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The Intersection of Wrongful Convictions and Gender in Cases Where Women Were Sentenced to Death or Life in Prison Without Parole

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THE INTERSECTION OF WRONGFUL
CONVICTIONS AND GENDER IN CASES
WHERE WOMEN WERE SENTENCED TO
DEATH OR LIFE IN PRISON WITHOUT
PAROLE

*By Connor F. Lang**

ABSTRACT

This Note examines National Registry of Exonerations data and discusses the prevalence of false confessions and presence of a child victim in cases of women who were convicted of murder, received a serious sentence, and were later exonerated. After looking at the cases of women exonerated after receiving death sentences or life without parole sentences in light of the prevalence of these factors, this Note argues that examination of the cases reveals that the presence of a false confession or a child victim may have contributed to some of the wrongful convictions where these factors may have led to the women being viewed as having failed to conform to society's expectations for women. This Note then discusses why evidence that portrayed the women as having violated society's expectations could not have been excluded at trial and why exclusion in future cases through the rules of evidence or new legislation is challenging. This Note concludes by arguing that an awareness of how gender can contribute to wrongful convictions or the imposition of harsher sentences can help attorneys and judges guard against gender affecting the outcomes of criminal proceedings.

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INTRODUCTION

In 1972 the United States Supreme Court held that contemporary capital punishment schemes were unconstitutionally arbitrary and

discriminatory.¹ This holding signaled a change in how capital punishment would be carried out in the United States in the future, if carried out at all. There were no executions in the country for the next four years.² After the Court affirmed the constitutionality of several capital punishment schemes in 1976, executions could resume.³ Given that states were able to impose death sentences regardless of any moratorium on the carrying out of the sentences, 184 women were sentenced to death between the beginning of modern capital punishment jurisprudence in 1973 and 2018.⁴ These sentences accounted for around 2% of all death sentences in the United States during that time period.⁵ Since the moratorium on executions ended, sixteen of the 184 women sentenced to death have been executed.⁶

Thorough research has demonstrated the role gender played in the convictions and sentences of the sixteen women who have been executed since 1976. Mary Welek Atwell, a historian and professor of criminal justice, examined in detail the cases of the first fourteen women executed in her book *Wretched Sisters: Examining Gender and Capital Punishment*.⁷ In describing the cases of the last three women who were executed before the publication of her book, Professor Atwell summarized her analysis by noting that “[these three] women were convicted—at least in part—based on their failures to measure up to the social expectations for women.”⁸ Professor Atwell’s research illustrates that most of the women who were executed after the moratorium ended were convicted and sentenced to death in part because of their failures

1. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

2. EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 63 (2013).

3. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

4. See *Women’s Death Sentences Since 1973: Number and Geography*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/women/womens-death-sentences-since-1973-number-and-geography> [<https://perma.cc/88Z7-5KMG>] (database periodically updated and annotated).

5. *Id.*

6. See *Case Summaries of Executed Women*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/case-summaries-of-executed-women> [<https://perma.cc/37QW-D4MN>].

7. See MARY WELEK ATWELL, *WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT* (2d ed. 2014).

8. *Id.* at 3. The first edition of Professor Atwell’s book discussed the first eleven women executed after the *de facto* moratorium on capital punishment came to an end. *Id.* at 1. In the second edition, Professor Atwell added a discussion of the cases of the three women who were executed between the publication of the first edition and early 2014: Teresa Lewis, Kimberly McCarthy, and Suzanne Basso. *Id.*

to conform to society's expectations for women.⁹ She found that gender stereotypes, gendered language, and sexuality played both subtle and overt roles in most of the women's convictions and sentences.¹⁰

Professor Atwell's work provides a starting point for examining how gender plays a role in other types of convictions. There has not yet been a close examination of the role society's expectations play in cases of women exonerated from death row. By definition, all exonerees are factually innocent of the crimes for which they were convicted, which is not necessarily true in the cases studied by Professor Atwell.¹¹ Yet, the finder of fact still somehow found each exoneree guilty beyond a reasonable doubt. Since gender plays a role in the imposition of some death sentences, as demonstrated by Professor Atwell's research, gender may also have played a role in the serious sentences¹² received by female exonerees, as well as their decisively wrongful convictions for murder. If this is in fact the case, preventing gender from playing a role in the finder of fact's decision on guilt or innocence is paramount to helping prevent future wrongful convictions. The use of such prejudicial details is always wrong, but especially so when factually innocent individuals are convicted and face serious sentences.

While the number of women convicted of murder, sentenced to death, and later exonerated is too small a sample size on which to base strong empirical conclusions about causal relationships, the abundance of searchable data about such cases available on the National Registry of Exonerations' website can be used to identify the extent to which gender played a role in exonerees' wrongful convictions and sentences.¹³

9. *See id.* at 3, 10.

10. *Id.* at 296.

Nonetheless, the pattern seems clear—and the patriarchal system seems secure—when juries are told they must protect society from women who threaten the natural order of things when they are greedy, or promiscuous, or selfish, or aggressive, or all of those things . . . one can see gendered assumptions and gendered perceptions at work in the selection of these cases and in the portrayal of these defendants for capital prosecution.

Id.

11. *See id.* at 3, 10.

12. This Note will use the term "serious sentences" to refer to death sentences and sentences of life without the possibility of parole.

13. *See Detailed View*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> [<https://perma.cc/YUR2-XV86>] (containing a database of all exonerations since 1989 and listing characteristics of each exoneration).

According to the National Registry of Exonerations,¹⁴ which tracks and collects information on all exonerations in the United States since 1989,¹⁵ only two of the 127 people that have been exonerated from death row between 1989 and August of 2020 have been women.¹⁶ Given the small number of cases in which women have been exonerated from death row, including cases where women were exonerated from life without parole sentences permits a more thorough analysis of how gender affects wrongful convictions for murder where a serious sentence is imposed.¹⁷ Of the 160 exonerates who received life without parole sentences after being convicted of murder,¹⁸ only six are women.¹⁹

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14. The National Registry of Exonerations defines “exoneration” in the following manner:

A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person’s guilt.

Glossary, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [<https://perma.cc/Q6GD-MBCY>].

15. *See Our Mission*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/mission.aspx> [<https://perma.cc/GT88-XXA6>] (“The Registry collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States, from 1989 to the present.”).
16. *See infra* Methodological Appendix at notes 166-67 and accompanying text.
17. While not directly analogous, life without parole sentences also stem from murder convictions and are either the most severe form of punishment or the next most severe form of punishment after the death penalty that a state can impose. Since there are so few female death row exonerates, adding female life without parole exonerates enables a more thorough analysis.
18. *See infra* Methodological Appendix at note 168 and accompanying text.
19. *See infra* Methodological Appendix at note 169 and accompanying text.

