could disagree that the evidence 'so infected the trial with unfairness' as to render the resulting conviction or sentence 'a denial of due process.'" *Id.* at 91.

4 *See, e.g.*, John Fritze & Devan Cole, *Supreme Court Revives Case of Death Row Inmate Who Says She Was "Sex-shamed" at Trial*, CNN (Jan. 21, 2025), https://edition.cnn.com/2025/01/21/politics/brenda-andrew-supreme-court-death-penalty-case [https://perma.cc/PXX4-D2UZ].

5 *See, e.g.*, Amy Howe, *Supreme Court Sends Capital Case Back for Reconsideration Over Focus on Sex*, SCOTUSBLOG (Jan. 23, 2025), https://www.scotusblog.com/2025/01/supreme-court-sends-capital-case-back-for-reconsideration-over-focus-on-sex/ [https://perma.cc/QW3V-RJW9].

undermine the fairness of a woman's criminal trial.[6] Absent from the coverage was any insight into the prevalence of sexualizing evidence in women's capital trials, the historical context for such practices, or the extent to which they reflect deeply rooted gender bias.

This Article fills that gap.[7] We analyze the cases of all women currently sentenced to death in the United States to determine how their bodies have been put on trial.[8] Our research reveals that the prosecution's tactics in Ms. Andrew's case were far from unique. Indeed, prosecutors introduced sexualizing evidence in 71% of these cases, ranging from testimony regarding women's sexual experiences to judgments of their appearance. Some of the evidence and argument we describe is explicit, such as the State's introduction of sex toys into evidence. Other evidence is more subtle, such as the argument that girls of color are sexually "mature" for their age.[9] In all instances, prosecutors' sexualization of women capital defendants demeans them and invites jurors to judge them based on gendered moral codes.

The tactics we describe are not novel. Historian David Baker has documented similar practices dating back hundreds of years.[10] More recently, sociologists and legal scholars have described prosecutions of women that relied on gendered tropes to obtain convictions.[11]

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6 The Supreme Court remanded Ms. Andrew's case to the Court of Appeals for the Tenth Circuit. That court issued a decision on January 13, 2026, declining to grant Ms. Andrew any relief and refusing to consider the full spectrum of the prosecution's sexualizing and sex-stereotyping evidence. *See* Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026). The panel decision has been appealed to the en banc court.

7 This Article has been supported by a grant from the National Science Foundation, funding that is now imperiled by the Trump administration's aversion to research focused on discrimination experienced by women, gender minorities, and people of color.

8 As we explain below, our dataset encompasses forty-eight women sentenced to death between 1990 and 2022. This includes all women currently on death row. *See infra* notes 21–24 and accompanying text.

9 As we explain below, this "adultification" of girls of color encourages jurors to view their experiences of child sexual abuse as less harmful.

10 *See* DAVID W. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE U.S.: AN ANALYTICAL HISTORY 81, 94–99, 153 (2016) (describing capital prosecutions of women throughout U.S. history).

11 *See, e.g.*, Patricia Wilkins, *Stories That Kill: Masculinity and Capital Prosecutors' Closing Arguments*, 71 CLEV. ST. L. REV. 1147, 1184–85 (2023) (citing prosecution arguments in the North Carolina capital case of Velma Barfield); Kathryn A. Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, 11 WOMEN & CRIM. JUST. 49, 56 (2000) (analyzing twentieth-century capital cases in the United States). *See generally* Jessica Sutton et al., *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 ST. JOHN'S L. REV. 1053 (2021); MARY WELEK ATWELL, WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT 19 (2014) (describing the role of sexuality

Yet most research in this field has relied on scattered case studies from Europe, Australia, and the United States to draw generalized conclusions about the treatment of women or gender minorities.[12] Because earlier scholars lacked access to trial transcripts for a large number of women, they were forced to speculate about the prevalence of sex-shaming in the contemporary criminal legal system. As a result, the existence of pervasive gender bias in criminal prosecutions remained hidden from public view. Our research provides the first glimpse into the systemic nature of gender bias—a finding that should spur policymakers to adopt systemic solutions.

This is not to say that previous research lacks any empirical foundation. Indeed, the case studies examined by earlier scholars confirm many of our findings. Three themes, in particular, emerge from the scholarship. First, women defendants who are perceived as overtly sexual—either through the clothes they wear, the number of intimate partners they have, or their focus on sexual pleasure—are cast as promiscuous and blameworthy.[13] Case studies from the United Kingdom and the United States have explained as much.[14] Second, women who have same-sex partners are cast as deviant and violent in ways that

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in the cases of Karla Faye Tucker and Teresa Lewis); 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).

12 *See, e.g.*, Sutton et al., *supra* note 11, at 1064; Mogul, *supra* note 11, at 491; *see also* Siobhan Weare, *"The Mad", "The Bad", "The Victim": Gendered Constructions of Women Who Kill Within the Criminal Justice System*, 2 LAWS 337, 346–48 (2013) (describing the cases of Myra Hindley and Rosemary West); LIZZIE SEAL, WOMEN, MURDER AND FEMININITY 30–49, 57–63, 66–83, 106–63 (2010) (describing capital and non-capital cases in the United States and England and Wales).

13 *See, e.g.*, Weare, *supra* note 12, at 347 (noting that female killers who have sexually "deviant" lifestyles are punished harshly); Helena Kennedy, *The Myth of the She-Devil: Why We Judge Female Criminals More Harshly*, GUARDIAN (Oct. 2, 2018), https://www.theguardian.com/uk-news/2018/oct/02/the-myth-of-the-she-devil-why-we-judge-female-criminals-more-harshly [https://perma.cc/G7UD-ALTJ] (describing the cases of Myra Hindley and Amanda Knox).

14 Notable cases include that of Susan Smith, who was capitally prosecuted for killing her children in South Carolina. Ms. Smith's sexual relationships were chronicled by prosecutors and recounted by journalists, who cast her as a "temptress." *See* Barbara Barnett, *Medea in the Media*, 7 JOURNALISM 411, 421–22 (2006). Another example is the notorious case of Myra Hindley, convicted with a male co-defendant of a series of murders in the United Kingdom in the 1960s, in which "the prosecution sexualised all of her relationships even if they were not sexual in nature." Weare, *supra* note 12, at 348. The case of Cynthia Sommers, who was convicted in 2007 of killing her husband in San Diego, California, is also illustrative. During her trial, prosecutors introduced evidence that she had obtained breast implants, participated in a "wet T-shirt contest," and had multiple sexual partners after her husband's death. She was later exonerated. *See* Danielle Bernstein, *Why Women's Wrongful Convictions Are So Difficult to Overcome*, THE APPEAL (Aug. 14, 2023), https://theappeal.org/womens-wrongful-convictions-no-crime-sexual-stereotypes/ [https://perma.cc/BVM4-S7JG].

are explicitly linked to their sexual orientation.[15] Twenty-five years ago, Kathryn Farr examined the cases of five lesbian women on death row in the United States, and concluded that in all five cases the defendants were represented as "masculinized and man-hating."[16] Since then, other scholars have argued that queer women facing capital prosecution are stigmatized as "immoral, deviant, and pathological,"[17] and that prosecutors leverage anti-LGBTQ bias to obtain death sentences.[18] Third, scholars examining non-capital cases have documented how women of color are subjected to a host of stereotypes linked to sexual behavior and expression, including the "adultification" of girls who are victims of gender-based violence[19] and the stereotype of Black women as aggressive.[20]

Our research reinforces these findings. But rather than focusing on isolated case studies, we analyze transcripts drawn from the entire population of women on death row to document patterns of bias. Exposing these patterns allows us to identify how gender bias affects assessments of culpability and death-worthiness. It also serves to identify areas where courts and legislatures should impose greater limits on prosecutorial evidence and rhetoric. Equipped with our data, defense teams can more effectively defend women from deeply prejudicial sexualizing evidence. Ultimately, our aim is to ensure that women in the criminal legal system are judged based on their actions, not their sex lives or appearances.

We begin this Article in Part I by providing an overview of the women in our dataset, including their personal characteristics and crimes of conviction. In Part II, we situate our research in historical context, and in Part III we outline our methodology for the present study. Part IV describes the range of sexualizing evidence and argument utilized by prosecutors

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15 *See generally* Sutton et al., *supra* note 11; Mogul, *supra* note 11.

16 Farr, *supra* note 11, at 61.

17 Mogul, *supra* note 11, at 480.

18 *See* Mogul, *supra* note 11, at 483–91 (discussing the cases of Bernina Mata in Illinois and Wanda Allen in Oklahoma); Sutton et al., *supra* note 11, at 1058–61 (discussing the cases of Bernina Mata in Illinois, Wanda Allen in Oklahoma, and Aileen Wuornos in Florida).

19 *See* Mikah K. Thompson, *Sexual Exploitation and the Adultified Black Girl*, 94 ST. JOHN'S L. REV. 971, 974 (2020); *cf.* REBECCA EPSTEIN, JAMILIA BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 5, 8 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/6CL4-QPVF] (describing how Black girls are seen as more sexually knowledgeable and "less needing of protection").

20 *See* Jacklyn Huey & Michael J. Lynch, *The Image of Black Women in Criminology: Historical Stereotypes as Theoretical Foundation*, *in* RACE, CRIME, AND JUSTICE: A READER 127, 133 (Shaun Gabbidon & Helen Taylor Greene eds., 2005).

in contemporary capital cases. In Part V, we explore the impact of sexualizing evidence on the fairness of women's capital prosecutions. Part VI concludes with recommendations for courts, policymakers, prosecutors, and defense teams.

I. Women on Death Row in the United States

This Article builds on research the authors have published regarding forty-eight women sentenced to death in the United States.[21] Below, we describe the characteristics of the women in our dataset and our main research findings to date.

A. Overview

Our dataset encompasses forty-eight persons legally recognized as women[22] who were sentenced to death in the United States between 1990 and 2022.[23] Twenty-eight (58%) of the people in our dataset are white; eleven (23%) are Black; six (13%) are Latina, two (4%) are Asian or Pacific Islander, and one (2%) is Native American.[24] Nineteen women—more than a third of the women in our dataset—were condemned to death in California. The rest were sentenced in Texas (seven women), Alabama (five women), Arizona (three women), North Carolina (two women), Florida (three women), and in nine other states that each

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21 *See* Sandra Babcock, Nathalie Greenfield & Kathryn Adamson, *Women on Death Row in the United* States, 46 CARDOZO L. REV. 1 (2024) [hereinafter Babcock et al., *Women on Death Row*]; Sandra Babcock & Nathalie Greenfield, *Gender, Violence, and the Death Penalty*, 53 CAL. WEST. INT'L L.J. 327 (2023) [hereinafter Babcock & Greenfield]; Sandra Babcock, *Gendered Capital Punishment*, 31 WM. & MARY J. RACE, GENDER & SOC. JUST. 1 (2025) [hereinafter Babcock, *Gendered Capital Punishment*].

22 Trans women are on death row in states including Ohio, Florida, California, and Oregon. *See Death Row: Women*, DEATH PENALTY INFO. CTR. (Oct. 7, 2025), https://deathpenaltyinfo.org/death-row/women [https://perma.cc/Y8M3-RMRT]; Zyst v. Kelly, 338 Or. App. 597, 599 n.1 (2025). There is one trans man on death row in California. *See* Babcock & Greenfield, *supra* note 21, at 378 n.224. The forty-eight cases in our dataset comprise forty-seven cisgender women and one trans man who presented as a woman at the time of trial. While recognizing shortcomings in our use of terminology, we will refer to those in the dataset as "women" throughout this Article as we primarily analyze their trial experiences, and all presented as women at trial.

23 This group was the entire women's death row population in January 2023, when we began collecting transcripts.

24 We have identified each woman's race based on data maintained by the Death Penalty Information Center, which is based on reporting by the NAACP Legal Defense and Education Fund. *Death Row: Women*, *supra* note 22. We recognize, however, that this data does not capture the complexity of each woman's racial identity. For example, one woman—who is identified as Black by the NAACP Legal Defense and Education Fund—has been identified in court pleadings as a person of Native American and African American descent. *See* Keaton v. State, 375 So. 3d 44, 83 n.7 (Ala. Crim. App. 2021).

sentenced one woman: Georgia, Idaho, Kentucky, Louisiana, Mississippi, Pennsylvania, Ohio, Oklahoma, and Tennessee.

As a group, death-sentenced women share certain distinguishing features. First, the overwhelming majority (96%) have experienced physical, sexual, and other forms of gender-based violence throughout their lives.[25] Second, the great majority (85%) are mothers.[26] Third, most (71%) had no exposure to the criminal legal system prior to their arrest on capital murder charges.[27] Finally, at least 83% of the women in our dataset live with psychological or intellectual disabilities.[28]

The crimes for which women are sentenced to death also share certain salient features. Of the women in our dataset, 85% were condemned to death for killing someone they knew—most commonly a child in their care or an intimate partner.[29] Nearly two-thirds (63%) of the women had co-defendants; of these, almost all were male.[30] Two-thirds of the women's co-defendants were current or former intimate partners, all of whom were male.[31]

B. Gendered Dynamics of Capital Prosecutions

The great majority of the women in our dataset were prosecuted in courtrooms dominated by men. Men "decide whether they will be capitally charged, whether they will receive a plea bargain, whether certain categories of evidence will be admitted, and how their stories will be told."[32] Of the women in our dataset, 96% were prosecuted under a male elected district attorney,[33] and 88% were tried before a male judge.[34] Most women

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25 *See generally* Babcock & Greenfield, *supra* note 21.

26 Babcock et al., *Women on Death Row*, *supra* note 21, at 17.

27 *Id.* at 12. Of the women in our dataset, 71% had no prior convictions, and 92% had never been convicted of a crime of violence. *See id.*

28 *Id.* at 15.

29 *Id.* at 25.

30 *Id.* at 43.

31 *Id.* at 44.

32 Babcock, *Gendered Capital Punishment*, *supra* note 21, at 3.

33 Babcock et al., *Women on Death Row*, *supra* note 21, at 21.

34 *Id.* at 23.

(69%) had all-male defense teams, and 56% were prosecuted by an all-male team of trial prosecutors.[35]

Our research indicates that the stories trial actors tell about women capital defendants are deeply gendered. Prosecutors, in particular, invoke a variety of stereotypes to persuade juries of women's blameworthiness; the most common involve women's perceived failures as mothers, their scheming or manipulative nature, and their sexual deviance.[36] Defense attorneys, in turn, frequently rely on stereotypes of women as nurturing caretakers.[37]

Women's experiences of gender-based violence also feature prominently in many capital trials.[38] As noted above, nearly all women on death row have experienced gender-based violence in their lives prior to their arrest on capital charges.[39] Women's experiences of violence shape their lives in myriad ways, and often bear directly on questions of legal and moral culpability.[40] But when women testify about the violence they suffered, or when expert witnesses describe the impact of gender-based violence on women's mental health, prosecutors routinely rely on gendered tropes to undermine their experiences.[41]

II. Women's Sexuality on Trial Throughout History

Prosecutors have long emphasized women's sexual behavior and expression in their criminal trials.[42] For centuries, women have been targeted and executed when they express sexuality in ways that are counter to dominant social norms.[43] The weaponization of sex that we observe in today's capital trials developed from this historical context.

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35 *Id.* at 22.

36 Babcock, *Gendered Capital Punishment*, *supra* note 21, at 11.

37 *Id.* at 13.

38 Babcock & Greenfield, *supra* note 21, at 382.

39 *Id*. at 329.

40 *Id*. at 335.

41 *Id*. at 382.

42 FRANCES HEIDENSOHN, WOMEN AND CRIME 94 (2d ed. 1995) (observing that "[o]ffences which have apparently nothing to do with sexuality are—when committed by women—transformed into expressions of female sexuality or the lack of it.").

43 SEAL, *supra* note 12, at 64 (noting that, throughout history, "[W]omen have been judged more harshly than men if they do not meet expectations of appropriate sexual behaviour in terms of chasteness and

The condemnation of women's sexual expression draws on some of the oldest and most enduring stories in human history. The Christian Bible has long established the perils of the seductive woman. Eve, as the prototypical temptress and source of sin, is one of the most influential cultural figures in this regard.[44] Her story of the forbidden fruit has become the foundational narrative for the concept of sin.[45] Other biblical women, such as Jezebel or Delilah, present similar cautionary tales of unchecked female sexuality and power.[46]

Allegories of dangerous female sexuality are also found in Greek mythology. Whether we look to Circe, the Titan goddess of sorcery who seduces Odysseus; Pasiphae, the Greek goddess whose sexuality produces the monstrous minotaur; or Helen of Troy, whose legendary beauty was the catalyst for a decades-long war, ancient stories are littered with examples of women whose sexuality and appearance signal peril.[47] These powerful tropes about women and sex have persisted over centuries. Criminal legal systems in the Christian-rooted Global North operate within this religious and cultural context.

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monogamy[.]"). Indeed, in the United States, laws criminalizing sexual relations for women and queer people have existed throughout the country's history. *See, e.g.*, Adultery, N.Y. PENAL LAW § 255.17 (McKinney 2023) (repealed 2024) (criminalizing adultery as a Class B misdemeanor); Lawrence v. Texas, 539 U.S. 558 (2003) (finding unconstitutional previously-held prohibitions on sodomy); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling federal abortion protections).

44 Sarah Nicholson & Zanne Domoney-Lyttle, *Women and Gender in the Bible and the Biblical World: Editorial Introduction*, 6 OPEN THEOLOGY 706, 706–07 (2020); *see also* Rosemary R. Ruether, *Sexism and Misogyny in the Christian Tradition: Liberating Alternatives*, 34 BUDDHIST-CHRISTIAN STUD. 83, 86–87 (2014).

45 Roche Coleman, *Was Eve the First Femme Fatale?*, 42 VERBUM ET ECCLESIA 1, 2 (2021). While the biblical text of Genesis 3 does not explicitly state that Eve *seduced* Adam after eating the forbidden fruit, later interpretations, particularly those drawing on the "femme fatale" archetype, have portrayed her as actively enticing Adam through her beauty and words. *Id.*

46 The Phoenician princess Jezebel has become a cultural embodiment of female wickedness, sexual immorality, and harlotry. She combines numerous unfeminine attributes: she is idolatrous, foreign, malevolent, and sexually suggestive, making her a powerful symbol of destructive female power and sexual independence. *See* KEVIN KILLEEN, *How Jezebel Became Sexy: Ahab, Naboth's Land and Jezebelian Hermeneutics*, *in* THE POLITICAL BIBLE IN EARLY MODERN ENGLAND 207, 227–28 (2017). In a similar vein, Delilah, Samson's Philistine partner described in Judges 14–16, presents another example of a woman who uses her seductive charm and persistence to betray a man, leading to his downfall. *See* Carol Smith, *Delilah: A Suitable Case for (Feminist) Treatment?*, *in* THE FEMINIST COMPANION TO JUDGES 93, 99 (A. Brenner ed., 1993).

47 Ancient Rome was no different: the goddess Venus was known for her powers of sex and beauty, and Ovid's *Metamorphoses* details the seductive and dangerous power of women's beauty. *See* MARY BEARD, WOMEN AND POWER 9 (2017).

