

GENDERING AND RACING WRONGFUL CONVICTION:  
INTERSECTIONALITY, “NORMAL CRIMES,” AND WOMEN’S  
EXPERIENCES OF MISCARRIAGE OF JUSTICE

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I. INTRODUCTION

On the afternoon of Saturday, May 14, 2005, four-year-old Jaquari Dancy died of asphyxiation from “an elastic band that had come loose from a fitted bed sheet.”<sup>1</sup> According to the State’s case at trial, the boy’s mother, twenty-three-year-old Nicole Harris, angered by Jaquari’s crying, choked him to death with the elastic band.<sup>2</sup> The evidence supporting this argument rested almost entirely on Harris’s inconsistent and recanted confession, a confession that resulted from more than twenty-four hours of intermittent questioning immediately following the death of her youngest son.<sup>3</sup> Harris, who is African American, was found guilty of first degree murder and sentenced to thirty years in prison.<sup>4</sup> She is one of dozens of women who have been exonerated after a wrongful conviction involving the death or injury of a child,<sup>5</sup> with their convictions accomplished through the State’s construction of “compelling narratives”<sup>6</sup> that put their motherhood itself on trial.

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<sup>1</sup> Harris v. Thompson, 698 F.3d 609, 612 (7th Cir. 2012).

<sup>2</sup> Harris v. Thompson, No. 10 CV 6257, 2011 WL 6257143, at \*1, \*7 (N.D. Ill. Dec. 14, 2011), *rev’d*, 698 F.3d 609 (7th Cir. 2012).

<sup>3</sup> *Thompson*, 698 F.3d at 614–15.

<sup>4</sup> *Thompson*, 2011 WL 6257143, at \*1

<sup>5</sup> Indeed, harms or perceived harms against children account for the largest proportion of women’s wrongful convictions. *See infra* note 105. For detailed information, see data available at the National Registry of Exonerations. *Exoneration Detail List*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Nov. 25, 2014).

<sup>6</sup> William S. Loftquist, *Whodunit? An Examination of the Production of Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 174, 183 (Saundra

As the prosecutor explained to jurors in Harris's case: "She doesn't stand up for her family . . . . She's not the mother the defense wants to present to you."<sup>7</sup>

The day Jaquari died, Harris and the boy's father, Dancy, had left him and his five-year-old brother Diante alone in the apartment for about forty minutes to go to the laundromat across the street, advising the children to stay indoors.<sup>8</sup> When Harris and Dancy returned they found Jaquari outside with some older boys and Diante in the hallway.<sup>9</sup> Harris scolded them and they returned to their room, with Jaquari in tears.<sup>10</sup> Dancy went to take a nap,<sup>11</sup> having worked a double shift the night before.<sup>12</sup> Harris left again for the laundromat to finish drying the family's clothes.<sup>13</sup> As she returned home, she encountered Dancy with a lifeless Jaquari in his arms and together "[t]hey rushed off in search of a hospital."<sup>14</sup> Jaquari was pronounced dead shortly after arriving.<sup>15</sup>

Harris first encountered police investigators while grieving in the hospital chapel<sup>16</sup> and was escorted to the police station for questioning shortly thereafter.<sup>17</sup> She and her son Diante were taken to what court documents would later refer to as the "quiet room."<sup>18</sup> Painted yellow with butterflies and ladybugs on the wall, it was "a sensitive room used mainly for victims of sexual assaults"<sup>19</sup>—a gendered space signaling comfort for the traumatized, one of many such rooms that have emerged in police stations throughout the United States in an effort to improve police responses to violence against women.<sup>20</sup> This was a ruse in Harris's case. Without Mirandizing her, detectives questioned her for about

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Westervelt & John A. Humphrey eds., 2001).

<sup>7</sup> Jeff Coen, *Mom Convicted of Strangling Son*, CHI. TRIB., Oct. 27, 2005, at 10 (internal quotation marks omitted).

<sup>8</sup> *Thompson*, 698 F.3d at 613–14.

<sup>9</sup> *Id.* at 614.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Duaa Eldeib, *The Road Back from a Wrongful Conviction: Exonerated Mom Battles 'Stigma' of Past While Rebuilding Her Life*, CHI. TRIB., Jan. 19, 2014, at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Harris v. Thompson*, No. 10 CV 6257, 2011 WL 6257143, at \*1 (N.D. Ill. Dec. 14, 2011), *rev'd*, 698 F.3d 609 (7th Cir. 2012).

<sup>15</sup> *Id.*

<sup>16</sup> Duaa Eldeib, *Woman Held in Son's Death Freed: Nicole Harris, in Prison for 7 Years, Still Faces Legal Fight*, CHI. TRIB., Feb. 26, 2013, at 1.

<sup>17</sup> *Thompson*, 2011 WL 6257143, at \*2.

<sup>18</sup> *Id.*

<sup>19</sup> *People v. Harris*, 904 N.E.2d 1077, 1080–81 (Ill. App. Ct. 2009).

<sup>20</sup> See HUMAN RIGHTS WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 6 n.28 (2013), available at [http://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](http://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf).

half an hour with Diante in her lap.<sup>21</sup> They then returned to her apartment to investigate and around midnight a child protective services worker came to take Diante to his grandmother's house.<sup>22</sup>

When law enforcement returned, now in the early morning hours of Sunday, May 15, they told Harris that her neighbors reported having seen her hit her boys with a belt that day.<sup>23</sup> Now, not only had she left the children unattended to take care of other domestic responsibilities, but she was believed to have used corporal punishment against them. Officers drew from contemporary cultural understandings of appropriate maternal behavior—what sociologist Sharon Hays has dubbed the ideology of “intensive mothering”<sup>24</sup>—and Harris, like many mothers struggling to make ends meet,<sup>25</sup> failed their test. As psychologists Michelle Fine and Lois Weis explain: “[W]hat passes for good mothering, happens in a particular context; a context of money, time, and excess. . . . [I]n the absence of these, it is far too easy to ‘discover’ bad mothering.”<sup>26</sup> For Nicole Harris, this meant becoming the prime suspect in what police and prosecutors erroneously decided was a homicide.

According to the State's version of events, after fifteen minutes of questioning, Harris spontaneously confessed that she had strangled Jaquari with a phone cord and then used the fitted bed sheet band to make it look like an accident.<sup>27</sup> After making this statement, she was instructed of her rights and acknowledged that she understood them.<sup>28</sup> According to Harris, however, detectives took her to an interrogation room, handcuffed her, and then began threatening and manipulating her.<sup>29</sup> They left her in the room with a blanket for hours, but she could not sleep.<sup>30</sup> At 2:25 a.m. she agreed to take

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<sup>21</sup> *Harris v. Thompson*, 698 F.3d 609, 614 (7th Cir. 2012).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 97 (1996).

<sup>25</sup> See SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 60 (2003). For a careful analysis of the application of such motherhood rules on African American women and their popular construction as “bad” mothers, see Sarah Carney, *Representations of Race and Social Responsibility: News Stories About Neglect and Failure to Protect*, in *OFF WHITE: READINGS ON POWER, PRIVILEGE, AND RESISTANCE* 186, 186–88 (Michelle Fine et al. eds., 2d ed. 2004). Harris had recently graduated from college and moved to a two-bedroom apartment on Chicago's Northwest Side, where she worked as a psychiatric rehabilitation service coordinator in a nursing home. See *People v. Harris*, 904 N.E.2d 1077, 1084 (Ill. App. Ct. 2009); Eldeib, *supra* note 12, at 1.

<sup>26</sup> MICHELLE FINE & LOIS WEIS, *THE UNKNOWN CITY: LIVES OF POOR AND WORKING-CLASS YOUNG ADULTS* 186–87 (1998).

<sup>27</sup> *Harris*, 904 N.E.2d at 1080.

<sup>28</sup> *Id.* at 1080–81.

<sup>29</sup> *Id.* at 1085.

<sup>30</sup> *Id.* One detective told her: “I'm sick of your BS lies, you are sitting here playing games

a polygraph examination that would not occur until 12:45 p.m.<sup>31</sup> According to Harris, the polygraph examiner told her that she had failed the test (in fact, the results were inconclusive)<sup>32</sup> and began screaming at her and calling her a monster.<sup>33</sup> This trope of “monstrous motherhood” is far-reaching in our cultural imagination.<sup>34</sup> For a sleep deprived mother—who had just lost her child and likely internalized blame for what happened<sup>35</sup>—its application appeared to have the desired effect. According to the State, Harris then confessed a second time.<sup>36</sup>

Neither of these first two confessions comported with the physical evidence. What they did comport with were police investigators’ theories of the “crime” as the investigation unfolded.<sup>37</sup> When

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with us, you can’t sit here and say you didn’t do it because we already found the [phone] cord.” *Id.* Another detective came into the room and told her that Dancy said he thought Harris could have killed their son. *Id.*

<sup>31</sup> *Id.* at 1081.

<sup>32</sup> See Harris v. Thompson, 698 F.3d 609, 614 (7th Cir. 2012); Eldeib, *supra* note 12, at 1. This is a common strategy in police interrogations that can lead to false confessions like Harris’s. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 214 (2008).

<sup>33</sup> Duaa Eldeib & Lisa Black, *Mother Finally Feels Free: After Release from Prison, Nicole Harris Was in Legal Limbo. Four Words Changed Her Life*, CHI. TRIB., June 18, 2013, at 1.

<sup>34</sup> For a discussion of its roots and contemporary manifestations, see MARILYN FRANCUS, MONSTROUS MOTHERHOOD: EIGHTEENTH-CENTURY CULTURE AND THE IDEOLOGY OF DOMESTICITY 10, 16, 18–20 (2012); Nicola Goc, *‘Monstrous Mothers’ and the Media*, in MONSTERS AND THE MONSTROUS: MYTHS AND METAPHORS OF ENDURING EVIL 149, 152, 155–57 (Niall Scott ed., 2007).

<sup>35</sup> Indeed, self-blame is commonly identified among women who suffer a range of traumatic events, including intimate partner violence, sexual assault, and breast cancer diagnosis; for mothers, such blame can occur for anything from decisions about breastfeeding to children’s illnesses or injuries. See Kymberley K. Bennett et al., *Self-Blame and Distress Among Women with Newly Diagnosed Breast Cancer*, 28 J. BEHAV. MED. 313, 321 (2005); Linda M. Blum, *Mother-Blame in the Prozac Nation: Raising Kids with Invisible Disabilities*, 21 GENDER & SOC’Y 202, 205, 211–12 (2007); Melanie L. O’Neill & Patricia K. Kerig, *Attributions of Self-Blame and Perceived Control as Moderators of Adjustment in Battered Women*, 15 J. INTERPERSONAL VIOLENCE 1036, 1037, 1041, 1043 (2000); Jette Schilling Larsen et al., *Shattered Expectations: When Mothers’ Confidence in Breastfeeding is Undermined—A Metasynthesis*, 22 SCANDINAVIAN J. CARING SCI. 653, 659–60 (2008); Ilina Singh, *Doing Their Jobs: Mothering with Ritalin in a Culture of Mother-Blame*, 59 SOC. SCI. & MED. 1193, 1196 (2004); Sarah E. Ullman, *Social Reactions, Coping Strategies, and Self-Blame Attributions in Adjustments to Sexual Assault*, 20 PSYCHOL. WOMEN Q. 505, 507–08, 515 (1996).

<sup>36</sup> Harris, 904 N.E.2d at 1081.

<sup>37</sup> Harris’s first confession that she had strangled the child with a phone cord comported with a police hunch that the phone cord had been involved. *Id.* This theory was disproven when the medical examiner reported that the elastic band on the bedsheet was an “exact fit” to the ligature marks on Jaquari’s neck. *Id.* at 1083. Thereafter, the police investigation of the incident as a homicide centered on the theory of the elastic band as the murder weapon. *Id.* Subsequently, in Harris’s second confession, she said that she wrapped the elastic band around Jaquari’s neck. *Id.* at 1081. She said that she then left him in the top bunk, where he, presumably, was strangled as a result of falling. *Id.* However, a protective rail around the top bunk would have prevented Jaquari from an accidental fall. *Id.* Moreover, spots of blood were found on the linens of the bottom bunk where Jaquari’s body was found. *Id.* at

detectives discovered discrepancies in Harris's second confession as well, they confronted her one last time in the "quiet room," on the evening of Sunday, May 15, after she had been at the station for nearly twenty-four hours.<sup>38</sup> Harris told them that she struck Jaquari with a belt after returning from the laundromat because he would not stop crying, she wrapped the elastic band around his neck until she saw blood coming from his nose, and then she left him on the bottom bunk, returning to the laundromat to collect her clothes.<sup>39</sup> Though the Cook County Medical Examiner's Office initially believed Jaquari's death to be accidental, upon learning of Harris's confession, it changed the cause of death to homicide.<sup>40</sup> It would be nearly nine years after Jaquari's death—and eight years of wrongful imprisonment for Harris—before his accidental death became legally factual, with her receipt of a certificate of innocence in 2014.<sup>41</sup>

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1083.

<sup>38</sup> See *id.* at 1080–81.

<sup>39</sup> See *id.* at 1082–83.

<sup>40</sup> *Nicole Harris: Convicted of Murder After Judge Barred Highly Exculpatory Testimony*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/nicole-harris.html> (last visited Apr. 17, 2015).

<sup>41</sup> See Maurice Possley, *Nicole Harris*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4202> (last updated June 13, 2014) [hereinafter *Nicole Harris*]. From the beginning, Harris's defense attorney argued that Jaquari's death was caused by accidental strangulation. *Harris*, 904 N.E.2d at 1083. This was reflected in the statements made by the only witness to his death—his older brother Diante. *Harris v. Thompson*, 698 F.3d 609, 616 (7th Cir. 2012); *Harris*, 904 N.E.2d at 1084. The day after Jaquari died, Diante told an investigator from the Child Advocacy Center that Jaquari had been playing a game of Spiderman when he wrapped the elastic band around his neck and his parents were not in the room when this occurred. *Thompson*, 698 F.3d at 616. Dancy testified that he had seen the child playing with the elastic band before. *Nicole Harris*, *supra*. But Dancy had not been in the bedroom when Jaquari died. *Thompson*, 698 F.3d at 617. Only Diante could testify about what happened at the critical moment, but the five-year-old was ruled unfit to testify because he believed that Santa Claus and Spiderman were real. *Id.* at 617, 620. The State of Illinois does not stipulate age requirements for being a witness, only that the person must prove that he or she can articulate himself or herself and that the person understands the duty of telling the truth in court. *Id.* at 616. Even very young children are called to testify, especially in sexual abuse cases when they act as prosecution witnesses. *People v. Dempsey*, 610 N.E.2d 208, 216, 218 (Ill. App. Ct. 1993). In fact, the Child Advocacy Center investigator concluded that Diante was competent to testify, but did not appear at his competency hearing because Harris's defense counsel had not followed up to ensure his presence. *Thompson*, 698 F.3d at 619, 643. Instead, the second investigator to interview Diante testified that he had difficulty distinguishing fantasy from reality. *Id.* Even worse, the judge related his false assumption that the burden of proving a witness's competence fell to the defense, and Harris's attorney did not correct him. *Id.* at 616. Indeed, according to state law, the burden falls to the party that challenges the witness's competence, in this case the prosecution. *Id.* Diante's competency hearing thus was replete with errors and marred by the troubling inadequacy of Harris's defense. This critical error—that Diante should have been allowed to testify and wasn't—ultimately eroded the integrity of the

While the Innocence Movement is among the most significant agents of social change in criminal justice policy and practice over the last quarter century,<sup>42</sup> it has been slow to pay explicit attention to women's cases of wrongful conviction, or the ways in which gender might meaningfully shape the types of cases for which women (and men) are wrongfully convicted. This oversight is especially striking given the parallel growth during this same period of feminist criminological and legal scholarship, which theorizes how gender shapes the organization of crime, law, and criminal justice.<sup>43</sup> Several factors have likely contributed to this androcentrism in the movement. Legal scholar Marvin Zalman notes: "The innocence movement that now exists is based in part on research that significantly undermined faith in the accuracy of the criminal justice process."<sup>44</sup> This includes philosopher Hugo Adam Bedau and sociologist Michael Radelet's pioneering 1987 study of wrongful convictions in capital cases,<sup>45</sup> the proliferation of scholarly and legal work following the first DNA exoneration in 1989,<sup>46</sup> and "the cumulative work of psychologists since the 1970s [that] has cast doubt on the unerring accuracy of eyewitness identification."<sup>47</sup> These foci have resulted in disproportionate attention to serious violent crimes involving strangers, and thus disproportionate attention to men.<sup>48</sup> As a consequence, until very recently, our best

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conviction on appeal. *Id.* at 650. Harris and her attorneys' efforts to obtain a new trial began in 2006. See Maurice Possley, *Mom Seeks New Trial in Murder of Boy*, CHI. TRIB., July 19, 2006, at 5. They finally succeeded when a federal appellate court overturned her conviction in 2012. *Nicole Harris, supra*. Prosecutors dropped the charges in June 2013, six months before she was awarded a certificate of innocence. *Id.*

<sup>42</sup> See JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 351 (2003); Michael L. Radelet, *Foreword*, in WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS xv (C. Ronald Huff & Martin Killias eds., 2013).

<sup>43</sup> See NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 1–2, 12 (2006); ALIDA V. MERLO & JOYCELYN M. POLLOCK, WOMEN, LAW, AND SOCIAL CONTROL 29–30 (1995).

<sup>44</sup> Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction: A Research Agenda*, 17 CRIM. JUST. POL'Y REV. 468, 469 (2006).

<sup>45</sup> Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 26 (1987).

<sup>46</sup> EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii (1996).

<sup>47</sup> Zalman, *supra* note 44, at 469.

<sup>48</sup> Elizabeth Rapaport, for example, points out that "[t]he great majority of capital sentences are meted out to those who have committed felony murder, murder committed during the course of another serious felony, and other predatory murders," crimes most often committed against strangers and by men. Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367, 370–71 (1991). Paradoxically, she also notes that this priority in meting out death sentences is "a form of gender bias inimical to the

information about wrongful convictions came from sources that reliably tracked DNA and death row exonerations, systematically overlooking women's cases as a result.<sup>49</sup>

The fact that this trend has recently begun to change is largely due to the efforts of female exonerees themselves. The Innocence Network<sup>50</sup>—a coalition of legal organizations doing innocence work nationwide—began hosting an annual meeting in 2000, attended by increasing numbers of exonerated men and women.<sup>51</sup> Amidst the dozens of male exonerees, the few women who regularly came began seeking each other out to discuss their unique needs and legal challenges, and how their experiences might differ from those of male exonerees.<sup>52</sup> A core group of women formed,<sup>53</sup> and in 2010

interests of women . . . . The death penalty is a dramatic symbol of the imputation of greater seriousness to economic and other predatory murder as compared with domestic murder," the form women are most likely to commit but also most likely to be killed in. *Id.* at 367, 378.

<sup>49</sup> *Women and Innocence Seminal Conference 2010*, OBVIOUS ANSWERS . . . SOMETIMES HIDE IN UNPLEASANT SITUATIONS (Sept. 1, 2010), <http://obviousanswers.presspublisher.us/issue/august-2010/article/women-and-innocence-seminole-conference-2010>. Among the 324 DNA exonerations listed on the Innocence Project website as of November 25, 2014, only four are women's cases and these are all cases involving male codefendants. *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, [http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b\\_start=0&c4=Exonerated+by+DNA](http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA) (last visited Apr. 17, 2015); *Kathy Gonzalez*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3247> (last visited Apr. 17, 2015) [hereinafter *Kathy Gonzalez*]; *Paula Gray*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3433> (last visited Apr. 17, 2015) [hereinafter *Paula Gray*]; *Debra Shelden*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3629> (last updated Dec. 17, 2014) [hereinafter *Debra Shelden*]; *Ada JoAnn Taylor*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3676> (last visited Apr. 17, 2015) [hereinafter *Ada JoAnn Taylor*]. Among death row exonerees, only two are female. See *22 Years on Death Row, Now She's Free*, L.A. TIMES, Mar. 25, 2015, at 10; Sabrina Butler, Op-Ed., *I Spent More Than Six Years as an Innocent Woman on Death Row*, TIME (May 30, 2014), <http://time.com/2799437/i-spent-more-than-six-years-as-an-innocent-woman-on-death-row/>; see also Andrea L. Lewis & Sara L. Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1035, 1046–48 (2014/2015) (discussing the Sabrina Butler case).

<sup>50</sup> See INNOCENCE NETWORK, <http://www.innocencenetwork.org/> (last visited Apr. 17, 2015).

<sup>51</sup> *History of the Innocence Network and Network Support Unit*, INNOCENCE NETWORK, <http://www.innocencenetwork.org/history> (last visited Apr. 17, 2015). More recently, the conference has established special workshops for exonerees, as well as informal opportunities for them to meet one another and offer support, develop organizing efforts, discuss advocacy work, and more. *2015 Innocence Network Conference*, INNOCENCE NETWORK, <https://innocencenetwork2015.topi.com/#agenda> (last visited Apr. 17, 2015).

<sup>52</sup> *About the Project*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/womensproject/about/> (last visited Apr. 17, 2015).

<sup>53</sup> These included Joyce Ann Brown, Audrey Edmunds, Gloria Killian, Beverly Monroe, Tabitha Pollock, Julie Rea, and Nancy Smith. *Id.*; Hilary Hurd Anyaso, *Center on Wrongful Convictions to Unveil First Women's Project*, NW. U. (Nov. 27, 2012), <http://www.northwestern>

they hosted the Women and Innocence Seminal Conference.<sup>54</sup> Their efforts coincided with emerging media interest in women's exoneration cases, motivated in part by concern over the integrity of so-called shaken baby syndrome (SBS) convictions.<sup>55</sup> Medical experts challenging the science used to diagnose SBS were helping to overturn a small but growing number of wrongful convictions involving mothers or female caregivers.<sup>56</sup> Taking note of these developments, several attorneys at the Northwestern University School of Law's Center on Wrongful Convictions started the Women's Project in 2012, in order to better represent female clients with claims of innocence, encourage research on women's wrongful convictions, educate the public on the issue, and monitor upcoming cases.<sup>57</sup>

Another significant change is the development of the National Registry of Exonerations (NRE), a joint project of the University of Michigan Law School and Northwestern University School of Law's Center on Wrongful Convictions.<sup>58</sup> Launched in 2012, the NRE tracks exonerations nationwide, posts case profiles, and records data about exonerations occurring since 1989 (the year of the first DNA exoneration).<sup>59</sup> The NRE profiles all exonerations—whether DNA or non-DNA, death penalty or otherwise—allowing a broader picture of the phenomenon and the first-ever comprehensive data source on women's wrongful convictions.<sup>60</sup> Nicole Harris is one of 126 women whose case information is now available in the NRE.<sup>61</sup>

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.edu/newscenter/stories/2012/11/center-on-wrongful-convictions-to-unveil-first-womens-project.html; Nancy Petro, *First Innocence Project Dedicated to Women Launched Today in Chicago*, WRONGFUL CONVICTIONS BLOG (Nov. 29, 2012), <http://wrongfulconvictionsblog.org/2012/11/29/first-innocence-project-dedicated-to-women-launched-today-in-chicago/>.

