

“HOOCHIE”

“COLD,
HARD
WOMAN”

“IOWA WITCH”

“SPIDER”

“Crazy woman”

“JACKAL”

“Domineering
woman”

“hard core
lesbian”

“Sassed up”

“DIRTY
LITTLE
SECRET”

“NO SHRINKING VIOLET”

“SLUT PUPPY”

“BLACK WIDOW”

BEST PRACTICES IN
DEFENDING WOMEN
AND GENDER
MINORITIES



Cornell Law School

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Preface

You don't know what you don't know until it's too late to matter. I needed a lawyer who could see me beyond the charges, beyond the headlines, beyond the "Strong Black Woman" I'd been conditioned to project. That myth became my prison long before steel bars did.

I was taught that admitting being harmed meant admitting weakness, that vulnerability was failure. So, I built walls even against those designed to defend me. How do you build trust in a few half hour weekly lawyer visits? How do you unpack decades of trauma when your defense attorney cuts you off before you finish a sentence?

I will never forget the day my lawyer told me he couldn't "sell me as a victim" because I was "too articulate." As if my education, my ability to speak clearly, somehow erased the violence I had endured. They laughed when I suggested taking the stand. Actually laughed. "The prosecutor would have you for dinner," they said, especially about my medical history. I was told to never go in front of a Dallas jury knowing I had an abortion. It would be used to support "a pattern of violence." My own reproductive choices weaponized against me.

When I finally summoned the courage to tell my attorneys about being kidnapped and gang raped for three days at twelve years old, I was dismissed. "This jury would assume you're a liar or promiscuous," they said. A child victim, recast as a liar. The same happened when I shared how I sat in the backseat while my grandfather tapped his horn at a cop when the light turned green.

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The officer put a gun to my grandfather's head and asked, "You in a rush?" My grandfather replied "No sir," leaving me with a lifetime of mistrust toward law enforcement. Why would they believe that I would ever go to them for help? These experiences weren't seen as formative trauma but as inconvenient complications to my case.

My defense team's response to my history of abuse? "What's wrong with you that you keep attracting men who abuse you?" As if violence was my magnetic pull rather than a systemic reality for countless women. How was I supposed to self-advocate for concepts I'm just learning to unpack nearly two decades later? How could I articulate the intersections of race, gender, and trauma when I had normalized abuse as simply "part of being in a relationship"?

A gender-sensitive lawyer wouldn't have shamed me for my past. They would have recognized the patterns of victimization and control. They would have seen my "articulate" speech not as evidence against victimhood but as survival. They would have understood that my abortion wasn't a character flaw but a deeply personal choice made within complicated circumstances.

"This manual isn't academic theory, it's survival. It's the difference between a defense that reinforces harm and one that recognizes humanity. It's the recognition that gender-sensitive representation isn't optional, it's constitutionally necessary justice."

-Kwaneta Harris, currently incarcerated in Texas

INTRODUCTION: WHY DO WE NEED SPECIAL SKILLS TO DEFEND WOMEN?

The overwhelming majority of lawyers have never received training on how to defend women facing extreme sentences. Many of us have little experience providing gender-sensitive representation. As a result, we simply approach the cases of women as we would any other client. We overlook the fact that women's cases invariably require specialized knowledge and skills that most lawyers lack, and we do not know to ask the questions or seek the resources that will enable us to build such knowledge and skills. The outcome is simple: when we do not account for gender in women's cases, we lose out on opportunities to better connect with our clients, we misinterpret critical evidence, and we fail to uncover facts that are essential to effectively defend women.

This manual seeks to address the gaps in our collective knowledge, building on our years of research, advocacy, and litigation on behalf of women and queer clients. **Constitutionally adequate representation is the minimum requirement in our cases, and it requires gender-sensitive representation.** Gender-sensitive representation is the responsibility and the purview of the entire team. As such, this manual is intended for defense teams in the broadest sense—we write for attorneys, mitigation specialists, investigators, paralegals, social workers, grassroots organizers, experts, and other defense team members.

We provide best practices that build largely on our experience in the capital defense field. While some aspects of this guide will be most pertinent in the capital defense context, the contents are broadly applicable in non-capital cases, too. We encourage all advocates to familiarize themselves with the guidance, values, and client-centered approach to defense work expanded on herein.

Your client is your partner in this work. The narratives we construct in partnership with our clients and the relationships we build with clients, community members, and the broader ecosystem of allies are essential to transform criminal defense practice for women, queer, and gender diverse clients.

We begin with an overview, in Chapter 1, which can help you orient yourself with the information contained in this manual. We then turn to the basics, in Chapter 2: how to create a gender-sensitive team and build relationships of trust with your women and queer clients. We also provide a glossary of terms. When we discuss “women” in this manual, we include cisgender and transgender people, as well as nonbinary, gender diverse, and other queer people within the LGBTQ+ community.

In Chapter 3, we address the epidemic of gender-based violence, which affects nearly all of our clients' lives. We touch on some of the major myths and misperceptions about gender-based violence and the behavior of women who are in abusive relationships. We also provide guidance for discussing these topics with your clients. Chapter 4 moves on to address the importance of sexual and reproductive health in our cases. We provide pointers on developing a sexual history with your client and guidance on discussing topics that may, at first blush, appear uncomfortable or unnecessary to building a competent defense.

Chapter 5 addresses mental health issues that are commonly found in women’s cases. Every lawyer defending a client accused of a capital crime should have a strong grasp of the origins and symptoms of common mental illnesses and mental health challenges, including trauma-related disorders. This is especially true when defending women and queer clients. The great majority of women facing extreme sentences have experienced gender-based violence and a wide range of adverse childhood experiences. These experiences invariably lead to complex mental health challenges, and we must be equipped to understand the nuances and gender specificities of these mental health backgrounds. We must also expect to call on the assistance of experts to help us understand our client and her needs. Chapter 6 discusses the forms of expertise you should consider in women’s cases and provides guidance on working with experts.

In Chapter 7, we describe how conditions in jails and prisons often fail to protect women’s rights and even compound some of the mental health challenges that they experience. This chapter includes a section devoted to the rights of transgender prisoners, who are frequently deprived of essential medical treatment and suffer cruel and dehumanizing conditions of confinement.

Chapter 8 provides an overview of how women are treated in the criminal legal system. Women can be particularly vulnerable to aggressive police interrogation and may be subjected to sexual threats or violence in police stations and jails. Their experiences of trauma can also make them more likely to admit guilt. This chapter also discusses common prosecutorial narratives and gendered stereotypes in women’s trials. We must understand the prosecutor playbook, anticipate prosecutors’ use of gendered tropes, and take steps to prevent bias from infecting our client’s trials—or at the very least, object when prosecutors use such tactics.

We address the international legal framework for understanding women’s rights in Chapter 9. This chapter also provides guidance on how defense teams can use international human rights standards to advocate for their clients—including around her conditions of confinement—and to reframe the narrative. Relatedly, Chapter 10 addresses the importance of narrative construction, movement building, and media work in women’s cases.

We conclude by providing a bibliography and information about accessing resources such as sample documents and toolkits. Please email us at deathpenaltyworldwide@cornell.edu for further information about these materials.

01

OVERVIEW: CORE CONSIDERATIONS IN WOMEN'S CASES

What makes women's cases different? There is no straightforward answer to this question, as gender permeates all aspects of a case and must be incorporated into all aspects of the legal team's work. This said, a number of patterns in women's cases bear reflection at the outset of this manual, as they shape how we account for gender in our practice. We list five core considerations below.



1. Anticipate GBV

The first pattern to consider is gender-based violence (GBV). As discussed in Chapter 3, GBV is abuse directed at a person because of their perceived gender or violence that disproportionately affects people of a particular gender.¹ GBV is broad in scope and includes acts of sexual abuse, physical abuse, and psychological abuse.

GBV is ubiquitous in women's cases. Recent research reveals that at least 96% of women currently on death row have experienced one or more forms of GBV in their lifetimes before incarceration, and rates of GBV are similarly high among women facing other extreme sentences.² The perpetrators of such abuse are rarely strangers: women typically experience GBV at the hands of caretakers, including parents and parental figures, family members, and intimate partners.³ Abuse also occurs at all stages of women's lives, but is exceedingly common during childhood: over 80% of women on death row have experienced one or more forms of GBV before the age of 18.⁴

So what does this mean for our work? Our clients are overwhelmingly victims before they are defendants, and we must anticipate complex histories of abuse and attendant mental health challenges in our clients' backgrounds. Thorough, trauma-sensitive investigation is essential, as is educating ourselves and courts about various forms of GBV. Moreover, we must understand that GBV is often normalized; this affects how we engage with our clients about abuse and how we present such information to decision makers. Chapter 3 covers all of these topics in greater detail.

2. Become comfortable with speaking about sex

Legal teams representing women will need to discuss topics related to intimacy and relationships with the client, witnesses, and experts. Understanding the full picture of possible GBV in a client's background—including sexual abuse and coercive dynamics in interpersonal relationships—entails speaking with our clients about their sexual lives. Critically, women's sexual and relationship histories also provide essential information about their physical and mental health, potential disabilities, and intimate relationships, not to mention their gender presentation and sexuality. Added to this is the fact that prosecutors can make a women's sexuality a core component of her trial and subsequent legal proceedings. Being comfortable and open with the vocabulary of relationships, anatomy, and sex-related topics will serve you well, as discussed in Chapter 4.

3. Understand co-defendant, victim, and courtroom relationships

Core relationships that we must explore extend beyond the client's background and relationship history. Recent research has revealed distinct patterns in women's crimes of conviction, among their co-defendants, and with their victims. Multiple studies explain that women rarely kill strangers.⁵ Of the women currently on death row, two victim groups prevail: women convicted of killing their intimate partners and women convicted of killing children in their care.⁶ Studies also show that when capital-sentenced women have a co-defendant, that co-defendant is overwhelmingly male and frequently has abused the woman.⁷

Women are tried, convicted, and sentenced in courts that are dominated by men. In capital cases, for example, women are overwhelmingly prosecuted by men, defended by men, and judged by men.⁸ This means that men control women's narratives at every step of her case.

These patterns must inform defense strategy, encouraging us to—at a minimum—pay attention to all relationships at stake and ensure our teams are diverse and gender-sensitive. It is important to remember that simply having a woman on the defense team is not the same as providing gender-sensitive representation. All team members must educate themselves about forms of gender oppression and gender-based violence and must take steps to actively employ the mindset and skills that will enable them to identify critical facts relating to women's lives and alleged crimes. Gender is not just confined to the mitigation investigation, but permeates all aspects of our cases, including fact development and claim presentation. Understanding these patterns also helps us develop compelling narratives, as Chapter 10 explains.

Moreover, as we discuss in Chapter 8, these patterns offer insight into the kinds of offenses and narratives that prosecutors favor in women's cases. Consider that over 90% of women on death row have no prior violent convictions.⁹ If women are not sentenced on the basis of prior violence, what are jurors relying on?

4. Guard against prosecutorial narratives

A number of core themes dominate the prosecutor playbook in women's cases. Prosecutors frequently draw on gendered stereotypes and engage in biased narratives to secure women's convictions and sentences. Some common themes in the prosecutor playbook include casting women as manipulative liars, social climbers, and sexual deviants. These portrayals are all the more harmful when combined with stereotypes about race, socioeconomic status, and gender presentation. From presenting evidence about women's sexual behaviors, to arguing that women are poor wives and mothers, prosecutors encourage jurors to condemn our clients as bad women.

Prosecutorial narratives also seek to reframe women's histories of GBV to cast women as liars and attention seekers. Where defense teams introduce information about their client's history of abuse, prosecutors often discredit, dismiss, and minimize women's stories. We must anticipate and defend against biased prosecutions, as discussed in Chapter 8.

5. Check your own biases

Prosecutors are not alone in deploying racial, gendered, and other stereotypes to mischaracterize women's social histories. Defense teams lean into some of these tropes, too, particularly when crafting a mitigation narrative. Moreover, defense teams can struggle to understand—or misunderstand—their client and her life history if they do not adopt a gender-sensitive and racially-aware approach. None of us are immune to bias, and we must actively assess and fight our own biases. All team members should understand that we each bring our own life experiences, implicit bias, and worldview to a case, which can hinder our work. Be open to embracing what you don't know and seek support accordingly.

As explained in Chapter 2, building a racially just, gender-sensitive team is a great first step in this regard. There are an increasing variety of resources available for teams representing women, including this guide. We hope you find it helpful.

02

BUILDING A GENDER-SENSITIVE TEAM

Many of you reading this manual may be representing your very first woman or transgender person facing capital punishment or another extreme sentence. In this chapter, we will explain why it is critical for you to provide legal representation that is both culturally competent and gender-sensitive. Put differently, you and other members of your team must understand the ways in which a client's gender identity affects her experience within the criminal legal system.



Women (including cis-women, transwomen, and non-binary people) are subject to gender bias throughout their lives, including in their interactions with the criminal justice system. Gender affects their interactions with law enforcement, perceptions of the judge and/or jury, prosecutorial narratives, communications with the defense team; family obligations and dynamics; conditions of confinement; and potential for reentry.¹

A defense team must also be aware of how a woman or trans client's gender identity and expression has affected her life experiences, including, but not limited to the following:

- Family dynamics
- Education
- Military experience
- Medical health
- Mental health
- Employment, including in underground economies such as sex work
- Class, wealth, and income
- Access to transportation, health care, banking
- Discipline by caregivers, school staff, and institutional staff
- Prior incarceration, including in jails, prison, and juvenile facilities
- Sexual development
- Romantic and sexual relationships
- Pregnancy
- Gender-based interpersonal violence
- Gender-based institutional and state violence

The above areas are not exhaustive, as gender affects all areas of life. Ultimately, understanding the role of gender in a client's life experiences is critical to developing the narrative of a client's life and conveying that story in a culturally competent way that resonates with the decision-making body.

1. The ABA Guidelines

Since 2003, prevailing professional norms have required that defense teams be culturally competent in order to conduct a constitutionally adequate life history investigation. The 2003 ABA Guidelines (“the Guidelines”) provide the baseline for culturally competent capital defense representation and should be treated as the minimum requirements for capital defense work. They are also highly relevant to noncapital work, as they outline important practices in client-centered defense.

The Guidelines emphasize the importance of cultural competency to developing and presenting mitigating evidence, including mental health evidence. They explain the need to retain individuals “familiar with the cultural context by which the defendant was shaped,” the importance of identifying and overcoming “cultural and/or language barriers,” and the role of “culturally appropriate resources.”²

The 2008 Supplementary Guidelines further explain the role of cultural competency in the life history investigation and in obtaining a reliable mental health assessment: “Compiling a life history includes understanding the broader environment that affects the client and this requires gathering records and asking questions regarding culture, class, race and ethnicity, national origin, gender identity, sexuality, spirituality, and other factors.”³

Moreover, as the Supplementary Guidelines explain, “[t]his is not a tangential inquiry. . . . Identity profoundly affects how medical and mental illnesses are described and experienced by an individual and [her] community.”⁴ Therefore, “[t]he defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client’s life history,” including “religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.”⁵

While the requirement that the defense team be culturally competent applies to each and every member, the 2008 Supplementary Guidelines directly address mitigation specialists, who “must be able to identify, locate, and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information.”⁶ As both the 2003 and 2008 Guidelines make clear, cultural competence includes, and is not limited to, gender and sexual orientation.⁷ Indeed, Guideline 10.11 of the Supplemental Guidelines expressly directs the defense team to investigate “gender, sexual orientation, ethnic, racial, cultural, and community influences” as well as “political factors.”⁸

Additional resources also highlight the importance of cultural competence in capital defense. As Scharlette Holdman, a pioneering mitigation specialist in the capital defense field, explained: “cultural competency is essential to the ability of capital defense teams to discover and reveal the humanity of the accused”⁹ person. In an article, Holdman also referred defense teams to the National Association of Social Workers (“NASW”) Standards for Cultural Competence in Social Work Practice, which highlighted the need for cultural sensitivity with regard to “the development of gender identity and social orientation.”¹⁰

Cultural competence is also vital to developing rapport with the client. “Cultural differences affect and alter the relationship between a service professional and her client. They may obstruct the effectiveness of the professional’s work, and consequently, hinder protection of the client’s health, well-being, or legal rights.”¹¹ Moreover, “[c]ulture influences a client’s interaction with law enforcement during and after arrest, weighs on the reliability and voluntariness of a client’s statement, affects a client’s expressions of remorse, [her] conduct during incarceration or probation, [her] receptiveness to a plea opportunity, [her] understanding of judicial proceedings. . . [her] relationship to the defense team, [her] trust of authority figures, and [her] mental health evaluations. Culture also affects legal determinations of competency . . . and of the validity of confessions, waivers, and pleas.”¹²

Prioritizing cultural competence on the defense team also extends to identifying and retaining experts, which may include “[a]nthropologists, sociologists, and persons with expertise in a particular race, culture, ethnicity, and religion” and “[p]ersons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.”¹³ If the defense team lacks the requisite understanding, the defense team must be able to identify one or more individuals with the needed skills to assist the team. **Ultimately, understanding your client’s life, functioning, and navigation of the criminal justice system within a cultural context is the foundation for humanizing your client, which is the central tenet of capital defense.**

2. Assembling your Team

If you work in a jurisdiction where more than one lawyer is appointed to represent indigent clients, you should ensure that at least one member of the team is a woman who embraces feminist analyses of gender-based violence and oppression. Similarly, if you are representing a transgender or gender diverse client, someone on the team must be fluent in issues surrounding queer identities,

communities, history, culture, and specific needs and vulnerabilities of transgender clients. Being female or queer is not synonymous with providing gender-sensitive and culturally-competent legal representation, but clients may be more comfortable disclosing certain facts to a member of the team who has a deeper understanding of their experiences as a woman, trans person, and/or queer person. In addition, you should ensure that you seek assistance from gender-sensitive experts, investigators, paralegals, and others, as we discuss in Chapter 6.

If you are a sole practitioner (of any gender) and the court will not appoint more than one lawyer to defend your client, you can—and should—still provide gender-sensitive legal representation. You will need to know your limitations and take steps to overcome them. In particular, you should: (1) recognize the areas in which you lack expertise, education, or awareness; (2) seek support, consultation, and assistance from professionals in associated fields, such as mental health, who possess specific cultural knowledge and expertise; and (3) educate yourself and the court about the ways in which gender has shaped a client’s experiences.

3. Gender-sensitive and inclusive team dynamics

In addition to considering the role of gender in shaping your client’s historical and contemporaneous experiences, a defense team must also be sensitive to the role of gender identity and expression in team dynamics and client relationships. This requires self-awareness, open-mindedness, resistance to stereotyping, and a willingness to reconsider views that you have developed from your upbringing and culture.

Defense team members may have internal gender bias that hinders the development of trust and rapport with the client, effective communication within the team, and the ability of a client to assist in her defense. Gender bias can cause people to interrupt a female or trans client or team member; dismiss or invalidate a client’s lived experiences, concerns, or reactions; presume that a client is heterosexual; or rely on socially constructed and restrictive concepts of womanhood, motherhood, sexuality, or gender binaries to value or de-value a client’s experiences.

Such displays of gender bias can undermine the development of rapport with a client and within a defense team. They can also impair your ability to provide effective representation. You must constantly work to achieve self-awareness and accountability and encourage open dialogue within your team (including with your client) to overcome any internal bias that may lead to resentment or mistrust.

