

DEATH, BUT IS IT MURDER? THE ROLE OF STEREOTYPES AND CULTURAL PERCEPTIONS IN THE WRONGFUL CONVICTIONS OF WOMEN

Andrea L. Lewis & Sara L. Sommervold***

I. INTRODUCTION

Six days after her three-year-old son died in a house fire, Kristine Bunch was arrested for starting the fire and intentionally killing him.¹ Bunch spent seventeen years in prison after being convicted of murder and arson under the theory she locked the child in a bedroom and lit the room on fire.² Tragically, evidence eventually showed there was no arson and Bunch was innocent.³ After Sabrina Butler spent more than five years on death row in Mississippi, she also was found innocent of killing her son, who actually died from a genetic medical condition.⁴ Before she was exonerated in 2008, Audrey Edmunds spent eleven years in prison after the death of a seven-month-old baby in her care.⁵ Edmunds's case was one of the first to

* Andrea Lewis works as a Clinical Fellow at the Center on Wrongful Convictions at Northwestern University School of Law. She focuses on the Women's Project, which represents convicted women with claims of actual innocence and researches the factors that contribute to the wrongful convictions of women. Prior to joining the Women's Project, Ms. Lewis was an associate at Vedder Price P.C. in Chicago, Illinois.

** Sara Sommervold works as a Clinical Fellow and the Intake Attorney at the Center on Wrongful Convictions at Northwestern University School of Law. Prior to joining the Center, Ms. Sommervold was a law clerk in both the Office of the Cook County Public Defender and the Office of the Washington County Public Defender in Minnesota.

¹ *Bunch v. State*, 697 N.E.2d 1255, 1256 (Ind. 1998); Rob Warden, *Kristine Bunch: Convicted of Murder by Arson—But the Fire Was Accidental*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/in/kristine-bunch.html> (last visited Apr. 20, 2015) [hereinafter *Kristine Bunch*].

² *Bunch*, 697 N.E.2d at 1256–58; *Kristine Bunch*, *supra* note 1.

³ See *Bunch v. State*, 964 N.E.2d 274, 296–97 (Ind. Ct. App. 2012).

⁴ See Sabrina Butler, Op-Ed., *I Spent More Than Six Years as an Innocent Woman on Death Row*, TIME (May 30, 2014), <http://time.com/2799437/i-spent-more-than-six-years-as-an-innocent-woman-on-death-row/>.

⁵ *State v. Edmunds*, 746 N.W.2d 590, 592 (Wis. Ct. App. 2008); see Rob Warden, *Audrey Edmunds: Eleven Years in Prison as a Result of Erroneous Medical Testimony*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/wi/audrey-edmunds.html> (last visited Apr. 20, 2015).

be reversed based on the arguably questionable science behind shaken baby syndrome, after experts testified that no evidence supported the State's theory that she shook the baby.⁶

As with many wrongfully convicted women, these women became suspects because they were mothers or caregivers. Also, like most wrongfully convicted women, these women were traumatized and lost years of their lives over "crimes" which, evidence has shown, did not occur. Consider that sixty-four percent of exonerated women were wrongfully convicted even though no crime had occurred.⁷ In contrast, 23.2% of exonerated men were wrongfully convicted for crimes that never happened.⁸ That disparity is a clear indication that something different happens in the wrongful convictions of women than when men are wrongfully convicted. The differences between the wrongful convictions of men and the wrongful convictions of women warrant serious study.

II. PURPOSE OF THIS ARTICLE

This article will highlight characteristics of women who have been wrongfully convicted of harming or killing children, especially when no crime has occurred. The article discusses how stereotypes play a unique role in those wrongful convictions. Specifically, we will examine how stereotypes and the cultural perception of women as nurturers, mothers, and protectors of children likely contribute to the wrongful convictions of women.

In Part III, we will provide general information and statistics related to women's wrongful convictions. Part IV will discuss how stereotypes may cause these convictions. In Part V, we will discuss the types of circumstances that lead to women being erroneously charged with and convicted of crimes that never occurred. Part VI will address how stereotypes in no-crime cases make the wrongful convictions of women particularly complex to resolve. In conclusion, the article will promote further study of the wrongful convictions of women and make policy recommendations to reduce those wrongful convictions.

[hereinafter *Audrey Edmunds*].

⁶ See *Audrey Edmunds*, *supra* note 5.

⁷ See *Exoneration Detail List*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Mar. 18, 2015).

⁸ See *id.*

III. OVERVIEW AND STATISTICS

A. *Relevant Definitions*

Wrongful convictions scholars utilize different terms to refer to and define the terms “exonerations” and “exonerees.” For example, Huff and colleagues describe wrongfully convicted individuals as “convicted innocents,” and define that term as “people who have been arrested on criminal charges . . . who have either pleaded guilty to the charge or have been tried and found guilty; and who, notwithstanding plea or verdict, are in fact innocent.”⁹ These authors exclude from their focus individuals who were held “for considerable periods of time” but had the charges dropped before trial because they were actually innocent; however, they still consider those individuals “convicted innocents.”¹⁰ In contrast, Samuel Gross, editor and cofounder of the National Registry of Exonerations (National Registry), and a leading scholar in the field, defines exoneration as “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted,” thereby making the defendant an “exoneree.”¹¹ Gross considers exonerations to result from four sources: (1) pardons or similar executive actions which freed prisoners based on actual innocence, (2) convictions vacated after new evidence of innocence emerged, (3) acquittals in retrials granted on the basis that the defendant was not involved in the crime, and (4) posthumous acknowledgements that a person was actually innocent.¹² For purposes of this article, we use Gross’s definition of exoneration.

We recognize that several organizations maintain separate tallies of exonerations.¹³ Here, we have gathered our data from the National Registry, a joint project between the University of Michigan and the Center on Wrongful Convictions at Northwestern University School of Law.¹⁴ Thus, when we refer to wrongfully convicted women,

⁹ C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 10 (1996).

¹⁰ *Id.* at 10–11.

¹¹ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005); Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 428 (2014).

¹² Gross et al., *supra* note 11, at 524.

¹³ See *Innocents Database*, FOREJUSTICE, http://forejustice.org/search_idb.htm (last visited Apr. 20, 2015); *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Apr. 20, 2015).

¹⁴ *About the Registry*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/ex>

unless otherwise noted, we refer to women listed in the National Registry.

B. Statistics

Since 1989, 1567 individuals in the United States have been exonerated.¹⁵ One hundred thirty-nine, or 8.9%, of the exonerees are women.¹⁶ Ninety-seven of those women have been exonerated since the year 2000.¹⁷ Clearly, women are only recently gaining more attention in the world of wrongful convictions.¹⁸ We anticipate that the number of wrongfully convicted women is higher than the current statistics reflect. We say this in part because not all individuals who are wrongfully convicted have the legal means or resources to challenge their convictions past the direct appeals process, even if new evidence of innocence does arise.¹⁹ As we will address in Part VI, this can be particularly true in cases where women are convicted of a crime that never occurred.²⁰

Some similarities exist between the types of crimes for which male and female exonerees were convicted. The most common crimes for which female exonerees were convicted were murder (forty-nine), child sex abuse (twenty-six),²¹ drug crimes (twenty-two),

operation/Pages/about.aspx (last visited Apr. 20, 2015).

