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Journal

UCLA Journal of Gender and Law, 31(1)

Authors

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Publication Date

2025-01-26

DOI

10.5070/L3.43490

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CARCERAL BACKLASH:
The Case for Changing the Course of Women's Homicide Convictions

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About the Authors

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The authors are very grateful to Melissa Salinas, Megan Richardson, Joanne Leonard, Marjorie Heins, Regina Austin, Leigh Goodmark, and Kathy Constantinides for their critical and insightful readings and suggestions for earlier versions of this Article. Our special thanks go to all the women who agreed to have their case summaries included, and apologies to those we were unable to include. We wish to acknowledge the Honorable Avern Cohn (1924–2022) for his early encouragement of this study. We thank both the National Center for Institutional Diversity and the ADVANCE Program at the University of Michigan for research support. All research materials, files, films, letters, video and audio footage, transcripts, interviews, charts, and records referenced here will be available in the Labadie Collection of the Harlan Hatcher Graduate Library at the University of Michigan, Ann Arbor, Julie Herrada, Director. Most of the women's cases summarized have been represented by the Michigan Women's Justice & Clemency Project, Lynn D'Orio, former legal director, and the Federal Appellate Litigation Clinic at the University of Michigan Law School, Melissa Salinas, Director, and Megan Richardson, Attorney.

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Introduction

> *The destructive combination of racism and misogyny, however much it has been challenged by social movements, scholarship, and art over the last three decades, retains all its awful consequences within women's prisons . . . The increasing evidence of a U.S. prison industrial complex with global resonances leads us to think about the extent to which the many corporations that have acquired an investment in the expansion of the prison system are, like the state, directly implicated in an institution that perpetuates violence against women.*[1]
>
> *Angela Y. Davis*

Amid widespread consensus that incarceration in the United States is a centuries-old system of racialized domination and retribution, there is less public recognition of imprisonment as a gendered system answering the call for control of women's bodies and liberty.[2] The unparalleled carceral boom that erupted across the United States in the second half of the twentieth century was a disastrous consequence of globalizing capitalism, opportunistic politicians, and sensational right-wing media, all symptoms of a declining dominant culture.[3] The Civil Rights, Black Power, LGBTQIA+, and women's movements that rose up during the 60s and 70s to demand an end to racism, sexism, homophobia, and economic inequality

1. Angela Y. Davis, *Are Prisons Obsolete?* 83 (2003).

2. *See* Catherine E. Lhamon, *Women in Prison: Seeking Justice Behind Bars*, (February 2020) (Report addressing the civil rights issues of incarcerated women in state and federal prisons in the U.S.); Beth E. Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (2012) (analyzing the most stigmatized, endangered and criminalized women in the buildup of America's prison nation—those who are Black); Caroline Light et al., *Gender and Stand Your Ground Laws: A Critical Appraisal of Existing Research*, *in* 91 The J. of L. Medicine & Ethics, 51, 53-63 (2023) (finding that research on homicide laws downplays or ignores the ways the laws reinforce gender injustice and contribute to existing socio-legal inequities and calls for an intersectional approach to research that emphasizes gender, race, ethnicity and class.)

3. *See*, Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2016) (historical survey of the racist buildup of the prison industrial complex in the United States); Ava Duvernay, Director, *13th*, (Kandoo Films 2020) (critical exploration of the intersection of race, justice and mass incarceration in the United States); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (critical analysis of the contemporary mass incarceration crisis from its roots in slavery and Jim Crow laws to the caste system of criminalizing race); *see also* Joseph T. Hallinan, *Going up the River: Travels in a Prison Nation*, xvi-xvii, 171-172, 217 (2001) (documenting how small companies and towns cashed in on the explosion of prisons which replaced jobs lost from disappearing corporations).

became targets of police crackdowns and criminalizing policies that continue to this day.[4] While police focused on surveilling and suppressing mostly Black communities, political and corporate leaders built a prison industry as a conservative bulwark in their war on drugs and crime.[5] Without any corresponding increase in their lawbreaking, women—among the easiest marks for police to take down—became the fastest growing prison population in the United States, expanding from less than 8,000 in 1970 to 231,000 by 2021.[6]

Most women and girls are arrested for minor, gender-based offenses— sex work (criminal sexual activity or enterprise), shoplifting or stealing (retail fraud, larceny, theft), writing checks without funds (uttering and publishing), or possessing drugs (methamphetamine or cocaine)—induced by desperation and coping with intimate partner or family violence, economic hardship, and single parenthood.[7] Women face harsh sentences which are disproportionate in impact to the harm they caused and more severe than

4. Lhamon, *supra* note 2, at 11-12; Richie, *supra* note 2, at 157-166; Hinton, *supra* note 3, at 1-10, 314-340; LGBTQIA+ refers to all people who identify as or with Lesbian, Gay, Bisexual, Transgender, Queer, Intersex or Asexual people and community. For criminalizing policies that continue and maintain mass incarceration, *see* Lola Vollen & Dave Eggers, eds., Surviving Justice: America's Wrongfully Convicted and Exonerated, 401–18 (2005) (providing oral accounts from exonerees about how the criminal justice system's flaws led to their wrongful convictions, and finding that causes of wrongful convictions in the United States include: (1) deceptive interrogation practices by police, *id.* at 20; (2) suspects who waive their Miranda rights, *id.* at 212; (3) polygraph tests (which are only 50 percent correct, but are used to elicit confessions), *id.* at 92; (4) false confessions, *id.* at 20; (5) hysterical media coverage, *id.* at 186; (6) harsh interviews of victims, *id.* at 374; (7) police torture, *id.* at 112; (8) eyewitness misidentification, *id.* at 120; (9) ineffective counsel, *id.* at 326; (10) prosecutorial misconduct (which played a role in almost 50 percent of the first seventy wrongful convictions overturned because of DNA evidence), *id.* at 50; (11) perjured testimony by witnesses, *id.* at 218; (12) bad scientific evidence, *id.* at 290; (13) all-white juries. *id.* at 124; (14) increased suspicion in spousal murder cases, *id.* at 400; (15) too few Innocence Projects, *id.* at 256; (16) loss of DNA evidence, *id.* at 386; (17) wrongful convictions and death row, *id.* at 348; and (18) lack of retrospective review).

5. Hinton, *supra* note 3 at 1-28, 163-217.

6. *See* E. Ann Carson, *Prisoners in 2020—Statistical Tables, Bureau of Justice Statistics*, (December 2021); Vera Institute, *Overlooked: Women and Jails in an Era of Reform* (August 2016); Lhamon, *supra* note 2, at 3, 18; *see also* Prison Policy Initiative, *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force* (May 14, 2019), https://www.prisonpolicy.org/blog/2019/05/14/policingwomen [https://perma.cc/4VLN-PAB2] (documenting that women's police encounters and arrests for drugs increased significantly in recent decades, while stops and arrests of men dropped).

7. Lhamon, *supra* note 2, at 6, 25, 124; Michigan Dept. of Corr., *Statistical Report, 2021*, Sec. C2 (published in 2023) [hereinafter referenced as MDOC].

similarly situated male defendants.[8] Their children are displaced and broader communities negatively impacted. Approximately a quarter of incarcerated women are convicted of homicide, and although most were also responding to gender-based abuse, their sentences swallow most of their lives or worse, condemn them to die in prison.

As a manifestation of global male dominance that has violent consequences in sexism, racism and classism, the criminal legal system in the United States has long turned its back on the crisis of gender violence and the rising tide of women's deaths by homicide.[9] Male violence continues to be the most significant factor in 89 percent of intimate partner homicides regardless of who is killed; and at least 63 percent of all women's homicides are committed by male romantic partners. Only about 5 percent of men are killed by their women partners.[10] Unlike men who kill women out of a sense of ownership, jealousy, or fear of losing the relationship, women kill men primarily as an act of survival.[11]

With its roots in white and male supremacy, the criminal legal system has routinely blamed women for their own abuse, wrongfully arrested and convicted them *before the fact* when they fought back to save their lives, and entrapped them in prison with post-conviction blockades that keep them there.[12] Over 6,600 women are

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8. Lhamon, *supra* note 2, at 6, 18.

9. Jacqueline Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy, Trauma, Violence, & Abuse*, 246–269 (2007) (finding that "the major risk factor" for intimate partner homicide, is intimate partner violence by the male whether the woman or the man is killed).

10. Sanctuary for Families, *The Silent Epidemic of Femicide in the United States* (March 10, 2023), https://sanctuaryforfamilies.org/femicide-epidemic [https://perma.cc/EY9T-H4R6].

11. *See* Isabel Grant, *Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners*, *in* 47:3 Alberta L. R. 779, 785 (2010) (A study of 252 cases finding that men kill women in relationships marked by ongoing violence against the woman triggered by loss of control over the relationship or suspicion of infidelity, most often unsubstantiated); Daniel G. Saunders, *Self-Defense and Violence Against women in the United States*, *in* The Wiley Blackwell Encyc. Of Gender and Sexuality Studies, Nancy A. Naples, ed. 1–2 (2016).

12. Rita Oceguera, *Thousands of Women are Serving Life in U.S. Prisons. Their History of Trauma is Often Overlooked* (2021), https://www.injusticewatch.org/criminal-courts/illinois-prisons/2021/women-life-sentences/#:~:text=One%20in%2015%20women%20in,women%20are%20on%20death%20ro[https://perma.cc/XQ3M-7Z4X]; *See also* Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars* (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html#:~:text=A%20months%2Dlong%20Marshall%20Project,those%20

serving life or near-life sentences in the United States.[13] At least one-third of them are Black.[14] As Michelle Alexander concluded, Black people who were historically shackled by slavery and Jim Crow laws are today controlled through mass incarceration. For Black women there remains the additional, "intersecting," sources of misogynistic control—economic, educational, social, and sexual - including subjugation through the mother role and restrictive laws on contraception and abortion.[15]

The present study examines 461 women's convictions and sentences for homicide—172 for first-degree murder and 289 for second-degree murder—who were incarcerated by the state of

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who%20pose%20little%20danger [https://perma.cc/WWP6-VD9N]; Regina Austin, *The Saga of Reginal McFadden—"Pennsylvania's Willie Horton" and the Commutation of Life Sentences in the Commonwealth of Pennsylvania*, *in* 112 J. Crim. L. & Criminology Online (2022) (detailing the impact of "the Willie Horton effect" on Pennsylvania's parole and clemency process by the disastrous, politically based decision to grant commutation of sentence to Reginald McFadden who committed murder after his release from prison. The "Willie Horton effect" continues to have a paralyzing impact on parole boards and politicians); Danielle Bernstein, *Why Women's Wrongful Convictions are so Difficult to Overcome* (August 14, 2023), https://theappeal.org/womens-wrongful-convictions-no-crime-sexual-stereotypes/ [https://perma.cc/B5BX-TV2R]; *see also* Carol Jacobsen & Lora Bex Lempert, *Institutional Disparities: Considerations of Gender in the Commutation Process for Incarcerated Women*, *in* 39 Signs: J. Women Culture & Soc'y 265, 272–74, 276–77, 282–84 (2013) (showing how gender, race and class bias functions to deny clemency to women in commutation hearings in Michigan).

13. Ashley Nellis, *In the Extreme: Women Serving Life without Parole and Death Sentences in the United States* (Sept. 22, 2021), https://www.sentencingproject.org/reports/in-the-extreme-women-serving-life-without-parole-and-death-sentences-in-the-united-states/ [https://perma.cc/K7MK-RJAC] (Virtual life is generally described as a minimum sentence over 50 years, or one that exceeds an individual's natural life expectancy.).

14. Trevariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women,* National Black Women's Justice Institute (Sept. 23, 2021), https://www.nbwji.org/post/extreme-sentences-disproportionately-impact-and-harm-black-women#:~:text=Black%20women%20account%20for%201,every%2059%20imprisoned%20white%20women [https://perma.cc/5D2H-G2GT].

15. *See* Alexander, *supra* note 3; Crenshaw, *infra* note 21; Black's Law Dictionary, 294, 835 (10th ed. 2015) defines "wrongful conviction" as conviction of a person for a crime that she or he did not commit; "Misconviction" is defined as "wrongful conviction of an innocent person, usually as a result of erroneous or fraudulent forensic evidence or mistaken eyewitness identification;" "Miscarriage of justice" is defined as "a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime—also termed failure of justice." (All these terms have been defined to fit a gendered legal system and do not apply equally or offer equivalent or sufficient mitigations to women's circumstances.).

Michigan in 2021.[16] Although the focus is on Michigan, the policies and practices discussed are by no means limited to one state. Most of the women remained incarcerated at the time of this publication or sadly their cases were replaced by similar ones. Results of the study showed more than half the women (55 percent) were Black, and at least 58 percent of the cases involved male violence. In at least another 21 percent, violence was intimated.[17] Almost half the women in the study (46 percent) were convicted as accessories to male codefendants who committed the murder, and almost half of them (44 percent) were convicted of first-degree murder and sentenced to life without parole (LWOP). Another 22 percent of women killed their abusers alone, and almost all their cases fit the legal framework for self-defense, yet about a third were convicted of first-degree murder (32 percent LWOP) and another 3 percent to life with possibility of parole. For those convicted of second-degree murder, the average sentence was 20.8 years.

More than half the women serving time for homicide were Black (55 percent); and most were convicted by courts in metropolitan Detroit. A larger percentage of white women (44 percent) than Black women (33 percent) were convicted of first-degree murder. However, the larger number of life and longer sentences for white women reflects the higher value dominant culture places on the lives of white persons than Black.

This study is divided into five parts. Part I addresses public policies, the adversarial structure of the criminal legal system, and the ways its laws and practices are gendered and racially encoded and have an impact on women's criminalization and incarceration. Included is a brief discussion of Michigan's singular role in having a higher incarceration rate as a percentage of its population than any democratic country on earth.[18] Part II examines the racist and sexist content in homicide charges and sentences and how changes in homicide and self-defense laws have not helped women but only added to their convictions and put a deadlock on their incarceration.

16. Michigan Dept. of Corr., *2022 Statistical Report*, C-63 (pub. in January 2024) lists a total of 474 women serving life or long sentences for first- and second-degree murder in Michigan. Almost all the women in the study remain in prison at the time of this publication; those who died or were released were replaced by similar cases.

17. *Id.* (These percentages of women whose cases involve intimate partner or other family violence continue to increase as we meet more and more incarcerated women who need assistance with writing and filing clemency petitions and parole support.).

18. Prison Policy Initiative, *State Profiles: Michigan*, https://www.prisonpolicy.org/profiles/MI.html [https://perma.cc/SBE2-RCMK] (last visited July 9, 2024).

Part III gives an overview of the study, its methodology, sample, data, and patterns related to race, age, abuse histories, roles, codefendants, relationships to persons killed, judges, defense attorneys, and other variables. Part IV presents case summaries for analysis and discussion that are divided into seven groups according to who committed the murder and who was killed and why. Part V looks at the primary stakeholders in the present system—judges, prosecutors, defense attorneys, jurors, parole boards—and how they have contributed to the carceral monstrosity and must contribute now to the revolutionary transformation that is changing the criminal-legal-carceral landscape through new grassroots, feminist, formerly incarcerated, abolitionist nonprofits, and citizen-driven projects.

I. Gendered Public Policies and the Carceral Backlash

A. *Gender Violence, Criminalizing Codes, and the Closed World of Women's Prisons*

Almost one-third of all the women incarcerated in the world are in the United States. Fifty-one percent are Black women.[19] While the overall number has been declining in recent years, Black women are still incarcerated at a rate almost twice that of white women and re-arrested more often as well.[20] As intersectional legal theorist Kimberle Crenshaw explained, Black women are subject to the intersection of two major social structural forces of oppression: racism and sexism. These forces converge on Black women in a unique way different from the impact of racism on Black men or sexism on Black women; they converge in a way that produces unique pressures, rather than resulting from adding the impacts of racism and sexism together. [21] Thus, as Crenshaw pointed out,

19. *How Incarcerating Women Fuels Our Mass Incarceration Crisis* (2023), https://www.aclu.org/issues/womens-rights/women-and-criminal-justice/how-incarcerating-women-fuels-our-mass-incarceration [https://perma.cc/S459-PTW8]; *see U.S. Census* (2020), https://www.census.gov/quickfacts/fact/table/US/LFE046220 [https://perma.cc/YP69-GPG7].

20. *See* Niki Monazzam & Kristen M. Budd, *Incarcerated Women and Girls*, (April 3, 2023), https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls [https://perma.cc/3NZ7-4JQ7]; Katie Ropes Berry et al., *The Intersectional Effects of Race and Gender on Time to Reincarceration*, *in* 37 Justice Quarterly, 132–160 (2020); Leah Wang, *New Data: Police Use of Force Rising for Black, Female and Older People; Racial Bias Persists* (Dec. 22, 2022). https://www.prisonpolicy.org/blog/2022/12/22/policing_survey [https://perma.cc/QY2L-CL2U].

21. Kimberle Crenshaw coined the term "intersectionality" to explain the unique discrimination experienced by Black women as "the combined effects

Black women experience discrimination "not [as] the sum of race and sex discrimination, but as Black women."[22] Both in their rate of incarceration, and in their experiences throughout the criminal legal system, Black women experience the overlapping and reinforcing power of both racism and sexism in shaping their lives.

Studies by the United States Commission on Civil Rights, the Sentencing Project, Prison Policy Initiative, and other nonprofits and individual scholars have pointed to the laws, courts, and public policies that have long ignored the context of women's lives, as well as their race and histories of abuse while criminalizing them as a result of these realities.[23] The normalization of racial and gender injustice in our society—and "the dearth of intersectional analysis" of the role of violence in women's criminalization means it cannot be ignored when analyzing women's legal processing.[24] Even in cases that did not appear to involve sexism or white supremacy, the present study found that gendered tropes and exclusions in the laws influenced structural subordination of women defendants and inevitably affected the proceedings and outcomes in their cases, For Black women, the "gender entrapment" by the carceral dragnet is rooted in the history of slavery and social control that has ensued through continuing enactment of legislation and policy perpetuating discrimination, economic marginalization, coercive power by the state and its manifestation in intimate partner violence with total disregard for the value and intersectional realities of Black women's lives.[25]

Our hierarchical and adversarial criminal system pits the state and a sympathetic "victim" against a reviled "criminal" and ignores the significance of race and gender as well as root causes of violence and inequality. Thus it denies the compound reality of victim/lawbreaker—that those charged with harm have themselves

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of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women." *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. of Chicago Legal Forum 140–149 (1989).

22. *Id*, at 149.

23. Lhamon, *supra*, note 2; Monazzam et al., *supra* note 20; Aleks Kajstura &Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie* (2023), https://www.prisonpolicy.org/reports/pie2023women.html [https://perma.cc/P2SZ-5V6T].

24. *Id; see also* Light et al., *supra* note 2, at 56.

25. Beth Richie first discussed gender entrapment in *Compelled to Crime: The Gender Entrapment of Black Battered Women* 133–158 (1996) (theorizing how male violence entraps and criminalizes Black women).

been harmed but are denied mitigation or redress of offenses for that harm or its context throughout their prosecution, trial, conviction and sentencing - and the ways the law has been broken to convict particularly women and impact vulnerable communities.[26] Decisions made in criminalizing women neither take account of their lived experiences nor their actual roles and culpability related to the law. Black women most of all have been shoe-horned into a system that neither fits nor releases them.[27]

Most of the workings of the criminal, legal and carceral systems are encoded, ephemeral, and generated by a mechanism that seeks to punish women who do not follow gendered rules.[28] Some of the disparities that have emerged from decades of criminal-carceral backlash against women are: (1) society's outdated expectations, stereotypes, and sexual tropes for women that are grounded in dominant male perspectives; (2) women have no equivalent to the DNA testing that is the "get out of jail" card for many men; (3) Many women are convicted of no-crime circumstances which do not constitute crimes at all such as those committed by a male partner, or an accidental or unknown reason for the death of a child. With no evidence to explain an alternative hypothesis, the mother or caretaker is easiest for the police, prosecutor, and society to blame; (4) Most cases involving women's self-defense occur in the home or out of sight from the public or witnesses, while women's credibility does not carry the same weight as men's in court or elsewhere; (5) Women are socialized to defer to authority and comply which means they are at greater risk of falsely confessing or pleading guilty to get back to their children and families; (6) Coercive dynamics and threats by abusers and by police land more forcefully on women and other vulnerable persons because of their gendered socialization and differences in physical size and strength; (7) Because discretion and discrimination are baked into many aspects of the system,

26. "The victim/offender overlap encompasses the victimization of lawbreakers, a primary factor in women's offenses which are in response to gender-based violence." *See* Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform, in* 87 Brooklyn L.R., 1319 (2022); *see also* Marie E. Karlsson & Melissa J. Zielinski, *Sexual Victimization and Mental Illness Prevalence Rates Among Incarcerated Women: A Literature Review, Trauma*, *in* 21 Violence & Abuse, 326–349 (2020) (Most studies estimate that between 68.4 percent and 94 percent of incarcerated women have histories of trauma and abuse, and scholars have documented racial discrimination at all levels of the criminal system. "The comprehensive literature review provides compelling evidence that women who become incarcerated evidence disproportionately high rates of childhood and lifetime sexual violence victimization . . . ").

27. Lhamon, *supra* note 2, at 26-27.

28. Bernstein, *supra* note 12.

prosecutors, judges and juries rely on gender as well as racial stereotypes to convict women. (8) Media reports of homicides depend primarily on prosecutors' statements and often emphasize details pointing to a woman's guilt. Many of these disparities build a portrait of a vengeful, jealous, or sexually promiscuous woman, or one who is unfit for her role as wife or mother but fit comfortably within gender and racial mythologies.[29]

Inside the closed world of women's prisons, about half are women of color, mostly Black, some are lesbians, a few are transgender, a few more are juveniles, almost all are heads of households, and the vast majority have heartbreaking histories of sexual and other physical abuse, trauma, and exploitation.[30] As single parents, most do the best they can to parent children and maintain familial ties while incarcerated, but prison has a disparate impact on women that increases the vulnerability of parents, children, and the community.[31] For women, prison means fewer educational and vocational opportunities, less access to medical care, library facilities, group programs, and family visits, and fewer alternatives to incarceration than men; at the same time, women are subjected to greater surveillance, harassment, infantilization, bodily violations, disciplinary sanctions, retaliation, and sexual assaults and exploitation by guards, staff, and outside vendors.[32]

As a closed system, women's prisons involve abuse as a part of daily life. Solitary confinement is a common tool of retaliation used

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29. *Id.*

30. *See* Carol Jacobsen, *For Dear Life: Women's Decarceration and Human Rights in Focus*, 71–81, 180 (2019) (a visual and written collection of incarcerated women's narratives, interviews, images, case records, and official documents with essays by feminist legal and cultural scholars); *see also* Lhamon, *supra* note 2, at 6, 18, 23-27, 229-231.

31. Lhamon, *supra* note 2, at 4; *see also* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, Prison Policy Init. (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/9GWP-KFR2].

32. Lhamon, *supra* note 2, at 229-231; *see generally* Jacobsen, *supra* note 30; *see also* lawsuits by incarcerated women, such as *Neal v. Michigan Dept. of Corrections*, 230 Mich. 202, 583 NW2d 249 (1998) (approximately 500 women won $100 million award in a landmark class action lawsuit against the State of Michigan for decades of rapes and sexual assaults the women had suffered at the hands of their keepers. Despite their lawsuits, many continued to endure threats, harassment and assaults. Some women filed individual lawsuits, including several who had given birth in prison to children fathered by guards who raped them); *see also* Michigan cases of sexual abuse by officers or staff include *Machelle Pearson v. Thomas Robinson, State of Michigan, and Mich. Dep't. of Corr.*, Civil Action No. 96-CV-73010-DT; *Beausoleil and Scholl v. Snyder, et al.*, Case No. 18–13139 (E.D. Mich. Feb. 17, 2021).

by guards who can and do chain down, hogtie, withhold food and water from, and degrade women.[33] Illness and disease are largely ignored by state administrators as are the mold, filth, rotting conditions, and poor nutrition that cause and aggravate ill health and death. Deaths are underreported or covered up, and accountability is rare. [34] It is a disturbing fact that approximately 66 percent of women suffer mental health problems from histories of abuse and trauma in addition to the injustice of their incarceration.[35] The barbarity of daily life in prison makes it obvious why many attempt suicide or die early.[36] If they survive, prison promises to shorten their lives after they leave.[37]

B. *The State of Michigan: A Brief History and Context of Racism, Sexism, and Criminalization*

Many aspects of the law and the criminal legal system are similar across the United States. But Michigan stands out as having the highest incarceration rate of any democratic state or country

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33. *Id; see also* Shawanna Vaughn, *Demonstrators Continue to Sound the Alarm about Abuses at Michigan's Huron Valley Prison: "They are not Pieces on a Chess Board!"* Honeysuckle Mag. (2023), https://honeysucklemag.com/michigan-prison-abuse-womens-huron-valley-correctional-facility [https://perma.cc/CU4F-W2JG].

34. *See* Dan Moshenberg, *Michigan Built a Special Hell for Women, the Women's Huron Valley Correctional Facility*, Women in and Beyond the Global (Nov. 25, 2019), http://www.womeninandbeyond.org/?author=3&paged=6 [https://perma.cc/GYS3-7K4V]; Amanda Chan & Anna Nathanson, *'Not for Human Consumption': Prison Food's Absent Regulatory Regime*, William & Mary Bill of Rights J. (2021); *see also Bailey, et al v. Mich. Dep't. of Corr., et al.*, Civil Action No. 19–13442 (U.S. Dist Ct. Eastern Dist. Of Michigan 2021).