4. Intersectionality

A gender-sensitive defense team must also have an intersectional perspective that takes into account the way a client's gender identity and expression intersect with that client's race, ethnicity, nationality, language, class, ability, and sexual orientation, among other identities. In other words, it is not sufficient to evaluate the role of a client's gender alone, as a female or trans client's experience is shaped by other identities as well. For example, the experiences of a white female client in the criminal justice system may differ significantly from those of a client who is a trans person of color. Both clients have experiences shaped by gender, but they are also shaped by race and other intersectional biases.¹⁴

Similarly, a defense team member must examine their own internal bias through that intersectional lens. This bias is pervasive. In one study of incarcerated LGBTQ people in the U.S., over 50% of transwomen and nonbinary people reported feeling discriminated against by their defense attorney because of their gender identity and/or sexual orientation.¹⁵ Over 40% of that same group of LGBTQ respondents also felt that their attorney discriminated against them on the basis of race.¹⁶

Meeting the Needs of Transgender Clients Facing the Death Penalty: One Lawyer's Experience

I knew that getting a new client sentenced to death in the middle of a pandemic was not good. My impressions of the case were not unlike many of my other cases. An indigent person had received counsel who did not have the knowledge, time, or skill to represent their client properly. What made this case different, and so shocking, was that my client's trial lawyers had not even bothered to learn the gender of their client.

When I received my assignment, I did what I always did. I looked at the few available documents, looked my new client up in the corrections system, and drafted an introduction letter advising the client that I would be assisting them in their post-conviction appeals. Because it was in the middle of a pandemic, I also apologized to the client for not being able to meet in person. I addressed the letter to "Mr." John Friendly (not the client's real name).

The response I received back from my client was a friendly, but guarded, hand-written letter. The letter thanked me for letting them know that I would be assisting them, asked a few questions about

what that would mean, and asked a little bit about the process. The letter also expressed some skepticism at pursuing the appeals at all. At the end of the letter, the client also advised that she used female pronouns and would like to be addressed by her proper first name, Jane. Finally, the letter thanked me for my time and attention and was signed, Jane Friendly.

I immediately wrote back to my client and apologized for my assumption in using a male honorific. I advised that I would, of course, address her by her chosen name and asked if she had any other needs or preferences that she would be comfortable sharing. I addressed her legal questions and sent her the letter, thinking not much about it.

The response I received from her was overwhelming. She disclosed that she was shocked by my acceptance and response. That she had never before received that type of response when advising an attorney that she was female. In the past, she had been dismissed, advised that telling a jury that would be a wrong move, or simply ignored. She was profusely grateful and asked if we could schedule a call to talk.

During that initial call, she opened up so much and asked about her appeals and trial. She said that our response to her letter had convinced her that maybe she finally had someone who would fight for her. From there, Jane put her trust in our team, and we haven't looked back. Jane has told us that our advocacy helped her regain confidence and motivated her to fight for herself, and to want to live again. She has said that the simple act of compassion and kindness when responding to her request to be correctly gendered has stopped her from giving up hope and volunteering for execution. She calls her team of lawyers her real-life miracles.

INTRODUCTORY LANGUAGE

1. Gender and Sex

Gender:

Gender consists of socially constructed roles, behaviors, attributes, and other characteristics that a given society considers appropriate. Because gender is a social construct, gender varies from society to society and can change over time. Gender is also multidimensional and intersects other social categories and identities such as race, ethnicity, class, ability, age, and religion. Gender is frequently viewed as a binary concept of male/female, but many individuals, communities, and societies identify with more than two genders and/or view gender as a spectrum of expression. Gender interacts with but is different from biological sex.¹⁷

Gender stereotype:

A widely held, simplified, or essentialist belief about a group based on their perceived gender. It manifests as a set of characteristics, preferences, and roles that society not only associates with masculinity and femininity but also imposes as a normative expectation.

Sex assigned at birth:

A term referring to anatomical, physiological, genetic, or physical attributes and is typically categorized as male, female, or intersex. There are a number of indicators typically used in determining sex assigned at birth encompassing both primary and secondary sex characteristics, including external genitalia, internal reproductive organs, gonads, hormone levels, hormone receptors, chromosomes, and genes.¹⁸

Intersex:

Intersex is a term that refers to people who are born with physical or biological sex characteristics (including sexual anatomy, reproductive organs, and/or chromosomal patterns) that do not fit the typical and/or medical definitions of male or female. The term intersex reflects the biological variation of sex. For example, a person may be born with mosaic genetics, so that some of their cells have XX chromosomes and some of them have XY. Others may have external femaletypical anatomy but have mostly male-typical anatomy internally. This can be through variations in hormones, chromosomes, internal or external genitalia, or any combination of any or all primary and/or secondary sex characteristics. Many intersex people are recognized as intersex at birth, but many others are not and do not discover this until adolescence or adulthood. As intersex is about biological sex, it is distinct from gender identity and sexual orientation. Historical medical terms such as hermaphrodite are no longer acceptable or accurate and should not be used.

IDEOLOGICALLY-DRIVEN EFFORTS TO INSTITUTIONALIZE THE FALSE AND EXCLUSIONARY BINARY OF BIOLOGICAL SEX

For hundreds of years,¹⁹ there have been governmental, corporate, administrative, and cultural attempts to institutionalize binary constructions of sex in the United States. Most recently, President Donald Trump issued an Executive Order titled, “Defending Women From Gender Ideology Extremism And Restoring Biological Truth to the Federal Government.”²⁰ The text of this order defines “sex” as an “immutable biological classification as either male or female,” defines “female” as “a person belonging, at conception, to the sex that produces the large reproductive cell,” meaning the egg, and defines “male” as “a person belonging, at conception, to the sex that produces the small cell,” meaning sperm.²¹

To be clear, these definitions are scientifically inaccurate and oversimplified. As the American Society for Reproductive Medicine (ASRM) explains, President Trump’s Executive Order and subsequent actions constitute “[i]deologically driven attempts to redefine biological sex,” but “such proposals to define sex into two easily determined categories are unsupported by science and oversimplify the intricate nature of human biology.”²²

Moreover, the term “at conception” is misleading—if it refers to fertilization, then it is inaccurate because “internal reproductive organs don’t form at the time of fertilization,” instead “form[ing] much later in the development of the fetus.”²³ While fertilized eggs do have sex chromosomes that are “associated with certain developmental pathways – XX chromosomes with the development of female reproductive organs and XY chromosomes with male reproductive organs,” those chromosomes “do not always determine the reproductive pathway that the individual follows”²⁴ The ASRM provides scientific and medical explanations for “the complexity of biological sex,” pointing to considerations such as “atypical combinations of chromosomes” and variations in primary and secondary sex characteristics, even among individuals within the same chromosomal sex, and describing “a spectrum of outcomes due to variations in genetic and hormonal influences.”²⁵

Furthermore, the construction of a male-female sex binary is erroneous and exclusionary: “[S]cientists are in wide agreement that biological sex in humans as well as the rest of life on earth is much more complicated than a simple binary.”²⁶ As Professor Maurine Neiman explains: “We can find real exceptions in real people to whatever rules we might apply to define sex, whether it be sex chromosomes, the size of reproductive cells, hormone levels, internal organs, or genitals The executive order demands that we fit a spectrum into a nonexistent binary box.”²⁷

Regardless of the inevitable future shifts in culture and ideological positions in leadership, it is critical to understand that biological sex is a spectrum, that a binary approach necessarily excludes people of all walks of life—trans and cisgender people alike—who do not fall into arbitrary and intransigent classifications, and that such ideologically-driven definitions and constructs impact your trans and gender-expansive clients from birth to the courthouse.

2. Sexual Orientation

Sexual orientation:

A person's romantic, sexual, and/or emotional attraction to another person.

LGBTQ+:

An acronym referring to Lesbian, Gay, Bisexual, Transgender, and Queer individuals and/or communities. The "plus" sign includes other identities, such as pansexual or two-spirit. You may also see LGBTQIA, which includes Intersex and Asexual/Ally. Both acronyms are inclusive and acceptable, although some organizations may prefer one over the other.

Lesbian:

A term referring to a woman who is emotionally, romantically, and/or physically attracted to other women.

Gay:

A term used to describe people who are emotionally, romantically, and/or physically attracted to people of the same sex and/or gender. A person may identify as gay even though that person does not have any sexual experience or any sexual experience with a person of the same gender and/or sex. A person may identify as gay despite having previously identified as straight or heterosexual and/or having relationships with individuals of the opposite sex and/or gender.

Bisexual:

A term referring to a person who is emotionally, romantically, and/or sexually attracted to people of more than one gender, though not necessarily at the same time, in the same way, or to the same degree.

Queer:

An umbrella term used by some LGBTQ+ people to describe a sexual orientation, gender identity, or gender expression that does not conform to dominant social norms. Queer is not only used as a self-identification but may also be used to describe communities. Historically, the word "queer" constituted a negative or pejorative term for people who are LGBTQ+, and some individuals may find the word offensive.

Note: terminology and language varies over time, communities, and cultures. Attorneys representing queer women and trans clients must not only support each client's autonomy and self-identification, but listen and learn about the development of that identity.

3. Gender Identity and Expression

Gender identity:

A person's deeply felt, core sense of self in relation to gender (see Gender). Gender identity may or may not correspond to sex assigned at birth or to a person's primary or secondary sex characteristics. Because gender identity is internal, a person's gender identity may not be visible to others, and it is determined by self-identification. People become aware of their gender identity at many different stages of life, from childhood to adulthood, and a person may disclose their gender identity at different times and to some people, but not others. Gender identity is a separate concept from sexuality (see Sexual Orientation) and gender expression (see Gender expression).²⁸

Gender expression:

The manner in which a person communicates gender to others within a given culture, such as clothing, appearance, or mannerisms. All people have gender expression. This communication may or may not reflect a person's gender identity or sexual orientation. While many people's gender expression relates to social constructions of masculinity and femininity, there are countless combinations that may incorporate both masculine and feminine expressions—or neither (e.g., androgynous expressions).²⁹

Cisgender:

(pronounced sis-gender): A term used to refer to an individual whose gender identity aligns with sex assigned as birth.

Transgender:

An umbrella term describing the wide range of people whose gender identity and/or gender expression does not necessarily conform to their assigned sex at birth. Transgender people may or may not decide to transition socially or medically. Because transgender is an umbrella term, the term may refer to, but is not limited to, people who identify as transsexual, non-binary (identifying not exclusively as male or female), genderqueer, or gender nonconforming. See below for common acronyms and terms including female to male (or FTM), male to female (or MTF).

Non-Binary:

An umbrella term encompassing gender identities and expressions existing outside of the binary definitions of man or woman, masculine or feminine.

Gender nonconforming:

A self-identifying term used by some people to describe gender identities and expressions that do not adhere to the gender norms and roles commonly associated with sex assigned at birth. Related but not equivalent identities include gender-expansive, genderfluid, and genderqueer.

Two-Spirit:

A term used within some Native American and Indigenous communities to refer to a person who identifies as having both a male and a female essence or spirit. In some Native American and Indigenous communities, two-spirit people traditionally occupied a distinct, alternative gender status(es) and in some tribes constituted a third or fourth gender. Notably, there are hundreds of distinct Native American and Indigenous communities that encompass varying gender identities, expressions, and roles; there is no universal experience or culture and no universally used or accepted term. Non-indigenous people should not use this term.

ATTEMPTED ERASURE OF EXPANSIVE GENDER IDENTITIES AND EXPRESSION

President Donald Trump's 2025 Executive Order titled "Defending Women From Gender Ideology Extremism And Restoring Biological Truth to the Federal Government"³⁰ presents a framework for the concepts of sex and gender (as opposed to "gender identity") that falsely reifies the sex and gender binary to the exclusion of any gender diverse identities and expressions. Indeed, the Executive Order aims to entirely erase the concept of gender identity and expression, which broadly impacts anyone who doesn't adhere to strict normative stereotypes of how a "woman" and "man" should look, talk, act, work, emote, have sex, and infinite additional gender stereotypes, from the colors pink and blue to the gendered perfume counters. In seeking to eradicate the identities and lives of millions of gender non-conforming people, the Executive Order wields the term "gender ideology" to imply that individual identities and expressions that fall outside of the sex binary are motivated by a political belief system, rather than one's own intrinsic sense of gender and lived experience. Such a rigid understanding of gender is harmful to cisgender women as well as transwomen and non-binary people.

Even so, President Trump's policies are not original.³¹ Throughout US history, there have been attempts to impose this rigid concept of gender, but nothing can erase the existence of real people who identify and express themselves outside of these capricious and unyielding tropes. The implication for attorneys representing those who do not adhere to gender stereotypes is to be aware of historical and contemporary culture shifts and policies that target your client so that you may honor and affirm your client's gender identity and expression and anticipate and combat prosecutorial rhetoric that attacks your client's humanity in order to obtain a conviction and the maximum sentence.

4. Transition

Transition:

A term used to describe the process that a person undergoes to affirm a gender identity that is different from sex assigned at birth. This process may be a social transition, such as using new names, pronouns, or clothing; it may be a legal transition, such as legally changing one's name or gender markers on documents; it may be a medical transition, such as taking hormones or undergoing gender-affirming surgery. An individual may choose to undergo a combination of these processes, all of them, some but not others, or none at all. There are also financial and institutional hurdles that limit the ability of many people to transition. Many individuals choose not to or are unable to transition for a wide range of reasons both within and beyond their control. Importantly, the validity of an individual's gender identity does not depend on any social, legal, and/or medical transition; the self-identification itself is what validates the gender identity.

Deadnaming:

This occurs when an individual uses the birth name of a transgender or non-binary person who has changed their name as part of their gender transition. This may result in trauma, stress, embarrassment, and even danger.

Gender dysphoria:32

A concept designated in the DSM-5 as clinically significant distress or impairment related to a strong desire to be of another gender, which may include the desire to change primary and/or secondary sex characteristics. Not all transgender, non-binary, or gender nonconforming individuals feel gender dysphoria. Some jurisdictions, agencies, institutions, and/or practitioners require a diagnosis of gender dysphoria before providing gender-affirming services, such as gender-affirming health care and housing.

Gender-affirming health care:

Health care that holistically attends to a transgender or non-binary person's physical, mental, and social health needs and affirms that person's gender identity.

Gender-affirming surgery:

Surgical procedures that can help people adjust their bodies to more closely match their innate gender identity. Not every transgender or non-binary person will desire or have resources for gender-affirming surgery, and surgery does not define one's gender identity. Use this term in place of the older term sex change.

Hormone Replacement Therapy (HRT):

A type of gender-affirming treatment that allows transgender and non-binary people to medically transition or feel more at home in their bodies (see Gender-Affirming Surgery and Transition). Those taking testosterone (masculinizing hormones) may grow more facial/body hair and notice their voices deepening. Those taking estrogen (feminizing hormones) may experience a redistribution of weight, breast development, and a decrease in body hair.

Bottom surgery:

Surgery performed on an individual's reproductive system as a part of genderaffirming surgery. (See Gender-Affirming Surgery.) Transgender and non-binary individuals may or may not have the desire or resources to pursue bottom surgery. As with any other aspect of transition, trans people retain the right not to discuss their surgical history, and surgery does not define gender.

Top surgery:

Surgery performed on an individual's chest/breasts as a part of gender-affirming surgery. (See Gender-Affirming Surgery.) For some individuals who were assigned female at birth, top surgery may encompass a chest reduction or full removal. For some individuals who were assigned male at birth, this can be an increase in chest size using saline or silicone. Transgender and non-binary individuals may or may not have the desire or resources to pursue top surgery.

FTM/F2M:

An abbreviation of Female to Male; a transgender man.

MTF/M2F:

An abbreviation of Male to Female; a transgender woman.

5. Other Terms

Chosen family:

Individuals who support an LGBTQ+ person, who are not biologically related, and who may fill the role of that person's biological family if an LGBTQ+ person's family is not supportive.

Gender-sensitive:

Strategies, plans, and policies that recognize gender-based differences and aim to eliminate gender inequality.

Gender-based violence:

Violence directed towards a person based on their assigned sex at birth or gender identity and expression and grounded in unequal power relationships. It encompasses physical, sexual, verbal, emotional, and economic harm, including threats and coercion. It should not be conflated with "Violence against women," which excludes a broad understanding of gender.

Homophobia:

Interpersonal or institutional discrimination, bias, violence, or other negative attitudes or behaviors towards LGBTQ+ people due to their gender identities and/or sexual orientation.

Transphobia:

Interpersonal or institutional discrimination, bias, violence, or other negative attitudes or behaviors towards transgender, gender nonconforming, and non-binary people due to their gender identities and/or expressions.

Intersectionality:

The complex and cumulative effect of discrimination resulting from the combination of different marginalized forms of identity. Intersectionality theory is rooted in the work of U.S. Black feminist scholarship; the term "intersectionality" was originally coined by Kimberlé Crenshaw, who, when writing about the forms of legal discrimination that African American women experience, explains: "Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both." Other feminists have taken a broader approach to the concept of intersectionality. June Eric-Udorie, for example, argues that "[i]ntersectionality offers us a way to understand how multiple structures—capitalism, heterosexism, patriarchy, white supremacy, and so on—work together to harm women who are poor, disabled, queer, Muslim, undocumented, not white, or a combination of those things. Intersectionality is a way for marginalized women to talk about how their lives are affected by multiple oppressive structures..." Intersectionality theory highlights that a person's identity may compose of a multitude of marginalized identity markers, such as gender, race, ethnicity, sexuality, disability, religion, or class, to name a few.

03

GENDER-BASED VIOLENCE: MYTHS AND MISPERCEPTIONS

“Translating the law into a language she understands allows her to grasp the full impact of the harm she endured—and why and how the law should have protected her.”

-- Jhody Polk



Introduction

Gender-based violence is ubiquitous in all cultures. It affects women of all social and economic backgrounds, irrespective of ethnicity, race, age, and sexual orientation. Recent research has revealed that over 96% of women on death row in the United States experienced gender-based violence before their incarceration,¹ and rates of gendered abuse among incarcerated women serving other extreme sentences are similarly high.² Your client has likely experienced multiple forms of gender-based violence, so you must be prepared to engage with her about it and consider how her experiences affect all aspects of her case.

Gender-based violence is “violence which is directed against a woman because she is a woman or that affects women disproportionately.”³

Gender-based violence also includes violence directed against transgender and gender diverse people on the basis of their gender identity and expression. It encompasses a broad array of experiences, from spousal violence to online harassment. Gender-based violence causes lifelong damage, affecting survivors’ physical, mental, sexual, and reproductive health.⁴

Gender-based violence is endemic. Around 20% of women in the United States have experienced rape or attempted rape.⁵ Over one in three women have experienced intimate partner violence.⁶ Data on psychological forms of gender-based violence is still developing, but recent research suggests that it is the most common form of abuse in intimate partnerships.⁷ Indeed, some research suggests that around half of women in the United States experience forms of psychological aggression from an intimate partner.⁸ Other forms of discrimination, such as those on the basis of race, ethnicity, sexual orientation, class, and gender identity, magnify the harms of gender-based violence.⁹ Women who experience these intersecting forms of discrimination are more vulnerable to gender-based violence and less likely to receive support.¹⁰

The prevalence of gender-based violence is staggering in the criminal context: the great majority of women charged with serious offenses experience at least one form of gender-based violence before encountering the criminal justice system.¹¹ Almost all of the women on death row in the United States have experienced gender-based violence.¹² Of the women’s death row population, almost 90% experienced at least one incident of sexual or physical violence, and over 80% experienced at least one form of psychological violence.¹³ Moreover, over 80% of the women’s death row population experienced one or more form of gender-based violence while they were under the age of 18.¹⁴ For women of color, these figures are even higher.¹⁵

Even though gender-based violence is common in the lives of women on death row, many teams fail to build a comprehensive picture of gendered abuse in their clients’ lives. At CCDPW, we have found that even experienced defense teams often fail to delve deeply into women’s experiences of violence. Professor Sandra Babcock explains: “defense teams shy away from uncomfortable topics when it comes to gender-based violence—and in particular, sexual violence. Because teams are not asking the right questions, their client’s experiences of GBV remain hidden.”