The high prevalence of several factors that are known to contribute to wrongful convictions²⁰—false confessions²¹ and the presence of child victims—in these women’s cases, when compared to their prevalence in the cases of male exonerees, indicates that these factors may be especially likely to lead to a wrongful conviction when a woman is convicted of murder. False confessions and the presence of a child victim are also more prevalent in cases of women exonerees convicted of murder who were sentenced to death or life without parole than those who received life or less than life sentences.²² A close examination of the cases in which women were exonerated after receiving a death or life without parole sentence reveals that while the presence of a false confession or a child victim may have played a role in their wrongful convictions and serious sentences, all of the exonerated women could have been perceived as having failed to conform to society’s expectations for women.²³

The details contained in the confessions that portrayed the defendants as having violated society’s expectations for women seem substantially more prejudicial than probative.²⁴ Nonetheless, these details were likely properly admitted under the rules of evidence.²⁵ While excluding some of the more prejudicial details is often not possible, an awareness by attorneys and judges of how certain details can lead to wrongful convictions, or contribute to the imposition of more serious sentences, could help these actors ensure that failure to conform to expectations based on gender is not the basis for a conviction or sentence.

20. See *Our Mission*, NAT’L REGISTRY OF EXONERATIONS, *supra* note 15 (“We also conduct empirical studies of the process of exoneration and of factors that lead to the underlying wrongful convictions.”); see also *Detailed View*, NAT’L REGISTRY OF EXONERATIONS, *supra* note 13 (describing columns displaying the contributing factors).

21. The National Registry of Exonerations defines a false confession as a false “statement made to law enforcement at any point during the proceedings which was interpreted or presented by law enforcement as an admission of participation in or presence at the crime, even if the statement was not presented at trial.” *Glossary*, NAT’L REGISTRY OF EXONERATIONS, *supra* note 14 (clarifying that statements are not confessions if made to an individual that is not a member of law enforcement, that statements must be at odds with the defense in order to qualify as a confession, and that guilty pleas are not considered confessions).

22. See *infra* Part I.

23. See *infra* Part IV.

24. These details are discussed *infra* at Part III; for a discussion of prejudicial and probative evidence, see *infra* Part V.

25. See *infra* Part V.

Part I of this Note examines National Registry of Exonerations data and discusses the prevalence of false confessions and presence of a child victim in the cases of women who were convicted of murder, received a serious sentence, and were later exonerated. Part II discusses how false confessions and the presence of a child victim may interact with gender to increase the risk of wrongful convictions by looking at Professor Atwell's findings on how gender played a role in the death sentences of the first fourteen women executed after 1976. Part III looks at the cases of women exonerated from death row or after receiving a life without parole sentence in light of the prevalence of false confessions and child victims discussed in Part I. Part IV argues that examination of these cases reveals that the presence of a false confession or a child victim may have contributed to some of the wrongful convictions where these factors led to the women being viewed as having failed to conform to society's expectations for women. Part V discusses why evidence that portrayed the women as having violated society's expectations could not have been excluded at trial and why its exclusion in future cases through the rules of evidence or new legislation is challenging. Part V also notes that an awareness of how gender can contribute to wrongful convictions or the imposition of harsher sentences can help attorneys and judges guard against gender affecting the outcome of a criminal proceeding.

I. PREVALENCE OF FALSE CONFESSIONS AND CHILD VICTIMS IN CASES IN WHICH WOMEN WERE CONVICTED OF MURDER, SENTENCED TO DEATH OR LIFE WITHOUT PAROLE, AND LATER EXONERATED

The National Registry of Exonerations contains publicly available data on all exonerations that have occurred since 1989.²⁶ In addition to the crime for which the exoneree was convicted, the sentence the exoneree received, and the sex of the exoneree, the National Registry of Exonerations also tracks whether specific factors that are known to contribute to wrongful convictions are present in each exoneration.²⁷ For example, the National Registry of Exonerations tracks whether an exoneration involved a false confession, a mistaken eyewitness identification, official misconduct, false or misleading forensic evidence, a child victim, jailhouse informants, or inadequate legal defense, among

26. See *Our Mission*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 15.

27. See *id.*

many other common causes of wrongful convictions.²⁸ In a short 2014 report discussing female exonerees, the National Registry of Exonerations noted that child victims were more prevalent in homicide cases in which women were exonerees than in homicide cases in which men were exonerees.²⁹ An examination of the updated data confirms this prevalence, as well as a prevalence of false confessions among women exonerees. The prevalence of these factors is even greater for exonerations in murder convictions where a female exoneree had received a death or life without parole sentence than when a female exoneree received a lesser sentence.³⁰

In examining the National Registry of Exonerations information on the eight women who were convicted of murder, received serious sentences, and were later exonerated, there is a prevalence of false confessions and child victims. Of these eight women, the two women sentenced to death and later exonerated both had false confessions and a child victim in their cases.³¹ Three of the remaining six women had false confessions in their cases while another three had a child victim in their cases.³²

This same prevalence of false confessions and child victims is not found in the exonerations of men who were convicted of murder, received a serious sentence, and were later exonerated.³³ Of the 125 men

28. *See Detailed View*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 13 (showing various categories of data tracked by the National Registry of Exonerations including whether the exonerations involved a false confession, a mistaken eyewitness identification, official misconduct, false or misleading forensic evidence, a child victim, jailhouse informants, inadequate legal defense, and several other factors that frequently contribute to wrongful convictions).

29. Kaitlin Jackson & Samuel Gross, *Female Exonerees: Trends and Patterns*, NAT'L REGISTRY OF EXONERATIONS (Sept. 27, 2014), <https://www.law.umich.edu/special/exoneration/Pages/Features.Female.Exonerees.aspx> [<https://perma.cc/LY4V-UDDN>].

30. *See id.*; *Detailed View*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 13.

31. *See infra* Methodological Appendix at notes 170-71 and accompanying text.

32. *See infra* Methodological Appendix at notes 172-73 and accompanying text.

33. The National Registry of Exonerations, in a short report on all female exonerees, discussed how, as of 2014, 40% of female exonerees were convicted of a crime involving a child victim while only 22% of male exonerees were convicted of such a crime. Jackson & Gross, *supra* note 29. The report also noted this greater prevalence of child victims in cases where women were exonerated from any type of homicide offense than cases where men were exonerated from any type of homicide offenses. *Id.* This Note looks at more recent data on cases involving child victims in addition to focusing on cases in which women exonerees falsely confessed, distinguishing between exonerations from different types of homicide convictions to determine just how gender may have caused the women's wrongful convictions. The report also noted that a large number of the women exonerees that had a child victim in their case were con-

sentenced to death, only twenty-three had false confessions in their cases and only thirty-three had a child victim in their cases.³⁴ Similarly, of the 154 men sentenced to life without parole, only thirty-nine had false confessions in their cases and only seventeen had a child victim in their cases.³⁵

Additionally, the prevalence of false confessions and child victims is slightly less in the exonerations of women who were convicted of murder and received life or less than life sentences than for those who received more serious sentences. Only one of the twenty women who received a life sentence with the possibility of parole had a false confession in her case and only five of the twenty had a child victim in their cases.³⁶ Similarly, only ten of the thirty-five women sentenced to less than life in prison had false confessions in their cases and only nine of the thirty-five had child victims in their cases.³⁷

The eight exonerations of women who were convicted of murder, received a serious sentence, and were later exonerated provide too small a sample size from which to draw any empirical conclusions. There is not enough data to test the relationship between the sex of the exoneree, the severity of sentence, and whether the cases contained a false confession or a child victim. However, the prevalence of false confessions and child victims in exonerations where women were convicted of murder and received a serious sentence is notable, especially given how many of these cases have these factors when compared to the cases of men. An examination of each case could indicate how gender and the presence of a false confession or child victim interacted and whether that interaction was a contributing factor in their wrongful convictions and the imposition of harsher sentences.