35. *See* Manuel Villa, *The Mental Health Crisis Facing Women in Prison* (June 22, 2017), https://www.themarshallproject.org/2017/06/22/the-mental-health-crisis-facing-women-in-prison [https://perma.cc/6JTW-R4Z4].

36. Anna Gustafson, *At Michigan's Only All-Women Prison, Reimagining a 'hostile situation,'*, Michigan Advance (March 23, 2022).

37. *See* Danya Ziazadeh, *Inadequate Health Care: A Significant Problem Affecting Incarcerated Women*, University of Michigan School of Public Health Report (May 30, 2019), https://sph.umich.edu/pursuit/2019posts/inadequate-healthcare-a-significant-problem-affecting-incarcerated-women.html [https://perma.cc/3JUC-N78X]; Emily Widra, *Incarceration Shortens Life Expectancy* (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy [https://perma.cc/7HP8-GGZG] (The study shows that each year of prison takes 2 years off an individual's life expectancy);*see also* Bruce Western, *Homeward: Life in the Year after Prison* 140 (2018) (In 2021-22, the State of Michigan paid $34 million for lawsuits against the Michigan Dept. of Corrections for such crimes as retaliation, discrimination, and harassment by officers, failure to provide medical care, failure to protect from abuse, and wrongful deaths. *See* Senate Fiscal Agency, FY 2021-22 Status of Lawsuits Involving the State of Michigan, (Sept. 2023).).

in the world.[38] From 1970 to 2005, Michigan's state prison population ballooned from 9,079 to 49,467, and then tapered downward to 32,239 by 2022.[39] Unfortunately, the decline in numbers was quickly countered by increases in the average minimum sentence from 7.1 years in 1998 to 11.7 years by 2022.[40] During the same period, the women's prison population in Michigan increased from approximately 600 in the 1970s to 2129 by 2022; but the male population decreased, including during the pandemic.[41] No special releases related to COVID were given to women prisoners even though Michigan had the second highest death rate of incarcerated persons in the United States that year.[42]

Michigan has long struggled with its overflowing prison population. In 1989, the Michigan Supreme Court released two reports on the state courts: one on racial and ethnic bias in the courts and the other on gender bias.[43] Both reports found discrimination on all counts at all levels of the criminal legal process. Other state courts published similar reports, including Washington, New York, Florida

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38. Prison Policy Initiative, *Michigan Profile*, https://www.prisonpolicy.org/profiles/MI.html [https://perma.cc/Q63W-WV5H] (last visited July 9, 2024).

39. Robin R Risko, *Summary: As Reported by the House Subcommittee*, FY 2022–23: Michigan Department of Corrections, https://www.house.mi.gov/hfa/PDF/Summaries/22h5780h1_Corrections_Summary_Reported_by_Hse_Subcmte.pdf [https://perma.cc/M3RJ-ZHS6].

40. *See* State App. Defender Office, *Safe and Just Michigan* (April 2022), https://www.sado.org/articles/Article/951#:~:text=This%20policy%20bans%20all%20forms,7.1%20years%20to%2011.7%20years [https://perma.cc/RK8A-W2W9].

41. Mich. Dept. of Corr., *Statistical Reports* (1991) and (2021); *see also* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth* (January 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/EXC3-PX7M]; *see also* Table 3, in U.S. Dept of Justice, *Prisoners in State and Federal Institution*s (Dec. 1978), https://bjs.ojp.gov/library/publications/prisoners-state-and-federal-institutions-december-31-1978-final-report [https://perma.cc/AXJ8-ZKBM]; *see also* Vera Institute of Justice, *Incarceration Trends in Michigan* (2019), ("The number of women in Michigan jails has increased more than fivefold, from 431 in 1970 to 2,343 in 2015.).

42. USA Facts.org, *How Many People in Prisons Died of COVID-19?* (September 20, 2022), https://usafacts.org/articles/how-many-people-in-prisons-died-of-covid-19 [https://perma.cc/BDX9-DPUL].

43. Mich. S. Ct., *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Cour*ts (1989), available at: https://www.michbar.org/file/programs/eai/pdfs/regtf_1989_part1.pdf [https://perma.cc/8XEC-2JPS] (documenting gender bias at all levels of the Michigan court system, including responses to violence against women in issues of domestic and family relations—such as divorce, child support, and custody—in the treatment of women whether as litigants, witnesses, attorneys, judges, defendants, or court personnel, and in the status of women within the profession of law).

and New Jersey.[44] The reports also offered blueprints for change. Unfortunately, many legislatures, including Michigan's, went on the offensive by enacting "Truth in Sentencing" laws and banning good time credits to increase incarceration rates.[45] The parole board added to punishment by refusing to release people sentenced to (so-called) "parolable life", in opposition to the law's intent.[46] By 2014, Michigan's parole board was requiring people in prison to serve an average of almost 140 percent of their minimum sentences before being released.[47]

Today Michigan is one of twelve states in which the prison population is more than 50 percent Black, although the state's demographics are only about 14 percent Black.[48] The disparity is largely due to the state's racist history and its exploitation of its largest city.[49] Although Detroit is associated with its rich contributions to American culture and legendary economic progress in the past, the

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44. *See* Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, *in* 16 Univ of Mich, L. Rev. 921–23 (1993).

45. The Truth in Sentencing Act of 1993, H.R. 3584, 103rd Congress (1993–1994). (In 1998, the "Truth in Sentencing" law passed in Michigan requiring people convicted and incarcerated in Michigan to serve 100 percent of their minimum sentence.).

46. *See*, State Bar of Michigan, *What Should "parolable life" mean?—Judges Respond to the Controversy*, State Bar of Michigan, 1, (Mar. 2002), available at https://www.safeandjustmi.org/2002/03/01/what-should-parolable-life-mean-judges-respond-to-the-controversy/ [https://perma.cc/49TX-9BTT]; *see also* Paul C. Louisell, *Parole Board Interpretation of Lifer Law Unfair, Unwise, Unconstitutional*, 1 Mich. Crim. Law Ann. J. 29 (2003) (arguing that the Michigan Parole Board's policy is against legislative and judges' intent); David Alan Sklansky, *Addressing Violent Crime More Effectively,* Brennan Center for Justice (Sept. 27, 2021), https://www.brennancenter.org/our-work/analysis-opinion/addressing-violent-crime-more-effectively [https://perma.cc/X77U-6P27].

47. Council on State Governments Justice Center, *Compilation of Michigan Sentencing and Justice Reinvestment Analyses*, 43 (May 2014), https://csgjusticecenter.org/wp-content/uploads/2020/10/Michigan ReportTechnicalAppendix.pdf [https://perma.cc/V6X5-DAX7].

48. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons [https://perma.cc/9PE3-B5QK]. (The 12 states are Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia.). U.S. Dept. of Health and Human Services lists demographics of Michigan in 2024 as: Black 14.1 percent; White 79%; Latinx 5.6 percent; Asian 3.4 percent; American Indian and Alaska Native 0.7 percent; other 2.7 percent https://mchb.tvisdata.hrsa.gov/Narratives/Overview/4371731b-af6c-4d9e-98df-14ad64eb4983 [https://perma.cc/HWN9-VADR].

49. 43 percent of the incarcerated women in the present study are from Wayne County, home of Detroit.

state has maintained a long, disturbing history of violence toward Detroit's Black population beginning with its mistreatment of the new citizens during the Great Migration. The police crackdowns against Black people that provoked rebellion in the 1960s were followed by even harsher economic policies and housing inequities that endure to the present day.[50] Power over Detroit has resided in oppressive systems such as courts and state officials who have failed to provide the city with its fair share of state tax revenues while cutting off public employee pensions, blocking housing projects in Black communities, refusing to address the lack of diversity in juries and courts, and suspending democratic processes by taking over the city and forcing it to file bankruptcy against the will of its elected representatives and at the expense of city pensions, property, and citizens.[51] As a consequence of decades of exploitation, Detroit's population size decreased and poverty surged.[52] From its wasteland of polluted factories left by an absconding auto industry to its vibrant musical and cultural life, Detroit is a city of contradictions, deep scars, and indomitable resilience. Its citizens have had to struggle to survive while constantly confronting a carceral monstrosity that threatens to consume them.[53]

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50. *See* Ross Eisenbrey, *Detroit's Bankruptcy Reflects a History of Racism*, Economic Policy Institute (Feb. 25, 2014), https://www.epi.org/blog/detroits-bankruptcy-reflects-history-racism [https://perma.cc/HJ6E-SKT5].

51. *Id.*; *see also* Erin Einhorn & Olivia Lewis, *How Detroit's Birwood Wall, Built to Divide Black and White Residents, Still Creates Racial Barriers* (July 19, 2021); Fox 2 News, *Detroit Activists Plan Juneteenth March over Disparities in Sentencing, Lack of Jury Diversity* (June 19, 2020), https://www.fox2detroit.com/news/detroit-activists-plan-juneteenth-march-over-disparities-in-sentencing-lack-of-jury-diversity [https://perma.cc/Q8D8-WMYS]; Todd C. Berg, Esq., *Not Enough Black people on Wayne County Juries: Sixth Amendment Fair Cross-Section Rights—Analysis*, Michigan Lawyers Weekly (October 20, 2008); Joanne Laurier, *Gradually, Then Suddenly: A Whitewashing of the 2013 Detroit Bankruptcy*, World Socialist Website (April 28, 2022), https://www.wsws.org/en/articles/2022/04/29/tzsp-a29.html [https://perma.cc/5YB3-P5V5]; Ed White, *Court Kills Flint Water Charges against Ex-Governor, Others*, Assoc. Press (June 28, 2022), https://apnews.com/article/health-crime-michigan-indictments-rick-snyder-609f461af3bb2d7f10a40c5d663620eb [https://perma.cc/R3PJ-F3PZ] (Former Governor Rick Snyder, a Republican businessman, was charged with two misdemeanor counts of willful neglect of duty, later dismissed.).

52. *See* Haseeb Bajwa & Mike Shields, *Detroit: Past and Future of a Shrinking City* (July 27, 2022), https://economyleague.org/providing-insight/leadingindicators/2022/07/27/detroitshrinkingcity [https://perma.cc/PA5R-YM85]; *see also* Frank Witsil, *Massive Layoffs Hurt Single-Parent Households More: Detroit Tops List*, Detroit Free Press (December 3, 2018).

53. Admin., *Driving While Black: What it is and Why it's Important*, ACLU of Michigan, https://www.aclumich.org/en/news/driving-while-black-what-it-and-why-its-important [https://perma.cc/7PV8-9PVQ] (The ACLU of

II. Homicide Charges, Sentences, and Unsustainable Harm

A. *How Gender and Race are Made Scapegoats in Homicide Processing*

Even as some prison populations have been reduced and the violent crime rate has gone down, criminal penalties have increased exponentially due to flawed reasoning by electoral politicians at both federal and state levels.[54] New laws, stacked charges, and "one size fits all" mandatory sentences have compounded punishments.[55] Racist practices are most often cited for subjugating and fragmenting Black communities, but systemic gender bias has also caused unsustainable harm.[56] Efforts to implement discretionary sentencing and reform or reduce prisons have accomplished little and have allowed mass incarceration to persist.[57] Conviction without representation for women and people of color means the laws, charges, practices, convictions, and sentences are all contaminated and must be repealed or abolished. The stakes are highest in women's homicide convictions where their sentences are obscene and their primary role has been as victims, whether or not they survived.[58]

1. The Deadlock of Life Sentences

Nationally, an estimated 6,600 women are serving life or virtual life sentences for homicide.[59] Decades of research have failed to show any beneficial effects of long prison sentences on public

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Michigan has had a "driving while Black" campaign since the early 1990s in Michigan.).

54. Mirko Bagaric et al., *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, *in* Hofstra L. Rev. 793 (2017).

55. *Id.*

56. Jeremy Travis et al., eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 68 National Research Council, 325 (2014). (Twenty of the United States jurisdictions have extensive guideline sentencing systems: Alabama, Kansas, Oregon, Alaska, Maryland, Pennsylvania, Arkansas, Massachusetts, Tennessee, Delaware, Michigan, Utah, District of Columbia, Minnesota, Virginia, Federal (U.S. courts), North Carolina, Washington, Florida, and Ohio; *see also* Mirko Bagaric et al., *Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties—But Science has the Answer*, *in* 53 Indiana Law Review, 498-544 (2020); For a feminist critique of Sentencing Guidelines, see Nancy Gertner, *Women and Sentencing*, *in* 57 American Crim. L.R. 1401 (2020).

57. *See generally* Godsoe, *supra* note 26.

58. *See generally* Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (2023).

59. Nellis, *supra* note 13, at 5-6; Sklansky, *supra* note 46.

safety. Approximately 2,000 women—one-third of them Black—are sentenced to life without possibility of parole, a number that has risen from almost zero in 1972.[60] In 2024, there were fifty-two women on death row.[61] Michigan, one of the most punitive states in the U.S., and one of only five states requiring mandatory life without parole sentences for first-degree murder, felony murder, or conspiracy to commit first-degree murder, incarcerates one of the highest numbers of women serving life sentences without parole in the country, at least a third of them Black.[62]

Akin to a death sentence, life without parole (LWOP) is nearly impossible to overturn.[63] For women, gender bias makes it even more difficult to overturn a life sentence.[64] In 2021, Michigan had 184 women, over half of them women of color, serving life without parole sentences for first-degree murder;[65] California had 182 women, Pennsylvania had 193, and Florida had 241.[66] By 2023, Governor Gretchen Whitmer had signed a number of minor criminal reform bills, and the new Democratic majority legislature responded to the "Second Look" movement by introducing a bill to allow judges to reconsider lengthy sentences after ten years.[67] The "Second Look" bill has not moved forward, however, and it is doubtful that such reforms will be enough to address the enormity of Michigan's LWOP crisis without a much greater transformation.

2. Felony Murder: A Problem of Culpability

The felony murder doctrine allows the state to prosecute someone for murder for a death that occurs during the commission of a felony such as robbery or rape. A throwback to another era, the felony murder law was imported into the United States where it has become a menace in the only country that has not outlawed it. The law has been skewed in practice to extend culpability for a murder

60. Nellis, *supra* note 13, at 5.

61. Death Penalty Information Center, *Current List of Women on Death Row* (March 11, 2024), https://deathpenaltyinfo.org/death-row/women [https://perma.cc/9DLC-2PC3].

62. Nellis, *supra* note 59; Mason, *supra* note 14.

63. Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, *in* 74 ALB. L. REV., 1470-71 (2010) ("The most difficult cases . . . involve rejected claims of self-defense.").

64. Bernstein, *supra* note 12; *see also* Gertner, *supra*, note 56.

65. MDOC, at C-63 (2021).

66. Nellis, *supra* note 13.

67. Alyssa Burrjaburr, *Giving Michigan Prisoners 'Second Look' could give them another chance at life.* (April 21, 2023), https://www.mlive.com/public-interest/2023/04/giving-michigan-prisoners-a-second-look-could-earn-them-another-chance-at-life.html [https://perma.cc/D5LK-WAJR].

to someone who not only did not commit it, but did not anticipate nor intend it, and even if they were in fear for their own life when the murder occurred. Because it allows for sentences that are grossly disproportionate to culpability, the law violates the Eighth Amendment's protection against cruel and unusual punishment.[68]

In Michigan, felony murder is further contorted by its status as first-degree murder which mandates a nonparolable life sentence.[69] The Michigan Supreme Court held in *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) that the mental element, or *mens rea*, of murder is not satisfied by proof of the intention of committing the underlying felony, but must be shown separately.[70] Nevertheless, nearly 1000 people in Michigan prisons who were wrongfully convicted of first-degree felony murder under the previous felony murder rule have not yet been able to successfully challenge their convictions.

In 2020, the Michigan Supreme Court addressed the problem again in *People v. Reichard*, 949 N.W 2d 64 (Mich. 2020).[71] Tiffany

68. Dolly Prabhu, *A Lifetime for Someone Else's Crime: The Cruelty of Pennsylvania's Felony Murder Doctrine*, *in* Univ. of Pittsburgh L. Rev. 441-442 (2019) (discussing how the felony murder law violates the Eighth Amendment and has no place in a fair and just criminal-legal system).

69. MCL 750.316(1)(b).

70. In *People v. Aaron*, 409 Mich. 672, 299 NW 2d 304 (1980) Michigan's Supreme Court found that the mental element of murder—malice or intent to kill—is not satisfied by proof of the intention of committing the underlying felony. Michigan's felony-murder statute requires there must be enough evidence to amount to at least second-degree murder. It lists the elements of second-degree murder: "(1) death, (2) caused by an act of the defendant, (3) with malice, (4) without justification. Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."; *People v. Hopson*, 178 Mich. App. 406, 410, 444 NW2d 167 (1989). Cases listed as felony murder and open murder are treated as first-degree murder. Theoretically, the charge of open murder, or first degree-, can later be lowered to second degree, or possibly to manslaughter, but that rarely occurs; Michigan law MCL 767.71 does not require a specific charge of first- or second-degree murder at the preliminary examination, and the charge of open murder often becomes the conviction.

71. In *People v. Reichard*, 949 N.W 2d 64 (Mich. 2020) the Michigan Supreme Court held that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony; Under MCL 750.316(1)(b), a person who commits murder in the perpetration of or attempt to perpetrate robbery, among other specified felonies, is guilty of first-degree murder. To convict a person of felony murder under this provision, the prosecution must show that the defendant acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. Thus, MCL 750.316(1)(b) operates only to elevate a second-degree

Reichard was charged under the felony murder theory for aiding and abetting her boyfriend in an armed robbery in which he killed a man. She moved to present evidence that her boyfriend had abused her, and she participated in the robbery under duress. The trial court granted the motion, but the prosecutor appealed. The Court of Appeals reversed the trial court's decision to grant the motion, holding that the state did not allow duress to be used as a defense to first-degree felony murder in which the claim of duress involves the defendant's participation in the underlying felony, in this case, robbery. The defendant appealed to the Michigan Supreme Court. In a unanimous opinion, the Michigan Supreme Court held duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. Similarly, in a third related case. *People v. Gafken*, 955 NW 2d 900 (2021), the Michigan Supreme Court ruled the defendant, who was charged with second-degree murder under the depraved-heart felony murder doctrine, also had a right to raise the affirmative defense of duress.[72] Unfortunately, these decisions were not made to be retroactive, and they do not help women who are already unfairly incarcerated.

3. Self-Defense: No Women Allowed

Laws of self-defense for justification, or acquittal, are generally consistent across the states and under the Model Penal Code, but they are outdated.[73] Self-defense is defined by Michigan law as "justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself [sic] against the use of unlawful force by such other person on the present occasion."[74]

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murder to first-degree murder if it was committed in the commission of one of the enumerated felonies.

72. *People v. Gafken*, 510 Mich. 503, 990 N.W.2d 826 (2022) (*See* Part IV, *infra*, for case summary.).

73. The Model Penal Code was developed for criminal courts by the American Law Institute in 1962. Provisions about rape, consent and other gender issues are outdated. The Institute is in the process of editing and redrafting the Code's provisions, particularly those on sentencing, sexual assault and related convictions. *See* American Law Institute, *The Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the Amer. L. Inst. At Washington, D.C.* (May 24, 1962); *The Model Penal Code*, 3.04 (1) Am. L. Inst. (2020); Joshua Dressler, *Criminal Law*, 15 (2nd ed 2005), https://lscontent.westlaw.com/images/content/DresslerCrimLaw.pdf [https://perma.cc/92H3-WT9U].

74. MCL 780.972, Act 309. http://www.legislature.mi.gov/(S(2iyqejimk4zj0eolx0uyr3g5))/mileg.aspx?page=getObject&objectName=mcl-Act-309-of-2006 [https://perma.cc/2UKP-VTEK]; *see also* Michigan Criminal Jury Instructions, 7.15 Use of Deadly Force in Self-Defense [Instructions] 174.11 (1986), https://www.courts.michigan.gov/siteassets/

In *People v. Riddle*, the Michigan Supreme Court clarified the state's self-defense law, stating:

> "We hold that the cardinal rule, applicable to *all* claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant honestly and reasonably believes that he [sic] is in imminent danger of death or great bodily harm and that it is necessary for him [sic] to exercise deadly force. As part and parcel of the «necessity» requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was *reasonably necessary* for him [sic] to kill his [sic] assailant. However, (1) one who is without fault is *never* obligated to retreat from a sudden, violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative «duty to retreat» only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the «castle doctrine» permits one who is within his [sic] dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force." [75]

In practice, women are not allowed to successfully claim self-defense in the same way it is granted to men. As law professor Mary Anne Franks stated, "One self-defense rule for men, another for women."[76] Many women in the present study testified in court about their acts of self-defense yet they were given little, if any, credibility.[77] As Leigh Goodmark found, "Even if the survivor's story of abuse is initially viewed as partially or wholly credible, the acceptance of the state's version of facts in a plea bargain or the finding of guilt by a judge or jury marks the rejection of the survivor's claim. In a system anchored to the victim/offender binary, there is simply not room for two victims. To acknowledge the victimization of a criminalized survivor also means acknowledging that the person

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rules-instructions-administrative-orders/jury-instructions/criminal/current/criminal-jury-instructions-responsive-html5.zip/index.html?r=1#t=Criminal_Jury_Instructions%2FCriminal_Front_Matter%2FCriminal_Front_Matter.htm [https://perma.cc/3Q7G-NGXZ].

75. *People v. Riddle*, 467 Mich. 116, 649 N.W.2d 30 (2002).

76. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege,* U. Miami L. R. 68, n. 4 (Summer 2014) 1123, quoted in Goodmark, *supra* note 58, at 86.

77. *See* Goodmark, *supra* note 58, at 7; *see also* case summaries of People v. Quiana Lovett, *infra* note 27; People v. Nancy Seaman, *infra* note 132; and People v. LaDonna Cummings, *infra* note 88.

will be abused twice—once by the perpetrator of gender-based violence and again by the state."[78]

Reforms, such as those relating to battered women's syndrome or stand your ground laws, which were meant to expand the legal interpretations of self-defense law or encompass women's experiences of abuse, coercion, trauma, and economic marginalization, have proved to be empty gestures as well.[79] In the gendered terrain of American law, the common law concept of self-defense is based on a response to a stranger's assault, or "fair fight" scenario involving two men of relatively equal size and strength who face off in a bar or another public site.[80] Such scenarios still hold power in the courtroom and in the collective mind. For women, the confrontation most often occurs in the privacy of the home or outside the view of witnesses, disadvantaging them under the law. Further, women's deaths often happen during recurring episodes of intimate partner violence in what has been called, a "long-term, ongoing homicidal process."[81]

In the early 90s, Michigan and many other states passed laws in response to the battered women's and feminist jurisprudence movements' demands for expert testimony on the abuse of women to be allowed in courts.[82] Unfortunately, these so-called "battered woman (or spouse) syndrome" (BWS) laws proved to be all but useless, or even harmful, in practice and are also based in outdated social science.[83] BWS theory not only confuses and works to discredit women's own narratives and self-defense claims, but it is widely misunderstood as a separate defense, which it is not.[84]

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78. *See* Goodmark, *supra* note 58, at 96.

79. *See id.* at 84-88; For a feminist intersectional study and critique of the lack of scholarship on gender in self-defense and stand your ground laws, *see generally*, Light, et al, *supra* note 2.

80. *Id.*

81. Robbin S. Ogle & Susan Jacobs, Self-Defense and Battered Women Who Kill: A New Framework 71 (2002).

82. For the Michigan law, *see* People v. Geraldine Wilson, 487 N.W.2d 822, 823 (Mich. Ct. App. 1992).

83. Dr. Lenore Walker, a psychologist who coined the term "battered women's syndrome" in her 1979 book, *The Battered Woman,* defined the phrase to identify common characteristics present in women who are physically and psychologically abused by their partners; Goodmark, *supra* note 58, at 84–85. *See also* Martha R. Mahoney, *Misunderstanding Judy Norman: Theory as Cause and Consequence*, 51 Conn. L. Rev. 671, 677 (2019).

84. In Michigan, at least 10 women are murdered by intimate male abusers for every intimate male partner killed by a woman. *See* Jacobsen, *supra* note 30, at 132–133. An unpublished study by the Michigan Women's Justice & Clemency Project for 2020 found more than seventy women murdered by intimate male partners in Michigan that year. In People v. Seaman, Dr. Lenore

Requirements for a self-defense claim use vague, male-coded terms such as the "reasonable" standard, the "imminence" measurement, and the "proportionality of force" calculation to justify gender and racial discrimination that fosters women's convictions.[85] Resistance to change comes from judges and prosecutors who fear a "parade of horribles" if the law is expanded to legalize women's perspectives for justification and becomes law.[86]

Walker testified at the trial and wrote a letter to Nancy Seaman's appellate attorney afterward: "I testified in Ms. Seaman's trial where she was convicted of murder in December 2004, but my testimony was so limited that I was unable to explain issues that are critical for juries to hear in order to fairly come to a just decision . . . If I had been permitted, I would have testified that in my professional opinion, Ms. Seaman was a battered woman in her relationship with her husband and that she had a reasonable perception of imminent danger to herself at the time she killed him." Letter to Appellate Attorney Michael A Farone on Aug. 23, 2005, No. 04–196916-FC (Mich. Oakland Cty. Ct. Feb. 13, 2007). In answer to the Michigan Court of Appeals denial of Nancy Seaman's appeal, Judge Karen Fort-Hood noted in her dissent: "the nature of the [battered woman] syndrome itself seemingly conflicts with legal principles addressing self-defense." Seaman, No. 04–196916-FC at [page] (Fort-Hood, J. dissenting). *See* Seaman case summary, *infra* Part IV.