The inescapable and overwhelming presence of gender-based violence in incarcerated women’s lives extends beyond death row. In a study of women serving life without parole sentences, one study remarks that “almost all who commit violence have first experienced it.”¹⁶ Another study of people serving life without parole for youth offenses found that 80% of women respondents experienced physical abuse, 77% experienced sexual abuse, and 84% witnessed violence in the home before their incarceration.¹⁷ A large proportion of women who are imprisoned for homicide offenses worldwide endure domestic violence, and many are imprisoned for killing their abuser.¹⁸ The data alone thus suggests that your client’s background will include multiple experiences of gender-based violence.

This chapter will help you begin to recognize and understand common forms of gender-based violence, including sexual abuse, psychological abuse and intimate partner violence. We begin with a discussion of why gender-based violence is important to your representation. We then move on to break down some common myths and misperceptions about gender-based violence, including different frameworks used to discuss intimate partner violence. Finally, in the Appendix, we provide practical guidance on speaking with or interviewing your client about these sensitive topics. Although conversations about gender-based violence are often among the most difficult you may have with your client, you have an important role to play in breaking the stigma around these topics, combating gender bias in the legal system, and giving your client a chance to tell her whole story.

1. Why does understanding gender-based violence matter?

Given the prevalence of gender-based violence in our clients' lives, all criminal defense teams must be equipped to understand the impact of varying forms of violence. Your client may not wish to share past traumas, she may not see her experiences as gender-based violence, and she may experience mental health complications as a result of abuse. Nevertheless, it is vital that you talk to her about her background.

Gendered abuse affects women in many ways. Significantly, abuse can have a prolonged and detrimental impact on women's mental health (see Chapter 5). These mental health complications can impair women's judgment and reasoning. The vast majority of women who use violence do so to defend themselves or their children, or to prevent an attack upon themselves or their children.¹⁹ But even if women act violently against someone who is not their abuser, their acts are often attributable to the violence and trauma they have experienced.²⁰ In this way, gender-based violence is often directly linked to your client's offense.

You must understand this link to provide your client with effective representation. Gender-based violence is relevant to issues of both guilt and penalty. Your client's experiences with violence will often provide information necessary for her full defense and mitigation of her sentence. Without a thorough understanding of these forms of violence, you risk overlooking important components in your client's defense. Moreover, you must educate legal actors—including judges, prosecutors, and jurors—on the effects of gender-based violence, its connection to your client's offense, and its centrality to mitigation. As discussed in Chapter 8, prosecutors weaponize women's experiences of gender-based violence against them to secure convictions and sentences. You can only respond to these arguments if you have a good grasp of the issues yourself.

Do:

- Read up on gender-based violence and understand the terminology.
- Be aware of how the judge, jury, attorneys, and investigators involved in the case may perceive your client and may attempt to portray her.
- Be aware of your own biases, whether conscious or unconscious.

Adopt a methodical approach to overcome them and work with gender-sensitive experts where possible.

2. Core terminology

Below, we outline some of the core terminology used throughout this chapter.

Gender-based violence (GBV)

Harm that is inflicted on a person because of their gender or gender expression, and harm that disproportionately affects people of a particular gender.

Violence against women (VAW)

Violence which is directed against a woman because she is a woman or that affects women disproportionately. The term is frequently used interchangeably with “gender-based violence.” Here, we use the term “gender-based violence” because it is inclusive of violence inflicted against gender-diverse people who may not identify as women.

Victim/survivor

Women who are subjected to gender-based violence are often referred to as “victims” or “survivors.” Neither term is perfect. Victimhood risks characterizing a woman who has experienced abuse as helpless, passive, and pitiful; survivorship strives to empower women and recognize strength, but also oversimplifies the range of reactions a woman may have to abuse. Moreover, not all women “survive” abuse. This chapter will typically refer to women who have experienced abuse as “victims” because this framing may be strategically helpful for litigation, and because legal systems may expect women to present as paradigmatic victims in order to recognize their experiences of abuse. Note that some women prefer one term over the other. If your client has a preference for how you refer to her experiences, you should respect her wishes.

Sexual violence

This includes all forms of unwanted activity of a sexual nature.²¹ Examples include rape (vaginal, oral, and anal), molestation, and forced nudity. The force involved does not have to be physical; someone may force another into sexual activity because of fear or by exploiting the victim’s age, illness, or incapacity.²² In cases of rape, penetration can be with a part of the perpetrator’s body or with an object. Sexual violence can be committed by a person of any gender on a person of any gender.

Physical abuse

This includes violence of a physical nature.²³ Examples include beating, whipping, and choking.

Psychological abuse

This refers to forms of abuse that leave mental and emotional scars on a person.²⁴ Examples include receiving death threats, being isolated from friends and family, being repeatedly told that you are worthless, and witnessing physical violence between parents. Many studies from the medical and social science fields now document how verbal abuse, isolation, and living in fear of harm have nefarious effects on women’s psychological health in ways that are comparable—and sometimes longer lasting—to the harm caused by physical and sexual forms of violence.²⁵

Socioeconomic abuse

This includes forms of abuse that have a financial impact on women.²⁶ This is most commonly observed in the context of domestic partnerships, when one partner controls the other's finances. The abuser may restrict their partner's access to money, control how she can spend money, and sabotage her access to resources that would give her financial independence.

Intimate partner violence

This term is frequently used interchangeably with "domestic violence." Intimate partner violence refers to gender-based violence directed at a person by their partner or former partner, such as a spouse, boyfriend, or ex-boyfriend. It can be perpetrated by a person of any gender, and the term encompasses many different forms of violence.

Coercive control

This term describes the constellation of behaviors used to restrain women's liberty and monitor their behavior—to establish control over her behavior. It is typically used in the context of domestic violence.²⁷ See part 4 below for more.

Battered Women's Syndrome

Battered Women's Syndrome refers to a psychological cycle resulting from domestic abuse. The term was coined by psychologist Dr. Lenore Walker in the 1970s. Dr. Walker theorized that abused women go through a cycle of three phases: the tension building phase, in which tension builds between a perpetrator and victim through low-level conflict; a battering phase, in which the tension grows to physical conflict; and a honeymoon phase, in which the perpetrator tries to win back the victim's affections.

In the United States, Dr. Walker's theory was incorporated into the legal understanding of domestic violence and continues to dominate courts' understanding of domestic abuse. Anti-violence advocates have since called the theory into question, though, for its characterization of domestic violence as an easily-identifiable cycle of physical violence, for its failure to capture the complexities of different forms of violence that can and do occur in a domestic partnership, and for its characterization of a domestic violence victim as a passive non-actor with no agency.²⁸ Battered Women's Syndrome characterizes women as fragile and passive, without accounting for survival actions they may take to protect themselves or their children. The cycle theory of violence is no longer widely embraced by domestic violence professionals, but it continues to influence the legal system.²⁹

3. Sexual violence: myths and misperceptions

This section will discuss some common misperceptions related to sexual violence. Sexual violence encompasses acts such as rape, attempted rape, unwanted sexual touching, and incest. Sexual violence can be committed by someone of any gender, against a person of any gender.

Sexual violence against women is a global health problem of epidemic proportions. Race, class, sexual orientation, gender identity and expression, and other factors influence the likelihood that a woman will be subject to sexual violence in her lifetime. Low-income women are more likely to suffer abuse than more affluent women.³⁰ National economic conditions also contribute to violence against women. In times of economic hardship, rates of violence against women increase.³¹

Women belonging to racial and ethnic minorities are also victimized at higher rates. Approximately 44% of Black women and 46% of Native American women will endure sexual abuse in their lifetimes, compared to 35% of White women.³² LGBTQ women face some of the highest rates of violence worldwide.³³ In 2020 alone, over 350 transgender people were murdered globally; of those killed, 98% were transwomen or transfeminine people.³⁴ In the US, people of color made up 79% of all transgender people murdered.³⁵ Women with psychological and intellectual disabilities are also subjected to higher levels of sexual violence.³⁶

Child Marriage

Women who are married before they turn 18 similarly face higher rates of victimization. Early marriage exposes girls to sexual violence by thrusting them into relationships with adults, who often expect sexual acts from their young brides for which they are neither physically nor emotionally prepared.³⁷ Child marriage thus increases the risk that the girls involved will have traumatic sexual experiences and will develop serious mental illnesses as a result of sexual violence (see Chapter 5).³⁸

Girls who enter into early and forced marriages are more susceptible to lifelong health complications because of their extreme vulnerability to sexual violence.³⁹ If your client was married, in a long-term relationship, or with a substantially older partner early in her life—and particularly before she turned 18—you should argue that this form of gender-based violence is a factor to consider at the penalty phase. You must also consider that she has a high risk of exposure to sexual violence and other forms of gender-based violence.

It is important for you to develop fluency with issues relating to sexual abuse. For example, many people conceive of rape as physically forcing someone into sexual intercourse with a stranger, but the diverse scenarios that constitute rape are much broader. Rape encompasses nonconsensual penetrative sex with intimate partners and husbands; it includes penetration of any orifice—including the vagina, anus, and mouth; and there does not have to be physical force involved. Thus, a man who forces his penis into a woman's mouth is raping her; it would be incorrect to say that she is "performing oral sex."

Some forms of abuse related to sex and reproduction are rarely discussed. Forms of sexual violence that disproportionately affect queer women in the U.S. but are poorly understood include "corrective rape,"⁴⁰ forced marriages,⁴¹ and state-sanctioned sterilization of LGBTQ people.⁴² Further, individuals who exercise direct control over a woman's reproductive choices are engaged in a form of gender-based violence. Sometimes termed "reproductive abuse," controlling a woman's pregnancy is linked to abusive domestic relationships, and often indicates that the victim is experiencing other forms of sexual violence.⁴³ Men can establish control over their partners' lives by interfering with contraceptive methods (such as removing a condom or confiscating her contraceptive pills), or forcing a partner to terminate or keep a pregnancy against her wishes.⁴⁴ If your client indicates that her reproductive decisions were not her own, then you should be alert for other signs of sexual or domestic abuse.

a. “Sex is a private matter”

Many of us grow up with the understanding that sex is a private affair and that all things relating to sex are private. In many cultures, speaking about sex is even considered shameful. This is particularly true of women, who often normalize the notion that their bodies and their sexual desires must remain hidden. For LGBTQ women, this stigma can even be even more difficult to overcome, especially in communities that are intolerant of same-sex relationships and gender diverse identities. As such, both you and your client may experience awkwardness, embarrassment, fear, and even shame when speaking about sexual activity.

These feelings, especially humiliation or discomfort, are only amplified when speaking about sexual violence. Many women internalize feelings of deep shame after a sexual assault. Your client may blame herself, feel unclean, or even refuse to see what happened as sexual violence. Many studies on rape have shown that women try to minimize what has happened to them.⁴⁵ It is, therefore, all the more important that you approach conversations about sexual violence, sex, and intimacy with great care. You must not add to your client’s feelings of shame and you must not become awkward or avoidant yourself. Chapter 4, on sexual and reproductive health, contains some tips on how to do this.

b. “She was asking for it”

The idea of the “perfect victim” is a myth. Some popular misperceptions about victims of sexual violence include the notion that certain clothing or behaviors give consent for sexual activity. A commonly-heard refrain around cases of sexual violence is that a woman was “asking for it” because she wore provocative clothing or flirted with her abuser. But victims of sexual abuse do not invite abuse. A woman’s choice of clothing and behavior has no bearing on any sexual violence she experiences.

For many LGBTQ+ people who are victims of gender-based violence, their very identity is used as a legitimate reason for victimization. In many communities, sexual violence against LGBTQ+ people is considered to be an appropriate corrective measure or a punishment for transgressing heteronormative norms.⁴⁶ In other instances, queer people are told that sexual violence is their fault, that they deserve it, or even that they must enjoy because of their sexual orientation or gender identity.⁴⁷

Prosecutors have also embraced the stereotype of the “perfect victim,” in other words, a woman who is meek, submissive, and non-violent.⁴⁸ The perfect victim is unable to take any action to save herself, and survival action (such as killing her abuser) is criminalized.⁴⁹ There are class, race, and sexuality implications that underpin the stereotypical victim. Women who belong to minority communities, such as sex workers, LGBTQ women, or women who are from certain racial groups, are often deprived of victimhood in the popular eye. As Leigh Goodmark writes, the stereotypical victim is a “passive, middle-class, white woman cowering in the corner as her husband prepare[s] to beat her again.”⁵⁰ Black women are deemed too strong or hypersexual to be victims; women in same-sex relationships are forgotten in conversations about sexual violence; poor women are not deemed worthy of protection.

The notion of the “perfect victim” is pervasive. Over the past 30 years, the public, the media, and the legal system have coalesced around this passive and non-violent stereotype of women subjected to abuse.⁵¹ This “perfect victim” is not representative of the vast majority of women subjected to abuse. But because that stereotypical victim is what judges, juries, and prosecutors expect to see, women who defy the stereotype are at a distinct disadvantage. A woman who kills does not correspond with the victim story that the public is conditioned to hear. As your client’s advocate, you must overcome the stereotype of victimhood and find a compelling way to present your client’s life experiences.

The case of Margaret Allen, who was on death row in Florida, illustrates the pernicious effects of intersectional discrimination that defense teams can fail to capture.

Ms. Allen, a Black woman, was repeatedly raped and assaulted throughout her life.⁵² Her parents whipped and beat her; her mother once held her head underwater in the bath when she was seven years old.⁵³ Multiple family members sexually assaulted Ms. Allen when she was a child.⁵⁴ At least three of her intimate partners beat her badly enough that she was hospitalized.⁵⁵ One of them choked her, beat her while she was pregnant, and hit her in the head with a hammer.⁵⁶ Another partner beat Ms. Allen so severely that when her aunt visited her in the hospital, “she was unrecognizable, had injuries to her face, could not get out of bed, and could not speak.”⁵⁷ Hospital records documented that she was once admitted with “human bites and facial and head trauma.”⁵⁸ A neuropsychiatrist at trial testified that Ms. Allen sustained multiple traumatic head injuries resulting in brain damage.⁵⁹

At trial, the jury heard no evidence of the childhood abuse she endured, and only a glancing mention that Ms. Allen had “been a victim of some sexual abuse” or a “possible sexual assault” at an undefined point in her life.⁶⁰ Her aunt testified briefly about some of the episodes of intimate partner violence she endured.⁶¹ In his abbreviated closing argument at the penalty phase, the defense did not even mention Ms. Allen’s victimization by her intimate partners, nor did he refer to her sexual abuse.⁶² Instead, he argued that she should not be put to death because of her “lifestyle,” because she was “living in the hood, so to speak.”⁶³ Rather than describing the mental health consequences of GBV, the defense repeated a theme introduced by the prosecution,⁶⁴ and stated that she grew up in a “culture” of “drugs, thugs and violence”⁶⁵ that was responsible for her character development.⁶⁶

Ms. Allen’s case illustrates that defense attorneys, like prosecutors, can infect a woman’s trial with intersectional bias. The defense attorney’s failure to explain why Ms. Allen’s experiences of childhood abuse, rape, and intimate partner violence were mitigating was in itself a complete dereliction of his duty to defend her. As a Black woman, Ms. Allen was less likely to be viewed as a victim of violence.⁶⁷ Given this reality, the lawyer’s failure to comment on her experiences signaled their irrelevance and cast further doubt on her credibility as a victim. In addition, his use of coded language invoked racist, dehumanizing stereotypes that increased the likelihood of a death sentence.⁶⁸

c. “She didn’t report it so it can’t be that bad”

There are many reasons why a woman may choose not to engage with law enforcement. As noted above, she may not view her experience as sexual violence, may be ashamed, or may be unsure about what happened. Many people also do not want the state to intervene in their sexual lives or relationships, especially when the abuser is someone known to the victim—as is overwhelmingly the case.⁶⁹ A woman is less likely to report an incident of sexual violence when she knows the perpetrator, sometimes through fear of the perpetrator, sometimes because she is socially or economically dependent on him, and sometimes because she loves him.⁷⁰ Black women, immigrant women, and queer people may also fear that they will be arrested if they call the police.⁷¹

Some women do not have access to the resources they would need to support them in reporting abuse. Women who are socially or geographically isolated may not see reporting as a viable choice because they cannot communicate easily with law enforcement or because they have no access to a support network, such as friends or professional services. In rural communities, the people a woman would go to in order to report abuse are people who know her or her abuser well. The abuser may be a respected leader in her community, or even a law enforcement officer. It can be difficult for women to bring such traumatic and personal experiences to authority figures whom she knows are close with her abuser.

Mistrust of the police can also be a powerful factor for a woman who chooses not to report. Police violence and discrimination against communities of color discourages people belonging to those groups from turning to the police for support in the wake of sexual violence.⁷² Moreover, police often minimize, disbelieve, blame or shame women who report sexual violence.⁷³ This is especially true for marginalized women—such as queer women, transgender women,⁷⁴ poor women, and women of minority racial and ethnic backgrounds.⁷⁵ Black girls are routinely “adultified,” meaning that society responds to and treats Black girls as though they are adults.⁷⁶ As a result, Black girls are perceived as needing less protection and nurturing than white girls, are seen as less innocent than their white peers, and law enforcement officials therefore are more skeptical of them as survivors. Where trust in the police is low and people fear asking the police for help—especially when people risk being arrested themselves when reporting sexual violence—victims are less likely to see reporting sexual violence to law enforcement as a viable option.⁷⁷ Moreover, victims may not want to see the perpetrator imprisoned for his offense, but that is often the only solution the criminal justice system can offer.

There are many reasons that a woman might choose to not speak of her experiences of sexual violence, much less report them. You must not judge your client’s decisions on this matter and nor can you draw any conclusions from them. Indeed, you should be prepared that your client may never have told anyone at all, and may not even view her experiences as sexual violence.

Do:

- Normalize talking about sex; approach topics relating to sexual violence sensitively (see Chapter 4 for more on this).
- Use language that your client is comfortable with to describe her experiences but remember that she may also normalize acts of sexual violence.
- Look for resources for your client to help her with the mental and physical health consequences of sexual violence.

Don’t:

- Expect your client to conform to stereotypical notions of the “perfect victim.”
- Dismiss your client’s experiences.
- Imply that your client was in any way to blame for her experiences of sexual violence.
- Draw any conclusions from your client’s decision to not report her experiences, speak of them to anyone, or choose to not cooperate with law enforcement or prosecutors.