The witch trials of early modern Europe and the colonial United States provide stark examples of these tropes.[48] As far back as the early 1400s, women's sexual histories were used to punish them—particularly in witchcraft cases. At the heart of this weaponization of women's sexual expression was state punishment of behavior that contravened expectations of women as chaste, demure, and deferential, particularly behavior that expressed sexual agency and knowledge.[49] Indeed, as we describe below, women's sexual histories—including histories of promiscuity, sexual agency, and gender-based violence at the hands of men—have long constituted evidence against them. Women's bodies have provided "proof" of crimes, and women have received harsher punishments for not conforming to

48 The European "witch craze" reached its height in the late sixteenth and early seventeenth centuries, during what is known as the "early modern period." By this point tens of thousands of people—predominantly women—had been executed. *See* LYNDAL ROPER, WITCH CRAZE 6–7 (2004). We focus on early modern Europe and the colonial United States because of the extensive scholarship documenting women's trials in these regions—particularly trials in Europe for Satanic witchcraft—and because European legal traditions have contributed to the development of the American legal system. Nevertheless, the patterns we describe below are not confined to the Global North or to the sixteenth and seventeenth centuries. Women are still prosecuted as witches in multiple countries. One 2020 U.N. study reports that there were at least 20,000 documented accusations of witchcraft across 60 countries between 2009 and 2019. U.N. INDEP. EXPERT ON THE ENJOYMENT OF HUM. RTS. BY PERSONS WITH ALBINISM ET AL., CONCEPT NOTE ON THE ELIMINATION OF HARMFUL PRACTICES RELATED TO WITCHCRAFT ACCUSATIONS AND RITUAL KILLINGS 2 (Nov. 2020), https://www.ohchr.org/en/documents/tools-and-resources/concept-note-elimination-harmful-practices-related-witchcraft [https://perma.cc/4ND4-A636]. In the Central African Republic, for example, witchcraft prosecutions make up 40% of court cases, and Saudi Arabia has carried out executions for witchcraft and sorcery within the past decade. Graeme Wood, *Hex Appeal*, ATLANTIC (June 2010), https://www.theatlantic.com/magazine/archive/2010/06/hex-appeal/308103/ [https://perma.cc/7QSC-VMJD]; *Saudi Woman Executed for 'Witchcraft and Sorcery'*, BBC NEWS (Dec. 12, 2011), https://www.bbc.co.uk/news/world-middle-east-16150381 [https://perma.cc/NUE9-PNL2]; *Saudi Arabia: Witchcraft and Sorcery Cases on the Rise*, HUM. RTS. WATCH (Nov. 24, 2009), https://www.hrw.org/news/2009/11/24/saudi-arabia-witchcraft-and-sorcery-cases-rise [https://perma.cc/YDL7-9LN8]. Moreover, women continue to be prosecuted for sexual activity—including capital prosecutions, as occurred in the 2012 case of a woman stoned to death in Mali for having extramarital sex. *See* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., ADULTERY AS A CRIMINAL OFFENCE VIOLATES WOMEN'S HUMAN RIGHTS 7–8 (2012), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf [https://perma.cc/PRW4-CQN2].

49 Women tried for satanic witchcraft were frequently deemed subversive because they were perceived variously as nonsexual or as over-sexual. *See* MARION GIBSON, WITCHCRAFT: A HISTORY IN THIRTEEN TRIALS 14 (2023) ("Witches were often seen as unwomanly women: child-haters, anti-mothers, anti-housewives."); *id.* at 259–60 (explaining that deviant sex, as determined by contemporaneous moral codes, formed a critical component of many women's witchcraft trials). Indeed, some writers have argued that the European witch craze of early modern period was driven, in part, by church leaders' fears of female knowledge regarding the "secrets of nature"—including knowledge of fertility, sex, and reproduction. *See* MATILDA JOSLYN GAGE, WOMAN, CHURCH, AND STATE: A HISTORICAL ACCOUNT OF THE STATUS OF WOMAN THROUGH THE CHRISTIAN AGES, WITH REMINISCENCES OF THE MATRIARCHATE 233 (1893); ROPER, *supra* note 48, at 4 (describing the perceived suspicious nature of women's exchanges, intimacy, and fertility to witch hunters).

sexual expectations of heteronormativity and chastity. The prevalence of testimony and argument about women's sexuality in contemporary capital prosecutions[50] thus builds on prosecutorial practices established hundreds of years ago.

A. Women's Sexual Histories as Evidence

Through the fifteenth to seventeenth centuries in Europe and, later, colonial America, promiscuity and sexual agency became reasons to suspect women of witchcraft.[51] Women "thought to have extramarital lovers or [who] had given birth to illegitimate children" were "marked . . . out as transgressors against Christian morality,"[52] as were "[w]omen who made their own decisions about sex and religion."[53] These women were targeted as witches and capitally punished because "[t]heir unregulated sexual activities and their lone childbearing troubled their accusers, and were thought to be linked to special female knowledges [sic] about sex and fertility."[54] One of the earliest accounts of a witchcraft trial involves accusations against Helena Scheuberin in Austria, a woman who initially aroused suspicions because she had multiple extramarital affairs. Her accusers argued that she was "promiscuous, untrustworthy, independent . . . deceitful [and] spirited."[55] During her interrogation, she was also asked if she was a virgin at the time of her marriage.[56]

Ms. Scheuberin's trial is far from unusual. Throughout the early modern period, women as far apart as the Arctic Circle, Scotland, and the colonial United States were confronted with evidence of their adultery, sexual desires, and other unchristian sexual practices as

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50 *See infra* Part IV.

51 GIBSON, *supra* note 49, at xvi.

52 *Id.*

53 *Id*. at 12.

54 *Id*. at xvi.

55 *Id.* at 12. Helena Scheuberin's "outspoken" nature rendered her a target because of her defiance of religious and cultural tropes in fifteenth-century Austria. Condemnation of women for using blunt language was not confined to that era. Nellie Duncan, for example, was tried in 1940s Britain under witchcraft charges and the evidence against her included testimony that she was "foul mouthed." *Id.* at 187–206. And more recently still, Brenda Andrew's 2004 capital murder trial in Oklahoma contained repeated references to her "foul mouth," her use of curse words, and her unfeminine language. *See* Petitioner's Supplemental Brief at 1–10, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

56 GIBSON, *supra* note 49, at 16.

proof of their immoral and corrupt characters.[57] The seventeenth-century Essex witch trials in the United Kingdom saw multiple women put to death after being made to describe the orgies they purportedly enjoyed, including orgies with fictional animals.[58] And during the seventeenth-century trials of the Vardø Witches in what is now Norway, Sámi women were accused by their white sexual partners of practicing witchcraft because the women had extramarital sexual relationships.[59]

Evidence of women's sexual practices also led to more severe punishment. In sixteenth-century North Berwick, Scotland, a convicted witch, Effie McCalzean, was burned alive rather than being hanged along with her fellow witches because, unlike them, she was "an undutiful wife" and therefore deserved a more painful death.[60]

Experiences of gender-based violence have long been used as evidence against women. For accused witches, prosecutors turned abuse into seduction and sexual violence was a sword, not a shield, in the courtroom. The case of Marie-Catherine Cadière in seventeenth-century France exemplifies this: Ms. Cadière endured rape at the hands of a clergyman, but when she reported it, the perpetrator subsequently accused her of witchcraft and seduction.[61] Women who were raped in jail while awaiting trial similarly saw sexual violence used to incriminate them—in one German case, the woman's accusers determined that she had used witchcraft to seduce the guards into having sex with her.[62]

Sex was bound up in women's trials during the witch craze because the witch, at her core, was "a human who had sex with the devil."[63] Indeed, seduction by the devil

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57 *See id.* at 24–83 (describing early modern witchcraft trials in Scotland, Norway, and the United States).

58 *See id.* at 84–105; Trace M. Maddox, *The Lawyer, The Witch, and The Witness: Proving Witchcraft in English Courts*, 35 YALE J.L. & HUMS. 666, 699–700 (2025) (describing the prevalence of evidence about witches' "familiars," or spirit animals, in English witchcraft trials).

59 GIBSON, *supra* note 49, at 52.

60 *Id.* at 42.

61 *Id.* at 141–46.

62 ROPER, *supra* note 48, at 56, 59–60.

63 *Id.* at 84. *See* HENRI BOGUET, AN EXAMEN OF WITCHES 29 (E. Allen Ashwin trans., 1929) (opining that "[t]he Devil uses [women] so because he knows that women love carnal pleasures, and he means to bind them to his allegiance by such agreeable provocations."); ROPER, *supra* note 48, at 84 (explaining that demonologists "mix[ed] a low view of women with a high regard for the power of sex.").

was "the story all witches had to provide" and the story all accusers wanted to hear.[64] Testimony regarding demonic orgies, unchristian lust, and suspicious relationships became commonplace in women's trials across Europe and colonial America, and women's torture-induced confessions frequently drew on their own sexual lives to provide the information and detail that interrogators sought to hear.[65] Inappropriate sex and relationships (including experiences of violence) shaped accusations, and the details of these relationships then served as critical evidence against them—ultimately condemning them to death.

B. Women's Bodies as Evidence

Prosecutors' reliance on women's clothing, appearance, and bodies to infer guilt in capital trials also has historical roots. Women's bodies have long been held up to invite shame and punishment. For example, common punishments for women as far back as the eighth century included public stripping and nude whippings.[66] Punishment, shame, sex, and women's bodies thus have deep and interconnecting tendrils.

Prosecuting authorities have also long drawn on women's bodies as proof of guilt. During the witch craze in Europe and the North American colonies, witch finders made assumptions about women based on how proper their clothing was and how attentive they were to men,[67] and many believed that beauty was dangerous as it was "the most potent instrument of the demon."[68]

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64 ROPER, *supra* note 48, at 62.

65 *Id.* at 84–85; GAGE, *supra* note 49, at 217. The interrogation of Bess Clarke in seventeenth-century Essex, for example, saw interrogators question her about her illicit child and "carnal relations" with the devil. In answering, Ms. Clarke relived her own experiences of sex and pregnancy and thereby cemented her own status as a condemned woman. *See* GIBSON, *supra* note 49, at 94–95.

66 *See* GAGE, *supra* note 49, at 282–83. Under the reign of Emperor Charlemagne during the Holy Roman Empire, "wom[e]n of the town" were punished by being "dragged naked through the city streets, subject to all the cruel tortures of an accompanying mob." *Id.* at 221. Such punishments also recall the treatment of women accused of having sexual relations with occupying soldiers in France following the end of the Second World War. Accusers took women to the streets to publicly shave their heads, a punishment designed to humiliate, defeminize, and shame women for inappropriate sexual conduct. *See* Fabrice Virgili, *Les « tondues » à la Libération: le corps des femmes, enjeu d'une réaproppriation*, 1 CLIO. FEMMES, GENRES, HISTOIRE 111, 112–13 (1995).

67 *See* GIBSON, *supra* note 49, at 10.

68 2 WILLIAM EDWARD HARTPOLE LECKY, HISTORY OF EUROPEAN MORALS 358 (3d ed. 1902); *see also* GAGE, *supra* note 49, at 251 (explaining that "Devils were said to be very fond of women with beautiful

One particularly chilling use of women's bodies as evidence of guilt was the practice of witch-pricking. As one historian writes, "What made the witch recognizable for what she was were signs in her body. She had the tell-tale 'Devil's mark' or darkened mole or bump . . . and her sexual organs were well used."[69] Accusers, interrogators, and executioners—who were overwhelmingly male—therefore inspected women's bodies for so-called "witch marks" and evidence of sexual activity. Accused women were completely shaved, every part of their bodies—including genitalia—inspected for marks, and the marks then pricked with needles to ascertain if they drew blood or if the witch experienced sensation.[70] Marks "were often found around the genital area."[71] One accused witch in 1747 Germany, Magdalena Bollman, had so many needles inserted into areas around her genitals to see if she experienced sensation there that she died under this torture.[72]

Women's naked bodies were not only part of the evidence, but they were part of the performance of trial. Decisionmakers were invited to observe women without clothes: accusers sometimes stripped women for interrogation and trial during the witch craze because the devil might be hiding in her clothes, and court records indicate that some trials began with the executioner ordering the accused to strip naked for the proceedings.[73] As we explain in Part IV, these practices are echoed in the prosecution of women for capital offenses today.

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hair."). Equally, many of the accused witches were elderly women—women no longer considered beautiful or fertile. *See* GIBSON, *supra* note 49, at xiii. Just as we see in today's cases, women's sexualized appearances and nonsexualized appearances were both presented as reason to convict her. *See infra* Section IV.B.

69 ROPER, *supra* note 48, at 9.

70 *Id.* at 49–56; GIBSON, *supra* note 49, at 36–37. *See* Maddox, *supra* note 58, at 700–02 (describing the practice of stripping women to search for a witch mark, or "witch's teat" in English witchcraft trials, the results of which "became standard pieces of evidence"); ORNA ALYAGON DARR, MARKS OF AN ABSOLUTE WITCH: EVIDENTIARY DILEMMAS IN EARLY MODERN ENGLAND 112 (2016) (explaining that by "the 1630s[,] the search [for witch's teats] became quite routine").

71 ROPER, *supra* note 48, at 54.

72 *Id.* at 49.

73 *Id*. at 54–56.

C. Sex and Intersectional Bias Through a Historical Lens

During the height of witchcraft persecutions, "[e]verywhere the most helpless classes were the victims."[74] These "most helpless classes" were frequently women who were cast out of society because of their illegitimate children, unmarried status, inability to bear children, or behavior that defied Christian norms.[75] And while people of all genders, classes, and racial backgrounds became entangled in the historical persecution of witches, women with multiple marginalized identities were particularly vulnerable to accusation.[76]

The witch hunts of the sixteenth and seventeenth centuries targeted poor and uneducated women who were unable to withstand interrogation from powerful men.[77] Historians have documented how women on the margins of society due to poverty "were used to agreeing with powerful men who deigned to speak to them" and were prone to submitting to authority.[78] Some scholars have found that women with disabilities and mental illnesses were vulnerable to making false confessions and to accusations on account of their difference.[79] Women of different racial and ethnic backgrounds—particularly women from communities that did not subscribe to Christian norms around sex, relationships, and marriage—were also targeted.[80] For example, historian Marion Gibson documents the Puritans' targeting of indigenous populations in northern Europe and details how some Vardø women were accused of witchcraft because of their liberal attitudes to intimate partnerships.[81] While there is a paucity of research on women with multiple marginalized identities during the early modern witch hunts, there are some historical examples of how accusers wielded class and race, along with gender, to women's detriment—as remains the case today.

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74 GAGE, *supra* note 49, at 232.

75 GIBSON, *supra* note 49, at 90–92, 260.

76 *See id.* at 260.

77 *See* ROPER, *supra* note 48, at 45–49.

78 GIBSON, *supra* note 49, at 37.

79 *See* GIBSON, *supra* note 49, at 84–106, 229–60. Gibson speaks of the historical targeting of women who are "disabled, vulnerable, or unwell," which criminal justice practitioners in the United States may understand through the lenses of intellectual disability and mental illness.

80 *Id.* at 44–64, 106–27.

81 *Id.* at 44–64.

D. The Male Gaze

Criminal proceedings focusing on women's sexuality were historically driven by men. Church leaders making pronouncements on sexuality and morality were men.[82] During the early modern period in Europe, "demonologists" were "often men who were educated in law and theology."[83] And courtroom accusers, interrogators, decisionmakers, and executioners were overwhelmingly men.[84]

The demonological texts and philosophies of this period indicate a male fascination with female lust and sex, and the details that interrogators elicited during witchcraft confessions—replete with stories of orgies and sex with the devil—were "incredible" and "riveting."[85] As one historian explains, "[T]he sheer fascination of the material often got the better of [male interrogators]."[86] The hatred and terror that drove the violence against women through the witch craze "were shaped by social tensions and religious beliefs, but the passions themselves derived from deeply rooted fantasies" about women's bodies, their "demonic lovers," and their fertility.[87]

Historical prosecutions of women remind us of the enduring fascination with women's sexuality. These tales of sex and sin evoke some of the oldest stories in human history and have inspired artistic works across centuries that have entered the cultural canon, from fine art to literature to plays.[88] But they also demonstrate that women's counter-normative sexual histories, sexual expression, experiences of violence, and their very bodies have been part of the prosecutorial playbook for centuries. Accusers have long weaponized women's sexuality against them to prosecute, convict, and kill; as our findings show in Part IV, these practices continue today.

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82 *See* GAGE, *supra* note 49, at 221.

83 ROPER, *supra* note 48, at 11.

84 *See id.* at 45–49.

85 *Id.* at 11.

86 *Id.*

87 *Id.* at 7.

88 Examples in the arts include Hans Baldung, The Witches (1510) (on file with the Metro. Museum of Art, Drawings and Prints, object no. 41.1.201); in literature include NATHANIEL HAWTHORNE, THE SCARLET LETTER (James R. Osgood & Co., 2d ed. 1878) (1850); and in theater include ARTHUR MILLER, THE CRUCIBLE (Penguin Books 2003) (1953).

III. Methodology for the Present Study

Our dataset consists of the trial transcripts of forty-eight people who were sentenced to death between 1990 and 2022[89] and who presented as women during their trials.[90] We identified basic demographic information for each person, including their race, age, year of sentence, and state of conviction from the transcripts. We also obtained descriptive data on the women—including information relating to their status as parents and mental health histories—in this way.

We identified prosecutorial narratives relating to sex in the trial transcripts using three primary methods. First, we reviewed the State's guilt- and penalty-phase closing arguments for each defendant to understand the core themes that prosecutors drew upon to argue for conviction and death, noting sex-related narratives where they occurred. Second, we coded portions of the transcripts containing the defendant's testimony and the prosecution and defense closing arguments at the guilt and penalty phases. We applied a predetermined set of codes designed to capture discourse relating to sex, appearance, sexuality, and gender-based violence.[91] Third, we reviewed the State's opening arguments in cases that heavily featured the pertinent themes to elaborate on the patterns that had begun to emerge.

From this information, we identified six core categories related to sexuality and appearance that prosecutors repeatedly invoked and turned to the remainder of the transcripts to understand how these themes appeared throughout each trial. Collaborating with colleagues in the field of information sciences who work frequently with large linguistic corpora, we expanded the scope of what was humanly reviewable in our dataset

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89 We selected this time period by reference to the women on death row in the United States in January 2023, when we began collecting transcripts for this work. At that time, the oldest case of a woman on death row was prosecuted in 1990 and the most recent in 2022. We collected the transcripts of the entire women's death row population at that time. Four of the cisgender women in our dataset—Tiffany Cole, Michelle Sue Tharp, Angelina Rodriguez, and Susan Eubanks—have since had their death sentences reversed. We continue to include them in our dataset because their death sentences fall within the parameters of our research.

90 There are also several transgender women on death row, as detailed in Part I, *supra*. These women all presented as men at the time of trial and for this reason we do not discuss them here. Our dataset also includes one transgender man, who presented as a woman at the time of trial.

91 This stage of our review drew on data gathered as part of a multi-year project at the Cornell Center on the Death Penalty Worldwide led by Sandra Babcock. Cornell researchers are reviewing each woman's transcripts for gender bias using the qualitative coding software MaxQDA. This project captures forms of gender bias that exceed the scope of this Article, but for the purposes of our research here, we isolated coded excerpts relevant to sex, appearance, and intimate relationships.

by using computational tools to run keyword searches across all of the transcripts.[92] We drew up a list of keywords for input into computational searches by reference to the six identified categories and isolated each sentence containing a keyword across the entire body of transcripts.[93] After removing false positives from the findings,[94] we reviewed the remaining sentences to further understand how prosecutors invoke women's sexuality and appearance during the trials, isolate further examples from witness testimony and attorneys' arguments, and refine our categorization of the data.

The data that emerged from this review of women's transcripts was rich and varied. However, our reliance on a large corpus, comprising many thousands of pages across forty-eight trial transcripts, means that there are gaps in our findings. We did not set out to undertake a forensic linguistic analysis of every trial, nor do we purport to have captured each use of sex, appearance, and sexuality in the women's trials, as we were not able to review each and every page. Rather, our focus on limited extracts from women's trials necessarily means that we have underestimated the prevalence of pertinent testimony throughout the body of the trial. Our reliance on a written record also means that we cannot capture the non-verbal cues that are often critical to discern how prosecutors behave—whether through gesture, intonation, or innuendo.[95]

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92 Researchers in the social sciences have developed targeted procedures for keyword-based searches that can identify the relevant text in a corpus. *See* Alicia Eads et al., *Separating the Wheat from the Chaff: A Topic and Keyword-Based Procedure for Identifying Research-Relevant Text*, 86 POETICS 1, 1 (2021). From a list of keywords, researchers versed in certain computational tools can scan large bodies of text for relevant usage of the words and export the data from the corpora.

93 We provided our colleagues in Cornell Information Sciences with a list of twenty keywords, which we chose by drawing on our years of experience defending women facing capital charges and by reviewing the categories that had already emerged from our initial review of the arguments. We used word stems to capture all variations of the stem. Our twenty chosen keywords were: Adulter-, Affair, Prostitut-, Lover, Seduc-, Flirt-, Intercourse, Sex, Orgasm, Abort-, Lesbian, Homosexual-, Sin-, Kiss-, Panty / panties, Bra, Naked, Porn-, Masturbat-, Fellatio. Our colleague Andrea Wang ran these searches and provided us with the exported data, which listed each use of a keyword and the sixty words before and after each keyword.