II. PRESENCE OF A FALSE CONFESSION OR CHILD VICTIM AND SOCIETY'S EXPECTATIONS FOR WOMEN

Professor Atwell argued that most of the first fourteen women executed since 1976 were convicted and sentenced to death in part

victed of child sex abuse. *Id.* The report concluded that “women are the likely victims of false convictions for violent crimes that are believed to have been committed by care-takers in roles that are overwhelmingly filled by women—as parents and other family care givers, and as day care workers and teachers of young children.” *Id.*

34. See *infra* Methodological Appendix at notes 174-75 and accompanying text.

35. See *infra* Methodological Appendix at notes 176-77 and accompanying text.

36. See *infra* Methodological Appendix at notes 178-80 and accompanying text.

37. See *infra* Methodological Appendix at notes 181-83 and accompanying text.

because they failed to conform to society's expectations for women.³⁸ Professor Atwell demonstrated that prosecutors used the women's failures to conform to society's expectations for motherhood, sexuality, and fidelity—along with evidence showing that the women were greedy, promiscuous, selfish, or aggressive—to negatively portray the women at trial.³⁹

For example, Professor Atwell examined the prosecution's closing argument in Christina Riggs's trial for the murder of her children.⁴⁰ At various times throughout the closing argument, the prosecutor stated that Riggs had "broke[n] the oldest and strongest bond known to man," that "[m]others give up their lives for their children" and are "the glue that makes everything stick," and that "[o]ur civilization is based on the ability of women to bear children."⁴¹ The prosecutor then urged the jury to not "allow [Riggs] to rip away at the very belief that a mother would never harm her children."⁴² The prosecutor used gendered language throughout, with references to mothers, motherhood, and women rather than parents or parenthood to remind the jurors and the court of society's expectations for motherhood and women, implying that Riggs failed to conform to those expectations when she killed her two children.⁴³

Professor Atwell's analysis of Christina Riggs' trial demonstrates that society's expectations for women, and motherhood in particular, can play an important role when there is a child victim in a case.⁴⁴ Women accused of killing children within their care also fail to conform to society's expectations of women as caretakers by embodying what Professor Atwell calls "[t]he image of an Evil Woman wreaking domestic havoc," which "seems powerful as an aggravating factor" for the death penalty.⁴⁵

Professor Atwell did not specifically discuss how confessions interact with society's gendered expectations for women. However, depending on the details contained in the confession, it can serve as

38. See ATWELL, *supra* notes 7-9 and accompanying text.

39. See ATWELL, *supra* note 7, at 296.

40. *Id.* at 172.

41. *Id.*

42. *Id.* at 172-73.

43. See *id.*

44. For further discussion on this topic, see Emma Milne, *Putting the Fetus First—Legal Regulation, Motherhood, and Pregnancy*, 27 MICH. J. GENDER & L. 149, 168-69 (2020) (discussing how myths surrounding motherhood delineate "good" mothers from "bad" mothers and how the myths can affect how women are viewed in the criminal justice process).

45. ATWELL, *supra* note 7, at 296.

confirmation of a violation of society's expectations for women. For example, in Karla Faye Tucker's trial for murder, the prosecution introduced evidence that Tucker had told her sister that she "had reached sexual climax with every stroke of the ax."⁴⁶ Professor Atwell argues that the details divulged in the confession made the crime seem too shocking to have been committed by a woman and that, by confessing, Tucker had "forfeited once and for all the protections available to other women" because she had admitted to behaviors deemed "male-like" by being "apt to be violent, and acting of her own accord."⁴⁷ Professor Atwell's examination of the case also reveals that the prosecution relied heavily on Tucker's confession and that the confession was the most damning piece of evidence against Tucker when the jury was deciding whether to sentence her to death.⁴⁸

While Professor Atwell examined the cases of women who were executed to determine how gender played a role in the death sentences the women received, there has not been an analysis of the cases of women exonerated from murder convictions that received serious sentences to determine whether gender played a role in their wrongful convictions or the subsequent imposition of a harsh sentence. Based on the data discussed in Part I, gender appears to play a role in wrongful convictions in these types of cases. A case-by-case analysis further reveals that gender may in fact play such a role.

III. DISCUSSION OF CASES OF WOMEN EXONERATED AFTER BEING CONVICTED OF MURDER AND SENTENCED TO DEATH OR LIFE WITHOUT PAROLE

Before discussing the ways in which gender may have played a role in the wrongful convictions, the subsections below provide a short summary of the cases, starting with the cases of the two women sentenced to death and later exonerated and followed by the cases of the six women sentenced to life in prison without parole and later exonerated. These short summaries, drawn from appellate opinions,

46. *Id.* at 79.

47. *Id.* at 90. Professor Atwell discusses, in the context of the case of Wanda Jean Allen, that sexual orientation can play a role in how women are portrayed as violating society's expectations for women in capital trials. *Id.* at 139. Professor Atwell found that in that case, the prosecution "made much of Allen's sexual orientation A defendant, whose lifestyle violated gender expectations" *Id.*

48. *See id.* at 90.

articles, and information from the National Registry of Exonerations,⁴⁹ provide a basis for the analysis that follows in Part IV.

As previously discussed, only two women, compared to 125 men, have been convicted of murder, sentenced to death, and later exonerated.⁵⁰ The cases of those women, Sabrina Butler and Debra Milke, both had false confessions and a child victim.⁵¹ Only six women, compared to 154 men, have been convicted of murder, sentenced to life in prison without parole, and later exonerated.⁵² Those women are Cathy Woods, Mary Weaver, Michelle Murphy, Susan Mellen, Hattie Tanner, and Hannah Overton.⁵³ There was a child victim in three of the women's cases and three of the cases contained a false confession.⁵⁴

A. Sabrina Butler

In April of 1989, Sabrina Butler took her nine-month-old son to a hospital in Mississippi after she found that he was not breathing; he later died.⁵⁵ Police questioned Butler, who was only eighteen, for hours late that night and into the early morning.⁵⁶ Butler gave several accounts about what happened, but eventually signed a statement confessing that when her child would not stop crying she punched him in the stomach.⁵⁷ She would later describe her interrogation and confession in the following manner:

49. Professor Atwell made use of trial transcripts to analyze the arguments made by the prosecution and defense and to see how the lawyers used gender and gendered language. *See, e.g.*, ATWELL, *supra* note 7, at 78-79 (describing the prosecutor's presentation of the Karla Faye Tucker case). Although the sources examined for case information in this Note provide a significant amount of information about these cases, trial transcripts may be useful for future analysis on this topic.

50. *See infra* Methodological Appendix at notes 166-67 and accompanying text.

51. *See infra* Methodological Appendix at notes 166-67, 170-71 and accompanying text (search results listing Sabrina Butler and Debra Milke).

52. *See infra* Methodological Appendix at notes 168-69 and accompanying text.

53. *See infra* Methodological Appendix at notes 168-69 and accompanying text (search results listing Cathy Woods, Mary Weaver, Michelle Murphy, Susan Mellen, Hattie Tanner, and Hannah Overton).

54. *See infra* Methodological Appendix at notes 172-73 and accompanying text.

55. *See* Maurice Possley, *Sabrina Butler*, NAT'L REGISTRY OF EXONERATIONS [hereinafter Possley, *Butler*], <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3078> [<https://perma.cc/AXT6-NYSD>].