4. Intimate partner violence: myths and misperceptions

This section will break down some common misperceptions relating to intimate partner violence, which is also commonly called “domestic violence.”⁷⁸ Intimate partner violence refers to abuse that occurs between people in or formerly in an intimate partnership, irrespective of the individuals’ gender. Intimate partner violence is particularly harmful because of where it happens and from whom it stems.⁷⁹ Our homes and our families are supposed to be places of safety. For many women and queer people, however, home is the most dangerous place they can be.⁸⁰

Intimate partner violence is an umbrella term that refers to a range of actions taken by one partner against the other. It can include physical and sexual abuse, isolation, intimidation, verbal threats, emotional manipulation, and economic abuse. Control is a critical motivating factor behind intimate partner abuse: one partner strives to restrain the liberty of the other partner and conform their behavior to the dominant partner’s expectations.⁸¹ The Power and Control Wheel is a visual tool that illustrates the range of abuses that can occur in an intimate partnership, especially psychological and socioeconomic forms of abuse, to exert control over the victim:



coercivecontrolcollective.org

The Wheel sets forth the range of behaviors that are used to obtain power and control over a partner. It situates the physical and sexual abuse that women experience within a broader context of controlling behaviors and stresses the intentionality of those mutually reinforcing behaviors.⁸²

Intimate partner abuse is a prevalent threat to women all over the world over. It affects people of all genders, though, at 85%, the overwhelming majority of victims of intimate partner violence are women and girls.⁸³ Women experience intimate partner violence at all ages—sometimes when they are barely teenagers—and victims of intimate partner violence tend to experience multiple forms of abuse.⁸⁴ And women with multiple marginalized identities, such as LGBTQ+ women and women of color, experience disproportionately high rates of domestic abuse.

For example, “domestic violence within LGB relationships is twice as prevalent as in heterosexual relationships” and “fifty percent of trans respondents stated that they had been assaulted or raped by a partner.”⁸⁵ Transgender people are uniquely vulnerable to domestic violence due to “social and legal rules governing gender identity [that] contribute to an abuser’s ability to isolate [their] victim,” as well as “conscious and unconscious transphobia of service providers.”⁸⁶

Criminalized women experience exceptionally high rates of intimate partner abuse. At least 74% of the women on death row have experienced abuse from a current or former intimate partner, including 63% of all women of color.⁸⁷ A recent study of women incarcerated for homicide offenses in California found that 74.2% of respondents had experienced intimate partner abuse.⁸⁸ Another large-scale study of women incarcerated in New York found that 75% experienced “severe” physical violence from intimate partners.⁸⁹ As one scholar writes, “[o]ur country’s jails and prisons are filled with battered women.”⁹⁰

Black women are particularly vulnerable to violence, especially where that violence comes from an intimate partner.⁹¹ For example, Black women are three times more likely to die at the hands of a current or former partner than women of other racial identities.⁹² When we also consider that Black women have less access to anti-violence intervention programs,⁹³ are more likely to distrust the police, and are consequently less able to seek help from state and nonprofit resources to protect them from harm,⁹⁴ a dangerous picture emerges. As the National Black Women’s Justice Institute explains, “Black women are arrested and incarcerated more often because Black women’s survival strategies are criminalized, including self-defense or being forced to engage in illegal activities by intimate partners or others who have harmed them physically and emotionally.”⁹⁵

a. “What happens in the home stays in the home”

Intimate partner violence occurs within families. There is a tendency to think that as a result, it is solely a family affair. Many cultures regard the home as within a person’s sphere of privacy, a space that outsiders should not interfere with. The criminal legal system has historically reinforced this notion, regarding intimate partner violence as a personal affair outside of the purview of the law.⁹⁶ But gender-based violence remains gender-based violence, even when it occurs in private spaces. When women experience violence in the home, we must recognize those experiences and the harm they cause.

If your client has experienced domestic violence, you must be able to speak about it with her. While there may be particular sensitivities involved in this discussion and you should be led by your client’s framing and terminology, as we discuss further in the next chapter, you should not avoid discussing abuse merely because it happened in her home or the abuser was a partner. Nor should you treat her experiences as any less severe because the perpetrator is her partner or former partner.

b. “She suffered no physical harm, so it is not domestic violence”

It is easy to fall back on thinking about intimate partner abuse as beatings and rape. The effects of physical violence are often clear to see and the concept of sexual violence is commonly understood by the public. The law follows this view of intimate partner violence, focusing on actual and threatened incidents of physical harm by one partner against another. But what about when a woman has not been physically harmed? In many relationships where domestic violence is present, there is no physical abuse at all.⁹⁷ Indeed, anticipating physical violence in intimate partnerships “masks the scope of most partner abuse and minimizes the harms it causes.”⁹⁸

Psychological abuse is very common in situations of domestic violence. Definitions of psychological abuse vary among experts; it can be verbal but can also involve actions intended to threaten or control the victim. American sociologist Richard Tolman has developed a publicly available tool to help understand women’s experiences of psychological abuse, the Psychological Maltreatment of Women Inventory (PMWI).⁹⁹ This tool asks women to indicate the frequency with which certain actions have occurred in their domestic relationships. The PMWI includes statements such as “My partner treated me like I was stupid,” “My partner withheld affection from me” and “My partner put down my physical appearance.” All of these actions can contribute to psychological violence. Many victims of abuse find psychological abuse to be the most harmful aspect of domestic violence.¹⁰⁰

Screening instruments for intimate partner abuse

Different tools exist to help assess the scale and severity of intimate partner violence. Working with experts who administer a screening instrument can help you understand your client's experiences and find compelling ways to present them to the court.

The Composite Abuse Scale is one such tool.¹⁰¹ This instrument is designed to screen for intimate partner abuse in adult relationships (defined by the tool as age 16 or above), and for partnerships lasting over one month. It presents respondents with a series of statements to which the respondent must answer yes or no. Statements include "My partner shook, pushed, grabbed, or threw me" and "My partner confined or locked me in a room or other space." If the respondent answers yes, she must then assess the frequency of the statement's occurrence on a scale of "once" to "daily."

The Danger Assessment is a tool that predicts a woman's risk of homicide from her intimate partner.¹⁰² The respondent answers a series of yes/no questions about her partner, such as "Does he own a gun?" and "Do you have a child that is not his?" Law enforcement agents and women's shelters alike have long used the Danger Assessment to assess the risks of intimate partner homicide.¹⁰³

Another instrument tailored specifically to psychological forms of abuse is the Psychological Maltreatment of Women Inventory (PMWI).¹⁰⁴ This tool presents a series of statements relating to psychological and emotional abuse and asks respondents to indicate whether they apply to her and the frequency with which they occur. This instrument can be particularly helpful with clients who may not conceive of their experiences as abuse and, therefore, normalize psychologically abusive actions.

An advantage of using tools such as the Composite Abuse Scale and Danger Assessment is that they are often used by law enforcement officers to screen survivors.¹⁰⁵ As such, it is hard for prosecutors to attack their validity. You should always speak with your experts about using screening instruments if you seek to present evidence about them in court.

These tools can provide valuable assistance in developing your client's history of intimate partner violence and presenting evidence of abuse to decisionmakers. Importantly, none of these tools replace the need for extended and trauma-informed conversations with your client about her experiences of abuse, as outlined in this chapter and elsewhere in this manual.

Economic abuse is another form of domestic violence. Economic abuse refers to tactics that control a woman's ability to acquire, use, and maintain economic resources, thus threatening her economic security and independence.¹⁰⁶ A perpetrator's actions constituting economic abuse might include cutting off a partner's access to money to pay for her daily needs, requiring a partner to request financial disbursements in order to pay for her or their children's needs, or preventing a partner from working and having her own income source. When a woman lacks economic security and financial independence, it is difficult for her to leave an abusive relationship or develop the financial literacy she needs to survive.

Control is a critical motivating factor in the abuse of domestic partners. The concept of coercive control refers to the constellation of behaviors an abuser uses to restrain a partner's liberty and monitor her behavior.¹⁰⁷ The primary outcome of coercive control "is a condition of entrapment that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity."¹⁰⁸ People often achieve control of their partners through non-physical means, such as intimidation, surveillance, degradation, shaming, and isolation. Intimidation is used to instill fear, secrecy, dependence, compliance, and loyalty in a victim by robbing her of psychological strength.¹⁰⁹ Surveillance—or a woman's belief that she is being surveilled—ensures that the victim is complying with the exercise of power from the abuser, deprives the woman of privacy, and isolates her from her family, friends, and sources of support.¹¹⁰ Degradation denies women self-respect, and isolation prevents women from disclosing their partner's behavior and from seeking help or support.¹¹¹ Look out for indicators of each of these factors when exploring your client's familial background. Be alert for signs that a woman's partner micromanages her everyday life

Coercive Control

Coercive control is a concept with which many advocates are unfamiliar, and therefore identifying it can be challenging. This is all the more so because the “vast majority of assaults used in coercive control are distinguished by their frequency and duration, not by their severity.”¹¹² Many of the assaults are normalized or downplayed, so neither the victim nor outside observers understand them as a form of domestic abuse—your client will be talking about pushes or being roughly handled, and less about a prolonged beating to the face or broken bones. Because coercive control is about a constellation of behaviors—many of them psychological in nature—that entrap women, the incidents of abuse are not taken seriously or ignored. When women then become increasingly fearful or unable to leave the relationship, they are the ones pathologized.¹¹³

It is important to emphasize *patterns* of abuse. Taken in isolation, “many tactics used in coercive control could typify a “bad” marriage. So it is critical to recognize that it is the combination of these tactics into a pattern of domination that comprises the offense, not the acts themselves.”¹¹⁴ When we reframe abuse as a pattern or course of conduct, we can begin to appreciate how a victim feels trapped, fearful, and isolated, even in the absence of “severe” episodes of abuse.¹¹⁵

Behaviors amounting to coercive control can be conceptualized in two primary categories: tactics deployed to “hurt and intimidate victims” (coercion), and tactics “designed to isolate and regulate them” (control).¹¹⁶ We provide examples of each below.

Intimidation and shame:

- Making humiliating comments, especially those associated with women’s default roles as mothers, homemakers and sexual partners. For example, criticizing how she dresses, cleans, cooks or performs sexually.
- Swearing at the victim.
- Ordering her around.
- Saying things to spite her; criticizing areas of her identity from which she draws selfesteem, such as cooking or child care.
- Branding the victim with tattoos, burns, or bites.
- Sexually degrading her, for example by ejaculating on her face if she is not comfortable with this behavior.

Isolation and regulation:

- Having the victim account for her expenses.
- Preventing the victim from contacting family members or friends.
- Preventing the victim from earning or managing her own money.
- Controlling her access to her children.
- Establishing rules for everyday living in the household, for example around how the carpet should be vacuumed or the programs that she can watch on television.
- Disciplining infractions of the rules.

Developing a full sexual and relationship history (see Chapter 4) can help you spot these more subtle forms of abuse, their frequency and duration in the relationship, and the impact on your client. If you think that your client may have experienced coercive control, we encourage you to seek the support of an expert (see Chapter 6).

c. “Why doesn’t she leave?”

One of the most asked questions of intimate partner abuse victims is “why didn’t you leave?” This common reaction is understandable in many ways; our instincts are to run away from harm. This question also stems, however, from a deep misunderstanding of the dynamics of intimate partner violence.

There are many reasons why a woman might choose to stay in an abusive relationship. Just because she stays does not mean that she likes the abuse or that it can’t be that bad. Many women do not leave because they know it will be more dangerous for them if they do. As dangerous as it is in an abusive home, it is almost always more dangerous to leave.¹¹⁷ **The majority of domestic homicides occur while the victim is trying to leave their abuser.**¹¹⁸

Other reasons why a victim of domestic violence may choose to stay with her abuser include fear, a belief that her partner will change, low self-esteem, stigma about leaving the relationship—particularly in cultures that look down on marital separations, and a lack of financial resources to manage on her own.¹¹⁹ Some women choose not to leave because of the children they share with the abuser, fearing that the children may come to harm, or that she will not be able to support them on her own.

Even if a woman wants to leave, she is not always able to. Low-income women, for example, often lack the economic resources—such as stable housing, work, childcare, and independent income—necessary to leave a violent relationship.¹²⁰ Similarly, some women are so geographically or socially isolated that they are unaware of or unable to access support services for women leaving abusive relationships. Transwomen may “feel even more dependent on her abuser for economic support” due to heightened workplace and housing discrimination.¹²¹

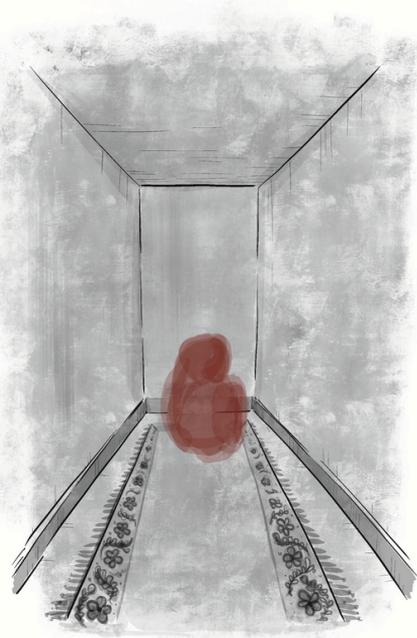
Do:

- Educate yourself on the many forms of intimate partner violence.
- Remember that intimate partner abuse is not always physical.
- Look out for indicators of controlling behavior by your client’s intimate partner.
- Engage with experts to inform your discussions with your client.
- Look for resources for your client to help her with the psychological effects of intimate partner abuse.

Don’t:

- Assume that domestic violence cannot happen in same-sex relationships.
- Avoid speaking about domestic abuse because it is within a family.
- Draw conclusions from your client’s decision to stay in an abusive home.
- Assume that the abuse cannot have been so bad if she did not call the police or seek help.

COMPETING LEGAL FRAMEWORKS



Courts' understanding of intimate partner abuse, particularly psychological abuse, is rapidly evolving. As legal actors, including judges, develop a greater understanding of how control and power are critical motivating factors behind GBV, they increasingly recognize non-physical and non-sexual forms of abuse that assert power and control over women's lives.¹²²

The concept of coercive control, for example, has seen legislative and courtroom recognition. The Oklahoma Survivors Act, for example, explicitly understands domestic violence to include psychological forms of abuse and coercive control and allows women seeking sentencing relief for homicide offenses related to domestic violence to base their claims on these forms of abuse.¹²³ In the criminal courtroom, a seminal 2019 case from the United Kingdom saw a British court become one of the first criminal courts worldwide to recognize the concept of coercive control and its psychological impact on women in

abusive relationships, drawing on evolving medical and social science research to reach its conclusion.¹²⁴

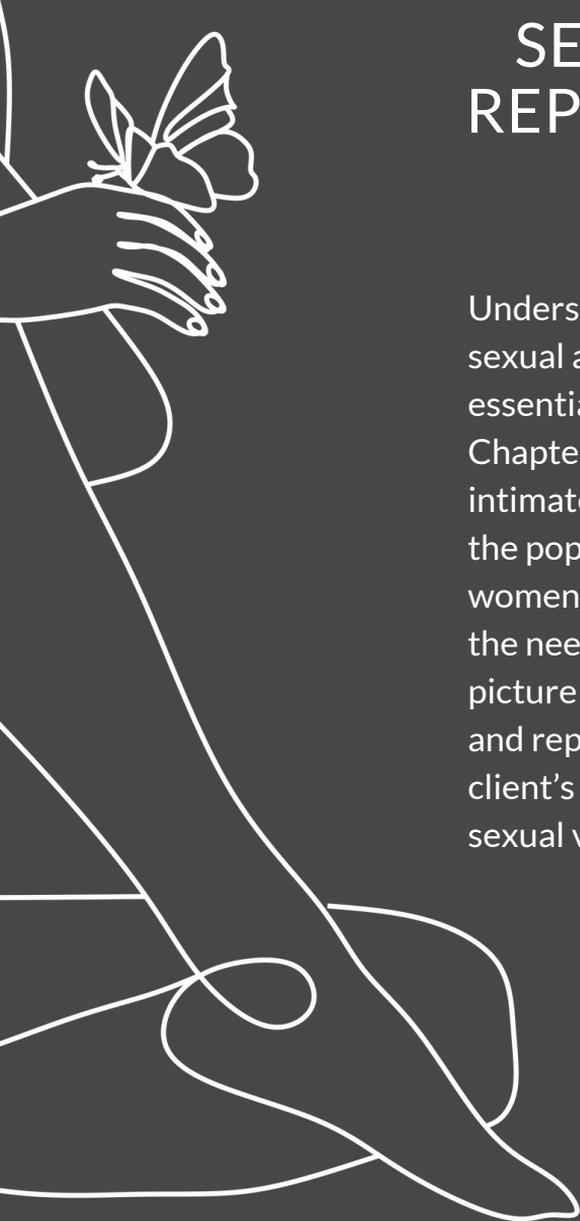
In speaking about intimate partner abuse in the courtroom, criminal defense lawyers have often drawn upon the concept of "Battered Women's Syndrome" ("BWS") to defend women accused of killing their abusive partners.¹²⁵ This concept evolved in recognition of the psychological distress that women experience when they endure intimate partner violence. BWS is classified as a psychiatric condition¹²⁶ that connects a woman's experiences of violence and her "deteriorating psychological state" to her "incapacity to perceive or utilize alternatives to [violence]."¹²⁷ While helpful in recognizing that a woman's experiences of intimate partner abuse (and gender-based violence more broadly), the BWS framework and its associated terminology no longer reflect experts' understanding of how abuse affects women. Critically, BWS fails to account for the impact of psychological abuse on women experiencing GBV. The BWS framework suggests that a batterer's physical acts—such as beatings and rape—affect a woman psychologically and make it difficult for her to regain control in a relationship, and divides abuse into three phases: tension building, violence, and contrition.¹²⁸ This reductionist model ignores the enormous impact that non-physical abuse has on a relationship, denies women agency in abusive relationships, and fails to appreciate that abuse—especially psychological abuse—is frequently ongoing, even if experiences of physical violence wax and wane.

A more appropriate model is the coercive control framework, which focuses broadly on the ways in which an abuser restricts a woman's liberty. As explained in this chapter, the coercive control framework acknowledges the impact of repeated patterns of abuse and the systemic nature of women's oppression. Emphasizing an abuser's patterns of coercion and control by restricting a woman's liberty acknowledges the toll of coercive relationships on a woman—even if she experiences no physical abuse—and the impact of constant coercive pressure outside of the three phases of the BWS approach.

04

SEXUAL AND REPRODUCTIVE HEALTH

Understanding your client's sexual and reproductive health is essential. As explored in Chapter 3, rates of sexual and intimate partner violence among the population of incarcerated women are exceedingly high. But the need to build a comprehensive picture of sex, relationships, and reproductive health in your client's life extends far beyond sexual violence.



THIS CHAPTER EXPLAINS WHY A BROAD EXPLORATION OF THESE TOPICS MATTERS, BEFORE EXPLORING HOW YOU CAN DEVELOP A RECORD OF YOUR CLIENT'S SEXUAL AND RELATIONSHIP HISTORY IN A SENSITIVE AND TRAUMA-INFORMED MANNER.

As a preliminary matter, our approach in this chapter is drawn from the capital defense field. In capital work, a forensic examination of clients' bio-psycho-social histories is both important and constitutionally required, and developing a sexual history is a vital component of such work. Non-capital teams may find that a detailed exploration of a client's sexual and reproductive history is not always appropriate. Nevertheless, we encourage all teams to familiarize themselves with the topics discussed below as it is always important to understand how your client's sexual history can affect her case, her presentation, and her relationship with her team.