<sup>54</sup> *Women and Innocence Seminal Conference 2010*, *supra* note 49.

<sup>55</sup> See, e.g., Emily Bazelon, *Shaken*, N.Y. TIMES MAG., Feb. 6, 2011, at 30, 33; Sandra Svoboda, *When Innocence Is Pink: Wrongly Convicted Women Fight for Recognition, Support, Remedies*, DETROIT METRO TIMES (Jan. 12, 2011), <http://www.metrotimes.com/detroit/when-innocence-is-pink/Content?oid=2147936>.

<sup>56</sup> Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 6–7 (2009).

<sup>57</sup> *About the Project*, *supra* note 52; Petro, *supra* note 53. Center on Wrongful Conviction attorneys Karen Daniel, Stephanie Horten, and Judy Royal had represented both men and women in their postconviction claims and recognized that the women's cases presented challenges different from those of men. See *About the Project*, *supra* note 52.

<sup>58</sup> *About the Registry*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/About-Us.aspx> (last visited Apr. 17, 2015).

<sup>59</sup> *Id.*

<sup>60</sup> See *Exoneration Detail List*, *supra* note 5 (allowing you to filter search results for exonerees).

<sup>61</sup> See *Exoneration Detail List*, *supra* note 5; Nicole Harris, *supra* note 41. The NRE is updated regularly; the data we use for our analysis include the 1480 cases available as of November 25, 2014, which include 126 female exonerees. See *Exoneration Detail List*, *supra*

Harris's case clearly typifies several of the case processing factors that have been identified as contributing to wrongful convictions across gender: official misconduct, a false confession, and inadequate legal defense.<sup>62</sup> Yet, the process by which her son came to be misidentified as a homicide victim—and she his killer—was also clearly influenced by criminal justice actors' cultural assumptions about gender and race, in particular the ways in which ideas about proper mothering facilitated the “tunnel vision” that occurred in her case. Numerous scholars of wrongful conviction have begun to theorize the significant role of tunnel vision in wrongful convictions. In their ambitious effort to predict erroneous convictions, legal scholar Jon Gould and his colleagues propose that tunnel vision is a “[q]ualitative [f]ramework of [s]ystem [f]ailure”<sup>63</sup> especially useful for understanding how such cases come about, explaining:

Tunnel vision is defined as the social, organizational, and psychological tendencies “that lead actors in the criminal justice system to focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt.” As more resources—money, time, and emotions—are placed into a narrative involving a suspect, criminal justice professionals are less willing or able to process negative feedback that refutes their conclusions. Instead, they want to devote additional resources in order to recoup their original investment. As a result, evidence that points away from a suspect is ignored or devalued, and latent errors are overlooked.<sup>64</sup>

Our primary purpose here is to explicitly attend to how gender,

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note 5. It is important to note that updates include not only new exonerations as they occur, but also old exonerations discovered through research. In fact, the majority of exonerations added to the NRE (about two-thirds) are newly discovered old cases rather than new exonerations. *The Registry, Exonerations and False Convictions*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx> (last visited Apr. 17, 2015). Bringing these cases to light may reveal patterns that would not otherwise be evident in exonerations championed by innocence projects and covered by the media. However, the ways in which these older exonerations are discovered may introduce bias as well. For example, government officials in some jurisdictions may be more cooperative than others, thus facilitating the discovery of exonerations that share certain other characteristics as a result of their proximity.

<sup>62</sup> See *supra* notes 32–36, 41 and accompanying text.

<sup>63</sup> Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 503 (2014).

<sup>64</sup> *Id.* at 504 (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292) (internal quotation marks omitted).

race, and their intersections feed this process of tunnel vision by providing criminal justice actors with particular kinds of cultural scripts through which they interpret real or perceived criminal events, and come to make decisions about which actor or actors they believe are responsible and why. Both the paucity of knowledge on women's wrongful convictions and recent calls to better develop conceptual and theoretical frameworks for understanding the causes and consequences of wrongful conviction<sup>65</sup> provide an avenue for thinking critically about how feminist criminology—and especially intersectional theory—can contribute to this enterprise. Intersectional analysis, which focuses on how structural inequalities are produced, reproduced, and resisted through social action, involves the investigation of “micro level processes—namely, how each individual and group occupies a social position within interlocking structures of oppression”—but frames these in relation “to the macro level connections linking systems of oppression such as race, class, and gender.”<sup>66</sup>

In taking this theoretical approach, our goal is not to predict wrongful convictions—as compared to legitimate convictions or even other types of miscarriages of justice—but to consider how gendered and raced biases play fundamental roles in creating the crime and suspect typifications that take hold in these cases and that shape the behaviors and practices of criminal justice system actors. This means viewing gender and race as “configuration[s] of [social] practice[s]”<sup>67</sup> within structural systems of inequality. Thus, we consider the broader roles that gender and racial inequalities play in these processes by positioning criminal justice actors and the

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<sup>65</sup> See, e.g., Richard Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 213 (2005) (arguing that criminologists need to start viewing the study of miscarriages of justice as a social science issue, rather than as a legal issue); Robert J. Norris & Catherine L. Bonventre, *Advancing Wrongful Conviction Scholarship: Toward New Conceptual Frameworks*, JUST. Q. 1, 2–4, 17 (2013) (addressing an overview of the study of miscarriages of justice and advocating for the use of theory in scholarship on the topic).

<sup>66</sup> Patricia Hill Collins et al., *On West and Fenstermaker's "Doing Difference,"* 9 GENDER & SOC'Y 491, 492 (1995); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 224, 226–27 (1991) (discussing the overlapping nature of oppression across racial, class, and gender lines, as well as how these forms of oppression are experienced within and across social institutions); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 61–65 (1988) (discussing how sexism is deeply intertwined with other forms of discrimination). For a discussion of this topic in connection with feminist legal theory, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251–52 (1991) (discussing the “intersectional disempowerment” of women of color).

<sup>67</sup> R. W. CONNELL, MASCULINITIES 84 (1995).

wrongfully convicted within “institutional arrangements, community structures, and even family systems”<sup>68</sup> built upon stratification, hierarchy, and power. Such inequalities pattern social interactions by configuring opportunities for action, creating both privileges and constraints. Indeed, we find previous research on a range of criminal justice practices implicated in the reproduction of gender and racial inequalities—sentencing disparities, for example, and the treatment and processing of sexual assault—quite useful for our theoretical purpose here. The gender and racial biases that operate within wrongful convictions—though especially egregious in their forms and consequences—are, we suggest, introduced in much the same fashion as they are in other discriminatory practices and miscarriages within the justice system.

We investigate these issues by focusing special attention to women’s cases of wrongful conviction. For reasons described above, there is currently a dearth of information about women’s wrongful convictions, and our analysis helps fill this significant void. However, it is important to note that the theoretical framework we present is not intended to be gender-specific, nor should it be relevant only for understanding wrongful convictions among women. At the heart of intersectional theory is the understanding that gender and race are sociological concepts; they are not simply about women and men, or African Americans, Latinos, and whites, for example, but about relations within and between groups, and how these are connected to patterns of social organization, institutional processes, cultural ideologies, and constructions of accountability.<sup>69</sup> Our hope is that the framework we present here not simply be applied to the study of women, but to wrongfully convicted men as well.

## II. PATTERNS OF EXONERATION BY GENDER AND RACE

To utilize the theoretical tools of intersectionality and criminology for understanding wrongful conviction first requires an exploration of its gendered and raced patterns. The NRE is the first dataset that allows us to do so. The NRE defines “exoneration” as any case in which a wrongfully convicted person is later officially cleared based on innocence.<sup>70</sup> This may come about as a result of a pardon,

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<sup>68</sup> Collins et al., *supra* note 66, at 500.

<sup>69</sup> See *id.* at 492; Crenshaw, *supra* note 66, at 1251–52; *infra* notes 374–78 and accompanying text.

<sup>70</sup> *Glossary*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneratio>

an acquittal of all charges on retrial, or a dismissal of all charges.<sup>71</sup> While this is a broader definition of wrongful conviction than actual innocence, as established for example through DNA exonerations, it nonetheless does not include all cases in which there is extensive evidence of innocence. In addition, though beyond the scope of our analysis here, it is worth raising one important limitation of the NRE in this context. Because this dataset classifies as exonerations all crimes in which the person is officially cleared, it may include individuals who are legally but not necessarily factually innocent.<sup>72</sup> Women represent 8.5% of the dataset,<sup>73</sup> slightly higher than their representation in the state and federal prison population, at approximately 7%.<sup>74</sup>

Figure 1 provides the racial demographics of exonerees across gender in the NRE as of November 25, 2014. While racial minorities (predominantly African Americans) were nearly two-thirds (62%) of male exonerees, this was nearly the reverse for female exonerees, only 35% of whom were women of color (again, predominantly African Americans).<sup>75</sup> Of the 126 women in the NRE as of November 25, 2014, eighty-two were white, thirty-four were African American, seven were Latina, two were American Indian, and one was Guyanese.<sup>76</sup> To some degree, these patterns reflect gender differences in racial disparities in imprisonment, which are greater for men than women.<sup>77</sup> The racial composition of male exonerees reflects the overrepresentation of minority men in the

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n/Pages/glossary.aspx (last visited Apr. 17, 2015).

<sup>71</sup> *Id.* Two of the women described above, *see supra* note 53, as having participated in the organization of the first women's innocence conference—Tabitha Pollock and Nancy Smith—are not (yet) in the NRE. Pollock, whose case we discuss in Part III, has been unsuccessful in her attempts to have charges dropped, even though the Illinois Supreme Court unanimously overturned her conviction over a decade ago. *See infra* text accompanying note 211. Consequently, her case does not meet the definitional criteria for inclusion in the NRE. In fact, the first author has been systematically collecting case information on dozens of women's wrongful conviction cases not included in the NRE. For a discussion of these definitional issues and their consequences, see Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1159–60 (2011).

<sup>72</sup> *See Glossary, supra* note 70; *see also* Findley, *supra* note 71, at 1160 (discussing distinctions between different definitions of innocence).

<sup>73</sup> *See infra* Figure 1.

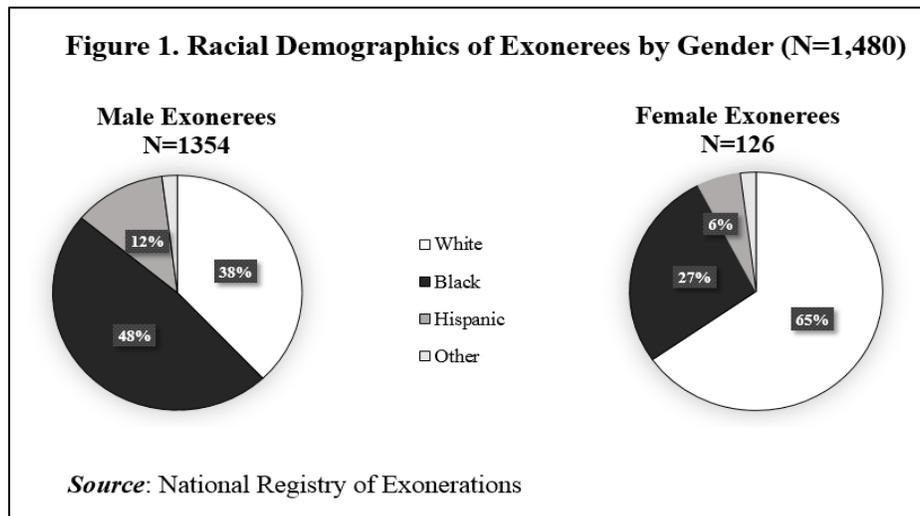
<sup>74</sup> E. ANN CARSON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 247282, PRISONERS IN 2013, at 8 tbl.7 (2014) (showing that the number of women in prisons was 104,134 while the overall number of people in prisons was 1,516,879 as of December 31, 2013).

<sup>75</sup> *See infra* Figure 1.

<sup>76</sup> *See Exoneration Detail List, supra* note 5; *infra* Figure 1.

<sup>77</sup> *See* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION 6–7 (2013), available at [http://sentencingproject.org/doc/publication/s/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publication/s/rd_Changing%20Racial%20Dynamics%202013.pdf).

prison system.<sup>78</sup> Still, there is a notable difference between the racial composition of exonerated women in the NRE and their counterparts in the prison population. Women of color make up over half of the female state and federal prison population, but only 35% of female exonerees (44 of 126).<sup>79</sup>



One reason for the large number of white women in the dataset is their overrepresentation among wrongful convictions in the child sexual abuse (CSA) hysteria cases of the 1980s and early 1990s.<sup>80</sup> These cases represented nearly a quarter of the white women in the NRE (20 of 82, or 24.4%).<sup>81</sup> However, even when these cases were excluded, white women still made up the majority of female

<sup>78</sup> See CARSON, *supra* note 74, at 1 (noting that men of color outnumber white men in state and federal prisons by over two to one); *infra* Figure 1

<sup>79</sup> See CARSON, *supra* note 74, at 8 tbl.7; *infra* Figure 1. The Department of Justice, Bureau of Justice Statistics counted 51,500 total white women in state and federal prison and 52,600 nonwhite women. CARSON, *supra* note 74, at 8 tbl.7.

<sup>80</sup> See Mary deYoung, *The Devil Goes to Day Care: McMartin and the Making of a Moral Panic*, 20 J. AM. CULTURE 19, 19 (1997) (“Despite the absence of evidence corroborating the children’s accounts, many of the day care providers were convicted, and to the cheers and jeers of their deeply divided communities, were sentenced to what often were draconian prison terms.”); Randall Grometstein, *Wrongful Conviction and Moral Panic: National and International Perspectives on Organized Child Sexual Abuse*, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 11, 11 (C. Ronald Huff & Martin Killias eds., 2008) (“[T]he moral panic concept suggests another source of error, namely, the weakening of traditional legal safeguards due to the perceived urgency of the danger threatening society.”).

<sup>81</sup> See *Exoneration Detail List*, *supra* note 5. Just one African American woman—Sandra Craig—was a CSA hysteria exoneree. See *id.*

exonerees. They were 59% of exonerations exclusive of CSA “hysteria” cases (62 of 105), while African American women were 31.4% and other women of color were 9.5% of these cases.<sup>82</sup>

Beyond the proportion of women and men of different racial groups in the NRE, there are some gender and race patterns in the types of crimes for which exonerees were wrongfully convicted.<sup>83</sup> Figure 2 shows that regardless of race and gender, the majority of exonerees were wrongfully convicted for violent offenses. This is not surprising. It reflects the case priorities of innocence movements, particularly since such individuals face the harshest criminal justice sentencing.<sup>84</sup> However, it is notable that women’s exonerations were more likely than men’s to include property, drug, and other offenses.<sup>85</sup> African American women’s wrongful convictions were especially likely to be for drug crimes, representing just over one in five of their cases.<sup>86</sup> However, they were the least likely to be wrongfully convicted of sexual assault/abuse.<sup>87</sup> On closer inspection, this is a gendered pattern; white women’s representation in the sexual assault/abuse category was almost exclusively because of CSA hysteria cases.<sup>88</sup> Excluding these, there were just five total sex crimes exonerations involving women in the NRE, each of which was a CSA case.<sup>89</sup> Sex crimes, then, are a crime

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<sup>82</sup> See *id.*

<sup>83</sup> Because the NRE does not contain a sufficient sample size of Latina and other nonblack minority women, they are excluded from the remaining statistics, figures, and tables, as are male exonerees listed as “other” race in the NRE, unless noted otherwise. In total, these make up thirty-three cases which have been omitted from the analysis. See *id.*

<sup>84</sup> See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 180 (2008) (noting that for crimes other than rape and murder the sentences “are comparatively short so there is less time to secure the defendants’ release and less incentive to try” to exonerate them). For a discussion of the limitations of available data, see *id.* at 175–76 (“And yet almost everything we know about false convictions in the United States depends on this small, assorted, messy data set.”). For an overview of why our knowledge is particularly limited for nonhomicide and nonsexual assault cases, see *id.* at 179–86.

<sup>85</sup> See *infra* Figure 2. To investigate the strength of the patterns we uncovered in our comparative analyses of gender and race patterns in wrongful convictions, we ran chi-square tests of significance. Here, differences in crime types across groupings are significant at the  $p < .001$  level.  $X^2 [4, N=1447] = 121.5002$ ;  $p < .001$ . Cramer’s V indicates a weak relationship (0.1449). It is important to note that the NRE dataset violates key assumptions of random or representative sampling. See generally EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 210–14 (5th ed. 2011) (explaining the assumptions underlying different methods of probability sampling). We use this test not to generalize about the relationships between gender, race, and wrongful convictions, but to highlight the strength of their patterns in the NRE.

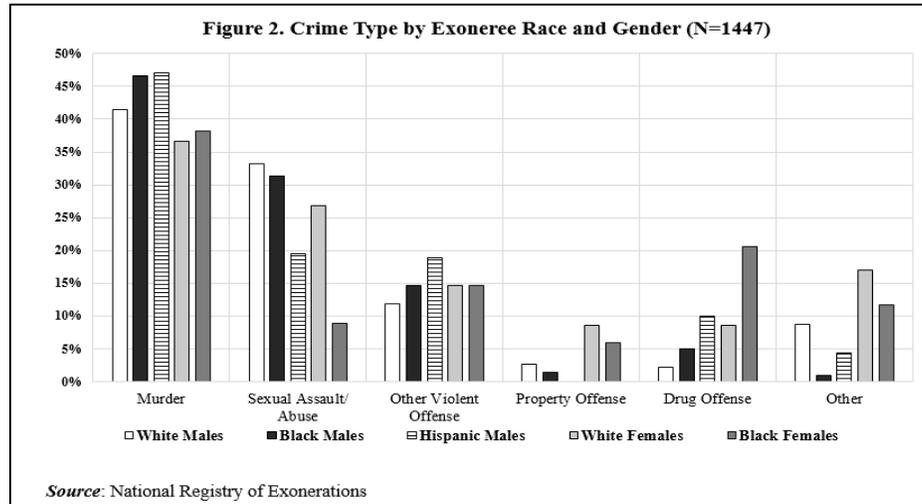
<sup>86</sup> See *infra* Figure 2. We caution against drawing strong conclusions from this pattern, however, given that just thirty-four African American women were in the NRE. See *supra* Figure 1.

<sup>87</sup> See *infra* Figure 2.

<sup>88</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>89</sup> See *id.* This included two white women, two African American women, and one

category for which men were almost exclusively the wrongfully convicted.<sup>90</sup>



In addition, looking only at crime type conceals additional patterns of wrongful conviction by race and gender. One important distinction, as illustrated in Figure 3, is the exoneree's relationship to the victim or presumed victim.<sup>91</sup> Half of the male exonerees were

Hispanic woman. *See id.*

<sup>90</sup> Most men's sexual assault cases in the NRE were stranger crimes and/or crimes in which DNA evidence played a role in the exoneration (83%, or 219 of 264 cases). *Id.*; Nat'l Registry of Exonerations, Relationship Between Victim and Exoneree Chart (Nov. 25, 2014) (unpublished data) (on file with authors). A minority, however, were acquaintance cases or cases that fit an acquaintance profile (for example, an incident that took place in someone's residence, at a party, or after the individuals involved in the case were drinking together at a bar), in which the exoneration was based on the defendant's claim that consensual sex took place. Nat'l Registry of Exonerations, *supra*. There is extensive evidence (discussed further in Part IV) of the challenges in criminal justice case processing of such rape cases, with gendered attribution processes similar to those we discuss here playing a prominent role in discounting women's accounts of rape. Thus, it is probable that there are, among these cases, at least a few in which the exoneree is not factually innocent. Of course this may be true for other cases as well, despite the NRE remaining the best information we have about patterns of wrongful convictions in the United States. For a systematic assessment of the role of extralegal factors on police and prosecutorial decision making in sexual assault cases, see CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM 16–21 (2014).

<sup>91</sup> As we describe below, many women exonerees were wrongfully convicted in "no crime" cases, some of which involved *presumed* victims later identified as injured or killed through accidents (as in Nicole Harris's wrongful conviction), suicides, or as the result of serious medical conditions. *See Exoneration Detail List, supra* note 5; *Nicole Harris, supra* note 41. Differences in Figure 3 are also statistically significant.  $X^2(4, N=1447) = 254.9333$ ;  $p < .001$ . Cramer's V indicates a moderate relationship (0.2099). *See supra* note 85 for an explanation

wrongfully convicted of crimes involving strangers (663 of 1331), compared to only 19% of the female exonerees (22 of 116).<sup>92</sup> As one might expect, cases involving sex crimes were one important source of these differences. Men's wrongful convictions for sex crimes were primarily for sexual assault (64.8%, or 265 of 409 cases).<sup>93</sup> The remainder included thirty CSA hysteria cases (7.3%) and another 114 cases (27.9%) of CSA.<sup>94</sup> Nearly three-quarters (73%) of men's sexual assault cases involved strangers, as did 21.3% of their wrongful convictions for nonhysteria CSA cases.<sup>95</sup> On the other hand, in every NRE case involving a woman for whom the most serious conviction was for a sex crime, the victim or presumed victim was a child.<sup>96</sup> Just one of these—a hysteria case—involved a stranger.<sup>97</sup> Sex crime cases partially account for gender differences in the relationship of exonerees to the victims or presumed victims, but homicides do as well. For males, 53% (313 of 595) of wrongful homicide convictions involved stranger victims, compared to only 26% of those cases involving female exonerees (11 of 43).<sup>98</sup>

Clearly, these patterns must be further delineated by race, since 62% of black men (409 of 656) were wrongfully convicted of crimes against strangers, compared with 44% of Hispanic men (70 of 159) and only 36% of white men (184 of 516).<sup>99</sup> For each of these groups, the next largest category of victims was acquaintances, friends, or coworkers.<sup>100</sup> Women, and particularly white women, were much more commonly represented in wrongful convictions against family members, especially compared to African American and Hispanic men.<sup>101</sup> In fact, half of all white women listed by the NRE were exonerated of crimes against a partner or spouse, immediate family

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of the purpose of chi-square tests here.