94 For example, one of our keywords was "naked." The search returned several false positives in which trial actors discussed whether something was visible to the "naked eye."

95 *See* Sue Osthoff, *When Victims Become Defendants: Battered Women Charged With Crimes*, *in* WOMEN, CRIME, AND CRIMINAL JUSTICE: ORIGINAL FEMINIST READINGS 232, 234 (Claire Renzetti & Lynne Goodstein eds., 2001) (noting, with respect to criminalized women who have endured intimate partner violence, that beliefs and values "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").

For these reasons, we do not purport to present the full scope of prosecutors' invocation of sex in women's trials. We do, however, identify recurrent tools in the prosecutorial toolbox that shame, humiliate, and vilify women for their sexuality and appearance. And everything we report in this Article was presented to decisionmakers in women's trials—decisionmakers who were tasked with determining whether the woman before them should live or die based, in part, on sex-related evidence.

IV. Sexualization of Women on Death Row Today

Most of the women in our dataset were prosecuted at the turn of the twenty-first century, hundreds of years after women were sentenced to death as witches. Although women are no longer stripped naked in court proceedings, prosecutors in the modern era continue to invoke images of their bodies and sexual activities as part of the proceedings against them. Indeed, our research reveals that prosecutors systematically weaponize women's sexuality in ways that are legally questionable and culturally regressive in order to secure punitive outcomes.

Of the forty-eight transcripts we reviewed for this Article, we identified thirty-four cases in which prosecutors presented sexualizing evidence or arguments. We define "sexualizing evidence" as witness testimony and physical evidence characterizing women's sexual relationships, sex work, sexual activities, sexualized appearance, and histories of sexual violence.[96] We define "sexualizing argument" as statements made by prosecutors during cross-examination, as well as during opening and closing arguments, that address these themes.

Prosecutors presented sexualizing evidence or argument in a wide spectrum of capital cases in our dataset. These cases involved victims with varying relationships to the defendant, including children, acquaintances, and strangers. Below, we discuss the major categories of sexualizing evidence we identified. In Part V, we explain why this matters.

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96 We applied the following definitions to these terms in analyzing the discourse used by trial actors in the forty-eight cases in our dataset. "Sexual relationships" encompasses consensual relationships that involve sexual intercourse, sex play, sexual contact such as kissing, and flirtation. "Sex work" includes prostitution, sex trafficking, stripping, and any other exchange of sex for money, goods, or services. "Sexual activities" encompasses masturbation and any other sexual activities that women engage in without the involvement of an intimate partner. "Sexualized appearance" encompasses descriptions of women's appearance that highlight their bodies, faces, and hair. "Histories of sexual violence" encompasses evidence that the defendant experienced nonconsensual sexual contact, including rape, childhood sexual abuse, and other forms of sexual assault.

A. Women's Sexual Relationships and Sexual Pleasure

Prosecutors discussed women's sexual relationships at trial in a wide range of capital cases across multiple jurisdictions. We found that prosecutors introduced some of the most extensive and detailed evidence of women's sexual relationships in cases where the defendant was accused of murdering her husband or intimate partner. In cases involving allegations of adultery, prosecutors often invoked themes drawn from Christian theology to attack women's character. Women's sexual pleasure—and the measures they took to increase it—was also a theme in several cases.

The relevance of women's sex lives to their alleged crimes was often opaque. In some cases—particularly those where the victim was the defendant's intimate partner—prosecutors argued that evidence of the defendant's sexual affairs was relevant to establish her motive to kill. But even in those cases, prosecutors often elicited explicit, irrelevant details of women's sex lives, such as the sexual positions they preferred or the locations where they had sex. In other cases, prosecutors made no attempt to connect evidence of women's sexual activity to the crime. In those cases, we could discern no legitimate purpose for the introduction of the evidence. Below, we describe the range of evidence and arguments regarding women's intimate relationships.

1. Hypersexualizing Women Defendants

Evidence that women defendants had multiple sexual partners or engaged in extramarital sex emerged as a prominent theme among the forty-eight cases in our dataset. In some cases, witnesses or prosecutors used sex-related slurs to describe defendants.[97] More commonly, prosecutors elicited descriptions of sex from witnesses and/or highlighted the defendant's sexual practices during closing arguments at the guilt or penalty phases of trial.[98]

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97 Reporter's Transcript of Proceedings at 4125, Oklahoma v. Andrew, No. CF-01-6189 (Okla. Dist. Ct. 2004) [hereinafter Andrew Transcript] ("what a slut puppy she must be"); Reporter's Transcript on Appeal at 2914, People v. Williams, No. KA080108-01 (Cal. 2012) [hereinafter Williams Transcript] ("the defendant was a nymphomaniac"); Transcript of Record at 2545, People v. Eubanks, No. SCN 069937 (Cal. Super. Ct. 1999) [hereinafter Eubanks Transcript] (calling defendant a "trashy girl").

98 Death penalty trials in the United States are bifurcated into guilt and penalty phases. During the guilt phase, the factfinder's obligation is to determine whether the defendant is guilty of the crime charged. During the penalty phase, the factfinder determines what sentence to impose. *Stages in a Capital Case*, DEATH PENALTY INFO. CTR. (2026), https://deathpenaltyinfo.org/resources/high-school/about-the-death-penalty/stages-in-a-capital-case [https://perma.cc/PX53-2B8D].

Below, we discuss cases from Oklahoma, Arizona, Ohio, and California where evidence of the defendant's sexual activity featured prominently. All but one of these cases involved women accused of killing their husbands.

a. Brenda Andrew

On September 22, 2004, Brenda Andrew was condemned to death in Oklahoma for the murder of her husband.[99] Throughout her capital murder trial, prosecutors elicited detailed testimony about Ms. Andrew's intimate relationships,[100] her affairs,[101] and her flirtatious behavior.[102] The prosecution called two men to testify about their past sexual relationships with Ms. Andrew.[103] Prosecutors asked one of them to describe the frequency and locations that the couple had sex:

> Q. Did you have sex with her any other places than at her house and at the motels?
> A. Car.
> Q. How many occasions did you have sex with her in her car?
> A. Several.
> Q. Was it her car or your car?
> A. Her car.[104]

Prosecutors portrayed Ms. Andrew as sexually assertive, eliciting testimony that she initiated an affair by "rub[bing] up against" a man in a grocery store and that she was "very hospitable" to men she liked.[105] Other witnesses testified throughout the trial about

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99 Cynthia Calkins & Natalia Feldgun, *Did Sex Shaming Lead to the Death Penalty?*, AM. PSYCH. ASS'N (Sep. 1, 2024), https://www.apa.org/monitor/2024/09/sex-stereotypes-death-penalty [https://perma.cc/MP2K-58TL].

100 Andrew Transcript, *supra* note 97, at 250–51, 4123–24.

101 *Id.* at 323.

102 *Id*. at 247.

103 *Id.* at 248–51, 361–67.

104 *Id.* at 249–51.

105 *Id.* at 247.

"all these affairs"[106] and condemned her "adultery."[107] In its closing statements at the guilt phase, the prosecution even read aloud Mr. Andrew's journal entries about an alleged sexual relationship that Ms. Andrew had while she was an unmarried freshman at college—almost twenty years before the shooting.[108] The prosecution called Ms. Andrew a "slut puppy" who "had sex on [Mr. Andrew] over and over and over and . . . [kept] a boyfriend on the side."[109]

Oklahoma Court of Criminal Appeals Judge Arlene Johnson recognized the dehumanizing impact of the prosecution's evidence, stating (in dissent) that the prosecution's arguments and testimony served "no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman."[110]

b. Wendi Andriano

Exactly three months after Brenda Andrew was condemned to death, Wendi Andriano was sentenced to die in an Arizona courtroom for the murder of her husband, Joe Andriano.[111] At trial, the prosecutor painted Ms. Andriano as sexually voracious, repeatedly referencing her flirtatious behavior[112] and sexual relationships[113]—even those that predated her relationship with her husband.[114]

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106 *Id.* at 450.

107 *Id.* at 127.

108 *Id.* at 4123–24.

109 *Id.* at 4125.

110 Andrew v. State, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (Johnson, J., concurring in part and dissenting in part).

111 Ariz. Sup. Ct., Oral Argument Case Summary: State v. Wendi Elizabeth Andriano, https://www.azcourts.gov/Portals/45/07Summaries/April24CR050005AP.pdf [https://perma.cc/BK37-GXWY].

112 [Sep. 7, 2004] Reporter's Transcript of Proceedings at 31, 55, State v. Andriano, No. CR-2000-096032 (Ariz. Super. Ct. 2004) [hereinafter Andriano Transcript] (for nonconsecutively paginated transcripts, the date of the transcript is provided in brackets).

113 *See, e.g.*, [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 74–76.

114 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 50–51 (describing Ms. Andriano's prior relationship with a pastor's son); [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 76–77 (questioning Ms. Andriano about early sexual relationships); [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 105–09 (same). The prosecution even attempted to introduce evidence that Ms. Andriano had taken a test for chlamydia.

During trial, a defense expert on intimate partner violence testified extensively about the physical and sexual abuse Ms. Andriano experienced in her marriage.[115] In his cross-examination, the prosecutor repeatedly insinuated that Ms. Andriano was promiscuous and, as a consequence, she could not be considered a victim of intimate partner violence. He asked the expert whether Ms. Andriano was "chaste" when she first met her husband.[116] He followed up by asking whether the expert knew that Ms. Andriano had two affairs[117] and was "constantly kissing on men" in bars.[118]

The prosecutor's cross-examination of Ms. Andriano similarly focused on her sexual activity.[119] He asked her to name the man with whom she first had sexual intercourse and to verify the names of other men she had had sex with.[120] He repeatedly asked her whether she cried when she had sex with other men.[121] He interrogated her about sexual relationships that predated her marriage.[122] He questioned her about a birthday celebration during which she "ended up between the legs" of a man in a limo.[123] And he questioned her at length about a brief affair she had while married, asking her to confirm the locations and times where she had sex.[124]

In closing arguments at the guilt phase, the prosecutor focused extensively on Ms. Andriano's sexual relationships before and after her marriage.[125] He argued that she was

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The judge sustained the defense objection to the evidence. [Nov. 2, 2004] Andriano Transcript, *supra* note 112, at 3–4.

115 [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 77–78, 90–91, 96–97, 127–28, 133–34; [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 6–38.

116 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 53.

117 *Id.* at 157.

118 *Id.* at 69, 123.

119 [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 75–77; [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 52–53, 57–58, 91–96, 105–09.

120 [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 75–77.

121 [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 105–07.

122 *Id.* at 105–09.

123 *Id.* at 96.

124 *Id.* at 52–54.

125 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 75–76, 83–85, 87–89.

sexually aggressive, relating how she "groped" a man she met because "I guess the woman has needs and she's going to do something about it."[126]

c. Donna Roberts

In 2003, Donna Roberts was convicted of capital murder in Ohio in connection with the death of her former husband.[127] Her boyfriend, who killed her husband and argued it was in self-defense, was also sentenced to death.[128]

Throughout her trial, prosecutors elicited detailed testimony about Ms. Roberts' sex life,[129] including descriptions of sex acts[130] and repeated references to the color and style of her underwear.[131] In his opening statement, the prosecutor underscored that her co-defendant and lover was young and Black,[132] and she was an "older white woman."[133] Later, he described another sexual relationship that Ms. Roberts had with a Black man, stating that he was "the persuasion that she prefers, a large black man."[134]

Calling Ms. Roberts a "depraved murderess" in his closing argument, the prosecutor argued that she "use[d] people to satisfy her sexual desires."[135] He recalled that she was unfaithful to her "boy toy convict" when she gave oral sex to an "ex-con."[136] He described the hotel room in which she planned to have sex with her boyfriend, and twice mentioned

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126 *Id.* at 88.

127 State v. Roberts, 850 N.E.2d 1168, 1171 (Ohio 2006).

128 *Id.*

129 Transcript of Proceedings at 5087, State v. Roberts, No. 01-CR-793 (Ohio C.P. 2003) [hereinafter Roberts Transcript]; *id.* at 6346.

130 *Id.* at 5088, 5442, 6118.

131 *Id.* at 5073, 6120.

132 *Id.* at 5067, 5084.

133 *Id.* at 5084.

134 *Id.* at 5087.

135 *Id.* at 6117.

136 *Id.*

that she had red "thong" panties[137] with the "butt end cut out."[138] Finally, he suggested that the jury wear "latex gloves" when they reviewed correspondence between Ms. Roberts and her boyfriend, suggesting that there could be "bodily substances" from Ms. Roberts on them, including "vaginal secretions."[139] Ms. Roberts' lawyers did not object to this argument, which was unsupported by any evidence.

At the penalty phase, the defense presented no witnesses. The only person to testify—in an unsworn statement—was Ms. Roberts herself.[140] She castigated the prosecution for sexualizing her, pointing out the irrelevance of her underwear and the race of the men she dated.[141] Although her defense attorneys failed to object to the prosecution's arguments, Ms. Roberts noted that the prosecution's sexualizing evidence was irrelevant[142] and designed to portray her as a "dirty little old lady."[143] She also called out the prosecution's deliberate race-baiting in his opening statement. By stating that her preference was for "a black man," Ms. Roberts said, the prosecutor was sowing "the seeds of evil, racism, and intolerance and Antisemitism."[144] With respect to the prosecution's repeated mention of her underwear, Ms. Roberts stated, "What does red thong underwear have to do with a murder case? Can anybody tell me? Mr. Bailey kept harping and harping on a red thong. So what?"[145]

d. Camila Jones[146]

Camila Jones was sentenced to death in California in 1998 after being tried jointly with her husband[147] for her niece's murder. Ms. Jones was a childhood victim of sexual abuse

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137 *Id*. at 6120, 6144.

138 *Id*.

139 *Id*. at 6131.

140 *Id.* at 6253–300.

141 *Id.* at 6281.

142 *Id.* at 6262.

143 *Id.* at 6281.

144 *Id.* at 6263. Ms. Roberts is Jewish, and she pointed out that the prosecution went out of their way to identify her as such. *Id.* at 6264.

145 *Id.* at 6262.

146 Camila Jones is not her real name. We have assigned a pseudonym at the request of the defense team.

147 Ms. Jones' husband was also sentenced to death.

at the hands of her stepfather,[148] who raped her repeatedly beginning when she was eleven years old.[149] She met her husband when she was fifteen.[150] Ms. Jones testified that her husband was violent and controlling, and that he beat and raped her.[151] Two defense experts testified that she was a battered woman.[152]

In response, the prosecution sought to portray Ms. Jones as a sexually promiscuous woman who liked "kinky sex."[153] The State introduced in evidence a dildo that was found in the couple's apartment, along with a number of pornographic videos, whose titles the prosecutor had the witness read aloud.[154] When Ms. Jones testified in her defense, the prosecutor questioned her at length about the dildo, a vibrator that her husband had bought for her, and her sex life with her husband. The prosecutor also accused her of "flashing her breasts" at a man who she testified had raped her.[155]

The prosecution called as a witness a man who had a brief affair with Ms. Jones and asked him to explain how many times they had sex, where it happened, and who was present.[156] During his cross-examination of Ms. Jones, the prosecutor asked her over and over again to confirm that she had extramarital sex, and queried whether she used contraception when she had intercourse.[157] The prosecutor used this testimony to suggest that she was not a battered woman—because a battered woman would not dare to have an affair.[158]

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148 Transcript of Record at 5836, 7343–46, People v. Jones (Cal. Super. Ct. 1998) [hereinafter Jones Transcript].

149 *Id.* at 7346.

150 *Id.* at 7379.

151 *Id.* at 7382–87.

152 *Id.* at 9279, 9403.

153 *Id.* at 5768.

154 *Id*. at 6149–50. When Ms. Jones testified, she stated that her husband used the dildo to rape her. *Id*. at 7391–92.

155 *Id*. at 7833.

156 *Id.* at 9666–72.

157 *Id*. at 7818–26.

158 *Id.* at 9359–63.

The four cases we describe above illustrate the spectrum of sexualizing evidence we found in our review: prosecutors invoked irrelevant details about the defendants' sexual experiences, invoked sexual tropes ("kinky sex," "slut puppy"), drew attention to women's bodies and clothing, and cast them as sexual aggressors rather than victims of sexual violence. Prosecutors in these cases were unabashed in their efforts to demonize the defendants by tethering their character to their sexual expression. Below, we elaborate on some of the themes revealed by our analysis.

2. Adultery and Christian Values

In cases where prosecutors focused on women's extramarital relationships, they frequently invoked religious themes to cast women as sinners. If defense witnesses testified about the defendant's religious faith, prosecutors attacked the sincerity of her beliefs by pointing out that adultery was sinful.[159] In all of the cases we discuss below, women were charged with killing their husbands or intimate partners.[160]

In the Arizona case of Wendi Andriano, who had been raised in a strict Christian home,[161] the prosecution argued that by having an extramarital affair, she was not taking care of her husband "in a Christian sense."[162] The prosecutor repeatedly emphasized her betrayal of her Christian upbringing, stating that at school she learned to be a "good Christian woman" and a "good wife."[163] By moving in with her husband before she was married, she disobeyed her father in contravention of her faith.[164] Through her "infidelity," he argued, she violated one of the Ten Commandments set forth in Exodus.[165] The prosecution concluded that Ms. Andriano was "using religion as a crutch when it benefits her,"[166] since "infidelity is

159 *See infra* note 179 and accompanying text.

160 All of the cases were prosecuted in states where more than half of the adult population is "highly religious." *See* Michael Lipka & Benjamin Wormald, *How Religious is Your State?*, PEW RSCH. CTR. (Feb. 29, 2016), https://www.pewresearch.org/short-reads/2016/02/29/how-religious-is-your-state/?state=north-carolina/ [https://perma.cc/JMT7-UYH7].

161 [Oct. 6, 2004] Andriano Transcript, *supra* note 112, at 20–21; [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 43–44.

162 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 73.

163 *Id.* at 132.

164 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 17.

165 *Id.* at 133.

166 *Id.*

something that is not sanctioned by the Christian religion."[167] Finally, in arguing that the jury should disregard Ms. Andriano's faith as a reason to spare her life, the prosecutor asked, "[H]ow can she say she has strong religious convictions when she's going out and committing adultery?"[168]

The prosecution used similar tactics in the case of Blanche Taylor Moore, who, at 93, is the oldest woman currently on death row.[169] Ms. Moore was convicted and sentenced to death in North Carolina for the murder of her partner.[170] Ms. Moore was the daughter of a minister[171] and, according to defense[172] and prosecution[173] witnesses, was a person of deep religious faith whose life revolved around her church.[174]

At trial, the prosecutor presented testimony that Ms. Moore had an extramarital affair with a pastor,[175] and suggested that she had uncontrollable "sexual impulses."[176] In closing argument at the guilt phase, he argued that Ms. Moore was "a woman who ate of the fruit of the tree of knowledge, of good and evil."[177] At the penalty phase, he further disparaged her religious faith, suggesting that someone with "traditional conservation [sic] Christian

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167 *Id.* at 134.

168 [Dec. 15, 2004] Andriano Transcript, *supra* note 112, at 103.

169 Russ Bowen, *Turning 90: North Carolina's Blanche Moore is Oldest Woman on Death Row in U.S.*, WBTW NEWS13 (Feb. 15, 2023), https://www.wbtw.com/news/state-regional-news/turning-90-north-carolinas-blanche-moore-is-oldest-woman-on-death-row-in-us/ [https://perma.cc/PFL8-DDEX].

170 *Id.*

171 Transcript of Record at 2257, 2751, State v. Moore, No. 89-CRS-25053 (N.C. Super. Ct. Crim. Sess. 1990) [hereinafter Moore Transcript].

172 *Id.* at 2203.

173 *Id.* at 1031.

174 *Id.* at 2262.

175 *Id.*

176 *Id*. at 2405.