Why does sex matter?

Sex, reproductive health, and relationships are an important component of our clients' lives. Societal norms continue to place a premium on women's chastity, police women's behavior and bodies, and regard women's reproductive health simultaneously as a matter for government regulation and as something to be ashamed of.¹ Women grow up with the understanding that their bodies are not just their own, but can variously be a source of public commentary, embarrassment, and power. In many cultures, women and women's sexuality are sinful.² Bodies and reproductive systems are all the more political for transgender, nonbinary, and gender diverse people; queer expression can be dangerous and even traumatic.³

Our clients are not immune from these societal norms. Rather, such norms apply with all the more force to incarcerated women and queer people, given their particular vulnerabilities and experiences of intersectional discrimination both before and during incarceration. Your client may have complex emotions about her body and relationships. She is overwhelmingly likely to have experienced abuse before incarceration, often linked to sex or relationships. Sex may have been a source of pain or a way of gaining an income. Her body is now controlled by the state and may be exploited by state actors in retraumatizing ways.

More subtle, though, is the myriad information that we can glean about all aspects of our clients' lives through discussions of sex, reproduction, and relationships. Conversations about menstruation and menopause provide critical information about women's physical and psychological wellbeing. Discussions about pregnancy and birth can help us unpack a woman's intellectual and adaptive skills, thereby supporting an Atkins claim. Understanding the complexities of a woman's relationship with her coercive co-defendant is essential fact development. In short: sex matters and these topics must be explored holistically.

We must also develop our clients' sexual and relationship histories to be well-equipped to resist state manipulation of these topics. Prosecutors have long understood the power of narratives around women's sexuality and relationships. As explained in Chapter 8, prosecutors frequently use sex to shame women, paint them as bad wives and mothers, and cast them as manipulative seductresses. Understanding the holistic picture of your client's sexual and relationship history is an important tool in resisting such portrayals.

You should build a comprehensive sexual and reproductive history as part of your representation. Whoever leads the development of the sexual history on the team, all team members will need to be comfortable with these topics and have a thorough understanding of them. Below, we cover how to approach topics related to sex, reproductive health, and relationships with your client. We also present a non-exhaustive list of themes that you should cover in the course of your representation and why they may be helpful.

Approaching these topics with clients and witnesses

The guidance below is intended primarily to be helpful for discussions with your client, as she is the foremost expert on her own life and sexual history. Inevitably, though, you will need to have discussions related to sexual and reproductive health with witnesses and experts, among others. These discussions may look different depending on the person you are speaking with and will necessitate some flexibility in how you approach the conversation. For example, the vocabulary you use when speaking with your client's OBGYN may be very different from the lexicon adopted in a trauma-informed conversation with your client. It is good practice for teams to discuss the issues presented below upfront so that the team member(s) leading these conversations is supported and intentional in their approach.

The considerations below are intended to supplement the guidance in Chapter 5 of this manual about trauma-informed interviewing. We encourage you to familiarize yourself with CCDPW's trauma-informed interview toolkit and refer to it regularly, along with the specific guidance below, when developing your client's sexual and reproductive history.

1. Be intentional about conversations relating to sex

No matter with whom you are speaking, the team should carefully consider who is best placed to lead these conversations. Factors you will want to consider include the client's relationships with different team members, team members' relevant experience and training, and the identities of team members and the client or witness—including race, gender, sexuality, and life experiences.

Be careful to not misread clients' previous behaviors when determining who should lead these conversations. For example, survivors of abuse may well have discussed sex-related topics previously with men in their lives. This should not be construed as an increased comfort with talking about such topics with men. Rather, as detailed in Chapter 5, this is related to trauma. In such situations, it may be more harmful for a male interviewer to approach the topic with the client and the team should consider having a person of another gender lead these conversations.

The team should also educate themselves on best practices in trauma-informed interviewing to ensure that interviews about challenging topics are conducted with care. As discussed in Chapter 5, conversations should be conducted in a one-to-one setting. Further, the topics outlined below should be developed gradually over the course of numerous interviews.

2. Leave assumptions at the door

Your approach to all topics related to sexual and reproductive health should be broad and open-minded. It is important to be open with interpretations of terminology. The word "sex," for example, means many different things to different people. Some of these interpretations may turn on your client's identity, upbringing, ease with—or understanding of—vocabulary, prejudices, or other factors. Do not make assumptions about what your client means when she speaks of "sex," "rape," "virginity," or other terms related to sexual and reproductive health. Rather, you should let your client lead with her use of vocabulary. Give your client space to describe relevant actions in her own words and guide the conversation so that you understand more precisely the actions to which she is referring.

Similarly, it is important to not make assumptions about the gender of a partner or abuser when discussing intimacy or abuse. Many women in the criminal justice system have same-sex partners; indeed, queer women are incarcerated at higher rates than women who are not under the LGBTQ+ umbrella and queer women face greater discrimination in prisons.⁴ Moreover, intimate partner abuse is not a phenomenon that is restricted to heterosexual couples.⁵ You should refrain from making assumptions about your client's sexuality, sexual behaviors that she describes, and sexual partners. Rather, let your client discuss these aspects of her life with you in her own words.

3. Set the tone from the start

Many of the topics that you need to discuss with your client can be considered shameful or embarrassing. Shame, fear, and awkwardness can be a barrier to having frank conversations, and clients may fall back on euphemisms to deal with these feelings. For example, a client may say that a man “had his way” with her, or that she “went along with it,” or may refer to her menstrual cycles as “the time of the month.” Moreover, the power dynamic inherent in the attorney-client relationship means that your client may not want to share information that she thinks will displease you, make you think less of her, or embarrass her in front of you.

It is important to normalize discussions around sexual and reproductive health from the outset. While you should always be led by your client’s comfort and vocabulary, and must appreciate that these are potentially shameful topics, there are steps you can take to establish a safe environment that fosters open conversation. Adopting a practical and neutral vocabulary helps clients to acclimatize to sex- and relationships-related topics and ensures that we are not the ones bringing any awkwardness into the room. Using descriptive terms can help your client find the words to express her experiences. Having these conversations over multiple interviews helps to normalize the topics and takes embarrassment out of the equation. And explaining to your client why you are discussing these issues can help her to open up. In time, you will need to move past euphemisms and generalities to understand what has happened in your client’s life, and setting the tone for these discussions from the start can facilitate that process.

4. Give your client space

It is important that your client feels empowered to share information with you and has the space to do so. In addition to the trauma-informed practices outlined in Chapter 5, teams should consider taking steps to give the client agency over the timing and nature of her disclosures. The person initiating sex- and reproduction-related conversations may want to open discussions with the “talk about the talk”—talking to your client about topics you need to discuss with her. You do not want your client to feel ambushed by a difficult conversation, and giving her as much information as possible upfront can help your client establish agency in the conversation. Moreover, if your client has the context to understand why these conversations matter and the space to discuss them in a timeline that is comfortable for her (to the greatest extent possible), she is likely to be more comfortable with the conversation. Setting your client up for success will yield better results, including when you are under tight timelines.

It is critical to not ambush your client with information that you learned from another source. If you learn from a witness, from discovery, or from the record that a client spoke with someone about abuse in her past, for example, you should nevertheless let the client share this information with you organically. Confronting her with someone else’s account will not empower her to share information with you and will affect the quality (and, possibly, the veracity) of the information you are gathering.

In a similar vein, it is important to not shame your client for sharing information with another source but not with you, or for sharing inconsistent narratives. Rather, strive to create an environment in which your client knows it is okay to remember things differently as the conversations develop. As we will see in Chapter 5, trauma affects a survivor’s memories and relationships with others around her. Teams who assume that their client is hiding things from them or lying may struggle to unearth the nuance in their client’s social history, and physical and mental health background.

As a final note, it is easy and understandable that team members may wish to share some of their own personal experiences with a client as a way of building a relationship or normalizing certain topics. However well-meaning it may be intended, this practice is generally harmful to the client. When interviewing a client about sensitive material and building a sexual history, it is essential to give the client as much space as possible to share her experiences and tell her story. Sharing our own experiences takes away from that space and puts the client in a position of having to support us. Moreover, it is important to maintain professional boundaries with a client for the benefit of the client and the team, and making personal disclosures in the realm of sexuality and relationships typically crosses that boundary.

Topics to cover

With the above guidance in mind, below is a non-exhaustive list of topics that you should discuss with your client and some brief notes on why each topic can be helpful.

1. All sexual experiences

It is important to discuss all sexual experiences with your client, from her earliest memories of a sexual nature onwards. This should include all consensual and nonconsensual acts, and can include touching, being looked at in a sexual manner, catcalling, being asked to dress in a particular way, and your client's perception of her own body and agency. The universe of possible information here is vast. If your client has worked in the sex trade, it is important that you educate yourself on this topic so that you are well-equipped to discuss your client's experiences of sex work in a safe and judgment-free environment. Chapter 8 contains more information on how you can do this.

You should also have open conversations with your client about her understanding and experiences of pleasure. Information relating to your client's sexual experiences can inform the team's understanding of her social history, sexuality, trauma background, physical and mental health, core relationships, and understanding and perceptions of her own body.

Consider discussing the following topics in an order that arises most organically in your conversations with your client:

- Your client's first experience of pleasure
- The first time someone touched her in a sexual manner
- The first time someone made a comment about her sexuality
- What she wore growing up, including what she wore to sleep in
- When her body began to change with puberty, and who helped her with this
- All of her sexual partners
- How sexual experiences may have developed over time
- Partners' expectations of her with respect to participating in various sexual acts
- Your client's relationship to various sexual acts, particularly any sexual acts that are painful or pleasurable for her
- Your client's experiences of sex work, meaning any trading of sexual acts for something of value
- How your client gives and receives pleasure, including partners' expectations of her with respect to giving and receiving pleasure
- Your client's relationship to masturbation
- How your client feels about her body, and how this may have changed over time

2. All intimate relationships

Intimate partner abuse is exceedingly common among the population of incarcerated women, as discussed in Chapter 3. Over 70% of the women's death row population have experienced intimate partner abuse prior to incarceration,⁶ and women serving non-capital sentences face similarly high levels of violence in their intimate relationships.⁷ These experiences are common irrespective of race, sexual orientation, and socioeconomic status, though women whose identities cross these intersections frequently experience higher levels of abuse.⁸

As such, understanding each and every intimate partner relationship—regardless of sexual expectations within those relationships—is critical. This information matters when developing a thorough social history for your client and is important for building a comprehensive picture of her physical and mental health. Moreover, given the prevalence of abusive partners among women's male co-defendants, understanding all intimate relationships can shed light on interactions among co-defendants. Having a detailed grasp of these relationships can provide critical information for issues of both guilt and penalty.

Topics to discuss with your client include:

- Age, age gaps, and gender of each intimate partner
- The chronology and development of each relationship
- Dynamics shaping each relationship, paying particular attention to all forms of GBV
- How your client learned about what an intimate relationship is
- Expectations others placed on your client in her intimate relationships
- How your client regards each relationship now

3. Familial relationships

Familial relationships can be some of the most challenging relationships in your client's life and are important to unpack as you develop your client's sexual history. Relationships between parental figures or other caregivers provide your client with an early model of what intimate relationships look like. Indeed, research has long established that women who witness abuse in the home as children are more likely to experience abuse growing up.⁹ If your client grew up watching her father beat her mother, she is likely to normalize such behavior in her own intimate partnerships. Such information would, therefore, be important for you to know as you develop her relationship history and enter into deeper discussions with her about her intimate partnerships.

Similarly, sexual behavior in the home and caregivers' relationships with your client often frame how she perceives boundaries, intimacy, and intra-familial relationships. Understanding how your client's family viewed sexual activity, bodies, nudity in the home, and displays of affection will help you understand your client's own views on these issues. For example, knowing that your client grew up with a male parental figure commenting on her body, or that she frequently saw her mother having sex with multiple partners, would provide valuable insights into her trauma history and perception of sexual relationships.

It is important that you talk to your client about her different relationships with individuals involved in her upbringing, as well as these individuals' relationships with each other. You should build a picture of the relationships, influences, and cultures that shaped her early life. Topics to discuss with your client include:

Topics to discuss with your client include:

- Dynamics between different members of her family
- Her relationships with each member of her family/the people around whom she grew up
- How she describes intimate relationships that she witnessed, e.g. how her parents related to each other
- How your client was disciplined as a child
- How caregivers educated her about her body

4. Relationships in jail and prison

Intimacy and relationships in jail and prison should be covered as part of the above conversations. It is important to affirmatively discuss prison relationships with your client as they are an important component of her health and wellbeing during incarceration. Moreover, such discussions can yield critical information about abusive dynamics in the prison. As Chapter 7 lays out, women's experiences of incarceration differ from those of men and post-incarceration relationships form part of those experiences.

Separately, the state can also use your client's relationships while in prison to argue that your client is dangerous and predatory, as we discuss in Chapter 8. This tactic plays into homophobic tropes, and understanding your client's relationships in the prison holistically will enable you to be more considered in rebutting the state's homophobia.

Topics to discuss with your client include:

- Platonic, romantic, and sexual relationships with others in the prison
- Your client's perception of her own body and sexuality since her incarceration
- Prison pen-pals, including any romantic relationships via pen pal
- Potential relationships with visitors

5. Menstruation and menopause

Developing a comprehensive menstrual history for clients who menstruate can offer important information about her physical and mental health. Irregular cycles can be indicative of trauma or malnourishment, changes in flow can be related to changes in medication, and poor menstrual hygiene can be an indicator of neglect in the family or intellectual disability. Further, early onset menopause can be an indicator of heightened stress or health issues.¹⁰

You also need to know when your client started menstruating so as to understand whether she could become pregnant at various stages in her life. As you develop her sexual history, you will be keeping an eye out for a possible pregnancy history (see more below) and complications with her reproductive health. Having conversations with your client about menstruation can help you understand if there might be more to her pregnancy history (and, thus, familial and health background) than you currently know.

Topics to discuss with your client include:

- When she started menstruating
- How she learned about menstruation
- Who supported her when she began menstruating, and how much support she needed
- Whether her menstrual cycles have been consistent
- Pre-menstrual symptoms
- Experiences of menstrual cycles, including flow, pain, discomfort, changes over time
- Periods in her life when she stopped menstruating
- Experiences of menstruation and menopause while in prison, and any support with respect to reproductive health
- Any medications that your client has taken while experiencing menstrual or menopausal symptoms

6. Birth control

Your client's use and understanding of birth control also offers important indicators of her physical and mental health. Irregular taking of birth control pills, for example, can suggest possible intellectual disability, trauma-related memory impairments, or even control of reproductive health by an intimate partner. You should also speak with your client about the side effects of taking birth control and her understanding of different forms of birth control.

You need to understand when your client became pregnant and how her use of contraceptives interacted with her pregnancy. Some research suggests that taking certain medications concurrent with birth control pills can affect their efficacy, and other research draws a link between trauma, stress, and irregularities in birth control.¹¹ If your client became pregnant while taking birth control then you will need to look deeper into her mental health and intellectual functioning at the time.

Birth control is a form of healthcare and all women and girls need access to confidential care. Talking to your client about whether she was able to have private conversations with a medical professional can yield important information about coercive dynamics in her household or with her partners. Relatedly, the quality and type of reproductive care that your client was able to receive prior to her incarceration—for example, if she had access to a free clinic or a qualified OBGYN— informs you about the political, economic, and social forces in her life.

You should be sure to also discuss your client's access to birth control within the prison, as this remains an important component of her healthcare. For many clients, birth control serves functions beyond preventing pregnancy and having access to appropriate medication can be essential.

Topics to discuss with your client include:

- Whether your client has ever taken birth control and the form(s) of birth control
- What your client understood—and understands—about how birth control works
- Reproductive health options available to your client prior to and during incarceration
- Whether others were involved in your client's decision to take birth control
- Whether your client has taken other medications in tandem with birth control
- Whether a partner controlled her access to birth control—explicitly or through other means
- Whether your client's pregnancies were planned

7. Pregnancy, birth, neo-natal care, and post-partum

Pregnancy, birth, and parenthood often are fundamental experiences in our clients' lives. Over 85% of women currently on death row are mothers.¹² Indeed, the vast majority of incarcerated women have children before they are pushed into the criminal legal system.¹³ It is, thus, important to discuss these experiences with your client.

Topics related to pregnancy are vast and can be challenging for clients, particularly when they are related to vaginal rape and other nonconsensual acts. Further, many of these topics have become politically charged, and clients can internalize negative feelings around them that present barriers to open and judgment-free conversation. It remains important that you talk about planned and unplanned pregnancies, wanted and unwanted pregnancies, abortion, miscarriage, and stillbirths—all of these topics are important to building up a holistic picture of your client's sexual and reproductive health.

You should also be sure to discuss your client's understanding of her changing body. Exploring with her when and how she learned she was pregnant, what she understood about pregnancy, and what she learned about caring for herself and the fetus during pregnancy can help you understand possible cognitive impairments, mental health challenges, and intergenerational trauma in the family. In a similar vein, you should discuss where and how your client was able to receive care during pregnancy and after the birth of her child, as well as any supports she had during pregnancy and with a newborn.

The period shortly after birth presents particularly complicated mental health challenges for some women, including post-partum disorders as we explain in Chapter 5). You client may struggle to manage finances during this time, resume her usual activities, or even care for the child. Taking the time to discuss this period in detail—particularly if your client is accused of killing a child within a year of giving birth—helps you understand her mental health and any support she needed in the aftermath of birth.

Topics include:

- Detailed discussion of each of your client's pregnancies
- The care that she received through pregnancy and birth
- Neo natal care
- Who, if anyone, supported your client during this time
- What your client understood about pregnancy, birth, and raising children
- Whether she had financial support
- How she felt about parenthood

8. Sex and reproductive health and education

Finally, your client's sexual and reproductive health matters. You should discuss all of the medical care that your client has sought and/or received in the area of sexual health. This includes any sexually transmitted diseases (STDs) that she may have had. Learning about STDs can help you understand your client's exposure to health risks in abusive relationships, teach you about your client's ability to manage her own healthcare, and her understanding of safe sexual practices.

Your client's access to information about her body and health also constitutes an important element of her sexual history. Discussions around your client's sex and reproductive health education offer important insights into her decision-making, access to information, and information that she was able to understand. Understanding whether your client learned about sex from a caregiver, educator, or from experience can shape how we view her subsequent experiences.

Societal biases and systemic discrimination affect the sex and reproductive health education that women receive. Racial and socioeconomic inequalities create barriers to accessing high-quality sexual and reproductive education.¹⁴ Political priorities can also impede educators from providing girls with information relevant to their health. Queer women frequently do not have access to health information that accurately reflects their experiences and bodies, which can also shape their decision-making.¹⁵ You should account for these factors and affirmatively discuss them with your client.

Topics you should discuss with your client include:

- Whether she has ever had symptoms of any STDs
- Whether she has ever received treatment for an STD
- How she learned about puberty, menstruation, sex
- Whether she received any formal education on these topics
- What she took away from any formal or informal education
- Whether she had access to information that reflected her and her experiences

Documenting the information gathered

Developing a client's sexual and relationship history is a long process that requires careful thought and dedication. You should consider how best to collect this information as you gather it, so that you can spot patterns, link together relevant anecdotes, and develop further lines of inquiry.