<sup>92</sup> See Nat'l Registry of Exonerations, *supra* note 90.

<sup>93</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>94</sup> See *id.*

<sup>95</sup> See Nat'l Registry of Exonerations, *supra* note 90.

<sup>96</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>97</sup> See Nat'l Registry of Exonerations, *supra* note 90; Maurice Possley, *Jennifer Wilcox*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3741> (last visited Apr. 17, 2015).

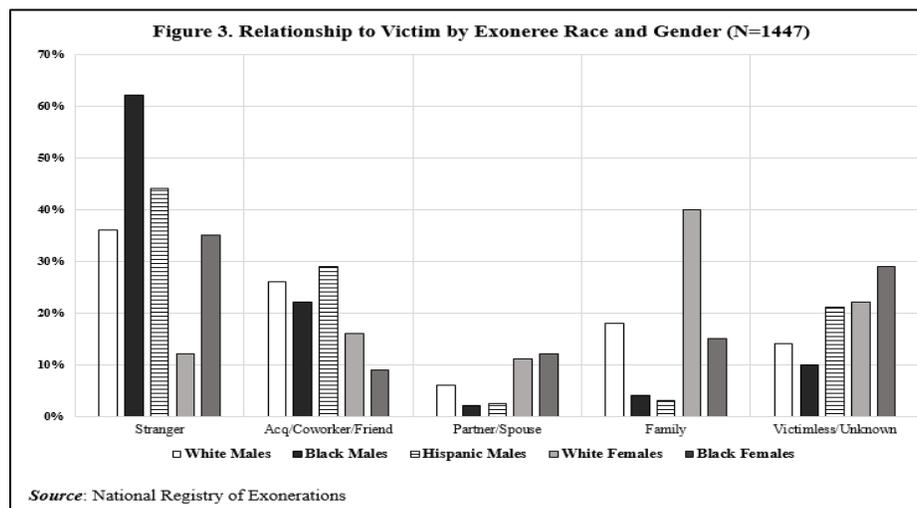
<sup>98</sup> See Nat'l Registry of Exonerations, *supra* note 90.

<sup>99</sup> See *id.* Black men's predominance in wrongful conviction for crimes involving strangers was even more extreme for sex crimes. For example, excluding hysteria cases, just 13% of white men's exonerations for CSA were crimes against strangers, as compared to 36% of black men's exonerations for these crimes. See *id.* Looking at sexual assault cases, 64% of white men's cases involved strangers while 79% of African American men's cases involved strangers. See *id.*

<sup>100</sup> See *infra* Figure 3.

<sup>101</sup> See *infra* Figure 3.

member, or extended family member (51%).<sup>102</sup> Nicole Harris notwithstanding, the pattern does not appear to be nearly as dominant among African American women (26%), as we will later discuss.<sup>103</sup> In fact, a smaller proportion of African American women were wrongfully convicted of a crime against a family member than were white men, and they were nearly as likely to be wrongfully convicted of a crime involving a stranger, suggesting the import of considering gender and race intersectionally rather than independently.<sup>104</sup>



This is further evidenced by cases involving child victims. As shown in Figure 4, white women were the most likely to be wrongfully convicted of crimes against children (48%), followed by white men (28%), African American women (21%), then Hispanic (18%) and African American (16%) men.<sup>105</sup> This pattern remains

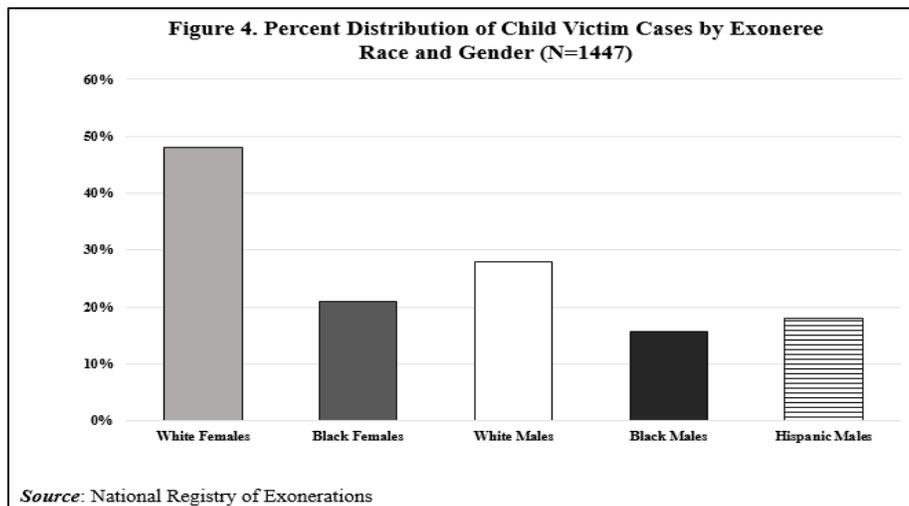
<sup>102</sup> See Nat'l Registry of Exonerations, *supra* note 90.

<sup>103</sup> See *id.*; *infra* notes 141–43 and accompanying text.

<sup>104</sup> See *infra* Figure 3.

<sup>105</sup> In all, 39 of 82 white women were wrongfully convicted of crimes against children, compared to 142 of 515 white men, 7 of 34 African American women, 103 of 653 African American men, and 28 of 159 Hispanic men. See Lienfeng Li, Nat'l Registry of Exonerations, *Tabulating Cases That Include a Child Victim* (Nov. 18, 2014) (unpublished data) (on file with authors); *infra* Figure 7. Differences in Figure 4 are also statistically significant.  $X^2(4, N=1443) = 56.9134$ ;  $p < .001$ . Cramer's V indicates a weak relationship (0.0993). See *supra* note 85 for an explanation of the purpose of chi-square tests here. With respect to the data represented in Figure 4, there are four fewer cases (N=1443) than those represented in Figures 2, 3, 5, and 6 (N=1447) because there were four additional cases added to the NRE between when the child victim data were tabulated (on November 18, 2014) and when the full dataset was obtained from the NRE (on November 25, 2014). See *Exoneration Detail List*,

even with the exclusion of CSA hysteria cases, though the proportion of white women's cases comes closer to that of other groups, at 31%.<sup>106</sup> Despite what appear to be meaningful differences across race, gender still matters in the nature of crimes against children for which women of all races are wrongfully convicted. It is through their roles as primary caregivers or in occupations involving childcare that women are convicted of crimes against children.<sup>107</sup> Beyond the child sex abuse hysteria cases, this subset includes cases involving death or injury to a child that may have been the result of a crime, a serious medical condition, or may have been accidental.<sup>108</sup> In this way, Nicole Harris's case typifies this particular manifestation of gendered wrongful conviction, even though the phenomenon appears to be disproportionate for white women in the NRE.



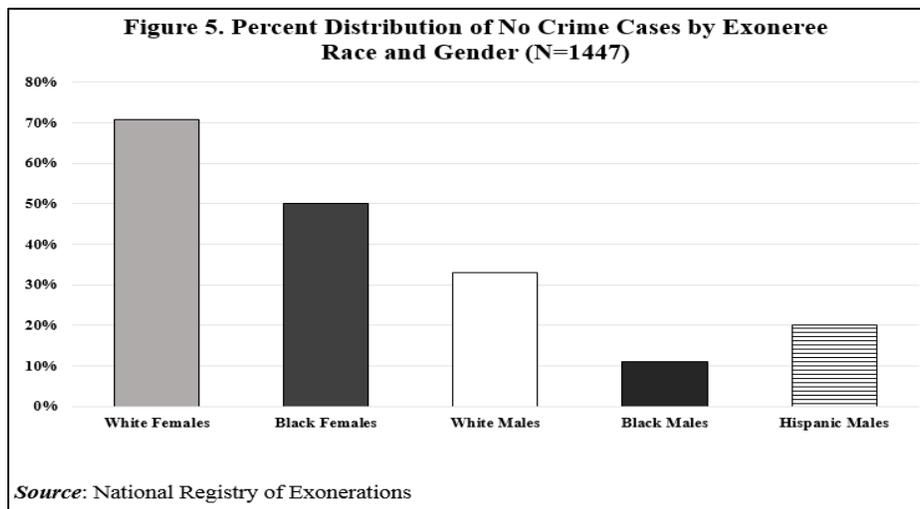
*supra* note 5.

<sup>106</sup> See *infra* Figure 7. Excluding CSA hysteria cases, 31% of white women's wrongful convictions were for crimes against children (19 of 62), compared to 24% of white men's (118 of 491), 18% of African American women's (6 of 33), 16% of African American men's (102 of 652), and 15% of Hispanic men's (23 of 154). See Li, *supra* note 105; *infra* Figure 7. A chi-square test of the significance of the distribution of child victim cases across gender and race categories, exclusive of CSA hysteria cases, is significant at the .05 level.

<sup>107</sup> Kaitlin Jackson & Samuel Gross, *Female Exonerees: Trends and Patterns*, NAT'L REGISTRY EXONERATIONS (Oct. 14, 2014), <https://www.law.umich.edu/special/exoneration/Pages/news.aspx>.

<sup>108</sup> *Id.*

It bears repeating that not all “victims” labeled as such in Figures 3 and 4 involved crimes that actually took place. Figure 5 illustrates that women were disproportionately represented in the “no crime” category of the NRE.<sup>109</sup> Twenty-three percent of the wrongful convictions in the dataset did not involve an actual crime—including 65% of women’s cases (75 of 116), yet only 21% of men’s (277 of 1331).<sup>110</sup> Indeed, both white and African American women were disproportionately represented in the no crime category.<sup>111</sup> These accounted for 71% (58 of 82) of white women’s wrongful convictions and 50% (17 of 34) of African American women’s.<sup>112</sup>



We also examined which crime types account for women’s no crime cases. For both white and African American women, the most substantial portion of no crime cases featured children as the presumed victims (34% and 31% respectively, excluding CSA hysteria cases).<sup>113</sup> From here, within-gender patterns for women

<sup>109</sup> Our chi-square test shows the relationship between gender and race categories and no crime cases to be significant at the .001 level.  $X^2(4, N=1447) = 192.0445$ ;  $p < .001$ . Cramer’s V indicates a moderate relationship (0.3643). See *supra* note 85 for an explanation of the purpose of chi-square tests here.

<sup>110</sup> See Nat’l Registry of Exonerations, *supra* note 90.

<sup>111</sup> See *infra* Figure 5.

<sup>112</sup> See *Exoneration Detail List*, *supra* note 5. Removing CSA hysteria cases does little to alter women’s disproportionate representation in no crime cases. Sixty-one percent of white women’s cases (38 of 62) as well as 48% of African American women’s cases (16 of 33) still involved crimes that did not occur. See *id.*

<sup>113</sup> See *Exoneration Detail List*, *supra* note 5. Again, we caution the reader that the

diverge, however. For white women, the next largest proportions of no crime cases were convictions for the victimization of an intimate partner or adult family member (18%) or for a white collar crime (18%), followed by wrongful drug convictions (16%).<sup>114</sup> For African American women, the next largest proportion of no crime cases (31%) was false drug convictions, with no other patterns emerging among the remaining cases.<sup>115</sup> This again suggests that the intersections of gender and race are a meaningful place for understanding wrongful convictions.

Thus far, we have described how the types and situational characteristics of crimes are distributed across gender and race categories among exonerees. Another consideration is whether there are differences across gender and race in the factors that contribute to wrongful convictions. Figure 6 reveals no simple answer to this question. Perjury or false accusation and official misconduct were the most common contributing factors across gender and race categories.<sup>116</sup> Mistaken witness identification was especially frequent for African American and Hispanic men, quite rare for white women, and a contributing factor for around one-fifth of white men and African American women.<sup>117</sup> This pattern is, of course, closely tied to the distribution of cases that involved victims who were strangers, as discussed in relation to Figure 3 above.

On the other hand, a larger proportion of women—and especially white women—had false or misleading forensic evidence contribute to their wrongful conviction.<sup>118</sup> A likely explanation for this difference lies in child victim cases involving women's caretaking roles. This includes, for example, cases involving women attributed to SBS<sup>119</sup> and other cases in which child injuries or deaths were

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numbers on which we report here are small. Excluding CSA hysteria cases, there were sixty-two white women in the NRE, of whom thirty-eight were no crime cases. *See supra* note 112. For African American women, 16 of 33 wrongful convictions were no crime cases. *See supra* note 112.

<sup>114</sup> *See Exoneration Detail List, supra* note 5.

<sup>115</sup> *See id.*

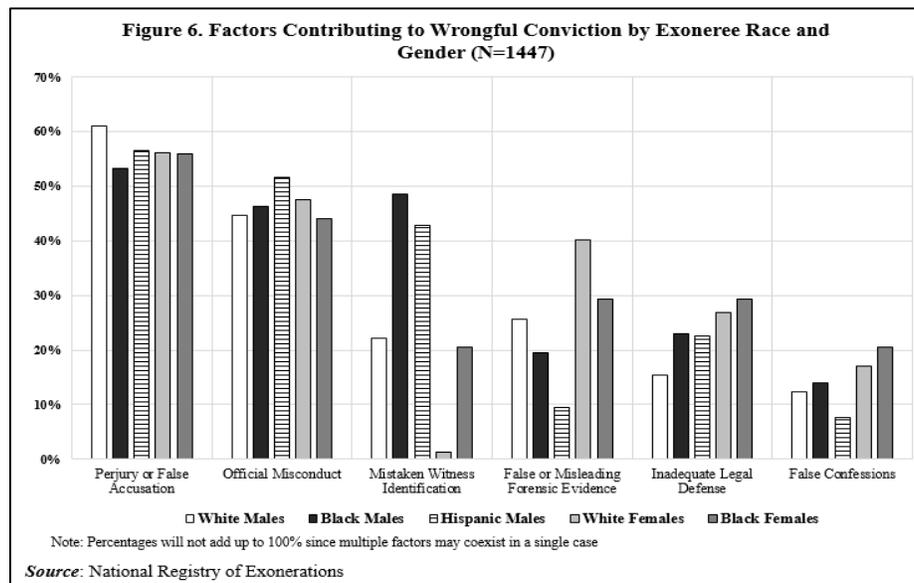
<sup>116</sup> *See infra* Figure 6.

<sup>117</sup> *See infra* Figure 6.  $X^2(4, N=1447) = 140.5053$ ;  $p < .001$ . Cramer's V indicates a moderate relationship (0.3116). *See supra* note 85 for an explanation of the purpose of chi-square tests here.

<sup>118</sup> *See infra* Figure 6.  $X^2(4, N=1447) = 37.8760$ ;  $p < .001$ . Cramer's V indicates a weak relationship (0.1618).

<sup>119</sup> Eight women have been exonerated for wrongful convictions involving SBS, as compared to five men. *See Exoneration Detail List, supra* note 5. Because the number of women in the NRE was much lower, these were a larger proportion of women's cases than men's. For a discussion of the role of SBS in wrongful convictions, see Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12

wrongly blamed on their female caregivers.<sup>120</sup> Women's cases were also slightly more likely to involve inadequate legal defense, with white men the least likely and African American women the most likely to have this as a contributing factor.<sup>121</sup> Finally, women were somewhat more likely to falsely confess than were men.<sup>122</sup> This may also be a result of their disproportionate wrongful conviction in cases involving children—as in Nicole Harris's lengthy interrogation immediately following the death of her son<sup>123</sup>—or the use of their children as a tactic to secure a confession,<sup>124</sup> topics we discuss further in Part III.



To recap, our review of the patterns of exoneration in the NRE by gender and race as of November 25, 2014, suggests the following: while the racial distribution of men's exonerations closely paralleled racial disparities in men's incarceration rates, in the case of women, white women were a larger proportion of exonerees than their

HOUS. J. HEALTH L. & POL'Y 209, 302–06 (2012).

<sup>120</sup> For an example of an injury blamed on a female caregiver, see Alexandra Gross, *Yvonne Eldridge*, NAT'L REGISTRY EXONERATIONS (Sep. 28, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3999> [hereinafter *Yvonne Eldridge*].

<sup>121</sup> See *infra* Figure 6.  $X^2 = 15.4044$ ;  $p < .01$ . Cramer's V indicates a weak relationship (0.1032). See *supra* note 85 for an explanation of the purpose of chi-square tests here.

<sup>122</sup> See *infra* Figure 6.  $X^2 = 7.6074$ ;  $p$  is not significant.

<sup>123</sup> See *supra* Figure 4; *supra* notes 28–36 and accompanying text.

<sup>124</sup> See *infra* note 297 and accompanying text.

representation among incarcerated women.<sup>125</sup> Across groups, the vast majority of wrongful convictions documented in the NRE were for crimes of violence, though sex crimes were a much larger proportion of men's exonerations than women's and, across race, women were more likely than men to have been exonerated for nonviolent crimes.<sup>126</sup> Considering exonerees' relationships to identified victims, white women were especially likely to be wrongfully convicted of crimes or presumed crimes against family members relative to other groups, while African American women were disproportionately wrongfully convicted in both family and stranger cases.<sup>127</sup> Men, and especially men of color, were most likely to be convicted of crimes against strangers, with crimes against acquaintances, friends, and coworkers the next most common relational status for all men.<sup>128</sup>

White women were especially likely to be convicted for crimes or presumed crimes involving child victims, relative to other groups.<sup>129</sup> And for both white and African American women, their overrepresentation relative to men in no crime cases was especially the result of wrongful convictions for incidents erroneously designated as crimes against children.<sup>130</sup> Finally, factors contributing to wrongful conviction demonstrated both similarities across groups and several notable differences: the cases of men of color were especially likely to involve witness misidentification, followed by white men and African American women, while this contributing factor was virtually absent in white women's cases.<sup>131</sup> On the other hand, both white and African American women were somewhat more likely than all groups of men to have false or misleading forensic evidence, inadequate legal defense, and false confessions as factors that contributed to their wrongful convictions.<sup>132</sup> On the whole, these patterns present a strong case for investigating wrongful convictions intersectionally, as neither gender nor race could account for these patterns on their own.

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<sup>125</sup> See *supra* text accompanying note 79.

<sup>126</sup> See *supra* Figure 2.

<sup>127</sup> See *supra* Figure 3.

<sup>128</sup> See *supra* Figure 3.

<sup>129</sup> See *supra* Figure 4.

<sup>130</sup> See *supra* note 113 and accompanying text.

<sup>131</sup> See *supra* Figure 6.

<sup>132</sup> See *supra* Figure 6.

### III. CONTEXTUALIZING WOMEN'S PATTERNS OF WRONGFUL CONVICTION

Part II reveals patterns in the NRE suggestive that gender and race meaningfully shape experiences of wrongful conviction. From here we turn our attention exclusively to the contexts of women's wrongful convictions. To further understand these, we performed a qualitative content analysis<sup>133</sup> of the 126 women's NRE cases available as of November 25, 2014, and also prepared detailed case studies of several cases we define as wrongful convictions that are not in the NRE, but that typify the same gendered patterns.<sup>134</sup> These analyses provide deeper contextual insights into the gendered and raced contexts of the crimes for which women were wrongfully convicted, and the ways in which gender and race came to construct them as suspects who were then convicted of actual or presumed crimes.

Perhaps the most striking findings in our content coding of NRE cases are the significant differences across race in the crime contexts of women's wrongful convictions. Excluding the twenty-one CSA hysteria cases (twenty of which involved white women),<sup>135</sup> Figure 7 provides a comparison of crime typifications for white and African American women.<sup>136</sup> First, it is notable that half of white

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<sup>133</sup> See, e.g., KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* 1, 5–7 (2002) (discussing strategies for qualitative content analysis); Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 *QUALITATIVE HEALTH RES.* 1277, 1278 (2005) (describing qualitative content analysis).

<sup>134</sup> Specifically, we sought to include several prominent or timely cases that highlight key themes but extend beyond the definitional criteria of the NRE or are ongoing. While the NRE is the most systematic database available, neither it nor other available lists of wrongful convictions can be representative of the total population of cases. Our choice to include these additional cases is meant to highlight the complexity of defining wrongful conviction and the fluidity of ongoing efforts to exonerate the wrongfully convicted. See *supra* note 71. Case studies were constructed by performing more detailed content analyses of legal documents acquired through Westlaw and Google searches and in some cases, received directly from the exoneree's postconviction attorney. These included appellate motions and decisions, clemency applications, and in one case, a trial transcript. Media searches were also conducted and media was used to supplement legal sources.