¹⁵ See *Exoneration Detail List*, *supra* note 7. Please note that the number of exonerees in the United States changes frequently, and at times daily. The statistics used in this article are current as of March 18, 2015.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., Elizabeth Webster & Jodi Miller, *Gendering and Racing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriage of Justice*, 78 ALB. L. REV. 973 (2014/2015).

¹⁹ This is because only some states have postconviction statutes that permit individuals to file claims based on new evidence of actual innocence, and often the applicability of those statutes is severely limited. See, e.g., ARK. CODE ANN. § 16-112-201 (2014) (permitting a habeas petition if the petitioner presents new scientific evidence, but not any other form of new evidence); VA. CODE ANN. § 19.2-327.11(A)(vii) (2014) (requiring that new evidence presented in a postconviction proceeding prove, beyond a reasonable doubt, that a rational trier of fact would find the defendant not guilty); FLA. R. CRIM. P. 3.850(b) (limiting the filing of a habeas motion in a noncapital case to two years after the judgment and sentence became final). For a survey of state postconviction statutes as of 2006, see David R. Dow et al., *The Death Penalty and the Question of Actual Innocence: Is It Constitutional to Execute Someone Who Is Innocent (and If It Isn't, How Can It Be Stopped Following House v. Bell)?*, 42 TULSA L. REV. 277, 293-321 (2006).

²⁰ See discussion *infra* Part VI.

²¹ Please note that of the twenty-six child sex abuse cases, twenty-one were cases involving "child sex abuse hysteria" in the mid-1980s and early 1990s. See *Exoneration Detail List*, *supra* note 7. A discussion of the child sex abuse hysteria phenomenon is outside of the scope of this article, but for a detailed explanation, see GAVIN DE BECKER & EMILY HOROWITZ, NAT'L CTR.

manslaughter (eight), and child abuse (five).²² The most common crimes for which male exonerees were convicted were murder (618), sexual assault (270), child sex abuse (150), drug crimes (ninety-three), and robbery (eighty-seven).²³ Nonetheless, while the types of crimes are similar, the circumstances under which women were wrongfully convicted differ.

About forty-five percent of all female exonerees were convicted of physically harming or killing a close family member, a loved one, or a child in their care.²⁴ Male exonerees were far more likely to be convicted of killing or physically harming individuals who did not fall into those categories.²⁵ Shockingly, in sixty-four percent of women's wrongful conviction cases, the evidence at the time of exoneration suggested that no crime took place at all.²⁶ In contrast, evidence showed no crime occurred in only 23.2% of male cases.²⁷

It has been estimated that "[m]others and step-mothers kill about half of all children murdered."²⁸ It is unclear whether this estimate contemplates the possibility of wrongful convictions, but considering the number of female exonerees who were falsely accused of killing their own children or others in their care, this issue certainly necessitates study and clarification.²⁹

IV. STEREOTYPES AFFECTING WOMEN IN THE CRIMINAL JUSTICE SYSTEM

Historically, Western society has considered a woman's role to be that of wife and mother.³⁰ Therefore, women are assumed to be natural caregivers with the biological bonds of love with the

FOR REASON & JUSTICE, DESTRUCTION OF INNOCENCE: THE FRIEDMAN CASE: HOW COERCED TESTIMONY & CONFESSIONS HARM CHILDREN, FAMILIES & COMMUNITIES FOR DECADES AFTER THE WRONGFUL CONVICTIONS OCCUR 4-6 (2013), *available at* <http://ssrn.com/abstract=2228941>.

²² See *Exoneration Detail List*, *supra* note 7.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*; see also Webster & Miller, *supra* note 18, at 988 ("For males, 53% (313 of 595) of wrongful homicide convictions involved stranger victims . . .").

²⁶ See *Exoneration Detail List*, *supra* note 7.

²⁷ See *id.*

²⁸ KATHERINE VAN WORMER, WORKING WITH FEMALE OFFENDERS: A GENDER-SENSITIVE APPROACH 81 (2010).

²⁹ Other race and class divisions exist which are outside of the scope of this article.

³⁰ Pauline K. Brennan & Abby L. Vandenberg, *Depictions of Female Offenders in Front-Page Newspaper Stories: The Importance of Race/Ethnicity*, 2 INT'L J. SOC. INQUIRY 141, 144 (2009).

children they bear.³¹ As noted by Caroline Rogus:

Because there exists an ideal form of motherhood, and because this ideal imagines the nurturing and caregiving we associate with motherhood to be instinctual among women, women who give birth are automatically compared to the ideal mother. Furthermore, because this ideal is unattainable for most women, women are set up to constantly attempt and consistently fail at modeling themselves after this ideal. The ideal mother is also used to justify restrictions on women's liberties and citizenship. Thus, the presumption that the biological event of birth results in motherhood imposes society's rigid construction of ideal motherhood on women. A woman who gives birth is expected to adhere to the ideals of motherhood or face the consequences (and penalties), leaving women with children (and those without) little room to express their citizenship as individuals.³²

In addition to the assumption that women are nurturers, society typically regards women as passive, cooperative, and nonthreatening.³³ People look favorably upon women who behave consistently with these stereotypes, and shun those who do not.³⁴ In contrast, men accused of threatening or harming others are given a greater degree of leniency in the eyes of society. For example, the male as a "warrior," or protector, is an archetype that traditionally is seen in a positive light.³⁵ In Western culture, evil or violent women have been placed into the "Female Monster" archetype, taking the form of sirens, chimeras, witches, and other grotesque figures said to reflect 'the male dread of women.'³⁶ Society also has permitted men more latitude to commit "crimes of passion."³⁷ When men kill their children and loved ones they are considered "bad and normal," whereas women accused of the same crimes are considered "mad and abnormal."³⁸

³¹ See Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the Nguyen v. INS Opinion*, 5 U. PA. J. CONST. L. 803, 818 (2003).

³² *Id.* at 815.

³³ Brennan & Vandenberg, *supra* note 30, at 144.

³⁴ *Id.*

³⁵ Miglena Sternadori, *The Witch and the Warrior: Archetypal and Framing Analyses of the News Coverage of Two Mass Shootings*, 14 FEMINIST MEDIA STUD. 301, 304 (2014).

³⁶ *Id.* at 303.

³⁷ *Id.* at 304.