177 *Id.* at 2573.

values" would not have had a relationship with a man she was not committed to,[178] and arguing that she had "used the Bible as a disguise."[179]

In the case of Brenda Andrew, the prosecution opened its case with testimony from two pastors about Ms. Andrew's relationship with James Pavatt, her co-defendant and a member of her congregation.[180] One of the pastors pointed out that adultery was "against our teachings and God's word."[181] During the penalty phase, after defense witnesses testified about Ms. Andrew's religious beliefs,[182] the prosecution contrasted Ms. Andrew's adultery with her husband's upstanding Christian faith.[183] The prosecution told the jury that Mr. Andrew was "a good Christian man"[184] who "wanted desperately to be a man who was committed to God," while Ms. Andrew "can't be a woman of God because she's sleeping with a married man."[185]

In all of these cases, prosecutors sought to cast women outside of their faith communities by detailing sexual practices that were—in the prosecution's view—inconsistent with the tenets of Christianity. In so doing, they encouraged jurors to condemn the defendants not only for the crimes they committed, but for their perceived deviance from biblical teachings.

3. Sexual Pleasure and Eroticized Violence

Women's sexual pleasure, and the steps they took to achieve it, featured in several trials. In our research, we did not encounter a single description of sex as wholesome or natural. While partly attributable to the nature of capital prosecutions, which seek to demonize the defendant such that a jury will condemn her to die, this particular perversion of women's experiences is nevertheless noteworthy. In some cases, women's sexual pleasure played no

178 *Id.* at 2861.

179 *Id.* at 2896.

180 Andrew Transcript, *supra* note 97, at 123–27, 206–07.

181 *Id.* at 127.

182 *Id.* at 4246.

183 *Id.* at 4125; Andrew v. White, 604 U.S. 86, 89 (2025) (noting that at "both the guilt and sentencing phases, prosecutors contrasted Andrew with the victim, whom they asserted had been 'committed to God'").

184 Andrew Transcript, *supra* note 97, at 4492.

185 *Id.* at 4124–25.

apparent role in the crime. In other cases, women were described as perpetrating sexual violence. These two categories of cases are described below.

a. Sexual Pleasure

In their 2010 prosecution of Manling Williams, an Asian American woman, prosecutors twice called her a "nymphomaniac."[186] Prosecutors called as a witness the man with whom Ms. Williams had a brief affair, asking him to relate the number of times they had sex over the course of a night.[187] They also introduced in evidence a text message Ms. Williams sent him indicating that her legs were "sore" from having intercourse.[188] Prosecutors invoked the text in every argument they made before the jury: in their opening and closing statements at the guilt phase, and in opening and closing statements at the penalty phase.[189] In their guilt phase closing argument, prosecutors argued that Ms. Williams' legs were "sore" because she had "so much sex."[190] In fact, they argued, she wanted sex "three times a day" and her husband "gave it to her every time she wanted it."[191] At the penalty phase, the prosecution also introduced evidence of letters that Ms. Williams sent to another incarcerated person while in the county jail, including one in which she told her correspondent she wanted to send him a photo of herself in a "bathing suit."[192] While the defense contested the admissibility of this letter based on its prejudicial nature, the state successfully argued that it "paint[ed] a different picture than the quiet, honest, caring person" that the defense presented.[193] In arguing that Ms. Williams should be sentenced to death at the penalty phase, the state argued that the text and evidence about Ms. Williams' sexuality revealed "the person that this defendant is."[194]

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186 Williams Transcript, *supra* note 97, at 2887, 2914.

187 *Id.* at 5812, 5815.

188 *Id.* at 5817.

189 *Id.* at 823, 2912, 5597, 6610, 7590.

190 *Id.* at 2912.

191 *Id.* at 2914.

192 *Id.* at 6602, 6617.

193 *Id.* at 5183.

194 *Id.* at 5597.

In the case of Wendi Andriano, described above, a defense expert described Ms. Andriano's sexual relationship with her husband. According to the expert, the couple's encounters were brief and affectionless, and Ms. Andriano used lubricant during intercourse.[195] Even though the expert had not opined on the reason why Ms. Andriano used lubricant, the prosecution seized on the testimony, claiming that she required lubricant because she found her husband to be "gross and skinny."[196] He then queried repeatedly whether Ms. Andriano needed to use lubricant with the man with whom she had an affair.[197]

In closing argument at the guilt phase, the prosecution returned to the topic of lubricant, questioning whether Ms. Andriano used it when she had sex with two men prior to her marriage to her husband.[198] The prosecutor then faulted Ms. Andriano for not enjoying sex with her husband:

> When she talks about this issue of the lubricant, the only thing that I can tell you is that . . . you weren't in love with him because you could not even bring yourself to the point of enjoying the most intimate thing that two people in love do, that's enjoy sexual intercourse. Couldn't do it.[199]

In these cases, prosecutors deliberately invoked women's sexual experiences to cast them as either perverted (she had "so much sex") or inadequate (she couldn't enjoy sexual intercourse with her husband without lubricant).

b. Eroticized Violence

We have previously observed that 85% of women on death row were sentenced to death for killing people who are known to them.[200] Of the seven women who were convicted of killing strangers, only three were convicted of crimes involving sexual assaults of women

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195 [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 63.

196 *Id.* at 68.

197 *Id.* at 68–69.

198 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 75.

199 *Id*. at 76.

200 *See* Babcock et al., *Women on Death Row*, *supra* note 21, at 28 (noting that only seven of forty-eight cases involved stranger killings).

or girls—and in all three of these cases, women were tried and convicted in joint trials with their (male) intimate partners.[201]

In each of these three cases involving sexual assault, the defense presented extensive evidence that the defendants had been subjected to severe intimate partner violence by their co-defendants and had been victims of rape.[202] Indeed, these cases involve some of the most harrowing accounts of sexual violence among the cases in our dataset.

In these three cases, the prosecution sought to prove that each woman was an active and equal participant in sex crimes. To that end, they presented detailed evidence of sex acts, some of which were directly linked to the facts of the crime. At the same time, much of the testimony went far beyond the crime itself to hypersexualize the defendants.[203] In large part, this evidence and argument discredited the women's accounts of their own experiences of sexual violence.[204] We do not seek to parse this testimony here, given that it would require a far more detailed discussion of the crimes themselves—which are, as we explain above, anomalous.

B. Women's Appearance

While women's naked bodies are no longer physically inspected during interrogation and trial, their bodies continue to be wielded as evidence against them. In at least sixteen transcripts, prosecutors presented evidence regarding women's bodies, underwear, and appearance. They often drew on this evidence in their arguments, inviting jurors to sexualize the body of the woman in the courtroom before them, or, alternatively, inviting jurors to conclude that she is unfeminine because of her appearance. This tactic was often combined with other sexualizing arguments described above. Prosecutors sometimes reinforced these narratives by introducing the defendant's underwear into evidence, showing jurors photos of the defendant unclothed, or denigrating the way she dressed in the courtroom, thereby ensuring that women's bodies were front and center in their capital trials.

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201 *See* People v. Coffman, 96 P.3d 30, 48 (Cal. 2004); People v. Daveggio, 415 P.3d 717, 729 (Cal. 2018); People v. Thornton, No. RIF-096679 (Cal. Super. Ct. 2001).

202 *See* 58 Transcript at 10780–83, 10832, People v. Snyder, No. RIF-096679 (Cal. Super. Ct. 2006) [hereinafter Snyder Transcript]; Coffman, 96 P.3d. at 52, 54; 39 Reporter's Daily Transcript of Proceedings at 8551, People v. Daveggio, No. 134147A (Cal. Super. Ct. 2002) [hereinafter Daveggio Transcript].

203 We have previously described the prosecution's tactics in all three cases of invoking debunked stereotypes of battered women. *See* Babcock & Greenfield, *supra* note 21, at 385–89.

204 *See id.*

1. Sexualizing Women's Appearance

Prosecutors frequently sexualized the appearance of women defendants. We observed testimony and argument about women's clothing, their bodies, and their underwear in our dataset, engaging the jury in moral judgments based on the defendant's appearance. In most of these cases, prosecutors made no attempt to link the descriptions of women's bodies and undergarments to the elements of the crime or aggravating factors relevant to punishment.[205]

a. Sexualizing Women's Bodies

The prosecutors in Brenda Andrew's case deployed several tactics to sexualize her appearance. Throughout the guilt phase of Ms. Andrew's trial, and alongside the above-mentioned evidence about her affairs, the State elicited testimony about her "sexy outfits," "provocative" clothing, and "revealing" dresses.[206] One witness described Ms. Andrew's "cleavage" while another described her "leather outfit[s]."[207] An acquaintance testified that she looked like a "hoochie."[208] Even Ms. Andrew's hair was presented as reason to condemn her, with prosecution witnesses variously describing it as "rolled [out] . . . really big," "very Gothic, long black hair," and dyed red, ostensibly to attract a man.[209]

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205 In a few cases, the State's discussion or introduction of the defendant's underwear had some evidentiary value. In one case, for example, the State alleged that the defendant used panties to strangle the victims and entered photos of that underwear into evidence. *See* Transcript of Record at 1399, People v. Rottiers, No. RIF-132260 (Cal. Super. Ct. 2010) [hereinafter Rottiers Transcript]. In another case, the defendant's underwear had blood spatters on it that the State tested for DNA. Transcript of Record at 7309, People v. Caro, No. CR 47813 (Cal. Super. Ct. 2001) [hereinafter Caro Transcript]. Our focus is not on the State's introduction of evidence that has some plausible relevance; rather, the cases at issue are those in which descriptions and photos of the defendant, her body, and her underwear were gratuitous and unconnected to the crime of which she was charged.

206 Andrew Transcript, *supra* note 97, at 247, 349, 357.

207 *Id.* at 323, 343.

208 *Id.* at 323.

209 *Id.* at 324, 343, 498–99. The State also elicited testimony that Ms. Andrew's hair looked unwashed the day after her husband died. *Id.* at 2727. The inconsistency here demonstrated by the State—condemning Ms. Andrew both for the maintenance of her hair and her failure to maintain her hair the day after her husband died—highlights the impossible standards that women defendants are held to. No matter women's gender presentation or sexuality, the State frequently finds ways to fault it.

Ms. Andrew's choice of underwear was presented as further evidence of her guilt. During the guilt phase closing argument, the prosecutor, Gayland Gieger, held up before the jury several pairs of Ms. Andrew's "thong underwear"[210] in "[shades of] red, black, and pink,"[211] drawing "gasps" from the courtroom.[212] With jurors moments from deliberations, the prosecutor argued that Ms. Andrew must be guilty because no real "grieving widow" would wear such underwear after her husband's death.[213] The State introduced Ms. Andrew's "thong underwear" into evidence, with no objection from the defense.[214]

Mr. Gieger was not the only prosecutor to discuss the defendant's clothing and underwear. The prosecutor in Wendi Andriano's trial, Juan Martinez, asked witnesses about her "skimpy clothing"[215] and argued that on one occasion Ms. Andriano was "all sassed up in her pink little outfit."[216] When Ms. Andriano testified in her own defense, the prosecutor questioned her about a "dress and panties" that she was "hiding" in her office when having an affair.[217] Four times in succession the prosecutor asked Ms. Andriano about her "black panties" before producing a photo and asking her, "[T]hose are your panties, right?"[218] The State introduced the photo of Ms. Andriano's underwear into evidence, along with photos of Ms. Andriano in a bikini.[219]

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210 *Id.* at 4103.

211 Nick Trougako & Michael Baker, *Andrew Case in the Hands of Jury: Deliberation Will Resume Today at 9 A.M.*, OKLAHOMAN (July 13, 2004), https://www.oklahoman.com/story/news/2004/07/13/andrew-case-in-hands-of-jury-br-deliberations-will-resume-today-at-9-am/61982390007/ [https://perma.cc/9956-MBFP].

212 *Id.*

213 Andrew Transcript, *supra* note 97, at 4103.

214 *Id.* at 2359.

215 [Oct. 5, 2004] Andriano Transcript, *supra* note 112, at 155.

216 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 63.

217 [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 126.

218 *Id.*

219 *Id.* at 34, 127. Such photos are reminiscent of the nude photo of the defendant that prosecutors introduced in Mary Ellen Samuels' case. Ms. Samuels was sentenced to death in California in 1994 and her death sentence was vacated in 2019. Order Denying in Part and Granting in Part Petition for Writ of Habeas Corpus at 62, Samuels v. Espinoza, No. CV 10-3225 SJO (C.D. Cal. Nov. 22, 2019). During her trial, the State showed jurors a blown-up photo of Ms. Samuels, naked and surrounded by money, as evidence that she had killed her husband for financial gain. Ann W. O'Neill, *Judge Allows Photo of Widow in Slaying Trial*, L.A. TIMES (Mar. 10, 1994), https://www.latimes.com/archives/la-xpm-1994-03-10-me-32439-story.html [https://perma.cc/BC3E-9Z32]. Ms. Samuels recently filed a habeas appeal raising the sexualizing nature of the evidence presented against

In another case, that of Susan Eubanks in California, the prosecutor also pressed a witness on the style of the defendant's underwear:

> Q. Do you recall what she was wearing?
> A. Yeah. She had on a white t-shirt and red panties.
> Q. What type of panties
> A. I—
> Q. Style?
> A. Just—just normal. I wouldn't know how to describe them.
> Q. Well, would they be something that would come up to the naval [sic] or bikini?
> A. I'd describe it as like a bikini bottom.[220]

Similarly, in Donna Roberts' guilt-phase trial, the male prosecutor spoke about a pair of Ms. Roberts' "red thong panties" five times in his opening argument alone.[221] During the trial, the State questioned a witness twice about Ms. Roberts' "red thong underwear"[222] and returned to the theme in its guilt-phase closing argument, telling jurors that they should consider "the red thong panties" as part of the evidence of guilt.[223] This focus prompted Ms. Roberts, when giving a statement in her own defense during the penalty phase, to clarify: "I am wearing regular underwear today."[224]

Prosecutors in the California trial of Socorro Caro also spoke about underwear. Here, the prosecutors displayed photos of Ms. Caro's underwear, including closeups of the

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her—including the photograph. Media coverage of her appeal continues to describe Ms. Samuels as a "green widow" and "a hard-partying, drug-using, club-going, shameless flirt," even reproducing the above-described photo of her. *See* Kathianne Boniello, *Hard-Partying 'Green Widow'—Seen Naked in Pile of Cash—Insists Murder Conviction Came from 'Sex-Shaming'*, N.Y. POST (Feb. 7, 2026), https://nypost.com/2026/02/07/us-news/californias-green-widow-mary-ellen-samuels-pushes-for-freedom-slams-sex-shaming-prosecutors/ [https://perma.cc/2RLY-48MY].

220 27 Transcript of Record at 3033, People v. Eubanks, No. SCN 069937 (Cal. Super. Ct. 1999) [hereinafter Eubanks Transcript].

221 Roberts Transcript, *supra* note 129, at 5073, 5076.

222 *Id.* at 5337.

223 *Id.* at 6144.

224 *Id.* at 6239.

"vaginal staining" on the inside of her underwear.[225] Though the underwear had evidentiary value insofar as there was blood on it, the State questioned its forensic expert witness far beyond blood spatter evidence. The prosecutor walked the expert through testimony variously describing "the vaginal staining in the crotch," the "cotton liner" of the panties, the "inside portion" of the "panties" (even though blood from Ms. Caro's gunshot wound would logically be on the outside of the underwear), and "lighter colored" "staining" on the underwear.[226] Each of these descriptions was accompanied by a photo displayed on the courthouse screens for the jury to see.[227]

In other cases, prosecutors have focused on a woman's breasts in their efforts to sexualize her. Darlie Routier was convicted in Texas. During her trial, the State asked a witness twice about her breast implants, despite a motion in limine from the defense to bar the prosecution from this line of questioning.[228] Prosecutors asked Ms. Routier's husband about Ms. Routier's "diet pills" and her desire to "look[] the way she had before [her son] was born," before asking, "[Y]'all had spent five thousand dollars for breast implants, hadn't you?"[229]

Later, the State asked two witnesses about Ms. Routier's appearance, specifically asking one witness whether Ms. Routier "ever w[ore] a bra."[230] Both witnesses replied that she did not wear a bra, with one witness elaborating, in response to further State questions, that "everything was showing usually," which was "very tacky."[231] The prosecutor returned to this testimony in her punishment-phase closing argument, referring twice to Ms. Routier's lack of a bra.[232] Similarly, in the Texas case of Kimberly Cargill, a prosecutor asked a law enforcement witness to describe Ms. Cargill's clothing during a traffic stop four days

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225 Caro Transcript, *supra* note 205, at 7370.

226 *Id.* at 7369–73.

227 *Id.*

228 Transcript of Record at 4422, State v. Routier, No. F96-39973-MJ (Tex. Crim. Dist. Ct. 1997) [hereinafter Routier Transcript].

229 *Id*. at 4348. The State raised Ms. Routier's breasts again later in Mr. Routier's testimony. *Id.* at 4467.

230 Routier Transcript, *supra* note 228, at 5416, 5463.

231 *Id.* at 5463.

232 *Id.* at 5662.

after the offense. The witness replied, "[S]he didn't—she had no bra on, and she—some underwear on, but that was it."[233]

In the case of Josephine Black,[234] the State took issue with the fact the defendant *did* wear a bra. The State asked two separate witnesses whether Ms. Black was wearing a bra after the night-time fire that she was accused of starting.[235] Ms. Black said she was sleeping when the fire started; the State argued that she was awake, as evidenced by the clothes she was wearing—including a bra.[236] Although the question of whether Ms. Black ordinarily slept in her bra was relevant to the State's theory of the case, prosecutors pressed Ms. Black to share extraneous details such as her bra size, whether her bra was washed, and whether she ever wore her sister's bra.[237]

b. Feminine Appearance

Women's gender presentation also features in some of their capital cases, including testimony and argument about the defendant's clothing, hair, makeup, and nails. Such testimony often seeks to present the defendant as a woman who is vain and image-obsessed. Prosecutors painted one woman on California's death row as vain because she was "going shopping" and "got [her] hair done."[238] The State described Maria Alfaro in California as "self-centered" because of the "looks of the defendant."[239] And in Socorro Caro's case, the State determined that she was different "from any other woman" because of "her vanity," which manifested in decisions to have weekly manicures and to see a dietician to lose

233 [May 10, 2012] Transcript of Record at 154, State v. Cargill, No. 241-1510-10 (Tex. Crim. Dist. Ct. 2012) [hereinafter Cargill Transcript].

234 Josephine Black is not the defendant's name. We have used a pseudonym at the defense team's request.

235 Transcript of Record at 994, 1270, State v. Black (Ala. Cir. Ct. 2009) [hereinafter Black Transcript].

236 Black Transcript, *supra* note 235, at 907. In closing, the State argued that jurors should consider the fact that Ms. Black wore a bra at night as evidence of guilt because she was "fully dressed" and not in "pajamas" after the fire. *Id.* at 4003.

237 *Id.* at 3782. Conversely, prosecutors in Darlie Routier's case invited an inference of guilt from testimony that Ms. Routier was *not* wearing panties under her nightwear after the death of her children at night, asking a law enforcement witness, "Does it strike you odd that a person who is getting ready to call 911 on the telephone wouldn't have on their panties?" Routier Transcript, *supra* note 228, at 2967.

238 10 Transcript of Record at 1799, People v. Smith (Cal. Super. Ct. 2017) (pseudonym used at the request of the defense team) [hereinafter Smith Transcript].

239 Trial Transcript at 2001–02, People v. Alfaro, No. C-82541 (Cal. Super. Ct. 1992) [hereinafter Alfaro Transcript].

weight.[240] Indeed, the State elicited testimony from witnesses about the defendant's regular manicures in at least three cases in our dataset.[241]

Prosecutors commented on women's hairstyles in some cases. In Josephine Black's case, prosecutors elicited testimony that the defendant went to the hair salon after the fire in which her sons died—a fact that the State also raised in its closing argument.[242] Brenda Andrew's trial saw prosecutors quiz witnesses about Ms. Andrew's hair color and style, as noted above.[243] And in the case of Taylor Parker, who is on death row in Texas, the State pressed witnesses with multiple questions about Ms. Parker's hair and appearance. Witnesses described how Ms. Parker was "very fake" because she liked to "show off body parts," did not like to leave the house without "some kind of hairstyle," and was "chang[ing] her hair . . . [and] fixing her hair all the time . . . right down to how her messy bun looked."[244]

Makeup is another area of focus for some prosecutors. In addition to pressing witnesses on Taylor Parker's hair, the State elicited testimony that Ms. Parker was "obsessed with how she looked" because she spent "hours on end" making sure her "makeup was[] perfect . . . . Her makeup couldn't be smeared."[245] In Brooke Rottiers' case, the State elicited testimony describing how Ms. Rottiers wore "some weird makeup and a short skirt and stuff."[246] Similarly, in Maria Alfaro's capital trial, prosecutors asked two witnesses whether Ms. Alfaro usually wore "red lipstick."[247] In its guilt-phase closing argument, the State urged jurors to "look past the red lipstick, you've got to look past the hair, you've got to look past the clothing."[248] The State even presented Ms. Alfaro's stereotypically feminine

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240 Caro Transcript, *supra* note 205, at 8778, 9595–96, 10536, 10715–16.