<sup>135</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>136</sup> See *infra* Figure 7. Please note that although Figure 7 depicts the percentage of black women exonerated for "street crime scenario" crimes as 34%, the correct number is 33.3%. The discrepancy is a product of rounding error in the program that formulated the chart. A chi-square test for significance, comparing white and African American women in three crime typifications—domestic scenario (child/partner/family victims), street crime scenario (including drug crimes), and other—shows that women's placement in these categories by race is significant at the .05 level.  $X^2 [1, N=95] = 6.8318; p < .05$ . Cramer's V indicates a moderate relationship (0.2681). Again, we use this test not in an attempt to generalize about women's wrongful convictions, which the NRE dataset does not allow for, but to highlight the strength of the patterns we uncovered. For the purpose of the chi-square test, "other"

women's NRE cases involved crimes (or presumed crimes) committed against children, intimate partners, or other family members in domestic or childcare contexts<sup>137</sup>—what we call here “domestic crime scenarios.”<sup>138</sup> Notably, such cases also represented the majority of white women's convictions for crimes that did not occur.<sup>139</sup> In addition, Figure 7 reveals that white women in the NRE were more than twice as likely as African American women to have been wrongfully convicted of property or white collar crimes.<sup>140</sup>

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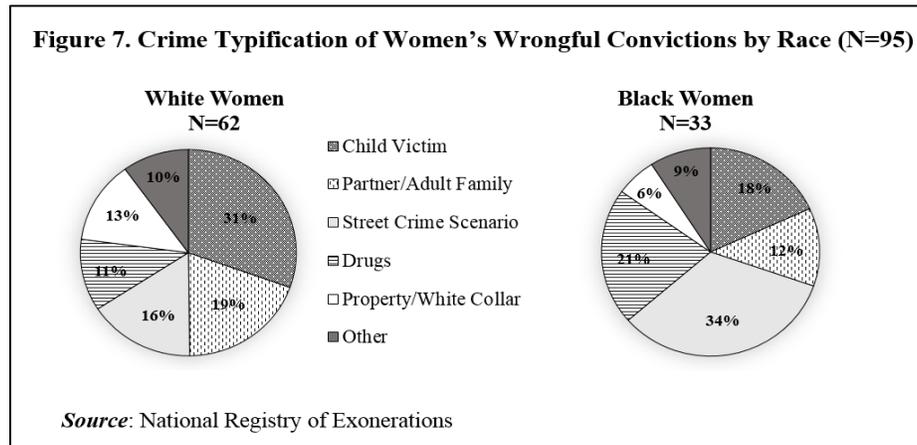
included both property and white collar crimes not involving family members as the presumed victim, as well as those crimes classified in Figure 7 as other. These included four vehicular manslaughter cases, three misdemeanors, an assault on U.S. Marshals, a workplace arson, and failure to pay child support. See Maurice Possley, *Yeidja Bostick*, NAT'L REGISTRY EXONERATIONS (Nov. 10, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4542>; Maurice Possley, *Nissa Baillie*, NAT'L REGISTRY EXONERATIONS (Jan. 29, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4362>; Maurice Possley, *Judith Fritz*, NAT'L REGISTRY EXONERATIONS (May 29, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4178>; Stephanie Denzel, *Jennifer Hall*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3271> (last visited Apr. 17, 2015); Maurice Possley, *Sierra Rigel*, NAT'L REGISTRY EXONERATIONS (Aug. 24, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4480>; Maurice Possley, *Darlene Span*, NAT'L REGISTRY EXONERATIONS (Aug. 30, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4255>; *Exoneration Detail List*, *supra* note 5.

<sup>137</sup> See *infra* Figure 7.

<sup>138</sup> Based on this definition, forty-five cases were identified from the NRE database as “domestic crime scenarios.” See *Exoneration Detail List*, *supra* note 5. A complete list of those cases is on file with the authors.

<sup>139</sup> See *supra* text accompanying notes 113–14.

<sup>140</sup> See *infra* Figure 7. For white women, these eight cases included three cases of women erroneously convicted of stealing or embezzling from their employers; one case of failure to pay for services; three cases of business-related white collar crimes (fraud, conspiracy to commit fraud, and obstruction of justice); and one case of tax fraud involving a former Playboy playmate convicted for not paying taxes on extravagant presents received from a wealthy male benefactor, which the State argued were income rather than gifts. See Maurice Possley, *Cheryl Adams*, NAT'L REGISTRY EXONERATIONS (Oct. 28, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4536> [hereinafter *Cheryl Adams*]; Maurice Possley, *Donna Bjerklie*, NAT'L REGISTRY EXONERATIONS (Feb. 16, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4368>; Stephanie Denzel, *Lisa Hansen*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3276> (last visited Apr. 17, 2015); Maurice Possley, *Lynnette Harris*, NAT'L REGISTRY EXONERATIONS (Oct. 18, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4525>; Maurice Possley, *Mary Mengloi*, NAT'L REGISTRY EXONERATIONS (Oct. 26, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4533> [hereinafter *Mary Mengloi*]; Maurice Possley, *Tamara McAnally*, NAT'L REGISTRY EXONERATIONS (June 21, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3923> [hereinafter *Tamara McAnally*]; Maurice Possley, *Lacey Phillips*, NAT'L REGISTRY EXONERATIONS (Feb. 3, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4367>; Maurice Possley, *Nancy Tullos*, NAT'L REGISTRY EXONERATIONS (June 30, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3920>. Just two African American women were in this category: one for forgery, the other for destruction of property. *Exoneration Detail List*, *supra* note 5. A third (included in the “other” category in Figure 7) was wrongfully convicted for failure to pay child support. *Exoneration Detail List*, *supra* note 5.



In contrast, over half of African American women's wrongful convictions involved either drug cases (21%) or cases we classify as involving "street crime scenarios" (33%)<sup>141</sup>—violent crimes such as murders, robberies, and home invasions that target either strangers or acquaintances<sup>142</sup> and occur outside the context of home.<sup>143</sup> Indeed, more than a third of African American women were wrongfully convicted of violent street crimes. All of these cases involved actual crimes, with most African American women wrongfully convicted of violent street crimes identified as the guilty party through witness misidentification or perjured testimony—from the actual offenders, other crime-involved individuals, or

<sup>141</sup> See *supra* Figure 7; *supra* note 136.

<sup>142</sup> Though the street crime scenario includes victims acquainted with the exoneree, only one of the African American women's cases in this category involved a known victim. See Maurice Possley, *Lisa Roberts*, NAT'L REGISTRY EXONERATIONS (June 9, 2014), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4443> [hereinafter *Lisa Roberts*]; see also *infra* note 143 (explaining authors' dataset for street crime scenarios). Among white women in this category, however, half of the cases (5 of 10) involved victims the exoneree knew (four acquaintances and one extended family member), and half were strangers. See Maurice Possley, *Debra Brown*, NAT'L REGISTRY EXONERATIONS (July 12, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4222> [hereinafter *Debra Brown*]; Maurice Possley, *Lana Canen*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4047> (last updated Feb. 24, 2014) [hereinafter *Lana Canen*]; Maurice Possley, *Paula Hall*, NAT'L REGISTRY EXONERATIONS (Oct. 14, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4286> [hereinafter *Paula Hall*]; *Debra Sheldon*, *supra* note 49; Maurice Possley, *Megan Winfrey*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4109> (last updated Feb. 28, 2014) [hereinafter *Megan Winfrey*].

<sup>143</sup> Based on this definition, twenty-five cases were identified from the NRE database as "street crime scenarios." See *Exoneration Detail List*, *supra* note 5. A complete list of those cases is on file with the author.

jailhouse snitches.<sup>144</sup> By comparison, only around a quarter of white women's wrongful convictions were either drug cases (11%) or involved street crime scenarios (16%).<sup>145</sup> White women's wrongful convictions, then, appear particularly likely to emerge in the context of domestic crime scenarios (50%), while African American women's wrongful convictions were strongly patterned by both street (33%) and domestic (30%) crime scenarios.<sup>146</sup>

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<sup>144</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>145</sup> See *supra* Figure 7.

<sup>146</sup> See *supra* Figure 7; *supra* note 136. Among the seven Latinas in the NRE as of November 25, 2014, three involved domestic crime scenarios. See *Exoneration Detail List*, *supra* note 5. Two were no crime cases involving children (Mary Ann Elizondo and Abigail Tiscareno) and one was a case of self-defense against an abusive partner (Sandra Ortiz). Maurice Possley, *Mary Ann Elizondo*, NAT'L REGISTRY EXONERATIONS (Oct. 14, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4019> [hereinafter *Mary Ann Elizondo*]; Maurice Possley, *Sandra Ortiz*, NAT'L REGISTRY EXONERATIONS (June 25, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4199> [hereinafter *Sandra Ortiz*]; Maurice Possley, *Abigail Tiscareno*, NAT'L REGISTRY EXONERATIONS (Apr. 18, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4413>. Another three are best typified as street crime scenarios (Kathy Gonzalez, Maria Hernandez, and Rachel Jernigan). *Kathy Gonzalez*, *supra* note 49; Maurice Possley, *Maria Hernandez*, NAT'L REGISTRY EXONERATIONS (May 12, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4429>; Maurice Possley, *Rachel Jernigan*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3437> (last visited Apr. 17, 2015). The final case (Fancy Figueroa) was a wrongful misdemeanor conviction for filing a false rape claim. Maurice Possley, *Fancy Figueroa*, NAT'L REGISTRY EXONERATIONS (July 26, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4474>. On her sixteenth birthday, Fancy Figueroa was the victim of a brutal sexual assault, which she reported to the police. *Id.* During the medical exam administered after her rape it was discovered that she was pregnant. *Id.* At that point "police suspected she had concocted the report of being raped to cover [the pregnancy] up." *Id.* Figueroa was then coerced into a false confession and pleaded guilty to filing a false report. *Id.* Six years later, a serial rapist's DNA was found to match that from Figueroa's rape kit, and he pleaded guilty to her sexual assault. *Id.* Of the ordeal, Figueroa has since said: "There was a point where I was just so upset with [the detectives who pressured her to recant her report]. I felt they hurt me more than the rapist hurt me. He just came and left, but for six years, nobody believed me. I lost my family. I lost my freedom. I lost a little of my sanity." *Id.* (internal quotation marks omitted).

Two of the 126 women's cases in the NRE involved Native American women; one was in the context of a group standoff and ensuing gun battle with police in a rural area (Norma Jean Croy) and the other was the killing of a man with a history of violence against the women in question (Ernestine James, who was exonerated, and her fourteen-year-old daughter, who was convicted as an adult and was not exonerated). See Maurice Possley, *Norma Jean Croy*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3842> (last visited Apr. 17, 2015); Maurice Possley, *Ernestine James*, NAT'L REGISTRY EXONERATIONS (June 11, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4439>; *Exoneration Detail List*, *supra* note 5. Finally, Sophia Johnson was wrongfully convicted of killing her mother-in-law. Maurice Possley, *Sophia Johnson*, NAT'L REGISTRY EXONERATIONS (Sept. 24, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4271> [hereinafter *Sophia Johnson*]. After her exoneration, she was deported back to Guyana based on a previous unrelated felony conviction for embezzlement. *Id.*

### A. Domestic Crime Scenarios

The wrongful conviction of Nicole Harris was one of forty-five women's cases in the NRE that fit what we have conceptualized as "domestic crime scenarios."<sup>147</sup> What these cases have in common is that the identified crime took (or was believed to have taken) place in the context of women's familial relationships and/or caretaking roles<sup>148</sup> (i.e., the gendered private sphere that is culturally recognized as women's domain of responsibility<sup>149</sup> as wives, mothers, and daughters). Domestic caretaking—of children, intimate partners, and elderly parents—is still considered a defining feature of women's lives, with "contemporary women across racial and ethnic groups . . . considered accountable to care for . . . [and] presumed responsible for self, for others, for kin, for community, and for controlling the behaviors of men."<sup>150</sup> The contemporary ideal of "motherhood," for example, embodies selfless sacrifice directed toward caring for, nurturing, and protecting one's children, with women held accountable for falling short of this ideal.<sup>151</sup> Recall how this was narrated explicitly in Nicole Harris's case—she was called a "monster" by the polygraph examiner and described to jurors by the prosecutor as "not the mother the defense wants to present to you."<sup>152</sup>

<sup>147</sup> Excluding CSA hysteria cases, this represented 43% of women's wrongful convictions (45 of 105). See *supra* Figure 1; *supra* text accompanying note 135; see also *supra* note 138 (explaining authors' dataset for domestic crime scenarios).

<sup>148</sup> See *supra* text accompanying note 137.

<sup>149</sup> Feminist theorists recognize these individualized responsibilities that adhere to women as "embedded in a set of implicit cultural practices . . . [that] sit in a well-tilled field of power relations." Michelle Fine & Sarah Carney, *Women, Gender, and the Law: Toward a Feminist Rethinking of Responsibility*, in HANDBOOK OF THE PSYCHOLOGY OF WOMEN AND GENDER 388, 388 (Rhoda K. Unger ed., 2001) (quoting JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 131–32 (1993)) (internal quotation marks omitted).

<sup>150</sup> Fine & Carney, *supra* note 149, at 388; see also HAYS, *supra* note 25, at 71, 85 (noting that raising children plays an essential role in the lives of women who receive welfare); Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Cultural Beliefs and Social Relations*, 18 GENDER & SOC'Y, 510, 526 (2004) (stating that there are cultural expectations for mothers to constantly care for their children).

<sup>151</sup> See HAYS, *supra* note 24, at 2–3 (noting that mothers are expected to be selflessly nurturing toward their children); HAYS, *supra* note 25, at 15–16 (discussing the high standard to which welfare mothers are held); see also MARTHA MCMAHON, ENGENDERING MOTHERHOOD: IDENTITY AND SELF-TRANSFORMATION IN WOMEN'S LIVES 5, 275 (1995) (discussing the cultural view of mothers as saints and self-sacrificing); Terry Arendell, *Conceiving and Investigating Motherhood: The Decade's Scholarship*, 62 J. MARRIAGE & FAM., 1192, 1194 (2000) (finding that the North American image of motherhood is one involving intensive mothering and self-sacrifice).

<sup>152</sup> Coen, *supra* note 7, at 10 (internal quotation marks omitted); Eldeib & Black, *supra* note 33, at 1 (internal quotation marks omitted).

## 1. Children as the Victims of Women's "Crimes"

It is, thus, unsurprising that cases involving child victims predominated domestic crime scenario cases across race and across crime type.<sup>153</sup> In all, there were twenty-seven such cases in the NRE, representing a quarter (25.7%) of all women's wrongful convictions, exclusive of CSA hysteria cases.<sup>154</sup> Fifteen of these cases were for murder, along with one manslaughter, one assault, five child abuse, and five sexual abuse cases.<sup>155</sup> In many of these cases, criminal justice officials' "escalating commitments"<sup>156</sup> to an interpretation of these events as both *crimes* and crimes perpetrated by *mothers* or other female *caregivers* appear to draw closely from cultural interpretations of "bad" mothering, which are utilized in constructing a "compelling narrative"<sup>157</sup> of the crime. Consider the wrongful assault conviction of Olga Shved against her four-month-old daughter.<sup>158</sup> Shved called 911 when the infant began choking, and a pediatric examination revealed numerous fractures, both old and recent.<sup>159</sup> A medicated cosmetic on the infant's face was taken as a critical piece of evidence that she had used make-up—a gendered tool in the construction of femininity<sup>160</sup>—to conceal her daughter's bruising.<sup>161</sup> Notably, while Shved was convicted of first degree assault and sentenced to ten

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<sup>153</sup> See Ridgeway & Correll, *supra* note 150, at 526 (noting that there are cultural expectations for mothers to constantly care for their children); *supra* Figure 7.

<sup>154</sup> See *supra* Figure 7; *supra* note 146; *supra* text accompanying note 135.

<sup>155</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>156</sup> See Lofquist, *supra* note 6, at 176, 180.

<sup>157</sup> *Id.* at 183.

<sup>158</sup> Tyler Richardson, *Pasco Mother Acquitted of Child Abuse Charges*, TRI-CITY HERALD (Mar. 5, 2014), [http://www.tri-cityherald.com/2014/03/05/2861124\\_pasco-mother-acquitted-of-child.html?rh=1](http://www.tri-cityherald.com/2014/03/05/2861124_pasco-mother-acquitted-of-child.html?rh=1).

<sup>159</sup> Paula Horton, *Pasco Woman's Infant Abuse Conviction Tossed*, TRI-CITY HERALD (Aug. 19, 2011), <http://www.tri-cityherald.com/2011/08/19/1608416/pasco-womans-infant-abuse-conviction.html>; Maurice Possley, *Olga Shved*, NAT'L REGISTRY EXONERATIONS (July 31, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4478>.

<sup>160</sup> Feminist scholars have traced how the cosmetics industry has constructed these products as a "social necessity" for women—they are "not truly feminine if they shun[] make-up, whatever their race or ethnicity." Meryn Stewart & Kimberly Lystar, *Ellen Carol Dubois and Vicki L. Ruiz*, eds.—*Unequal Sisters: A Multi-Cultural Reader in U.S. Women's History*, 29 SOC. HIST. 259, 260 (1996) (reviewing *UNEQUAL SISTERS: A MULTI-CULTURAL READER IN U.S. WOMEN'S HISTORY* (Vicki L. Ruiz & Ellen Carol DuBois eds., 2d ed. 1994)). Shved's act of applying cosmetics to her infant's face can thus be read as doubly deviant—not just an attempt to conceal her perceived crime, but a violation of the normative uses of this product to construct femininity.

<sup>161</sup> Liz Klimas, *Parents Deprived of Their Children for Eight Years Even After Abuse Charges Were Cleared*, BLAZE (May 12, 2014), <http://www.theblaze.com/stories/2014/05/12/parents-deprived-of-their-children-for-eight-years-even-after-abuse-charges-were-cleared/>.

years, her husband was charged only with failing to report the baby's injuries, a misdemeanor that was later dismissed.<sup>162</sup> On retrial, pediatric experts testified about several medical conditions that caused the infant's injuries, and on this basis Shved was acquitted five years after her wrongful conviction.<sup>163</sup>

Numerous additional women are in the NRE for "crimes" in which preexisting medical conditions were not recognized as the cause of harm or death. These includes, for example, Julie Baumer's infant nephew, who had suffered a childhood stroke while in her care;<sup>164</sup> Brandy Briggs's infant son, whose death was the result of complications stemming from an infection coupled with medical error;<sup>165</sup> Patricia Stallings's infant, who had a rare genetic disorder;<sup>166</sup> the infant in Melonie Ware's daycare, who died of sickle cell anemia;<sup>167</sup> and the deaths of several "medically fragile" infants for whom Yvonne Eldridge was trained to provide specialized foster care.<sup>168</sup> Given that "[m]ost of the infants in this program were born drug-addicted or with life-threatening conditions,"<sup>169</sup> instances of infant mortality should not be unexpected. According to the NRE, Eldridge's wrongful conviction stemmed from inadequate legal defense, including the failure of her counsel to introduce evidence that "one of the doctors who raised allegations against [Eldridge] . . . had previously made a [sexual] pass at [her], had been accused of a series of unwelcome sexual overtures directed at other patients and hospital staff, and had a history of accusing women of Munchausen Syndrome by Proxy [(MSBP)]"—an accusation he had made in her

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<sup>162</sup> *Id.*; Richardson, *supra* note 158.

<sup>163</sup> Richardson, *supra* note 158.

<sup>164</sup> Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. MICH. J.L. REFORM 657, 657, 659 (2012); Stephanie Denzel, *Julie Baumer*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3017> (last visited Apr. 17, 2015).

<sup>165</sup> *Ex parte* Briggs, 187 S.W.3d 458, 460–63 (Tex. Crim. App. 2005); Alexandra Gross, *Brandy Briggs*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3812> (last visited Apr. 17, 2015).

<sup>166</sup> Michael T. Flannery, *Munchausen Syndrome by Proxy: Broadening the Scope of Child Abuse*, 28 U. RICH. L. REV. 1175, 1231–32 (1994); Michael S. Perry, *Patricia Stallings*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3660> (last visited Apr. 17, 2015).

<sup>167</sup> Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 529–30 (2011); Alexandra Gross, *Melonie Ware*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3814> (last visited Apr. 17, 2015).

<sup>168</sup> Michael T. Flannery, *First, Do No Harm: The Use of Covert Video Surveillance to Detect Munchausen Syndrome by Proxy—An Unethical Means of "Preventing" Child Abuse*, 32 U. MICH. J.L. REFORM 105, 110 n.14 (1998); Yvonne Eldridge, *supra* note 120.

<sup>169</sup> Yvonne Eldridge, *supra* note 120.

case as well.<sup>170</sup>

Both of these critically excluded pieces of evidence demonstrate additional gendered contexts surrounding Eldridge's wrongful conviction. Research demonstrates the range of harms that result from sexual misconduct among physicians, many of whom continue in medical practice even if they are disciplined.<sup>171</sup> Moreover, it is most often women accused of or diagnosed with MSBP;<sup>172</sup> feminist legal analyses suggest that "social revulsion and retributive impulse[s] toward[] 'bad mothers' invite[] professionals to infuse alleged cases of MSBP with morality, gender attributions, and social judgments," impacting the adjudication of these cases.<sup>173</sup> Indeed, the title of a recent article—*Monsters in the Closet: Munchausen Syndrome by Proxy*—published in the journal *Critical Care Nurse* further illustrates the powerful metaphor of monstrous mothers seen explicitly in imputations against Nicole Harris.<sup>174</sup> In a parallel vein, Tammy Smith, erroneously convicted of child abuse

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<sup>170</sup> *Id.*

<sup>171</sup> R. M. Cullen, *Arguments for Zero Tolerance of Sexual Contact Between Doctors and Patients*, 25 J. MED. ETHICS 482, 482 (1999); Christine E. Dehlendorf & Sidney M. Wolfe, *Physicians Disciplined for Sex-Related Offenses*, 279 JAMA 1883, 1883 (1998); Cherrie A. Galletly, *Crossing Professional Boundaries in Medicine: The Slippery Slope to Patient Sexual Exploitation*, 181 MED. J. AUSTL. 380, 380–81 (2004); see also Randy A. Sansone & Lori A. Sansone, *Crossing the Line: Sexual Boundary Violations by Physicians*, 6 PSYCHIATRY 45, 48 (2009) (noting that fewer than 1.6% of physicians are disciplined for sexual contact with patients, yet 7% of physicians report having had sexual experiences with patients). It is worth noting that several additional case profiles in the NRE make note of similar types of gendered misconduct on the part of criminal justice actors. Cheryle Beridon, who was wrongfully convicted of heroin distribution and given a life sentence, "maintained her innocence, and claimed that the district attorney arrested and prosecuted her in retaliation because she recently ended an affair with him." *Cheryle Beridon*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3022> (last visited Apr. 17, 2015). Tamara McAnally and her husband were convicted of insurance fraud; at various points during the case, she asserts, the prosecutor made sexual advances and pursued her romantically. *Tamara McAnally*, *supra* note 140. She also learned of other women to whom this had happened. *Id.* Her conviction was vacated after "an internal investigation by the District Attorney's Office revealed that [this prosecutor] allegedly had relationships with or pursued relationships with more than a half dozen women that he had prosecuted." *Id.* The prosecutor was allowed to retire in 2010, and the district attorney's office "did not pursue any further disciplinary action— including not reporting him to the California State Bar."