56. *Id.*

57. *Id.*

I was alone with no lawyer or parent with me. I told him I tried to save my baby. He wrote down what I said and threw it in the garbage. He yelled at me for three hours. No matter what I said, he screamed over and over that I had killed my baby. I was terrified. I was put in jail and not allowed to attend Walter's funeral. I was a teenager who less than 24 hours before had lost my precious baby boy. Ambitious men questioned, demoralized and intimidated me. In that state of mind, I signed the lies they wrote on a piece of paper. I signed my name in tiny letters in the margin to show some form of resistance to the power they had over me.⁵⁸

Butler was charged with murder.⁵⁹ She was convicted in a jury trial in March of 1990 and sentenced to death.⁶⁰

The Mississippi Supreme Court overturned Butler's conviction in 1992,⁶¹ holding that the prosecutor had improperly commented on Butler's failure to testify when he made the following comments during closing argument⁶²:

So, Ladies and Gentlemen, she has not yet told you the whole truth of the torment she subjected her son to. You still don't know the whole story. Incredible, unbelievable evasion from start to finish. Ladies and Gentlemen, is that what an innocent person does?⁶³

At a second trial in 1995, a medical expert testified that efforts to resuscitate Butler's child could have caused the internal injuries found in the autopsy, which, along with her confession, had resulted in her initial conviction.⁶⁴ Butler was acquitted.⁶⁵

58. *Id.*

59. *Id.*

60. *Id.*

61. *Butler v. State*, 608 So. 2d 314, 315 (Miss. 1992).

62. *Butler*, 608 So. 2d at 318-19 ("These comments were reversible error, so egregious in fact that even if there had been no objection at trial, we would nevertheless have been obligated to reverse.").

63. *Butler*, 608 So. 2d at 318.

64. *See* Possley, *Butler*, *supra* note 55.

65. *Id.*

B. *Debra Milke*

In December of 1989, Debra Milke's four-year-old son went missing.⁶⁶ After her son's body was discovered, a police officer obtained a confession from a friend of the man last seen with Milke's child.⁶⁷ He implicated Milke, saying that the child had been killed so that they could cash in on a \$5,000 life insurance policy.⁶⁸ The officer then interrogated Milke,⁶⁹ though the interrogation was not recorded, which was in violation of the orders of the officer's supervisor.⁷⁰

At Milke's trial in 1990, the police officer, Detective Armando Saldate, testified about the confession he claimed to have obtained from Milke.⁷¹ The Ninth Circuit, in an opinion issued on Milke's habeas petition, described Saldate's testimony as follows:

He testified that, in the span of just thirty minutes, Milke knowingly waived her rights to silence and counsel, reminisced about her high school years when she was "in love with life," feigned tears, calmed down, narrated her failed marriage to Mark Milke—his drug and alcohol abuse and his arrests—recounted how she'd gotten pregnant while on birth control and contemplated an abortion, even making an appointment for one, discussed her fear that Christopher was becoming like his father, confessed to a murder conspiracy, characterized the conspiracy as a "bad judgment call" and solicited Saldate's opinion about whether her family would ever understand. (His view: No.) By the end of the interview, Saldate had more than just cinched the case against Milke; he'd helped her emotionally. According to Saldate, Milke said she was "starting to feel better and was starting to get some of her self-esteem back." Saldate also testified that Milke asked whether she would be released that night, and when he said she wouldn't be, she asked whether the court

66. See Maurice Possley, *Debra Milke*, NAT'L REGISTRY OF EXONERATIONS (Mar. 19, 2015) [hereinafter Possley, *Milke*], <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4660> [<https://perma.cc/2ML2-B27T>].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

could give her “probation for life” if “she could have her tubes tied and never have children again.”⁷²

The National Registry of Exonerations, in its account of Milke’s case, states that during his testimony Saldate also “claimed that during the investigation, Milke flashed her breasts at him and offered sex if he would not arrest her.”⁷³

In stark contrast to Saldate’s narrative, Milke claimed that she told Saldate that she did not understand the *Miranda* warnings that he had given her and that she needed a lawyer.⁷⁴ Milke stated that Saldate responded by putting his hand on her knee and continuing to interrogate her.⁷⁵ Milke maintained that she never confessed and that the police officer had fabricated the statements he attributed to her.⁷⁶

The Ninth Circuit granted Milke’s habeas petition and vacated her conviction in 2013.⁷⁷ The court found that the prosecution had failed to disclose Saldate’s previous misconduct, including “a five-day suspension for taking ‘liberties’ with a female motorist and then lying about it to his supervisors; four court cases where judges tossed out confessions or indictments because Saldate lied under oath; and four cases where judges suppressed confessions or vacated convictions because Saldate had violated the Fifth Amendment or the Fourth Amendment in the course of interrogations.”⁷⁸ Charges against Milke were dismissed in March of 2015, over twenty-four years after she was convicted and sentenced to death.⁷⁹

72. *Milke v. Ryan*, 711 F.3d 998, 1002 (9th Cir. 2013).

73. See Possley, *Milke*, *supra* note 66.

74. *Milke*, 711 F.3d at 1002 (“Milke testified that she told Saldate she didn’t understand the *Miranda* warnings and that, when Saldate asked if she wanted the interrogation taped, she said: ‘No, I need a lawyer.’”).

75. *Milke*, 711 F.3d at 1002 (“According to Milke, Saldate ignored her request, instead putting his hands on her knees and proceeding with the interrogation . . .”).

76. See *Milke*, 711 F.3d at 1002 (“Milke has always denied involvement in the murder, and her account of the interrogation differs substantially from Saldate’s. . . . According to Milke, Saldate . . . embellished and twisted [her] statements to make it sound like she had confessed.”).

77. *Milke*, 711 F.3d at 1019.

78. *Milke*, 711 F.3d at 1003. If Milke’s attorneys had known about Detective Saldate’s previous misconduct at trial, they would have been able to use the misconduct for impeachment purposes and seriously undermine the credibility of his narrative of Milke’s “confession.”

79. See Possley, *Milke*, *supra* note 66.

C. Cathy Woods

In February of 1976, a University of Nevada student named Michelle was found dead in Reno.⁸⁰ Several years later, Cathy Woods, an inpatient at a mental health facility who had been diagnosed with schizophrenia, confessed to a worker at the facility that she had killed someone named Michelle in Reno.⁸¹

Police interrogated Woods at the hospital where she was a patient.⁸² Woods made statements that the police knew to be false and did not provide any information that had not been widely reported in the local media.⁸³ Still, after the police obtained a confession and verified that Woods had worked in Reno in February of 1976, Woods was charged with murder.⁸⁴ At trial, one detective testified that “Woods admitted that she was a lesbian and had offered to help [the student] with her car . . . that she lured [the student] to the garage [where the student’s body was found] under the pretext that she had some tools to fix the car,” and that once “[i]n the garage, Woods made a sexual advance and when [the student] rebuffed her, Woods slit her throat.”⁸⁵ Woods was convicted of first-degree murder and sentenced to life in prison without parole.⁸⁶

In 2014, DNA from a cigarette butt found at the crime scene was matched to a man whose DNA had been found at the crime scenes of the murders of three other women who had been killed around the same time in nearby California.⁸⁷ As a result, Woods was exonerated in 2015.⁸⁸