85. Carol Jacobsen and Lynn D'Orio, *Defending Survivors: Case Studies of the Michigan Women's Justice & Clemency Project*, U of Penn., 18, 1, J of L. and Social Change, 23-28 (2015).

86. Garner, *supra* note 15, at 937. A "parade of horribles" is a rhetorical warning of "retrograde consequences that will, in the view of an opponent of some proposed action, occur if the action is taken." It has particular resonance as warning to the hierarchical legal system that is built on male supremacy and perspectives.

87. *See* Self-Defense Act, Mich. Comp. Laws § 780.972 (2006). In People v. Christel, 449 Mich. 578 (1995) 537, N.W.2d 194, Docket No. 98748 (Calendar No. 9) Supreme Court of Michigan, 581 (Argued May 2, 1995, Decided August 15, 1995), the Michigan Supreme Court rules that an expert witness can testify only to "battered spouse syndrome" by explaining symptoms and statistics but cannot make a connection to the defendant who is on trial. Although Michigan's Castle Doctrine, or stand your ground law, requires no duty to retreat and allows lethal force by a person who is in danger of serious bodily injury, sexual assault or death, in practice the law excludes women. *See* Light, et al., *supra* note 2 (feminist intersectional study on the gender and racial consequences of the Castle Doctrine and self-defense laws); Nicole M. Quester, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse,* 40 Akron L. Rev. 391 (2007) (arguing that violence against women has been a prevalent problem throughout time, and that American law has failed to protect against such intimate partner abuse); *see also,* Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 Univ. of Miami L.R. 1102, 1123, 1126-1127 (2014) (maintaining that, in practice, stand your ground laws harm women by reinforcing the criminal-legal system's double standard, posing no threat to social order, and functioning as "the chief

By 2022, all states had eliminated the requirement to retreat from the home in self-defense cases through some form of the "Castle Doctrine" or "stand your ground" law, but even using this doctrine within lawful claims of self-defense women have been unable to overcome gender and racial biases in court.[87] For example, in cases where couples co-habit or are present in one home, courts have prevented women from presenting the Castle Doctrine or self-defense instruction to the jury. In *People v. LaDonna Cummings*, Cummings shot and killed her abusive husband when his gun fell from his waist band while he was beating and kicking her on the floor. She got to the gun first.[88] The incident occurred at the home they cohabited where Cummings alone paid the mortgage. LaDonna Cummings was a college graduate. She held a job, and she had custody of their children when she left him because of his abuse. She had filed a personal protection order against him in the past, and she returned that day to do laundry and get clothes. The prosecutor argued against LaDonna Cummings' self-defense claim stating that her primary motive for shooting her husband was that she wanted the house but there were no grounds for her self-defense claim since he had locked her out, and the house was not hers but was legally in her mother-in-law's name. She was found guilty of first-degree murder by a jury and sentenced to mandatory life in prison.[89]

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narrative by which men can now justify provoking deadly fights… granting them immunity from prosecution and even from arrest." By contrast, women survivors who stand their ground in the home—where assaults and rapes against women most often occur—are shamed for not leaving and persistently convicted since the primary legal narrative women have who defend themselves is Battered Women's Syndrome, which is outdated, inconsistent with a defense of taking reasonable action, and not a defense at all but a theory that pathologizes women who fight back and requires them to subject their behavior in lethal situations "to extensive scrutiny and judgments by experts, lawyers, and juries" in a courtroom). *See also*, Cristina G. Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. Crim. L. and Criminology, 593, 597 (2016) (analyzing and critiquing the applicability of the Castle Doctrine to intimate partner violence due to situations involving cohabitant violence, privacy, and property rights).

87.

88. People v. LaDonna Cummings, No. 2005-16675-FC, Trial Transcript, Nov. 10, 2005, 252-254 (Mich. Genesee Cty. Ct. 2005).

89. *Id*. Sentencing Transcript, Dec. 12, 2005, 9. Trial Transcript V. 5 on Nov. 15, 2005 at 4-6, Cummings, No. 2005-16675-FC. In 2023, Cummings was granted clemency by Governor Gretchen Whitmer. Tragically, Cummings died later that year.

The Castle Doctrine has devolved into "a confusing patchwork of rules" that rely on "property rights to the exclusion of competing property interests that value the individual's personal safety… [T]he effect of these rulings is to rob intimates who are faced with violence of their basic and fundamental right of self-defense." [90]

Michigan Penal Code 750.321 permits intentional killing of another person as a result of sudden, violent, passion caused by serious provocation. There cannot be a significant cooling off period between provocation and the killing. Called a "heat of passion" defense, this also favors male experience without one that fits the kinds of violence women face, such as escalating, recurring, and potentially lethal incidents, leading them to conclude that de-escalation—not to mention support from police—is hopeless.

A study by the National Institute of Justice showed that, rather than taking unreasonable actions against violent partners in intimate partner homicide cases, nearly half the women who were murdered by male partners in the United States had underestimated the imminent threat to their lives.[91] In Michigan, at least sixty women—40 percent of them Black—are murdered every year by their violent male partners.[92] Some had criminal protection orders, and many had called police.[93]

4. Pleas and Punishments

Penalties for second-degree murder vary across the states; in Michigan, a judge is allowed discretionary sentencing but within a set of state guidelines.[94] Choices include a term of years or a life sentence with the possibility of parole.[95] From 1984 to 2012, the number of life sentences, including life with possibility of parole for second-degree murder, increased 469 percent.[96] By 2021, there were 296 women—about half of them Black—incarcerated for

90. Catherine Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense,* 86 Marquette L. Rev. 657, 660 (2003).

91. *See*, Jacqueline Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Rebecca Block, Doris Campbell, Mary Ann Curry, Faye Gary, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonnee Ulrich, and Susan A. Wilt, *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ Journal, 16 (Nov. 2003).

92. Jacobsen, *supra* note 30, at 132–133.

93. *Id.*

94. *See,* Michigan Judicial Institute, *State of Michigan Sentencing Guidelines* (May 2023). https://www.courts.michigan.gov/publications/felony-sentencing-resources/sentencing-guidelines-manuals/ [https://perma.cc/WNX5-LMTY].

95. *Id.*

96. Marc Morje Howard, *Unusually Cruel: Prisons, Punishment, and the Real American Exceptionalism*, 45, 49 (2017).

second-degree murder in Michigan.[97] Their sentences ranged from life with possible parole to an average term of 20.8 years, up from 15.4 years in 1991.[98] Most accepted a plea to second-degree murder to avoid the very real threat of a life without parole sentence, though most of them should not have been charged with murder to begin with.

III. The Study

A. *Overview and Goals*

The Michigan Department of Corrections 2021 Statistical Report (published in early 2023) listed 480 women serving sentences for homicide: first- or second-degree murder.[99] This number, which represents approximately one-quarter of all the women imprisoned by the state that year, includes 184 for first-degree murder and 296 for second-degree.[100] The present study examines 96 percent (461) of these women's cases, 172 first-degree murder and 289 second-degree.[101] Manslaughter cases were not included in the study.[102] The convictions span a period from 1976 to 2022. All the women were incarcerated at Women's Huron Valley Prison, the only state prison for women in Michigan, listing a population of 1566 in 2021.[103] The study captures a moment in time during the long upward drive to incarcerate women and intersects with the COVID pandemic.[104] The goals of the study were to interrogate the facts

97. MDOC, at C-63 (2021).

98. *Id.;* MDOC, *at* 117-121 (1991).

99. *Id.*

100. MDOC, *at* C-63 (2021).

101. Records for the remaining cases were unavailable at the time the study was made. MDOC statistics also vary depending on when they are collected.

102. MDOC, at C-64 (2021) (listing 38 manslaughter cases with an average sentence of 7.6 years, in 2021).

103. *Id*, at C-63. (Intake was stopped during COVID-19 at Michigan's Women's Prison),

104. *See* MDOC, at 117-121 (1991) and MDOC, at C-63 (2021). (Of 272 women convicted of homicide in 1991: 59 were convicted of first-degree murder (mandatory life w/o parole), 139 second-degree murder (15.4 yrs. avg. sent.), and 74 manslaughter (5.2 years avg. sent.). Of 371 women in 2000, 104 were convicted of first-degree murder (mandatory life w/o parole), 189 second-degree murder (18.4 yrs. avg. sent.), and 78 manslaughter in 2000 (5.2 avg. sent.). Of 480 women in 2021: 184 were convicted of first-degree murder (mandatory life w/o parole), 296 second-degree murder (20.8 yrs. avg. sent.), 34 manslaughter (7.4 years avg. sent.). *See also* United Nations Office on Drugs and Crime, *Killings of Women and Girls by their Intimate Partner or Other Family Members: Global Estimates 2020,* 3 Data Matters, 3 (2021) (Showing that 47,000 women

and circumstances of women's homicide cases and their criminal processing individually and collectively, and to provide evidence for women's mass decarceration as a step in decriminalizing survivors and dismantling the criminal legal and carceral systems in favor of a revolutionary feminist and abolitionist form of justice.

B. *Methodology*

The details and contexts of the 461 homicide cases in the study were collected through personal interviews, filmed and audiotaped interviews, phone conferences, county, state, and federal court records, transcripts, pleadings, affidavits, letters and correspondence, as well as through Michigan Department of Corrections documents, parole and public hearing records and transcripts, police reports, and media articles.[105]

Information gathered for statistical examination of the 461 cases included the following: name of the person, age, race, and prior criminal history; year of incident, county, jury trial, bench trial, or plea; conviction, and sentence; name of judge; name of defense attorney, and whether retained or appointed (an imperfect indicator of economic status, but in many cases the only data available); name, gender, and race of and relationship to person/s killed; name, gender, and race of and relationships to codefendants or coperpetrators, and their sentences; whether defendant was the actual killer or a non-killer accessory or a co-killer accessory; whether self-defense was claimed or evident; whether intimate partner violence (IPV) was involved; whether other abuse was involved; whether the woman's history showed evidence of abuse, or if it was unknown; whether mental illness was known; if drugs or alcohol were involved; whether there was another or previous conviction, and other details.[106] Several cases in the study involved male codefendants who were not prosecuted or not convicted, but who were involved in or committed the murder.

C. *Sample*

The sample encompasses 461 cases of women convicted of first- or second-degree murder in Michigan. Their convictions span

and girls worldwide were killed by intimate partners or other family members in 2020, including a 9 percent increase in the Americas that year).

105. Many women in the study have been represented for clemency petitions or parole support or human rights issues by the Michigan Women's Justice & Clemency Project; and since 2019 the Project has partnered with the Federal Appellate Litigation Clinic, University of Michigan Law School, Melissa Salinas, Director, and Megan Richardson, Attorney.

106. We use the term codefendant to indicate male codefendants, and in some cases, coperpetrators who were either not charged or not convicted.

the years 1976 to 2021, and the characteristics of the women and their cases are outlined here. The sample includes 252 Black women (55 percent); 195 white women (42 percent), six Latinx women (1.3 percent); five Native American women (1 percent), and three Asian women (<1 percent). Twenty-six women (5 percent, or fourteen Black women, ten white women, two Latinx women) were juveniles.

There were 172 cases of first-degree murder, all with mandatory sentences of life without parole; and 289 cases of second-degree murder including seventeen who had life with possible parole sentences. However, the vast majority received specific terms: forty-two received 30–60 years minimum sentences, 115 received 20–29 years minimum, 104 had 10–19 years minimum, and nine had less than ten years minimum. Therefore, most women in the sample were serving very long sentences, with an average of 20.8 years minimum.

About half of the women had trials: 218 had jury trials, with eighteen given bench trials by judges. The remaining 225 had plea agreements. The women's legal representation was largely appointed by the court rather than retained by the women: at least 345 (75 percent) of the women had appointed attorneys, while ninety-nine had retained attorneys, and in seventeen cases it was unknown whether attorneys were appointed or retained.

There were 214 women who had one or more male codefendants, and twenty-one who had at least one female codefendant. Male violence, including intimate partner violence, was known to be related in at least 254 cases.

Table 1 lists eighty-three Michigan counties where women were convicted of homicide. Wayne County, home to metropolitan Detroit, is about 38 percent Black but it convicted 197 women (43 percent) of the study and 80 percent were Black. Other counties also showed a pattern of racial discrimination. Genesee County, home to Flint, has a Black population of about 20 percent, but 49 percent of the women convicted of murder were Black and more than half received life without parole. Oakland County, on the north border of Wayne County, has a Black population of 13 percent, but 36 percent of the women convicted of murder were Black, and almost a third were sentenced to life without parole. Macomb County, where about 12 percent of the population is Black, convicted 48 percent Black women, and 40 percent were sentenced to life without parole. On the west side of the state, Kent County, whose Black population is about 10 percent, convicted 44 percent Black women, and a quarter were sentenced to life without parole.

Figure 1. Michigan prison population of women incarcerated for homicide

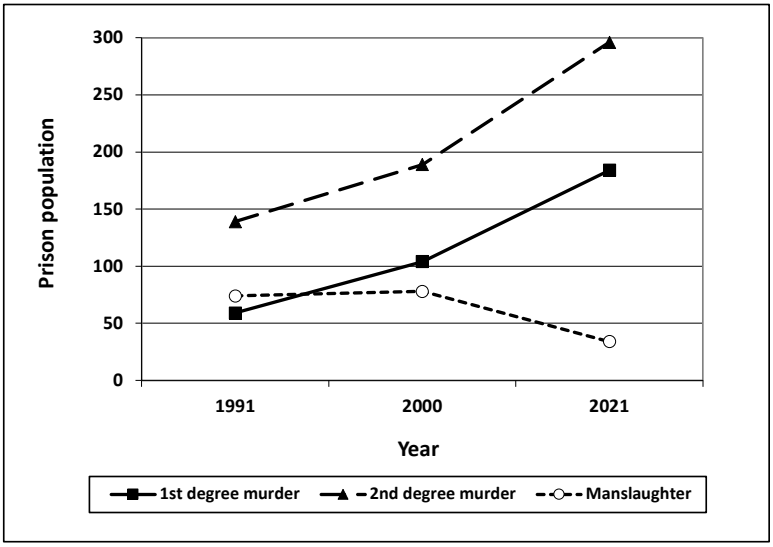


Table 1. Michigan women's racial backgrounds and homicide sentences by counties

County	Number of cases	Race		Number sentenced to life without parole
		Black	White	
Allegan	3	0	3	3
Alpena	2	0	2	1
Baraga	1	0	0	0
Barry	1	0	1	0
Bay	4	1	3	2
Berrien	7	5	2	4
Calhoun	4	0	4	2
Cass	1	1	0	0
Clare	2	0	1	0
Eaton	3	1	2	1
Emmet	2	0	2	1
Genesee	39	19	18	11
Gladwin	2	0	2	1
Gratiot	1	0	0	0
Hillsdale	1	0	1	0

County	Number of cases	Race		Number sentenced to life without parole
		Black	White	
Ingham	12	4	8	2
Iron	1	0	1	1
Isabella	1	0	1	1
Jackson	9	6	3	3
Kalamazoo	8	4	4	4
Kent	25	11	14	8
Lapeer	1	0	1	0
Leelanau	1	0	1	1
Lenawee	1	0	1	0
Livingston	1	0	1	0
Macomb	26	12	13	17
Manistee	4	0	4	0
Marquette	1	0	1	1
Mason	1	0	1	0
Mecosta	1	0	1	1
Midland	1	0	1	1
Missaukee	1	0	1	0
Monroe	4	0	4	2
Montcalm	1	0	1	0
Muskegon	8	3	4	5
Newaygo	4	2	2	7
Oakland	36	13	22	21
Oceana	1	0	1	0
Ottawa	5	0	4	3
Saginaw	8	7	1	2
Sanilac	1	0	0	0
Shiawassee	1	0	1	0
St. Clair	8	1	7	3
St. Joseph	2	0	1	0
Van Buren	9	2	7	6
Washtenaw	9	4	5	3
Wayne	197	156	37	59

Note: No women in this sample of 461 were incarcerated for homicide from the remaining 36 Michigan counties at the time of this study.

D. *Variables and Patterns in the Data*

Next we consider whether any of the features of the women, the facts for which they were convicted, or the circumstances of the

act or the trial were associated with longer sentences (assessed in terms of six categories: life without parole (usually for Murder 1), or (for Murder 2) with life with possibility of parole, 30–60 year minimum terms, 20–29 year minimum terms, 10–19 year minimum terms, or fewer than ten year minimum terms). When we used a statistical test to assess the significance of these relationships, we have reported them in the footnotes. Otherwise, we are commenting on clearly visible patterns in the data. The issues of race and gender discrimination, and male violence are discussed in more detail than any other features because they are particularly significant to women's convictions and incarceration.[107]

1. Race

Overall, we can see from Figure 2 that there were more Black women (252, or 54 percent) than white women (195, or 42 percent) in the study. Thus, although Black women were incarcerated at a much higher rate than their demographic levels in particular counties or the state would indicate, white women's conviction levels comprise a lower percentage than their population would anticipate comparatively. The overrepresentation of Black women in the sample likely reflects the intersection of the highest levels of violence, poverty, and police surveillance in the Black community, as well as the intersectional impact of sexism and racism.

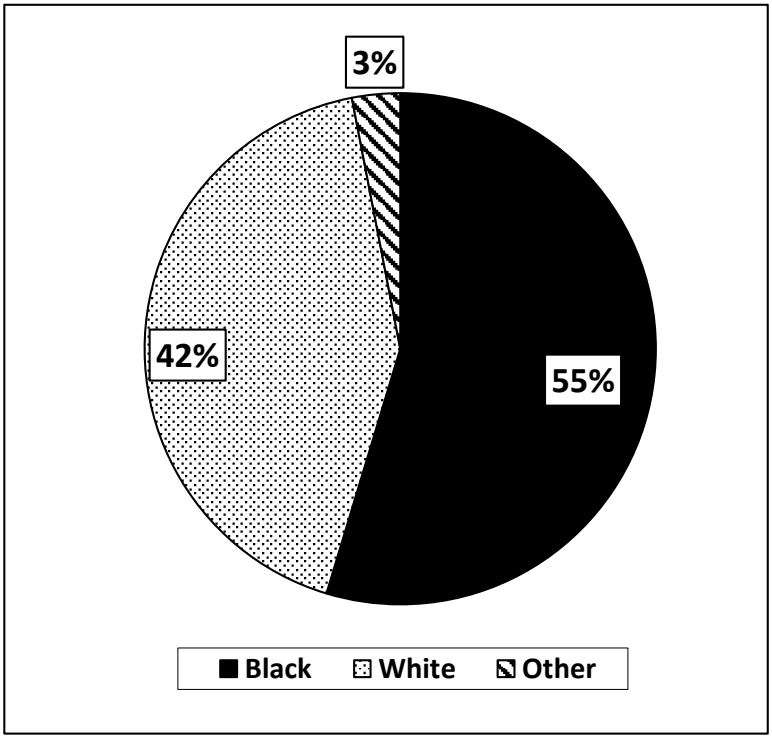
More persons of color than white people were killed: approximately 53 percent were Black, 3 percent Asian, 6 percent Arab, 5 percent Latino, 14 percent Unknown, and 45 percent white. And more males were killed than females: 342 males and 158 females. Because most murders (including in this sample) occur within racial groups, the highest number of life and longer sentences given to white women may also reflect the dominant culture's valuing of

107. *See* Figs. 1-13. For discussions on the significance and relationship of gender and race violence to women's mass criminalization, see, for example: Beth E. Richie and Erin Eife, *Black Bodies at the Dangerous Intersection of Gender Violence and Mass Incarceration*, 30 J. of Aggression, Maltreatment & Trauma 877 (2019 (illuminating the links between state and individual gender violence and Black women's criminalization and offering strategies for political and social change); Goodmark, *supra* note 2, at 2-17 (analyzing how efforts by the criminal legal system to address gender based violence has led instead to increased rates of arrest, prosecution, conviction and incarceration of women the system was supposed to protect); Julia K. Campbell, Emily F. Rothman, Faizah Shareef & Michael B. Siegel, *The Relative Risk of Intimate Partner and Other Homicide Victimization by State-Level Gender Inequity in the United States, 2000-2017* (study finding that gender inequity is related to at least seven types of homicide and femicide victimization in the United States, and affirming gender equity is needed as a strategy to protect lives.) 6 Violence and Gender 211 (2019) https://doi.org/10.1089/vio.2019.0023 [https://perma.cc/GJH9-76UK].

white lives over Black lives, their greater surprise and outrage when white women are involved in a homicide, or both (see Figure 3).

It is well documented that Black women face high rates of male violence, even higher than white women, and they are subjected to more intensive rates of police surveillance, abuse, and arrest.[108] The study showed Black women also received life without parole sentences at a level disproportionate to their population, an indication of statewide bias through weaponization of Black women's victimization by ignoring their claims of abuse and self-defense, or using these claims against them.

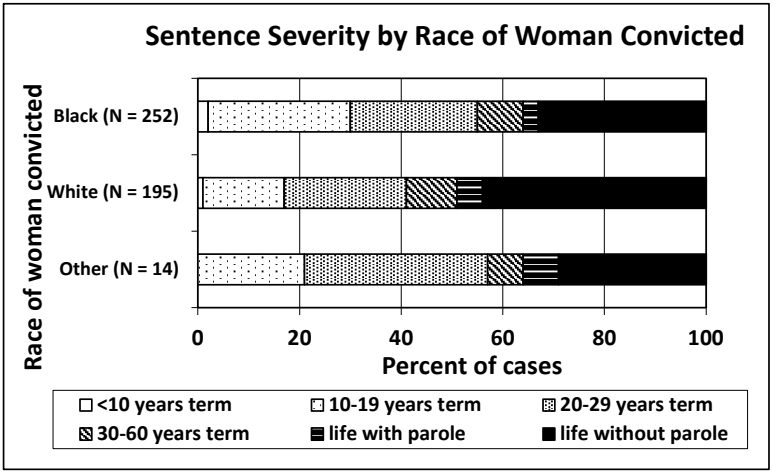
Figure 2. Race of 461 women convicted of homicide in Michigan



Note: "Other" category includes 6 Latinx, 5 Native American, and 3 Asian women.

108. Asha Dumonthier, Chandra Childers & Jessica Milli, *The Status of Black Women in the United States* 120–121 (Institute for Women's Policy Research 2015). (Finding that more than 50 percent of Native American women, more than 40 percent of Black women, more than 30 percent of white women, more than 29 percent of Latinx women, and more than 15 percent of Asian women experience physical violence by an intimate partner during their lifetimes).

Figure 3. Sentence severity by race of woman convicted



χ^2 on Black/White difference = 11.80, $df = 5$, $p = .038$

2. Gender Violence

The study encompasses a heterogeneous set of homicide cases involving almost all the women incarcerated for first- or second-degree murder in the state of Michigan in 2021. To examine the gender and racial issues and other details that were associated with criminal processing in these cases, we have grouped them first by two salient features: the person who committed the murder (the woman or someone else) and the person or persons who were killed.

As we explain below, we have prioritized those cases that directly involved male violence because it is the primary underlying cause of women's homicides, and it demonstrates how systemic gender oppression functions in women's cases. We identified racial populations in each group to show how systemic racism is criminally processed. We provide descriptive statistics for each group together with illustrative case summaries.

The impact of male violence, individually and structurally, has had a devastating impact on human, social, political, economic, health, and legal rights and freedoms.[109] In the United States, indi-

109. Most studies estimate that between 56 and 94 percent of incarcerated women have histories of trauma and abuse. Racial discrimination has been documented at all levels of the criminal process. See Karlsson, et al, *supra* note 26, at 326; and Survived and Punished, *A Few Quick Statistics*, 2, https://survivedandpunished.org/quick-statistics/#:~:text=As%20many%20as%2094%25%20of,sexual%20abuse%20before%20being%20incarcerated.&text=Prisons%20are%20violence%20against%20girls [https://

vidual male violence is the second leading cause of death for Black women between the ages of fifteen and twenty-five, and the sixth leading cause of death for white women between the ages of twenty and forty-four.[110] In 2020, homicides of Black women increased 33 percent, while homicides of white women were up 15 percent.[111]

We know that at least 58 percent of the cases in the study involved male violence by a male who was killed; or by a male who committed the murder or caused the death that formed the basis for the woman's accessory charge. We also know the figure is much larger, as it continues to grow through contacts with the women themselves since the cut-off date for the study. In some of the cases, both the person who committed the murder and the person who was killed were abusers. Two cases involved lesbian partner violence. Violence is intimated in other cases as well.[112] Histories of family violence was also prevalent. As discussed below, male violence (reflected in this category of instances of male codefendants), did not appear to mitigate the sentences, and in some cases was used against the women. Although we did not have data on male violence for all the cases in the study, it was a dominant element in those cases where we had such information.

3. Male Co-Defendants and Co-Perpetrators

As Figure 4 shows, if the woman convicted had a male codefendant, no matter who the person killed was, her sentence was more severe than if there was not a male codefendant. Specifically, for example, 44 percent of those with male codefendants, while only 32 percent of those with no male codefendants, were sentenced to life without parole.