*Id.*

<sup>172</sup> Fiona E. Raitt & M. Suzanne Zeedyk, *Mothers on Trial: Discourses of Cot Death and Munchausen's Syndrome by Proxy*, 12 FEMINIST LEGAL STUD. 257, 258, 260 (2004).

<sup>173</sup> Rosanna Langer, "A Dignified and Caring Mother": *An Examination of Munchausen Syndrome by Proxy Case Law*, 16 PSYCHIATRY PSYCHOL & L. 217, 217 (2009); see also Raitt & Zeedyk, *supra* note 172, at 257 (explaining how discourses about motherhood play a hidden yet "determining role" in the prosecution of cases of child maltreatment, including women's diagnoses of MSBP).

<sup>174</sup> Laura Criddle, *Monsters in the Closet: Munchausen Syndrome by Proxy*, 30 CRITICAL CARE NURSE 46, 46 (2010); see *supra* text accompanying notes 32–33.

after her four-year-old, developmentally disabled son broke his arm in an accident, bore the maternal “courtesy stigma” not just of her son’s injury but his disability.<sup>175</sup> Her motherhood was put on trial not just as a result of her son’s injury, but through the attribution of mother blame at what were interpreted as his character traits, not simply a disability, as a social worker “testified that he was ‘the most unsocialized child’ she had ever seen,” characterizing him as “a little animal child.”<sup>176</sup>

Other women’s wrongful convictions were imbued with gendered motives that provided a crime narrative placing the women directly at odds with the ideal of motherhood as selfless sacrifice for one’s children. Eighteen-year-old Sabrina Butler’s attempts at CPR were interpreted as fatal abuse;<sup>177</sup> like Nicole Harris, many hours of questioning immediately following her infant’s death led to a false confession that she had punched the baby because he would not stop crying.<sup>178</sup> Seventeen-year-old Michelle Murphy, who also falsely confessed after her eighteen-month-old son was stabbed to death, was accused at trial of being motivated to “get rid of” her infant son so that her estranged husband, who “suspected that he was not [the baby’s] father,” would reconcile with her.<sup>179</sup> Julie Rea, whose son was murdered by the serial killer Tommy Lynn Sells, was presumed to have taken her son’s life due to a “bitter” custody dispute with the boy’s father.<sup>180</sup> Kimberly Mawson, whose former boyfriend testified against her but later admitted to causing the injuries that killed her young daughter, was described as “frustrated” by her childcare responsibilities.<sup>181</sup> And Margaret Earle, whose live-in boyfriend at the time later confessed to perpetrating the violence that killed her young daughter and was sentenced to life in prison,

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<sup>175</sup> See Maurice Possley, *Tammy Smith*, NAT’L REGISTRY EXONERATIONS (Jan. 23, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4354> [hereinafter *Tammy Smith*]; see also J. M. Norvilitis et al., *Courtesy Stigma in Mothers of Children with Attention-Deficit/Hyperactivity Disorder: A Preliminary Investigation*, 6 J. ATTENTION DISORDERS 61, 61, 65 (2002) (describing courtesy stigma).

<sup>176</sup> *Tammy Smith*, *supra* note 175 (internal quotation marks omitted).

<sup>177</sup> See *Butler v. State*, 608 So. 2d 314, 315, 317–18 (Miss. 1992); Maurice Possley, *Sabrina Butler*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3078> (last visited Apr. 17, 2015).

<sup>178</sup> *Harris v. Thompson*, 698 F.3d 609, 614 (7th Cir. 2012); *Butler*, 608 So. 2d at 316–17; *Nicole Harris*, *supra* note 41.

<sup>179</sup> Maurice Possley, *Michelle Murphy*, NAT’L REGISTRY EXONERATIONS (Sept. 20, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4504>.

<sup>180</sup> *Julie Rea*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3278> (last visited Apr. 17, 2015).

<sup>181</sup> Maurice Possley, *Kimberly Mawson*, NAT’L REGISTRY EXONERATIONS (Aug. 21, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4243>.

was co-convicted of the murder in a separate trial and also given a life sentence for “failing to promptly seek medical treatment,” despite evidence that she had done so.<sup>182</sup>

## 2. Mothers Held Responsible for Others’ Crimes

What is particularly striking about these cases is how readily criminal justice officials’ tunnel vision narrows in on mothers in attributing blame when a child is harmed or killed, even, as in Earle’s case, when the actual perpetrator has confessed.<sup>183</sup> Three cases that are not in the NRE—Tabitha Pollock, Molly Bowers,<sup>184</sup> and Raquel Nelson—provide additional evidence of the power and extremes of mother blaming in women’s wrongful convictions. These cases do not meet the definitional criteria for inclusion in the NRE,<sup>185</sup> and in fact appear to be the tip of the iceberg in miscarriages of justice against mothers resulting from the gendered usage of failure-to-protect laws. Though designed as a mechanism to respond to child abuse, “the application of [these] laws is anything but gender-neutral: Defendants charged and convicted with failure to protect are almost exclusively female.”<sup>186</sup> Indeed,

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<sup>182</sup> Maurice Possley, *Margaret Earle*, NAT’L REGISTRY EXONERATIONS (Feb. 23, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4381> [hereinafter *Margaret Earle*].

<sup>183</sup> *Id.* We came across very few cases in the NRE in which fathers or male partners were also implicated when women were wrongfully convicted of harm to their child. Teresa Engberg-Lehmer and her husband both pleaded guilty to manslaughter in an SBS case. See Maurice Possley, *Teresa Engberg-Lehmer*, NAT’L REGISTRY EXONERATIONS (July 29, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3952>. Debbie Loveless and her common-law husband were both convicted of murder after their four-year-old daughter died, though the prosecutor’s theory of the crime was that her partner was the actual killer. Maurice Possley, *Debbie Loveless*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3393> (last updated Feb. 11, 2015). The only other cases in which both partners were implicated, if not wrongfully convicted, were three CSA cases (Emmaline Williams and her husband; Mary Ann Elizondo and her second husband, who were implicated by her first husband in retaliation for their marriage; and Pamela Sue Reser, whose boyfriend was also accused of sexual abuse by her children, though charges against him were dropped). See Maurice Possley, *Emmaline Williams*, NAT’L REGISTRY EXONERATIONS (July 3, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4463>; *Mary Ann Elizondo*, *supra* note 146; Maurice Possley, *Pamela Sue Reser*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3571> (last visited Apr. 17, 2015).

<sup>184</sup> At the time of her conviction, Bowers went by her married name, Midyette. Heath Urie, *Mother: Molly Midyette a Victim of “Broken Legal System,”* BOULDER DAILY CAMERA, Dec. 7, 2011, available at 2011 WLNR 25449054. She has since divorced and retaken her original family name, thus this is how we refer to her here. *Id.*

<sup>185</sup> See Findley, *supra* note 71, at 1159–60; *supra* text accompanying notes 70–71.

<sup>186</sup> Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 274 (2001); see Brenda M. Ewen, *Failure to Protect Laws: Protecting Children or Punishing Mothers?*, 3 J. FORENSIC NURSING 84, 85 (2007).

gender disparities in failure-to-protect prosecutions are so extreme that they cannot simply be explained by women's greater likelihood to be primary caregivers.<sup>187</sup>

Molly Bowers was convicted in 2007 of reckless child abuse resulting in death and sentenced to sixteen years in a Colorado state prison for the death of her ten-week-old son, Jason.<sup>188</sup> The prosecution's case was that Bowers had failed to seek out timely medical care, which resulted in the baby's death,<sup>189</sup> and not that she had abused the infant herself.<sup>190</sup> Instead, her husband at the time, who spent more time at home with the baby, was charged with the actual abuse.<sup>191</sup> Prosecutors have been criticized for using gendered arguments in attempting to show that Bowers was poorly bonded to her son.<sup>192</sup> For example, during a hearing regarding her appeal these attorneys cited the fact that, during her pregnancy, Bowers had engaged in social events outside of the home before the baby's nursery was fully decorated.<sup>193</sup> They also questioned her practice of doing yoga videos in her home after Jason was born.<sup>194</sup> At the trial, the prosecutor argued: "If she didn't know [of the infant's injuries], why didn't she know? . . . Mothers can read the different cries of their babies. They know everything about their baby . . . . She has shown no remorse for her inaction. Not once has she stood up and said, 'I should have done something.'"<sup>195</sup> Yet, in another Colorado case, Stephanie Rochester, who suffered from an acute case of postpartum depression, killed her six-month-old son in 2010.<sup>196</sup> The baby's father was not charged, even though he was aware of his wife's condition and was home at the time of the incident.<sup>197</sup>

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<sup>187</sup> Fugate, *supra* note 186, at 274. For a thoughtful analysis of the gendered and raced cultural underpinnings of failure to protect, see Carney, *supra* note 25, at 186–87.

<sup>188</sup> Tom McGhee, *16 Years for Boulder Mom in Baby Death*, DENVER POST (Apr. 17, 2008), [http://www.denverpost.com/outdoors/ci\\_8958444?source=pkg](http://www.denverpost.com/outdoors/ci_8958444?source=pkg).

<sup>189</sup> *People v. Midyette*, No. 07 CR 919, slip op. at 1 (Colo. Dist. Ct. Nov. 21, 2011).

<sup>190</sup> See Felisa Cardona, *Tiny Life "Filled with Pain": Alex Midyette's 76-Day-Old Son Died with Multiple Broken Bones*, DENVER POST, Jan. 18, 2009, at B1 (noting that the prosecution's case led to the conviction of Midyette for failing to seek medical help, which the prosecution claimed resulted in her child's death from his injuries).

<sup>191</sup> See Felisa Cardona, *Alex Midyette Gets 16 Years in Neglect of Dying Baby Son*, DENVER POST, May 16, 2009, at B1.

<sup>192</sup> See McGhee, *supra* note 188.

<sup>193</sup> See Midyette, No. 07 CR 919, slip op. at 5.

<sup>194</sup> Joanne Belknap, *Guest Commentary: Justice for Molly Bowers*, BOULDER DAILY CAMERA, Nov. 20, 2011, available at 2011 WLNR 24088674.

<sup>195</sup> McGhee, *supra* note 188 (internal quotation marks omitted).

<sup>196</sup> See Vanessa Miller, *Police: Stephanie Rochester Feared Son Had Autism, Admitted She Put Blankets, Plastic Bag over Baby's Head*, BOULDER DAILY CAMERA, June 7, 2010, available at 2010 WLNR 11649952.

<sup>197</sup> See *id.*; Howard Pankratz, *Coroner: Superior Boy Died of Suffocation*, DENVER POST,

As striking with regard to Bowers's case, a year after her conviction her husband, Alex Midyette, was found guilty of the lesser charge of criminally negligent abuse when jurors split over the charge of reckless child abuse.<sup>198</sup> Midyette's defense presented expert witnesses who countered the prosecution's theory of abuse by suggesting that the infant had died of a rare metabolic disorder. In addition, defense attorneys argued that there was no outward sign of trauma to the baby, who died with more than thirty broken bones and a skull fracture.<sup>199</sup> Several of the jurors in Midyette's trial were swayed by these arguments, though Bowers herself did not benefit from them.<sup>200</sup> Ironically, her conviction rested on the assumption that she had neglected to seek help when her husband abused the baby<sup>201</sup>—though the basis for this assumption was never proven in court.<sup>202</sup> Midyette was never convicted of physically harming Jason, only of neglecting him.<sup>203</sup>

The tunnel vision that led prosecutors to pursue their case against Bowers, even in the absence of a conviction for Midyette, is equally evident in the wrongful conviction of Tabitha Pollock. When Pollock's boyfriend, Scott English, killed her three-year-old daughter, Pollock was convicted and sentenced to thirty-six years in prison based on the assumption that she "should have known" English was a threat.<sup>204</sup> As for English, he immediately became a

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July 29, 2010, at B2.

<sup>198</sup> Cardona, *supra* note 191, at B1.

<sup>199</sup> *Id.*

<sup>200</sup> *See id.*

<sup>201</sup> McGhee, *supra* note 188.

<sup>202</sup> *See* Joel Warner, *Molly Midyette, a Mother Sentenced to Sixteen Years for the Death of Her Son, Speaks Out*, WESTWORD (Apr. 7, 2011), <http://www.westword.com/2011-04-07/news/molly-midyette-speaks-out/full/>.

<sup>203</sup> McGhee, *supra* note 188. Legally, Bowers was not wrongfully convicted nor has she been exonerated. Her appeals and request for a retrial were denied, and she spent five years in prison. *See* *People v. Midyette*, No. 07 CR 919, slip op. at 14 (Colo. Dist. Ct. Nov. 21, 2011). Her case is nonetheless useful for our purposes here; it illustrates the limitations in our knowledge of the extent of wrongful convictions due to the application of a strict legal definition. For example, in comparing her case with that of Tabitha Pollock and Margaret Earle, where do the differences lie? Earle's conviction was for homicide—an extreme application of failure-to-protect—and her trial attorney had failed to present some of the evidence that Earle had continued to seek medical attention for her daughter. *Margaret Earle*, *supra* note 182. Yet her boyfriend, and Pollock's, were both convicted of the homicides that killed their children; Alex Midyette, Bowers's then husband, was not. Cardona, *supra* note 191; *Margaret Earle*, *supra* note 182. That Earle's case resulted in an exoneration (through a reversal of conviction and dismissed charges), Pollock's is widely recognized as a wrongful conviction but does not meet the NRE threshold because the charges were never dismissed, and Bowers's case does not meet these criteria, shows the difficulties in defining and counting wrongful convictions. *See* Findley, *supra* note 71, at 1158–60 (discussing the definition of exoneration versus innocence).

<sup>204</sup> *Stories of the Exonerees: Tabitha Pollock*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL

suspect based on his self-incriminating statements;<sup>205</sup> nevertheless, officials continued to focus on Pollock.<sup>206</sup> The cause of the child's death was never seriously under investigation, as it was in the Bowers case, and neither was the identity of the perpetrator.<sup>207</sup> Scott English was tried by jury, found guilty of first degree murder and aggravated battery, and sentenced to life in prison.<sup>208</sup> At Pollock's 1996 trial, the State argued that "[s]he should have known. She should have done something. . . . [S]he's as guilty as Scott English of murder and aggravated battery of a child."<sup>209</sup> The prosecution sought life in prison for Pollock, but the judge would not allow it.<sup>210</sup> Pollock served seven years of her sentence before the Illinois Supreme Court unanimously overturned her conviction.<sup>211</sup> Shortly thereafter, a commentator pondered "whether some judges, prosecutors and communities ask too much of mothers and are prepared to punish them, even at the expense of the surviving family."<sup>212</sup> Indeed, during Pollock's incarceration she was separated from her remaining children, one of whom was adopted by another family.<sup>213</sup>

Bowers and Pollock, like Margaret Earle, were held accountable for abuse that their intimate partners inflicted (or were presumed to have inflicted). Mothers have been held accountable for death and injury inflicted by strangers outside the home as well. In 2010, Raquel Nelson, an African American mother of three, got off the bus with her children directly across the street from the apartment complex where they lived in Marietta, Georgia.<sup>214</sup> The bus stop was positioned one-third mile from the closest crosswalk,<sup>215</sup> meaning she would have had to walk well over half a mile out of her way (there and back) with three children and an armload of shopping bags. As other pedestrians crossed from the bus stop, jaywalking, Nelson did

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CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/tabitha-pollock.html> (last visited Apr. 17, 2015).

<sup>205</sup> *People v. Pollock*, 708 N.E.2d 669, 677–78 (Ill. 2002).

<sup>206</sup> *See id.* at 679.

<sup>207</sup> *Id.* at 674.

<sup>208</sup> *Id.* at 678–79.

<sup>209</sup> *Id.* at 680.

<sup>210</sup> Adam Liptak, *Judging a Mother for Someone Else's Crime*, N.Y. TIMES, Nov. 27, 2002, at A17.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Radley Balko, *Grieving Mother Faces 36 Months in Jail for Jaywalking After Son Is Killed by Hit-and-Run Driver*, HUFFPOST CRIME (July 21, 2011), [http://www.huffingtonpost.com/radley-balko/raquel-nelson-jail-for-jaywalking\\_b\\_905925.html](http://www.huffingtonpost.com/radley-balko/raquel-nelson-jail-for-jaywalking_b_905925.html).

<sup>215</sup> *Id.*

too, wrapping the plastic shopping bags around her wrist so she could hold her children's hands.<sup>216</sup> When her nine-year-old daughter crossed ahead of Nelson and her two toddlers, four-year-old A.J. broke free from his mother, entered the roadway, and Nelson ran after him.<sup>217</sup> She and both younger children were struck by a hit-and-run driver, and A.J. was killed.<sup>218</sup>

Nelson faced an all-white jury who almost never utilized public transportation.<sup>219</sup> She was convicted of reckless conduct, improperly crossing a roadway, and second degree homicide by vehicle for jaywalking, which carried a possible sentence of three years.<sup>220</sup> The driver, who had fled the scene, admitted that he had consumed alcohol that day as well as oxycodone.<sup>221</sup> In addition, he had glaucoma in his left eye—the same side that the pedestrians were crossing from—and had two other hit-and-runs on his record.<sup>222</sup> He further stated that he did not know he had struck anyone, thinking instead that the three individuals he struck had been a post on the side of the road.<sup>223</sup> The driver pleaded guilty and served six months of a five-year sentence.<sup>224</sup> Nelson was sentenced to forty hours of community service and twelve months of probation.<sup>225</sup> Had she received the maximum sentence, she could have served more time in prison than the driver. In a similar Georgia case, Altamesa Walker's four-year-old daughter was killed while jaywalking, and that driver was not even charged.<sup>226</sup> Walker, who is also African American, faced trial for involuntary manslaughter and reckless conduct.<sup>227</sup>

### 3. Domestic Crime Scenarios Involving Intimate Partner Abuse

Though the majority of women's wrongful convictions in domestic crime scenarios involved children (27 of 45, or 60%),<sup>228</sup> a sizeable

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<sup>216</sup> *Id.*

<sup>217</sup> Marcus K. Garner, *Cobb County: Mom in Hit-Run Loses Appeal*, ATL. J.-CONST., Sept. 8, 2012, at 1B.

<sup>218</sup> *Id.*

<sup>219</sup> Balko, *supra* note 214.

<sup>220</sup> *Id.*

<sup>221</sup> *Nelson v. State*, 731 S.E.2d 770, 773 n.3 (Ga. Ct. App. 2012).

<sup>222</sup> *Id.*; Balko, *supra* note 214.

<sup>223</sup> *Nelson*, 731 S.E.2d at 773.

<sup>224</sup> Balko, *supra* note 214.

<sup>225</sup> *Nelson*, 731 S.E.2d at 772 n.1.

<sup>226</sup> Ralph Ellis, *Jaywalkers Take Deadly Risks*, ATL. J.-CONST., May 4, 2010, at A1.

<sup>227</sup> *Id.*

<sup>228</sup> See *supra* Figure 7; *supra* note 146; see also *supra* note 138 (explaining authors' dataset for domestic crime scenarios).

number involved intimate partners as the victims or presumed victims (14 of 45, or 31%),<sup>229</sup> and the remainder other adult family members (4 of 45, or 9%).<sup>230</sup> All of the women's wrongful convictions in the NRE for crimes against intimate partners were homicides.<sup>231</sup> Surprisingly, only four of these female exonerees had been convicted for self-defensive acts against violent partners or former partners.<sup>232</sup> These included Teresa Thomas, an African American woman who shot her live-in boyfriend in self-defense after enduring months of extremely violent and psychologically controlling abuse.<sup>233</sup> Official misconduct contributed to Thomas's wrongful conviction as well as that of Sandra Ortiz, whose prosecutor argued that her "calm tone" in the 911 call was evidence that the killing was intentional.<sup>234</sup> This interpretation of Ortiz's demeanor parallels criminal justice actors' responses to sexual assault victims, with emotional responses not in keeping with criminal justice actors' expectations used to discredit victims' accounts.<sup>235</sup> In the case of Abere Karibi-Ikiriko, an African American woman, the trial judge excluded a series of correspondence from her boyfriend "showing that he was so desperate to resume their relationship that he was willing to force himself upon her [sexually] at gunpoint," which is what happened on the night of his shooting.<sup>236</sup> Finally, Carol Stonehouse, a white police officer, shot a man she had briefly dated three years earlier, a fellow police officer, after years of extensive "abuse that included death threats, slashed tires, break-ins and stalking."<sup>237</sup> When the

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<sup>229</sup> See *supra* note 138.

<sup>230</sup> See *supra* note 138.

<sup>231</sup> See *supra* note 138. This includes twelve murder convictions and two manslaughter convictions. See *supra* note 138.

<sup>232</sup> See *supra* note 138.

<sup>233</sup> Maurice Possley, *Teresa Thomas*, NAT'L REGISTRY EXONERATIONS (Mar. 21, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4124> [hereinafter *Teresa Thomas*].

<sup>234</sup> *Sandra Ortiz*, *supra* note 146; *Teresa Thomas*, *supra* note 233. Other misconduct in these two cases included failing to provide adequate instructions to the jury about battered women's syndrome, making improper comments, and remarking on the defendant's choice not to testify. *Sandra Ortiz*, *supra* note 146; *Teresa Thomas*, *supra* note 233.

<sup>235</sup> For an excellent overview of the neurobiology of trauma and its misinterpretation by police, see Rebecca Campbell, Professor of Psychology, Mich. State Univ., The Neurobiology of Sexual Assault at a National Institute of Justice Research for the Real World Seminar (Dec. 3, 2012), available at <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx>.

<sup>236</sup> Maurice Possley, *Abere Karibi-Ikiriko*, NAT'L REGISTRY EXONERATIONS (July 11, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4221> [hereinafter *Abere Karibi-Ikiriko*].

<sup>237</sup> Maurice Possley, *Carol Stonehouse*, NAT'L REGISTRY EXONERATIONS (Mar. 11, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4117> [hereinafter *Carol Stonehouse*].