Your work product may take the form of a chart, a research memo, or a chronology. However you choose to record it, be sure to share this information across the whole team. Your client's sexual history is relevant to issues of guilt and penalty, to investigation and claim development, to her physical and mental health, and to her conditions of incarceration. Talking about sex matters in women's cases, and sensitive discussions can yield life-saving information.



05

MENTAL HEALTH: CONSIDERATIONS FOR DEFENSE TEAMS

Poor mental health is endemic among incarcerated people. Mental illnesses such as schizophrenia, post-traumatic stress disorder, and bipolar mood disorder affect an individual's ability to form the intent to commit a crime and may render her incompetent to stand trial.



POOR MENTAL HEALTH IS ENDEMIC AMONG INCARCERATED PEOPLE. MENTAL ILLNESSES SUCH AS SCHIZOPHRENIA, POST-TRAUMATIC STRESS DISORDER, AND BIPOLAR MOOD DISORDER AFFECT AN INDIVIDUAL'S ABILITY TO FORM THE INTENT TO COMMIT A CRIME AND MAY RENDER HER INCOMPETENT TO STAND TRIAL. IF SHE IS FOUND GUILTY, YOUR CLIENT'S MENTAL DISABILITY OFTEN AFFECTS HER MORAL BLAMEWORTHINESS, PROVIDING A POWERFUL ARGUMENT FOR A REDUCED SENTENCE.¹

Mental health challenges are particularly acute among women serving extreme sentences. Recent research has identified evidence of mental illness, substance abuse disorders, organic brain damage, cognitive impairments, or a combination thereof in 83% of cases of women on death row.²

Many of these women have been diagnosed with mental disorders included in the DSM-V-TR, commonly PTSD and depression.³ Another study recently suggested that traumatic brain injury (TBI) is very common among women incarcerated for homicide offenses.⁴ This data is unsurprising, given the exceedingly high rates of gender-based violence among women serving death and other extreme sentences.

Recognizing gender-based violence is not only essential to understanding women's stories holistically, it is also critical to ensuring the just treatment of women in the criminal legal system. This is because of the clear link that researchers draw between GBV and poor long-term mental health.⁵ Experiencing GBV causes many women to develop trauma, depressive disorders, and substance dependence. These mental health challenges affect women's pathways to incarceration and their ability to tolerate certain conditions of confinement in ways that are distinct from men.⁶

Nevertheless, few attorneys understand the relationship between gender and mental health. This is perhaps not surprising, since much mental health research has failed to account for genderspecific differences in the etiology and symptomology of mental illnesses. Yet incarcerated women have a greater incidence of serious mental illness than men, higher rates of substance dependence, and are more likely to have suffered physical and sexual abuse.⁷ As a result, practitioners must evaluate the mental health of their women clients through a gender-sensitive lens.

This chapter will help you develop a gender-specific approach to assessing your client's mental health. Rather than providing a comprehensive guide to mental health in capital cases, it focuses on the mental illnesses that commonly affect women charged with crimes. We highlight how each of these illnesses can affect a woman's behavior and provide advice to practitioners on navigating these mental health challenges with their women clients. This chapter is intended both as a guide and a resource to aid practitioners in providing gender-sensitive representation for women defendants. It is not intended to provide comprehensive diagnostic criteria, nor should it serve as a substitute for consulting with a competent mental health expert. Rather, our hope is that after reading this chapter, you will be better able to recognize the signs and symptoms of mental illness in your women clients and take steps to preserve their rights in the course of your representation.

1. Women and Trauma

“ONE OF THE MOST CONSISTENTLY REPORTED RISK FACTORS FOR PTSD IS BEING FEMALE.”⁸

Women are more likely than men to experience trauma, including rape, intimate partner violence, and other forms of gender-based violence, and this risk of trauma is heightened for women with multiple marginalized identities.⁹ For this reason alone, practitioners need to understand common sources of trauma and their impact on women’s mental health and daily functioning. Research shows that women living with trauma frequently “report an impact on their functioning” related to the trauma¹⁰ and are at a higher risk of developing certain conditions associated with trauma.¹¹

Criminalized women have experienced trauma at higher rates than women in the general population—and at higher rates than the male prison population. This is because of the exceedingly high prevalence of gender-based abuse in criminalized women’s lives, as discussed in Chapter 3. Women’s experiences of gender-based abuse are traumatic events that can lead to severe emotional and psychological distress throughout their lives.¹²

Responses to trauma vary. They include behavioral, physical, biological, emotional, cognitive, and other reactions. Repeated, severe trauma often results in trauma-related mental disorders such as PTSD.¹³ As an advocate, you must learn to recognize the symptoms of trauma in a client, as they can affect virtually every stage of your client’s contact with the criminal legal system. Remember that trauma occurs on a spectrum. There has been much debate over the narrow definition of trauma disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM), and mental health professionals who have worked with children and women survivors of abuse have argued that the category of “PTSD” does not adequately capture the effects of child abuse and gender-based violence.¹⁴

This section will begin by exploring common sources of trauma for women who are charged with serious crimes. It will then provide a brief overview of mental health challenges that result from trauma, exploring common signs and symptoms. Finally, the section will provide practical guidance for capital defense lawyers defending women survivors of trauma.

a. Sources and Symptoms

SOURCES OF TRAUMA AND ADVERSE CHILDHOOD EXPERIENCES

Women in prison have often experienced multiple traumatic events. One study found that incarcerated women experienced on average six different types of trauma in their lifetime.¹⁵ Common sources of trauma for incarcerated women include experiences with interpersonal violence, including physical and sexual violence in childhood and adulthood.¹⁶ These traumatic experiences can also lead to depression, PTSD, and substance dependence. The more trauma that a woman experiences, the more likely it becomes that she will develop these conditions.¹⁷ Adverse Childhood Experiences (“ACEs”) are also prevalent among incarcerated women.¹⁸ The graphic below provides an overview:

| | |
|--|--|
| ACEs are traumatic events that occur before the age of 18. Researchers often group ACEs into three categories: neglect, abuse, and household challenges.¹⁹ In addition to the common list of ACEs below, some studies include poverty, community violence, and death of a parent as additional experiences.²⁰ | |
| Neglect | <ul style="list-style-type: none">● Emotional neglect● Physical neglect |
| Abuse | <ul style="list-style-type: none">● Physical abuse● Sexual abuse● Emotional abuse |
| Household Challenges | <ul style="list-style-type: none">● Mother treated violently● Household substance abuse● Household mental illness● Parental separation or divorce● Incarcerated household member |

Incarcerated women are not only more likely to have experienced ACEs than women who have never been incarcerated, but they are also more likely to have suffered multiple ACE events.²¹ The more childhood trauma a woman endures, the more likely she is to suffer interpersonal violence in adulthood and develop post-traumatic stress disorder and related symptoms.²²

While the ACE questionnaire may be a good way to assess potential childhood trauma in a client, it is only a starting point. The ACE questionnaire does not measure for “degree, duration, severity, timing, or quality” of each experience,²³ and as mentioned above, repeat exposure to traumatic events compounds the harm each person experiences.

COMMON SYMPTOMS OF TRAUMA

Most women facing the death penalty will have suffered repeated trauma over the course of their lives. After enduring trauma stemming from physical, sexual, and/or psychological abuse or neglect, women frequently experience post-traumatic stress.²⁴ “Simple” post-traumatic stress often occurs after a one-time incident, while “complex” post-traumatic stress develops from persistent, long-term abuse, typically from caregivers and during early life stages. Complex posttraumatic stress may also occur in adulthood as a response to frequent abuse by a partner over years.²⁵ Typically, people who experience severe abuse will have both simple and complex posttraumatic stress. ²⁶ Further, trauma is cumulative: repeated exposure to traumatic events exacerbates their impact and leads to heightened symptoms.²⁷ While not everyone who experiences a traumatic event will develop post-traumatic stress disorder, women are twice as likely as men to develop it.²⁸ Furthermore, queer women and gender-diverse people experience higher rates of PTSD than heterosexual and cisgender women.²⁹ One study showed that over 50% of incarcerated women met the criteria for PTSD. ³⁰

Women who have simple post-traumatic stress may have nightmares, flashbacks, feelings of numbness, disinterest in daily activities, constant vigilance, or avoidance of events that remind her of the traumatic experience.³¹ Women who suffer from complex post-traumatic stress may have feelings of despair, worthlessness, depression, unexplained shame or guilt, problems trusting others, susceptibility to emotional outbursts and impulsive behaviors, feelings that life is meaningless, an inability to relax, persistent sleep problems, and feeling like they are not entitled to happiness.³² In response to these emotions, women may abuse drugs or alcohol, cut or burn themselves in self-harm, or isolate themselves from others because they feel safer alone. They may also try to please others to avoid conflict, another person’s anger, disappointment or hurt.³³ It is worth mentioning that trauma can cause or exacerbate a variety of other mental disorders, some with unique behaviors or symptomologies.

Symptoms of severe trauma vary, but the following are extremely common: emotional numbing, hypervigilance, dissociation, somatic symptoms, and intrusions.³⁴ The table below provides an overview of each symptom: ³⁵

| | |
|--------------------------|---|
| Emotional numbing | Emotional numbing refers to a reaction where a person detaches their emotions from thoughts, behaviors, and memories. A person experiencing numbing may display few emotional reactions and may speak with a flat affect, or in a matter-of-fact manner. |
| Dissociation | Dissociation is a symptom where people lose focus on the present. They may enter a sort of “auto-mode,” severing the connection between thoughts, memories, feelings, action, and sense of identity. Evidence of dissociation includes fixed or glazed eyes, sudden flat affect, prolonged silence, excessive intellectualization, and responses that seem inappropriate for the situation. |

| | |
|--|---|
| <p>Hypervigilance</p> | <p>Hypervigilance, also known as hyperarousal, is a symptom where the body is in a state of preparation for danger. It often presents through physical symptoms like sleep issues, tension in the body, and a lower threshold for startle responses that remain for a long period after the traumatic experience. Hypervigilance is also a primary diagnostic criterion of PTSD.</p> |
| <p>Somatic symptoms</p> | <p>Somatic symptoms or bodily symptoms of trauma can include sleep, digestive, heart, brain, muscle, skeletal, breathing, skin, urological, and substance abuse issues. Emotional distress may present through these physical symptoms. They are particularly common in persons with PTSD.</p> |
| <p>Changes in brain development and cognitive functioning</p> | <p>Changes in brain development and cognitive functioning are symptoms that may materialize in various ways. One might perceive a safe situation that reminds them of a traumatic event as dangerous, experience excessive or inappropriate guilt, including survivor's guilt, idealize or feel compassion for perpetrators through trauma bonding, experience hallucinations or delusions, or have intrusive thoughts. Trauma survivors may also "feel different" from others, feeling they can only relate to persons with similar traumatic experiences.</p> |
| <p>Intrusion</p> | <p>Intrusion may include triggers or flashbacks. Triggers are sensory reminders of trauma; they can include smells, noises, physical touch, views, or other sensory intakes that cause strong emotional or other reactions. Flashbacks are a re-experiencing of a trauma as though it was happening in the present. While they are typically short, the emotional after-effects can last for hours.³⁶ Intrusion is also a very common symptom of PTSD.</p> |

Dissociative Disorders are also common among people who suffer from complex or repeated trauma.³⁷ Women with dissociative amnesia may forget autobiographical details or memories. A woman who experiences “depersonalization” or “derealization” may have feelings of unreality, or repeated detachment from herself or her environment.³⁸ These symptoms have important consequences for the attorney-client relationship. For example, when you discuss your client’s experiences of trauma, it may trigger dissociative responses.³⁹ Clients may also experience amnesia or shame, leading them to disavow a previous narrative she may have reported.⁴⁰ She might also shut off when discussions of her trauma become emotionally overwhelming.⁴¹

b. Trauma and Representation

INCONSISTENT TESTIMONY

Trauma affects a woman’s ability to offer a cohesive narrative. In the courtroom, judges and juries tend to look for internal and external narrative consistency. Internally consistent stories are emotionally and logically coherent, linear, and whole.⁴² Externally consistent stories mold to the way a typical person might understand the world.⁴³ Because of psychological and neurological trauma, your client may struggle to recall experiences or act in ways that conform to the court’s expectations.

Because trauma may affect your client’s memory and sense of self,⁴⁴ she may struggle to tell an internally consistent story. Dissociative states or lapses in memory make it difficult to recall events or tell a linear narrative.⁴⁵ Clients who suffer from certain dissociative disorders are prone to autobiographical amnesia;⁴⁶ they may not be able to remember certain events or periods of their life. When a client recalls traumatic memories, the memories “often lack verbal narrative detail and context.”⁴⁷ A client may experience the memory “in the form of sensations, flashes, and images, often with little or no story,” rendering it difficult to communicate the experiences to the court.⁴⁸ Unable to place her own memories on a timeline, she will find it exceedingly difficult to communicate what happened in a linear fashion to the court. Additionally, your client may experience intense emotions when recalling the trauma; as a result, she may forget, skip, or be “unable to speak key details” of the story.⁴⁹

Trauma may also affect your client’s decisions or behaviors, creating stories that seem to be externally inconsistent. Women who experience various forms of abuse may not report the abuse to authorities and often remain with their abusers for various psychological, emotional, financial, and other reasons.⁵⁰ Judges and other courtroom actors tend to treat this behavior as evidence that negates a narrative of abuse.⁵¹ Viewing the world from their perspective, judges implicitly or explicitly ask themselves “why would she stay?” or “why didn’t she ask for help?”⁵² Additionally, judges, mostly male non-survivors, tend to discount psychological harm and concentrate on physical harm of victims.⁵³ If your client leads her testimony with experiences of psychological or emotional harm, courtroom actors may consciously or subconsciously discredit or discount the abuse, even if it is the most salient form of her trauma.⁵⁴

In a non-trauma-informed courtroom, testimonial inconsistency is especially harmful; courtroom actors, including judges, officers, and jurors, will question your client’s credibility and view her narrative as “suspect,” thereby harming your case.⁵⁵ You must anticipate that your client may suffer from memory gaps or inconsistency, and you must not assume that your client is dishonest or unintelligent. As discussed below, it will be necessary to educate the court on why trauma survivors are apt to give inconsistent statements about traumatic events and act in ways that do not conform to society’s expectations. Note that these challenges are not unique to trauma—women with TBI injuries may also struggle to recall information in a linear fashion and maintain a consistent narrative in the courtroom, which many criminal legal system actors fail to account for.⁵⁶

CLIENT DEMEANOR

The symptoms of trauma, notably hyperarousal, numbness, and intrusion, may affect a client's demeanor in the courtroom or before law enforcement.⁵⁷ Without trauma training, legal actors may misinterpret these reactions and judge her as cold and unemotional. This can further damage your client's credibility.

A survivor who responds to trauma through emotional numbing may recount her experiences in a flat, uninvolved, or matter-of-fact tone (also known as "flat affect").⁵⁸ When she gives testimony, she may appear to those around her as callous or unremorseful when discussing details of her alleged crime.⁵⁹ A client experiencing hyperarousal, or the "anxious posture of alertness and reactivity to an imminent danger," on the other hand, may appear "highly paranoid" or overemotional.⁶⁰ The client may further experience "unexpected outbursts of rage in response to relatively minor incidents,"⁶¹ potentially miscommunicating to the jury or judge that they are violent or dangerous. Intrusion, or reliving of trauma, notably in the form of flashbacks, may prevent a witness from testifying about events in a chronological and consistent manner.⁶²

To the non-trauma-informed court, a client's emotional or non-emotional reaction may affect the court's assessment of her character or the credibility of her testimony: "Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by police, prosecutors, and judges."⁶³ An untrained judge or prosecutor may weaponize the client's demeanor, or the evidence of her trauma, in the courtroom, suggesting the client is guilty, unremorseful, and inhumane.

FALSE CONFESSIONS

A survivor's experience of physical and psychological trauma may increase the likelihood that she will falsely confess to criminal behavior.⁶⁴ One study of adolescent women explained that the strongest predictor of false confessions for females was psychological or physical trauma, including viewing physical violence in the home.⁶⁵ The study concluded that fear of negative or difficult interactions with authority figures from these experiences increases the risk of false confessions.⁶⁶ Survivors of domestic abuse in particular are "more vulnerable to authoritarian police investigation, [more likely to] get confused, and believe promises similar to battering relationships."⁶⁷

Violence, Trauma, and Suggestibility in Police Interrogations of Women

Melissa Lucio, a victim of childhood sexual abuse and domestic violence, was wrongly convicted and sentenced to death in Texas for the death of her toddler daughter. Her mother's boyfriend began abusing Melissa when she was only six years old. For two years, he abused her regularly, and when she told her mother, her mother didn't believe her. As a teenager, Melissa was raped by a stranger. Traumatized and desperate to escape her home, Melissa married at age sixteen. Her husband was a violent man who also abused Melissa and eventually abandoned her after she bore five children.

Melissa's next partner continued the cycle of violence. During this time Melissa had seven additional children. Like many victims of sexual abuse and domestic violence, Melissa developed Post-Traumatic Stress Disorder and Depression. She began to dissociate under stress, and became passive and avoidant when confronted, especially when those confronting her were stronger than her.

While Melissa and her large family were moving, Melissa's daughter fell down a full set of outdoor stairs, landing on the cement at the bottom. Several of Melissa's other children witnessed this fall. Days later, Melissa's daughter became lethargic, went to sleep and never woke up.

Melissa was immediately arrested and interrogated. She denied harming her daughter. The police insisted she was guilty, aggressively interrogating her until 3 a.m. Finally, Melissa told them what they wanted to hear—that she was responsible for her daughter's injuries. At trial, the court refused to let Melissa's defense lawyer present expert testimony explaining why a victim of repeated sexual abuse and domestic violence would be more likely to falsely confess.

The Innocence Project submitted a brief in the U.S. Supreme Court in support of Melissa, noting that "[w]omen with abuse histories, like Ms. Lucio, [are] particularly vulnerable to false confessions."⁶⁹ The Innocence Project further noted that "false confessions are prevalent in cases involving child victims," particularly when the defendant has a history of trauma.⁶⁹ Although the Supreme Court denied certiorari, a Texas court has since concluded that Ms. Lucio's "lifetime of trauma resulted in significant vulnerability in the interrogation room,"⁷⁰ and that she had "exceptionally high levels of suggestibility, compliance, and risk of false confession."⁷¹ The court concluded that Ms. Lucio is actually innocent and did not kill her daughter.⁷²

A study on gender differences in false confessions suggests that women who make false confessions “are more likely than men to have trauma backgrounds,” “are more likely involved in crimes against children,” often make such confessions to “protect the abuser out of love [or] fear,” and “internalize guilt about not protecting children due to their own abuse and inability to persuade [the] batterer to seek help.”⁷³ These findings reiterate that past and present trauma may affect a survivor’s vulnerability to police pressure to confess.

c. Considerations to Mitigate Harm

You should educate prosecutors, judges, and jurors about the causes and symptoms of trauma, and your client’s psychological and neurological symptoms. Some considerations on how you can do so are listed below.