80. See Maurice Possley, *Cathy Woods*, NAT’L REGISTRY OF EXONERATIONS (Mar. 9, 2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4656> [<https://perma.cc/GLB7-3YKC>].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

D. Mary Weaver

In January of 1993, the eleven-month-old child Mary Weaver was babysitting stopped breathing and later died at a hospital.⁸⁹ The cause of death was determined to be Shaken Baby Syndrome.⁹⁰

Weaver was charged with first-degree murder.⁹¹ At trial, experts testified that the injuries the child sustained were consistent with having occurred while in Weaver's care.⁹² After an initial mistrial, Weaver was convicted at a second trial and sentenced to life in prison without parole.⁹³

After Weaver's conviction, three women signed affidavits stating that the child's mother had told them a few days after the child's death that the child had hit her head on a coffee table before the child was in Weaver's care.⁹⁴ Two of the women's affidavits stated that the mother told them that the child lost consciousness after hitting her head on the coffee table.⁹⁵ Along with a new expert witness who testified that the child hitting her head on the coffee table could have produced the injuries found during the autopsy, the affidavits of the three women led a judge to grant Weaver a new trial.⁹⁶ She was acquitted in 1997.⁹⁷

E. Michelle Murphy

In September of 1994, Michelle Murphy found her fifteen-week-old son dead on her kitchen floor with a deep puncture wound.⁹⁸ Police questioned Murphy, who was a minor, alone for eight hours.⁹⁹ According to police, Murphy admitted to arguing with a woman and

89. See Maurice Possley, *Mary Weaver*, NAT'L REGISTRY OF EXONERATIONS (July 29, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3954> [<https://perma.cc/CP6W-7SHT>].

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See Maurice Possley, *Michelle Murphy*, NAT'L REGISTRY OF EXONERATIONS (Sept. 20, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4504> [<https://perma.cc/E9ZX-QVLN>].

99. *Id.*

accidentally stabbing her child with a knife.¹⁰⁰ At trial, the detective who interrogated Murphy admitted to touching her head and examining her thighs during the interrogation, which he claimed was only to search for evidence.¹⁰¹ Murphy was convicted of first-degree murder and sentenced to life in prison without parole.¹⁰² Murphy was exonerated in 2015 after DNA testing showed there was DNA matching the profile of an unknown individual found at the scene that did not match Murphy or her child.¹⁰³

F. *Susan Mellen*

In July of 1997, after a body was found in an alleyway,¹⁰⁴ an informant told police that Susan Mellen had confessed to killing the individual.¹⁰⁵ The informant, whose sister had relayed to police that she was a “pathological liar” and “master manipulator,” told police that Mellen and her boyfriend had found the victim sleeping in a house on the property where Mellen lived.¹⁰⁶ The individual also stated that Mellen had confessed to taping the victim’s mouth shut and, along with her boyfriend and another accomplice, kicking the victim to death.¹⁰⁷

At trial this individual’s testimony changed¹⁰⁸: The individual testified that Mellen had told her that Mellen’s boyfriend had walked into the house to find her “engaged in a sexual act” with the victim, that Mellen had kicked the victim numerous times, and that Mellen had “stuffed a bandana down [the victim’s] throat and used Super Glue to seal his mouth shut.”¹⁰⁹ The prosecution’s case relied primarily on this individual’s trial testimony, even though elements of that testimony were contradicted by the evidence found at the crime scene.¹¹⁰ Mellen was convicted of first-degree murder and sentenced to life in prison

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See Maurice Possley, *Susan Mellen*, NAT’L REGISTRY OF EXONERATIONS (Oct. 10, 2014) [hereinafter Possley, *Mellen*], <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4507> [<https://perma.cc/4H6F-M69M>].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

without parole.¹¹¹ Mellen was exonerated in 2014 after the real perpetrators confessed that Mellen was not involved in the murder.¹¹²

G. *Hattie Tanner*

In March of 1995, a bartender was found dead in the basement of the bar where she worked.¹¹³ Police interviewed Hattie Tanner on three separate occasions after learning that she had been with an individual who admitted he was at the bar late on the night of the murder.¹¹⁴ The officer who conducted the third interview later stated that Tanner admitted to going to the bar with the individual the night of the murder.¹¹⁵ According to the officer, in response to a question about circumstances under which she would have killed the victim, Tanner denied she had taken part in the murder, but stated that she would have killed the bartender if the bartender had treated her badly.¹¹⁶ In an earlier interview Tanner had also admitted that the knife found at the scene may have been hers.¹¹⁷

The individual who had allegedly been with Tanner at the scene on the night of the murder was not charged.¹¹⁸ Tanner was convicted in a jury trial of first-degree murder and sentenced to life in prison without parole.¹¹⁹ Tanner's conviction was vacated after a federal court found that there was insufficient evidence to sustain her conviction in 2017.¹²⁰

H. *Hannah Overton*

In October of 2006, Hannah Overton took a child she and her husband were in the process of adopting to the hospital where he was

111. *Id.*

112. *Id.*

113. See Maurice Possley, *Hattie Tanner*, NAT'L REGISTRY OF EXONERATIONS (Dec. 26, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5299> [<https://perma.cc/BJF9-4BQQ>].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

diagnosed with a toxic salt overdose.¹²¹ Overton would later state that she had fed the child, who had an eating disorder that caused him to compulsively consume both food and non-food items, water sprinkled with seasoning.¹²² The child later died.¹²³ At trial, the prosecution argued that the seasoning caused toxic salt levels, leading to his death.¹²⁴ A neighbor testified that Overton had told her that the child was intentionally vomiting, defecating, and smearing vomit and feces on Overton in order to “get to” Overton and that Overton “had a smile on her face” as she was performing CPR on the child.¹²⁵ A local publication would later describe “the image [the witnesses] conjured—of a woman grinning at the sight of a comatose four-year-old” as “devastating.”¹²⁶

Overton was convicted of capital murder and sentenced to life in prison without parole in 2007.¹²⁷ Overton’s conviction was overturned in 2014 after a new expert was obtained.¹²⁸ This expert testified that the seasoning in the water could not have led to the sodium level found in the child’s system.¹²⁹ Overton was exonerated in April of 2015 when the prosecutor dismissed all charges.¹³⁰

IV. HOW FALSE CONFESSIONS AND CHILD VICTIMS INTERACT WITH GENDERED EXPECTATIONS TO PRODUCE WRONGFUL CONVICTIONS

An analysis of these cases demonstrates that false confessions or child victims may have led the women defendants to be perceived as having violated society’s expectations for women resulting in their wrongful convictions and the harsh sentences they received. Only one of these women, Susan Mellen, did not have either a child victim or what the National Registry of Exonerations considers a false confession in her case; however, the informant’s testimony about Mellen’s confession to

121. See Maurice Possley, *Hannah Overton*, NAT’L REGISTRY OF EXONERATIONS (Mar. 7, 2018) [hereinafter Possley, *Overton*], <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4674> [<https://perma.cc/5DCD-NZUP>].

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*; see Pamela Colloff, *Hannah and Andrew*, TEX. MONTHLY (Jan. 2012), <https://www.texasmonthly.com/articles/hannah-and-andrew/> [<https://perma.cc/5NCQ-63JM>].