Pennsylvania Supreme Court reversed her conviction, it noted that “colleagues in the police department did little to protect [Stonehouse] from Welsh’s surveillance, harassment, acts of vandalism and assaults” despite her calls for assistance and reports to internal affairs.<sup>238</sup> Stonehouse’s case therefore reveals how insidious criminal justice biases can be, even prior to the incident for which she was wrongfully convicted of murder. This is an example of what sociologist Patricia Yancey Martin calls “mobilizing masculinities” in the workplace, by refusing to hold their fellow officer accountable to the laws they were charged with upholding.<sup>239</sup>

There is an extensive body of research on the problem of convicting battered women who kill in self-defense, and thus compelling evidence of a sizeable group of women likely wrongfully convicted but underrepresented among those who have been exonerated.<sup>240</sup> Instead, advocacy for such women often takes the form of seeking clemency, rather than exoneration.<sup>241</sup> The handful of cases in the NRE share many similarities with these cases of women whose convictions were never overturned, with similar evidence of domestic abuse precipitating the killing.<sup>242</sup>

An ongoing case—which is therefore not in the NRE—merits attention here as well, as it reflects both the lack of empathy for battered women, but also parallels the Molly Bowers case described

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<sup>238</sup> *Id.*

<sup>239</sup> See Patricia Yancey Martin, *Mobilizing Masculinities: Women’s Experiences of Men at Work*, 8 ORG. 587, 588–89, 598 (2001). Because criminal justice organizations have long been male-dominated, they may be especially prone to such practices. See DANA M. BRITTON, *AT WORK IN THE IRON CAGE: THE PRISON AS GENDERED ORGANIZATION* 12, 14, 18 (2003) (discussing mobilizing masculinities in other criminal justice organizations); Steve Herbert, *‘Hard Charger’ or ‘Station Queen’? Policing and the Masculinist State*, 8 GENDER, PLACE & CULTURE 55, 59, 61 (2001) (discussing mobilizing masculinities in policing).

<sup>240</sup> See ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 27–32 (2002); CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 12–13 (1989); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 113–14, 146 (2000).

<sup>241</sup> The first prominent instance of this was in 1990 when then-Governor Richard Celeste granted clemency to over a dozen such women in Ohio. See Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1. For more recent examples of this movement, see ILL. CLEMENCY PROJECT, <http://clemencyproject.com> (last visited Apr. 17, 2015); MICH. WOMEN’S JUSTICE & CLEMENCY PROJECT, <http://www.umich.edu/~clemency/> (last visited Apr. 17, 2015). For a critique of this strategy as “a remedy that is used arbitrarily, sparingly and sometimes begrudgingly,” see Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women*, *A Decade’s Review*, 11 AM. U. J. GENDER SOC. POL’Y & L. 533, 565 (2003).

<sup>242</sup> Compare *supra* note 241 (describing cases involving women who experienced intense domestic abuse), with *Abere Karibi-Ikiriko*, *supra* note 236, *Carol Stonehouse*, *supra* note 237, *Sandra Ortiz*, *supra* note 146, and *Teresa Thomas*, *supra* note 233 (each noting the extensive abuse these women suffered prior to killing their partners or former partners in self-defense).

earlier: the conviction of a woman based on a theory of the crime not held to be legally factual. Michelle Byrom was scheduled for execution on March 27, 2014, for the 1999 murder of her abusive husband and would have been the first woman in seventy years to be executed by the State of Mississippi.<sup>243</sup> After decades of denials,<sup>244</sup> the state supreme court's response to the attorney general's request for approval of the execution date was unexpected; instead of granting the execution, it unanimously issued a reversal of her conviction.<sup>245</sup> Her retrial has been rescheduled for September 1, 2015.<sup>246</sup>

Byrom was first questioned by police about the shooting death of her husband while hospitalized for ingesting rat poison.<sup>247</sup> The Byroms met when Michelle Byrom was a fifteen-year-old runaway from an abusive home working as an underage stripper and Edward Byrom was a thirty-one-year-old bachelor.<sup>248</sup> When Michelle Byrom was eighteen, Edward and she had a son, Edward Byrom Jr.—known as Junior—and the couple married when Junior was age five.<sup>249</sup> On the day his father was killed, Junior was nineteen years

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<sup>243</sup> Ronni Mott, *An Innocent Woman? Michelle Byrom vs. Mississippi*, JACKSON FREE PRESS (Mar. 19, 2014), <http://www.jacksonfreepress.com/news/2014/mar/19/innocent-woman-michelle-byrom-vs-mississippi/>.

<sup>244</sup> Byrom's direct appeal to the Mississippi Supreme Court in 2003 raised fifteen claims of error which the court rejected. *See* *Byrom v. State*, 863 So. 2d 836 (Miss. 2003). In 2006, the court denied her application for postconviction relief. *Byrom v. State*, 927 So. 2d 709, 730 (Miss. 2006). In 2011, the U.S. District Court for the Northern District of Mississippi denied her petition for habeas relief. *Byrom v. Epps*, 817 F. Supp. 2d 868, 917 (N.D. Miss. 2011), *aff'd*, 518 F. App'x. 243 (5th Cir. 2013). In 2013, the Fifth Circuit denied habeas relief. *Byrom v. Epps*, 518 F. App'x. 243, 263 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1275 (2014). The U.S. Supreme Court denied her petitions for writ of certiorari three separate times. *See* Response in Opposition to Motion for Leave to File Successive Petition for Post-Conviction Relief at 3, 5, *Byrom v. State*, No. 2014-DR-00230-SCT (Miss. Mar. 3, 2014) [hereinafter Response in Opposition to Motion for Leave].

<sup>245</sup> *Byrom v. State*, No. 2014-DR-00230-SCT, 2014 Miss. LEXIS 185, at \*1 (Miss. Apr. 3, 2014) (en banc); Donna Ladd, *Miss. Supreme Court Reverses Michelle Byrom's Conviction, Delays Second Execution*, JACKSON FREE PRESS (Mar. 31, 2014), <http://www.jacksonfreepress.com/news/2014/mar/31/miss-supreme-court-reverses-michelle-byroms-convic/>.

<sup>246</sup> Jerry Mitchell, *Michelle Byrom: Off Death Row, Back on Trial*, CLARION-LEDGER (Jan. 17, 2015), <http://www.clarionledger.com/story/news/2015/01/17/michelle-byrom-death-row-back-trial/21940253/>.

<sup>247</sup> Michelle Byrom's Motion for Leave to File Successive Petition for Post-Conviction Relief at 58, *Byrom*, No. 2014-DR-00230-SCT (Miss. Feb. 24, 2014) [hereinafter Motion for Leave]. When investigators began questioning Byrom, she was receiving medications including muscle relaxers, sleeping pills, and pain medication. *Id.* In addition, she was not properly informed of her rights. *See* Response in Opposition to Motion for Leave, *supra* note 244, at 57.

<sup>248</sup> Brief for Nat'l Clearinghouse for the Def. of Battered Women as Amicus Curiae in Support of Petitioner at 8, *Byrom v. Epps*, 134 S. Ct. 1275 (2014) (No. 13-5998) [hereinafter Brief for Nat'l Clearinghouse for the Def. of Battered Women].

<sup>249</sup> *Id.*

old.<sup>250</sup> It is indisputable that he played a role in his father's death. At different times and to different people, he confessed with varying degrees of culpability.<sup>251</sup> To a court-appointed psychologist and in letters to his mother he took sole responsibility.<sup>252</sup> To the courts and to the police he would admit only to having helped his mother plan a murder-for-hire scheme by providing the weapon to his friend Joey Gillis and helping him dispose of it.<sup>253</sup> Junior led police to the murder weapon and gunshot residue was found on Junior's palms but not Gillis's.<sup>254</sup>

Byrom, seemingly in an effort to protect her son, implicated Gillis as well as herself.<sup>255</sup> From her tape-recorded interrogation sessions over the next four days police can be heard repeatedly playing upon her loyalty to her son by warning her that he would "take the rap"<sup>256</sup> and "bite the big bullet"<sup>257</sup> and saying, "Don't let him be out there by himself on this. . . . And I can tell you, you are trying to leave him out there by himself."<sup>258</sup> Though Byrom initially denied involvement in the crime, eventually she confessed that she intended to pay Gillis from her husband's life insurance proceeds.<sup>259</sup> All three were indicted for capital murder.<sup>260</sup> However, during an evaluation of their competency to stand trial, Junior confessed to the court-appointed psychologist that he had killed his father for his own personal reasons—he was tired of the physical and emotional abuse—and not as part of any larger financial scheme.<sup>261</sup> In the course of these interviews, both he and Gillis stated that Gillis had only helped him dispose of the weapon after the shooting.<sup>262</sup> While the psychologist revealed this to the trial judge, neither shared it with Michelle Byrom's defense<sup>263</sup> and the psychologist's official report to the court did not mention it.<sup>264</sup>

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<sup>250</sup> See *id.*; Motion for Leave, *supra* note 247, at 11.

<sup>251</sup> Motion for Leave, *supra* note 247, at 13, 17–18.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 12.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 11 (internal quotation marks omitted).

<sup>257</sup> Response in Opposition to Motion for Leave, *supra* note 244, at 57 (internal quotation marks omitted).

<sup>258</sup> Motion for Leave, *supra* note 247, at 59 (internal quotation marks omitted).

<sup>259</sup> *Id.* at 11–12.

<sup>260</sup> *Id.* at 8.

<sup>261</sup> See *id.* at 3.

<sup>262</sup> See *id.* at 3–4, 21.

<sup>263</sup> *Id.* at 4.

<sup>264</sup> Andrew Cohen, *Why Does Mississippi Want to Execute Michelle Byrom?*, ATLANTIC (Mar. 24, 2014), <http://www.theatlantic.com/national/archive/2014/03/why-does-mississippi-w>

Byrom disclosed a history of physical and sexual abuse at the hands of her stepfather and then her husband, who made her have sex with other people while he videotaped.<sup>265</sup> A psychiatrist retained by the defense diagnosed Byrom with “borderline personality disorder, depression, alcohol dependence, and Munchausen syndrome, which caused her to deliberately make herself sick.”<sup>266</sup> At trial, the defense presented the psychiatrist’s report, but failed to call him, or any other witnesses who might have corroborated Byrom’s history of abuse, to testify.<sup>267</sup> In the absence of such evidence the prosecution freely presented Byrom as a spoiled housewife, with a hardworking husband,<sup>268</sup> who developed Munchausen syndrome as a way of manipulating people’s sympathies—just as she manipulated the psychiatrist into believing that she was mentally ill.<sup>269</sup> She was a “cold-blooded” calculator, just after her husband’s money.<sup>270</sup> The prosecutor argued: “[I]f she has Munchausen, she has exploited that to the nth degree . . . to get whatever attention she could.”<sup>271</sup> In truth, Byrom’s illness allowed her to escape her husband’s abuse temporarily. For three years, she ingested rat poison in order to find respite in the hospital.<sup>272</sup>

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ant-to-execute-michelle-byrom/284577/.

<sup>265</sup> Brief for Nat’l Clearinghouse for the Def. of Battered Women, *supra* note 248, at 7–8.

<sup>266</sup> Motion for Leave, *supra* note 247, at 16.

<sup>267</sup> Brief for Nat’l Clearinghouse for the Def. of Battered Women, *supra* note 248, at 4. In addition, Junior downplayed the violence in his testimony as a State’s witness at his mother’s trial. In return for his testimony, he was offered a plea agreement to conspiracy to commit murder. *See id.* at 6. He denied that his mother was mentally ill, and denied that his father ever hit her, admitting only that his father occasionally “grabbed her and slung her around.” *Id.* at 6–7. But while Junior denied the full extent of abuse at trial, he wrote about it in detail in his letters to his mother in jail. In these letters, which the defense possessed, Junior confesses to acting alone: “Mom, I’m gonna tell you right now who killed dad, cause I’m sick and tired of all the lies. I did, and it wasn’t for money, it wasn’t for all the abuse to me, it was because I can’t kill myself.” *Edward Jr. Ltr 1*, JACKSON FREE PRESS, <http://www.jacksonfreepress.com/documents/2014/mar/19/edward-jr-ltr-1/> (last visited Apr. 17, 2015). In a subsequent letter, he tells the full story in detail. He writes of being shoved and slapped by his father, and called, “bastard, no good, mistake.” *Edward Jr. Ltr 2*, JACKSON FREE PRESS, <http://www.jacksonfreepress.com/documents/2014/mar/19/edward-jr-ltr-2/> (last visited Apr. 17, 2015). “I sat on my bed, tears of rage flowing, remembering my childhood, my anger kept building and building, and I went to my car, got the 9mm, and walked to his room, peeked in, and he was asleep. I walked about 2 steps in the door, and screamed, and shut my eyes, when I heard him move, I started firing.” *Id.* Byrom’s defense attorneys inexplicably concealed these letters from prosecutors during the discovery process so they could admit them as impeachment evidence to cross examine Junior at trial, but the court would not allow it. Motion for Leave, *supra* note 247, at 5.

<sup>268</sup> *See* Brief for Nat’l Clearinghouse for the Def. of Battered Women, *supra* note 248, at 11.

<sup>269</sup> *See id.* at 12.

<sup>270</sup> Motion for Leave, *supra* note 247, at 67.

<sup>271</sup> Brief for Nat’l Clearinghouse for the Def. of Battered Women, *supra* note 248, at 12.

<sup>272</sup> *Id.* at 8. In addition, during sentencing, the defense sought to portray Byrom as a victim of abuse, yet again offered no corroboration. Motion for Leave, *supra* note 247, at 16.

Though evidence of Junior's confession was not introduced in Byrom's trial, the court-appointed psychiatrist disclosed this information to Gillis's attorneys and Gillis "was allowed to plead guilty to charges of 'accessory after the fact' and conspiracy to commit murder."<sup>273</sup> It is now widely recognized that "even the prosecution does not now believe that Gillis was the triggerman who killed Edward Byrom, Sr."<sup>274</sup> The State's position, as understood through the treatment of the three defendants in this case, rejected the murder-for-hire scenario for one defendant; allowed the confessed killer to plead guilty to lesser charges than what he admitted to and what the evidence showed; and yet upheld the murder-for-hire scenario for Byrom, framing her as the cold-blooded, manipulative "mastermind" behind her husband's death.<sup>275</sup>

Like Molly Bowers—convicted for failing to seek help when her husband abused their baby despite his avoidance of a conviction for doing so<sup>276</sup>—Byrom's conviction rests on a narrative at odds with other facts of the case. The failures in Byrom's case—as well as those few NRE cases involving violent intimate partners as the victims or presumed victims—each have an undercurrent in which the practices of criminal justice personnel reflect a perspective shared with commentator Andy Rooney, who infamously claimed that the first large-scale clemency of battered women had "declared open season on" men.<sup>277</sup> This, we would argue, is its own form of tunnel vision, premised on an androcentric understanding of intimate partner violence and male privilege. The limited number of battered women who have been exonerated in such cases, with clemency as the primary strategy for postconviction relief, likewise reflects an important gendered feature of miscarriages of justice more broadly.

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The prosecutor repeated several times that Byrom "had every opportunity to leave." Brief for Nat'l Clearinghouse for the Def. of Battered Women, *supra* note 248, at 11. This statement might have been directly contradicted by the psychiatrist who interviewed Byrom and knew that her prior attempts to leave had resulted in her husband's threats to kill her, or have someone else kill her, if she tried again. *Id.* at 22. According to Byrom, she had tried to leave three times and each time he had found her, beaten her, and brought her back. *Id.* In a 2013 affidavit, the psychiatrist explained how he would have testified, had he been called, finding: "[S]he was psychologically unable to leave the abusive relationship with her husband . . . ." Mott, *supra* note 243.

<sup>273</sup> Motion for Leave, *supra* note 247, at 2–3, 5.

<sup>274</sup> *Id.* at 2.

<sup>275</sup> *See id.* at 9–10, 25; Mott, *supra* note 243.

<sup>276</sup> *See supra* text accompanying notes 188–91, 198–203.

<sup>277</sup> Ammons, *supra* note 241, at 544 (quoting Andy Rooney, *Celeste Declares Open Season on Ohio Men*, COLUMBUS DISPATCH, Dec. 28, 1990, at 11A).

#### 4. Other Domestic Crime Scenarios Involving Intimate Partners and Adult Family

Ten additional cases in the NRE were women's exonerations for killing their intimate or former intimate partners.<sup>278</sup> Four of these involved actual murders in which the woman was wrongly identified as the perpetrator,<sup>279</sup> four were men's suicides that were misclassified as homicides,<sup>280</sup> one was an apparent natural death,<sup>281</sup> and the other was an accident.<sup>282</sup> Several of the homicide cases strain credulity. Susan King, for example, was convicted of manslaughter through an *Alford* plea ten years after her on-again, off-again boyfriend was shot twice in the head and dumped over the railing of a bridge into the river.<sup>283</sup> A great deal of false forensic evidence convinced a grand jury to overlook the fact that she weighed only ninety-seven pounds and was missing one leg, making it improbable at best that she could have transported and lifted the 180-pound victim over the guardrail.<sup>284</sup> Mechelle Linehan was convicted of murder for hire based on circumstantial evidence, including false testimony that Linehan had been inspired by a movie called *The Last Seduction*, which featured a female protagonist who manipulated a man into killing her husband for his

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<sup>278</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>279</sup> Maurice Possley, *Elicia Hughes*, NAT'L REGISTRY EXONERATIONS (July 19, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4226>; Maurice Possley, *Susan King*, NAT'L REGISTRY EXONERATIONS (Oct. 11, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4517> [hereinafter *Susan King*]; Maurice Possley, *Mechelle Linehan*, NAT'L REGISTRY EXONERATIONS (Jan. 10, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4088> [hereinafter *Mechelle Linehan*]; *Lisa Roberts*, *supra* note 142.

<sup>280</sup> Stephanie Denzel, *Virginia LeFever*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3378> (last updated Sept. 28, 2014) [hereinafter *Virginia LeFever*]; *Beverly Monroe*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3482> (last visited Apr. 17, 2015) [hereinafter *Beverly Monroe*]; Stephanie Denzel, *Fredda Susie Mowbray*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3495> (last visited Apr. 17, 2015) [hereinafter *Fredda Susie Mowbray*]; Maurice Possley, *Carolyn June Peak*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3528> (last visited Apr. 17, 2015) [hereinafter *Carolyn June Peak*].

<sup>281</sup> See Stephanie Denzel, *Cynthia Sommer*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3652> (last updated Jan. 24, 2014) [hereinafter *Cynthia Sommer*].

<sup>282</sup> Maurice Possley, *Leona Pettit*, NAT'L REGISTRY EXONERATIONS (June 22, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4194> [hereinafter *Leona Pettit*].

<sup>283</sup> *King v. Commonwealth*, No. 2012-CA-001985-MR, 2014 WL 3547480, at \*1 (Ky. Ct. App. 2014); *Susan King*, *supra* note 279.

<sup>284</sup> See *Susan King*, *supra* note 279.

life insurance.<sup>285</sup> Here, the State's characterization of Linehan as a *femme fatale*—a longstanding gendered trope in crime fiction<sup>286</sup>—successfully led to her conviction.<sup>287</sup> In addition, the victim's continued pursuit of a relationship with Linehan was used as evidence against her at trial.<sup>288</sup>

King and Linehan, both white and heterosexual,<sup>289</sup> evidently fit different stereotypes than Lisa Roberts, an African American woman wrongfully convicted of killing her lesbian intimate partner.<sup>290</sup> The victim, a sex worker, had been found nude and strangled to death in a park<sup>291</sup>—a circumstance much more typical of the extreme risks faced by sex workers at the hands of predatory men.<sup>292</sup> Prosecutors did not disclose to Roberts's defense attorneys that male DNA had been found at the scene.<sup>293</sup> Later tests revealed the semen of two men, one of whom was a convicted sex offender who had reportedly harassed the victim and who was said to have a “predilection for choking women” during sex.<sup>294</sup> Roberts's case has important parallels with the street crime scenarios we turn to in the next section, for which African American women were disproportionately wrongfully convicted compared to their white female counterparts.<sup>295</sup> The twist in this case is that a crime typifying this scenario was instead attributed to the victim's domestic partner.

In addition, six women in the NRE—all white—were wrongfully convicted of homicide after losing an intimate partner or ex-partner

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<sup>285</sup> Linehan v. State, 224 P.3d 126, 129–30 (Alaska Ct. App. 2010).

<sup>286</sup> See JULIE GROSSMAN, RETHINKING THE FEMME FATALE IN FILM NOIR: READY FOR HER CLOSE UP 21 (2009).

<sup>287</sup> See Linehan, 224 P.3d at 129, 143–44.

<sup>288</sup> *Id.* at 134. Though Linehan's case makes no reference to intimate partner violence, the parallel with Carol Stonehouse's and Abere Karibi-Ikiriko's cases is worth drawing, as the use of this evidence against Linehan at trial suggests that it is the man's right to determine when and if to terminate an intimate relationship. Not surprisingly, research has found that women have a high risk for victimization after ending intimate relationships, based on the same underlying logic. See Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION & VIOLENT BEHAV. 514, 529 (2006).

<sup>289</sup> See Susan King, *supra* note 279; Mechelle Linehan, *supra* note 279.

<sup>290</sup> See Roberts v. Howton, 13 F. Supp. 3d 1077, 1082 (D. Or. 2014); Lisa Roberts, *supra* note 142.

<sup>291</sup> See Roberts, 13 F. Supp. 3d at 1082; Lisa Roberts, *supra* note 142.

<sup>292</sup> See Kathleen N. Deering et al., *A Systematic Review of the Correlates of Violence Against Sex Workers*, 104 AM. J. PUB. HEALTH 42, 42 (2014); John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 782, 784 (2004).

<sup>293</sup> Lisa Roberts, *supra* note 142.