Presenting Expert Testimony

Expert testimony is often necessary to provide jurors or judges with the right framework to understand trauma and its presence in the courtroom.⁷⁴ An expert may testify about symptoms of trauma, explaining the symptoms in plain language and in a relatable way.⁷⁵ Expert witnesses in cases of interpersonal violence are particularly important. Beyond providing direct testimony, they can assist in assessing the police interrogation and its impact on your client, they can help prepare your client for trial, and assist with jury selection.⁷⁶ Testifying witnesses can also dispel common myths about trauma survivors—including, for example, the reasons women may remain in violent relationships.⁷⁷ Experts can help explain common questions that juries and judges have, including why a trauma survivor would be more susceptible to coercion by a male co-defendant, or why she may have acquiesced in the abuse of her children.⁷⁸

Ultimately, experts may also provide context for your client’s non-linear, inconsistent testimony, her lack of emotion (or hyper-emotional responses) in the courtroom, and other emotional, mental, and behavioral symptoms that a client demonstrates which might undermine her credibility to the observer unfamiliar with the effects of trauma. See Chapter 6 for more guidance on working with experts.

Asking the Right Questions and Building Trust

As mentioned above, it is often difficult for survivors of trauma to tell a cohesive, linear narrative. In order to uncover your client’s trauma history, you must first build a relationship of trust. Your client may not feel safe speaking to you. She may not trust you, or she may not feel able to express herself or share details of her history. You will need to be patient and take the time to build a relationship where your client feels safe with you. You should be transparent, predictable, and reliable. You must support your client while allowing her to exercise control of her situation.⁷⁹

In order to help your client feel safe, it is important to communicate each step of the criminal process to your client. Communication with judges or other figures of authority, conditions of detention, or the testimony of others may trigger trauma responses for your client. It is important to tell your client what she should expect at each stage of the process to help her prepare for these moments. Simply using your client’s own terminology instead of professional language can help your client feel more comfortable and heard.⁸⁰

When a client experiences a trigger, it is important to help your client distinguish the past and present; grounding techniques are particularly helpful. We have included a list of a few techniques below for your use. Normalizing the events, as well as offering information about flashbacks and triggers, can help you and your client discuss potential causes, and therefore avoid re-traumatization in the future. Small acts, like giving your client time and space to speak or offering her food or a beverage can help create a comfortable atmosphere. You can always ask your client directly if there are particular activities that make her feel calm or safe and invite her to do them.

Grounding activities

- 5, 4, 3, 2, 1: Ask your client to name five things she can hear, then five things she can see, then five things she can feel in the room. Repeat the exercise by asking her to find four new things, then three, two and one thing.⁸¹
- Categories: Have your client choose a category (e.g., colors, objects), then ask her to point out objects from that category in the room.⁸²

Guided meditation

- Progressive muscle relaxation: Ask your client to close her eyes and breathe slowly. Then, ask her to focus on various body parts. As she focuses on one, ask her to breathe out the tension she might feel there.

Breathing exercise

- 3-3-3: Ask your client to breathe in for three seconds, hold for three, and exhale for three. Repeat as desired.

2. Postpartum Mental Disorders

WHENEVER YOU ARE DEFENDING A WOMAN CHARGED WITH KILLING HER CHILD YOU SHOULD EXPLORE WHETHER SHE SUFFERED FROM POSTPARTUM DEPRESSION OR PSYCHOSIS.

Although these conditions are not uncommon, they are widely misunderstood. The case of Debra Gindorf is illustrative. Debra was sentenced to life without the possibility of parole in 1986 for killing her two children. Of the nine mental health experts who evaluated her, all agreed that she suffered from some form postpartum psychosis.⁸³ Yet at the time of her trial, the judge largely ignored Gindorf's experts and relied on witness testimony that Debra, although slightly depressed in the months after childbirth, did not seem "psychotic." In 2009, in a victory for postpartum advocates, the Governor of Illinois finally commuted Gindorf's sentence and ordered her released for time served.

Postpartum mental disorders remain an under-explored form of mental illness in mothers. There is no one set of symptoms, nor is there a single set of experiences. What an individual mother goes through can vary from a few weeks of mild sadness to, in very extreme cases, a full psychotic break. This section provides a basic overview of postpartum mental disorders, symptoms, and risk factors, and their implications for the defense of women facing murder charges.

a. Postpartum Mental Disorders

For the practitioner, it is important to recognize that postpartum disorders exist along a spectrum. Also, the duration of symptoms varies by individual, and mothers can experience severe mental distress up to a year after childbirth. Postpartum disorders can also be episodic; practitioners should be wary of judging their client's behavior at the time of the crime by her current state of mind.⁸⁴

POSTPARTUM DEPRESSION

Postpartum depression is a major depressive disorder that can appear anywhere from two weeks to a full year after childbirth. The DSM-5 has a heading for postpartum disorders under the general heading for "Major Depressive Disorders."⁸⁵ Practitioners should know that this conflation is at odds with clinical and medical literature, which treats postpartum disorders as a distinct category of mental illness.⁸⁶

If left untreated, postpartum depression can last for months. Some researchers have estimated that it affects anywhere from 13-19% of childbearing women.⁸⁷ Significantly, women who suffer from postpartum depression may develop intrusive thoughts of harming themselves or their baby and recurrent thoughts of suicide.⁸⁸

There are two important risk factors that correlate with postpartum depression: prenatal depression and ongoing physical, verbal, or emotional abuse.⁸⁹ Additional indicators for postpartum depression include stressful life events, marital conflict, young maternal age, low income, and being an immigrant.⁹⁰

POSTPARTUM PSYCHOSIS

The most severe postpartum disorder is postpartum psychosis. This extreme condition can develop within the first few weeks after delivery, but each case will be different, and symptoms may continue episodically for months after childbirth.⁹¹ Postpartum psychosis is very rare and may affect around 1 in 500 mothers.⁹²

Symptoms, however, are extreme, and include:

- Confusion and disorientation
- Obsessive thoughts about the baby
- Hallucinations and delusions
- Sleep disturbance
- Excessive energy and agitation
- Attempts to harm themselves or their baby⁹³

Risk factors for postpartum psychosis include a previous history of postpartum psychosis, previous psychotic episodes, a family history of psychosis, or bipolar disorder.⁹⁴ Postpartum psychosis is treatable, but it is a severe mental illness that may require hospitalization and psychotropic medication.

b. Postpartum Disorders in Criminal Trials

Postpartum disorders are relevant in capital defense at both the guilt and penalty phase. If the case involves infanticide, practitioners should conduct a thorough investigation for any possible postpartum psychosis or depression. Because postpartum disorders can go undiagnosed, and because so many people are unfamiliar with the disorders, retaining a qualified expert is essential. Capital defense lawyers will typically raise postpartum disorders—and particularly postpartum psychosis—by way of an insanity defense.⁹⁵ Indeed, several women have been found not guilty by reason of insanity based on their postpartum disorders.⁹⁶ If your client is convicted of murder notwithstanding her postpartum disorder, you should argue that her illness justifies a lenient sentence.

3. Gender Differences for Serious Mental Illness

THERE IS STILL MUCH WORK TO BE DONE IN THE STUDY OF GENDER DIFFERENCES SURROUNDING MENTAL HEALTH. THERE ARE STRIKING GENDER DIFFERENCES WHEN IT COMES TO THE DEVELOPMENT AND SYMPTOMS OF MENTAL ILLNESS. WHILE RECENT STUDIES HAVE BEGUN TO LOOK AT GENDER DIFFERENCES, THE RESEARCH IS FAR FROM COMPLETE. RESEARCH DOES SHOW, THOUGH, THAT GENDER DIFFERENCES EXIST IN THE AGE OF ONSET OF SYMPTOMS, FREQUENCY OF PSYCHOTIC SYMPTOMS, CONTENT OF DELUSIONS, LIFE COURSE OF DISORDERS, SOCIAL ADJUSTMENTS, AND LONG-TERM TREATMENT OUTCOMES.⁹⁷

Schizophrenia provides a good case in point. The U.S. National Institute on Mental Health defines schizophrenia as a mental disorder characterized by disruptions in thought process, perceptions, emotional responsiveness, and social interactions. Schizophrenia is typically persistent and can be both severe and disabling.⁹⁸ The symptoms of schizophrenia emerge earlier in men than they do in women. This is consistent across cultures, diagnostic criteria, and definitions of onset. While the onset of symptoms in men peaks between ages 15-25, women have two ages of onset, peaking both between 15-30 and again at 45-49. Mean age of onset in broadly defined schizophrenia (under the International Classification of Diseases and Related Health Problems-9) is 31.2 years for men and 41.1 years for women.

Symptoms between schizophrenic men and women differ substantially. Schizophrenic men are more likely to experience negative symptoms, such as social withdrawal, lack of motivation, and blunted speech. Women, by contrast, are more likely to experience atypical psychotic or affective symptoms such as dysphoria, depression, inappropriate affect, hostility, irritability, sexually inappropriate or bizarre behavior, and sexual delusions.⁹⁹ Women are also more likely to experience persecutory delusions than men and are more vulnerable to cycloid psychosis (a term used to describe psychosis that does not meet the criteria of either schizophrenia or bipolar affective disorder).¹⁰⁰ Women are also much more likely to experience auditory hallucinations than men.¹⁰¹

Some studies have also shown sex differences in bipolar disorder. In one study, UK researchers monitored men and women's experiences with bipolar disorder over the course of 35 years. They found that symptoms of bipolar disorder emerged sooner in men than women, even when adjusting for premorbid variables (variables that existed prior to the first onset of psychosis), including factors such as education, socio-economic status, and access to health care. The authors concluded that men had a higher incidence of bipolar disorder in early adult life, and women had a higher incidence throughout the rest of adult life until late life (although these differences did not reach statistical significance to allow for specific age brackets of expected occurrences).¹⁰² Other studies have reached the same conclusion.¹⁰³

Symptoms of mental illness can be both physical and psychological. Sometimes, somatic symptoms of mental health conditions such as headache and palpitations may correspond with an anxiety disorder, or in other cases fatigue and muscle pain may be symptoms of depression.¹⁰⁴

When women report symptoms, health providers often do not take their complaints seriously, in part because women are stereotyped as more emotional and more hypochondriacal.¹⁰⁵ This can lead to misdiagnosis or underdiagnosis of mental illnesses in women.

For all those reasons, it is important to go through your client's medical records carefully to identify any of these seemingly 'physical' conditions to determine if there is an underlying mental health condition that has been misdiagnosed.¹⁰⁶ It is equally important to talk to your client about any persistent symptoms they have experienced or reported whether or not they received treated, or were told it is "in their head" and that there is nothing wrong.

06

WORKING WITH EXPERTS

Working with experts can help your defense strategy and your understanding of your client. Identifying where you have needs, what you don't know, and who can assist you are critical aspects of your representation.



THIS CHAPTER WILL BEGIN BY DISCUSSING THE EXPERTISE OF YOUR CLIENT AND HER COMMUNITY—WHICH SHOULD BE AT THE HEART OF YOUR REPRESENTATION—BEFORE OUTLINING VARIOUS EXPERTS THAT TEAMS REPRESENTING WOMEN, QUEER, AND GENDER DIVERSE CLIENTS MAY CONSIDER HIRING, AS WELL AS CONSIDERATIONS FOR TEAMS WHEN ENGAGING EXPERTS.

VIEWING EXPERTISE HOLISTICALLY

“Expertise” is not the sole province of individuals with advanced degrees. Rather, many different forms of expertise are relevant to the defense team’s work. Consider, for example, community-based experts, cultural experts, experts on gender-based violence, sex work, and expertise that stems from the life experiences of survivors. This is all the more applicable in women’s cases, which present many issues that attorneys, investigators, and courtroom decisionmakers have not previously contemplated. Taking a broad view of expertise will help you understand and address these multifaceted issues.

At the outset, it is essential to remember that the foremost expert on your client’s life is your client. No one knows the details of your client’s life, culture, and community better than her. Your client is your partner in defense work. She is an essential member of the defense team and must be treated as such. Understanding your client as a partner and expert is transformative to the team-client relationship.

Additionally, advocates and organizers within your client’s community provide invaluable expertise and perspective. The multigenerational investigation and psycho-social history you will develop over the course of your work relies on the deep knowledge of people who intimately understand the factors shaping your client’s life. Organizers, community advocates, and individuals within the community are critical in this regard. Local gender justice groups, for example, can provide key perspectives on how GBV is regarded in your client’s community, just as working with queer advocates in the community can shape your understanding of how your client’s gender identity and sexual expression affected her experiences within her family, at school, and with the larger community. As we elaborate on in Chapter 10, partnering with organizers and advocates strengthens your understanding of your client’s background, culture, and experiences.

EXPERTS FOR THE DEFENSE TEAM

Many different forms of expertise may be relevant to your representation, depending on the case posture and your client’s needs. Experts also play different roles, depending on the capacity in which the defense team seeks assistance. Testifying experts are typically hired by the defense to provide the court with specialized knowledge and opinions on a relevant subject matter. Based on their qualifications, testifying experts will typically share their conclusions on the subject matter of their expertise and will explain how they reached those conclusions. Often, these experts are professionals who have been previously admitted to testify in other cases. We encourage defense teams to think creatively and critically about expertise to elevate the caliber of lawyering, expand conceptualizations of expertise, and better educate judges and juries about your client’s lived experiences.

Consulting experts, on the other hand, are members of the defense team. Consulting experts are an invaluable resource for teams representing queer people, women, and gender diverse people because they are brought on to assist the team with particular areas that fall within their sphere of expertise. In this way, they can help address gaps in team members’ knowledge or gender-specific issues with which team members may be unfamiliar. A psychologist who specializes in coercive control, for example, can help a team understand how abuse affected—and continues to affect—their client’s behavior and presentation.

BELOW ARE SOME OF THE EXPERTS TO CONSIDER WHEN DEFENDING WOMEN, QUEER, AND GENDER DIVERSE CLIENTS. THIS LIST IS NON-EXHAUSTIVE AND DOES NOT REPLACE THE NEED FOR OTHER EXPERTS WITH WHOM TEAMS WORK WHEN DEFENDING CAPITAL CLIENTS, BUT RATHER SEEKS TO IDENTIFY FORMS OF EXPERTISE COMMONLY NEEDED TO DEVELOP A GENDER-SENSITIVE AND CONSTITUTIONALLY ADEQUATE DEFENSE FOR WOMEN AND GENDER DIVERSE CLIENTS.

1. PEOPLE WITH LIVED EXPERIENCE

As discussed in Chapter 2, it is important for all teams to build a diversity of experiences and identities among team members. People with lived experience of the criminal legal system and issues pertinent to your client's life bring particularly valuable expertise. Centering the perspectives and expertise of those who have endured the criminal legal system can provide invaluable insights and novel perspectives—even for attorneys who have represented incarcerated people for years. Working with people who can share these experiences with the team helps us to develop a deeper understanding of clients' experiences, build stronger relationships with clients, and better identify pertinent issues. This is even more important for teams working with women and queer clients, given gender- and sexuality-specific issues that these cases raise.

You will also want to consider working with experts who have lived experience of facets of the case that the team is unfamiliar with. Many issues that are common to our clients' lives are frequently misunderstood or unexplored, and teams that do not seek the resources and expertise to educate themselves can risk causing further harm and missing information that is critical to the representation. Teams representing a client who has been a sex worker, for example, should consider working with a person with lived experience of sex work to better understand the issues, dynamics, and appropriate terminology involved. Teams representing a client who has had their children removed by child protective services would benefit from the expertise of someone who has direct experience with that system (as well as experts on how the system discriminates against women of color¹). Equally, teams representing a client who is transitioning should seek the guidance of directly impacted people who can help them support their client, understand their client's needs, and better comprehend the relationship between their client's gender identity and experiences of the criminal legal system. In short, people with experience of the client's background, culture, community and identity can provide a broad range of possible expertise. Being open to what you do not know and considering expertise holistically will set you in good stead to best assist your client.

2. EXPERTS ON GBV

Chapter 3 discussed the ubiquity of gender-based violence (GBV) in the lives of women serving extreme sentences. GBV is an area in which teams greatly benefit from subject-specific expertise. Sourcing experts on different forms of GBV—whether that is human trafficking, child marriage, or coercive control—will help you develop knowledge that is critical to your client's life and present this critical knowledge to decisionmakers.

There are many different forms of expertise in the realm of GBV, and your client's background and needs will determine which are applicable to you. Experts on coercive control and gender-based violence can help explain why your client was unable to leave an abusive relationship or how she sought to protect a child from an abusive partner. Neuropsychological experts can speak to the impact of GBV on cognitive functioning. Trauma experts can discuss how abuse-related trauma can lead to dissociation, vulnerability to coercion, and pliability in police interrogations. Child developmental experts can address the disparate physical and psychological effects of early marriage. The universe of possible expertise that will be important to your case is vast, but consultants (see below) can help you identify experts with whom to work. The bottom line is that it is important for you to understand that issues related to GBV are issues with which you are likely unfamiliar, and with which the decisionmakers are unfamiliar, so educating yourself is essential.

3. IAC/STANDARD OF CARE EXPERTS

Representing woman and queer clients requires specific knowledge and skills. IAC/standard of care experts can help the team with prevailing professional norms regarding representation, investigation, mental health evaluations, and the development and presentation of mitigation, among other areas.

Since 2003, prevailing professional norms have required that a capital defense team be culturally competent in order to conduct a constitutionally-adequate life history investigation.² As the ABA Guidelines clarify, culturally competent representation includes a thorough understanding of gender, sexuality, and other facets of the client's identity, as these intersectional vectors affect all aspects of the client's case.³

These professional guidelines are no less pertinent in non-capital cases. IAC/standard of care experts can help teams meet these prevailing professional standards and can help educate teams on best practices for representation and constitutional requirements.

At post-conviction stages, IAC/standard of care experts can be invaluable in explaining professional standards to the court. For example, an IAC/standard of care expert can opine about any testing that was done in earlier stages of the case without due regard for your client's identity; the cultural competency of the defense team; and how a (lack of) cultural competency affected the adequacy of the investigation, representation, client relationship. In this way, IAC/standard of care experts can also be helpful in reshaping the narrative about your client.

4. CONDITIONS OF CONFINEMENT EXPERTS

As Chapter 8 outlines, our clients' conditions of confinement present distinct issues. Many of us are accustomed to visiting male clients in male prisons, which can differ substantially from the experiences of women, gender diverse, and queer clients. From police detention and immigration detention, to the county jail and prison, we must be attuned to the myriad issues that our clients face in the criminal legal system. Whether your client is facing psychological deterioration from the acute isolation she experiences as the only woman on death row in her state, struggling to get the hormones she needs in line with her gender identity, or suffering physical health challenges as a result of going through perimenopause in the sweltering heat of an unventilated prison, you will encounter issues related to your client's confinement over the course of your representation.

It is important to develop fluidity and understanding of possible issues related to conditions of confinement. Her conditions affect every aspect of her day-to-day life and, therefore, also affect your relationship with her and the issues you are developing for litigation. Conditions of confinement experts—and most importantly, people with lived experience of incarceration—can assist you with your response to these issues. Working with a conditions of confinement expert helps you educate the court on the impact of gender and sexuality on incarceration, whether in your defense representation or in ancillary litigation.

5. EXPERTS ON GENDER AND GENDER BIAS IN THE CRIMINAL LEGAL SYSTEM

Bringing on a consultant or expert on gender in the criminal legal system can help your team navigate the challenges discussed in this manual—including identifying and hiring the right experts for your case. Gender experts and consultants can help teams adopt a holistic view to gender-sensitive representation. Advocates and researchers who work extensively in this field help teams navigate everything from claim development, to building a strong attorney-client relationship, to gender-sensitive team building, to gender-informed investigation. In most cases, these are consulting experts, although some may testify. For example, a linguistics expert may be relevant to testify about gender bias expressed by police officers during the interrogation of your client, or by prosecutors and witnesses during trial.