241 [May 16, 2012] Cargill Transcript, *supra* note 233, at 34; [Jul. 11, 2017] Transcript of Record at 120, State v. Allen, CR2011-138856-003 (Ariz. Super. Ct. 2017) [hereinafter Allen Transcript]; Caro Transcript, *supra* note 205, at 9595.

242 Black Transcript, *supra* note 235, at 2954, 2993–94, 4032.

243 *See supra* notes 206–209 and accompanying text.

244 44 Transcript of Record at 150, State v. Parker, No. 20F1345-202 (Tex. Crim. App. 2022) [hereinafter Parker Transcript]; 45 Parker Transcript at 170.

245 45 Parker Transcript, *supra* note 244, at 169.

246 Rottiers Transcript, *supra* note 205, at 3422.

247 Alfaro Transcript, *supra* note 239, at 1011, 1103.

248 *Id.* at 2001.

looks as a reason to condemn her, arguing that "beautiful people can be very ugly"[249]—an argument also made in Brenda Andrew's guilt phase trial when the (male) prosecutor argued that Ms. Andrew was "an attractive woman" but that looks were deceiving.[250]

2. De-Sexualizing Women's Appearance

Women's appearances present a double-edged sword in their capital trials. As we have seen above, women are vilified for taking too much care of their appearance. Equally, though, women are criticized for not conforming to stereotypical expectations of femininity. Recall Darlie Routier's case, in which the State elicited testimony that she was "tacky" for not wearing a bra.[251] The State further asked witnesses to describe Ms. Routier's appearance, to which witnesses variously responded that "usually she was without makeup, shorts, baggy shirts"[252] and "the way she was dressed, she always wore—she always had all of her jewelry on, her hair was never fixed, she never had any makeup on."[253]

Prosecutors produced similar descriptions of Manling Williams. One exchange with a witness detailed her appearance:

> A. She was always very poorly—in my opinion, poorly dressed.
> Q. What about when she would go out?
> A. She would usually wear the slacks she would wear to work because they were basic black slacks . . . .
> Q. And she would do her makeup when she would go out?
> A. Just basic. She didn't do a whole lot.[254]

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249 *Id.*

250 Andrew Transcript, *supra* note 97, at 3908, 4121.

251 Routier Transcript, *supra* note 228, at 5463.

252 *Id.* at 5416.

253 *Id.* at 5463.

254 Williams Transcript, *supra* note 186, at 7382.

The witness later stated that Ms. Williams "didn't really wear makeup to work."[255] These descriptions of Ms. Williams led the State to describe her as "frumpy"[256] and her own counsel to call her "dowdy."[257]

In contrast to the sexualization of women's bodies, clothing, and presentation choices that we have seen above, some prosecutors sought to emphasize the defendant's "unwomanly" appearance.[258] In Brooke Rottiers' case, the prosecution emphasized her "physicality, her strength"[259] and that she was "6 feet, 250 pounds."[260] The State paradoxically used its sexualization of Ms. Rottiers to de-feminize her, stating that the defendant—a sex worker who stood accused of using her underwear as a murder weapon—was "physically intimidating, aggressive, and she has no qualms about being physically aggressive with a man. With a man."[261] Prosecutors argued that "this person . . . all 6 feet, 250 pounds of her" did not "deserve" life.[262]

Shawna Forde's case, in Arizona, similarly evoked tropes of the defendant as a masculine woman. The State elicited testimony that Ms. Forde was "short," "heavy set," "didn't have any makeup on," and that she "dressed in camouflage."[263] In its guilt-phase

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255 *Id*. at 7400.

256 *Id*. at 7382.

257 *Id*. at 7400.

258 These are tactics that prosecutors also use to target queer women, as described with respect to the case of Celeste Carrington in Section IV.D *infra*.

259 Rottiers Transcript, *supra* note 205, at 3942.

260 *Id.* at 4468.

261 *Id.* at 3906.

262 *Id.* at 4468. Ms. Rottiers' case presents a combination of sexualizing and de-sexualizing language, alternating between descriptions of her physicality and testimony about underwear and her sex work. Such a tactic discredited Ms. Rottiers in multiple ways—her sexuality was presented as a moral stain on her character, and prosecutors weaponized her alleged easy facility with men, combined with her physicality, to propose a narrative of Ms. Rottiers as the person in control of her male co-defendants.

263 [Jan. 25, 2011] Transcript of Record at 94, State v. Forde, CR-20092300-001 (Ariz. Super. Ct. 2011) [hereinafter Forde Transcript]. Some of the description of Ms. Forde during her trial was important for identification purposes, as the State sought to place her at the scene of the offense. The repeated descriptions of Ms. Forde in this way, though, especially in closing arguments, transcend any necessary identification measures and arguably sought to demean her.

closing argument, the prosecutor described Ms. Forde as "a short, fat white woman"[264] who "was barking out orders almost in a military fashion" to her male co-defendants.[265] The State's portrayal of Ms. Forde's appearance and her behavior presented her as the unfeminine leader of the offense.[266]

When it comes to their appearances, women are in a double bind. Whereas Brenda Andrew and Wendi Andriano were attacked for being too sexual in their femininity—and the style and color of their underwear was held up as proof—Shawna Forde and Brooke Rottiers were criticized for not being feminine enough.

3. Weaponizing Women's Courtroom Appearance

We noted several cases in which prosecutors drew jurors' attention to perceived differences between the testimony about a defendant's appearance and her appearance in the courtroom. The crux of these comments, often appearing in closing arguments, was that the defendant's appearance in court created a false image of who she was. In Brenda Andrew's trial, the prosecutor told jurors in closing that the "meek and quiet and pretty" woman sat before them was not "the real Brenda Andrew."[267] Rather, the prosecutor argued, "the real Brenda Andrew" was the adulterous woman described by witnesses.[268] Similarly, in Maria Alfaro's case, prosecutors contrasted Ms. Alfaro's choice of lipstick in the courtroom with the portrayal of her as unkempt they presented during the trial, thereby framing her makeup choices as deceptive.[269] And in Brittany Holberg's case, the State argued that the defendant in the courtroom—"a 25-year-old female with bows in her hair, in a nice suit"—was an

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264 [Feb. 10, 2011] Forde Transcript, *supra* note 263, at 85.

265 *Id.*

266 The defense then reinforced these tropes in its closing arguments by contrasting Ms. Forde's physical presentation with another woman involved in the case, a woman who had "curling irons, . . . flat irons, the hello kitty diamond, [and] cheap costume jewelry." *Id.* at 129.

267 Andrew Transcript, *supra* note 97, at 3908.

268 *Id.*

269 Alfaro Transcript, *supra* note 239, at 2001. Prosecutors had asked witnesses during the trial whether Ms. Alfaro wore red lipstick prior to trial, eliciting testimony that she did not. *See id.* at 1011, 1103. The appeals to Ms. Alfaro's appearance during the closing argument therefore contrasted the makeup choices of the person before the jury with the allegedly real defendant, as presented by the state's testimony. *See supra* notes 239, 247 and accompanying text.

"illusion."[270] The prosecutor spoke of the "bows in her hair" no fewer than three times in his argument.[271]

Prosecutors in two Arizona cases also evoked floral imagery to contrast the defendant in the courtroom with the defendant of the State's narrative. During Wendi Andriano's trial, the State detailed how Ms. Andriano initiated sexual contact with a man in a bar before commenting: "She's the one that initiated—this demure little lotus blossom we have here."[272] And in Sammantha Allen's case, the prosecutor argued in the guilt-phase closing statement that Ms. Allen was "no shrinking violet."[273]

No defense attorneys raised contemporaneous objections to these prosecutorial remarks about their client's appearance. Donna Roberts, speaking in an unsworn statement during her own penalty phase, was the only person across the trial transcripts we reviewed to point out the absurdity of the State's tactics. In his closing, the prosecutor argued that the "State's exhibit 403 shows the real Donna Roberts, the person in the photograph, the defendant with the heavy makeup and dyed hair."[274] Ms. Roberts responded:

> I really did dye my hair and I really did wear makeup, and Mr. Bailey [the prosecutor] thinks that because of that, I'm an evil person. I don't think there's one woman in here that doesn't care how she looks, that doesn't fix her hair and doesn't wear makeup. The matriarchs in the Bible, they all wore makeup from berries and plants to look nice for their husbands. Today we're the same.[275]

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270 [Mar. 13, 1998] Transcript of Record at 1168, State v. Holberg, No. 11492-C (Tex. Crim. Dist. Ct. 1998) [hereinafter Holberg Transcript].

271 *Id.* at 1167–68, 1831.

272 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 88.

273 [June 20, 2017] Allen Transcript, *supra* note 241, at 98.

274 Roberts Transcript, *supra* note 127, at 6117.

275 *Id.* at 6268.

C. Sex Work and Trafficking

At least nine of the women (19%) in our dataset worked in the sex industry.[276] But this is likely an underestimate. Sex work is stigmatizing,[277] and women may not have disclosed prior sex work to defense teams—or if they did, defense teams may have opted not to present the evidence at trial. This would be unsurprising, given our observation that prosecutors often commented on women's experiences as sex workers in disparaging ways.

In the case of Brittany Holberg, a woman sentenced to death in 1998, prosecutors referred to her repeatedly as a "crack addict prostitute"[278] and a "hooker."[279] The defendant testified that she had killed the victim, a former client, in self-defense.[280] The prosecution argued that her experience as a sex worker rendered her testimony wholly incredible. The following exchange, taken from the prosecution's cross-examination of the defendant, is typical:

> Q. In order to be a successful prostitute, as you were, to get any kind of repeat business, you would have to at least give the appearance that this was something you enjoyed. Correct?
> A. Yes.
> Q. Okay. And, in fact, that may have something to do with the fact that a prostitute's customer is called a trick. Would you agree with me? There's an element of deceit or deception involved in this business, isn't there?
> A. I believe on both parts, yes.
> Q. Okay. Fair enough. But we're speaking of you right now. There is that side of this business where the prostitute, the hooker at least has to appear to be enjoying it, there's an element of deceit. Would you agree with me?

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276 We found references to the defendant's sex work in eight transcripts. In a further case, the defendant's post-conviction lawyer informed us that her client had engaged in sex work. Because sex work is stigmatizing for some people, we have deliberately omitted mention of their names here.

277 *See* Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 65 (2016).

278 [Mar. 13, 1998] Holberg Transcript, *supra* note 270, at 22, 73, 74.

279 [Mar. 11, 1998] Holberg Transcript, *supra* note 270, at 81; [Mar. 5, 1998] Holberg Transcript, *supra* note 270, at 86.

280 [Mar. 13, 1998] Holberg Transcript, *supra* note 270, at 29.

A. Yes, I would.[281]

In closing argument at the guilt phase, the prosecution argued that the defendant, "a woman who is a crack addict and prostitute and a confirmed liar who would abandon her own two-year-old child in order to continue using drugs," was guilty of capital murder.[282]

Prosecutors and judges also mischaracterized child sex trafficking as prostitution,[283] implying that underage girls who were trafficked for sex were willing participants.[284] In the case of one woman in California, multiple witnesses testified that the defendant had begun to trade sex for money as a child—possibly as early as age thirteen.[285] By age fourteen or fifteen, she was regularly seen in the company of older men and women;[286] the defendant explained that one woman would take all of her earnings and give her drugs in exchange.[287] In closing argument, the prosecutor argued that "she chose the lifestyle that she led."[288] Although child sex trafficking victims are incapable of consenting to their exploitation,[289] the trial judge—who, under California law, must re-weigh the aggravating and mitigating

281 *Id.* at 80–81.

282 *Id.* at 27.

283 *See* Nickera Rodriguez, *The Plight of Cyntoia Brown: Can Safe Harbor Laws Prevent the Prosecution of Child Sex Trafficking Victims?*, 31 U. FLA J.L. & PUB. POL'Y 459, 461 (2021) ("The Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations define human trafficking as: a) [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.").

284 Prosecutors and judges were not the only trial actors to mischaracterize child sex trafficking as prostitution. In one case of a woman defendant who was around fourteen years old when she was trafficked, defense counsel and defense experts repeatedly referred to her as engaging in "prostitution" for money. [Feb. 16, 2011] Forde Transcript, *supra* note 263, at 67, 136–38, 169–70.

285 Alfaro Transcript, *supra* note 239, at 1516, 1533–34, 4092.

286 *Id.* at 1528–29.

287 *Id.* at 1620–21.

288 *Id.* at 4368.

289 CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, BEST PRACTICES IN DEFENDING WOMEN AND GENDER MINORITIES 79 (2025), https://dpw.lawschool.cornell.edu/wp-content/uploads/2025/07/Best-Practices-in-Defending-Women-and-Gender-Minorities.pdf [https://perma.cc/D2NE-A6GX] [hereinafter DEFENSE MANUAL].

factors after the jury returns its verdict[290]—concluded that the defendant made a voluntary choice to sell sex:

> It also appears to the court that people are really the sum total of the choices we make in our life. She chose to leave school. She chose to use drugs. She chose to engage in acts of prostitution on the streets. . . . She made all of those choices. Those are all choices. There was no evidence presented to the court that those were involuntary choices, anybody forced her into doing that, things of that nature.[291]

D. Intersectional Bias

Women with multiple marginalized identities are particularly vulnerable to biased prosecutorial narratives. This section details some of the ways in which prosecutors' sexualization of women interacts with race, sexual orientation, gender identity, and socioeconomic status, providing examples from transcripts in our dataset across each category.

1. Women of Color

Black feminist scholars have documented how women's various identities (including gender, race, gender identity, economic precarity, disability, and immigration status) affect their experiences both as victims and offenders.[292] Women of color are not afforded the same benefits of youth granted to white girls, for example. Society "adultifies" girls belonging to racial minorities, meaning that people view, respond to, and interact with these girls as if they were adults.[293] Black girls are often mistakenly perceived to be biologically older than they are.[294] As a result, Black girls are perceived as needing less protection and nurturing

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290 CAL. PENAL CODE § 190.4(e) (West, Westlaw through 2026 Reg. Sess. ch. 7).

291 Alfaro Transcript, *supra* note 239, at 4506.

292 *See, e.g.*, Kali Nicole Gross, *African American, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25, 28–29 (2015) (discussing the history of masculinization of Black women and how such negative stereotypes contributed to Black women's disproportionate incarceration); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman's Syndrome*, 1995 WIS. L. REV. 1003, 1036 (1995) ("Black women have never been placed on a pedestal; the cages in which they have been held have been real, not metaphoric.").

293 EPSTEIN, BLAKE & GONZÁLEZ, *supra* note 19, at 4.

294 *Id.* at 6.

than white girls and are seen as less innocent than their white peers, particularly on topics related to sex.[295] Across our dataset, prosecutors used sexualizing evidence to adultify and hypersexualize women of color.

a. Adultification of Women of Color

We saw adultification at work in the capital trial transcripts of several women of color. In the case of Grace Connell,[296] a woman of color who was sentenced to death in California, the prosecutor sought to downplay evidence that when she was an eleven-year-old child, she was repeatedly raped by a man who was twice her age.[297] 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.[298] Nevertheless, the prosecutor characterized Ms. Connell as a "mature 11-year-old" who engaged in a "consensual relationship" with the perpetrator.[299] "[I]t's not the same as forcible rape," the prosecutor argued.[300] "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."[301]

The State presented this adultification of Ms. Connell alongside racial stereotypes elicited during the prosecutor's cross-examination of a defense witness, in which the prosecutor asked questions about the "primitive or prior culture" of "members" of Ms. Connell's racial group.[302] The prosecutor also posited that people of Ms. Connell's racial background "sometimes have trouble really governing themselves."[303] The prosecution's racially-loaded questions about Ms. Connell's supposedly violent culture further minimized the abuse she endured and the mental health consequences of that abuse. Discounting expert

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295 *Id.* at 1, 8; *see also* Trevariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women*, NAT'L BLACK WOMEN'S JUST. INST. (Sep. 23, 2021), https://www.nbwji.org/post/extreme-sentences-disproportionately-impact-and-harmblack-women [https://perma.cc/4HDU-WTH8].

296 Grace Connell is not her real name. We are using a pseudonym at the request of the defense team.

297 Reporter's Transcript at 1957, People v. Connell (Cal. Super. Ct. 2014) [hereinafter Connell Transcript].

298 CAL PENAL CODE § 288.5 (West 2006).

299 Connell Transcript, *supra* note 297, at 1957.

300 *Id.*

301 *Id.*

302 *Id.* at 1545.

303 *Id.* at 1542.

testimony that Ms. Connell was traumatized by the rapes,[304] 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."[305]

Maria Alfaro was similarly cast as a mature adult when she was still a child. Ms. Alfaro was raped by a friend of her father's when she was nine years old.[306] In cross-examining a defense expert who testified about the rape, the prosecutor repeatedly emphasized that Ms. Alfaro was smoking cigarettes at age nine.[307] The focus on cigarettes served to create the image of an adult smoking after sex in the jurors' minds, and thereby minimized Ms. Alfaro's experiences of sexual abuse. And the prosecutors' tactics worked. Ms. Alfaro was only eighteen years of age at the time of the offense, making her one of the youngest women to be condemned in our dataset. Yet in their comments to the jury in re-weighing the evidence, the trial judge determined that Ms. Alfaro's youth should not be mitigating because she was "streetwise":

> It does appear that the defendant was eighteen years old at the time of the crime. If mere age by itself without any other factor is involved, it would appear perhaps that the age of eighteen might be a mitigating factor in the case. I think you have to put the age in context of what her background shows about she had dropped out of school at an early age, been out on the streets for a substantial period of time, been involved in the drug culture for a substantial period of time, things of that nature. So it would appear that in a streetwise sense she was much more mature than her age would indicate. So it doesn't appear that the age of the defendant at the time of the crime is really a substantial mitigating factor in the case.[308]

b. Hypersexualization of Women of Color

In addition to being adultified, women of color are routinely hypersexualized. Angelina Rodriguez, a Latina woman sentenced to death in California, was portrayed as

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304 *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.*

305 *Id.* at 1957.

306 Alfaro Transcript, *supra* note 239, at 1867.

307 *Id.* at 1876, 4151.

308 *Id.* at 4505.

a sexually active woman from a young age, despite being a victim of child sexual abuse. Prosecutors asked witnesses to describe her multiple marriages and extramarital sexual relationship,[309] arguing that "she jumped essentially from man to man, including married men."[310] Prosecutors repeatedly referred to her "lover[s]"[311] and "hookup[s],"[312] described how she was "having play time" with a sexual partner,[313] and condemned her for "actively cheat[ing] on her husband."[314] They also criticized her for "flirting with" a sheriff's deputy in the jail.[315] In closing argument at the guilt phase, prosecutors argued that Ms. Rodriguez killed her husband so she could be with her "young boyfriend."[316] These repeated and explicit depictions of Ms. Rodriguez as a sexually loose woman—including when she was still a teenager—appeal to racialized stereotypes of the exotic and seductive Latina.[317] Moreover, the prosecution's argument that Ms. Rodriguez was "greed[y]" for seeking financial stability from a husband and that she was motivated by "money money money" appealed to stereotypes about Latinx, immigrant populations as poor and money-hungry.[318]

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309 Transcript of Record at 2455–56, 2458–59, 2492–94, 3703–04, People v. Rodriguez, No. BA213120 (Cal. Super. Ct. 2003) [hereinafter Rodriguez Transcript].

310 *Id.* at 3704.

311 *See, e.g.*, *id.* at 1737, 2581, 2640.