<sup>294</sup> *Id.*

<sup>295</sup> See *infra* Part III.B.

to apparent suicide, or from an accident, or from natural causes.<sup>296</sup> Like incidents involving children, gendered narratives of the crime took hold in the minds of criminal justice actors. A detective, working on a hunch that Beverly Monroe had killed her boyfriend in a jealous rage despite initial reports of suicide, coerced her into making incriminating statements by “threaten[ing] that she would not be able to see her children if she was found guilty.”<sup>297</sup> Similarly, the prosecution in Virginia LeFever’s case presented her as a disgruntled divorcée with the help of a toxicologist who falsely characterized his credentials and insisted that the drug overdose LeFever’s husband died of could only mean that “someone had poisoned him.”<sup>298</sup> Cynthia Sommer’s wrongful conviction also rested on false forensic evidence.<sup>299</sup> Called “the ultimate ‘Desperate Housewife’” on CNN’s Nancy Grace, Sommer was widely condemned by the court of public opinion for appearing insufficiently grief stricken after her husband, a Marine, suddenly died.<sup>300</sup> Evidence admitted at trial included a breast augmentation shortly after her husband’s death, as well as her “partying” and joining an online dating site.<sup>301</sup> Later tests revealed no trace of the arsenic she was said to have used to poison her husband.<sup>302</sup>

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<sup>296</sup> *Virginia LeFever*, *supra* note 280; *Beverly Monroe*, *supra* note 280; *Fredda Susie Mowbray*, *supra* note 280; *Carolyn June Peak*, *supra* note 280; *Leona Pettit*, *supra* note 282; *Cynthia Sommer*, *supra* note 281.

<sup>297</sup> *Beverly Monroe*, *supra* note 280. Two additional cases profiled in the NRE (Cheryl Adams and Mary Mengloi) also involved the use of women’s children to secure false confessions. *Cheryl Adams*, *supra* note 140; *Mary Mengloi*, *supra* note 140. Both women were threatened with the loss of custody of their children unless they confessed to theft. *Cheryl Adams*, *supra* note 140; *Mary Mengloi*, *supra* note 140. These false confessions were each secured by loss prevention personnel where the women worked. *Cheryl Adams*, *supra* note 140; *Mary Mengloi*, *supra* note 140.

<sup>298</sup> *Virginia LeFever*, *supra* note 280.

<sup>299</sup> See *Cynthia Sommer*, *supra* note 281.

<sup>300</sup> *Nancy Grace* (CNN television broadcast Dec. 20, 2005). A sample of the dialogue on Nancy Grace provides evidence of the gendered nature of the condemnation for Sommer, as an investigative reporter explained:

This—this is the ultimate “Desperate Housewife,” Nancy. Come on! They should have written a show about this woman, if what cops believe about her is true. She allegedly had this plan to just off the guy, according to cops, allegedly, because she had four kids, didn’t like the lifestyle, wanted to be glitz and glam. I think her motto on her gravestone when she dies will be, Breasts, not bombs. You know, her whole thing was to go out and live this really crazy, wild life. Right after the guy dies, she’s having parties. She’s showing other Marines her taped-up breasts. She’s just gotten them done.

*Id.* Because Sommer’s defense attorney “introduced evidence presenting [her] as a grieving widow,” prosecutors were able to use this information at trial. *Cynthia Sommer*, *supra* note 281.

<sup>301</sup> See *Cynthia Sommer*, *supra* note 281; *Nancy Grace*, *supra* note 300.

<sup>302</sup> *Cynthia Sommer*, *supra* note 281. Despite its lengthy history in political homicides and warfare, arsenic poisoning is also a cultural trope long associated with women, most

In several cases, women were wrongfully convicted of crimes against their parents or other elderly family members. Supposed financial motives were at the root of each case. Madeleine Ward and Leeann Thain, who each provided assistance to their elderly parents, were both convicted of theft after their noncaretaking siblings went to the police with accusations that they had embezzled or misappropriated their parents' monies.<sup>303</sup> Sheila Bryan was convicted of murder after she was the driver in a car accident in which her eighty-two-year-old mother was killed.<sup>304</sup> Bryan lost control of the vehicle and it went into a deep ditch and caught on fire.<sup>305</sup> "[P]rosecutors said that Bryan, weary of caring for her elderly mother, had deliberately set the car afire to collect on the auto's insurance policy."<sup>306</sup>

Women's caretaking—whether of children, partners, or elderly parents—comes with the cultural expectation that it be done selflessly,<sup>307</sup> with “tremendous social pressures [for] women to perform it.”<sup>308</sup> Indeed, feminist scholars have illuminated how such “gendered . . . carework” is associated with an economic “*care penalty*.”<sup>309</sup> In the context of family life, its economic burdens are made invisible; women like Madeleine Ward and Leeann Thain were penalized, in part, for making these burdens visible—utilizing their parents' funds to support their familial caretaking.<sup>310</sup> Sheila Bryan's case was more subtle; her economic gain from her mother's death was inadvertent, but nonetheless raised the specter of profit in violation of normative expectation that she “suspend[] self in

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prominently depicted in Frank Capra's film *Arsenic and Old Lace*. See Jerome O. Nriagu, *Arsenic Poisoning Through the Ages*, in ENVIRONMENTAL CHEMISTRY OF ARSENIC 1, 1, 9 (William T. Frankenberger, Jr. ed., 2002).

<sup>303</sup> See *Cobine v. Mead*, 890 N.E.2d 964, 966 (Ill. App. Ct. 2008); *People v. Thain*, No. 308127, 2013 WL 5812835, at \*1 (Mich. Ct. App. Oct. 29, 2013); Maurice Possley, *Leeann Thain*, NAT'L REGISTRY EXONERATIONS (Feb. 17, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4379> [hereinafter *Leeann Thain*]; Maurice Possley, *Madeleine Ward*, NAT'L REGISTRY EXONERATIONS (Apr. 5, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4133> [hereinafter *Madeleine Ward*].

<sup>304</sup> *Bryan v. State*, 518 S.E.2d 672, 672 (Ga. 1999).

<sup>305</sup> *Id.*

<sup>306</sup> Maurice Possley, *Sheila Bryan*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3066> (last visited Apr. 17, 2015) [hereinafter *Sheila Bryan*].

<sup>307</sup> See Lisa Dodson & Rebekah M. Zinzavage, “*It's Like a Family*”: *Caring Labor, Exploitation, and Race in Nursing Homes*, 21 GENDER & SOC'Y 905, 907 (2007).

<sup>308</sup> Pamela Herd & Madonna Harrington Meyer, *Care Work: Invisible Civic Engagement*, 16 GENDER & SOC'Y 665, 675 (2002).

<sup>309</sup> Dodson & Zinzavage, *supra* note 307, at 907.

<sup>310</sup> See *People v. Thain*, No. 308127, 2013 WL 5812835, at \*1–2 (Mich. Ct. App. Oct. 29, 2013); *Leeann Thain*, *supra* note 303; *Madeleine Ward*, *supra* note 303.

favor of others.”<sup>311</sup>

Sophia Johnson, who is Guyanese, was the only woman of color in this grouping of exonerees.<sup>312</sup> Like Lisa Roberts, Johnson’s case blurs the line between domestic and street crime scenarios. The victim, Johnson’s mother-in-law, was “bludgeoned to death in her home,” her body discovered by Johnson and her husband.<sup>313</sup> Johnson was implicated in the murder by her brother, who claimed he was with her when she was attempting to steal from the victim and was caught in the act.<sup>314</sup> He testified against his sister in exchange for a one-year sentence on lesser charges, though forensics experts in her retrial concluded that the perpetrator would have been at least five feet, ten inches and left-handed; “Johnson was 5 feet 4 inches . . . and right handed.”<sup>315</sup>

### B. Street Crime Scenarios

While domestic crime scenarios were the modal category for white women, African American women’s wrongful convictions were equally as likely to be for violent street crimes as for domestic crimes.<sup>316</sup> In fact, street crime and drug convictions combined constituted over half of African American women’s wrongful convictions, compared to just over a quarter of white women’s.<sup>317</sup> Moreover, though 16% of white women’s wrongful convictions fit the street crime scenario, by and large these cases have a different character to them: 7 of 10 involved an elderly victim or victims, half involved a victim known to the exoneree, and just one—Susan Mellen’s—was contextually similar to those of African American female exonerees, as we explain in more detail below.<sup>318</sup>

#### 1. African American Women’s Street Crime Wrongful Convictions

African American women’s wrongful convictions in street crime scenarios included six murder convictions, two attempted murder convictions (stemming from a single case), a robbery, a robbery and

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<sup>311</sup> Dodson & Zinzavage, *supra* note 307, at 907; see Sheila Bryan, *supra* note 306.

<sup>312</sup> See Sophia Johnson, *supra* note 146.

<sup>313</sup> *Id.*

<sup>314</sup> See State v. Johnson, 105 P.3d 85, 87 (Wash. Ct. App. 2005); Sophia Johnson, *supra* note 146.

<sup>315</sup> Sophia Johnson, *supra* note 146.

<sup>316</sup> See *supra* Figure 7.

<sup>317</sup> See *supra* Figure 7.

<sup>318</sup> See *Exoneration Detail List*, *supra* note 5; *supra* Figure 7; see also *supra* note 143 (explaining authors’ dataset for street crime scenarios).

assault, and an arson conviction related to a home invasion robbery and murder.<sup>319</sup> None of the exonerees knew the victims in these crimes.<sup>320</sup> Given the distribution of factors contributing to wrongful conviction,<sup>321</sup> it is not surprising that nearly all of these cases (10 of 11) involved perjury or false accusation as a contributing cause, seven involved official misconduct, and six included mistaken witness identification.<sup>322</sup> These cases appear very similar to those of African American men wrongfully convicted in street crime scenarios, and indeed the majority either had male codefendants or the theory of the crime included male accomplices.<sup>323</sup> The women

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<sup>319</sup> See *Exoneration Detail List*, *supra* note 5; see also *supra* note 143 (explaining authors' dataset for street crime scenarios).

<sup>320</sup> See *Exoneration Detail List*, *supra* note 5; see also *supra* note 143 (explaining authors' dataset for street crime scenarios). Relationship status is not indicated in the NRE dataset for two of these cases (Shirley Kinge and Reshenda Strickland), though there is no indication in the wrongful conviction narrative that either knew the victims. See Maurice Possley, *Shirley Kinge*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3352> (last updated Oct. 31, 2014) [hereinafter *Shirley Kinge*]; Maurice Possley, *Reshenda Strickland*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3668> (last visited Apr. 17, 2015) [hereinafter *Reshenda Strickland*].

<sup>321</sup> See *supra* Figure 6.

<sup>322</sup> See *Exoneration Detail List*, *supra* note 5; see also *supra* note 143 (explaining authors' dataset for street crime scenarios). Three of these are known to have involved cross-race witness misidentification; this information is not available for the other three cases. For a discussion of this topic, see Steven M. Smith & Veronica Stinson, *Does Race Matter? Exploring the Cross-Effect in Eyewitness Identification*, in *CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW* 102, 103–04 (Gregory S. Parks et al. eds., 2008). Concerning the role of witness misidentification in wrongful convictions, see generally JIM DWYER ET AL., *supra* note 42, at 54–55, 57–58, 95; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *LAW & HUM. BEHAV.* 1, 10–13 (1998).

<sup>323</sup> Six of the eleven cases explicitly involved male coconspirators (Malisha Blyden, Paula Gray, Latisha Johnson, Shirley Kinge, Betty Tyson, and Cathy Watkins). See Maurice Possley, *Malisha Blyden*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4397> (last updated Sept. 23, 2014) [hereinafter *Malisha Blyden*]; *Paula Gray*, *supra* note 49; Maurice Possley, *Latisha Johnson*, NAT'L REGISTRY EXONERATIONS (Mar. 12, 2014), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4396> [hereinafter *Latisha Johnson*]; *Shirley Kinge*, *supra* note 320; Stephanie Denzel, *Betty Tyson*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3702> (last visited Apr. 17, 2015) [hereinafter *Betty Tyson*]; Maurice Possley, *Cathy Watkins*, NAT'L REGISTRY EXONERATIONS (Dec. 13, 2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4073> [hereinafter *Cathy Watkins*]. In another (Ellen Reasonover), the State's theory of the case was that the crime was completed with two unidentified male accomplices. Steve Weinberg, *Innocent Until Reported Guilty*, PAC. STANDARD (Sept. 23, 2008), <http://www.psmag.com/politics-and-law/innocent-until-reported-guilty-4231>. And in an eighth, Cherice Thomas was convicted of a homicide "committed for the benefit of a criminal street gang." Maurice Possley, *Cherice Thomas*, NAT'L REGISTRY EXONERATIONS (Nov. 5, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4297> [hereinafter *Cherice Thomas*]. Just three cases (Dominique Brim, Joyce Ann Brown, and Reshenda Strickland) did not involve the actual or assumed participation of men, and each included the robbery of a

came to the attention of the police, in any given case, as a result of contextual proximity: they or a family member had a prior record or were known to the police; they lived or were in close proximity to the crime or to other perceived suspects; and/or they were falsely implicated by the actual offenders, other crime-involved individuals, or police informants.<sup>324</sup> Whereas women in domestic crime scenarios came to be viewed as suspects because of their relationships to the victims or presumed victims, African American women in street crime scenarios often came to be identified as suspects through chance, bad luck, the eagerness of criminal justice officials to close cases seen as particularly heinous, or some combination of these. Once identified, tunnel vision set in.

Consider the case of Ellen Reasonover, who came forward as a potential witness only to find herself the chief suspect in the murder of a gas station attendant.<sup>325</sup> Reasonover had happened by the station around the time of the crime, so she attempted to assist police in identifying suspects and vehicles from the parking lot.<sup>326</sup> Reasonover had no criminal record but “a family history at society’s margins—two half-brothers had committed violent crimes, and the father of Reasonover’s child had been murdered.”<sup>327</sup> In less than a week, police and prosecutors were convinced they had their culprit, and that Reasonover’s cooperation was an effort to “deflect[] suspicion from herself.”<sup>328</sup> As a consequence, they failed to pursue other leads and arrested Reasonover on suspicion of murder.<sup>329</sup> The prosecutor, who had withheld exculpatory evidence from the defense

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commercial establishment (Sears, a fur store, T.J. Maxx). Stephanie Denzel, *Dominique Brim*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3050> (last visited Apr. 17, 2015) [hereinafter *Dominique Brim*]; Maurice Possley, *Joyce Ann Brown*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3061> (last visited Apr. 17, 2015) [hereinafter *Joyce Ann Brown*]; *Reshenda Strickland*, *supra* note 320.

<sup>324</sup> See *Malisha Blyden*, *supra* note 323; *Dominique Brim*, *supra* note 323; *Joyce Ann Brown*, *supra* note 323; *Paula Gray*, *supra* note 49; *Latisha Johnson*, *supra* note 323; *Shirley Kinge*, *supra* note 320; Charles Armbrust, *Ellen Reasonover*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3564> (last visited Apr. 17, 2015) [hereinafter *Ellen Reasonover*]; *Reshenda Strickland*, *supra* note 320; *Cherice Thomas*, *supra* note 323; *Betty Tyson*, *supra* note 323; *Cathy Watkins*, *supra* note 323.

<sup>325</sup> Steve Weinberg, *Railroaded*, AM. LAWYER, Aug. 2000, at 124, 127.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* Despite having no criminal record, one of the things that made Reasonover suspicious to police was her familial ties to persons involved in crime. See *id.* Shirley Kinge was wrongfully convicted of arson, when police insisted that she had assisted her son in covering up a home invasion murder and robbery he had committed; a state trooper was later convicted for planting her fingerprints at the scene. *Shirley Kinge*, *supra* note 320.

<sup>328</sup> Weinberg, *supra* note 325, at 127.

<sup>329</sup> *Id.*

and whose case “rested entirely on the testimony of two jailhouse informants,” sought the death penalty from an all-white jury and missed by only one vote.<sup>330</sup> At sentencing he argued: “You know what she deserves. . . . Somewhere in Ellen Reasonover’s life she decided that killing a person is like taking a drink of water. . . . That’s what it means for her.”<sup>331</sup> In a slightly different twist of fate, Latisha Johnson—and later her friend Malisha Blyden—became suspects in a brutal home invasion based on nothing more than a misdialed phone number.<sup>332</sup> Johnson, an eighteen-year-old runaway, was then mistakenly identified by the victim as one of two sex workers who participated in the attack when he awoke from a coma two weeks later.<sup>333</sup> After a lengthy interrogation, Johnson’s false confession also implicated her friend Blyden.<sup>334</sup> Despite several witnesses insisting that these young women were not the “party girls” in question, one of the men who had committed the crime accepted a plea deal in exchange for testifying against Johnson and Blyden,<sup>335</sup> protecting his actual female coconspirators in the process.<sup>336</sup>

Two African American women’s wrongful convictions in street crime scenarios came about when their names were implicated in the crime—one intentionally, the other inadvertently. Fourteen-year-old Dominique Brim became the key suspect in an assault and robbery when the actual suspect, a twenty-five-year-old woman, provided Brim’s name, address, and phone number to police as her own.<sup>337</sup> When Brim was charged two weeks later, employees from the store where the incident took place mistakenly identified her as the perpetrator,<sup>338</sup> and officers apparently failed to notice that the

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<sup>330</sup> Weinberg, *supra* note 323; *see* Weinberg, *supra* note 325, at 128; *Ellen Reasonover*, *supra* note 324.

<sup>331</sup> Weinberg, *supra* note 325, at 128 (internal quotation marks omitted). The jury came within one vote of granting the prosecutor’s demand for the death penalty, in a case that all began with Reasonover’s efforts to help the police. *Id.*

<sup>332</sup> Shayna Jacobs, *Robbed of 7 Yrs. Bad Bust, Bad Conviction*, N.Y. DAILY NEWS, Mar. 30, 2014, at 7; *Malisha Blyden*, *supra* note 323; *Latisha Johnson*, *supra* note 323.

<sup>333</sup> *Malisha Blyden*, *supra* note 323; *Latisha Johnson*, *supra* note 323.

<sup>334</sup> Jacobs, *supra* note 332, at 7; *Malisha Blyden*, *supra* note 323; *Latisha Johnson*, *supra* note 323.

<sup>335</sup> *Malisha Blyden*, *supra* note 323; *Latisha Johnson*, *supra* note 323.

<sup>336</sup> *See Malisha Blyden*, *supra* note 323; *Latisha Johnson*, *supra* note 323.

<sup>337</sup> *Dominique Brim*, *supra* note 323.

<sup>338</sup> *See id.* Consider also the case of Cathy Watkins. Identified by a drug-addicted police informant as one of multiple suspects—all the others male, around ten years her junior, and strangers (and also wrongfully convicted)—Watkins’s voice was falsely identified by a car service dispatcher as that of the person who called for a car from the Bronx high rise where she lived, the driver of which was murdered. *See Cathy Watkins*, *supra* note 323.

young teenager was not the adult they had previously questioned and released.<sup>339</sup> Joyce Ann Brown shared the same name with a woman who rented the car used in a fur store robbery in which the owner was killed and his wife injured.<sup>340</sup> Police knew Brown from a prior prostitution conviction, and she was then misidentified by the surviving wife, who was white.<sup>341</sup> She was subsequently falsely implicated by a jailhouse snitch.<sup>342</sup>

Just as Brown's prior prostitution conviction is what initially flagged her to police, Betty Tyson, too, was first identified by police as a possible suspect in a homicide because she was a "known prostitute."<sup>343</sup> A man found strangled and bludgeoned was believed to have solicited a sex worker the evening before, and officers picked up Tyson and a transgender sex worker based only on the grounds that police were familiar with their involvement in sex work.<sup>344</sup> Both "signed confessions, but later recanted, saying police had beaten them into confessing."<sup>345</sup> Similarly, Cherice Thomas's involvement in a Los Angeles Bloods gang played an important role in her wrongful conviction for a gang-related homicide.<sup>346</sup> Though two witnesses to the shooting believed the gunman was male, another gang member—who was a relative of the victim—falsely implicated Thomas.<sup>347</sup> Inflammatory photographs of her throwing gang signs and an online "roster" of gang members aided in her conviction.<sup>348</sup>

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<sup>339</sup> See *Dominique Brim*, *supra* note 323.

<sup>340</sup> Paul Weingarten, *Wrongful Conviction Charges Haunt Dallas Prosecutors*, CHI. TRIB., Oct. 12, 1989, at 25; see *Joyce Ann Brown*, *supra* note 323.

<sup>341</sup> Weingarten, *supra* note 340; *Joyce Ann Brown*, *supra* note 323.

<sup>342</sup> Weingarten, *supra* note 340; *Joyce Ann Brown*, *supra* note 323. For a detailed discussion of jailhouse snitches, see generally ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009).

<sup>343</sup> *After 25 Years, Inmate Set Free*, NEWSDAY, May 22, 1998, at A22; *Betty Tyson*, *supra* note 323.

<sup>344</sup> See *After 25 Years, Inmate Set Free*, *supra* note 343; *Betty Tyson*, *supra* note 323.

<sup>345</sup> *Betty Tyson*, *supra* note 323. Two teenagers acquainted with Tyson also were held in custody and coerced into providing false testimony against Tyson and the other wrongfully convicted sex worker. See *id.*

<sup>346</sup> See *Cherice Thomas*, *supra* note 323.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* One final case—known as "the Ford Heights Four"—deserves special mention because of the gendered consequences of its name: stripping visibility of the fifth, female, exoneree in the case. This was a particularly brutal 1978 double homicide in Chicago in which a young engaged suburban white couple was kidnapped, the woman was gang raped, and both were shot; their bodies were found in an abandoned townhouse in an African American section of the city. Peter M. King & William H. Jones, *Crime and Punishment, Crimes of the State: Obtaining Justice for the Wrongfully Imprisoned*, 29 LITIG. 14, 15 (2002). A false tip led the police to four African American young men (i.e., the Ford Heights Four), along with Paula Gray, a "mildly retarded 17-year-old . . . held without legal counsel for two

Many of these cases are characteristic examples of how tunnel vision happens once an individual comes into the sights of investigators. The women in question were identified through their contextual proximity to the crimes, as residents in disadvantaged high-crime communities who were known or came to be known to the police through their network ties. It was this—"the cumulative and often durable effects of residing in poor, segregated neighborhoods"<sup>349</sup>—that first made them suspect. In the era of racialized mass incarceration,<sup>350</sup> it is difficult to imagine there are many individuals in urban African American communities who have managed to escape having some connection to at least one crime-involved person, especially given that "approximately one in three African American men now carry a serious criminal record."<sup>351</sup> Yet this contextual proximity is precisely what allows innocent members of these communities, female and male, to become ensnared when "the state's machinery [is set] in motion."<sup>352</sup> Research has shown that structural conditions in such communities, including "poverty, joblessness . . . and income inequality," have "criminogenic effects" that contribute to "high

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days." *Paula Gray*, *supra* note 49. Gray confessed to the crime, recanted, was charged with murder and perjury, and later testified against the young men. King & Jones, *supra*, at 16; *Paula Gray*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/paula-gray.html> (last visited Apr. 17, 2015) [hereinafter *Paula Gray*, BLUHM LEGAL CLINIC]. Seven years into her fifty-year sentence, she testified again in exchange for release from prison. King & Jones, *supra*, at 17; see *Paula Gray*, BLUHM LEGAL CLINIC, *supra*; *Paula Gray*, *supra* note 49. It was nearly another decade before the five, including Gray, were exonerated through DNA testing. *Paula Gray*, BLUHM LEGAL CLINIC, *supra*; *Paula Gray*, *supra* note 49. Gray did receive early release, but nonetheless, the case inexplicably is not known as the Ford Heights Five. See King & Jones, *supra*, at 16–17. Indeed, even the Center on Wrongful Convictions' profile of Gray leads with "Paula Gray confessed to a role in a crime she knew nothing about, sending herself and four innocent men to prison, two of them to death row." *Paula Gray*, BLUHM LEGAL CLINIC, *supra* (emphasis added). Her wrongful conviction and exoneration, then, are tainted in discussions of the case by her false confession and its consequences, despite demonstrating many of the known vulnerabilities to false confession: she was underage when the confession first took place, was intellectually disabled, and was convicted of perjury for recanting her confession. King & Jones, *supra*, at 15–17. For examples of narrating the case as about the four male exonerees, see generally DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE (1st ed. 1998); Steve Mills, *Ford Heights Four Were Released from Prison in 1996, but Struggles Didn't End*, CHI. TRIBUNE, Apr. 11, 2014, at 1. For an analysis of the special vulnerabilities of the intellectually disabled and youth, and situational facets of lengthy interrogations that increase duress, see LEO, *supra* note 32, at 195–237.