126. See Colloff, *supra* note 125.

127. See Possley, *Overton*, *supra* note 121.

128. *Id.*

129. *Id.*

130. *Id.*

her was the functional equivalent of a false confession because the informant testified that Mellen admitted to her involvement in the murder.¹³¹ In seven of the eight cases examined it appears that the women could have been perceived as having violated society's expectations for women, largely through relying on their false confessions or the presence of a child victim in their cases.¹³² Available information on these cases indicates that prejudicial details recounted in the false confessions and prejudicial details about the crimes committed against children under the women's care led to the portrayal of the women as having violated society's expectations, not just that the women falsely confessed or had child victims in their cases.

There are three primary societal expectations, also discussed in Professor Atwell's work as contributing to the convictions and sentences of the first fourteen women executed since 1976,¹³³ that appear to have played a role in the women's wrongful convictions and serious sentences: motherhood, sexuality, and violence.

A. *Motherhood*

Four of the cases—those of Sabrina Butler, Debra Milke, Michelle Murphy, and Hannah Overton—contain information indicating that the women were perceived as having violated society's expectations surrounding motherhood.¹³⁴ In the course of improperly commenting on Butler's failure to testify, the prosecutor noted that Butler refused to tell the jury the whole story about the torment she had caused her son, portraying Butler as not meeting society's expectations for mothers, who would never cause any torment to their children.¹³⁵ When the officer at Debra Milke's trial testified about the confession he fabricated, he relayed to the jury that Milke had told him she had contemplated and even made an appointment to obtain an abortion before her child was born, that she asked if she could receive a sentence without jail time if she underwent a procedure that would not allow her to have children again, and that she stated she had conspired to have her child murdered so she could collect on a life insurance policy.¹³⁶ Each of these portrayals cut against society's expectation that women are "child-centered" and

131. See Possley, *Mellen*, *supra* note 104.

132. See *infra* Part IV.

133. See ATWELL, *supra* note 7, at 296.

134. See *supra* Parts III.A, III.B, III.E, III.H.

135. See *supra* Part III.A.

136. See *supra* Part III.B.

nurturing mothers who would never harm their children.¹³⁷ The statements also conjure up what Professor Atwell called the “image of an Evil Woman wreaking domestic havoc.”¹³⁸ The officer’s inclusion of the statements in a fabricated confession also indicates that the officer believed the details in these statements would be particularly incriminating and shocking evidence for the finder of fact even though several of the details had very little probative value in determining who was responsible for the child’s murder.

The same could be said for the statements attributed to Hannah Overton by her neighbor. The neighbor’s testimony portrayed Overton as insensitive to the child’s needs, doubting that the child was ill and instead convinced that the child’s behavior was the child trying to “get to” her. The neighbor also testified that Overton smiled while performing CPR on the child.¹³⁹ The neighbor’s testimony paints Overton as having failed to meet society’s expectation that mother figures be caretakers in touch with their children’s needs.¹⁴⁰ Professors Andrea Lewis and Sara Sommervold, who examined Overton’s case closely in a broad analysis of how stereotypes surrounding motherhood can lead to wrongful convictions, concluded that “[j]urors convicted Overton because they believed she neglected to get her child medical help fast enough” indicating that “Overton was convicted of being an inattentive mother, not for actually killing her child.”¹⁴¹ Similarly, the statements police officers attributed to Michelle Murphy, including that she accidentally stabbed her child while arguing with another woman, portrayed Murphy as reckless and careless in contrast to society’s

137. See Milne, *supra* note 44, at 168.

138. See ATWELL, *supra* note 7, at 296.

139. See *supra* Part III.H.

140. See *supra* Part III.H; Milne, *supra* note 44, at 168.

141. Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1049 (2014). In this article, Professors Lewis and Sommervold discuss how stereotypes surrounding motherhood can lead to wrongful convictions. Professors Lewis and Sommervold discuss the cases of Sabrina Butler and Hannah Overton and how stereotypes about motherhood played a role in their convictions. *Id.* at 1046-47, 1049. While Professors Lewis and Sommervold discuss primarily stereotypes surrounding motherhood, deaths of children, and wrongful convictions of women in general, *id.*, this Note focuses on wrongful convictions of women for serious crimes. While Professors Lewis and Sommervold discuss false confessions, they focus on the role the biases of the interrogators played in eliciting the false confessions rather than on how the confessions may have been perceived at trial and whether they should have been excluded from trial. *Id.* at 1046-48. For a longer discussion on the role stereotypes of motherhood play in wrongful convictions as a whole, see Lewis & Sommervold, *supra*.

expectation that mothers ought to keep their children out of harm's way at all costs by being child-centered.¹⁴² Through prejudicial details that came in at trial in the form of false confessions or the presence of a child victim, each of these women were portrayed as having violated society's expectations of motherhood, namely that they be nurturing and child-centered.¹⁴³

B. *Sexuality*

Three of the women—Debra Milke, Cathy Woods, and Susan Mellen—were portrayed as violating society's expectations for women in regard to norms surrounding sexuality.¹⁴⁴ In testifying about the confession he fabricated at Debra Milke's trial, the officer described how she had flashed her breasts and offered him sex if he could ensure the investigation did not end in her arrest.¹⁴⁵ In Susan Mellen's case, the individual who testified that Mellen confessed to her described how Mellen's boyfriend had walked in on her having a sexual interaction with the victim.¹⁴⁶ The officer who testified about Cathy Woods's confession described how she admitted that she had killed the female victim when she refused her sexual advances.¹⁴⁷ These statements are highly prejudicial because of how they portrayed the defendants as having violated society's expectations for women's sexuality. In Professor Atwell's words, they appeared, like Karla Faye Tucker because of the statement she made that was admitted at her trial, to have “forfeited once and for all the protections available to other women” by acting “male-like in [their] behavior, apt to . . . violen[ce], and acting of [their] own accord.”¹⁴⁸ The brazenness of Milke's alleged actions towards the officer interrogating her, Woods's alleged reasons for killing the victim, and Mellen's alleged infidelity were all used to portray the women as violating society's expectations for women.

One cannot overlook that the details to which the officer in Milke's case and the informant in Mellen's case testified were allegedly fabricated out of thin air. In Milke's case, the officer seems to have included the details to purposely portray Milke as an unsympathetic

142. See *supra* Part III.E; Milne, *supra* note 44, at 168.

143. See Milne, *supra* note 44, at 168.

144. See *supra* Parts III.B, III.C, III.F.

145. See *supra* Part III.B.

146. See *supra* Part III.F.

147. See *supra* Part III.C.

148. See ATWELL, *supra* note 7, at 90.

defendant and to be as shocking as possible for the jury. In Mellen's case, the informant leaving out the details about Mellen engaging in a sexual act with the victim when her boyfriend entered the house in her initial discussions with police only to reveal the detail at trial indicates that the detail may have been purposely included in order to portray Mellen in an even more unfavorable light in front of the jury.¹⁴⁹ The conscious choice to include these details in both cases demonstrates that the officer and informant both understood that a jury would likely find the sexual details particularly damning in their deliberations on the verdict, indicating that the portrayals of the women as having violated society's norms were known to be prejudicial and likely to assist in obtaining a conviction.