312 *Id*. at 1740, 2633, 2640, 2645.

313 *Id*. at 2584.

314 *Id*. at 2581.

315 *Id.* at 3777–79.

316 *Id*. at 2640.

317 *See* ISABEL MOLINA-GUZMÁN, DANGEROUS CURVES: LATINA BODIES IN THE MEDIA 152–74 (2010). The State continues to hypersexualize Ms. Rodriguez in this way. In a recent pleading filed in Ms. Rodriguez's state post-conviction proceedings, the Los Angeles County District Attorney equated evidence about Ms. Rodriguez's history of childhood rape (evidence that Ms. Rodriguez's lawyers argued was relevant to her mental state) with evidence that Ms. Rodriguez had "play time" and "hookup[s]" with a younger man (evidence that the lawyers argued was irrelevant to the offense). The prosecutor's comparison of child rape to consensual affairs, claiming that these experiences are all evidence of Ms. Rodriguez's "sexual history," represents precisely the kind of problematic and sex-shaming attitude that Ms. Rodriguez's lawyers claim infected her trial. Respondent's Opposition to Petitioner's Motion for Leave to Amend and File Supplemental Petition at 14 n.2, *In re* Rodriguez, No. BA213120 (Cal. Super. Ct. Mar. 5, 2026).

318 *See* Naily Ananda Putri & Fitria Akhmerti Primasita, *The Counter-Stereotypical Representation of Latinas in the American Police Procedural Comedy Series Brooklyn Nine-Nine (Fox & NBC, 2013-2021)*, 11 J. TRANSNAT'L AM. STUD. 16, 17–18 (2024); Hannah Lipman, *Embodying Hollywood's Hispanic Body: The Impact of the Male Gaze on Hispanic Women in Film*, 13 HOHONU 27, 27–31 (2014).

In the case of Jane Smith,[319] a Black woman on California's death row, the State underscored that the defendant had a child with a man who was not her husband. Evoking tropes about Black women's sexualities and their "baby daddies,"[320] the State told jurors in its opening statement that Ms. Smith's daughter was "fathered by another man."[321] Prosecutors elicited testimony about Ms. Smith holding herself out to be single while married.[322] During the guilt-phase closing, prosecutors again raised that Ms. Smith's daughter was not fathered by her husband[323] and continued this drumbeat into the penalty phase, asking witnesses about who Ms. Smith was "fooling" with.[324]

Prosecutors in the case of a Latina woman, Camila Jones, similarly highlighted that she had a child from a man who was not her husband. Further, they repeatedly emphasized that Ms. Jones had six children, marshalling stereotypes around Latina women having many children.[325] The State argued that "it's the defendant's choice to have a child with somebody that wasn't her husband. It was the defendant's choice to have six children. Although she says that [her partner] wanted her fat and pregnant, I highly doubt [he] wanted her fat and pregnant with somebody else's child."[326]

2. LGBTQ+ Defendants

Scholars have previously documented the homophobic and transphobic narratives that prosecutors employ in queer people's criminal trials.[327] Overt appeals to derogatory tropes, such as masculinizing lesbian women, hypersexualizing gay men, or pathologizing

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319 Jane Smith is not the defendant's real name. We have used a pseudonym at the defense team's request.

320 *See* Lisa Rosenthal & Marci Lobel, *Stereotypes of Black Women Related to Sexuality and Motherhood*, 40 PSYCH. WOMEN Q. 414, 414–27 (2016).

321 Smith Transcript, *supra* note 238, at 1545.

322 *Id.* at 1909.

323 *Id.* at 1435.

324 *Id.* at 1450, 1683, 1693.

325 Jones Transcript, *supra* note 148, at 7754, 7757, 8094, 9279.

326 *Id.* at 5493.

327 *See* VALENA E. BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS 96–107 (2022) (documenting how homophobic narratives can contribute to the wrongful incarceration of queer women). *See generally* Mogul, *supra* note 11 (documenting cases of homophobia in capital cases); Sutton et al., *supra* note 11 (same).

transgender people, pervade the trials of people in the LGBTQ+ community.[328] Here, we focus on how those tropes intersect with the sexualizing evidence and arguments that prosecutors employed across our dataset.[329]

a. Sexual Orientation and Danger

Prosecutors sought to introduce testimony about the defendant's same-sex sexual interactions while incarcerated in multiple cases. Although prosecutors sometimes claimed that such information was relevant to show the defendant's poor disciplinary record and inability to abide by prison rules, such evidence had no discernible relevance to the jury's life-or-death determination. Rather, it appeared that the prosecution presented such testimony to draw attention to the defendant's perceived sexual orientation, paint her as a sexual predator, and cast her as a danger to other women in the prison no matter the consensual nature of the interactions—drawing on discriminatory and deeply dehumanizing ideas about queer people endangering society. In effect, such testimony asks jurors to regard queer defendants as a threat and therefore return a death verdict.

Sammantha Allen was sentenced to death in Arizona. During the penalty phase of her trial, the State called a witness to testify about a relationship that Ms. Allen may have had while incarcerated at the county jail:

> Q. There can be no sexual contact of any kind with other inmates, that's prohibited?
> A. That's my understanding, yes. . . .
> Q. Even if it's consensual, it is a violation?
> A. That is correct.
> Q. One of the disciplinary write-ups the defendant got, exhibit number 227, was for kissing another inmate?

328 Sutton et al., *supra* note 11, at 1054.

329 The sexual orientation and gender identity of the defendant is not always known from the transcript, nor did we seek to find out this information where it was not readily available from the transcripts. The defendant's sexual orientation is frequently immaterial to the State's use of homophobic tropes, though those tropes have even more force when the parties identify the defendant with the queer community. Prosecutors' use of evidence about a defendant's same-sex relationships in prison, for example, fan the flames of homophobia irrespective of the defendant's sexual orientation. Further, and as we have noted elsewhere, many defense teams fail to adequately discuss topics related to sex and gender with their clients. *See* DEFENSE MANUAL, *supra* note 289, at 4–5. This means that much of the pertinent information about the defendant's identity and social history—information that sheds light on the State's narrative at trial—remains hidden.

A. I understand that. I don't have it in front of me, but you are correct. . . .[330]

The prosecutor elicited detail about the appropriate sanction for a same-sex kiss, the number of infractions Ms. Allen had on her record, and referred repeatedly to "the kissing" throughout the witness' testimony, thus constantly reminding jurors of this interaction.[331]

The State has employed similar tactics in other cases, regardless of the defendant's sexual orientation. When Victoria Brown[332] took the stand in her own defense, the prosecutor questioned her about her relationships in jail. Ms. Brown confirmed that she had such relationships to "pass the time."[333] In Virginia Caudill's case in Kentucky, the State questioned her about the women she shared a cell with and their sexual interactions as "lovers," insinuating that Ms. Caudill may have participated in a relationship that made other women "jealous."[334] In Olivia Davis'[335] case, prosecutors had sought to introduce testimony that Ms. Davis "attacked" another inmate because Ms. Davis "believed that [the other inmate] slept with . . . her wife while she was in prison" but reached a stipulation with defense counsel to avoid discussing the "homosexual references."[336] In one case, the trial judge refused to allow the prosecution to introduce such evidence because of the risk of bias to the defendant, explaining that he was not going to admit the evidence of "homosexual activity."[337] Instead, the judge instructed prosecutors to "not let the jurors know the nature of the rule violations, just that she has been found to have violated [the jail rules.]"[338]

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330 [Jul. 24, 2017] Allen Transcript, *supra* note 241, at 87–88.

331 *Id.* at 88–89. In a bench conference before the testimony—testimony that, unusually, the defense objected to—the county prosecutor explicitly stated that she sought to introduce the testimony to present Ms. Allen as a sexual aggressor and threat to other women living in prison. *Id.* at 73–74. The prosecutor wanted jurors to know that the "prohibited contact" was "not just a kiss on the cheek." *Id.* The court ultimately allowed the testimony because it was based on a prison report that the defense team had previously introduced. *Id.* at 81–82.

332 Victoria Brown is not her real name. We have used a pseudonym at the request of the defense team.

333 Transcript of Record at 501, State v. Brown (Ala. Cir. Ct. 2006) [hereinafter Brown Transcript].

334 Transcript of Record at 123, Commonwealth v. Goforth, No. 99-CR-146 (Ky. Cir. Ct. 2013) [hereinafter Caudill Transcript].

335 Olivia Davis is not her real name. We have used a pseudonym at the request of the defense team.

336 Transcript of Record at 4253, People v. Davis (Cal. Super. Ct. 2015).

337 Transcript of Record at 4418, People v. Dalton, No. 135002 (Cal. Super. Ct. 1995).

338 *Id.* at 4421.

b. Appearance and Queer Identities

The State exploited Celeste Carrington's appearance to infuse his trial with discriminatory comments from the outset. Carrington[339] is a Black transgender man who was tried as a lesbian woman. The trial transcript contains overt references to his sexual orientation, "girlfriends," and identity as a "lesbian."[340] One of the first sentences the prosecutor uttered in her opening statement contained a physical description, combining racialized and homophobic tropes:[341] "What you will hear is that at the time the defendant was arrested, she was five-eight, 230 pounds."[342] The prosecutors followed by stating that "she wore baggy pants; long shirts was her style of dress"[343] and that while the victim was a "small woman," Carrington was a "larger woman."[344] In its opening, the State also made sure to note that the defendant "was living with another woman."[345]

The State continued to stoke fear on the basis of the defendant's race and gender presentation throughout the trial. Witness testimony detailed that "she's not a small woman, [she's a] strong woman."[346] Witnesses variously described the defendant as "the macho one," "very macho," and "too macho."[347] The defense did not object to the State's strategy. Rather, the State's insistence on trafficking in homophobic and racial tropes was aided by the defense team, who asked their own expert witness whether "homosexuality is a mental disorder" under the American Psychiatric Association's diagnostic manual.[348]

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339 We refer to Carrington without an honorific or first name in accordance with his preferences.

340 Reporter's Transcript on Appeal at 5680, 5983, California v. Carrington, No. C-29739 (Cal. Super. Ct. 1994) [hereinafter Carrington Transcript].

341 Black women are routinely defeminized to portray them as aggressive and dangerous. *See* Rosenthal & Lobel, *supra* note 320; Blackburn Center, *The Historical Roots of the Sexualization of Black Women and Girls*, BLACKBURN CTR. (Feb. 20, 2019) https://www.blackburncenter.org/post/2019/02/20/the-historical-roots-of-the-sexualization-of-black-women-and-girls [https://perma.cc/RQ5X-LTAQ].

342 Carrington Transcript, *supra* note 340, at 3688.

343 *Id.* at 3698.

344 *Id.* at 3706.

345 *Id.*

346 *Id.* at 5418.

347 *Id.* at 5683, 6300.

348 *Id.* at 6428.

The State returned to this theme in its guilt-phase closing argument, emphasizing Carrington's size: "She's five-seven, five-eight, at the time 230 pounds. . . . She's bigger than most of the deputies there. She's bigger than your average person, gender neutral, man or woman."[349] By drawing a comparison of Carrington's appearance to that of the deputies, the State argued that Carrington's size rendered him threatening, thereby grounding its argument in the defendant's gender presentation. In pulling together these defeminizing themes, prosecutors argued that Carrington was unworthy of protection in a "paternalistic" society, telling jurors, "[Y]ou do not need to protect this woman, if you feel that unconsciously."[350]

c. Trading in Homophobia

Other appeals to homophobia involve more complex narratives about the defendant and the queer community. These appeals nevertheless draw on tropes around queer identities to achieve the same end: dehumanizing the defendant. Such was the case in the trial of Jessica Johnson,[351] an Asian American woman on death row. There, the State sought to enmesh the defendant in gay communities and played on stereotypes portraying Asian women as hypersexual and mysterious.[352] Ms. Johnson was accused of killing a fortuneteller and her daughter, but the State opened by telling jurors that "[t]his case has greed, lust, obsession, revenge, incestuous relationship, straight sex, gay sex, manipulations, lies, the occult, threats, stealing things, and stealing lives."[353] While the State's theory was that Ms. Johnson secured an accomplice to the murders by promising to set him up with male sexual partners, the prosecutor's questions elicited details that presented Ms. Johnson as a corrupting force embedded in the gay community. The State questioned one male witness about Ms. Johnson's role in facilitating his relationships with other men, with the prosecutor asking this witness about at least three different gay men and Ms. Johnson's

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349 *Id.* at 6696.

350 *Id.* at 6669.

351 Jessica Johnson is not the defendant's real name. We have assigned a pseudonym at the request of the defense team.

352 Prosecutors sometimes referred to the defendant by her Vietnamese name, which served to emphasize her Asian immigrant roots to the jury. *See* Transcript of Record at 2094–2100, People v. Johnson (Cal. Super. Ct. 2010) [hereinafter Johnson Transcript]. *See generally* Maria Cecilia Hwang et al., *The Gendered Racialization of Asian Women as Villainous Temptresses*, 35 GENDER & SOC. 567 (2021).

353 Johnson Transcript, *supra* note 352, at 1377.

connection to them.[354] The defense objected to some of this questioning, arguing that it was irrelevant and "salacious," but to no avail.[355] The prosecutor then elicited testimony from a second witness, Ms. Johnson's alleged accomplice, that Ms. Johnson wanted "to introduce [him] to some of those homosexual guys. The gay guys."[356] The State also questioned this witness about whether he had previously told Ms. Johnson that he was interested in same-sex interactions, implying that she was the immoral force behind her accomplice's sexual orientation.[357]

In Maureen McDermott's case, the State alleged that Ms. McDermott hired men to kill her gay roommate and stage it to look like a "homosexual murder."[358] The State's theory was that Ms. McDermott staged the murder "to look like it was done by homosexuals," specifically "to look like an argument between two gay men."[359] The State called the jury's attention to Ms. McDermott's and the victim's sexual orientation in its opening statement.[360] In closing argument at the penalty phase, the prosecution argued that "McDermott's morality was zero"[361] and that "she was basically from the gutter."[362] In a case where the prosecution identified Ms. McDermott as a lesbian on the first day of trial, its denigration of her as being "from the gutter" implicitly invited the jury to connect her sexual orientation to its assessment of her death-worthiness.

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354 *Id.* at 2094 (eliciting testimony that Ms. Johnson "introduce[d]" the witness to another man "for sex purposes"); *id.* at 2099 (asking the witness if Ms. Johnson "ever introduced [him] to any other homosexual men"); *id.* at 2102 (asking about a third man, "a homosexual" who was "a friend" of Ms. Johnson's according to the State).

355 *Id.* at 2094, 2100–01.

356 *Id.* at 2121–22.

357 *Id.*

358 Transcript of Record at 4498, People v. McDermott, No. A810541 (Cal. Super. Ct. 1990) [hereinafter McDermott Transcript].

359 *Id.* at 4494.

360 *Id.* at 4493.

361 *Id.* at 11078.

362 *Id.*

3. Women of Poor Socioeconomic Status

Rural women and women from lower socioeconomic backgrounds are some of the most vulnerable women in society.[363] In some cases, prosecutors highlighted defendants' socioeconomic status by drawing on stereotypes around poorer women's sexualities, such as "welfare queens" or "white trash" women.[364] For example, prosecutors invoked language that disparaged poorer women's appearances in their trials. Prosecutors in Darlie Routier's trial elicited testimony that she was "tacky" because of the loose clothing she wore, her lack of makeup and bra, and her hair that was "never fixed."[365] Susan Eubanks' prosecutors called her a "trashy girl" and claimed that she was so "trashy" that her mother-in-law would never have picked her to marry her son.[366]

In both Socorro Caro and Sammantha Allen's trials, the State elicited testimony about the defendant's manicures, but to different ends. Ms. Caro was presented as a woman who married into money and had "once a week" manicures as a sign of vanity afforded to her as a woman of means.[367] Indeed, prosecutors presented Ms. Caro's love of the lifestyle she married into as the motive for her husband's death—the State claimed that upon separation with her husband, Ms. Caro "was stripped of her financial freedom" and could no longer "get[] manicures once a week," giving her a motive to kill.[368]

Conversely, in Sammantha Allen's case, the State elicited testimony about Ms. Allen's manicures to invite judgment of her perceived irresponsibility as a poor woman

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363 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 33 on Women's Access to Justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015); *see also* Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 on the Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016).

364 Katia Savchuk, *Poor Journalism: Is Media Coverage of the Poor Getting Better or Worse?*, CAL. MAG. (Apr. 6, 2016), https://alumni.berkeley.edu/california-magazine/online/poor-journalism-media-coverage-poor-getting-better-or-worse/ [https://perma.cc/SS9G-S8J7]; Catherine Powell & Camille Gear Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 115 (2020) ("[T]he welfare queen was used to stereotype and villainize Black women on public assistance and using other social welfare programs. Americans were told that the welfare queen was indolent and self-indulgent . . . .").

365 Routier Transcript, *supra* note 228, at 5462.

366 24 Eubanks Transcript, *supra* note 97, at 2545.

367 Caro Transcript, *supra* note 205, at 9595–96, 9681–82.

368 *Id*. at 10715–16.

who had children to feed.[369] Prosecutors asked witnesses repeatedly about why Ms. Allen did not work, pressing them on why she "didn't get a job,"[370] did not "contribut[e] to the household,"[371] and did not "want to work."[372] The State concluded thus: "So what all this tells you is that the defendant is lazy."[373] In light of these judgments about her socioeconomic status, the State disparaged Ms. Allen for doing anything for herself, asking one witness, of Ms. Allen, "Her nails are done, aren't they?"[374] and following up with, "So she's clearly got enough money to get her nails done?"[375] The State even elicited testimony that such spending, for a woman of Ms. Allen's means, was "frivolous."[376]

E. Sexuality and Motherhood

Over 85% of the women in our dataset are mothers.[377] Like many women in the criminal legal system, they had caregiving responsibilities before their incarceration.[378] Yet prosecutors wielded their motherhood as another reason to condemn them—particularly when their sexual behavior fell short of pervasive tropes around how mothers should behave.

Societal norms continue to expect women to be attentive and caring mothers, wives, and homemakers.[379] "Good" mothers are those who are nurturing, emotional, and perpetually

369 Trial testimony established that Ms. Allen's family frequently lived below the poverty line. [Jul. 11, 2017] Allen Transcript, *supra* note 241, at 120.

370 [Jul. 18, 2017] Allen Transcript, *supra* note 241, at 92.

371 *Id.* at 77.

372 *Id.* at 93.

373 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 132.

374 [Jul. 13, 2017] Allen Transcript, *supra* note 241, at 15.

375 *Id.*

376 [Jul. 18, 2017] Allen Transcript, *supra* note 241, at 27.

377 Babcock et al., *Women on Death Row*, *supra* note 21, at 12.

378 *See* Laura M. Marushak & Jennifer Bronson, *Parents in Prison and Their Minor Children: Survey of Prison Inmates, 2016*, BUREAU OF JUST. STAT. (Mar. 30, 2021), https://bjs.ojp.gov/library/publications/parents-prison-and-their-minor-children-survey-prison-inmates-2016 [https://perma.cc/3BED-S72W].

379 *See generally* C. Nathan DeWall, T. William Altermatt & Heather Thompson, *Understanding the Structure of Stereotypes of Women: Virtue and Agency as Dimensions Distinguishing Female Subgroups*, 29 PSYCH. WOMEN Q. 396 (2005).

available for their children.[380] Prosecutors in Sammantha Allen's trial drew heavily on these tropes to condemn her as a poor mother because of her sexual life. The State called multiple family members, former sexual partners, and other acquaintances of Ms. Allen's to comment on her sexual history, highlighting that she had children from different fathers—a refrain that taps into stereotypes about women of poorer socioeconomic status being burdens on society and unfit parents.[381] The State told jurors that Ms. Allen was "a 23-year-old mother of four," arguing that by having children, she "[had] now made—not only has she made the house overcrowded, she now goes and has another baby, . . . making the house even more crowded."[382]

Prosecutors pressed witnesses about the parenthood of Ms. Allen's children and her relationships with their fathers. The State asked one former partner, "Is he—a father to any of Sammantha's children?"[383] and asked another about "the different last names for [her] kids."[384] One of Ms. Allen's ex-partners took the stand in the penalty phase, and the prosecutor asked multiple questions about Ms. Allen's children, including: "Was it your child?" "So she was cheating on you?" "But do you know if the child that the defendant miscarried was yours?"[385]

During their penalty-phase closing statement, prosecutors argued that "[Ms. Allen] certainly didn't have any problems with boyfriends after she turned 18, because she married three of them in pretty short order"[386] and later said, "In fact, she was married *too many times*."[387]

This focus on Ms. Allen's sexual history and the paternity of her children was presented alongside days of testimony about Ms. Allen's capacities as a mother. The prosecutor

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380 *See* Patricia Easteal et al., *How Are Women Who Kill Portrayed in Newspaper Media? Connections with Social Values and the Legal System*, 51 WOMEN'S STUD. INT'L. F. 31, 32 (2015).