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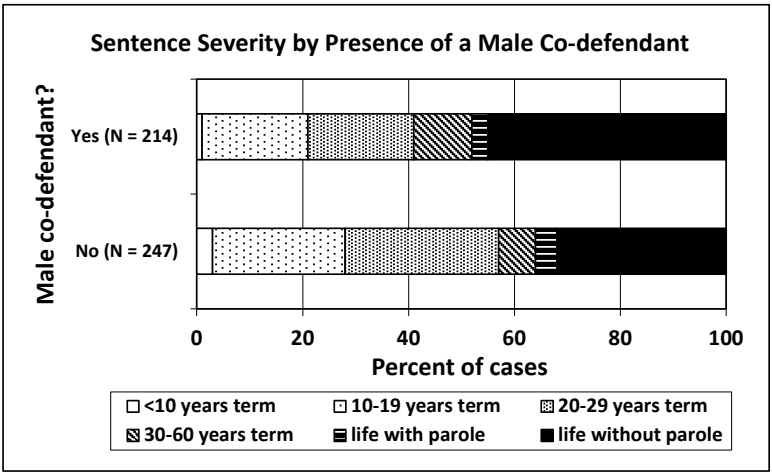
perma.cc/B7HG-D2R9].

110. Lois Beckett & Abene Clayton, *An Unspoken Epidemic: Homicide Rate Increase for Black Women Rivals that of Black Men*, The Guardian (Jun. 25, 2022 5:00 AM), https://www.theguardian.com/world/2022/jun/25/homicide-violence-against-black-women-us [https://perma.cc/SNJ4-HUVE].

111. *Id.*

112. At the time of publication, an additional five percent of cases in the study were found to have involved male abuse that were designated unknown regarding abuse at the time of the study, for a total of 63% to date.

Figure 4. Sentence severity by presence of a male codefendant

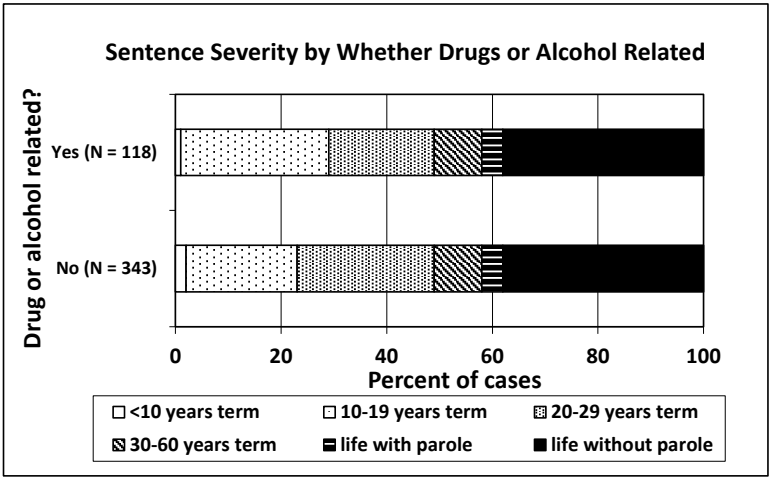


$\chi^2 = 12.72, df = 5, p = .026$

4. Drugs, Alcohol, and Past Arrests

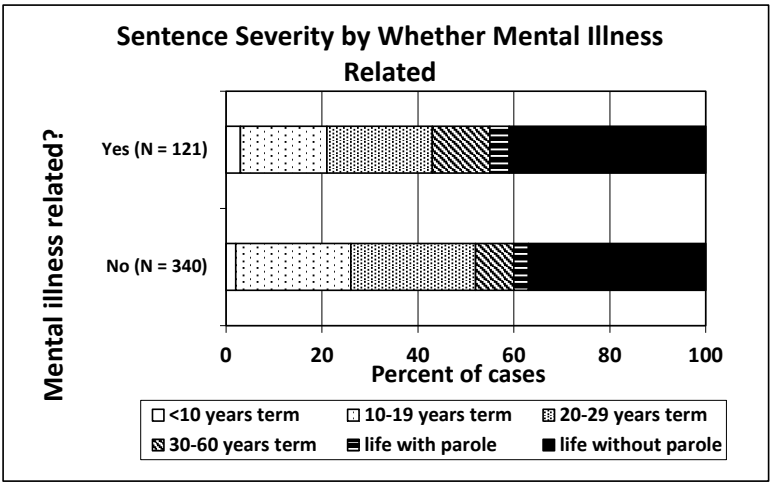
In Figures 5, 6, and 7, we can see that those cases with a known involvement of drugs or alcohol, or a history of past arrests or mental illness were not related to sentence outcomes. Thus the presence or absence of these factors played no role in the women's sentences, though one might expect them to be viewed as pertinent to sentencing decisions.

Figure 5. Sentence severity by whether drugs or alcohol related



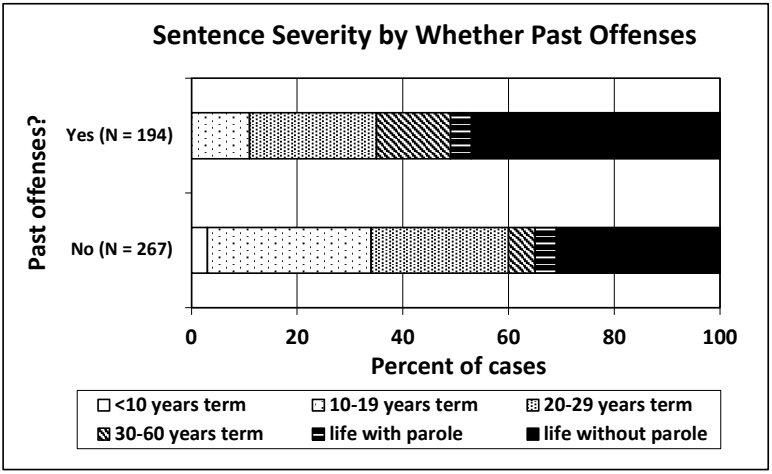
$\chi^2 = 4.54, df = 5, p = .474$

Figure 6. Sentence severity by whether mental illness related



$\chi^2 = 4.44, df = 5, p = .487$

Figure 7. Sentence severity by past (major or minor) offenses



$\chi^2 = 42.25, df = 5, p < .001$

5. Counties

Wayne County was strongly represented in the sample, as we saw in Table 1.[113] This is perhaps not surprising since it has the largest population of any county in the state (1,793,561), the second highest percentage of Black persons (38.7 percent), and the third highest poverty rate (20 percent), after Saginaw and Genesee.

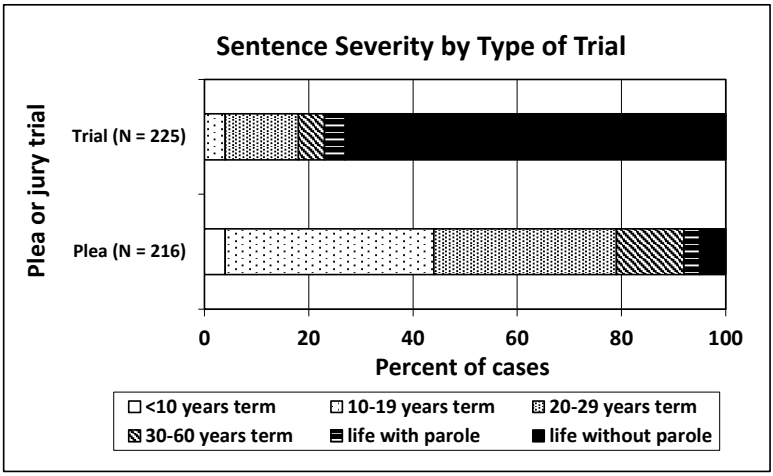
113. *See*, Table 1.

The number of women convicted in Wayne County represented a shocking 43 percent of the study. In terms of sentencing, women sentenced in Wayne County received significantly less severe sentences than those in other counties that mostly have higher percentages of white people and a lower percentage of economically disadvantaged people. The next largest number of cases in the study came from Genesee County and Oakland County.

6. Trials v. Pleas

As can be seen in Figure 8, women who were tried were likely to receive life or much longer sentences than those who had pleas. Of course, this may be because the seriousness of the charge or other decision by the prosecutor made them ineligible for plea agreements. However, many women turned down pleas due to lack of knowledge about the criminal legal system and/or failure by their defense attorneys to provide adequate counsel.[114] Nonetheless, the difference is huge; 95 percent of those who were sentenced to life without parole had trials.

Figure 8. Sentence severity by type of trial



Note: The 13 cases who had a bench trial (by the judge only) are excluded.

$\chi^2 = 228.354$, $df = 5$, $p < .001$

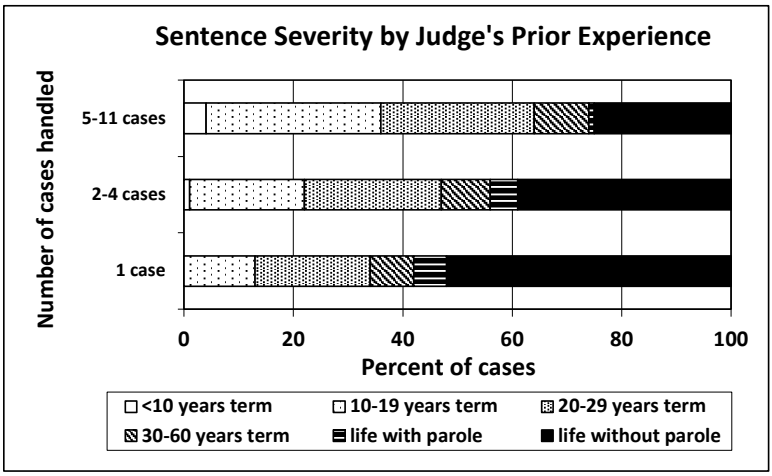
7. Judges

Figure 9 shows the role of judges' experience with women accused of homicide in sentence outcomes. Sentences were generally less severe when they were decided by judges who handled

114. *See*, People v. Eppenger, No. 94-004618-01-FC (Mich. Wayne Cnty. Ct. 1994).

more of the cases in the sample (1 v. 2–4 v. 5–11).[115] This may be in part due to greater experience with some cases, but it may also be a function of a larger proportion of cases arising in Wayne County (so judges in that county have more experience). That said, a few judges stood out for giving out extreme sentences: Judge McBain and Judge Houk, for example, as discussed in Part IV.

Figure 9. Sentence severity by judge's prior experience with homicide cases



Note: Judges' "prior experience" includes only cases in the current sample of 461 cases.
$\chi^2 = 36.31, df = 10, p < .001$

8. Defense Attorneys

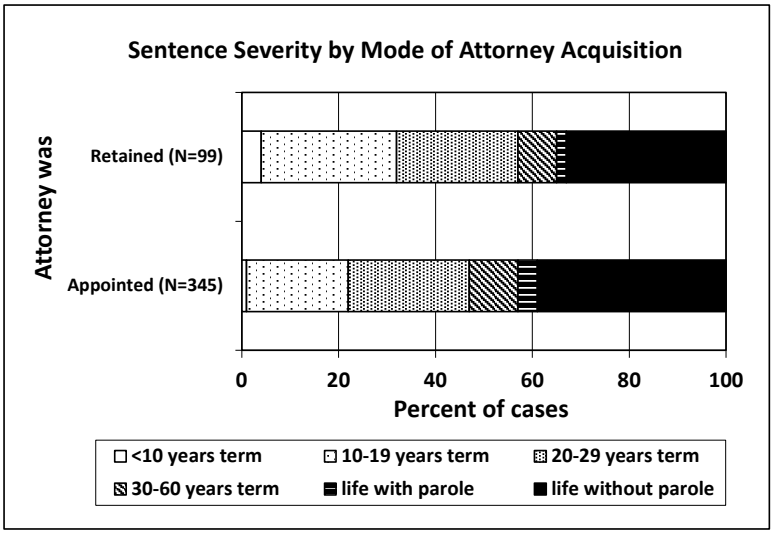
In Figure 10, we see that women who retained their own attorneys did not fare better than those who had appointed attorneys generally.[116] The number of cases the attorney handled for women defendants in this sample appeared to relate to sentence severity, with the attorneys handling the most cases being associated the least severe sentences (see Figure 11; however, the difference between the groups in outcome severity were not statistically significant).[117]

Consideration of the role of these women, their codefendants, and those killed, as well as the legal and geographic context in this section allowed us only to consider one aspect of the case at a time. While each of the structural elements and variables studied played a part in the wrongful homicide convictions or sentencing of the women in the study, it was the compound of harmful elements,

115. *See*, Fig. 9
116. Fig. 10
117. Fig. 11

processing and coded language embedded in a racist, sexist criminal system that sealed their outcomes in advance. Women's experiences of abuse or claims of self-defense or duress were largely discounted or dismissed as excuse defenses, implying an irrational mind without lawful justification, including by women's own defense counsel.[118] By examining groups of cases defined by the relationships, circumstances, and classifications of the people involved we can look more deeply at what happens in different types of situations. Even more detailed examination of particular cases reveals much more about precisely how various elements of the circumstances and of the legal system operated together to produce the outcomes documented in Part V.

Figure 10. Sentence severity by mode of attorney acquisition

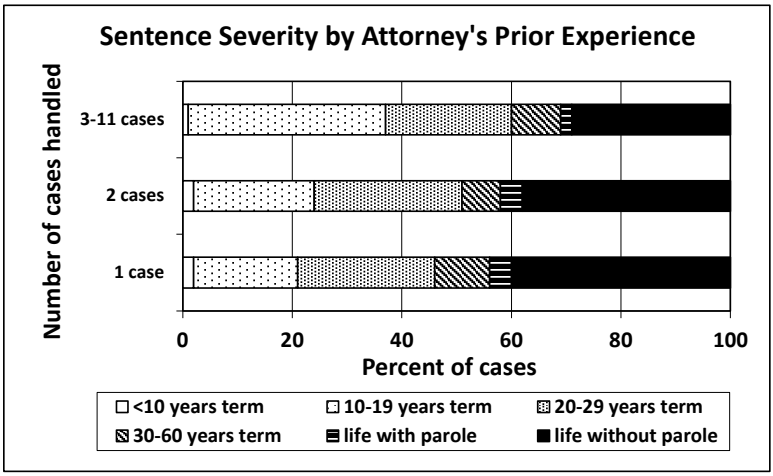


Note: Seventeen cases where attorney acquisition was unknown are omitted.

$\chi^2 = 6.90$, $df = 5$, $p = .228$

118. Light, et al. *supra* note 2, at 54, 61 (finding that research on homicide laws downplays or ignores the ways the laws reinforce gender injustice and contribute to existing socio-legal inequities. The study calls for a robust, intersectional approach to research that emphasizes gender, race, ethnicity and class within the context of domestic violence, intimate partner violence and an awareness of how biased assumptions that are baked into our legal codes and practices naturalize double standards and incentivize violence.)

Figure 11. Sentence severity by attorney's prior experience with homicide cases



Note: Attorney's "prior experience" includes only cases in the current sample of 461 cases.
$\chi^2 = 44.55$, $df = 10$, $p = .317$

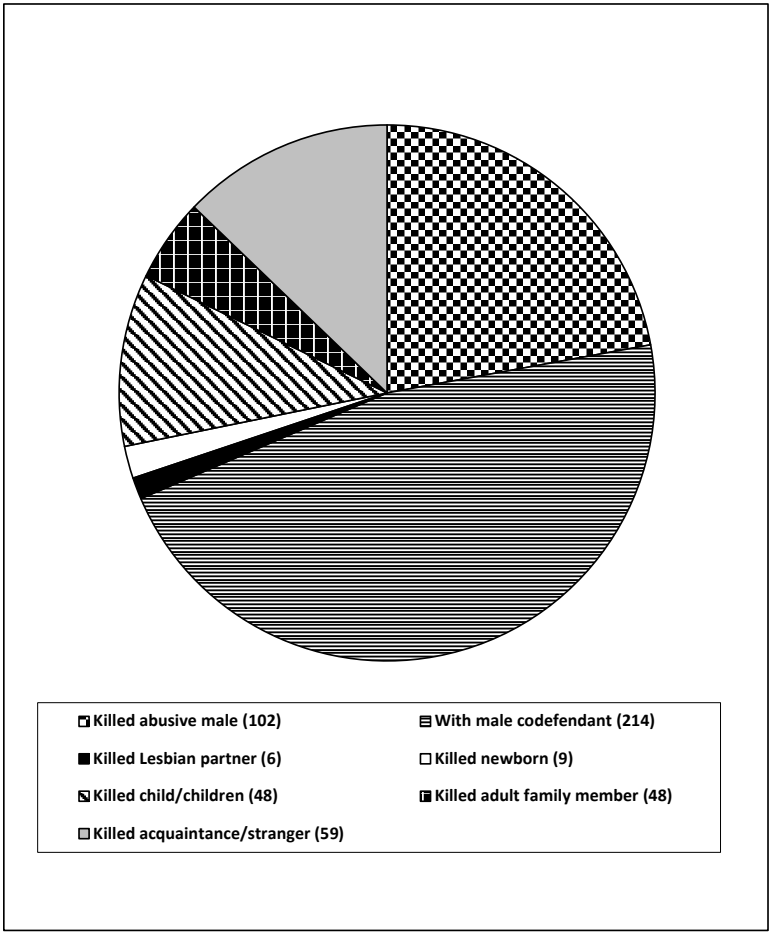
IV. Groups, Case Summaries, and Analysis: Who, What, and Why of Women's Homicide Convictions

A. *Groups and Case Summaries*

The sample is divided into seven groups of unequal sizes, shown in Figure 12. Groups are organized by the person convicted of committing the murder (the woman, or the (usually male) co-defendant/coperpetrator, both, or someone else), and by the person or persons who were killed. Black women comprised 55 percent of the study, white women 42 percent, and Native Americans, Latinas, and Asians together were 3 percent.

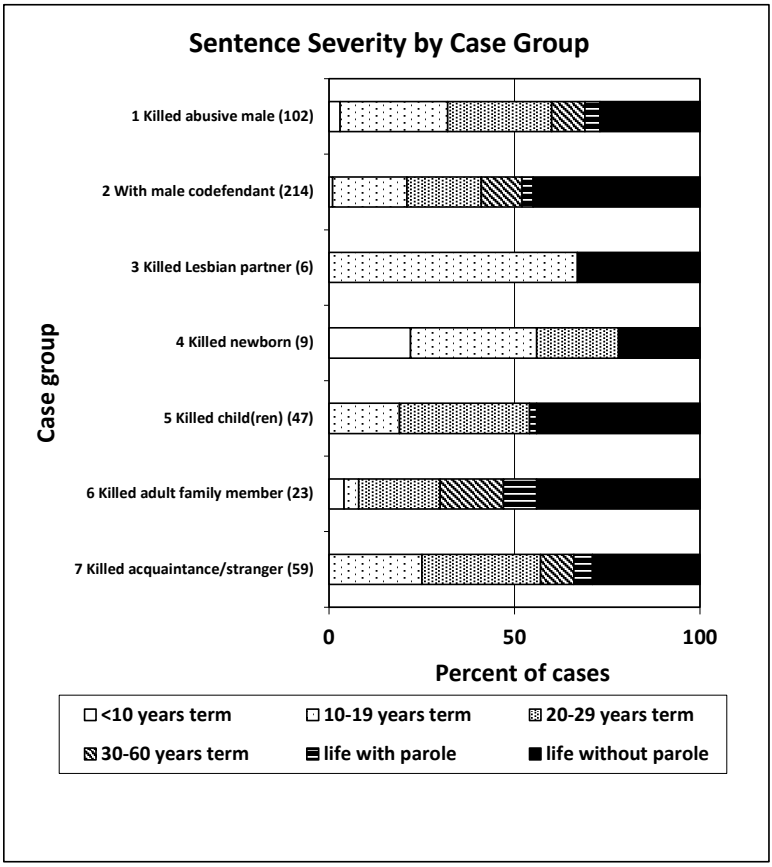
We examined the sentences received by each group, presented in Figure 13. In Group 1, 102 women were convicted of killing their male abusers themselves (ninety-six were intimate partners), and 27 percent were sentenced to life without parole. In Group 2, 214 women were convicted as accessories to male codefendants who committed the murder and (118 involved abusers, 109 of them intimate partners), and 44 percent were sentenced to life without parole. Groups 5 (forty-seven women) and 6 (twenty-three women) which involved instances in which women themselves killed family members, including children, also received long sentences, 44 percent had life without parole; while Groups 3 (six women), 4 (nine women), and 7 (fifty-nine women) received somewhat shorter sentences for killing women partners, newborns, acquaintances, or strangers.

Figure 12. Numbers and percentages of women in Groups 1—7



Note: The number of cases in each group is in parentheses.

Figure 13. Sentence Severity by Case Group



Note: The number of cases in each group is in parentheses.

1. Group 1. Women Convicted of Killing Male Abusers

Group 1 includes 102 women, including two juveniles (less than eighteen years of age at the time of offense), who killed their abusers themselves. Most acted in accordance with the Model Penal Code's justification for acting in self-defense, killing their abusive male partners or other assailants during face-to-face struggles with "such force [that] is necessary to protect himself [sic] against death or serious bodily injury." Ninety-six of them fought an intimate male partner who was physically attacking them, and in six cases they fought off other males who assaulted them. There were fifty-seven Black women, forty-three white women, one Latina, and one Asian woman. Only three women who killed their intimate male partners had cases where abuse was unknown; they are included in Group 6

(adult family members). At least 87 percent involved physical confrontations and fit the legal framework for self-defense. A weapon was used by most of the women (ninety-four) to offset the physical disadvantage; forty-six used knives, forty-four used guns, and four picked up household objects. Almost half, forty-seven women, had jury trials, and fifty-five took plea deals. More than two-thirds (68 percent) received life or twenty years and above as minimum sentences (Fig. 13). Despite the justifications for self-defense that are set out by the Model Penal Code in 3.04 and most state laws, including Michigan's, the fact that women reach for an object when they are confronted by a violent male to offset his upper body strength, which has easily overpowered and injured them before, is used against women in interpretations and practice of the law. Viewed as "unreasonable" or "disproportionate," the use of a weapon or object by a woman to defend herself is a gender biased perspective that punishes women who were acting reasonably in an unreasonable situation and using such force as was necessary to save themselves.

Sentencing was extremely harsh given the violent circumstances, including physical struggles for their lives, that the women faced. In most, the facts of the cases in the study—women with criminal protection orders, visibly black eyes or injuries when arrested, past abuse witnessed by others, and perhaps most of all, women's own narratives of the incident and its context are all effectively buried - by official confessions written by police officers and signed by women under duress or false promises; by unreasonable, excessive charging brought by prosecutors to advance their own conviction rates and careers; by retribution wanted for a loved one of witnesses; and by judges who, like prosecutors, face little or no accountability for their decisions and are unassailable keepers of dominant, gendered interpretations of the law and normalization of punishment. More than half of the women were sentenced to life or longer than twenty years minimum in prison. The following case summaries are examples of the cases and circumstances in Group 1.

a. Case Summary: People v. Quiana Lovett

> *I was scared and, you know, I knew he had been drinking and he was intoxicated, and I don't really think he really knew, you know, like his own strength right at that moment and I was scared, and I couldn't breathe and I just wanted him to stop choking me.*[119]
>
> *Quiana Lovett*

119. Trial Transcript from Aug. 24, 2010, at 42-43, People v. Quiana Lovett, No. 10-004540–01-FC (Mich. Wayne Cty. Ct. (2010).

Quiana Lovett's abusive fiancé, and father of her three children, had strangled, hit, punched her in the face and head, blackened her eye, threatened Lovett's life, and bullied her for years. Every time he drank, she got scared. Once Lovett fought back. Her fiancé let up on the abuse for a while. On the day of the incident, Lovett and her fiancé had a family gathering at their house, in which Lovett, her fiancé and many others were drinking or smoking marijuana. After the guests left the house and were getting into their cars, Lovett's abusive fiancé turned and yelled at her, angry about something she'd said to his brother. He grabbed her by the neck and held her in a choke hold up against the kitchen wall. This was not the first time her fiancé had done this.[120] Terrified and unable to breathe, Lovett reached around, grabbed a knife, and jabbed her fiancé once. He stumbled, fell and died within minutes, despite Lovett's desperate efforts to perform mouth to mouth resuscitation.

Quiana Lovett was arrested and confessed under the officer's badgering while she was still sobbing in shock.[121] Her attorney later advised Lovett not to accept a plea offer of ten years but conducted little or no investigation of the case. At trial, the prosecutor played the videotaped "confession," which should have been suppressed by the judge. The confession clinched Lovett's guilt for the jury even though Lovett testified at trial and gave a clear account of being strangled by her fiancé precipitating her fatal act to defend herself.[122] Her attorney failed to investigate her history of abuse or present it. The judge allowed the prosecutor to present members of the fiance's family, who all gave inflammatory and prejudicial testimony against Lovett, denying that she was abused and accusing her of being the abuser instead. The trial court's admission of the prosecutor's witnesses violated Lovett's right to the presumption of innocence and due process under the law.[123] The police, prosecutor, judge, and defense attorney all knew, or had the opportunity to know, that her confession described a legal act of self-defense, and the evidence proved it. Photographs showing her bruised face and thumbprints on her neck were taken by her mother three days after

120. *Id.,* Detroit Police Dept., Crime Report No. 0102020191, 2/2/2008, Police Report filed by Quiana Lovett against Brian Woods, for assault and battery, including choking, punching, assaulting her in 2008.