C. Violence

Two of the cases examined—those of Susan Mellen and Hattie Tanner—contained statements falsely attributed to the women that were used to portray them as violent in violation of society's expectations for women. The individual who testified against Mellen at trial claimed Mellen had told her that, in addition to engaging in sexual conduct with the victim, she kicked the victim, stuffed a bandana down his throat, and super glued his mouth shut.¹⁵⁰ The officer who interviewed Hattie Tanner testified that she had stated, in answer to a hypothetical question, that she could have killed the victim in the case if the victim had treated Tanner poorly.¹⁵¹ These violent behaviors could have led to these women being perceived in a similar manner to how Professor Atwell described Tucker's portrayal at trial: violent and therefore masculine.¹⁵²

Whether the exonerees discussed were perceived as having violated society's expectations for women as mothers or with regards to sexuality or violent behavior, the information that led them to be perceived in such a manner came in at trial despite the prejudicial nature of the information.

149. See *supra* Part III.F.

150. See *supra* Part III.F.

151. See *supra* Part III.G.

152. See *supra* Part II.

V. WHY PREVENTING THE DETAILS OF CONFESSIONS AND OTHER
PREJUDICIAL TESTIMONY FROM HAVING AN UNFAIR IMPACT AT TRIAL
WHERE THE DETAILS PORTRAY WOMEN AS HAVING VIOLATED
SOCIETY'S EXPECTATIONS FOR WOMEN IS DIFFICULT

Under current law, excluding the prejudicial details found in the false confessions and other witness testimony is difficult. While most defendants would prefer to have their confessions entirely excluded, confessions can only be excluded from trial for a few reasons. First, the interrogating officers could have failed to properly inform the defendant of her rights under *Miranda v. Arizona*, violated the defendant's right to silence or to speak with an attorney during a custodial interrogation, or violated the defendant's Sixth Amendment right to counsel during a post indictment interrogation.¹⁵³ However, *Miranda* and its progeny were apparently unsuccessful at preventing the false confessions in the cases examined from coming in at trial.¹⁵⁴ Debra Milke even alleged that the detective in her case had violated her *Miranda* rights, but the testimony still came in at her trial.¹⁵⁵

Confessions can also be excluded from trial if the interrogations in which they were obtained are found to be coercive.¹⁵⁶ Courts consider some coercive interrogations to be involuntary and in violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment.¹⁵⁷ In order for an interrogation to be so coercive as to violate Due Process, a court must find that the defendant's will was overborne.¹⁵⁸ This standard also seems to have apparently been unsuccessful at preventing any of the false confessions examined above from coming in at trial.¹⁵⁹

The Federal Rules of Evidence (FRE) are another means through which the prejudicial details described above could potentially be excluded from trial. Under FRE 403, and state equivalents, a "court

153. See *Miranda v. Arizona*, 384 U.S. 436, 469-71 (1966); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

154. See *supra* Part III.

155. See *supra* Part III.B. A court would also have to find that the confession was made during an interrogation, which, under current law, requires that there be "either express questioning or its functional equivalent," and that the confession have occurred while the confessor was in custody. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

156. See Klara Stephens, *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations*, 11 NE. U. L. REV. 593, 599 (2019).

157. See *id.*

158. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

159. See *supra* Part III.

may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice.”¹⁶⁰ The Notes of the Advisory Committee on FRE 403 state that unfair prejudice “means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”¹⁶¹ In the cases discussed above, some of the details contained in the false confessions and witness testimony that portray the women as having violated society’s expectations for women could fairly be argued to be substantially more prejudicial than probative of guilt or innocence. However, in each of the cases, arguments could be made that the details were relevant enough to the defendant’s guilt or innocence that the danger of unfair prejudice did not substantially outweigh their probative value.

For example, in Debra Milke’s case the statement the officer made about Milke flashing her breasts and offering him sex seems substantially more prejudicial than probative of Milke’s guilt or innocence.¹⁶² The statement did not provide information that could reasonably be said to contribute to the finder of fact’s determination of guilt or innocence and could have caused the finder of fact to have a negative perception of Milke’s character. Other alleged statements, such as Milke admitting to thinking about obtaining an abortion before her child was born and asking if she could receive a reduced sentence if she underwent a sterilization procedure, seem substantially more prejudicial than probative because they depict Milke as violating society’s expectation for women, have a high likelihood of producing an emotional response in the jury, and seem to lack value in determining guilt or innocence.¹⁶³ Taken together, the statements could have led the jury to decide the case on an emotional rather than a rational basis, the very reason that evidence found to be substantially more prejudicial than probative is excludable according to the Notes to FRE 403.

Yet the statements were likely properly admitted as relevant to Milke’s consciousness of guilt. The prosecution could have argued that the statements demonstrated Milke knew she was guilty and was trying to bargain with the officer to avoid being charged with her son’s murder. At least under current law, without knowing that the officer had committed misconduct in the past, which would have cast doubt on

160. FED. R. EVID. 403. Character evidence is also generally inadmissible under the Federal Rules of Evidence, but most of the details in the confessions or witness statements were admissible because they related to the facts of the specific case and not prior bad acts or the reputation of the defendants in general. FED. R. EVID. 404.

161. *Id.*

162. *See supra* Part III.B.

163. *See supra* Part III.B.

the likelihood the statements were in fact made, the statements seem to have at least some probative value when considering Milke's guilt or innocence even though they were substantially prejudicial. The Federal Rules of Evidence are therefore ill-equipped to deal with these issues because there is probative value in the statements and determining what is more prejudicial than probative is difficult when confessions are examined under this analysis.

Other details, such as those in the cases of Cathy Woods and Susan Mellen, could be fairly thought of as having probative value as well. For example, Woods's comments about the victim refusing her sexual advances could be fairly considered as probative of Woods having a motive for killing the victim.¹⁶⁴ And in Mellen's case, the details about Mellen engaging in a sexual interaction with the victim when her boyfriend walked in the house could also fairly be considered as probative of Mellen having a motive.¹⁶⁵

Perhaps the most workable way to ensure that details in confessions, witness statements, or details surrounding crimes involving children do not interact with gender to cause a wrongful conviction and harsh sentence is to make attorneys and judges aware of the ways in which the details may cause the finder of fact, or the individual imposing a sentence, to view the defendant as having violated society's expectations for women and how that view could impact the outcome of the trial or sentencing hearing. Judges could issue limiting instructions in cases in which prejudicial details were admitted at trial to try to prevent the jury from deciding the case on an unfair basis or based upon implicit biases. Similarly, attorneys could ask questions on *voir dire* to make sure that jurors selected for the trial do not have implicit biases and will not be prone to being swayed by details likely to be admitted at trial that portray female defendants as having violated society's expectations for women. Finally, judges and criminal justice actors tasked with investigating and writing presentence reports could receive training on implicit biases regarding society's expectations for women so that they are better equipped to carefully examine whether they may have problematically taken into account that a woman defendant violated society's expectations for women. While these solutions are of course imperfect, they are a step in the right direction

164. See *supra* Part III.C.

165. See *supra* Part III.F. The other details in Mellen's case, about stuffing a bandana in the victim's mouth and supergluing the victim's mouth shut, could fairly be said to be probative of intent. *Supra* Part III.F.

and might just prevent a wrongful conviction or imposition of an unfairly harsh sentence.