381 *See* Tatiana Masters et al., *Jezebel at the Welfare Office: How Racialized Stereotypes of Poor Women's Reproductive Decisions and Relationships Shape Policy Implementation*, 18 J. POVERTY 1, 2 (2014).

382 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 139.

383 [June 14, 2017] Allen Transcript, *supra* note 241, at 57.

384 [Jul. 17, 2017] Allen Transcript, *supra* note 241, at 35.

385 [Jul. 11, 2017] Allen Transcript, *supra* note 241, at 128–30.

386 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 97.

387 *Id.* at 121 (emphasis added).

bemoaned in its guilt-phase closing that she "wasn't fixing the bunk beds or wiping up baby vomit,"[388] and in its penalty-phase closing that she "pushed off her responsibilities for changing [her children] to [others]."[389] The prosecutor even appealed to jurors directly to condemn Ms. Allen as a parent, telling them, "Many of you, I'm sure, are parents, and you know that, quite simply, there are ways to do this, to get your kids to stay in school, keep doing their work."[390]

Prosecutors invoked women's sexual histories to condemn them as poor mothers in other cases, too. Brenda Andrew's jury heard in detail about how she "flirt[ed]" with a sexual partner in front of her son and how she had sex with a boyfriend in the family home.[391] The State questioned witnesses about the relationship between Ms. Andrew's partners and her children, introducing into evidence a holiday card that Ms. Andrew and her children sent one of her partners[392] and eliciting testimony that her home was "filthy" and "unkempt" while her children lived there.[393] Much of the State's condemnation of Ms. Andrew as a mother came during the penalty phase, during which the State asked successive witnesses whether Ms. Andrew was a good mother in light of her affairs.[394] The prosecutor asked one witness no fewer than nine consecutive questions about whether Ms. Andrew was a "good mother," including whether "a good mother would run off with her boyfriend."[395] The prosecutor then evoked this testimony during the State's penalty phase closing to argue that Ms. Andrew was not a "good mother" because she "br[ought] men into her house with her children there."[396]

Similarly, in Susan Eubanks' trial, the State argued in closing that Ms. Eubanks' affairs caused "chaos" in her house for her children and referred to a diary kept by her husband

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388 [June 27, 2017] Allen Transcript, *supra* note 241, at 27.

389 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 132.

390 *Id.* at 32.

391 Andrew Transcript, *supra* note 97, at 248, 251.

392 *Id.* at 2309.

393 *Id.* at 1991.

394 *Id.* at 4312–46.

395 *Id.* at 4346.

396 *Id.* at 4394.

about Ms. Eubanks going out at night and not making dinner for their children.[397] In Wendi Andriano's trial, the prosecutor noted that Ms. Andriano was not taking care of her children when she was knocking on the door of a man she was seeing.[398] The message is clear: in the eyes of the State, women's sexual histories render them unfit mothers and therefore bad women deserving of death.

Women's attention to their image, as previously described in Part IV.B, is another way in which prosecutors target defendants' perceived shortcomings as mothers. In Kimberly Cargill's case, the State argued that she was a poor mother because she was vain at the expense of her children, asking the defendant, "[Y]ou're dumping [your child] off with no food while you go get your nails done?"[399] The State adopted the same tactic in Ms. Allen's case, questioning witnesses about her inability to feed her children while emphasizing that "she's clearly got enough money to get her nails done"[400] and that she was a "stay-at-home mother, who didn't want to work."[401] The transcripts in our dataset reveal that prosecutors powerfully weaponize women's sexuality to condemn them as mothers—a tactic that is all the more harmful when combined with intersectional biases such as race or socioeconomic status.

F. Blaming Survivors of Sexual Violence

Gender-based violence is ubiquitous in the lives of women on death row.[402] Of the women in our dataset, 96% experienced one or more forms of physical, sexual, psychological, or socioeconomic violence before their arrest on capital charges.[403] At least 74% of these women experienced sexual violence.[404]

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397 Eubanks Transcript, *supra* note 220, at 1066, 1151, 2552.

398 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 63–64.

399 [May 16, 2012] Cargill Transcript, *supra* note 233, at 34.

400 [Jul. 13, 2017] Allen Transcript, *supra* note 241, at 15.

401 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 121.

402 Babcock & Greenfield, *supra* note 21, at 358.

403 *Id.*

404 *Id.* at 359.

In some of the trial transcripts we reviewed, defense teams presented evidence of women's experiences of sexual violence at either the guilt or penalty phases of trial.[405] Most commonly, that evidence was presented through expert testimony or through the testimony of the defendants themselves.[406] Women testified about childhood sexual abuse,[407] about rape,[408] and about having to get abortions resulting from rape.[409] Some women were trafficked as children,[410] and some were forced to have sex with fathers,[411] grandfathers,[412] or other family members.[413] In no case, however, did the prosecution fully acknowledge the severity of the abuse or credit the women's accounts. Instead, they sought to discredit, minimize, or dismiss the evidence—often by invoking debunked stereotypes of sexual assault victims.[414]

With respect to victims of sexual violence, prosecutors sometimes sought to undermine their accounts by portraying them as sexual aggressors. The case of Janeen Snyder is a particularly potent example of this tactic. Ms. Snyder was sentenced to death alongside her intimate partner, Michael Thornton, for the murder and sexual torture of a young woman.[415] As a young teenager, Ms. Snyder moved in with Mr. Thornton's family, and Mr. Thornton—who was twenty-six years her senior—cast himself as her surrogate father.[416] He raped her

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405 *Id.* at 377.

406 *See id.* at 378, 384 (discussing expert testimony in the case of Lisa Jo Chamberlin); *id.* at 385–86 (discussing expert testimony in the case of Cynthia Coffman).

407 *Id.*

408 Jones Transcript, *supra* note 148, at 7392.

409 Rodriguez Transcript, *supra* note 309, at 3782.

410 *See supra* notes 276–290 and accompanying text.

411 30 Reporter's Transcript of Proceedings at 6492, 6537, 6568–69, People v. Bell (Cal. Super. Ct. 2002) [hereinafter Bell Transcript] (the defendant's real name is not Bell; we have used a pseudonym at the request of the defense team).

412 Rodriguez Transcript, *supra* note 309, at 3510, 3636–37.

413 *See* Jones Transcript, *supra* note 148, at 5826, 5835 (describing abuse by stepfather).

414 *See* Babcock & Greenfield, *supra* note 21, at 385–91 (presenting cases in which prosecutors used disproven stereotypes to delegitimize and minimize evidence of abuse).

415 Snyder Transcript, *supra* note 202, at 2547.

416 *Id.* at 8308, 9428.

for the first time when she was fourteen[417]—then continued to rape her "vaginally, orally, and anally, including while she was in restraints."[418]

In response to this testimony, the prosecutor sought to portray Ms. Snyder as sexually precocious at an "inappropriate" age.[419] When a defense psychologist testified about how Mr. Thornton repeatedly raped Ms. Snyder, the prosecution suggested that it was a "sexual experience" in which Ms. Snyder was "willing to sell herself" to Thornton for a "business opportunity":

> Now, I know there is a huge age imbalance, that he is 15—she is 15, he is much older than her, but the sexual experience is expressed as him offering her a business opportunity and her, essentially—sadly, willing to sell herself for this business opportunity?[420]

In his penalty phase closing argument, the prosecutor argued that Ms. Snyder was the one with the power in her relationship with the older Mr. Thornton:

> And she had another power. She had power over her partner. She had power over her partner, Michael Thornton. . . . What was her power? You know, Michael Thornton apparently couldn't get an erection. And she needed her sex, didn't she?[421]

In the California case of Christine Bell, a defense expert testified that Ms. Bell had been repeatedly raped by her father over a period of years, beginning when she was only eleven or twelve.[422] Her father also became her trafficker.[423] Starting at age eleven, her father forced her to trade sex for money and collected her earnings.[424] The prosecution downplayed the significance of this testimony, repeatedly suggesting that Ms. Bell was

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417 *Id.* at 10783.

418 *See* Babcock & Greenfield, *supra* note 21, at 388 (citing Snyder Transcript, *supra* note 202, at 10780–83).

419 Snyder Transcript, *supra* note 202, at 10945.

420 *Id.* at 10934.

421 *Id.* at 11179–80.

422 Bell Transcript, *supra* note 411, at 6568–69.

423 *Id.* at 6484–85, 6488.

424 *Id.* at 6485.

a "dominatrix" despite her status as a child sex trafficking victim.[425] The prosecutor, a woman, asked a witness whether Ms. Bell ever described her favorite sexual practices, and whether she "bragg[ed]" about "liking stuff shoved up her," and that "sodomy was best."[426] The prosecutor also asked whether the witness knew that Ms. Bell "liked women," implying that she was bisexual.[427] Later, the prosecutor elicited testimony that Ms. Bell "got off on aggressive, violent, sex."[428]

The tactics we describe above play on the same tropes that have been roundly condemned when invoked by defense attorneys—and which led to so-called "rape shield" laws.[429] Scholars have pointed out that women in the criminal legal system are rarely viewed as victims, even when their experiences of gender-based violence are closely intertwined with the actions that led to their arrest.[430] This is often referred to as the victim/defendant binary.[431] A woman can be either a victim, or a defendant, but she cannot be both. Prosecutors in the cases we describe above reinforced this binary by blaming victims for the sexual violence they endured as children—and by simultaneously casting them as sex-crazed women who "got off on" or "needed" sex.

V. The Impact of Sexualizing Evidence

The evidence and argument detailed above does not exist in a void. Once jurors have heard and seen evidence concerning the defendant, her body, her underwear, her appearance,

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425 *Id.* at 6482, 6516.

426 *Id.* at 6483–84.

427 *Id.* at 6484.

428 *Id.* at 7862.

429 *See generally* Suzanne St. George Coble, Emily Denne & Stacia N. Stolzenberg, *Blaming Children: How Rape Myths Manifest in Defense Attorneys' Questions to Children Testifying About Child Sexual Abuse*, 37 J. INTERPERSONAL VIOLENCE 17–18 (2022) (providing an overview of rape myths and their invocation by defense attorneys in sexual assault cases involving children).

430 *See generally* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023). *See also* Michal Buchhandler-Raphael, *Survival Homicide*, 44 CARDOZO L. REV. 1673, 1675–76 (2023).

431 *Breaking the Binary: When Survivors of Abuse Become the Accused*, JBWS (2026), https://jbws.org/news/breaking-the-binary-when-survivors-of-abuse-become-the-accused/ [https://perma.cc/D2KZ-SZUQ]; *"Perpetrator" vs. "Victim" and the Impact of Carceral Logic*, VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL. (June 13, 2024), https://vsdvalliance.org/press_release/perpetrator-vs-victim-and-the-impact-of-carceral-logic/ [https://perma.cc/75HQ-NLYN].

and her sexual life, it cannot be unheard or unseen. Such evidence goes with jurors into the deliberation room and informs their decisionmaking.

This section will map out some of the ways in which sexualizing evidence affects the quality of justice that women defendants receive. First, sexualization erases women's individuality and personhood. This affects all aspects of women's cases—from their interrogation through to their clemency appeals—by using gendered stereotypes to position the defendant as someone who does not adhere to socially accepted norms.[432] Second, prosecutors use sexualizing evidence to heighten women's legal culpability, including through their theories of motive. Third, prosecutors specifically draw on sexualizing evidence to heighten women's moral culpability and increase their chances of receiving death sentences. Ultimately, prosecutors' use of sexualizing evidence and argument can render a defendant's trial fundamentally unfair—as the Supreme Court recognized in *Andrew v. White*—by deflecting jurors' focus from an assessment of the defendant's guilt or the appropriate penalty to a referendum on her femininity and morality.

A. Dehumanizing Women Through Stereotypes

The overarching impact of sexualizing evidence is to reduce the defendant to an archetype of an evil woman. Evidence focused on women's sexual histories and bodies juxtaposes the defendant and "normal" women, inviting judgment about their failure to adhere to conventional feminine norms. These views of "normality" are premised on societal expectations of how women should conduct themselves as wives and mothers: a woman should "remain chaste, . . . [and] remain true to her husband."[433] She should be demurely dressed and not attract male attention.[434] And she should not have sex outside of

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432 In the case of Karla Faye Tucker, for example, scholars have described how accounts of her sexual pleasure during the murder of the victim affected perceptions of her case long after her trial. *See* Joan Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 226–28 (2002).

433 Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1862 (2008).

434 *See* Naomi Ellemers, *Gender Stereotypes*, 69 ANN. REV. PSYCH. 275, 280 (2018).

hetero-patriarchal marriage structures.[435] Jurors' perceptions of the defendant and her case are filtered through this lens, shaping their evaluations of her guilt and punishment.[436]

Prosecutors' presentation of sexualizing evidence engenders "hostility toward, and negative stereotyping of, women"[437] by positioning defendants outside the boxes of chastity, fidelity, and sexual heteronormativity. Women who enjoy sex, who have too much sex, who have sex with women, who have sex outside of marriage, who have sex for remuneration, and who are too sexual while being mothers fly in the face of cultural tropes. Instead of being chaste, the defendant is cast as a hypersexual harlot. Rather than being demure, she wears revealing or, alternatively, masculine clothing. As for women who are wives, prosecutors argue that their infidelity "proves a character fault[,] such as promiscuity or immorality" that the jury can rely on "to find that the defendant is an immoral or evil person," a finding that leads jurors to conclude she is "more likely to commit criminal acts such as murder than is a person of good character."[438] In this way, sexualizing evidence invokes "jurors' fears of a society out of control, one where women's sexuality [runs] amok."[439] Prosecutors' presentation of testimony and argument sexualizing the defendant at all phases of the trial thus grounds the State's case—including the conclusions that it asks jurors to draw—in stereotypical views about women's roles in society.

Moreover, the nature of stereotypes deprives defendants of individualized proceedings at all phases of their trial. Stereotypes reflect "general expectations about members of

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435 Amanda Potts & Siobhan Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 INT'L J. SEMIOTICS L. 21, 36 (2018) (explaining that married women are expected to adhere to "appropriate femininity" associated with "passivity, good character and membership [in] a (dedicated) heterosexual marriage.").

436 The pictures that prosecutors paint of the defendant at trial affect post-conviction proceedings, too. For example, appellate courts in Brenda Andrew's case have continued to characterize her behavior as poor "for a woman," and the Oklahoma Court of Criminal Appeals even determined that some of the sexualizing evidence in her case was relevant as it showed that Ms. Andrew's co-defendant "was just the latest in a long line of men she seduced." Andrew v. State, 164 P.3d 176, 185–92 (Okla. Crim. App. 2007). In the case of Brittany Holberg, one Fifth Circuit judge referred to her as a "cocaine-addled prostitute" in dismissing her self-defense claim. Holberg v. Guerrero, 130 F.4th 493, 508 (5th Cir. 2025) (Duncan, J., dissenting), *vacated on grant of reh'g en banc*, 145 F.4th 625 (5th Cir. 2025).

437 Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 L. & SOC'Y REV. 45, 50 (2008).

438 Joseph Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1641, 1651 (2007).

439 ATWELL, *supra* note 11, at 19.

particular social groups"[440] that are "highly resistant to counter-evidence."[441] By sexualizing the defendant, prosecutors ask jurors to judge her as a representative of a group.[442] Evidence grounded in stereotypes anchors jurors' perceptions of the defendant's blameworthiness in social values and normative judgments about women, instead of individualized information about the offense.[443] The defendant's individuality is flattened and she becomes a one-dimensional archetype—the adulterous slut, the man-hating lesbian, the irresistible and deadly siren whom the jury must punish.

Such reductionism is particularly harmful because it means that prosecutors invite jurors to judge women's morality by their failure to conform to cultural tropes. Prosecutors' focus on women's sexual expression and sexual histories prompts jurors to consider "not only what the woman has done but also who she is with respect to her position in the family and in society."[444] In so doing, the State encourages jurors to convict and condemn women based on their violation of gendered moral codes. Prosecutors wield these violations as proof of the defendant's bad character and lack of morality. "Sexually deviant" women are deemed less worthy of compassion, the evidence they present is less trustworthy, and their lives are more expendable.[445] And the State blinds jurors to the defendant's humanity by focusing their attention on her transgressions against gender norms—a tactic that is devastating in the penalty phase of capital trials, when jurors are tasked with weighing whether the defendant is a human worthy of life.[446] Women who are presented as failures of

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440 Ellemers, *supra* note 434, at 276.

441 Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 433 (2019).

442 REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 9 (2011) (explaining that by virtue of membership in a group—here, the group "women"—a person is "is believed to conform to the generalized view or preconception" of the group).

443 *See* Epstein & Goodman, *supra* note 441, at 432–33 ("[M]ost commonly held derogatory stereotypes include those that devalue the words of women[.] . . . [O]nce formed, these stereotypes are highly resistant to counterevidence.").

444 Herzog & Oreg, *supra* note 437, at 49.

445 *See* Weare, *supra* note 12, at 347 (explaining that the law aims to control sexually deviant women and in the process is "excessively punitive to them"); Farr, *supra* note 11, at 55–56 (describing study findings of women on death row as portraying women as "ruthless, manipulative, seductive and often lustful" and "heterosexually unattached").

446 In the penalty phase, the jury must consider "the diverse frailties of humankind," a task that is rendered impossible when the State reduces the defendant to a villainous archetype based on her sexual transgressions. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

femininity by their deviation from societally-prescribed roles as chaste wives and mothers are thus easier to condemn—a woman who cannot abide by the laws of womanhood is more likely to flout the laws of the land, or so the prosecutorial playbook says.

The noxious effect of gender-biased evidence premised on such stereotypes packs a powerful punch in the courtroom, and prosecutors know it. Studies have shown that the criminal legal system holds mothers to a higher standard than other defendants.[447] Indeed, one study found that courts have imposed more severe sentences against mothers who were less involved in their children's lives as compared to attentive mothers,[448] and juries have tended to reward female defendants who portray themselves as loving and nurturing mothers.[449] In capital sentencing, women who deviate from these cultural expectations—including through their sexual behavior and appearance—are portrayed as "representing the evil side of heterosexual female nature—ruthless, manipulative, seductive and often lustful."[450] Womanhood is thus a millstone around the neck of women who are viewed as failing to meet societal expectations.

Courts have recognized the harmful impact of reducing women to dehumanizing stereotypes in their criminal proceedings. The Supreme Court has repeatedly prohibited state action perpetuating "overbroad generalizations about the different talents, capacities, or preferences of males and females"[451] and explained that state actors cannot impose on women "natural and proper timidity" or the idea that "[t]he paramount destiny and mission of wom[e]n [is] to fulfil[l] the noble and benign offices of wife and mother."[452] As the Supreme Court recently explained in *Andrew v. White*, evidence premised on stereotypes about women—or, rather, evidence that the defendant *failed* to abide by these tropes—can rise to the level of a due process violation where that evidence affects the fundamental

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447 *See* Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 95–96 (1993) (explaining that "criminal law is more likely to impose an affirmative duty on mothers than other classes of people").

448 Melinda Tasca et al., *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 CRIME & DELINQ. 1899, 1899 (2019).

449 Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1446 (1997).