121. *Id.*, Appellant's Brief on Appeal from Jun. 2, 2011 at 17–18.

122. Trial Transcript from Aug. 24, 2010 at 29–30, 43–45.

123. *Id.;* Brief on Appeal at 8-9, 12. *See* US Const. amend. XIV; Mich. Const. of 1963, art 1, § 17; and Mich. R. Evid. 404(b); and People v. Crawford, 582 N.W.2d 785 (1998) 458 Mich. at 797 (finding that admission of evidence (in that case, a prior arrest) is not a harmless error if it is prejudicial since it negates the presumption of innocence and denies a defendant a fair opportunity to defend against a charge).

the incident and were entered as exhibits.[124] She testified about the incident. However, her attorney established no context for Lovett's strangulation, including prior incidents of abuse and choking, and he refused to call an expert witness despite requests by her mother and others to do so. Without a rebuttal to the prosecutor's prejudicial witnesses, and failure by the judge to conduct the required balancing evidence and give only a brief instruction on self-defense, and with her videotaped confession, Lovett was found guilty of second-degree murder by the jury. Prior to sentencing, her family and friends sent letters to the judge emphasizing Lovett's history of abuse by the boyfriend. Despite all the mitigating factors, such as her own testimony clearly describing lack of intent in her act of self-defense, her genuine remorse recorded in the videotape and at trial, and her history of abuse by her fiancé described in letters to the judge, the judge chose not to lower the sentence and sentenced her over the minimum guidelines to 16 years in prison.[125] The Court of Appeals called the prejudicial testimony by Lovett's son a "harmless error;" and her coerced confession "voluntary," and denied her appeal. Her appeal attorney failed to include the claim of ineffective assistance of counsel in her appeal.[126]

Post-Conviction Sentencing:

> *[T]here was some evidence of some strangulation or bruising on your body. You did attempt to resuscitate . . . I didn't know until we got into this post-trial stage about . . . the battering . . . There are some mitigating circumstances here, but not enough for me to depart, to go to the lower end of the guidelines . . . you will serve 16 years to 30 years in the Michigan Department of Corrections . . . .* [127]
>
> *Wayne County Judge Gregory Bill*

b. Case Summary: People v. Teresa Hedges

> *Something hit me in the right hand . . . he was jabbing at me with the scissors . . . I was screaming for my mom, but they didn't hear me. He grabbed my hair and pulled me toward the hallway. He still had the scissors. I was fighting, trying to push him off me. . . .*[128]
>
> *Teresa Hedges*

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124. Trial Transcript, from Aug. 24, 2010 at 6–8.

125. Sentencing Transcript from Sept. 9, 2010 at 23, 29–30, People v. Quiana Lovett, No. 10 004540–01-FC (Mich. Wayne Cty. Ct (2010).

126. Opinion, Mich. Ct. of App. at 1-5 (Mich. Wayne Cty. Ct. on Feb. 16, 2012).

127. Sentencing Transcript from Sept. 9, 2010, at 23, 29, 30-31.

128. Ginther Hearing Transcript from June 20, 1996 at 22-33, People v.

Teresa Hedges was twenty years old, working several jobs, and living at home. When a friend told Hedges she could earn extra money by working for an older man whose wife had Alzheimer's disease, she went to see him. The man offered to rent his basement room to her, but Hedges said no. She knew a few of her friends had sex with him for money, but she was not willing to do that and kept the man at bay whenever she worked for him, caring for his wife and cooking and cleaning the house, which was about twice a week. He harassed her for sex, but she would laugh it off, change the subject and insist she was busy working. He did not pay her when she worked but told her to return to the house to be paid, so she always took a family member with her to collect her pay. One evening Hedges came to the man's house to pick up an advance in her pay to buy tickets to a Lions football game. Hedges had told him earlier in the day that she would care for his wife on the following day. Her mother and boyfriend were waiting outside in a taxi while she went to the door. The man said he wanted her to stay and bathe his wife right then. She reminded him she would be there the next day. He insisted she step inside while he went to get her pay. As he handed her $110, he again insisted that she stay. Hedges said no, she had to leave and turned toward the door. Suddenly the man grabbed her by the hair and dragged her back inside. She felt pain in one hand. She realized he had scissors and was jabbing her, cutting her hand and permanently injuring it. She wrestled with him, fell to the floor, and was dragged down the hallway as she kept fighting and pulling back. During the prolonged struggle the man dragged her into the kitchen and then to the bedroom. He pushed her onto the bed and jumped on top of her. Finally, Hedges got ahold of the man's hand with the scissors and turned it backward, stabbing him to let her go. He stopped fighting, but she did not know she had killed him. She rinsed her hands, ran to the taxi and was visibly upset but said nothing to her mother and boyfriend until they got home where she fell on her knees and cried to her mother, "I stabbed him," [129] Her brother called police.

Teresa Hedges was arrested and later charged with first-degree murder. At her trial, she claimed self-defense, yet her defense attorney failed to suppress her police statement given under coercion and threats while she was suffering from insulin shock and without an attorney. He filed no motions, conducted no *voir dire* of the jury, exercised no peremptory challenges, gave no opening statement, refused to allow her to testify though she wanted to, and called no

---

Teresa Hedges, No. 94–994548, FC (Mich. Wayne Cty. Ct. (1994).

129. *Id.*

witnesses on her behalf, including one who could have testified that the man had a reputation for violence and had tried to stab him once with a screwdriver. In short, her defense counsel presented no defense at all.[130] Hedges' confession, written by the arresting officer, was presented by the prosecutor as evidence that she admitted killing the man. It also said she claimed self-defense, and that she did not rob him (which was the motive for the killing according to the prosecutor's version). Hedges was convicted of first-degree murder and sentenced to mandatory life without parole. The Michigan Court of Appeals denied her appeal, with a single judge dissenting that Hedges did not have an adequate defense. The Michigan Supreme Court denied leave to appeal. In her final appeal for a writ of habeas corpus to The U.S. District Court, Hedges claimed a violation of her right to due process, fair trial, and ineffective assistance of counsel. Her appeal was denied citing defense trial strategy.

> Post-Conviction Court of Appeals Statement:
>
> *Defense counsel's trial tactics did little, if anything, to support defendant's claim of self-defense . . . counsel failed to adequately present any defense on defendant's behalf . . . I would reverse and remand for a new trial.*[131]
> *Judge Kathleen Jansen, dissenting, Michigan Court of Appeals*

c. *Case Summary:* People v. Nancy Seaman

> *Attached is a copy of the PSI report that you requested. Please note that there are numerous typos in it. [My defense attorney] never bothered to get it corrected, saying that it didn't matter anyway because I had a life sentence.*[132]
>
> *Nancy Seaman*

In the weeks before their final, violent confrontation, Nancy Seaman's husband's rage and threats were escalating. For years Seaman had taken her husband's abuse, alcoholism, rants, and threats, but no longer. Their two children were adults, and Seaman had a job she loved as a teacher, so she could leave her husband. Seaman saw a lawyer, made a down payment on a condominium, and was looking toward her future. But one morning her husband

130. *Id.*; Ginther Hearing on Apr. 18, 1996, at 24-25; and on June 24, 1996, at 22-33, 56-58; and on Aug. 8, 1996, at 9. See also, Unpub. Opinion, (dissenting) by Hon. Kathleen Jansen on Oct. 30, 1998, at 1-6.

131. *Id.*

132. Letter from Nancy Seaman on April 8, 2013 at 1, People v. Nancy Seaman, No. 04196916-FC, (Mich. Oakland Cty. Ct., 2004). (The presentence investigation report (PSI) is a document prepared by an official of the court, usually a parole officer, after conviction and in preparation for sentencing by the Court. It represents the prosecutor's, or State's, perspective on the crime.)

discovered her plan and flew into a rage. Seaman grabbed the car keys and ran into the garage, but her husband chased and tackled her. Sprawled on the garage floor, Seaman frantically grabbed the closest object—a hatchet—and struck and stabbed her husband to get him off her. Seaman could not believe her husband was dead, let alone that she had killed him. She got up, went to school, came home, and cleaned up the garage. She put the body in the car. Seaman was in a mental state of shock and denial until she was arrested and confessed a few days later. The autopsy later showed both alcohol and amphetamines in her husband's blood. The case was heavily sensationalized by the media. Seaman testified in her own defense and was allowed to have an expert witness, although Michigan law limits testimony about abuse and does not permit the expert to give an opinion related to the case. At the end of trial, Judge John McDonald failed to give proper instructions to the jury when he omitted the instruction on justification for a finding of self-defense. Her attorney failed to object to the omission.[133] He also failed to present the full range of expert testimony admissible under Michigan law, and blamed her for his own deficient defense: "When she answered the first question, I said . . . 'we just lost the case'."[134] Before the trial, there was widespread, lurid news coverage, and jurors admitted to being familiar with the case. After their verdict, the media recited cliches: "She did not fit the picture,"[135] "[she] did not stay at home,"[136] "[she] was not a meek, howling woman . . . "[137] At sentencing, Judge McDonald patronized her: "I must tell you that the proper option in the situation that you found yourself in would have been to seek a separation or a divorce."[138] In fact, she was in the process of leaving her husband and filing for divorce; the most dangerous time for most women in an abusive relationship. Weeks later Judge McDonald came to a different conclusion, stating, "this Court feels that premeditation and deliberation was not established. And I'm going to reduce

133. Opinion and Order Granting Conditional Writ of Habeas Corpus and Granting Certificate of Appealability, U.S. Sixth Circuit, Petitioner Nancy Seaman v. Heidi Washington, Respondent, No. 08-CV-14038, decided on Oct. 29, 2010, at 52, People v. Seaman, No. 041969916-FC (Mich. Oakland Cir. Ct. (2004).

134. *Id,* at 26; *see* Lisa Brody, *Survivors of Abuse Behind Bars*, Downtown News Magazine, Sept. 1, 2017 at 1-10.

135. Stephen Frye, *Teacher Guilty of Murdering Husband*, The Daily Oakland Press, Dec. 15, 2004 at A1.

136. *Id.*

137. L. L. Brasier, *Seaman Jury Rejects Battered Wife Claim*, Detroit Free Press, Dec. 15, 2004 at A1.

138. Sentencing Transcript from Jan. 24, 2005 at 28, People v. Nancy Seaman, No. 04196916-FC (Mich. Oakland Cty. Ct. (2004).

the case to second-degree murder . . ."[139] He sentenced her to ten years minimum. However, on prosecutorial appeal, the first-degree murder conviction was reinstated. Seaman's subsequent appeals were struck down, although two appellate judges agreed she did not receive a fair trial due to the lack of evidence and errors in the case. Until his death in 2019, Judge McDonald publicly acknowledged he was "haunted" by the case and campaigned for clemency for Nancy Seaman.[140]

> Post-Conviction Federal Court Opinion:
>
> *The prosecution did not present overwhelming evidence Petitioner was guilty of first-degree premeditated murder. . . In fact, at least two reasonable jurists, the trial court judge and Judge Karen Fort-Hood, who dissented from the Michigan Court of Appeals' decision, concluded that the prosecutor failed to prove premeditation and deliberation beyond a reasonable doubt. . . Defense counsel's failure to argue for the admission of the full range of expert testimony admissible under Michigan law and his failure to have Dr. Walker personally interview Petitioner, combined with the lack of overwhelming evidence establishing that Petitioner acted with premeditation . . . Accordingly, the Court finds that Petitioner has shown she was prejudiced by counsel's errors . . .*[141]
>
> *United States District Court Judge Bernard Friedman*

2. Group 2. Women Convicted as Accessories to Males Who Killed

Group 2 comprised the largest category in the study with 214 women, including twenty juveniles, or 46 percent of the sample, all of whom were convicted as accessories or codefendants to males who committed the murder. There were 120 Black women, eighty-six white women, three Native Americans and one Asian woman. In thirty-seven cases, the women had one or more females as codefendants in addition to the male codefendant. Not all the codefendants or coperpetrators were charged or convicted. In many cases, the women conspired or participated in an underlying offense such

139. Mot. For Dir. Verd., New Trial, or Evid. Hearing on Aug. 31, 2005 at 1-2, Seaman, No. 04196916-FC.

140. Hannah Rappleye, *The Judge who Sentenced Nancy Seaman for Murder Now Wants to Set her Free*, NBC News (Apr. 26, 2018, 6:33 AM), https://www.nbcnews.com/news/crime-courts/judge-who-sentenced-nancy-seaman-murder-now-wants-set-her-n868841 [https://perma.cc/UY3A-3H88].

141. Opinion and Order Granting Conditional Writ of Habeas Corpus and Granting Certificate of Appealability, U.S. Sixth Circuit, Petitioner Nancy Seaman v. Heidi Washington, Respondent, No. 08-CV-14038, decided on Oct. 29, 2010, at 26, People v. Seaman, No. 041969916-FC (Mich. Oakland Cir. Ct. (2004).

as robbery or buying drugs but did not anticipate or participate directly in the murder.

Violence against the women was a major factor in this group. In at least 118 cases (55 percent) the women were abused by their male codefendant or the person who was killed, or both. At least 109 were intimate partners (IPV). In most cases (ninety-seven) the abusers were the codefendant males who committed the murder; in the other twenty-one cases it was the male abusers who were killed. In at least twenty-three cases, both the killer and the killed were abusers. In ninety-six cases, information about abuse and victimization was unknown, but it is not unlikely that some of these women were also under duress from codefendants. In thirty-one cases, those who were killed were children, usually the couple's own. Many women were shocked when a death occurred, and some testified against their codefendants. Several women were not present at the scene, and several more were involved only after the fact.

Sentences in this group were among the harshest in the overall study with the highest percent of life without parole sentences, and more than half receiving life or virtual life sentences[142] through life without parole or long terms (See Figure 13). More than half (114) had jury trials. Five had bench trials, ninety-five took pleas. Ninety-five women (44 percent) were convicted of first-degree murder and sentenced to life without parole. The remaining 119 women (56 percent) were convicted of second-degree murder and most (86 percent) received long sentences of life with possible parole or twenty years and above minimums. Deterrence is often given as a reason for overcharging and harsh sentencing of all parties when a death occurs. However, citing deterrence as a reason to sentence a person to a life sentence for first-degree felony murder makes no sense when the person has no opportunity to be released and commit another offense. Nor, under felony murder law, does it make sense to sentence a person to life without parole who did not anticipate, intend, nor commit the murder.

Several case summaries from Group 2 are presented below to explain some of the circumstances, charges, rulings, and practices that were common in the largest group of cases in the study.

142. A virtual life sentence is usually described as fifty years or one where the expectation of death will occur while incarcerated.

a. Case Summary: People v. Sharleen Wabindato

> *I feel Judge Larned was biased. He told the jury, 'Do not look at the fact that she is a woman, pregnant, Indian.' But then he refused to put that in the transcript.*[143]
>
> *Sharleen Wabindato*

Sharleen Wabindato was sexually and physically abused by family members as a child and beaten by her boyfriend as a young adult.[144] Whenever she disagreed or disobeyed her boyfriend, he slapped, punched, and viciously attacked her. Once he held her hostage and threatened to kill her with a shotgun because she was leaving him. Another time he threw her to the ground and beat her because she stopped him from hitting her child. Her father and two brothers came to her rescue several times. She suffered a black eye, swollen face, bruises, and injuries. On the day of the incident, Wabindato's boyfriend told Wabindato she would be going with him and his buddy to rob an older man in the neighborhood. She refused to go. Wabindato's boyfriend badgered and threatened her and would not take no for an answer. Pregnant and afraid he would beat her again, she reluctantly agreed. As the three arrived at the house, he ordered her to go to the front door, push her way inside, and let the two men in the back door. But when the front door opened, she froze and could not bring herself to force her way into the man's house. The man closed the door, and she ran next door to ask for help, but no one answered. Her boyfriend and his buddy then broke into the back door and her boyfriend ordered her to come inside. After he tied up the man, he told Wabindato and his buddy to look through the house for money. When they returned with nothing, he beat and then shot the man. In shock, Wabindato believed he might shoot her next. When the three were arrested, she told her attorney about the beatings and coercion, but he advised her not to speak about the abuse at trial. Nevertheless, she did manage to testify that her boyfriend had used

143. Interview with Sharleen Wabindato on Jul. 26. 2003, People v. Sharleen Wabindato, No. 7720460-FY, (Mich. Muskegon City Ct. (1977).

144. Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men* 277 Nat'l Inst. Just. J., 2 (June 1, 2016) (Finding that 84.3 percent of American Indian and Alaska Native women have experienced sexual or other physical violence in their lifetime; Christopher Hartney & Linh Vuong, *Created Equal: Radical and Ethnic Disparities in the US Criminal Justice System*, Nat'l Council on Crime and Delinquency 3, 16 (Mar. 2019) (Finding that Native American women have been admitted to prison at 6.7 times the rate of white women, and Black women at almost 4 times the rate of white women). https://nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men [https://perma.cc/LHS4-8C4D].

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his fists on her and coerced her into participating, and that she was afraid of him. The boyfriend's buddy, who had supplied the gun and hatched the plan with Wabindato's boyfriend testified against both Wabindato and her boyfriend for his own freedom and served no time.[145] Wabindato was convicted of first-degree felony murder and sentenced to life without parole.

In 2008, Wabindato was granted a clemency hearing, but she was later denied. At the hearing, the Assistant Attorney General repeated the old canard, "why didn't you leave?" and answered the question himself from his own gendered, privileged, "objective" perspective by telling her what he would have done. The Assistant Attorney General also ignored affidavits from Wabindato's family members, accused Wabindato of lying about abuse, and mocked the prison's own psychological evaluation of Wabindato for being "so favorable" rather than "unbiased."[146] In 2022, Wabindato was again granted a clemency hearing. Though less combative toward her, the second hearing was an inquisition into her juvenile record from almost fifty years before, a time when she was running away from incest and grieving her absent mother who left the family and then died. The violence she survived from her codefendant was minimized by the assistant attorney general at the second clemency hearing and framed in a way to impose blame on Wabindato as "you argued," and your boyfriend "slapped you a couple times."[147] There was no understanding of the context of violence so prevalent in the lives of especially those of Native American women, nor the ways their narratives or narrative styles might differ from white or male narrations. Nor was there any acknowledgment that her felony murder conviction was unlawful under *People v. Aaron*, since she never anticipated, intended nor committed the murder, and was present only because her life was threatened. In a system that stigmatizes, racializes, and dehumanizes women like Wabindato, who manage to overcome horrendous backgrounds, maintain positive records, receive a college degree, and earn the love and respect of many people on both sides of the prison fence, it is unfathomable to discern any possible reason for her denial after she had served more

145. Trial Transcript from 1977 at 547-77, 609, 781, Wabindato, No. 7720460-FY; Wabindato, No. 7720460-FY, Mich. Dept. of Corr., Presentence Investigation Report, (1977); Affidavit of Jeffrey P. Wabindato from Feb. 14, 2005 at 1, Wabindato, No. 7720460-FY.

146. Public Comm. Hearing Transcript from Jan. 22, 2008 at 133, 138, 143–144, Wabindato, No. 7720460-FY.

147. Public Comm. Hearing Transcript from Dec. 1, 2022 at 30, Wabindato, No. 7720460-FY.

than forty years in prison for another's crime: the only explanation is discrimination.

Post-Conviction Clemency Hearing (2008):

But again if you were such a reluctant participate [sic] I don't see why you didn't take that opportunity at that time to run away . . . I'll tell you at that point I would have run away . . . It comes as no surprise that Wabindato would now profess repentance [and] attempt to obstricate [sic] her role in this killing by falsely claiming that she was suffering from battered woman syndrome after all she wants out of prison.[148]
Assistant Attorney General Charles Schettler

Post-Conviction Clemency Hearing (2022):

[Y]ou do have a juvenile record . . . drunk and disorderly charges that you had in 1972, 1973, and 1975 . . . you acknowledge, though, that you were pretty, you know, amoral . . . according to the record, it reflects that you and codefendant primarily just argued, and that he had slapped you a couple times, . . . [149]

Assistant Attorney General Alicia Lane

b. Case Summary: People v. Christy Neff

The judge was overheard talking about my guilt before my trial even began . . . [150]

Christy Neff

In 1996, when Christy Neff's violent ex-husband learned she had remarried, he escaped from jail in another state and returned to Michigan. Both her husbands tortured Neff physically and sexually, and both threatened to kill her and each other. When her ex-husband contacted Neff, her ex-husband said he would kill Christy Neff's parents if Neff called the police. Nevertheless, she tried to call the police and left a message with the station, but the officer did not return her call. She was too terrified to call again. Her ex-husband convinced Neff he only wanted to talk with the new husband and then he planned to go to Canada. Instead, Neff's ex-husband and another man kidnapped and savagely murdered Neff's new husband. Afterward, her ex-husband continued to threaten Neff and her family and threatened her and her parents if she did not meet him at a motel, where he raped Neff and then told her he had murdered her new husband. At trial, Neff's ex-husband admitted to committing the murder saying, "he took what was

148. Wabindato, note 146 at 133, 143–144.

149. Wabindato, note 147 *at* 11, 16, 29–30.

150. Interview with Christy Neff on July 9, 2021 at 14, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996).

mine . . . she belonged to me."[151] He further testified Neff did not know of his plan or participate in it. Throughout the trial, the judge ruled against the defense and in favor of the prosecution.[152] The judge denied Christy Neff's Verified Motion to Disqualify Judge based on an affidavit from a court employee who attested to overhearing the judge make a biased comment about Neff's guilt prior to trial.[153] Judge Houk also denied her motion for expert testimony on battering.[154] But he allowed the prosecutor to show salacious photographs of Neff to the jury. Neff had worked as a stripper to support herself and her children after her divorce. Finally, the judge told the jury how to consider her guilt by warning them to "be very careful about accepting" her ex-husband's testimony since it exonerated her.[155] Neff was convicted of second-degree murder, but the judge added another, nonexistent charge of conspiracy to commit second-degree murder (later dismissed on appeal)—and sentenced

151. Trial Transcript from Mar. 28, 1997 at 2513, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996); *See* also People v. Neff, No. 96-070583-FC (Mich. Ct. of App. 2000).

152. Hearing on Motion to Recuse the Court, Transcript from Feb. 28, 1997, at 2-4, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996). Judge Peter Houk was the prosecutor on the landmark case of Francine Hughes, a battered woman who was acquitted by a jury after she killed her violent husband and whose story was sensationalized by The Burning Bed book and film fame. In that case, Judge Michael Harrison made a similar, biased comment about the Defendant's guilt prior to trial and was forced to recuse himself when his court reporter testified against him. In a blow to the prosecutor, Peter Houk, Hughes was then tried by a different judge and acquitted. Judge Harrison, however, remained on another battered woman's case without recusing himself, People v. Violet Allen, No. 77–27943-FY, Mich. Ingham Cty. Ct. (1977). That case was tried the same week as Francine Hughes'. Violet Allen was convicted and sentenced to life in prison. No evidence of abuse was presented in her defense, and she was not allowed to testify. Violet Allen served over 20 years when she was resentenced on a Motion for Relief from Judgment filed by Lynn D'Orio, legal director for the Michigan Women's Justice & Clemency Project in 1999.) *See also* Faith McNulty, *The Burning Bed* 204, 238 (1980); and Jacobsen, *supra* note 30, at 16–28.

153. Affidavit of Joye Sharpe from Feb. 27, 1997, at 1, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996); Hearing on Motion to Disqualify Judge from Feb. 28, 1997, at 38-39, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996).

154. Order from Feb. 26, 1997 at 2; Motion to Exclude and Prohibit Testimony Pertaining to the Battered Woman/Battered Spouse Syndrome at 72-74; Motion in Limine to Suppress Photographs/Video from March 5, 1997, at 1-3; Motion for Appointment of Investigator and Expert and for Court Ordered Funds to Hire Said Expert and Investigator and Legal Memorandum in Support from Oct. 10, 1996 at 1-6, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996).

155. Trial Transcript from June 26, 2002, at 2704-2705.

her to a minimum of forty years in prison, a sentence akin to life, and sharply upward in departure from the guidelines at that time of twelve years.[156]

Post-Trial Letter:

Of all of the cases I handled at SADO [State Appellate Defenders Office], Ms. Neff's trial may have been the most unfair. In particular, the trial was marred by blatant sexism . . . [t]his trial was, in short, a train wreck of legal error and sexism. [157]

David Moran, Co-Director of the Innocence Project, University of Michigan Law School

c. *Case Summary:* People v. Barbara Davis

I was under the total influence of my father and convinced that I was doing the right thing.[158]

Barbara Davis

Barbara Davis was twenty years old when her father, who had abused her sexually and physically for most of her life, manipulated her into helping him commit a robbery to save the family home. Davis's mother had taken Davis's father to court for the incest of Davis and her sister years before, but Davis's mother also made excuses for Davis's father. Davis's mother took Davis to visit Davis's father in prison and allowed him to return to the home when he was released.[159] Davis moved out because of her father's ongoing sexual advances toward her. When Davis was admitted to a college in another state, she moved back home temporarily to save money until she was to leave. During that time, her father approached her saying he needed money because they were about to lose the house to foreclosure. Davis's father suggested a robbery and he and her mother both pressured Davis to help him. Davis relented and told him about a man she did housework for who was financially well off because the man bought and sold used cars. Davis agreed to let her father into the man's house while the man was away. On the day of the robbery, Davis's father entered the unlocked house while Davis waited in her mother's car nearby. She

156. Defendant's Motion for Judgment of Partial Acquittal and Resentencing from Jun. 15, 1998, at 2-3, People v. Christy Neff, No. 9670583-FC (Mich. Ingham Cty. Ct. (1996). There is no crime for conspiracy to second degree murder since no premeditation is involved.