³⁸ Kate Whiteley, *Monstrous, Demonic and Evil: Media Constructs of Women Who Kill*, in THE HARMS OF CRIME MEDIA: ESSAYS ON THE PERPETUATION OF RACISM, SEXISM AND CLASS

A stereotype commonly applied to women accused of killing children is that of the flawed mother.³⁹ In other words, the woman is portrayed as “evil, deceptive, and callous.”⁴⁰ She is a failed caretaker.⁴¹ The media often emphasizes this dichotomy between the good mother and the bad mother: the good mother as the ultimate nurturer, and the bad mother as the ultimate destroyer.⁴²

Two types of flawed mothers are portrayed within the criminal justice system: the “mad” mother, the superior caretaker who has conformed to traditional gender roles but merely committed an irrational act because she was mentally ill; and the “bad” mother, who simply is a cold, callous woman incapable of caregiving and therefore nonfeminine.⁴³ The bad mother falls into the cultural archetype of the Female Monster.⁴⁴ The mad woman is an otherwise “perfect” mother manifesting some sort of illness.⁴⁵ Journalists typically comment that “only an insane woman would murder her children.”⁴⁶ The bad woman, on the other hand, has crossed the boundary of gender role expectations by her own will.⁴⁷ Because women are expected to be passive and nonviolent, bad women are sometimes depicted in masculine terms, as women are expected to be nonviolent.⁴⁸ A woman accused of killing a child or loved one is far more likely to be portrayed as bad if the crime was particularly heinous.⁴⁹

It is important to note that the concept of punishing women harshly for killing their children is a modern development.⁵⁰ Historically, population control and economic hardship constituted acceptable

STEREOTYPES 91, 93 (Denise L. Bissler & Joan L. Connors eds., 2012).

³⁹ Barbara Barnett, *Medea in the Media: Narrative and Myth in Newspaper Coverage of Women Who Kill Their Children*, 7 JOURNALISM THEORY PRAC. & CRITICISM 411, 416 (2006).

⁴⁰ *Id.*

⁴¹ *Id.* at 417.

⁴² *Id.* at 412.

⁴³ *Id.* at 417–18.

⁴⁴ *Id.* at 418; see Sternadori, *supra* note 35, at 304.

⁴⁵ Barnett, *supra* note 39, at 417–18. This article focuses on the influence of the bad mother stereotype on women’s wrongful convictions, but for an in-depth discussion on the mad woman stereotype in the criminal justice system, see Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527 (2006).

⁴⁶ Barnett, *supra* note 39, at 416.

⁴⁷ Whiteley, *supra* note 38, at 100.

⁴⁸ See *id.*

⁴⁹ *Id.* at 96, 100.

⁵⁰ Lucy Jane Lang, *To Love the Babe that Milks Me: Infanticide and Reconceiving the Mother*, 14 COLUM. J. GENDER & L. 114, 129 (2005); see also Shannon Farley, *Neonaticide: When the Bough Breaks and The Cradle Falls*, 52 Buff. L. Rev. 597, 604-05 (2004).

explanations for women killing children.⁵¹ The current tendency to heavily prosecute women suspected of harming or killing children in their care demonstrates a drastic shift in societal attitudes. Now, as discussed, society tends to assume that a woman who kills a young child must have been insane or evil, ignoring any potential socioeconomic explanations for killing a child, and often completely foregoing the possibility that a woman did not kill the child at all.⁵²

A. *Media Coverage and Public Perceptions on Crime and Punishment*

In this media age, the public at large often hears about an alleged crime even before a suspect is in custody. When a suspect is apprehended, that person's identity is immediately made known to the public. Crime stories presented by the media and by others tend to perpetuate social stereotypes, and affect how defendants are perceived and treated.⁵³ This may negatively skew the opinions of potential jurors, making it very difficult for a defendant to prevail in his or her case.⁵⁴

The media reports violent crime at a disproportionately high rate compared to other events.⁵⁵ This disproportionate coverage of violent crime alters public perceptions of likely offenders, thereby helping to develop the stereotypes of criminals that are prominent in our society.⁵⁶ Prosecutors are additionally under pressure to solve crimes committed against children, and as noted later, fall into the trap of using stereotypes to form theories of their cases.⁵⁷ Therefore, women

⁵¹ *Lang*, *supra* note 50, at 129.

⁵² *See supra* notes 38–49 and accompanying text.

⁵³ Abby L. Vandenberg et al., *What's the Story? The Impact of Race/Ethnicity on Crime Story Tone for Female Offenders*, in PERCEPTIONS OF FEMALE OFFENDERS: HOW STEREOTYPES AND SOCIAL NORMS AFFECT CRIMINAL JUSTICE RESPONSES 47, 49–50, 68 (Brenda L. Russell ed., 2013).

⁵⁴ *Id.* at 68; *see* Janelle M. Eliasson-Nannini & Deirdre Sommerlad-Rogers, *The Social Construction of Serial Murder Victims: A Multivariate Level Analysis*, in THE HARMS OF CRIME MEDIA: ESSAYS ON THE PERPETUATION OF RACISM, SEXISM AND CLASS STEREOTYPES, *supra* note 38, at 38, 48.

⁵⁵ Vandenberg et al., *supra* note 53, at 49.

⁵⁶ *Id.*

⁵⁷ *See* VAN WORMER, *supra* note 28, at 94 (discussing how prosecutors may use stereotypes of women to appeal to the jury); Molly Gena, Comment, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions*, 2007 WIS. L. REV. 701, 726; Maria Elizabeth Grabe et al., *Gender in Crime News: A Case Study Test of the Chivalry Hypothesis*, 9 MASS. COMM. & SOC'Y 137, 142 (2006) (suggesting that stereotypes about motherhood provided a tactical advantage for prosecutors).

who are falsely accused of committing crimes against children not only fight their legal charges, but also fight to overcome an immediately negative public and institutional opinion of them as women.⁵⁸

Crime stories involving female suspects in general receive more attention than crime stories involving male suspects.⁵⁹ Grabe and colleagues found women accused of violent crimes are more likely than women accused of nonviolent crimes to (1) appear on the front page or main section of a newspaper, (2) be featured as a lead story in the publication, (3) have larger headlines, (4) receive more days of coverage, and (5) have their photographs in the media.⁶⁰ In addition, when compared to women accused of committing other crimes, stories about women perpetrating crimes against children were substantially more likely to (1) appear on the front page of the newspaper (1.0% versus 7.5%), (2) appear with a photograph (3.0% versus 21.8%), (3) be featured as a lead story (0.5% versus 3.6%), and (4) be in the main section of the paper (65.2% versus 84.6%).⁶¹ This is true despite statistical evidence that men are convicted of infanticide at least as often as, if not more often than, women.⁶²

The media was more likely to explain the actions of women accused of committing crimes against children by citing individual flaws than it was to explain the actions of women who committed other crimes or men who committed crimes against children.⁶³ Further, while women accused of committing crimes against children were never framed as being motivated by societal causes, the media used a societal framework to tell the stories of women who committed other crimes.⁶⁴ The Grabe study also found that violent crimes allegedly committed by females received more prominent news coverage than violent crimes where the alleged perpetrator was male.⁶⁵ Furthermore, journalists were far more likely to conjecture about a

⁵⁸ Vandenberg et al., *supra* note 53, at 68; see VAN WORMER, *supra* note 28, at 81 (“If women who murder their spouses are considered an anomaly, women who kill their children are regarded as downright monsters.”).

⁵⁹ See Vandenberg et al., *supra* note 53, at 67; Whiteley, *supra* note 38, at 96.

⁶⁰ Grabe et al., *supra* note 57, at 149.

⁶¹ *Id.*

⁶² ALEXIA COOPER & ERICA L. SMITH, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 1, 7 (2011) (noting that thirty-three percent of children under the age of five were killed by their fathers and thirty percent were killed by their mothers); Rapaport, *supra* note 45, at 529.

⁶³ Grabe et al., *supra* note 57, at 150–51.

⁶⁴ *Id.* at 150.