<sup>349</sup> WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 61 (2009).

<sup>350</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010).

<sup>351</sup> Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOC. 387, 389 (2010).

<sup>352</sup> See Weinberg, *supra* note 325, at 127.

levels of violent crime.”<sup>353</sup> Such conditions may also shape the crimes scenarios for which many African Americans are wrongfully convicted. However, that a large proportion of African American female exonerees experienced wrongful convictions in both domestic and street crime scenarios points to the intersections of gender and racial inequalities in their erroneous convictions.

## 2. White Women’s Street Crime Wrongful Convictions

White women, on the other hand, appear to benefit from gendered racial privilege by not easily fitting into cultural tropes about who is likely to be involved in street crime and also from the geographic distance of even the poorest white urban communities from high-crime disadvantaged communities of color.<sup>354</sup> A significantly smaller proportion of white women than African American women in the NRE fit within the street crime group (16% versus 33%, respectively).<sup>355</sup> In addition, the situational contexts of violent street crimes for which these white women were wrongfully convicted were, by and large, distinct from those of African American women. Most notable are the characteristics of the victims in these cases. The majority involved victims known to the exoneree or to an exoneree who was co-convicted of the crime.<sup>356</sup> This was true for none of the African American women erroneously convicted in street crime scenarios.<sup>357</sup>

In addition, the majority involved cases of eldercide,<sup>358</sup> in which one or more elderly victims were murdered (7 of 10), and most also had a female victim or victims (6 of 10).<sup>359</sup> Just two cases involved

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<sup>353</sup> Dana L. Haynie & David P. Armstrong, *Race- and Gender-Disaggregated Homicide Offending Rates: Differences and Similarities by Victim-Offender Relations Across Cities*, 10 HOMICIDE STUD. 3, 9 (2006).

<sup>354</sup> See generally RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE (2010) (discussing how racial composition of neighborhoods correlates with crime).

<sup>355</sup> See *supra* Figure 7; *supra* note 136.

<sup>356</sup> See *Exoneration Detail List*, *supra* note 5; *supra* Figure 3. Four of ten were acquaintances; one was an extended family member. See *Debra Brown*, *supra* note 142; *Lana Canen*, *supra* note 142; *Paula Hall*, *supra* note 142; *Debra Shelden*, *supra* note 49. Of the five cases with victims who were strangers to the exoneree, one involved a victim related to another female coexoneree in the case (Ada JoAnn Taylor, who was wrongfully convicted with Debra Shelden and four others; the victim was a relative of Shelden). *Debra Shelden*, *supra* note 49; *Ada JoAnn Taylor*, *supra* note 49.

<sup>357</sup> See *Exoneration Detail List*, *supra* note 5.

<sup>358</sup> For a discussion of eldercide, see Jessie L. Krienert & Jeffrey A. Walsh, *Eldercide: A Gendered Examination of Elderly Homicide in the United States, 2000–2005*, 14 HOMICIDE STUD. 52, 53 (2010).

<sup>359</sup> See *Exoneration Detail List*, *supra* note 5. None of the African American women’s

nonelderly male victims, suggesting that white women's wrongful convictions in street crime scenarios primarily involved victims who are culturally understood as both physically and socially vulnerable.<sup>360</sup> In fact, just one of the white women's street crime scenario cases—that of Susan Mellen—was contextually similar to those of African American women's. Mellen was an admitted methamphetamine user who lived in an ethnically diverse neighborhood in South Los Angeles and was convicted of the brutal murder of a homeless man.<sup>361</sup> She was implicated by a neighborhood “snitch,” though the crime was later discovered to have been committed by local gang members.<sup>362</sup> Thus, the only case to date in the NRE in which a white woman's wrongful street crime conviction was contextually similar to that of African American women's took place in a predominantly nonwhite urban neighborhood.

One other case in this category is notable—despite being an outlier—because of its strongly gendered dimensions. When a young woman was found raped, beaten, and strangled in her community, Laverne Pavlinac “read about the murder in depth and decided [the] case could be used to end her 10-year abusive relationship with her . . . boyfriend.”<sup>363</sup> She implicated him in the crime, first through anonymous tips and then by calling the case

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exonerations involved crimes against the elderly and just two involved a female victim (one of whom was killed along with her partner). *See id*; *Paula Gray*, *supra* note 49; *Cathy Watkins*, *supra* note 323. While 6 of 11 African American women in this scenario had male codefendants, this was true for 8 of 10 white women. *See Exoneration Detail List*, *supra* note 5. The number of cases on which we draw for this analysis is admittedly small, so patterns should be interpreted with particular caution.

<sup>360</sup> *See Mechele Linehan*, *supra* note 279; *Megan Winfrey*, *supra* note 142. While elderly persons have “the lowest rate of violent victimization” among the U.S. population, it is recognized that “[i]solation, reliance on caregivers, and decreased physical or mental capacity can increase older people's exposure to physical and mental abuse.” *Elder Victimization*, VICTIMSOFCRIME.ORG 22 (2014), <http://victimsofcrime.org/docs/default-source/nvrvw2014/elder-abuse-statistics-2014.pdf?sfvrsn=2>. Women, too, are recognized as socially vulnerable to victimization, with some scholars explaining these vulnerabilities in relation to physical strength and others gender inequalities. For a discussion, see Jennifer E. Cobbina et al., *Gender, Neighborhood Danger, and Risk-Avoidance Strategies Among Urban African-American Youths*, 46 *CRIMINOLOGY* 673, 675–76 (2008).

<sup>361</sup> *See Corina Knoll*, *Witness' Dubious Legacy*, L.A. TIMES, Sept. 30, 2014, at A11; Maurice Possley, *Susan Mellen*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4507> (last updated Nov. 23, 2014) [hereinafter *Susan Mellen*].

<sup>362</sup> Knoll, *supra* note 361, at A11; *Susan Mellen*, *supra* note 361.

<sup>363</sup> Michael S. Perry, *Laverne Pavlinac*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3526> (last visited Apr. 17, 2015) [hereinafter *Laverne Pavlinac*].

detectives.<sup>364</sup> She also appears to have planted evidence to frame her partner, and later implicated herself in the crime by claiming that she and her boyfriend had met the victim at a bar and that he had “forced her to help him rape [the victim] and dispose of the body.”<sup>365</sup> At trial, Pavlinac “recanted her confession and said that she had made it up to escape from” the abusive relationship.<sup>366</sup> Though few in number, white women’s erroneous convictions in street crime cases, then, looked strikingly different than those of African American women.

#### IV. INTERSECTIONALITY, “NORMAL CRIMES,” AND WRONGFUL CONVICTION: A THEORETICAL FRAMEWORK

Thus far, we have investigated patterns of wrongful conviction by gender and race, and explored in detail the contextual features of women’s wrongful convictions, identifying both similarities and differences in the crime-related circumstances under which white and African American women were erroneously convicted. Efforts to theorize the causes of wrongful conviction, and predict the circumstances under which wrongful convictions are likely to occur, have focused on the concept of tunnel vision—“the social, organizational, and psychological tendencies”<sup>367</sup> that result in criminal justice actors’ “premature commitment to a particular suspect, [and] inattention to alternative scenarios.”<sup>368</sup> These lead to “escalating commitments . . . [resulting in] an ‘incremental descent into poor judgment.’”<sup>369</sup> But from where do these commitments emerge? How is it that police and prosecutors come to identify particular suspects as suspect, and particular scenarios as those that “fit the crime”? What role do cultural understandings of gender, race, and their intersections play among criminal justice decision makers and within criminal justice organizations in answering these questions?

Drawing from symbolic interactionist theory, sociologist William Lofquist suggests that David Sudnow’s “normal crime”<sup>370</sup> framework

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<sup>364</sup> *Evidence Clears Two. The Law Doesn’t*, N.Y. TIMES, Nov. 26, 1995, at A28; *Laverne Pavlinac*, *supra* note 363.

<sup>365</sup> *Laverne Pavlinac*, *supra* note 363.

<sup>366</sup> *Id.*

<sup>367</sup> Gould et al., *supra* note 63, at 504.

<sup>368</sup> Lofquist, *supra* note 6, at 176.

<sup>369</sup> *Id.* (quoting DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* xiii (1996)).

<sup>370</sup> David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 259–60 (1965).

may be especially useful for understanding how tunnel vision emerges.<sup>371</sup> Specifically, criminal justice “actors impose preexisting frameworks on emergent [crime] scenarios,” and these “shape investigations, assessments of evidence, interpretations of legal rules, and the entire range of decisions” that result in the erroneous conviction.<sup>372</sup> Lofquist illustrates the utility of this framework through the analysis of a single case, providing a compelling argument that:

[L]egal wrongdoing . . . is the product of narrative constructions: efforts by various people to construct a highly credible narrative account. This process of storytelling or narrative construction inevitably relies on popular images, assumptions, and inferences. Factually unique stories are fitted into particular narrative frames (“normal crime” scenarios) in a manner that diminishes their distinctiveness. . . . [T]he power, resonance, and effectiveness of a narrative can overwhelm the facts or logic of a particular case, leading legal decision makers to ratify a narrative that results in a wrongful conviction.<sup>373</sup>

In light of the patterns and crime scenarios we uncovered in our analysis we find great utility in this framework, particularly in conjunction with intersectional theory. Intersectional theory focuses specific attention to how individuals’ social positions within structures of gender and racial inequality coalesce with “controlling images”<sup>374</sup> of socially assigned categories of people<sup>375</sup> (in our analysis here, white and African American women) to produce and reproduce social inequality.<sup>376</sup> The intersections of gender and race operate within the practices and organization of social life, but also within “the discursive fields by which [groups] are constructed . . . .”<sup>377</sup> Cultural ideologies about gender, race, and

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<sup>371</sup> Lofquist, *supra* note 6, at 177.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 183.

<sup>374</sup> See COLLINS, *supra* note 66, at 67–72.

<sup>375</sup> Our analysis focuses specifically on white and African American women; however, it is important to reiterate that the framework we propose is not gender-specific; it is equally applicable for understanding raced patterns of wrongful conviction among men. A pertinent example is African American men’s disproportionate representation in the NRE for stranger sexual assaults. See ANGELA Y. DAVIS, WOMEN, RACE & CLASS 172, 199 (1981); *supra* note 99. In addition, ideally our analysis here would more systematically integrate social class in the intersections of women’s wrongful convictions. Available data precluded our ability to do so.

<sup>376</sup> See COLLINS, *supra* note 66, at 67–72.

<sup>377</sup> Kathleen Daly & Lisa Maher, *Crossroads and Intersections: Building from Feminist Critique*, in CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE 1, 4

their intersections are profoundly embedded in social life, and their impacts have been shown in a range of studies of criminal justice actors, practices, and settings.<sup>378</sup> It makes sense, then—and our research suggests—that they also have a meaningful impact in determining how it is that particular gendered and raced individuals come to be identified as suspects in a given crime scenario, and how particular gendered and raced crime narratives come to be both constructed and vehemently believed. Sudnow’s original development of the “normal crimes” framework suggests that it is:

In the course of routinely encountering persons . . . [the criminal justice actor] gains knowledge of the typical manner in which offenses of given classes are committed, the social characteristics of the persons who regularly commit them, the features of the settings in which they occur, the types of victims often involved, and the like.<sup>379</sup>

Yet, many wrongful convictions—at least those we are aware of—are anything but “routine.” Homicides, for example, account for just “one-tenth of 1% of all male and female arrests,” with women representing just 11% of homicide perpetrators.<sup>380</sup>

In such cases, then, criminal justice actors’ attribution processes likely draw less from routine or typical knowledge of crime scenarios and more from cultural ideologies or stereotypes of events and the people presumed to be involved.<sup>381</sup> Thus, we have

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(Kathleen Daly & Lisa Maher eds., 1998).

<sup>378</sup> For an overview, see generally DANA BRITTON, *THE GENDER OF CRIME* (2011).

<sup>379</sup> Sudnow, *supra* note 370, at 259.

<sup>380</sup> Darrell J. Steffensmeier & Jennifer Schwartz, *Trends in Female Criminality: Is Crime Still a Man’s World?*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, PRISONERS, VICTIMS, AND WORKERS* 95, 98 tbl.1, 101 (Barbara Raffel Price & Natalie J. Sokoloff eds., 3d ed. 2004).

<sup>381</sup> Consider, for example, that “[a]ll but 3% of offenders who committed . . . crimes against children were male,” LAWRENCE A. GREENFIELD, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 153258, *CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS* iv (1996), more children under age five are killed by their fathers than their mothers, with the largest proportion (38%) killed by neither parent, ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 236018, *HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008*, at 7 (2011), and eldercide by women is both extremely rare and most likely to be committed against a male family member and least likely to target a female stranger. See Krienert & Walsh, *supra* note 358, at 64. In addition, “[n]ot only are intimate partners the most frequent homicide victims of women, but a strong association is found between women’s victimization by intimate partners and the incidences of homicide women commit against their intimate partners,” Haynie & Armstrong, *supra* note 353, at 8, though this “crime scenario” appears to be underrepresented among exonerees, as described above. One facet of wrongful convictions that seems to better fit crime patterns, however, is the overrepresentation of whites in crimes against children: among those incarcerated for violent crimes against children, 70% are white. GREENFIELD, *supra*, at iv.

*monstrous mothers; desperate, spoiled, and manipulative housewives; femme fatales; selfish daughters;* women who declare *open season* on (violent) men; and—especially for African American women convicted in street crime scenarios—*cold-blooded killers* who could ruthlessly kill someone as easily as *taking a drink of water*, and where involvement in any illicit activities (like sex work or drug use) is evidence of the capacity to commit murder. It is by drawing on gendered and raced cultural ideologies that the crime narratives constructed by criminal justice actors become “highly credible,” with erroneously convicted women held criminally accountable for accidental and natural deaths, crimes committed by others, and their efforts to protect themselves from serious harm.<sup>382</sup>

We also discovered additional gendered processes relevant for understanding women’s wrongful convictions. Most notably, mothers’ self-blame and grief, along with their concern about their children’s well-being, were sometimes manipulated for securing false confessions; women’s experiences of sexual harassment at the hands of criminal justice actors, and others with a stake in their cases, were overlooked as meaningful factors contributing to case outcomes; and emotional displays not in keeping with criminal justice actors’ expectations were read as evidence of guilt. This latter factor has been shown to play a significant role in other gendered features of criminal justice decision making, most notably, the decision by police and prosecutors to unfound cases in which women report sexual assault.<sup>383</sup> Indeed, there are other important parallels between the cultural ideologies at play in the erroneous convictions of women and the literature on case processing of sexual assault: gendered and raced “controlling images” of women—tied to rape myths about worthy victims, culpable sexual actors, and manipulative liars—play an important role in how the criminal justice system treats sexual assault. As with wrongful convictions,

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<sup>382</sup> As noted previously, the wrongful convictions we have the most information about are those associated with serious violent crime. See Gross, *supra* note 84, at 179. It remains an open question whether and how our framework would hold as an explanation for erroneous convictions for more mundane crimes. Tunnel vision also appears to be a less critical factor in such cases. To address these questions will require the development of a more representative pool of wrongful convictions than is currently available.

<sup>383</sup> On police sexual assault decision making, see Melinda Tasca et al., *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERSONAL VIOLENCE 1157, 1158 (2013). On prosecutors’ decision making, see Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 214 (1991); Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice,”* 48 SOC. PROBS. 206, 208 (2001).

a sort of tunnel vision takes hold in which both individual biases and organizational imperatives come together to delegitimize many women's experiences of sexual assault.<sup>384</sup>

We suggest that this combination of “normal crimes” and intersectional theory is useful for understanding not just how particular crime scenarios come to be applied to white and African American women, but to individuals assigned to other gender or race categories. Qualitative content analysis and detailed case studies of men's wrongful convictions across race would be a useful strategy for examining how cultural ideologies and “controlling images” are features of the narrative accounts constructed to justify men's erroneous convictions as well.<sup>385</sup> For example, while the majority of homicides are committed by acquaintances and just 22% are stranger crimes,<sup>386</sup> African American men were disproportionately represented among those wrongfully convicted in stranger cases.<sup>387</sup> In fact, 62% of African American men in the NRE erroneously convicted of murder were convicted of stranger homicides.<sup>388</sup> Moreover, 79% of African American men wrongfully convicted for sexual assault were convicted for crimes against

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<sup>384</sup> For excellent accounts of these processes in sexual assault trials, see BERNARD LEFKOWITZ, *OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 420* (1997); GREGORY M. MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 215, 219* (1993).

<sup>385</sup> An important question that we and others are unable to address concerns the extent to which the chances of exoneration are themselves shaped by gender and race. Certainly, when resources are devoted exclusively to DNA and capital cases, for example, women will be underrepresented, as their wrongful convictions are much less likely to meet these criteria. *See supra* Figure 6 (showing that the main factors contributing to women being wrongfully convicted and subsequently exonerated are unrelated to DNA). We also suggest that certain cases known to disproportionately involve women—for example, killing a violent intimate partner in self-defense—are more likely to result in activism oriented toward clemency than exoneration. On the other hand, the greater likelihood of white women than African American women to be in the NRE—particularly in light of racial disparities in incarceration for these groups—could suggest a greater likelihood for their wrongful conviction cases to result in exoneration. At this stage, however, such an argument is speculative at best. Given that the total number of wrongful convictions is unknown and unknowable, our best chance for better understanding these processes would be organizational ethnographies of appellate courts, district attorney's offices, and innocence projects as well as any other sites where postconviction decision making may facilitate or aggravate efforts towards exoneration. Naturally, these decisions will also vary according to state and regional differences, including actors' willingness to review old cases, the presence of innocence projects, policies regarding biological evidence preservation, and more. Comparative analyses of successful and unsuccessful efforts to establish innocence may therefore also be useful, including with careful attention paid to how gender and race shape these processes.

<sup>386</sup> COOPER & SMITH, *supra* note 381, at 16.

<sup>387</sup> *See supra* Figure 3.

<sup>388</sup> Nat'l Registry of Exonerations, *supra* note 90.

strangers.<sup>389</sup> While the NRE does not include systematic data on victim race, our framework would suggest that a meaningful proportion of these cases involve white victims, as this crime scenario is strongly in keeping with controlling images of African American men.<sup>390</sup> Moreover, both African American men and women—given significant structural inequalities that result in residential racial disparities in impoverished high-crime neighborhoods—likely face disproportionate risks for wrongful conviction as a consequence of the community contexts in which they reside, which not only have disproportionate rates of violence<sup>391</sup> but are burdened with entrenched cultural stereotypes constructing community members as dangerous.<sup>392</sup>

Evidence of the impact of such stereotypes in criminal justice processing comes from empirical support for “focal concerns” theory in explaining intersectional disparities in sentencing, which most harshly affect young African American men.<sup>393</sup> Scholars using this framework suggest that the courts draw from three key focal concerns: the perceived blameworthiness of the offender, the risks the offender poses to the community at large, and the practical considerations tied to organizational imperatives in determining sentencing.<sup>394</sup> Most significantly for our purposes, they find that judges rarely have sufficient information about any given convicted offender or crime and, thus, rely on what sociologist Darrell Steffensmeier and his colleagues refer to as “perceptual shorthand” based on “race, gender, and age attribut[es]” in determining both how culpable and how dangerous a given offender is when making sentencing decisions.<sup>395</sup> Similar processes have been documented in pretrial decision making, with “negative racial and ethnic attribut[es] . . . more likely to be made when legal factors relevant to the case increase their salience,” such as when African American

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<sup>389</sup> *Id.*

<sup>390</sup> See KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 71 (1998); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315, 1341, 1345 (2004).

<sup>391</sup> See PETERSON & KRIVO, *supra* note 354, at 110; Eric Baumer et al., *Neighborhood Disadvantage and the Nature of Violence*, 41 *CRIMINOLOGY* 39, 40, 61 (2003).

<sup>392</sup> See Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *AM. J. SOC.* 717, 726 (2001).

<sup>393</sup> See Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *CRIMINOLOGY* 763, 788 (1998).

<sup>394</sup> *Id.* at 766–67.

<sup>395</sup> *Id.* at 767–68.

2014/2015] Gendering and Racial Wrongful Convictions 1033

defendants—stereotyped as “dangerous and violent”—are charged in crime scenarios that “match” the stereotype.<sup>396</sup> In the case of wrongful conviction, we suggest that gendered and racial attribution processes intersect with “normal crimes” scenarios, and these are at the heart of the tunnel vision that takes hold.

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<sup>396</sup> Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 172 (2005).