157. Letter from David Moran, Co-Director of the Innocence Project, University of Michigan Law School, to Michigan Parole Board (August 16, 2021).

158. Letter from Barbara Davis to the Wayne County Prosecutor on Mar. 12, 2018, People v. Barbara Davis, No. 02 9234–02, Mich. Wayne Cty. Ct. (2002).

159. People v. Gerald Davis, No. 89–004375–01-FC (Mich. Wayne Cty. Ct. (1989).

did not see her father until later when her father told Davis the man returned unexpectedly and he'd shot him, but then her father lied and said the man was all right.

Davis was picked up by police the following day. Davis, her mother, and sister were interrogated, threatened, and held overnight by police. The officer who held them wrote Davis's confession and coerced her to sign the confession with the deceptive understanding Davis could go home.[160] The police officer had a reputation for unlawfully jailing witnesses and committing other violations against citizens' civil rights.[161] When Davis's father was arrested, both parents pressured Davis not to testify against him. Davis was offered a plea of 13.5 years, but it was contingent on her agreement to testify at her father's trial, so she turned it down at her parents' urging. They told her she could not get convicted since she was not present at the scene of the murder. At her trial, Davis testified she was in a car around the corner when her father entered the house, shot, and robbed the man. The prosecutor ignored her testimony and implicated Davis in the murder with the stereotype of the sexually promiscuous Black female, stating in his closing arguments, "Folks, we know what happened that evening. She went there . . . luring him into some kind of sexual relationship and it was at that time that dad surprised them, and they robbed him."[162] On the day she was convicted of first-degree felony murder and sentenced to life without parole, the prosecutor dismissed all charges against her father.

> Post-Trial Sentencing:
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> *I think that it is obvious that the person who should be sitting there in that chair along with you is not and sometimes the legal system and the way things work, I guess, defeat the ultimate purpose . . .* [163]
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> *Thomas Jackson, Trial Judge, Wayne County*

160. Trial Transcript V. 2 from Oct. 30, 2002, at 152-154, 162, Barbara Davis, No. 02 9234–02.

161. David Ashenfelter & Suzette Hackney, *End to Illegal Arrests Promised*, Detroit Free Press, Mar. 30, 2001, at A1; David Ashenfelter & Susan Hackney, *Cops Confirmed They Jailed Witnesses*, Detroit Free Press, Mar. 29, 2001, at A1, 16A; Davis Ashenfelter, Jim Schaefer & Suzette Hackney, *City Cops Struggling to Change their Ways; Murders Harder to Solve Without Dragnet Arrests*, Detroit Free Press, Dec. 18, 2001, at A1; Trial Transcript, *supra* at 160, at 87-92.

162. Barbara Davis, *supra* note 158, at 171.

163. *Id.* at 7–8.

3. Group 3. Women Convicted of Killing Lesbian Partners

Women who killed lesbian partners comprised the smallest group in the study. Only six women (1 percent), including one juvenile, and all of them Black, killed their lesbian partners. All six indicated the incident occurred during or following arguments. Two said they suffered abuse from their partners. All but one (who stabbed her partner) used guns; one claimed it was self-defense, and one said it was an accident.

Two women had jury trials and were sentenced to mandatory life without parole. Four accepted plea agreements. Their sentences averaged 14.3 years, which is considerably less than the average sentence of 20.8 years for all incarcerated women serving sentences of second-degree murder in the study.[164]

Claire Renzetti's study of intimate partner violence in the lesbian community affirmed that "getting help is extraordinarily difficult for battered lesbians."[165] Given the context of a world which is not only misogynistic and racist, but also homophobic, lesbians find they receive little or no substantive help when they call police or even shelters for support in handling partner abuse.[166] Like many heterosexual couples, most same-sex partners in abusive relationships hope the partner will change and place a high value on relationship stability and staying together.[167] At the same time, lesbian relationships cannot be neatly compared to heterosexual ones since that tends to erase them, their sexuality, and their community. A 2017 public health study found that those who self-identify as lesbian, gay, bisexual, or transgender were disproportionately incarcerated at higher rates than others in women's prisons.[168] However, as was noted earlier, when white people were killed—which was rare among the Black incarcerated women in the sample—sentences were particularly severe. Since all six women who were killed were lesbians and Black, their lower average sentences indicate a lower value placed on their lives by the courts.

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164. *See*, MDOC, at C-63 (2021).

165. Claire Renzetti, Violent Betrayal: Partner Abuse in Lesbian Relationships, 75–78, 118–19 (1992).

166. *Id.*

167. *Id.*

168. Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca Wilson & Jody L. Herman, *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 Am. J. Pub. Health, 267, 267–273 (2017).

a. Case Summary: People v. Debra Smith

> *And then she picked it up. And I said, 'Don't fuck around with the gun . . .*
> *All I remember is hearing the shot and seeing her laying on the bed . . .*
> *And I started screaming . . .* [169]
>
> *Debra Smith*

Debra Smith was in bed asleep on the night of the incident when she was awakened by her girlfriend asking for liquor or pills. When Smith said she didn't have any, her girlfriend asked her to take her to the store. On the way back, Smith's girlfriend said she wanted to steal a BMW that was in the apartment parking lot with keys in the ignition. Smith said she wanted nothing to do with the idea. The two argued, went into the apartment, drank vodka, and became intoxicated. Smith had an excruciating history of incest and other physical violence by her father. Smith's girlfriend was also sexually and physically abusive. Smith found drinking helped to drown her pain. Smith remembered her girlfriend smoking something, then asking Smith for her gun, taking it, and using the phone to call someone about money and the BMW. Smith warned her to be careful with the gun, then fell asleep or passed out. Smith awoke when her girlfriend cracked her on the head with the gun. Smith grabbed for the gun, but the gun went off and hit Smith's girlfriend, who fell on the bed.[170] Smith ran outside and yelled for help. When police arrived, they took Smith to the station and interrogated her despite her incoherent, intoxicated and emotionally distraught state. She remembers asking for an attorney, but the officers ignored her request. Smith called her girlfriend's mother from jail and told her what had happened. The interrogation lasted for more than two days without food until police had a sufficient confession for the prosecutor. Smith was convicted of first-degree murder and sentenced to mandatory life without parole.

Post-Trial Application:

> *The trial court refused to let trial counsel ask whether Detective Kierman gave her any Miranda warnings.*[171]
>
> *Pro Per Application for Leave to Appeal to Michigan Supreme Court*

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169. Detroit Police Interview Transcript from Mar 2, 1997 at 13, People v. Debra Smith, No. 97152970-FC (Mich. Wayne Cty. Ct. 1997).

170. Letter from Debra Smith from Dec. 15, 2009, People v. Debra Smith, No. 97152970-FC (Mich. Wayne Cty. Ct. 1997).

171. Appellant's Brief to Mich. Ct. of App. from Nov. 12, 1999, at 27.

4. Group 4. Women Convicted of Killing Their Newborn

Nine women (approximately 1 percent) were convicted of neonaticide, a gendered offense affecting almost exclusively women, for causing the death of their newborn - although the deaths are not always due to an act of violence - within twenty-four hours of giving birth.[172] All nine women in the study except one were white, and all but one in their twenties. At least three cases involved intimate partner violence and three more had histories of abuse. The ratio of one Black woman to eight white women in the study differs from a 2021 study by the National Association of Medical Examiners Foundation that found the neonaticide rate for Black women was twice that of white women.[173]

Four white women had jury trials: two received life sentences for first-degree murder, and two received eighteen years minimum sentences. The five women who pleaded guilty received sentences ranging from nine to twenty-seven-year minimums. Life sentences are extremely rare for neonaticide, but all sentences for this offense are excessive and appear to be arbitrarily applied. Michelle Oberman's research on neonaticide found that nationally sentences vary from probation to life in prison due to the law's lack of understanding of the patterns that link neonaticide cases, the social expectations for mothers, and the media's power to blame women in these cases.[174]

The women are generally young, and often concealing or denying their pregnancies. Most fear abandonment or punishment by family or friends and are socially isolated, without partners or financial means to support themselves. Historically, there has been great ambivalence and lack of clarity and consistency in the law regarding neonaticide and infanticide. Michelle Oberman's

172. Philip J. Resnick coined the term neonaticide in 1969 to describe the killing of one's biological newborn within twenty-four hours of birth, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 Am. J. Psychiatry 1414 (1970).

173. Rebecca F. Wilson, Joanne Klevens, Beverly Fortson, Dionne Williams, Likan Xu & Keming Yuan, *Neonaticides in the United States—2008–2017* 8 Acad. Forensic Pathology: Publ'n Nat'l Ass'n Med. Exam'rs Found. 3, 10 (2021) (An unofficial count of 33 women arrested for neonaticide in Michigan during the time span in which the 9 women in this group were convicted (1988 to 2022) also found racially similar results. Of 33 neonaticide cases, 21 women were white, 7 were Black, 2 Latinx, and 3 unknown as to race. Sentences ranged from probation (or no prosecution at all) to life in prison; most severe sentences were given to those who had trials).

174. Michelle Oberman, *Mothers Who Kill: Cross-cultural Patterns in and Perspectives on Contemporary Maternal Filicide,* 26 Int'l J. L. and Psychiatry 493, 494-499 (2003).

research on neonaticide found that "maternal filicide is committed by mothers who cannot parent their child under the circumstances dictated by their particular position in place and time."[175]

No men were prosecuted as accessories in the cases in the study. One woman reported her pregnancy resulted from rape.[176] The only Black woman in the group almost died in childbirth and was found unconscious and taken to the hospital; she was then charged with first-degree murder. She later pleaded guilty to second-degree murder and was sentenced to nine years minimum, the lowest sentence given for neonaticide in the group, but high given the facts of her case.[177] Another woman was charged with manslaughter since the autopsy revealed no evidence of murder; however, the trial judge chose punishment and changed the charge to homicide. She was then convicted of second-degree murder by a jury and sentenced to a minimum of eighteen years.[178]

Perhaps the primary question raised by neonaticide has to do with the social and economic hardships of the mother role, and the gender stigma attached to pregnancy for young, single women. Many are young, or have more children than they can manage already, have only minimum wage jobs in their futures, and they see no way to care for themselves, let alone raise a child in a harsh, biased world.[179]

As we have seen in recent Supreme Court decisions, as well as increasingly in state laws and regulations, policy related to women's bodies, sexuality, and pregnancy is grounded in gender subjugation and white supremacy. The hazards of pregnancy and birth, financial costs, educational needs, and family or partner support, or lack thereof, are contextual vulnerabilities attached to any woman's pregnancy. An estimated 250 neonaticide cases occur each year in the United States. Scholars have shown that an inadequate understanding of women's circumstances in these cases together with a lack of compassionate legislation and understanding by the

175. *Id.*

176. Kelly McLaughlin, *College Student Mom Gets Up to 40 Years in Prison for Death of her Newborn Girl*, Okemos Daily Mail, Apr. 13, 2016.

177. Assoc. Press, *Detroit Woman Gets 9–20 years in Death of Newborn Daughter*, Detroit Free Press (Apr. 5, 2018 5:20 PM), https://www.freep.com/story/news/local/michigan/detroit/2018/04/05/glencetta-gloster-washington-newborn-death/491337002 [https://perma.cc/Q6M9-KR4B] (One other woman was sentenced to nine years minimum in this group of neonaticide cases).

178. Jennifer Nemer, *Trial Begins for Baby Murder*, The Ortonville Citizen, March 3, 2016, at 1.

179. *Id.*

legal community have resulted in inconsistent charges, inadequate defenses, and unreasonable outcomes overall.[180]

Unlike the United States, at least two dozen nations have enacted infanticide laws that reduce penalties for infanticide and neonaticide.[181] Attitudes and laws about neonaticide have not evolved here, perpetuating an unrealistic narrative of motherhood that precludes an understanding of both neonaticide and infanticide cases, and criminalizes both.[182] In the United States, neonatal deaths plummeted in the early 1970s as a direct result of *Roe v. Wade* legislation that protected abortion rights. According to the Center for Reproductive Rights, "Globally, there is an overwhelming trend towards the liberalization of abortion laws… From Ireland to Nepal, abortion rights are becoming recognized as fundamental human rights… And in Latin America, the Green Wave is ushering in a new era of liberalization in Colombia, Mexico, Argentina, and elsewhere…"[183] The recent decision by the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization* is in opposition to the global trend, and is already resulting in greater hazards to women's lives through doctors' refusals to treat precarious pregnancies, death and near-death experiences, punishment to pregnant children, and neonaticides and infanticides that will increase until *Dobbs* is overturned.[184]

Some countries have specific laws on neonaticide: in Austria the sentence is one to five years; in Finland it is four months to four years. A study of neonaticide in those countries recommended psychological treatment, not prosecution.[185] England passed the Infanticide Act of 1922, amended in 1938, providing that a woman

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180. *See* Beth E. Bookwalter, *Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B. U. L. Rev. 1185, 1186 (1998).

181. Susan Hatters Friedman, James Cavney & Phillip J. Resnick, *Mothers Who Kill: Evolutionary Underpinnings and Infanticide Law*, 30 Behav. Sci. and the Law 585, 585–597 (2012) (while neonaticide refers to causing the death of a newborn the first 24 hours after birth; infanticide generally refers to causing the death of a child after the first 24 hours).

182. *See* Julie Spain, *Changing the Narrative of Neonaticide*, 2 Ind. J. L. Soc. Equity, 166, 167–168 (2013).

183. The World's Abortion Laws, Center for Reproductive Rights, https://reproductiverights.org/maps/worlds-abortion-laws/ [https://perma.cc/82EP-R2Y8].

184. *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 292 (2022) (holding that the Constitution of the United States does not confer women's right to abortion).

185. *See* Sabine Amon et al., *Neonaticide in the Courtroom—Room for Improvement? Conclusions Drawn from Austria and Finland's Register Review*, 29 Child Abuse Rev. 61, 61 (2019), https://onlinelibrary.wiley.com/doi/full/10.1002/car.2589 [https://perma.cc/WA6M-AFPP].

would not be prosecuted for murder for infanticide or neonaticide: today the great majority of the women in England who commit neonaticide receive counseling, not prison, something the United States must aspire to emulate and work toward.[186]

a. Case Summary: People v. Melissa Swiney

> *[The] officer did not give me my Miranda rights . . . [He] asked me leading questions that caused me to second guess myself. For example, "was it possible that you did this?"*[187]
>
> *Melissa Swiney*

Melissa Swiney may be the longest serving woman in the United States for neonaticide. She was arrested in 1987. Swiney grew up in a violently abusive home. She was hospitalized as a child for depression, suicide attempts, and psychological distress. The family kept devastating secrets that effectively silenced her as she grew up: her father's violent behavior and drug abuse, her mother's rages and depression, and her brother's rape and sexual violations against her. At twenty, Swiney became pregnant by her boyfriend. Swiney told no one, but moved out of their apartment when her boyfriend, too, became abusive. She went into labor early one day while driving to her mother's house and she panicked. She pulled over to the side of the road and gave birth in her car. In a state of shock, she recalls desperately covering the newborn's face, and then, believing the infant was dead she placed it in a bag in the trunk, and later left it in a field. The cause of death was declared inconclusive by the medical examiner. The record was later changed to homicide when a police officer told the medical examiner Swiney had confessed. The officer egregiously violated Swiney's civil and human rights by hounding her in the hospital against her will while she was heavily medicated, enlisting a nurse to help extract her confession, writing it in his own words, and persuading the medical examiner to change the cause of death. The prosecutor's decision to charge Swiney with first-degree murder, a sentence far out of line with the circumstances of the case, together with the police misconduct, medical mishandling, and an inadequate defense all combined to shamelessly close the case with a mandatory life sentence over the concerns of jurors, police officers, and doubts by the judge at

186. *See* Michelle Oberman, *A Brief History of Infanticide and the Law, in* INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL 3, 9 (Margaret G. Spinelli ed., 2003).

187. People v. Swiney, No. CR-89-090362-FC (Mich. Oakland Cnty. Ct. 1988); Letter from Melissa Swiney, to author (June 30, 2022) (on file with author).

the end of the trial.[188] A later autopsy found homicide was not an accurate conclusion, but it came too late.[189] For twenty-eight years Melissa was the only woman to be sentenced to life in prison for neonaticide in Michigan, but in 2016 another woman received the same sentence.[190] In recent years, developments in forensic science have exposed the scope of the problem of false and coerced confessions as well as changes made by forensic doctors in autopsy reports based on undue influence by police.[191]

> Post-Trial Statements:
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> *[B]ased upon the trial testimony of Det./Sgt. Barden, that the Defendant should have been read her Miranda Rights on November 1, 1988, and by not doing so the interview of Melissa Kay Swiney on November 14, 1988, was the fruit of the poisonous tree along with not being free and voluntary.*[192]
>
> *Jerome L. Fenton, Appeal Attorney*
>
> *I was the Oakland County Probation Officer who wrote Melissa Swiney's Presentence Investigation Report in 1988–89. I strongly believe she never deserved the conviction of first-degree murder or the mandatory life sentence. This is the only case of all the cases I investigated that has haunted me all these years. I know deep down this case was a terrible miscarriage of justice.*[193]
>
> *Jack Harrington, Former Officer of the Court, Oakland County*

188. *See* Kathleen Gray, *Jurors' Life-death Decisions Can Cause Post-Trial Troubles*, Oakland Press Dec. 1989 at A1, 7. (At least three jurors were upset about the harshness of the sentence following the trial; and at the end of trial, Judge O'Brien remarked, "I think it's at least curious to consider that had this Defendant's conduct, that is in terminating the infant, occurred six months earlier in her pregnancy than the date that's charged in this particular case, a large segment of our population would be championing her right to do so.").

189. Memorandum from Daniel J. Spitz, Forensic Pathologist and Toxicologist, to Paul F. Condino, Attorney at Law 6 (Feb. 22, 2017) (on file with author).

190. In 2016, a second woman was also sentenced to life for neonaticide. *See* Christina Hall, *Angela Alexie Found Guilty of Murder in Death of Newborn Left in Trash*, Detroit Free Press (Mar. 5, 2016, 4:08 PM), https://www.freep.com/story/news/local/michigan/macomb/2016/03/04/alexie-eastpointe-baby-roseville-recycling-jury/81319034/# [https://perma.cc/9YSY-K7KR].

191. In March 2020, the National Registry of Exonerations reported that 12 percent of the 2400 defendants who have been exonerated of a crime falsely confessed to that crime. Exonerees who reported a mental illness or intellectual disability falsely confessed at an astonishingly high rate of 70 percent. *See* Nat'l Registry of Exonerations, Table: Age and Mental Status of Exonerated Defendants Who Confessed, 1 (Mar. 17, 2020), https://tinyurl.com/y246wuj7 [https://perma.cc/W4HK-X3EY].

192. Motion for Directed Verdict of Acquittal and/or a Motion for a New Trial at 2, People v. Swiney, No. CR-89-090362-FC (Mich. Oakland Cnty. Ct. Nov. 15, 1989).

193. Letter from Jack Harrington, Oakland Cnty. Ct. Officer, to Gretchen

> *It was my opinion at the time that the prosecutor unfairly sensationalized the case, and prejudiced the jury . . . I would not have voted to convict Melissa Swiney* . . . it was a miscarriage of justice . . . .[194]
>
> *Juror (alternate)*

5. Group 5. Women Convicted of Killing Children

Group 5 includes forty-eight women (about 10 percent of the study) who killed a child or children on their own.[195] In thirty-four cases (70 percent) the child was their own, and in fourteen cases (30 percent) the children were in the woman's care.[196] In six cases, more than one child was killed. A high proportion of women (85 percent) were known to have histories of abuse or mental illness or both. Two women denied killing the child, and one woman was exonerated in 2021 due to a wrongful conviction.[197]

Forty percent of the women in the group were convicted of first-degree murder; with most of the rest receiving minimum sentences of 20 to 29 years minimums.

A little over half the women in Group 5 were Black. Consistent with findings about the race of people killed generally, Black women on average received less severe sentences than white women in this group, suggesting that the lower valuing of Black lives extends to children. The prosecutor's obsessive references to social, racial, and class status in the trial of *People v. Carol Poole*, (see case summary below) reflects the notion that punishment will be greater for a white woman who fails to meet social expectations for causing the death of a white child.[198]

Both the courts and the media frequently dismiss women who kill their children as either "mad" or "bad."[199] It is an understudied subject, and most scholarship focuses on the pathology, etiology,

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Whitmer, Governor of Mich. (June 24, 2023) (on file with author).

194. Affidavit of Ilona Dotterer at 1, People v. Swiney, No. CR-89-090362-FC (Mich. Oakland Cnty. Ct. Nov. 15, 1989).

195. Those women who had male codefendants who killed a child or children—some of whom participated in causing the death while others did not—are included in Group 2.

196. There were another thirty-one women whose intimate male partners killed their child/children; some of them also killed the child/children. At least nineteen involved intimate partner violence, and six more had histories of abuse or mental illness, who are included in Group 2.

197. Tonia Joyce Miller was exonerated by the University of Michigan Law School Innocence Project in 2021.

198. Poole v. Stewart, No. 16-1729, 2017 WL 3014000, at *1 (6th Cir. July 14, 2017); People v. Poole, No. 06-014443-FC (Mich. Wayne Cir. Ct. Jan. 8, 2018).

199. Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 Women & Crim. Just. 71, 71–72 (1991).

and motives of the women, rather than the context of their lives. As Michelle Oberman's research revealed, women who kill children are generally isolated, economically disadvantaged, and struggling as solo parents. "By focusing on the circumstances surrounding the mother who kills her child, it becomes clear maternal filicide is not a random, unpredictable crime committed predominantly by mentally ill women. Instead, it is deeply imbedded in and responsive to the societies in which it occurs . . ."[200]

a. Case Summary: People v. Carol Poole

> *My little girl, Allison, lost her life and for that I will always hold myself accountable.*[201]
>
> *Carol Poole*

Carol Poole was a foster mother to a two-year-old girl whose biological parents could not care for her. On the evening of the incident, Poole was playing with the child upstairs, twirling her around when she accidentally lost her hold on the child, who was thrown over the railing. The child was conscious, and Poole put her to bed. Later, when she checked on her, she was not able to wake the child. Poole took her to the hospital where the little girl died of a brain injury. An autopsy could not determine whether the death was accidental or intentional. On appeal, Poole argued that the death was a tragic accident, and that police treated her like she was in custody in the hospital and would not allow her to see the child until she gave them a statement. At trial, the prosecutor mocked Poole, commented on her demeanor, class and education in improper remarks to the jury, and even compared Poole to a dog. Poole was convicted of second-degree murder and the judge added the crime of child abuse even though at sentencing her attorney reminded the judge there was no evidence of abuse of the child in Carol's care. Carol was sentenced to 20 to 35 years for second-degree murder.[202]

Post-Trial Note:

> *The prosecutor demonized her. [He] immediately said, 'No white, affluent, suburban foster mother will get away with murder' (something to that effect) . . . The judge added a 4th charge the last week of the trial against the objections of both lawyers. Anyway, it's an injustice.*[203]
>
> *D. S., Advocate for Carol Poole*

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200. Oberman, *supra* note 174, at 493–514.

201. Doug Guthrie, *Foster Mother Sentenced to 20–35 Years in Prison for Death of Girl*, Detroit News, Feb. 28, 2008 at B1.

202. Poole v. Stewart, No. 16-1729, 2017 WL 3014000, at *1 (6th Cir. July 14, 2017); Cecil Angel, *Foster Mom Sentenced in Death—She Apologizes, then Gets 20-35 Years*, Detroit Free Press, Feb. 28, 2008 at 3B.

203. E-mail from D.S., Advocate for Carol Poole, to author (March 14,

6. Group 6. Women Convicted of Killing Adult Family Members

While most women convicted of homicide acted against or because of abusive male partners, their victimization by other family members is a reason for many of those killings as well. Often, the women faced situations that directly related to their location within our hierarchical society, which is stratified on the basis of race, gender, and class, and reflected the disadvantages they faced because of it.

In this group, twenty-three women killed twenty-five adult family members. Twelve women were white, ten Black and one Latina. All the women were alone except for one who had a female codefendant. Persons who were killed included five mothers of the women, six grandmothers, two fathers, siblings, adult children, current and ex-boyfriends, husbands, and in-laws. More than half (fifteen) had histories of mental illness, histories of abuse, or both. Several women cited abuse as the reason for the killing; and three women who killed ill husbands said they were mercy killings.

Eleven women had jury trials, one had a bench trial, and eleven took pleas; sentences in this group were varied. Ten, or about 44 percent received life without parole; two, or 9 percent received life with the possibility of parole; and all but two of the rest received minimum sentences above twenty years minimum. Sentences in the group were among the harshest in the study.

a. Case Summary: People v. Mary Bigford

> *She [Mary Bigford] said she'd like to beat him up I said I think there's a lot of people who would like to do that.*[204]
>
> *Anonymous Friend of Mary Bigford*

Mary Bigford was charged with open murder, first-degree murder, felonious assault, carrying a dangerous weapon, and felony firearm for shooting her granddaughter's father to stop him from taking his child for a visit when he arrived at her apartment building. A criminal investigation was under way based on allegations that he had molested the three-year-old.[205] Multiple family friends testified at trial that the child had disclosed the sexual abuse to

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2008).