⁶⁵ *Id.* at 151.

woman's motivations for the criminal act than they were for a male suspect, suggesting a belief that female violence needed more of an explanation than did male violence.⁶⁶

We have already discussed the typical stereotypes applied to women accused of killing children and loved ones before they even go to trial.⁶⁷ Historically, two theories have applied to the public perception of how to punish these women. One theory is the chivalry theory.⁶⁸ The other is the evil woman theory.⁶⁹

Under the chivalry theory, women are stereotyped as the weaker, more passive sex, and therefore deserve a lighter punishment for their bad acts.⁷⁰ Generally, the chivalry theory is used to explain why fewer women are sentenced to death than men.⁷¹ The chivalry theory certainly clarifies historical interpretations of violence by women. For example, at least one discussion of women and crime claimed that women were capable of committing violent crime *because of* the feminist movement and women's strides towards equality with men.⁷² Another author noted that an increasing number of female arrests for assault in certain states showed women were committing an "impressive" number of assaults, and the arrests for those assaults were increasing at a faster rate than men.⁷³ These comments demonstrate the expectation that women are passive, so it is unusual or "impressive" when women are accused of committing violent crimes.

While the chivalry theory potentially explains some of society's thoughts on female offenders, its applicability seems limited. For example, at least one author has questioned its applicability to

⁶⁶ *Id.* at 151–52. For example, women accused of committing violent crimes were almost twice as likely as men to be framed as acting from "self-interested individual-level motivations." *Id.* at 151. In other words, these women were framed as acting out of individual motivations such as revenge or psychological instability rather than acting out of sociostructural motivations such as poverty or sexism. *Id.* at 142.

⁶⁷ See *supra* text accompanying notes 30–49.

⁶⁸ Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. 91, 112 (1983).

⁶⁹ *Id.* at 112, 115.

⁷⁰ See Nagel & Hagan, *supra* note 68, at 112–13; Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 66–67 (2012); Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1418 (1997).

⁷¹ See Shatz & Shatz, *supra* note 70, at 84–87; Carroll, *supra* note 70, at 1148.

⁷² See HELEN BORITCH, *FALLEN WOMEN: FEMALE CRIME AND CRIMINAL JUSTICE IN CANADA* 62 (1997).

⁷³ CORAMAE RICHEY MANN, *WHEN WOMEN KILL* 7 (David Luckenbill ed., 1996).

punishment for family and other intimacy murders.⁷⁴ Other scholars have asserted that chivalry is only afforded to women who conform to the traditional notion of passivity and obedience to men, and when women are seen as unfeminine they are treated more harshly than women who stay within the bounds of “womanhood.”⁷⁵

Ultimately, the only arena in which the chivalry theory appears to apply consistently to women accused of committing violent crime is with regards to the death penalty.⁷⁶ Women convicted of capital offenses have always been less likely to receive death sentences than men convicted of the same crimes.⁷⁷ The fact that only two known female death row exonerees⁷⁸ exist amongst the many innocent women convicted of capital murder highlights the potential applicability of this theory. However, the number of female exonerees overall shows the chivalry theory does not necessarily apply when women are accused and convicted of crimes that defy the evidence.

Some might argue that the “evil woman” theory better explains women’s wrongful convictions. Under this theory, a woman no longer deserves to be treated as a woman when she commits violent crime; therefore, she deserves even harsher punishment for violating her social role.⁷⁹ So-called violent women have often been framed as irrational, emotional, just plain evil, or otherwise behaving outside the bounds of what society recognizes as “normal.”⁸⁰ This theory may apply regardless of whether the death penalty is on the table.⁸¹

In [any] given trial, a woman[’s] . . . failure to conform to traditional notions of womanhood may lead judges and juries

⁷⁴ See Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 508–11 (1990).

⁷⁵ See Cortney A. Franklin & Noelle E. Fearn, *Gender, Race, and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?*, 36 J. CRIM. JUST. 279, 281–82 (2008); Barbara A. Koons-Witt, *The Effect of Gender on the Decision to Incarcerate Before and After the Introduction of Sentencing Guidelines*, 40 CRIMINOLOGY 297, 299–300 (2002).

⁷⁶ Carroll, *supra* note 70, at 1418–20.

⁷⁷ See *id.* at 1419.

⁷⁸ The two female death row exonerees are Debra Milke and Sabrina Butler. See *22 Years on Death Row, Now She’s Free*, L.A. TIMES, Mar. 25, 2015, at 10; Maurice Possley, *Sabrina Butler*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3078> (last visited Apr. 20, 2015) [hereinafter *Sabrina Butler*].

⁷⁹ Carroll, *supra* note 70, at 1423.

⁸⁰ See Grabe et al., *supra* note 57, at 140; Bronwyn Naylor, *The ‘Bad Mother’ in Media and Legal Texts*, 11 SOC. SEMIOTICS 155, 170–73 (2001).

⁸¹ See Ryan Elias Newsby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 HASTINGS WOMEN’S L.J. 113, 115, 119 (2011).

to believe that she is more likely to have committed the offense with which she is charged, to impute a higher degree of *mens rea* to her criminal action, or to condemn her more harshly for criminal behavior.⁸²

The biological concept of motherhood, or woman as caregiver, has merged with the sociological concept of womanhood.⁸³ Thus, the mere thought of women harming children shocks the conscience because traditionally society has been reticent to accept a woman's behavior outside of her traditional feminine role.⁸⁴ Further, once society interprets that a woman has rejected that role, she is punished not only for her crime, but also for being unwomanly.⁸⁵ Thus, a woman accused of harming or killing a child or loved one in her care faces a distinct problem when mounting a defense. She is uniquely scrutinized by the public and by the criminal justice system not only to ascertain whether she committed the crime that she was accused of committing, but also to determine whether, by "allowing" a child to die, she should be punished for shirking her duties as a woman and as a natural caregiver.

B. Stereotypes in Interrogations and False Confessions

The influence of stereotypes and cultural perceptions of women is evident from the moment a woman becomes a crime suspect. We posit that law enforcement officers, consciously or unconsciously, use the bad woman stereotype and the female monster archetype to structure their interrogations of female suspects.⁸⁶ Eighteen percent of women exonerees falsely confessed to the crimes for which they were convicted.⁸⁷ In the cases of Nicole Harris and Sabrina Butler, their interrogators' reliance on these stereotypes both elicited and shaped their false confessions.

⁸² Chimene I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 38 (2002).

⁸³ Rogus, *supra* note 31, at 817.

⁸⁴ *Id.* at 803, 815.

⁸⁵ Keitner, *supra* note 82, at 70.

⁸⁶ Drizin and colleagues examine the application of cultural stereotypes in juvenile interrogations and note interrogators rely on cultural stereotypes about a "certain type" of person to generate a theory around why that person committed the crime in question. Steven Drizin et al., *Juvenile Justice Investigation: Narrative Contamination, Cultural Stereotypes, and the Scripting of Juvenile False Confessions*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 169, 169 (Allison D. Redlich et al. eds., 2014). The interrogators allow the stereotypes to influence the questions they ask in order to obtain a confession that corresponds with the stereotype. *Id.* at 176-77.

⁸⁷ See *Exoneration Detail List*, *supra* note 7.