450 Farr, *supra* note 11, at 56.

451 United States v. Virginia, 518 U.S. 515, 533 (1996).

452 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 132–34 (1994) (quoting Bradwell v. State, 16 Wall. 130, 141 (1873)).

fairness of the trial.[453] Such evidence creates "the risk that a jury will convict a defendant for crimes other than those charged—or that, uncertain of guilt, it will convict a defendant because a bad person deserves punishment."[454]

Sexualizing evidence prejudices women by drawing on jurors' explicit and implicit biases.[455] Jurors are more likely to find a defendant guilty if they perceive the person—rather than the facts of the case—negatively.[456] Moreover, prosecutors speak with a voice of authority in the courtroom. As noted in *Berger v. United States*, "[I]mproper suggestions, insinuations and, especially assertions of personal knowledge [by prosecutors] are apt to carry much weight against the accused when they should properly carry none."[457] Trial prosecutors' decisions to present evidence about the defendant's sexuality therefore prime jurors to pass moral judgments about the defendant based on information that lacks any bearing on the offense.[458] This applies equally to cases in which prosecutors make direct appeals to jurors about the defendant's sexuality and to cases in which they present sexualizing evidence in piecemeal fashion. In many cases, sexualizing evidence is introduced throughout the trial, accumulating through witness testimony and prosecutors' comments. The effects of these tactics are no less pernicious. As the Supreme Court has recognized, "Some toxins can be deadly in small doses."[459]

Ultimately, sexualizing evidence dehumanizes the defendant in the eyes of the decisionmaker. Prosecutors' use of lurid, voyeuristic detail paints lasting mental pictures for jurors of the defendant's body, underwear, and sexual behavior, turning her trial into

453 604 U.S. 86, 87 (2025).

454 Old Chief v. United States, 519 U.S. 172, 181 (1997).

455 Implicit bias refers to "automatically evoked mental associations about social groups," including associations based on race and gender. B. Keith Payne & Jason W. Hannay, *Implicit Bias Reflects Systemic Racism*, 25 TRENDS COGN. SCI. 927, 927 (2021).

456 *See* Neil A. Rector et al., *The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. SOC. PSYCH. 651, 657–58 (2010).

457 295 U.S. 78, 88 (1935); *see also* Buck v. Davis, 580 U.S. 100, 121 (2017) (the prejudicial effect of testimony advancing racial stereotype "was heightened due to the source of the testimony . . . a medical expert bearing the court's imprimatur.").

458 *See* Weare, *supra* note 12, at 346–47.

459 *Buck*, 580 U.S. at 122 (rejecting argument that prejudicial invocations of defendant's race were *de minimis* because they only occurred twice). The deadly effect of sexualizing evidence is particularly important in capital cases, where, as the Supreme Court has explained, "The risk of . . . prejudice infecting [the] proceeding is especially serious . . . ." Turner v. Murray, 476 U.S. 28, 35 (1986).

a titillating show. When jurors see Brenda Andrew's "thong underwear," the State wants them to picture her wearing it. When they hear about Camila Jones' dildo, the State invites them to think about her using it. When they see photos of Donna Roberts' "red thong panties," hear about Wendi Andriano's lubricant, or contemplate Manling Williams' "sore" legs, the State asks them to imagine the defendant having sex. Women's trials become a spectacle through which the State turns the defendant into a grotesque figure upon whom jurors can project their desires, hatred, and condemnation. The State's use of sexualizing evidence thus asks jurors to punish the defendant as a symbol of all that is sinful about female sexuality.

B. Heightening Legal and Moral Culpability

Beyond tainting jurors' every perception of the defendant, prosecutors use sexualizing evidence to heighten women's legal and moral culpability.

1. Legal Culpability

In cases including male and female co-defendants, the State has used sexualizing evidence to increase women's relative culpability. Prosecutors have accomplished this by arguing that the female defendant controlled her male partner through sex, for example, and therefore is the more responsible party of the two. The prosecution in Tiffany Moss' case stated in their closing arguments that Ms. Moss "seduced" her male co-defendant and was therefore more culpable.[460] Testimony in Sammantha Allen's trial focused on her sexual relationships with male partners and her interactions with her male co-defendant, leading the prosecution to argue that she was "no shrinking violet" and was a leader in the offense.[461] In Brenda Andrew's case, Ms. Andrew's co-defendant—who was also her sexual partner—admitted to shooting Ms. Andrew's husband, but the prosecution argued that Ms. Andrew controlled her co-defendant through their sexual relationship.[462]

Another way in which prosecutors use sexualizing evidence to heighten women's legal culpability is through motive. In multiple cases, women's sexual histories and appearances have served to solidify the State's alleged motive for the murder. By drawing on tropes about

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460 Transcript of Reporter at 2733, State v. Tiffany Nicole Moss, No. 18-B-01541-1 (Ga. Super. Ct. 2019).

461 [June 20, 2017] Allen Transcript, *supra* note 241, at 98.

462 Petitioner's Supplemental Response Brief at 16, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

bitter, man-hating women,[463] prosecutors perpetuate the notion that women cannot separate from a partner without resorting to extreme emotions, whether hysteria or visceral hatred. Prosecutors then argue that those extreme emotions—and women's resultant inability to regulate their emotions in an appropriately feminine way[464]—are the impetus for the crime.

Prosecutors in Socorro Caro's case, for example, explicitly used Ms. Caro's appearance to support their theory of motive. In the guilt-phase closing, the prosecutor argued that "[Ms. Caro] knew her marriage was troubled. She knew that Dr. Caro was leaving," which "stripped [her] of her financial freedom. This just had to be a humiliating moment for her. This woman, who was getting manicures once a week."[465] The prosecutor then stated: "The defendant wasn't going to get to be Mrs. Dr. Xavier Caro, and so Dr. Caro wasn't going to get his family. She took away his children."[466]

Susan Eubanks' prosecutors similarly premised their theory of motive on their portrayal of the defendant as a wronged woman. The closing argument contains multiple references to Ms. Eubanks being "very anti-male" and a "man hater" because of problems with a sexual partner and being out for "revenge against men who hurt her."[467] Prosecutors posited that she was a bitter and rejected woman who "carried out her very sick, sick crime, all because of a man who she couldn't have."[468] In Virginia Caudill's case, prosecutors argued that a break up with her boyfriend triggered an emotional spiral that saw Ms. Caudill murder his mother.[469] And in Angelina Rodriguez, Manling Williams, and Brenda Andrew's cases, the State argued that each defendant resorted to murdering her husband because she was having sex with another man and wanted to be with him.[470]

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463 *See* Robin E. Roy et al., *Effects of Stereotypes About Feminists on Feminist Self-Identification*, 32 PSYCH. WOMEN Q. 81, 146 (2007).

464 Prosecutors frequently use demeanor evidence to target women's emotions, drawing on tropes around women's appropriate expression of emotion. *See* E. Ashby Plant et al., *The Gender Stereotyping of Emotions*, 24 PSYCH. WOMEN Q. 81, 81 (2000) ("For decades, the belief that women are more emotional than men has been one of the most consistent gender stereotypes.").

465 Caro Transcript, *supra* note 205, at 10738.

466 *Id.* at 10787.

467 Eubanks Transcript, *supra* note 220, at 1064.

468 *Id.* at 1080, 1151.

469 Caudill Transcript, *supra* note 334, at 55.

470 Rodriguez Transcript, *supra* note 309, at 1737; Williams Transcript, *supra* note 186, at 7591; Andrew Transcript, *supra* note 97, at 4100–01.

2. Moral Culpability

Prosecutors also marshal sexualizing evidence to affect jurors' determinations of moral culpability. Sexualizing evidence frequently serves to discredit women's mitigation narratives. As noted above, women on death row are almost uniformly survivors of gender-based violence, and over 74% have experienced sexual violence before their incarceration.[471] Sexualizing evidence frequently undercuts defendants' ability to adequately present evidence of their abuse as a mitigation narrative, or even as part of their defense of the crime. This is because sexualizing evidence in its many forms renders the defendant an imperfect victim, and prosecutors urge juries to look for perfect victimhood in order to credit a defendant's experiences of abuse.[472]

Women portrayed as hypersexual or working in the sex trade are often regarded as imperfect victims because they were "asking for it."[473] The State's focus on the defendant's body and clothing plays to myths about women inviting male attention, and therefore renders any history of abuse less credible.[474] As a case in point, the State's focus on Wendi Andriano's affairs, sexual interactions with men in bars, and underwear rendered her evidence of domestic violence in her marriage less credible in the eyes of the jury. The State's sexualization of Ms. Andriano deprived jurors of the opportunity to understand her as a victim of abuse.

The adultification of women of color also heightens their moral culpability. As noted above, presenting women of color as mature and sexually active while they are children undermines the impact of the defendant's history of abuse. In Grace Connell's case, the State repeatedly insisted that the childhood rapes she endured were "consensual" and that she was a "mature 11-year-old."[475] This prevented jurors from fairly weighing the harm of Ms. Connell's experiences of sexual violence.[476] Conversely, prosecutors' de-sexualization of defendants, regardless of the defendant's sexual orientation, undercuts the believability of their sexual violence histories. While queer women experience some of the highest rates

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471 *See supra* notes 403–404 and accompanying text.

472 GOODMARK, *supra* note 430, at 9–10 (2023).

473 *Id.*

474 *See* DEFENSE MANUAL, *supra* note 329, at 29.

475 Connell Transcript, *supra* note 297, at 1957.

476 *See* Babcock & Greenfield, *supra* note 21, at 389–90.

of gender-based violence nationwide, the State's portrayal of a defendant as "masculine" invites skepticism of the possibility that the defendant could have been a victim of sexual violence.[477] In Shawna Forde's case, for example, Ms. Forde's defense team sought to present information about her history of childhood sexual abuse and physical violence—a history that was effectively neutralized by the State's presentation of Ms. Forde as a masculine military leader.[478]

Finally, prosecutors use sexualizing evidence to demonize sexual identities falling outside of monogamous, heterosexual paradigms. Same-sex sexual behavior among women capital defendants is often equated with aggression or dominance.[479] The State's introduction of the defendant's sexual activity in prison thus portrays the defendant as a risk to other incarcerated women. By presenting evidence of prison sexual activity, the State asks jurors to conclude that giving the defendant a life sentence is dangerous to other prisoners. Rather, she must die.[480]

C. Defense Responses to Sexualizing Evidence

A robust discussion of defense responses to the State's sexualizing evidence and argument is beyond the scope of this Article.[481] It nevertheless bears note that much of the evidence we have documented throughout this Article was admitted without any objection from defense counsel. Where defense counsel did object, those objections frequently failed to explain the problematic gender biased elements of the challenged evidence and judges frequently overruled the objections.[482] Similarly, attorneys rarely requested limiting instructions for sexualizing evidence and when they did, judges often failed to grant them. In Brenda Andrew's trial, for example, defense counsel requested limiting instructions four

477 *See* DEFENSE MANUAL, *supra* note 329, at 28.

478 Forde Transcript, *supra* note 263, at 1516.

479 *See* Sutton et al., *supra* note 11, at 1061–62.

480 Prosecutors in Angelina Rodriguez's case used similar reasoning to ask for death but premised their argument on her seduction of male correctional officers, as opposed to other incarcerated women. The State elicited testimony from one officer stating, "I don't see her as a high-risk inmate. I think that she might be somewhat manipulative, she might be a person that would be inclined to be maybe seductive with some of the male staff." Rodriguez Transcript, *supra* note 309, at 3701–02.

481 Research and analysis into how defense teams work with gendered themes in women's trials is needed. To this end, the authors are studying ineffective assistance of counsel claims in women's cases—the scope of which covers defense responses to gender biased evidence—and will publish this research in due course.

482 *See, e.g.*, Andrew Transcript, *supra* note 97, at 2958.

times regarding testimony from Ms. Andrew's former sexual partners.[483] The trial judge denied these requests.[484]

Moreover, defense attorneys are often complicit in sexualizing the defendant. In Donna Roberts' case, for example, defense counsel introduced a photograph of a sex toy and asked a witness, "And are there, for lack of a better term, sex toys in that photograph?"[485] Similarly, defense experts in Shawna Forde's trial testified that Ms. Forde was a "prostitute" when she was still a child—as opposed to more accurately characterizing the interactions as child sex trafficking.[486] In Brenda Andrew's case, even the trial judge commented on Ms. Andrew's makeup and appearance.[487] Stories and stereotypes about women, sex, and sin are so powerful that all courtroom actors perpetuate them.[488]

VI. Conclusion and Recommendations

In this Article, we provide the first systematic analysis of sexualizing evidence in women's contemporary capital cases. We conclude that prosecutors routinely rely on varied forms of sexualizing evidence to obtain women's convictions and death sentences. The narratives that prosecutors wield today are modern-day invocations of the sexualizing evidence deployed against women during early modern witchcraft trials. Following the Supreme Court decision in *Andrew v. White*, Brenda Andrew's case was remanded to the Court of Appeals for the Tenth Circuit, where the State continued to argue that Ms. Andrew "crave[d] the admiration of men and will go to abnormal lengths to get their attention. It's

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483 *Id.* at 107–10, 313, 431.

484 *See id.* The trial judge even commented on Ms. Andrew's appearance during her guilt-phase trial, telling defense counsel that their client "d[id]n't need makeup" because she was "a pretty woman." *Id.* at 1145.

485 Roberts Transcript, *supra* note 127, at 5687.

486 Forde Transcript, *supra* note 263, at 169.

487 Andrew Transcript, *supra* note 97, at 1145.

488 While this Article is informed by the forty-eight capital cases in our dataset, these tactics are not limited to capital cases. In the case of one woman tried capitally and sentenced to life, the defense opened its closing argument by telling jurors that the case was about "[f]ear, love, sex, lies and dirty little secrets." [May 3, 2013] Transcript of Record at 21, State v. Jane Doe (Ariz. Ct. App. 2013) (we are using a pseudonym at the request of the defendant's legal team). During the trial, defense counsel repeatedly called his client "the dirty little secret on the side." *Id.* at 90. He spoke of his client's sexual experiences in similarly sensationalized and erotic language throughout the argument, evoking her "sexual rendezvous," *id.* at 35, her "booty calls," *id.* at 56, a "faked . . . orgasm," *id.* at 61, and a "French maid outfit," *id.* at 71.

hardly an admirable trait."[489] The panel decision denying Ms. Andrew relief still refused to unequivocally say that her underwear was not relevant to her legal or moral culpability.[490] In the twenty-first century, as in the seventeenth, legal actors wield women's sexuality as a weapon. Until the legal system acknowledges the pervasiveness of these tactics and their prejudicial impact, every woman facing capital proceedings risks being judged on irrelevant details of her sex life and appearance.

Our findings have broad implications for courts, prosecutors, the defense bar, policymakers, and scholars. Below, we outline a number of recommendations to limit the introduction of sexualizing evidence in criminal proceedings involving women and gender minorities.

A. Evidentiary Rules

Courts must hold prosecutors to a high bar when they seek to introduce sexualizing evidence in women's trials. General assertions that evidence "goes to motive" are insufficient to justify testimony or argument regarding the details of women's sexual relationships or sexual pleasure. Sexual slurs are per se prejudicial and thus should never be permitted. Arguments—whether overt or implicit—that women who flirt or have affairs are bad mothers should also be excluded. Descriptions of women's clothing or appearance should be prohibited, except to the limited extent that they are necessary to identify the defendant. Photographs of women defendants in revealing clothing, discussion of their underwear, and physical evidence of defendants' underwear or sex aids should likewise be excluded unless they are directly related to one or more elements of the criminal offense. Whenever sexualizing evidence is admitted, judges should instruct the jury regarding the limited purpose(s) of such evidence.

Second, prosecutors' attacks on the credibility of sexual assault victims who are criminal defendants should be subjected to the same degree of scrutiny as defense attacks on the credibility of sexual assault complainants. Prosecutors know that the primary evidence of sexual violence is the victim's own account—and that sexual assaults often take place behind closed doors.[491] As the Department of Justice instructs prosecutors, "[T]hese crimes

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489 Respondent's Supplemental Brief at 30, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

490 Andrew v. Tinsley, 164 F.4th 789, 799 (2026). Ms. Andrew filed a petition for en banc review on April 27, 2026, the outcome of which is currently pending.

491 U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, FRAMEWORK FOR PROSECUTORS TO STRENGTHEN OUR NATIONAL RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE INVOLVING ADULT VICTIMS 2–5

generally do not occur in front of witnesses, nor are they captured on video, and they rarely result in dispositive physical evidence."[492] This is particularly true for childhood sexual abuse.[493] Thus, prosecutors should not be permitted to argue that jurors should dismiss women's accounts of sexual violence in the absence of independent corroboration.[494] Prosecutors should also be precluded from arguing that childhood sexual abuse victims were mature for their age. Nor should they be permitted to discredit women's experiences of violence by pointing to their attire.

B. Legislative Reform

The judges in our dataset largely failed to limit the admission of sexualizing evidence. Thus, to ensure that irrelevant sexualizing evidence and gender bias play no role in jurors' and judges' assessments of women's legal and moral culpability, legislatures should adopt evidentiary rules that impose stringent gatekeeping requirements for such evidence. To that end, and in response to our research, the California Committee on Revision of the Penal Code has recommended amendments to state rules of evidence "to require heightened judicial scrutiny before admitting evidence or argument likely to trigger gender-based stereotypes."[495] The Committee's recommendations would require courts to hold a hearing outside the presence of the jury to "weigh[] the risk of reinforcing gender stereotypes against the evidence's probative value."[496] Recognizing that trial actors may fail to apprehend the nature of gender-biased evidence, the Committee enumerated several categories of evidence that require heightened scrutiny, including:

> (a) Information about the defendant's sexual activity, orientation, sexual partners, reproductive choices, gender presentation, or romantic relationships;
> (b) Sexually suggestive photos or images;

(May 2024), https://www.justice.gov/ovw/media/1352371/dl?inline [https://perma.cc/Y3UX-8CKK].

492 *Id.*

493 *See id.*

494 After intense lobbying by victims' rights advocates, most states have eliminated the requirement that a victim's account of sexual assault be corroborated. *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 13–14 (2017).

495 COMM. ON REVISION OF THE PENAL CODE, ANNUAL REPORT AND RECOMMENDATIONS 12 (2025), https://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2025.pdf [https://perma.cc/R5WF-MXKF].

496 *Id.*

> (c) Evidence related to clothing, appearance, or gender expression when used to suggest or reinforce gender-based stereotypes;
> (d) References to a defendant's failure to conform to traditional gender roles, including parenting expectations; and
> (e) Appeals to notions of a "woman's nature" or "emotional" disposition.[497]

The Committee also recommended the adoption of post-conviction pathways to retrial where defendants "can show that gender-biased evidence or argument affected their trial and that there is a reasonable probability that the outcome would have been different if such evidence were not admitted."[498] On February 17, 2026, California Assemblymember Sade Elhawary introduced Assembly Bill 2014, which seeks to codify the Committee's recommendations.[499] Other states should consider similar measures to provide redress for women who have been convicted in trials where such evidence was introduced.

C. Training

Judges, prosecutors, and criminal defense teams should receive training on gender stereotypes and women's pathways to incarceration. All trial actors must be educated regarding the nature of gender bias and how it can affect the quality of justice women receive. Moreover, trial actors should be sensitized to the prevalence of gender-based violence in the lives of women in the criminal legal system.[500]

D. Scholarship

More research is needed into non-capital prosecutions of women and gender minorities to determine whether sexualizing evidence is as prevalent in those cases as it was in our dataset. Scholars should also research the extent to which sexualizing evidence plays a role in policing and charging decisions for low-level crimes. For example, to what extent do police rely on descriptions of women's attire to justify stops, searches, or arrests of women

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497 *Id.*

498 *Id.*

499 A.B. 2014, State Assemb., 2025–2026 Reg. Sess. (Cal. 2026), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260AB2014 [https://perma.cc/FV5U-ADYD].

500 *See* Babcock & Greenfield, *supra* note 21, at 336, 399.

suspected of illegal sex work?[501] How do courts weigh women defendants' experiences of sexual violence in sentencing decisions? To what extent do appellate courts embrace and rely upon the same sexualizing evidence to uphold women's convictions and sentences?

We also call on the capital defense community to recognize the extent to which gender bias provides yet another reason to question the legitimacy of capital punishment. The issue of systemic gender bias—and the extent to which the capital defense community has internalized many of the same stereotypes that undermine the fairness of women's capital cases—has long been ignored. This failure has deprived the death penalty abolition movement of a powerful argument: misogyny, like racism, is rampant in the criminal legal system, and it plays an unacceptable role in determining who is singled out for the harshest of punishments.

501 *See generally* Kate Mogulescu, *Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIA. L. REV. 68 (2020).