204. News Staff, *Mary Bigford Back in Court, Witnesses Testify in First-Degree Murder Case*, Channel 9 and 10 News (Sept. 28, 2015), https://www.9and10news.com/2015/09/28/mary-bigford-back-in-court-witnesses-testify-in-first-degree-murder-case [https://perma.cc/E732-Q6VP]; *accord* People v. Bigford, No. 333493, 2017 WL 5616105 (Mich. Ct. App. Nov. 21, 2017).

205. Bigford, 2017 WL 5616105, at *1. For a discussion of open murder, *see generally People v. Aaron*, 299 N.W.2d 304 (Mich. 1980).

them.[206] Bigford was overcharged by the prosecutor and was tried three times by the same Isabella County judge due to two mistrials. The first mistrial was caused by the prosecutor's misconduct during *voir dire* and his failure to turn over discovery to the defense. The second mistrial occurred because a juror was overheard saying she "would have shot the son of a b***h herself [since]she's a grandmother."[207] At her third trial, the judge ruled punitively against the defense including denying the defendant's motion for a change of venue and sharply cutting back on questioning of jurors during *voir dire*.[208] Bigford was found guilty on all counts. Bigford's act of defending a child she reasonably viewed as in imminent danger brought no mitigation of her sentence. On appeal, the Michigan Court of Appeals denied the defendant's arguments including the judge's errors and biased rulings, the instances of prosecutorial misconduct, the state's error in failing to protect the child during the child abuse investigation, the copious, biased media coverage that denied defendant a fair trial in that county, and the violation of Bigford's Fifth and Seventh Amendment Rights to an impartial jury and against double jeopardy.

> Post-Trial Opinion:
>
> *[E]ven presuming that Howard had sexually assaulted the child in the past, there was no indication that Howard was in any position to immediately sexually assault the child . . . .* [209]
>
> *Michigan Court of Appeals*

7. Group 7. Women Convicted of Killing Strangers or Acquaintances

Group 7 includes fifty-nine women who killed strangers or acquaintances alone. A 2019 study by the U.S. Justice Department found only about 10 percent of homicides by women nationwide involved strangers.[210] In the present study, it was about eleven percent. Over half (59 percent) of the group killed acquaintances, and the rest (41 percent) killed strangers. One-third received life sentences, most without the possibility of parole; and more than another third received extreme sentences (over twenty years minimum).

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206. Bigford, 2017 WL 5616105, at *1.

207. *Id.* at *4.

208. *Id.* at *1.

209. *Id.* at *5.

210. U.S. Department of Justice, Crime in the United States, 2019: FBI Uniform Crime Report 2 (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide.pdf [https://perma.cc/4Y39-8NL3].

Histories of abuse, alcohol, drugs, and driving accidents were prominent features in the cases in this group. Over one-third of the women (twenty-three) had histories of abuse or mental illness or both. At least a third (twenty-two) involved drugs or alcohol; fifteen occurred while driving; at least seven involved theft; and fifteen women killed other women during arguments. At least three women claimed self-defense, and five said they were defending children.

a. Case Summary: People v. Theresa Gafken

> *If I could've traded places that day, I would've because I would never have purposefully taken another precious human life.*[211]
>
> *Theresa Gafken*

In *People v. Gafken*, the Michigan Supreme Court took a step forward in allowing duress as a defense to homicide, stating:

> Two terms ago, in *People v. Reichard*, 505 Mich. 81; 949 NW2d 54 (2020), this Court unanimously held that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony. This case asks whether Reichard's rationale extends to allowing duress to be asserted as an affirmative defense to what is known as depraved-heart second-degree murder. It does.[212]

Theresa Gafken agreed to give a ride to a male acquaintance and his friends. When a police car approached them from behind and signaled her to stop, Theresa started to pull over, but the acquaintance suddenly stuck a gun in her ribs and told her to speed up. He continued to threaten Gafken, so she increased her speed, passing other vehicles. She ran a red light at the intersection and struck three cars, killing one person instantly, and injuring herself and the three men in her car.[213] She told police and emergency room attendants at the hospital that she fled from police because her passengers threatened to kill her if she stopped, and one thrust a gun into her ribs. Prior to trial, she asked to be allowed to testify that she intended to pull over but did not do so because the man was holding a gun on her and threatening her life. The judge ruled she would not be allowed to testify about the threat to her life or her past sexual abuse as a child (which intensified her fear of being killed), or her mental state just before the collision, effectively ruling

211. Jackie Smith, *Camaro Driver Sentenced to 20 to 30 Years*, Times Herald (Oct. 8, 2018, 4:20 PM), https://www.thetimesherald.com/story/news/2018/10/08/camaro-driver-sentenced-20-years/1566227002/ [https://perma.cc/7HS3-3CDB].

212. People v. Gafken, 990 N.W.2d 826, 827 (Mich. 2022); *see also* People v. Reichard, 949 N.W.2d 64 (Mich. 2020).

213. People v. Gafken, 990 N.W.2d at 827.

out her entire defense. At the end of the trial, Gafken was found guilty of second-degree murder and sentenced to a minimum of twenty years in prison. The Michigan Court of Appeals denied her appeal, but in a landmark decision, the Michigan Supreme Court overturned her conviction, holding that duress may be asserted as an affirmative defense to what is known as "depraved-heart," conditions of second-degree murder, reversing both the trial court and the Court of Appeals.[214] The Court stated, "Because Gafken alleges that she chose to do the lesser evil, [drive recklessly] a duress defense was available."[215] That is, because she drove without stopping rather than be killed, she should be permitted to testify and present evidence of duress.[216]

> Post-Trial Opinion:
>
> *The trial court's order preventing Gafken from raising a duress defense to a second-degree murder charge that relied on a depraved-heart theory of malice was in error, and it was not harmless. The denial of the defense, coupled with the trial court's exclusion of any evidence that [codefendant] threatened Gafken, effectively left Gafken with no defense at all . . . .* [217]
>
> Michigan Supreme Court

While the decision may stem the tide of women's homicide convictions related to duress from an abuser, *Gafken*, like *Reichard*, was not made retroactive and leaves many women and men incarcerated longer than the law now allows. More importantly, it does not address the deeper crisis of gender violence, at both individual and state levels.

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214. "A defendant charged with second-degree murder under a depraved-heart theory has a right to raise the affirmative defense of duress . . . depraved-heart murder does not present the choice between sparing one's own life or taking the life of an innocent; rather, the choice presented is to lose one's life or commit a lesser felony than intentional murder. . .The denial of the defense, coupled with the trial court's exclusion of any evidence that Scandalito threatened defendant, effectively left defendant with no defense at all." *Id.* at 829, 830–31.

215. *Id.* at 830.

216. Theresa Gafken was released from prison in 2023, after serving nearly 5 years; however, the prosecutor has pursued a second trial. *See Offender Tracking System- Offender Profile: Theresa Marie Gafken*, Michigan Department of Corrections, https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=515843 [https://perma.cc/J88Q-YPBA] (last visited Mar. 26, 2024).

217. People v. Gafken, 990 N.W.2d at 830–31.

V. Policies and Courses of Action Toward Feminist Abolition Justice

It is in the universe of feminism, abolitionism, intersectional critical race theory, and other progressive grassroots movements and research where patterns of systemic discrimination and harm become visible and we can find tools to root out and replace them with healthy, visionary and constructive approaches to justice.[218] Feminist scholars, professionals, activists, and organizations have demonstrated how fundamental concepts, legal principals, and assumptions about the law and its relationship to gender and race have harmed women, especially women of color; how systemic, state and individual male violence function together as the root cause women's victimization, lawbreaking and criminalization, and how most women who kill their male partners are not acting irrationally or intentionally, nor are most killing a sleeping male, as the common stereotype about women's homicides holds —although those few who did were usually living in terror of their abusers.[219] In fact, most women's homicide cases constituted self-defense in accordance with Michigan law and the Model Penal Code.[220] While some inroads have been made in the duress defense, women who are with males who committed murder continue to be convicted of his crime under the felony murder law. Hundreds of women are incarcerated without relief in Michigan.[221] Only by acknowledging that misog-

218. For a discussion of feminist abolition, *see* Goodmark, *supra* note 58, at 171–195.

219. *See* Mahoney, *supra* note 83, at 702–719; *see also* Nancy Levit & Robert R. M. Verchick, Feminist Legal Theory 207–08 (NYU Press 2d ed., 2016). One of the few exceptions in the study is the case of *People v. Kapuscinski*. People v. Kapuscinski, No. 86-41544-FC, (Mich. Kent Cnty. Ct. 1988). In 1986, Delores Kapuscinski shot her abusive sleeping husband after years of sexual, emotional, and financial abuse and terrorization. *Id.* The case occurred in 1987, prior to Michigan's marital rape law (Mich. Comp. Laws Ann. § 750.520l (West 2024)) or other laws which have not proved helpful, however, in providing relief from gender violence or women's homicide convictions. Delores Kapuscinski requested an attorney at least twice but was ignored by police officers who interrogated her. Today, police are required to stop questioning as soon as a person mentions an attorney. Since interrogation records were destroyed by Michigan State Police, there is no proof of her request. *See* Letter from Bethany Goodwin, Mich. State Police Dep't., to Lynn Dorio, Mich. Women's Just. & Clemency Project (Aug. 8, 2016) (on file with author).

220. *See supra* note 73 for a discussion of the Model Penal Code's and Michigan's laws on self-defense.

221. In addition to People v. Reichard, 949 N.W.2d 64 (Mich. 2020) and People v. Gafken, 990 N.W.2d 826, the Seventh Circuit ruled in U.S. v. Dingwall, 6 F.4th 744 (7th Cir. 2021), that a criminal defendant may introduce evidence of battering and its effects to support a duress defense, furthering feminist efforts

yny, heterosexism and white supremacy have shaped the American criminal-legal-carceral system, can the backlash end and changes be made, beginning with acknowledging root causes of women's homicide, investing in prevention and non-carceral solutions. Education, vocational training, food, housing, medical care, mental health rehabilitation, and social work programs are all critical to transforming justice in the United States.

Some decriminalizing of minor convictions, such as drugs and sex work, has already begun, as a number of prosecutors refuse to issue charges in those cases. In the struggle for women's credibility, the "Me, Too" movement, the E. Jean Carroll case, and other cases are putting stakes in the ground for the credibility of women's testimony. Michigan's shift to a Democratic majority in its legislature brought the introduction of bills to restore good time and second chance legislation. However, the decline in the prison population has been minimal, and it is unlikely to make a dent in the prison population without major, large-scale actions.

The agreement is widespread, particularly among abolitionist feminists and groups organized by formerly incarcerated people, that there is no point in reforms since they only legitimate oppressive state systems rather than oppose and dismantle them, and because reforms reproduce harm disproportionately—to women, Black and other people of color, and LGBTQIA+ people—by not going far enough. Reforms tend to exclude so-called "violent offenders" who are precisely those—especially criminalized survivors—who have been harmed the most by the criminal legal system. Reforms aim to protect society by lowering arrests, prosecutions, convictions and sentences rather than restructuring society, abolishing prisons, and ending the criminalization of survivors.[222] Even the so-called "just culture" approach is problematic for maintaining the current criminal legal structure with all its power relations and systems intact.[223] Instead, prison abolition, and participatory and transformative politics is a process that offers new, innovative approaches and "disruptive strategies" that empower defendants, their families, and communities to organize and challenge the criminal legal system with the goal of transforming the entire structure.[224] These progressive movements use methods such as court-watching, cop-watching,

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to convince courts to accept a woman's version of facts. *See Recent Cases*, Harvard L. Rev. 1937 (2022).

222. Goodmark, *supra* note 58, at 186-195.

223. For discussion of the "just culture" approach *see* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio State J. Crim. L. 705 (2017).

224. Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 Mercer L. Rev. 715, 716 (2018).

prison and jail watching, community bail funds, and protesting unjust arrests and charges.[225] Eliminating many of the criminal stakeholders' roles—prosecutors, police, and parole boards, for example—and transforming others—such as moving from judges to small groups of community mediators made up of diverse members (in gender, race, class, education, including relatives and advocates) using feminist intersectional and reconciliation methods to mediate, address harm and determine noncarceral resolutions and settlements —would signal significant steps forward.

A. *Adjudicating Judges*

Judges have enormous power and a unique role to play in ending the mass incarceration crisis.[226] As federal Judge Nancy Gertner and other scholars have shown, they must acknowledge and abandon the routine practice of adjudicating cases on the pretense of objectivity and neutrality that, together with prosecutors' abuses, have created the carceral crisis and denied women and people of color fair and equitable deliberation of the facts and contexts of their cases.[227] Using legal interpretations that are illogical, inconsistent, and detrimental to women's cases, judges have defined women's requests for due process as pleas for special treatment, dismissed male violence as the "abuse excuse," and negated efforts to present relevant evidence as stepping outside the traditional legal [i.e., male] framework of criminal law, all practices they can end.[228]

A national investigation by Reuters News Organization covering a period from 2008 through 2019 found that thousands of U.S. judges who broke laws or oaths remained on the bench.[229] Judicial misconduct is not tracked and rarely reported to the public.

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225. *See* Raj Jayadev, *"Participatory Defense"—Transforming the Courts Through Family and Community Organizing*, Albert Cobarrubias Just. Project, https://acjusticeproject.org/about/purpose-and-practice [https://perma.cc/6777-FUAZ] (last visited Mar. 26, 2024).

226. Goodmark, *supra* note 58, at 97.

227. Gertner, *supra* note 56, at 1403 (describing how the judicial practice of making what are meant to be objective, gender-neutral decisions fail to take into account the context of women's subordinate roles in crimes committed by men as well as factors of abuse, coercion, and battering that disproportionately impact women's sentencing); *see also* Deborah M. Weissman, *Social Justice as Desistance: Rethinking Approaches to Gender Violence*, 72 Am. U. L. Rev. 215 (2022).

228. Levit & Verchick, *supra* note 219, at 41–42 (discussing the ways legal feminist scholars question male bias hidden behind so-called "neutral" laws).

229. *See* Michael Berens & John Shiffman, *Objections Overruled*, Part I to *The Teflon Robe: Holding Judges Accountable*, Thomson Reuters (June 30, 2020, 12:00 PM), https://www.reuters.com/investigates/section/usa-judges [https://perma.cc/7C7P-9HBA].

Omissions of applications of law, exclusions of evidence, deletions of applicable instructions to juries, racist and sexist comments, loyalty to abusive judges, and preying on women are some of the common practices found.[230] Gendered and racist rationales dominated courtrooms in many cases in the study: she doesn't "fit the pattern"[231] (timid, white, housewife); she is "guilty,"[232] (a cold-blooded killer); the classic, "she should have left" (she's at fault); or the unspoken, "she is Black" (of less value).

A recent example of Michigan's oppressive court system—unusual only for being called out by the state appellate and supreme courts—is the case in *People v. Dawn Dixon-Bey*.[233] The defendant was convicted of second-degree murder by a jury despite her claim of self-defense for killing her abusive boyfriend when he lunged at her during a physical altercation. The judge sentenced her far above the guidelines for second-degree murder to 35 to 70 years, calling it "premeditated murder."[234] The Michigan Court of Appeals and State Supreme Court both remanded the case for resentencing citing the trial judge's "blatant refusal" to listen to the defendant and acknowledge she was not convicted of first-degree murder.[235] Judge McBain defied the guidelines again, resentencing her to thirty years minimum whereupon a new judge was ordered to resentence the case for a third time. Her final sentence was eighteen to thirty-five years. Like most cases in the study, the murder charge, the conviction, and sentences all betrayed their bias, but the higher courts' failure to overturn *Dixon-Bey* was a symptom of the tyranny that plagues women's cases.

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230. *See* Michael Berens & John Shiffman, *Exploiting the Bench*, Part III of *The Teflon Robe: Holding Judges Accountable*, Thomson Reuters (July 14, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-commissions/ [https://perma.cc/8FJT-YMJV]; *see also* Aliza Shatzman, *Untouchable Judges? What I've Learned about Harassment in the Judiciary, and What We Can Do to Stop It,* 29 UCLA J. Gender & L. 161 (2022).

231. L. L. Brassier, *Seaman Jury Reject Battered Wife Claim*, Detroit Free Press, Dec. 15, 2004, at A1.

232. People v. Neff, No. 96-70583-FC (Mich. Ingham Cnty. Ct. 1996); Ed White, *Court Knocks Judge, Suggests He's in the 'Wrong Line of Work*, Yahoo! News (Feb. 2 2022), https://news.yahoo.com/court-knocks-judge-suggests-hes-195932498.html [https://perma.cc/VA4Q-DB72].

233. People v. Dixon-Bey, No. 154596-FC (Mich. Jackson Cnty. Ct.).

234. Jonathan Edwards, *A Controversial Judge Defied a Higher Court. It's Now Suggesting He's Unfit for the Bench: 'Wrong Line of Work'*, Wash. Post (Feb. 4, 2022, 7:02 AM), https://www.washingtonpost.com/nation/2022/02/04/michigan-judge-john-mcbain-appeals-court-murder-sentence/ [https://perma.cc/US9D-QKDF] (referring to trial judge John McBain).

235. *Id.*

By opening the door to women's testimony and ending their victimization by the state, judges can champion systemic change. As authorities on lawbreaking, judges can press legislators for laws to end life and mandatory sentences, initiate resentencing for women, and grant early eligibility and compassionate releases that do not require parole board consideration—all with an eye toward dismantling the criminal carceral machine.[236]

B. *Prosecuting Omnipotence*

A 2017 study published by Prison Legal News found that 95 percent of prosecutors are white males in the United States criminal system, which raises serious concerns about the fairness of the system to all defendants.[237] As Cynthia Godsoe pointed out, "prosecutors are not the magic bullet" to make the systemic change needed since they cannot fix "the carceral monster they largely created."[238] There are many ways, however, that prosecutors can cease unethical tactics such as stacking charges, lying and misrepresenting women's cases, using sexist and racist stereotypes, gaslighting, sensationalizing, and ridiculing women in court to get convictions.[239] In *People v. Barbara Davis*, for example, no one called out the prosecutor who raised racist tropes about Black women as sexually promiscuous when he chastised the defendant and misled the jury away from the actual circumstances though he knew she was not even present at the scene when her incestuous father alone committed the murder.[240]

Although some progressive prosecutors have begun to cut back on charging people for drugs or sex work, and some laws have passed allowing prosecutors to seek modifications in excessive sentences, such reforms are not enough.[241] Prosecutors must

236. *Id.*

237. *See* Joe Watson, *Study: 95 Percent of Elected Prosecutors Are White*, Prison Legal News (Feb. 8, 2017), https://www.prisonlegalnews.org/news/2017/feb/8/study-95-percent-elected-prosecutors-are-white [https://perma.cc/BW7V-JDJD]. (A study showing how the U.S. criminal system guarantees inequality because 95 percent of prosecutors are white males).

238. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. Rev. 164, 164 (2022).

239. *See generally*, Delaney Rives Knapp, Note, *Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution*, 83 Alb. L. Rev. 313 (2020).

240. People v. Davis, No. 02-9234-FC (Mich. Wayne Cnty. Ct. 2002). *See supra* Part IV for case summary.

241. Ashley Nellis, The Sent'g Project, No End in Sight: America's Enduring Reliance on Life Sentences 5 (2021), https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/ [https://perma.cc/UD9M-Y989].

relinquish their power, influence and alliances with police, parole agents, judges, jailhouse informants, parole boards, and lobbies to end coerced confessions and unfair sentences and bring an end to "don't ask don't tell" policies that play out with impunity for all sides. They must recuse themselves from decisions regarding police, forensics, prison, parole, and clemency because their own careers are involved, and those alliances do not conform to the public interest. Replacing white male prosecutors with women and people of color would help reduce sexism and racism embedded in the present legal system; but as the Movement for Black Lives Matter, Community Justice Exchange, and other abolitionists agree, our aim is to keep working to eliminate prosecution altogether.[242]

C. *Divesting from Police*

Citizens, journalists, abolitionists, and scholars have all demanded an end to the militarization, racism, sexism, and unrestrained violence of police and insisted that control be transferred to communities. The hypermasculine, racist, sexist law enforcement culture that maintains social hierarchies by abusing power over people of color, women, children, and families of low socioeconomic status, and use of fascist tactics while escaping public accountability cannot stand in a democratic system.[243]

Because intimate partner violence calls are the most dangerous calls police receive, law enforcement has largely abandoned women, or even punished them for calling for help.[244] Police assaults on citizens, as well as their own partners, are endemic to the occupation.[245] The harm this causes means that women, disproportionally

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242. *See generally*, Community Justice Exchange, Abolitionist Principles and Campaign Strategies (2020), https://static1.squarespace.com/static/60db97fe88031352b829d032/t/61348c6c138bef56b46eaad0/1630833772218/CJE_AbolitionistPrinciples_FINAL.pdf [https://perma.cc/M2TY-FQQR].

243. Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. Rev. 1183, 1235–46 (2015). (Appendix lists 102 cases of IPV by police officers); *see also* Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 Colum. J. Race & L. 601 (2022).

244. *See* Angela R. Gover, Dagmar Pudrzynska Paul, & Mary Dodge, *Law Enforcement Officers' Attitudes About Domestic Violence*, 17 Violence Against Women 619, 620 (2011); *see also* Sandra Park, *Shut Up or Get Out: PA City Punishes Domestic Violence Victims Who Call the Police*, ACLU (Apr. 24, 2013), https://www.aclu.org/blog/shut-or-get-out-pa-city-punishes-domestic-violence-victims-who-call-police [https://perma.cc/N8C5-9RH7]. (A number of police departments and cities across the United States have gone so far as to pass "nuisance ordinances" which are used by police to punish intimate partner violence survivors or have them evicted for calling 911).

245. Goodmark, *supra* note 243, at 1189.

those who are Black, have died while in custody, and many more have been murdered by their abusers while crying out for help.[246] The Innocence Project has reported many of the ways police officers lie, use fraudulent tactics, write witness statements, coerce confessions, injure and kill people in their custody, and commit perjury as witnesses in court.[247] Such testimony is so common it is called "testilying."[248] Most women in the study had no criminal history and little or no prior contact with police, even as witnesses. Many were coerced into signing confessions written by officers who later testified against them and won convictions by "*the fruit of the poisonous tree along with [their confessions] not being free and voluntary.*"[249]

In its resistance to change, police culture has closed the door on relationships of trust with the public and delegitimized law enforcement as a public service agency by proving it cannot be fixed.[250] Redirecting police funding to anti-authoritarian mutual aid, gender and race responsive community-based nonprofits, social work programs, and food and housing efforts is the only answer to assure public safety and respect for citizens' civil and human rights.[251]

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246. *See* Latesha K. Harris & Yamnia I. Cortes, *Police Violence and Black Women's Health*, 18 J. Nurse Pracs. 588 (2022).

247. The Innocence Project lists at least five ways police deception facilitates arrests, including (1) lying or making false claims during interrogations; (2) Presuming guilt in order to force a confession; (3) Taking advantage of youth to pressure vulnerable young people; (4) Using coercion by bullying, or writing or dictating confessions; (5) Using codefendants against each other. Nigel Quiroz, *Five Facts About Police Deception and Youth You Should Know*, Innocence Project (May 13, 2022), https://innocenceproject.org/police-deception-lying-interrogations-youth-teenagers [https://perma.cc/5YXF-GXKL].

248. Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/6ZS3-PMC4].

249. Motion for Directed Verdict of Acquittal and/or Motion for a New Trial, People v. Swiney, No. CR-89-090362-FC (Mich. Oakland Cnty. Ct. Nov. 15, 1989).

250. Gover, et al, *supra* note 244, at 622–28. Surveys have shown police officers often have derogatory views toward the survivor, and frequently resist social work roles in their response to intimate partner violence calls, and that officers' own gender and race influence how they respond and who they arrest. *Id.* Police culture generally is male dominated, paramilitary in structure, and directed toward arrest. *Id.*

251. For discussions on accomplishing the transformation to shift power from police to those who are vulnerable to domination by the state, *see* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 Yale L.J. 778, 803-04 (2021); *see also* Garcia and Godsoe, *supra* note 243, at 615.

D. *Defending Women*

Ineffective assistance of counsel, as set out in *Strickland v. Washington*, is one of the most frequently used—and most useless—arguments raised in criminal appeals.[252] A study by the National Law Journal found *Strickland* is virtually meaningless.[253] Most of the cases in the study that went to trial raised *Strickland* claims on appeal to no avail. It was not unusual for defense attorneys to not investigate women's cases, question prospective jurors during *voir dire*, interview witnesses before trial, or object to inadmissible evidence, false testimony, or erroneous statements made by prosecutors, with any or all of these later excused on appeal as trial strategy. In some cases, such as in *People v. Towanda Eppenger*, defense counsel overestimated their ability to "win" without proper investigations or presenting the abuse context for women's acts of self-defense. Eppenger's attorney, in an astonishing admission of his own hubris, later acknowledged.