Nicole Harris denied killing her son for over twenty hours of a twenty-seven hour interrogation before she gave in to the pressure to falsely confess.⁸⁸ Ms. Harris testified that the officer who interrogated her told her, “[Y]ou are pissing me off, I’ve been very patient with you, I’ve been very nice to you, and you are still sitting up here, you are lying to us . . . you know what, *you’re acting like a monster.*”⁸⁹ Other interrogators continued in this same vein saying they were “sick and tired” of Ms. Harris “lying,” echoing the threats to “turn this stuff over to the state,” and telling her to stop acting “like a *monster.*”⁹⁰ Before Harris gave her false confession, her interrogators told her they believed she got *angry* and strangled her son with a string.⁹¹ Throughout Harris’s interrogation she was bombarded with the accusation that she was a monster, clearly insinuating she was a bad mother.⁹²

This is how Sabrina Butler describes her interrogation:

When I got there, a detective yelled at me, “You know you killed your baby. *You stepped on him with your feet and smashed him on the floor.* You killed him.”

. . . .

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. People who say they would never sign a false confession have never been in my shoes.⁹³

Butler’s interrogators immediately made her out to be a bad mother, a monster who would “smash” her son onto the floor. In both cases these women’s interrogators directly articulate the stereotypes that are informing their theories of the women’s guilt. These examples demonstrate how societal expectations of women as nurturers and providers may cause an interrogator to judge a woman

⁸⁸ See *People v. Harris*, 904 N.E.2d 1077, 1080–81 (Ill. App. Ct. 2009); Maurice Possley, *Nicole Harris*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4202> (last updated June 13, 2014) [hereinafter *Nicole Harris*].

⁸⁹ Report of Proceedings at 87, *People v. Harris*, No. 05 CR 14415 (Ill. Sept. 29, 2010) (emphasis added) (on file with authors).

⁹⁰ *Id.* at 88–89 (emphasis added).

⁹¹ *Id.* at 91, 93.

⁹² See *id.* at 87; *Nicole Harris*, *supra* note 88.

⁹³ See Butler, *supra* note 4 (emphasis added).

accused of harming a child more harshly.⁹⁴

C. Courts and Punishment

Studies show that women who are perceived as gender inappropriate in court receive harsher sentences than women who appear more feminine in court.⁹⁵ This could be because prosecutors often emphasize a woman's masculine characteristics, or lesbianism if applicable, to turn jurors against female defendants, instead of relying solely on evidence that the woman committed a crime.⁹⁶ One study of women on death row showed that the media had portrayed the convicted women as "manly" and "man-hating" evil women.⁹⁷ Despite any chivalric inclination to "save" women from death row, after media vilification these women were sentenced to death.⁹⁸ These journalists tend to rely, at least in part, on attorneys to explain a woman's actions when she is accused of killing a child.⁹⁹ The attorneys who provide information to the journalists themselves perpetuate the "mad" and "bad" stereotypes of women who harm children in their care.¹⁰⁰ The same attorneys perpetuate these stereotypes to juries, as in the case of Kristine Bunch.

During closing arguments at Bunch's trial, the prosecutor told the jury that Bunch had not tried hard enough to save her son after a fire erupted in her home and that she had not shown enough remorse to the police after he died.¹⁰¹ The prosecutor also told the jury Bunch wanted to give up custody of her son a year prior, despite testimony to the contrary.¹⁰² None of these statements had any bearing on the elements of the alleged murder; they simply asserted to the jury that

⁹⁴ See *supra* Part IV.A.

⁹⁵ See JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* 166 (3d ed. 2007); VAN WORMER, *supra* note 28, at 94–95.

⁹⁶ VAN WORMER, *supra* note 28, at 95.

⁹⁷ Kathryn Ann Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, PRISONERS, VICTIMS, AND WORKERS* 249, 249 (Barbara Raffel Price & Natalie J. Sokoloff eds., 3d ed. 2004).

⁹⁸ *Id.*

⁹⁹ Barnett, *supra* note 39, at 416.

¹⁰⁰ *Id.* at 416–18.

¹⁰¹ Record of Proceedings at 1381–83, *Bunch v. State*, No. 16S00-9607-CR-00486 (Ind. Sept. 13, 1999) (on file with authors); ANDREW E. STONER, *NOTORIOUS 92: INDIANA'S MOST HEINOUS MURDERS IN ALL 92 COUNTIES* 63 (Lesley Bolton ed., 2007); Megan Fernandez, *When Will Kristine Bunch Be Free?*, *INDIANAPOLIS MONTHLY* (Jan. 16, 2014), <http://www.indianapolismonthly.com/news-opinion/when-will-kristine-bunch-be-free/>.

¹⁰² Record of Proceedings, *supra* note 101, at 1083–84, 1429; Fernandez, *supra* note 101.

Bunch was a bad mother. The jury subsequently convicted Bunch.¹⁰³ To add insult to injury, in sentencing Bunch to the maximum term of sixty years in prison, the judge accused her of only getting pregnant to receive leniency, stating: “I understand that you have arranged to have yourself impregnated . . . prior to the . . . trial. . . . [Y]ou thought it would work to your advantage somehow in this process. It will not. . . . You will not raise that child.”¹⁰⁴ Despite no reliable evidence that she committed a crime, Bunch lost not just one, but both of her children—for being a “bad mother” and an evil woman.

A more recent example of the harsh treatment of women by the criminal justice system is the case of Texas woman Hannah Overton. Overton was granted a new trial in September 2014, in connection with the death of her foster son in 2007.¹⁰⁵ Overton had four biological children, was in the process of adopting her foster child, and was pregnant when the foster child died.¹⁰⁶ The prosecutor in the case theorized that Overton had force fed her child enough salt to kill him, despite having evidence that the child might have had a neurological disorder which caused him to willingly ingest salt.¹⁰⁷ Overton was typecast as having lost control and having punished her son inappropriately.¹⁰⁸ The prosecutor made Overton out to be a villain of a mother, even conjuring images of the story of Cinderella, stating: “Andrew had an enraged mother who didn’t—I don’t think loved him the way that she loved her own biological children.”¹⁰⁹

Jurors convicted Overton because they believed she neglected to get her child medical help fast enough.¹¹⁰ In other words, Overton was convicted of being an inattentive mother, not for actually killing her child. Ultimately, Overton’s conviction was overturned based on expert testimony that Overton’s foster child was beyond help once he showed any signs of illness.¹¹¹ While the district attorney’s office initially announced its intention to retry Overton, it recently

¹⁰³ *Bunch v. State*, 964 N.E.2d 274, 279 (Ind. Ct. App. 2012).

¹⁰⁴ Record of Proceedings, *supra* note 101, at 1462; Fernandez, *supra* note 101.

¹⁰⁵ Juju Chang et al., *Texas Mother of 5 Freed After Spending Years in Prison for Foster Son’s Murder*, ABC NEWS (Dec. 16, 2014), <http://abcnews.go.com/US/texas-mother-freed-spending-years-prison-foster-sons/story?id=26186920&singlePage=true>.

¹⁰⁶ *Id.*

¹⁰⁷ *Ex Parte Overton*, 444 S.W.3d 632, 641, 646–47 (Tex. Crim. App. 2014) (Cochran, J., concurring).