CONCLUSION

Available anecdotal evidence demonstrates that women who were convicted of murder, received a serious sentence, and were later exonerated could have been perceived at trial as having violated society's expectations for women. These portrayals of the women as bad mothers, sexually deviant or promiscuous, and violent, based upon the presence of child victims in their cases or the prejudicial details contained in their false confessions, may have had an effect on the outcomes of their cases. Further research with more empirical data and access to trial transcripts could demonstrate an even stronger connection between the details contained in false confessions or witness statements, child victims, gender, and the outcomes of cases.

For now, courts should consider how evidence admitted at trial may interact with implicit biases about society's expectations for women to improperly impact the outcomes of trials or sentencing. Under the current rules of evidence, many of the details in the confessions and witness testimony examined above would continue to be considered relevant. The cases discussed here serve as a warning of the severe consequences that can result when such testimony is not excluded, treated more critically, or mitigated through other methods.

METHODOLOGICAL APPENDIX

To obtain all data, go to the Detailed View page on the National Registry of Exonerations website, located in the Browse Data menu. To obtain the number of exonerees and female exonerees sentenced to death, filter first for exonerees who were sentenced to death under the sentence column. As of August 14, 2020, there were 127 exonerees in the registry who had been sentenced to death.¹⁶⁶ Then filter for female exonerees by selecting the tag “F” under the tags column. As of August 14, 2020, only two female exonerees had been sentenced to death.¹⁶⁷ To obtain the number of exonerees convicted of murder and sentenced to life in prison without parole, filter first for exonerees who were convicted of murder under the crime column, then for exonerees who received life in prison without parole sentences under the sentence column. As of August 14, 2020, there were 160 exonerees convicted of murder who received life in prison without parole sentences.¹⁶⁸ To obtain the number of female exonerees convicted of murder and sentenced to life in prison without parole, filter for exonerees convicted of murder under the crime column and then for exonerees who received life in prison without parole sentences under the sentence column. Then filter for female exonerees by selecting “F” under the tags column. As of August 14, 2020, only six female exonerees were convicted of murder and sentenced to life in prison without parole.¹⁶⁹

To obtain the number of female exonerees who have been convicted of murder and sentenced to death who falsely confessed, filter first for exonerees who received death sentences under the sentence column, then for female exonerees by selecting the “F” tag under the tags column, and then for false confessions under the FC column. As of August 14, 2020, both women who have been exonerated after being convicted of murder and sentenced to death falsely confessed.¹⁷⁰ Then, to find the number of female exonerees convicted of murder and sentenced to death who had cases involving a child victim, remove the filter for false confessions, while retaining the filters for death sentences and female exonerees, and filter for child victims by selecting the “CV” tag under the tags column. As of August 14, 2020, both women who

166. See *Detailed View*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 13.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

have been exonerated after being convicted of murder and sentenced to death had cases that involved a child victim.¹⁷¹

To obtain the number of female exonerees who were convicted of murder and sentenced to life in prison without parole who falsely confessed, filter first for exonerees who were convicted of murder under the crimes column, then for exonerees who were sentenced to life in prison without parole under the sentence column, then for female exonerees by selecting the “F” tag under the tags column, and then for false confessions under the FC column. As of August 14, 2020, three of the six female exonerees convicted of murder and sentenced to life in prison without parole had false confessions in their cases.¹⁷² Then, to obtain the number of female exonerees who were convicted of murder and sentenced to life in prison without parole who had cases involving a child victim, remove the filter for false confessions while keeping all other filters. Count the number of cases with “CV” in the tags column. As of August 14, 2020, only three female exonerees who were convicted of murder and sentenced to life in prison without parole had a child victim in their case.¹⁷³

To obtain the number of male exonerees sentenced to death who falsely confessed, filter first for exonerees who received death sentences under the sentence column and then for false confessions under the FC column. Subtract two from the total because two of the exonerees who were sentenced to death and falsely confessed were women. As of August 14, 2020, only twenty-three of the 125 male exonerees convicted of murder and sentenced to death had false confessions in their cases.¹⁷⁴ To obtain the number of male exonerees who were sentenced to death that had cases involving a child victim, remove the filter for false confessions while keeping the filter for death sentences. Then filter for child victims by selecting the “CV” tag under the tags column and subtract two from the total because two of the exonerees who were sentenced to death that had a child victim in their case were women. As of August 14, 2020, only thirty-three of the 125 male exonerees who were sentenced to death after being convicted of murder had a child victim in their case.¹⁷⁵

To obtain the number of male exonerees convicted of murder and sentenced to life in prison without parole who had false confessions in their cases, filter first for murder under the crime column, then for life

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

in prison without parole sentences under the sentence column, then for false confessions under the FC column, and then subtract three from the total because three women were convicted of murder, sentenced to life in prison without parole, and had false confessions in their cases. As of August 14, 2020, thirty-nine of the 154 men convicted of murder and sentenced to life without parole and later exonerated had false confessions in their cases.¹⁷⁶ To obtain the number of male exonerees convicted of murder and sentenced to life in prison without parole that had cases involving a child victim, filter first for murder under the crime column, then for life in prison without parole sentences under the sentence column, then for child victims by selecting the “CV” tag under the tags column, and then subtract three from the total because three women were convicted of murder, sentenced to life in prison without parole, and had cases involving a child victim. As of August 14, 2020, only seventeen of the 154 men convicted of murder and sentenced to life in prison without parole had cases involving a child victim.¹⁷⁷

To obtain the number of women who were exonerated after receiving a life sentence with the possibility of parole upon conviction for murder who falsely confessed, first filter for murder cases under the crime column, then filter for life sentences under the sentence column, and then filter for female exonerees by selecting the “F” tag under the tags column. As of August 14, 2020, only twenty women had been exonerated after being convicted of murder and sentenced to life in prison.¹⁷⁸ Then filter for false confessions under the FC column. As of August 14, 2020, only one of the twenty women convicted of murder and sentenced to live in prison had a false confession in her case.¹⁷⁹ Then, to obtain the number of female exonerees convicted of murder who received a life sentence with the possibility of parole who had a case involving a child victim, remove the false confessions filter and count the number of cases with “CV” in the tags column. As of August 14, 2020, only five of the twenty women convicted of murder and sentenced to life in prison had a case involving a child victim.¹⁸⁰

To obtain the number of women who were exonerated after receiving a less-than-life sentence upon conviction for murder who falsely confessed, first filter for murder cases under the crime column and then filter for each less-than-life sentence under the sentence

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

column. Add up the numbers of each less-than-life sentence. Then filter for female exonerees by selecting the “F” tag under the tags column. As of August 14, 2020, only thirty-five women were exonerated after being convicted of murder and sentenced to less-than-life in prison.¹⁸¹ Then filter for false confessions under the FC column for each less-than-life sentence and add up the number of cases found. As of August 14, 2020, only ten of the thirty-five women who were convicted of murder and received a less-than-life sentence had a false confession in their case.¹⁸² Then, to obtain the number of female exonerees convicted of murder who received a less-than-life sentence that had a case involving a child victim, remove the false confessions filter and count the number of cases with “CV” in the tags column in each less-than-life sentence category. As of August 14, 2020, only nine of the thirty-five female exonerees convicted of murder and sentenced to less than life in prison had a case involving a child victim.¹⁸³ ♣

181. *Id.*

182. *Id.*

183. *Id.*