> "I told her the prosecutor had offered her two point—two plus five, that I thought it was a good offer . . . I think it might have been arrogant of me to not—to not push that deal because . . . I thought I could win it, and because of her inexperience and because of her naivete, I said yes, let's do this, I think we can win it . . . I think I can convince any 14 people of anything I want to."[254]

Such calls by defense counsel in women's trials or plea negotiations are not unusual and cost many women life sentences or long terms. Some of the most disastrous calls are the "strategic" decisions routinely made in women's cases—such as bringing a temporary insanity or other psychological claims that essentially blame the defendant—because they shield the attorney from being ruled ineffective later.[255] In other cases mitigation evidence or the

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252. Strickland v. Washington, 466 U.S. 668 (1984); *see also* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, Crim. Just., Fall 2009, at 6.

253. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l. L.J., (1990) at 30, 32.

254. In People v. Eppenger, No. 94-004618-01-FC (Mich. Wayne Cnty. Ct. 1994), a case in the study but not summarized in Part IV, the defendant, a veteran of the military operation called "Desert Storm," killed her abusive boyfriend in self-defense, was offered a plea, and her defense counsel advised her not to accept it. Her attorney later admitted his error. She is serving a life without parole sentence for first-degree murder. Post-Conviction Motion Transcript, People v. Eppenger, No. 94-004618-01-FC (Mich. Wayne Cnty. Ct. 1994) 6–13, (April 25, 1997).

255. People v. Kapuscinski, No. 86-41544-FC, (Mich. Kent Cnty. Ct. 1988).

woman's own story was withheld as strategy, or omitted without explanation, which left the defendant with no defense at all, as was the case in *People v. Teresa Hedges*.[256] The underlying problem is the legal principle that privileges male experiences and perspectives which reinforces gender injustice and leaves women without any viable defense.

Defense counsel, like the entire cast of the criminal-legal enforcement team, have a role to play in transforming our justice system by rejecting existing power structures that silence and criminalize women. By working against the hierarchical and adversarial structure, defense counsel can initiate team approaches with women defendants, defendants' families, advocates, and professionals—along with prosecutors and judges—all acting as contributors to justice. By sharing and understanding the full context of each case, including all mitigating evidence, defense counsel can intervene in women's wrongful criminalization before the fact of issuing charges or going to trial.[257]

E. *Opening the Box*

As one prosecutor admitted, "[T]he deck is already stacked . . . We may tell the jurors the Government has the burden of proof . . . but of course this is undercut by the other messages we send . . . little wonder the vast majority of defendants who dare to go to trial are convicted."[258]

The presumption of guilt begins for jurors as soon as, if not before, they enter a courtroom. In court, we found that jurors are hard pressed to see a woman who uses violence—even when she had no other choice—as both victim and survivor. The demand—'why didn't she leave'—is always there for women, but is not applied to men who kill their partners.[259] Nor does a hardened stereotype pose a major obstacle for male defendants who defend themselves

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(The defense counsel in Delores Kapuscinski's case presented an insanity defense, effectively marking her as insane and dooming her case.)

256. People v. Teresa Hedges, No. 94-994548, (Mich. Wayne Cnty. Ct. 1994). *See* case summary in Part IV.

257. Godsoe, *supra* note 224, at 715.

258. Bennett Capers, *Still Against Prosecution*, 13 Calif. L. Rev. Online, 95, 96 (2022). As shown in *People v. Lovett*, *People v. Seaman*, and *People v. Hedges*, discussed in Part IV, and many other cases not summarized here, even when women testify for themselves, have bruises and other evidence at the time of arrest, and even may have Personal Protection Orders (PPOs) or witnesses to past abuse, they are most often charged and convicted of murder.

259. The law of self-defense does not require that a defendant who is being choked or otherwise attacked should be denied the defense because they were in the wrong place at the wrong time, including at home.

the way it does for women who do not fit the image of the perfect "battered woman." Even when a woman has evidence, as many in the study did, the weight of prosecutors' charges, judges' rulings, defense attorneys' failure to present all mitigating evidence, and the disproportionate power of gender and race injustice stack the deck for juries.[260] The appellate and supreme court have little or nothing to examine. To combat this, radical changes are needed. One improvement would be citizen oversight and abolitionist mediation methods that value women's lives and their right to defend themselves. Of course, sexist and racist ideas can still affect both citizens and mediators—shaping presumptions of guilt and relying on prevailing myths rooted in prejudicial assumptions found in dominant culture's views of both white women and women of color. Thus, those persons involved in mediation methods and citizen oversight must be educated about the potential for biased perspectives to enter into practices. These educational practices, oversight, and mediation methods, taken together, would challenge the legitimacy of the criminal-carceral industry and begin to dismantle and divest from the system, eventually replacing it with abolition projects that free incarcerated survivors and no longer criminalize them.

F. *Abolishing the Black Hole*

In her call to abolish the black hole of state violence, Angela Y. Davis reminded us we do not have to take prisons for granted.[261] Tragically, most citizens do. Even most judges, prosecutors, and jurors have never been inside a prison, attended a parole or clemency hearing, or visited people inside. Only by understanding who the people are and how they were criminalized, and exposing the destructive purpose of prisons to see who profits from prisons, the brutalizing inhumanity prisons represent, the damage prisons cause to families and communities, and the "abysmal failures" prisons are, can we build healthy alternatives to replace them.[262]

The ACLU estimates there could be a 50 percent reduction in prison populations while new centers are built for only the most serious or repeat law violators. Others argue for much greater

260. Many women in the study had proof of defensive injuries at the time of their arrests, yet they were convicted of murder. *See* case summaries *supra* Part IV; *see also* Goodmark, *supra* note 58.

261. Davis, *supra* note 1, at 9, 15 ("prison is considered an inevitable and permanent feature of our social lives . . . [but] [w]hy do we take prisons for granted?").

262. Ruth Sangree & Rachel E. Barkow, *Breaking the Cycle of Mass Incarceration*, Brennan Ctr. for Just. (January 3, 2020), https://www.brennancenter.org/our-work/analysis-opinion/breaking-cycle-mass-incarceration [https://perma.cc/5PG4-AYJC].

reductions suggesting up to 90 percent is possible without adverse effects, and envisioning rehabilitation and community accountability rather than punishment as the dominant mode of working with people who have caused harm.[263]

As to public safety, "the dangerous few" who suffer from behaviors that pose a serious threat to the public should not be seen as being unable to change or grow, nor should they be punished further by solitary confinement.[264] Allegra McLeod points to the fact that thinking a person who is violent must be contained should be reconsidered: "this course of action ought to be undertaken with moral conflict, circumspection, and even shame, as a choice of the lesser of two evils, rather than as an achievement of justice."[265] Housing persons within healthy, community centers can instead provide care in supportive environments with the goal of building productive lives. Unless we break our addiction to punishment and make radical changes to eradicate the carceral industry, the Sentencing Project projects it will take seventy-five years to cut the prison population by half.[266]

G. *Paroling the Board*

Fossilized and utterly lacking in accountability, parole boards are failed institutions that have unlimited discretion to make decisions about people's lives on any basis.[267] Michigan's board is dominated by former prison guards, staff, and police officers who operate behind closed doors and answer to no one except the carceral purpose. Michigan is one of only six states that have banned all "good time credit," yet the parole board adds to people's punishments by keeping them in prison beyond their minimum sentences without explanation.[268] For decades, reform bills to change

263. *See* Mirko Bagaric, Dan Hunter, & Jennifer Svilar, *Prison Abolition: From Naive Idealism to Technological Pragmatism*, 111 J. Crim. L. & Criminology 352, 355 (2021) ("We advance a viable alternative to prison that involves the use and adaptation of existing monitoring and censoring technology . . . for a reduction of at least 90 percent in prison population.").

264. *See* Jacobsen, *supra* note 30, at 69–83.

265. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1171 (2015).

266. Nazgol Ghandnoosh, Sentencing Project, Can We Wait 75 Years to Cut the Prison Population in Half? 1 (2018), https://www.sentencingproject.org/app/uploads/2022/08/Can-we-wait-75-years-to-cut-the-prison-population-in-half.pdf [https://perma.cc/L86D-XG2K].

267. A recent draft of the Model Penal Code declared parole boards "failed institutions." *See supra* note 73; *see also* Schwartzapfel, *supra* note 12.

268. *O'Neal and Rogers Introduce Good Time Bills*, MI House Democrats (Dec. 8, 2022), https://housedems.com/oneal-and-rogers-introduce-good-time-bills/ [https://perma.cc/7BQL-XRU9]; Schwartzapfel, *supra* note 12.

punitive laws have languished in the Michigan's legislature, yet reforms cannot begin to make the radical transformation needed.

A study by the Prison Policy Initiative showed that in 2020 Michigan held the fewest parole hearings and approved the second fewest paroles of the thirteen states studied.[269] Yet women who have served the longest terms—such as older women and many of those in the study—are the least likely to cause harm or return after release but the most likely to die in prison.[270]

Attempts to improve the parole and clemency process and address overcrowded, costly prisons were initiated twice in Michigan by Democratic women governors: Jennifer Granholm (2003–2010), and Gretchen Whitmer (2019–2026).[271] Unfortunately, the efforts had little effect on the parole board or its practices and did not go far enough. In 2009, Governor Granholm issued an official executive order expanding the parole board from ten to fifteen members and renaming it the "commutation and parole board."[272] The new members were not from the Department of Corrections, and they met separately to recommend paroles and clemency to the Governor. It was a step in the right direction and the prison population decreased minimally. Eight women were granted clemency from life without parole sentences. But the population surged again under the next governor, Rick Snyder, who cancelled the

269. Tiana Herring, *Parole Boards Approved Fewer Releases in 2020 than in 2019, Despite the Raging Pandemic*, Prison Policy Initiative (Feb. 3, 2021), https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/ [https://perma.cc/94ZG-8ETQ].

270. Wang, *supra* note 20. (For example, Susan Farrell was granted a commutation hearing at the end of Governor Rick Snyder's final term in office in 2018 but was then denied. She was one of the first women at Huron Valley Prison to die of COVID in 2020.)

271. In 2006, the State of Michigan was spending the highest proportion of its total state revenues on corrections of any state in the nation, at 21.8 percent of the general fund. Brian Sigritz, Nat'l Assoc. of State Budget Officers, State Expenditure Report: Fiscal Year 2006, at 60 (2007), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2006%20State%20Expenditure%20Report.pdf [https://perma.cc/5YRD-P4CG]. From 2011 to 2018, Republican Governor Rick Snyder's administration did nothing to address women's wrongful incarceration problem despite commitments to do so. By 2020, prison expenditures were still among the highest in the nation. *See State Government Spending on Corrections in the United States in 2020 by State,* Statista (June 2, 2023), https://www.statista.com/statistics/624327/prison-costs-in-the-us-by-state [https://perma.cc/8T74-HVJM].

272. Governor Granholm's Executive Order 2009–5 established a Parole and Commutation Board of fifteen members, at least six of whom had not been employed by the Michigan Department of Corrections. *See* Mich. Ex. Order No. 2009-5 (Feb. 12, 2009).

commutation part of the board and reduced it to nine members, dangerously constipating the system once again.

Under Governor Whitmer's administration, the parole board was asked to participate in an initiative developed by scholars at Carleton University to "professionalize" and "reframe" the parole process.[273] Issues of gender and race were not part of the content of the new framework. Rather, the focus was on "objective" facts and "neutral" evidence, echoing the sexist, racist criminal processing of women by prosecutors and courts. No changes were made in the membership qualifications of the board, which is dominated by former prison and law enforcement staff. In dereliction of its agreement to "reach consistent, transparent, and defensible high-quality conditional release decisions," the board recommended only two women for clemency from life without parole sentences at the end of the Governor's first term in 2022, denying all others with life sentences who applied, and showing no change in its decision-making toward women.[274] Nor did the experiment enhance public trust through greater transparency. Only through mass clemencies and legislation that rids the state of carceral solutions can we hope to break the cycle of women's victimization and entrapment.[275]

H. *Decarceration, Clemency and Justice*

Meaningful forms of decarceration are possible to accomplish with on the ground citizens, communities, nonprofits, advocates, abolitionists, former prisoners, and current stakeholders who

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273. *See* Ralph Serin & Renee Gobell, U.S. Dept. of Justice, Analysis of the Use of the Structured Decisionmaking Framework in Three States 2 (2014), https://info.nicic.gov/nicrp/system/files/028408.pdf [https://perma.cc/LA8M-3CFF]. (The initiative employed a "structured decision-making evidence-based framework tool" for conducting more consistent and professional parole and clemency hearings. The "framework tool" deemphasized discussing details of the crime at hearings and placed greater weight on rehabilitative efforts by the individual).

274. *Id.* at 1. *See also* Field Days Podcast, *Parole Board Members Discuss the Structured Decision-Making Framework Tool*, Soundcloud (2023), https://soundcloud.com/field-days/parole-board-members-discuss-the-structured-decision-making-framework-tool [https://perma.cc/26MU-ABJZ]. For an example of the parole board's resistance to change, see the case summary of *People v. Wabindato supra* Part IV.

275. It would not be the first mass clemency of women serving life and long sentences for murder. In 1990, Governor Celeste of Ohio released twenty-five women; in 1991 Governor William Schaefer of Maryland released eight women; between 1994–97, Governor Lawton Chiles of Florida commuted eight women's sentences; from 1994–97, Governor Edgar of Illinois granted clemency to seven women; and in 1996 Governor Brereton Jones of Kentucky commuted nine women's sentences.

understand the issues and are invested in creating the transformational change needed in our justice system. Even for those serving life or long sentences there are means to accomplish their freedom, especially with support from judges, prosecutors, and other current stakeholders in the criminal legal system. At this point, clemency, or commutation of sentence, offers the last hope for release from unfair trials and wrongful convictions that came with life or long sentences.[276] Since appeals focus on legal and procedural errors and allow virtually no avenue to justice from a conviction based on factual errors or discrimination, and last-ditch motions almost never succeed because of stringent limits on the kinds of evidence that may be presented, clemency is often the only opportunity to bring new evidence or arguments in a case. Unfortunately, clemency is mired in the stagnancy of parole boards and politics. Few governors have the courage to grant clemency as generously as was intended by the Constitution because of the power of the single victim myth,

276. Clemency is an umbrella term for: a pardon, which erases both the punishment and the guilt of the offender after conviction and may be absolute or conditional; commutation, which shortens the sentence; reprieve, which is a temporary suspension to postpone execution of the sentence, including death; and amnesty, which usually refers to release from a political sentence. The power of clemency was incorporated into the United States Constitution, as well as into state constitutions, as a vital function of the system of checks and balances. (U.S. Const. art II, § 2, cl.1; *see also* U.S. Dep't of Just., Attorney General's Survey of Release Procedures: Pardons 1-53 (Wayne L. Morse, Henry Weihofen, & Hans von Hentig eds., 1939)); It has traditionally been used to correct injustices in individual cases but has also served as a response to systemic problems in applications of law. In the case of courts and laws that have been too harsh or unjust, clemency can send a message that change is needed to ensure justice. The U.S. Supreme Court stated that it is a "fail safe," and without clemency, our government "would be most imperfect and deficient." *Ex parte* Wells, 59 U.S. 307, 310 (1855). Clemency's significance (value to human life and society) and its intent (openness and generosity) can be understood first in the fact that it is rooted in human laws as far back as laws are known to exist (*see* G.R. Driver and J.C. Miles, Legal Commentary xxiv-xxv, 281-82, 348-49 (1955)); and second, in the language of the United States Constitution which provides for only two limitations on the pardon power: 1) It is vested solely in the President (in the states it vests in the Governor); and 2) It bars clemency only in the case of impeachment against a federal official. In recent decades it has been those clemencies involving the death penalty and battered women that have raised important legal questions about the need for greater exercise of the clemency power. At the same time, it has been abused by some who used it as a political tool. While clemency does not change the system that denies many women equal protection, it often remains the only tool to rectify the failures of the current criminal-legal system and therefore remains indispensable. *See* Carol Jacobsen, *Clemency*, in Battleground Criminal Justice 76-83 (2010) (Summarizing the history, legal significance, key events, and relevance to fair and equal justice of the clemency power).

the retributive purpose of incarceration, and the cost to careers.[277] Still, there has never been a greater need for expansive, and creative, use of the clemency power.

In contemporary practice, clemency represents a stick without a carrot. Few are released after completing a grueling obstacle course of paperwork, interviews, and hearings. Most clemency hearings in Michigan are held to pardon minor drug convictions or probation sentences at the end of a governor's term. The rare hearings held for lifers are more intensive and prolonged than parole hearings. They drill down for two or more hours on past infractions, including ones long since adjudicated, to dissect the "crime." Given women's low recidivism rates, their gendered reasons for lawbreaking—including male violence by individuals and the state through its institutions and processes; white, male, and heterosexist supremacy in law and society; economic disadvantages and sociopolitical subordination; dominant cultural coding in laws, courts, and interpretations that exclude women's experiences and denigrate their credibility; and legal and social coercive controls that retain jurisdiction over women's bodies and autonomy—together with the compounded inequities of women's incarceration, they should be front and center in lines for parole, resentencing, and clemency. But it is a risk to raise their own victimization in the context of hearings since follow-ups (questioning, decision-making) by the board remain [male] gendered, [white] racialized, and [middle] classed in perspective. Evidence of remorse is said to be a key to release, but it is known to be an unreliable concept, "more of an art than a science."[278] Gendered expectations that privilege male

277. *Id.* at 76-83. The power to grant pardons (or clemency) was given by the U.S. Constitution to the President alone, with only one exception: "The President… shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. Const. art II, § 2, cl.1. Scholars such as Margaret Colgate Smith argue that the openness of the pardon power and lack of limitations on its power allows for a broad interpretation and use. She quotes George W. Bush's Decision Points (discussing the abolition of federal parole which could help lead to "an expanded and crucial role for pardon[s]…" to encourage the president "to use his [sic] constitutional power with the courage and capacity the Framers intended.") Margaret Colgate Love, *Invigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. Saint Thomas L.J. 730, 732 n.5, 733 (2012)*; see also* Mark Osler, "[T]he soul of our Constitution resides in its most individualistic provision… In regard to the Framers' intent regarding clemency, it is most clearly seen in the plain words of the Pardon Clause, which creates an unchecked power… to undo convictions and sentences for reasons of his or her own conscience alone," *Clemency as the Soul of the Constitution*, 34 J.L. & Pols., 131, 155 (2019).

278. Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. Rev. L. & Soc. Change

forms of narrating experiences and expressing remorse fortify the social subordination of women and people of color, often diminishing their own, deeply felt expressions of conscience.[279] They are required to articulate in gendered, classist, and racialized ways that do not always conform to white, middle class, or male responses.[280] Ultimately, the same biases that corrupt their convictions and sentences obstruct their releases. The single victim theory which trumps almost anything women can say betrays both the overriding discrimination they face and the retributive goal of the criminal system.

Intervening in this Byzantine process is crucial to freeing the thousands of women who do not deserve to die in prison. Any governor can streamline the process. An independent board comprised of community members, professionals, and formerly incarcerated persons who are outside the purview of law enforcement and the Department of Corrections can coordinate a massive affirmative relief effort to break through the log jam of the state's wrongfully convicted and incarcerated women. Legislators need to act to nullify the parole board and end its power to abuse, rescind life without parole sentences, and open new avenues for relief from extreme sentences. The Governor herself has the power to grant commutations without the recommendation of the parole board. It is entirely feasible to accomplish massive changes with the courage of our powerholders and the leadership of community stakeholders.

Conclusion

The law has traditionally viewed women who are accused of murder with contempt and fear, as alien creatures who strike at the roots of home, family, civil government, and threats to society—in short, treasonous. The reality is very different. The home, family, and government are the greatest sites of violence, misogyny, oppression, and death, threatening more than half of society. Failure to recognize and account for gender victimization by legal and criminal systems has legitimated violence against women and predetermined their fate. The facts underlying most women's cases tell us that a large majority of women convicted of murder were not violent offenders at all; they were protecting their lives when the law would not.

155, 158 (2015) (showing that with the increase in support and compensation efforts for (single) victims in many jurisdictions in recent decades, the balance has tipped even further toward punishment).

279. *See*, Jacobsen & Lempert, *supra* note 12; Godsoe, *supra* note 26, at 1326; Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 Mo. L. Rev., 321, 350 (2020).

280. *See* Bernstein, *supra* note 12; *see also* Godsoe, note 26, at 1326-27.

The United States justice system has consistently lagged behind much of the world in establishing a just jurisprudence. Our addiction to ever increasing punishment has long since spiraled out of control, as Martha Minow warned it might.[281] Prosecutors, judges, police, and prison officials have together built a system that can never reduce harm but only add to it. We do not need to reproduce more criminals in our quest for justice, nor do we need to spend our time on reforms since they only legitimate the violence and preempt the radical change needed to address root causes.[282] There is no magic method to achieve radical, abolitionist, feminist change, but we need to make an unremitting, tenacious push toward redefining laws and legal practices to reflect the intersectional and structurally subordinated realities of women's and people of color's victimization in order to fully respect everyone's constitutional rights to justice. By moving away from retribution, victimization, and incarceration, and replacing the tools of the state—police, prison, probation, parole—with new, expanded, frameworks and initiatives that address the deep need for education, health care, housing, and social services, we can design revolutionary methods that will include and serve us all.[283]

Alternatives to reforms can be found in paradigms for justice which have already arisen out of organizing by Community Justice Exchange, Critical Resistance, the Movement for Black Lives, Black Lives Matter, Survived and Punished, women's clemency and justice projects, innocence, exoneration, second chance, and a wealth of nonprofits founded by formerly incarcerated people—to name only a handful. In the United States, Scandinavia, and Germany, models and initiatives abound that prioritize strategies for dispute resolution, decriminalization, community health care, educational and vocational opportunities, and social reintegration.[284] These efforts are generating a seismic shift in the criminal-legal-carceral landscape. Their on-the-ground innovations to surveil police, city councils, and courts are all about dismantling the carceral industry and the institutions that support it, but at the same time they are laying the foundation for a more equitable, healthy, and politically engaged society. As the Movement for Black Lives argues, "the

281. Martha Minow, When Should Law Forgive? 25 (2019).

282. *See* Goodmark, *supra* note 58, at 171–195.

283. *See id.*

284. *See* Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 412–13, note 3 (2018); Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. Times Mag. (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html [https://perma.cc/56NR-GKSP].

most impacted in our communities need to control the laws, institutions, and policies that are meant to serve us . . . We envision a remaking of the current U.S. political system in order to create a real democracy where Black people and all marginalized people can effectively exercise full political power . . . [while] institutions that have profited off of the harm they have inflicted on Black people–from colonialism to slavery through food and housing redlining, mass incarceration and surveillance–must repair the harm done."[285]

As abolitionist feminists, theorists and activists have pointed out, the work of decriminalizing people, decarcerating and closing prisons, and transforming the justice system is messy, deeply rooted, time-consuming, and ever changing, but "[t]his is a moment calling for a radical imagination, where the scale of deep critique is matched with a scale of grand vision . . . These movements . . . are making powerful sketches of much-needed alternative frameworks . . . Social change happens on the streets and in formal and informal domains where power and legitimacy circulate."[286] By imagining what we want to create and working together to maintain a visionary goal for an ethical transformation, our communities and bottom-up efforts can ultimately dismantle the unforgiving criminal-legal-penal system and make amends for the lives it has broken and the damage it has done to so many in the name of justice.

On an immediate level, the present study is a call for powerful acts of justice by means of granting immediate, affirmative relief to women wrongfully criminalized who are serving long and unfair sentences. The backlog of women's unjust convictions is "not even a tip of an iceberg, it's a tip of a tip of an iceberg."[287] Continuing their punishment would be perverted. The collective criminal-legal system—judges, prosecutors, defense attorneys, legislators, others—all have a part to play in helping to free survivors of violence and transform oppressive policies that have laid waste to women's lives for generations. Steps such as those discussed above will allow the state to transfer its exorbitant annual expenditure from the prison industry to new, noncustodial, community mediations and service programs, care for the seriously ill, and other social justice initiatives.

Although the clemency power belongs only to the Governor, she will not be alone in taking this first, courageous step toward transforming the justice system by granting mass commutations to women survivors.[288] In Michigan and elsewhere, there are feminist

285. *Vision for Black Lives: 2016 Platform,* Movement for Black Lives (Aug. 2016), https://m4bl.org/policy-platforms [https://perma.cc/844S-DCAQ].

286. Akbar, *supra* note 284, at 412–13.

287. Bernstein, *supra* note 12.

288. In 1990, Governor Celeste of Ohio released twenty-five women.

educators, scholars, attorneys, advocates, incarcerated, and formerly incarcerated women and families ready to advise and facilitate the process.[289] This crucial step will denounce the carceral backlash by affirming the chorus of women's voices whose collective narratives carry the force of truth. Without this and other massive gestures to signify a new era, no woman can trust the law or the courts now or in the future. The 461 women in the study and those similarly situated across the United States have much to contribute to the coalitions for change we need to build together. These women, their families, and communities deserve this act of justice and nothing less.

Other governors have followed suit over the years, though the numbers have been less. Their actions represented background work by teams of feminist activists. *See* Patricia Gagné, Battered Women's Justice: The Movement for Clemency and the Politics of Self-Defense 1 (1998).

289. Not a single woman released from life or long sentences who were represented or supported by the Michigan Women's Justice & Clemency Project or the Project in collaboration with the Federal Appellate Litigation Clinic of the University of Michigan Law School, has caused harm or returned to prison.