¹⁰⁸ Chang et al., *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; *Overton*, 444 S.W.3d at 641 (Cochran, J., concurring).

¹¹¹ *See Overton*, 444 S.W.3d at 651–52.

dismissed the case after further review.¹¹²

V. NO-CRIME CASES: MARQUEE CHARGES OF WRONGFULLY CONVICTED WOMEN

We have established that when a woman is accused of child abuse or murder after the death of a child she is judged both societally and legally through stereotyped ideals of womanhood and motherhood.¹¹³ Because of these stereotypes, we have a cultural predisposition to suspect the female caretaker of wrongdoing when an infant or child suddenly and inexplicably dies.¹¹⁴ A logical connection can be drawn between our cultural predisposition to see women first and foremost as gentle nurturers, and its impact on the alarming rate at which women are wrongfully convicted when no crime has occurred. No-crime cases that have been uniquely susceptible to stereotype-driven theories include arson, shaken baby syndrome, and sudden illness or death.

A. Arson

Consider arson and the history of fire science. A 1955 publication on arson investigation included a section titled, “How to discover whether a female caused the fire.”¹¹⁵ The manual claimed to apply “the elements of female psychology” to make this determination, as female arsonists purportedly had certain traits in common.¹¹⁶ “Female fires tend to be a bit ‘childish,’ ‘silly,’ hasty, poorly planned . . . spur-of-the-moment, impulsive, and ill-considered jobs.”¹¹⁷ In that manual, Straeter and Crawford suggested that the fire investigator seek out women who seemed frustrated, women with “[]love and marital troubles,” pregnant women, shy women, and women

¹¹² Pamela Colloff, *Capital Murder Case Against Hannah Overton Dismissed*, TEX. MONTHLY, Apr. 9, 2015, <http://www.texasmonthly.com/daily-post/capital-murder-case-against-hannah-overton-dismissed>.

¹¹³ Melinda Cleary, *Mothering Under the Microscope: Gender Bias in the Law and Medicine and the Problem of Munchausen Syndrome by Proxy*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 183, 195–96 (2005).

¹¹⁴ Kirstin Kramar, *Coroners’ Interested Advocacy: Understanding Wrongful Accusations and Convictions*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 803, 805–06 (2006).

¹¹⁵ RAYMOND L. STRAETER & C. C. CRAWFORD, *TECHNIQUES OF ARSON INVESTIGATION* 110 (1955).

¹¹⁶ *Id.* As far as the authors can determine neither Straeter nor Crawford was a psychologist.

¹¹⁷ *Id.* at 111.

undergoing menopause.¹¹⁸ No such personality traits for fire setting are specifically mentioned for men. Over the course of the last fifty years fire science has changed, but as recently as the 1990s arson investigation was still considered “a mixture of art and science,”¹¹⁹ a dangerous combination for women accused of setting fires to kill loved ones.

Kristine Bunch was charged and convicted of arson in 1996 based on the findings of a state arson investigator that the two fires in her home had been started with liquid accelerant.¹²⁰ The investigator claimed the existence of “V” burn patterns on horizontal surfaces indicated areas where the fire was set.¹²¹ Ten years later, after fire science moved closer to science and further from art,¹²² forensic investigators determined that no accelerant had been found in the living room or the child’s bedroom, where the fire was supposedly started.¹²³ The cause of the fire should have been classified as “undetermined.”¹²⁴ Bunch was granted a new trial based on this evidence.¹²⁵ After she spent seventeen years behind bars for a crime that never occurred, the State of Indiana dropped the charges against her.¹²⁶ Sadly, because a child died while in Bunch’s care, the prosecutor has reserved the right to try her again.¹²⁷

Many unknown cases of wrongful convictions for arson, especially before the 1990s, may exist.¹²⁸ Experts in fire investigations have

¹¹⁸ *Id.* at 113.

¹¹⁹ Richard L. P. Custer, *Considerations for Arson Investigations in NFPA 921: Guide for Fire and Explosion Investigations*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE FORENSIC ASPECTS OF ARSON INVESTIGATIONS 31, 31 (1995).

¹²⁰ *Bunch v. State*, 964 N.E.2d 274, 279–80 (Ind. Ct. App. 2012); *see also supra* notes 1–3 and accompanying text.

¹²¹ *Id.* at 280.

¹²² *See Custer, supra* note 119, at 32.

¹²³ *Bunch*, 964 N.E.2d at 303; *see also Kristine Bunch, supra* note 1 (“[Bunch] was entitled to a new trial both because the evolving fire science met the legal criteria for new evidence and because the undisclosed [U.S. Bureau of Alcohol, Tobacco, and Firearms] evidence ‘directly contradict[ed] . . . trial testimony supporting fires originating in two places.’” (second alteration in original) (quoting *Bunch*, 964 N.E.2d at 304)).

¹²⁴ *Bunch*, 964 N.E.2d at 290.

¹²⁵ *Id.* at 304.

¹²⁶ *Kristine Bunch, supra* note 1.

¹²⁷ *Fernandez, supra* note 101.

¹²⁸ Marc Price Wolf, *Habeas Relief from Bad Science: Does Federal Habeas Corpus Provide Relief for Prisoners Possibly Convicted on Misunderstood Fire Science?*, 10 MINN. J.L. SCI. & TECH. 213, 227 (2009) (explaining that many individuals convicted of arson prior to the advent of new scientific advances may have been erroneously tried based on misunderstood science). Please also note that several other known cases of wrongful conviction exist whereby women were falsely accused of harming loved ones via arson. However, as this article focuses on women who are accused of killing children, the authors have not discussed those cases here.

estimated that numerous individuals have been erroneously convicted of arson where fires might have been accidental.¹²⁹ Given the criteria used against women for several decades, numerous cases of women's wrongful convictions for arson have likely never been discovered.

B. Sudden Unexplained Illness

An innocent woman charged with child abuse or murder after the unexplained sickness or death of a child in her care is typically without an alternative explanation for what caused the harm.¹³⁰ In nearly all instances, in fact, she sought explanations or treatment to save the child.¹³¹ When no explanation can be found she faces both our cultural predisposition to find the woman responsible and our historical need to believe babies do not just die.¹³² In these cases, many women are condemned by imbalances in the criminal justice system both in terms of resources and gender bias.¹³³

Most wrongfully convicted women were indigent at the time of conviction.¹³⁴ They were at the mercy of overworked, underfunded public defenders or solo practitioners, who were not in a position to investigate the complex issues involved in these cases or to consult experts for alternative explanations for the harm.¹³⁵ On the other hand, the state was unencumbered by restrictive finances and developed a theory of violent child abuse with support from the state forensic lab, scientists, and doctors.¹³⁶ This theory played into the fact finder's repulsion for the idea of women violating their duties as nurturers, resulting in convictions that were wrong.

Two examples of women falling victim to this imbalance in the system are Hannah Overton and Sabrina Butler. Both cases highlight the intersection between the cultural pressure to harshly condemn women seen as acting outside the norm of being a nurturing

¹²⁹ *Id.* at 227–28.

¹³⁰ See Pamela Colloff, *Hannah and Andrew*, TEX. MONTHLY, Jan. 2012, at 108, 155–57.

¹³¹ *Id.* at 156; Butler, *supra* note 4; see Alexandra Gross, *Yvonne Elridge*, NAT'L REGISTRY OF EXONERATIONS (Sept. 28, 2012) <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3999> [hereinafter *Yvonne Elridge*].

¹³² See Kramar, *supra* note 114, at 805–06.

¹³³ See Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 897 (2008); Colloff, *supra* note 130, at 157, 160; Butler, *supra* note 4; *Yvonne Elridge*, *supra* note 131.

¹³⁴ See Findley, *supra* note 133, at 929–30.

¹³⁵ *Id.* at 930.

¹³⁶ *Id.* at 929–31.

mother and the power of the State's forensic machine.

Once it was clear Overton was going to be charged with her son's murder, the Overtons' church raised the money to retain a defense attorney for her.¹³⁷ Overton's attorney contacted the prosecutor and the two agreed the State would notify the Overtons when the warrants were issued so they could turn themselves in.¹³⁸ Instead, the State made a dramatic felony traffic stop with guns drawn and Overton's mug shot was on every local news station by that evening.¹³⁹ *Texas Monthly* journalist Pamela Colloff wrote: "The most unsettling aspect of *The State of Texas v. Hannah Ruth Overton*, which got under way in August 2007, was how effectively a woman who had spent most of her life as a do-gooder could be recast as a *monster*."¹⁴⁰ Two nurses, a phlebotomist, two paramedics, a medical examiner, and a pediatric critical care specialist testified for the State.¹⁴¹ Overton had *one* defense expert who offered a variety of logical possibilities for the cause of Overton's son's death, other than child abuse.¹⁴² Overton lost, and she spent seven years in prison as a result.¹⁴³

Sabrina Butler was at home with her nine-month-old son when he stopped breathing.¹⁴⁴ She rushed the boy to her neighbor who helped her perform CPR, which she did all the way to the hospital.¹⁴⁵ The emergency room doctors could not save the boy.¹⁴⁶ Butler was arrested the next day and charged with murdering her son.¹⁴⁷ She was bullied and yelled at until she confessed.¹⁴⁸ The state forensic experts told the jury the baby's injuries were consistent with abuse.¹⁴⁹ The prosecution repeatedly told the jury Butler's son died because she punched him in the stomach.¹⁵⁰ Butler was sentenced to

¹³⁷ See Colloff, *supra* note 130, at 158.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.* at 158–59.

¹⁴² *Id.* at 160.

¹⁴³ Chang et al., *supra* note 105; see Pamela Colloff, *Hannah Overton's Capital Murder Conviction is Overturned*, *TEX. MONTHLY*, September 17, 2014, <http://www.texasmonthly.com/story/hannah-overton%E2%80%99s-capital-murder-conviction-overturned/page/0/1>.

¹⁴⁴ *See* Butler, *supra* note 4.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Butler v. State*, 608 So. 2d 314, 316 (Miss. 1992); Butler, *supra* note 4.

¹⁴⁸ Butler, *supra* note 4.

¹⁴⁹ *Butler*, 608 So. 2d at 316.

¹⁵⁰ *Sabrina Butler*, *supra* note 78.

death.¹⁵¹ Five years later, she was exonerated after the court heard medical evidence that the baby had died from a genetic kidney disease, and the neighbors testified to performing CPR.¹⁵² However, to this day she still experiences public scorn for having been a “bad mother.”¹⁵³

C. *Shaken Baby Syndrome and Abusive Head Trauma*

Women’s wrongful convictions for shaking children in their care further represent how ideals about motherhood and women’s roles as caregivers can lead to wrongful convictions in no-crime cases. As of March 18, 2015, at least eight of the 139 women who have been exonerated in the United States (5.8%) were convicted under a theory of shaken baby syndrome (SBS).¹⁵⁴ Strong supporters of the theory still adamantly contend that shaking can cause the symptoms traditionally associated with SBS.¹⁵⁵ However, the science surrounding child head trauma has changed, such that many medical experts are abandoning the term “shaken baby syndrome” in favor of “abusive head trauma” (AHT), necessarily broadening the potential cause of the injury to recognize potential nonabusive causes of illness.¹⁵⁶ In addition, it is now generally agreed upon that a child may be conscious for hours or even days before symptoms are apparent, negating experts’ previous certainty that the last person with the child, often a female caregiver, caused the child’s injury.¹⁵⁷

Audrey Edmunds was convicted of shaking to death an infant in her care and spent eleven years in prison.¹⁵⁸ In 2008, the Court of

¹⁵¹ *Butler*, 608 So. 2d at 315; *Butler*, *supra* note 4.

¹⁵² *See Butler*, *supra* note 4.

¹⁵³ Sabrina Butler, Center on Wrongful Convictions Women’s Project Conference (Mar. 7, 2014). Butler was asked to leave a job bagging groceries because someone recognized her as “the woman who killed her child.” *Id.*

¹⁵⁴ *See Exoneration Detail List*, *supra* note 7.

¹⁵⁵ *See Gena*, *supra* note 57, at 707; Cassandra Ann Jenecke, Comment, *Shaken Baby Syndrome, Wrongful Convictions, and the Dangers of Aversion to Changing Science in Criminal Law*, 48 U.S.F. L. REV. 147, 149 (2013); Genie Lyons, Comment, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 UTAH L. REV. 1109, 1110–12.

¹⁵⁶ Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 17–22 (2009).

¹⁵⁷ *Id.* at 18; *see also* U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-14-1137, AMERICAN TIME USE SURVEY—2013 RESULTS 1, 7 (2014) (showing that women are nearly twice as likely to provide primary childcare as men).

¹⁵⁸ *State v. Edmunds*, 2008 WI App 33, ¶ 2, 308 Wis. 2d 374, 378, 746 N.W.2d 590, 592; Alexandra Gross, *Audrey Edmunds*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3201> (last visited Apr. 20, 2015); *Audrey*

Appeals of Wisconsin reversed and remanded her case for a new trial.¹⁵⁹ The Wisconsin court plainly stated that “newly discovered evidence in this case shows that there has been a shift in mainstream medical opinion since the time of Edmunds’s trial”¹⁶⁰ Researchers had reevaluated the possibility of lucid intervals following a traumatic event; therefore, Edmunds’s identity as a perpetrator was called into serious doubt.¹⁶¹

More recently, Jennifer Del Prete spent nearly ten years in prison following the death of an infant at the daycare where she worked.¹⁶² At her trial the court was convinced the prosecution’s SBS theory was sound.¹⁶³ In 2014, U.S. District Judge Matthew Kennelly released her on bond while the court reviewed the claims in her petition for habeas corpus.¹⁶⁴ After hearing evidence from medical experts on both sides of the SBS debate Judge Kennelly wrote: “This evidence gives rise to abundant doubt, not merely reasonable doubt, regarding Del Prete’s guilt.”¹⁶⁵

At the time of this writing, a county judge in Rochester, New York, reversed and remanded for a new trial Renee Bailey’s 2001 SBS conviction.¹⁶⁶ Bailey was convicted of second degree murder in the death of a two-year-old child at her in-home daycare.¹⁶⁷ Bailey maintains the child fell approximately eighteen inches off a chair and hit her head.¹⁶⁸ County Court Judge James Piampiano detailed the medical evidence presented by the defense and prosecution experts at Bailey’s 2014 evidentiary hearing, of which there were many.¹⁶⁹ Judge Piampiano wrote:

The Court concludes . . . that in light of current information available to the medical and other scientific communities, it is unlikely that the Prosecution’s experts at a new Trial would testify as adamantly, if at all, as they did in 2001, that Brittney’s injuries were the type caused by shaking, and that

Edmunds, *supra* note 5.

¹⁵⁹ *Edmunds*, 2008 WI App 33 ¶ 23, 308 Wis. 2d at 392, 746 N.W.2d at 599.

¹⁶⁰ *Id.* ¶ 23, 308 Wis. 2d at 391, 746 N.W.2d at 598–99.

¹⁶¹ *Id.* ¶ 15, 308 Wis. 2d at 385–86, 746 N.W.2d at 596.

¹⁶² *Prete v. Thompson*, 10 F. Supp. 3d 907, 909–10 (N.D. Ill. 2014); Jason Meisner, *Release Ordered in Day Care Death*, CHI. TRIB., Apr. 24, 2014, at 7.

¹⁶³ *Prete*, 10 F. Supp. 3d at 920.

¹⁶⁴ *Id.* at 909, 958; Meisner, *supra* note 162, at 7.

¹⁶⁵ *Prete*, 10 F. Supp. 3d at 957.

¹⁶⁶ *People v. Bailey*, 999 N.Y.S.2d 713, 727 (Cnty. Ct. 2014).

¹⁶⁷ *Id.* at 714–15.

¹⁶⁸ *Id.* at 715, 717.

¹⁶⁹ *Id.* at 717–23.

they were not the type caused by a short fall.¹⁷⁰

Following extensive study of SBS and the legal issues that surround it, legal scholar Deborah Tuerkheimer writes: “Given the scientific developments described, we may surmise that a sizeable portion of the universe of defendants convicted of SBS-based crimes is, in all likelihood, factually innocent.”¹⁷¹

VI. WHY STEREOTYPES ARE UNIQUELY DETRIMENTAL TO WRONGFULLY CONVICTED WOMEN

Once a woman is wrongfully convicted, reversing that conviction is remarkably difficult. Particularly in no-crime cases, there is rarely DNA evidence, which is the most direct and commonly understood method for successfully challenging a wrongful conviction.¹⁷² In the absence of DNA evidence, overturning innocent women’s wrongful convictions often requires them to prevail in a “battle of the experts” by presenting scientific evidence that was not available to them at the time of trial. Cases centered on still-evolving science require considerable time and resources.¹⁷³ Unlike DNA cases, where there is a definitive scientific test, in science-based, no-crime cases both the defense and the prosecution locate and hire experts to testify to divergent theories.¹⁷⁴ There are no definitive tests to determine that a particular woman did not shake a child, or set a fire, or cause a sudden unexplained illness or death. Thus, even after expending considerable costs and effort to prove one’s case based on science, ultimately the finder of fact simply decides which side it finds most credible a second time. Under these circumstances an innocent defendant is unlikely to prevail. Finally, in women’s cases where no crime actually occurred, the defendant faces the uphill battle of not only trying to prove her innocence, but also, oddly, trying to prove the nonexistence of the crime.

Given the expense and complexity of these cases, certain innocence projects will not even consider cases in which DNA evidence is not

¹⁷⁰ *Id.* at 726.

¹⁷¹ Tuerkheimer, *supra* note 156, at 22.

¹⁷² As of March 18, 2015, only five women had been exonerated based on DNA evidence. See *Exoneration Detail List*, *supra* note 7. Please note that, according to the National Registry, postconviction DNA was available in eleven women’s cases, but it was only essential to the exoneration in five of those cases. See *id.*

¹⁷³ See Tuerkheimer, *supra* note 156, at 15 n.91, 48.

¹⁷⁴ See *id.* at 15 n.91.

available.¹⁷⁵ Similarly, several conviction integrity units only accept cases in which DNA evidence is available for testing.¹⁷⁶ The difficulty of finding legal representation only compounds the struggle for freedom of a woman convicted in a no-crime case.

VII. CONCLUSION

Until researchers, law enforcement agencies, legal scholars, and practitioners in the field of wrongful convictions focus on the unique issues pertaining to women, many more female wrongful convictions are likely to fall through the cracks. This is particularly true in cases involving the deaths of children under unclear circumstances. While researchers and scholars have studied wrongful convictions in general, because of DNA cases, this has been a male-centered topic.¹⁷⁷ Other researchers specialize in women and crime, but few have reflected on the combination of these topics with regards to women.¹⁷⁸ Specifically, women's issues in wrongful convictions must become known to scholars and the general public in order for progress to be made.

Currently, steps can be taken to decrease the number of wrongfully convicted women moving forward. First, law enforcement should incorporate into interrogation training research-based findings on the role stereotypes play in investigations. Second, law enforcement should introduce into its training a consciousness of gender differences in communication. Such training would help to reduce confession contamination, and particularly the tendency to erroneously assume that if a child inexplicably dies a female caregiver must have committed a criminal act. The reduction in false confessions alone would alleviate the number of women wrongfully

¹⁷⁵ See, e.g., *How Can Someone Ask the Innocence Project to Get Involved in a Case?*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/How_can_someone_ask_the_Innocence_Project_to_get_involved_in_a_case.php (last visited Apr. 20, 2015) ("The Innocence Project does NOT review claims where DNA testing cannot provide innocence.").

¹⁷⁶ CTR. FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM 6 (2014), available at <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf>. Conviction integrity units (CIUs) are individual sections within district attorney's offices that were created to investigate claims of wrongful convictions within the districts' jurisdiction. *Id.* at 1. CIUs give defendants an outlet in which to bring their claims of wrongful convictions, outside of the formal legal process. See *id.*

¹⁷⁷ See Julie Krupa, *Innocent Until Proven Guilty: The Representation of Wrongfully Convicted Women*, 5 MCNAIR SCHOLARS RES. J. 93, 94, 122 (2012).

¹⁷⁸ *Id.* at 123.

convicted in no-crime cases.¹⁷⁹

Third, the criminal justice system must develop an awareness that once a woman is typecast as “mad” or “bad,” that stamp will follow her throughout the entirety of the criminal proceedings. Journalists use these stereotypes constantly, causing women suspects to be vilified in the eyes of the public. The use of these stereotypes by prosecutors lead finders of fact to convict and sentence women based not on their criminal culpability, but on behavior that is perceived to fall outside of gender norms. Finally, as the era of DNA exonerations is waning, innocence projects and conviction integrity units must start to give more serious consideration to cases that involve the complex issues found in the wrongful convictions of women.¹⁸⁰

¹⁷⁹ See *supra* Part IV.B. See generally Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (discussing the relationship between false confessions and wrongful convictions).

¹⁸⁰ To date, the Center on Wrongful Convictions Women's Project at Northwestern University School of Law is the only innocence organization dedicated to wrongfully convicted women. *About the Project*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/womensproject/about/> (last visited Apr. 20, 2015).