CONSIDERATIONS WHEN WORKING WITH EXPERTS

Once you know the forms of expertise that you are seeking, it is important to undertake a thoughtful search for your expert. There is no one-size-fits-all approach when it comes to expert assistance, particularly when hiring professional experts such as psychologists. Given the particular needs of women, queer, and gender diverse clients, it is essential that the expert have the requisite training and expertise to address those needs.

A critical consideration is that all of your experts should have worked with a population akin to your client before. In the case of women, for example, this means that all of your experts must have worked with women previously, and ideally incarcerated women.

An expert who has solely worked with incarcerated men will not provide the same benefits to your client and team as an expert who is well versed in the needs, backgrounds, and experiences of incarcerated women.

When hiring, you should check the extent to which your expert has worked with women before and whether they understand how gender and sexuality affects their field of expertise.

In the case of mental health professionals, you should identify an expert who understands the gender differences across mental illnesses and disorders. As discussed in Chapter 4, the symptomology, presentation, and risk factors of diverse mental health challenges differ across gender lines, issues with which your expert should be both familiar and fluent. Similarly, any experts involved in evaluations of your client (such as neuropsychologists and trauma experts) must have an appreciation of the impact of gender and sexuality on your client's background, presentation, affect, and conditions of incarceration. Ideally, you should seek experts who have worked with survivors of gender-based violence before—no matter whether your expert is directly working with issues of GBV—so that they can appreciate the impact of this abuse on your client and her experiences of incarceration. At the very least, your mental health professional should be up-to-date on the literature regarding incarcerated women and abuse so that they can anticipate how these issues interact with their field of expertise.

While this chapter has not specifically discussed intellectual disability as a gender-specific issue, it is worth touching on considerations for experts in this domain. Gender and sexuality affect the risk factors for intellectual disability, the development of adaptive deficits, and the presentation of disability.⁴ Issues related to your client's reproductive health and understanding of her own body, for example, may be pertinent to the conceptual domain of adaptive functioning, and childhood gender-based abuse may present substantial risk for cognitive impairment. Gender also affects your client's masking of her disability, especially when considering societal norms about expectations of women's behavior.⁵ It is important for your experts to understand the impact of gender on the development, presentation, and assessment of intellectual disability, and for your team to develop fluency with these issues so that a potential disability does not go overlooked.

When hiring professional experts, therefore, it is important to account for these considerations. Generalists are unlikely to have the knowledge and experience that you require and so will not be able to provide the expertise you need for your case. When reviewing your experts' CVs, look for gender-specific experience. Talk to them about gender when interviewing them. Craft your expert referral questions with gender in mind. Investing in the right expert at the outset can transform your case.

SOME SAMPLE QUESTIONS WHEN INTERVIEWING EXPERTS INCLUDE:

RESEARCH AND EXPERIENCE

- What populations have you worked with? (Incarcerated people? Incarcerated women? Queer folks? Women who are abuse survivors?)
- Have you noticed any differences in the kinds of mental health issues that arise in the cases of incarcerated women and men? Can you explain?
- What advancements in research and/or scholarship seem especially relevant to the work you might imagine doing on a woman's case? On the case of an LGBTQ+ client?

TESTING AND ASSESSMENT

- How, if at all, would aspects of the client's identity affect testing and assessment (i.e. race, gender, sexuality)?
- What challenges arise in administering instruments in prison settings, particularly in women's prisons?
- What test instruments do you feel are critical when assessing the mental health of an incarcerated woman/trans person/gender diverse person?

TRAUMA AND GBV

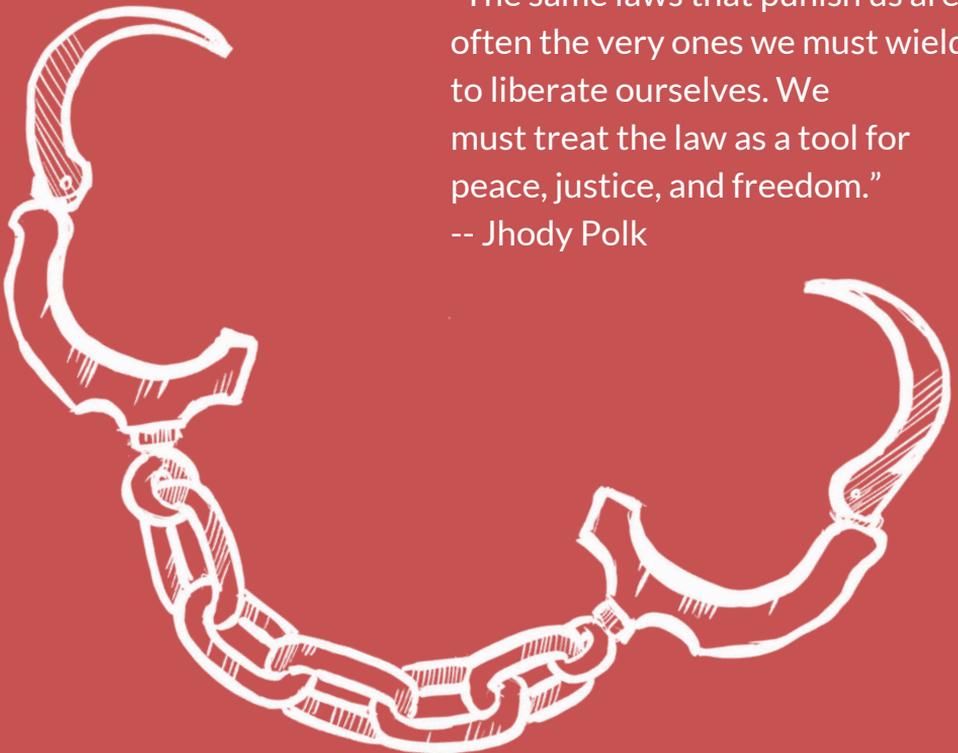
- What kind of trauma have you seen most often among incarcerated women/queer people?
- How do you understand gender-based violence?
- Can you describe your experience working with people who have experienced genderbased violence?
- How do you understand intimate partner violence?
- What is your understanding of the state of the literature in this area? Are there particular frameworks you adhere to?
- How does gender affect experiences and presentations of different forms of trauma?

07

CONDITIONS OF DETENTION FOR WOMEN FACING EXTREME SENTENCES

“The same laws that punish us are often the very ones we must wield to liberate ourselves. We must treat the law as a tool for peace, justice, and freedom.”

-- Jhody Polk



The criminal legal system is designed by men and for men. Prisons often overlook women's specific needs and vulnerabilities. This chapter aims to sensitize defense teams to the particular needs of women facing extreme sentences and conditions common to them, such as extreme isolation, poor medical care, and vulnerability to sexual assault. We frame these needs in the context of the international legal framework that outlines the United States' obligations to care for women in detention. We do so because this framework provides a comprehensive normative overview that you can use to understand your client's conditions of confinement. Armed with this information, you can better advocate for your client's needs.

1. THE INTERNATIONAL LEGAL FRAMEWORK FOR WOMEN IN DETENTION

In 2010, the United Nations Office on Drugs and Crime adopted Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders ("Bangkok Rules") to take into account the gender-specific needs of women prisoners.¹ The Bangkok Rules apply a gender lens to an extensive range of issues, providing gender-sensitive guidance on prison admission,² security and search procedures,³ disciplinary procedures,⁴ institutional personnel training,⁵ and prisoner supervision.⁶ The Rules also cover women prisoners' access to general and female-specific physical and mental health care,⁷ training opportunities,⁸ and rehabilitation.⁹ The Rules stress the importance of women's communication with family and friends, and especially contact with their children.¹⁰ The Rules also identify considerations for especially vulnerable categories of women: women under arrest or awaiting trial,¹¹ juvenile female prisoners,¹² foreign nationals,¹³ minorities and indigenous women,¹⁴ pregnant women,¹⁵ breastfeeding mothers,¹⁶ and mothers in prison with a child.¹⁷

The 2015 revisions to the United Nations Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules") further recognize women's unique needs. The Mandela Rules have provisions on separated housing,¹⁸ supervision by female prison staff,¹⁹ hygiene,²⁰ and banning restraints during labor and childbirth.²¹ The Mandela Rules also prohibit visiting restrictions as a way to discipline prisoners, particularly women prisoners.²²

2. THE RIGHT TO FAMILY CONTACT

Many of our clients remain the primary caregivers for children and elderly relatives at the time of their incarceration. As a result, restrictions on visitation can be devastating for women prisoners and their dependent family members. Moreover, the social stigma associated with women who are convicted and imprisoned, paired in some cases with restrictive family and child visitation rules, means that many incarcerated women suffer an enduring lack of family contact, contributing to the high levels of depression suffered by women prisoners. For women who are caregivers, particularly women with young children, separation from their children can cause tremendous emotional anguish.

Sunny Jacobs: A Mother Wrongly Convicted and Sentenced to Death

Sunny Jacobs was breastfeeding her ten-month-old daughter when the police arrested her for a crime that she had not committed. During her detention, she was deprived of all contact with her infant and her nine-year-old son.

Sunny continued to lactate, unable to nourish and bond with her baby. She kept thinking that at any moment the state would realize its mistake and reunite her with her children. As time passed, Sunny coped with the loneliness and despair by preparing for her release. Day after day, she collected her milk in a plastic bowl that she secured in the prison, eager to continue to be able to produce milk for her daughter. Without the opportunity to feed her daughter, she sought any way to remain connected with her. For over a year, she drank the milk that she had produced for her baby.

The only connections Sunny had to the outside world were occasional letters from family and from her husband, who was also wrongly convicted and sentenced to death. In one letter, she learned that her daughter began to drink milk from a bottle. And her nine-year-old son, who had been held in juvenile detention for over two months, needed psychological help and had to be put in a special school because of the trauma that he suffered at the hands of the authorities. Her despair deepened.

Sunny spent seventeen years in prison, five of them while sentenced to death, before she was exonerated. In that time, her parents died, her children entered foster care, and her husband was executed. The foster parents demonized Sunny. They showed her children articles detailing Sunny's alleged crime, told them they shared her bad DNA, and threatened that they, too, would also end up in prison.

When Sunny was released at 45 years old, her children were grown, and she was a grandmother. Sunny now works to educate the public on the death penalty. With her late husband, an exoneree from Ireland who was also wrongly convicted and sentenced to death, she started a foundation to help other wrongly convicted people.

When you are representing a woman who has recently been arrested, she may need your help obtaining information about her children's welfare. Some lawyers may think that this falls outside the scope of their representation, but if your client is distracted by worry and fear, she will not be able to focus on her legal proceedings. Moreover, showing your concern for your client's emotional well-being will help build trust and strengthen the attorney-client relationship. Even if your client has no children, she may experience profound isolation from friends and family.

Women who identify as LGBTQ+ may experience additional obstacles to visitation as a result of their sexual orientation and/or gender identity and expression. Some individuals may not be in contact with their biological families or may not have biological relatives who can provide financial or emotional support. Some LGBTQ+ persons may have close ties with their chosen family,²³ but most prisons and jails do not recognize these non-biological family members as relatives and have policies that bar or restrict visitation. Similarly, same-sex marriages or longterm relationships may not be recognized and may even be criminalized, which can affect visitation and support. All of these factors can isolate your already-vulnerable LGBTQ+ clients and increase the risk of trauma, suicide, and self-harm.²⁴

3. HOUSING AND SOLITARY CONFINEMENT

Many women facing a death sentence are the only woman on death row in their state, or one of only a small number of women. This frequently means that they are housed separately from the rest of the prison population, and often are entirely alone. These isolating conditions have a severe and detrimental impact on women's health, on their access to programming, and on their ability to engage in religious practice.

You need to understand your client's day-to-day housing conditions, as they have a profound impact on her ability to build a relationship with you and meaningfully support her case. Her housing conditions may also be directly relevant to her defense litigation, parole request, or clemency request, and you may need to work with a prison conditions expert. Sometimes you can advocate for your client with the prison service and department of corrections. You can also consider litigating issues relating to housing and conditions of confinement in civil suits or in international courts, as we discuss in Chapter 9.

Christa Pike, the only woman on death row in Tennessee, recently sued the Tennessee Department of Corrections over her housing conditions, explaining that the state had kept her in de facto solitary confinement for over a quarter century.²⁵ In 2024, Ms. Pike's attorneys achieved a settlement for her. They explained that for almost 30 years, "Ms. Pike has been subjected to solitary confinement in a cell the size of a parking space, where she has had nearly no meaningful human contact."²⁶ She had "no social engagement with other incarcerated individuals or prison staff, no educational or religious programming, and nearly no physical contact with another human being."²⁷ These conditions were "devastating" to her health. Under the terms of the settlement agreement, she is now able to work as an administrative assistant in the unit and participate in group activities such as meals, classes, and religious services with other incarcerated women.²⁸

4. TRANSGENDER, NONBINARY, AND GENDER DIVERSE PEOPLE

HOUSING

One of the most significant obstacles facing LGBTQ+ prisoners, and in particular transgender women, is obtaining safe and gender-appropriate housing in carceral institutions. Most prisons and jails are segregated on the basis of sex assigned at birth and either house male or female prisoners. Therefore, many transgender women are classified by their assigned sex at birth and are housed in male facilities, which disaffirms their gender identity, restricts their ability to express that gender identity through access to gender-affirming clothing, accessories, cosmetics, and hygiene products, heightens their risk of physical and sexual assault by both inmates and staff, and increases their risk of severe psychological distress.

While some jurisdictions allow for transgender women to transfer to a women's institution,²⁹ the majority of carceral institutions do not provide for housing classification based on a prisoner's gender identity. Many institutions acknowledge the increased risk of violence facing transgender women in men's facilities and respond by placing transgender women in solitary confinement, purportedly for their own protection. Yet studies show that solitary confinement, which is considered a form of torture by the UN Special Rapporteur on Torture,³⁰ is often used as a tool of control and violence over transgender women and all LGBTQ-identified people.³¹

Given the varied approaches to housing classification by state and by facility, it is imperative that the defense team apprise themselves of the relevant institutional policies on housing for trans clients. Such policies concern housing, access to gender-affirming medical and mental health care, and access to gender-affirming clothing and hygiene products.

Defense teams must also inquire about a client's housing preference and, in turn, advocate for LGBTQ+ clients to be safely and appropriately housed. Such preferences may include being in a facility that conforms with a client's gender identity, in protective custody, in a unit with other LGBTQ prisoners, or another alternative. Similarly, defense teams must advocate for genderaffirming clothing, hygiene products, and cosmetics, and challenge policies concerning hair or dress that restrict a client's expression of gender identity in accordance with a client's preferences.³² This may require ancillary litigation and assistance from legal advocacy organizations that frequently litigate prison conditions for LGBTQ+ people.

HEALTHCARE

Transgender and non-binary people often face exceptional challenges to receiving genderaffirming health care while incarcerated. Of those facilities that provide some form of genderaffirming health care, most require that prisoners have a diagnosis of Gender Dysphoria³³ or a medical history of treatment in order to receive appropriate health care and, even then, many institutions must be forced by court order to provide that care.³⁴

GENDER DYSPHORIA REFERS TO THE FEELING OF DISCOMFORT OR DISTRESS THAT MIGHT OCCUR IN PEOPLE WHOSE GENDER IDENTITY DIFFERS FROM THEIR SEX ASSIGNED AT BIRTH OR SEX-RELATED PHYSICAL CHARACTERISTICS.

Those institutions that deny gender-affirming healthcare outright, whether because of cultural stigma, criminalization, or other reasons,³⁵ create significant risks for the medical and mental health of transgender and non-binary clients. According to World Professional Association for Transgender Health (WPATH), which developed the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, "While each patient requires an individualized treatment plan that accounts for the patient's specific needs, the recommended treatments for people experiencing gender dysphoria include assessment, counseling, and, as appropriate, social transition, hormone therapy, and surgical interventions to bring the body into alignment with the patient's gender identity."³⁶ For prisoners with gender dysphoria, the denial of gender-affirming health care "can result in serious medical issues such as depression, suicidality and self-castration."³⁷

Moreover, even those jails and prisons that are purportedly willing to provide genderaffirming health care, but that require a gender dysphoria diagnosis or history of medical intervention, inappropriately exclude a number of transgender and non-binary prisoners who need gender-affirming treatment. Importantly, not all individuals who identify as transgender or gender nonconforming experience gender dysphoria; in other words, some people do not feel discomfort in their bodies, with or without medical intervention. Regardless of a diagnosis of gender dysphoria, however, many incarcerated individuals have medical needs specific to their gender identity and expression as well as their medical history. For example, prior to incarceration, many transgender and non-binary prisoners have undergone some type of gender-affirming medical treatment, such as hormone therapy, and need continued treatment for medical and mental health reasons. In one study, “more than a third of transgender, nonbinary gender, and Two-Spirit respondents took hormones prior to their incarceration,” but the majority of those individuals took street-based hormones that were not prescribed by a doctor and thus have no record of this treatment. Of the respondents who had previously been taking hormones, 44% were denied access to those hormones in prison.³⁸ Prisons should not abruptly discontinue hormone therapy for transgender and non-binary people, regardless of whether that treatment was prescribed, as doing so could endanger their physical and mental health. Similarly, prisons should not deny transgender people gender-affirming medical care simply because they have not previously received a gender dysphoria diagnosis or transition-related treatment.³⁹ Restrictive policies that limit treatment to those with a specific diagnosis or prior medical record therefore prevent many individuals from accessing critical gender-affirming health care in prison.

It is important that defense teams respectfully and sensitively discuss clients’ medical and mental health needs⁴⁰ as well as their desires on how to obtain the gender-affirming care required to meet these needs. Defense teams should be aware of the DSM-5 and ICD-10 descriptions of disorders and/or conditions related to gender identity and expression, the prevailing standards of medical care for transgender and gender diverse people, and the laws and policies pertaining to the provision of adequate medical care in the relevant jurisdiction.

BOP-SPECIFIC CONSIDERATIONS

The federal Bureau of Prisons (BOP) has its own policies regarding gender-affirming housing classifications and health care, which shift dramatically depending on the politics of each administration. Under the administrations of Presidents Obama and Biden, BOP policies were altered to allow for housing classification on the basis of several factors—not simply sex assigned at birth. During President Trump’s first and second terms, however, he ordered that BOP housing classifications be determined on sex assigned at birth. Specifically, in his January 2025 Executive Order, President Trump mandated that “males are not detained in women’s prisons or housed in women’s detention centers” and that “the Bureau of Prisons revises its policies concerning medical care to . . . ensure that no Federal funds are expended for any medical procedure, treatment, or drug for the purposes of conforming an inmate’s appearance to that of the opposite sex.”⁴¹

Defense teams must educate themselves on the fluctuating policies of the BOP and any state carceral institutions, which are largely driven by politics. Those policies are of vital importance to your client, their mental and medical health, their ability to engage with the defense, their concerns about pleas and sentencing, and their very survival. If the prevailing policies at the time of your defense do not provide for gender-affirming housing and health care, defense teams must be prepared to litigate those issues or, if prohibited by administrative rules, to engage with advocates who can do so.

Do not be deterred by seemingly insurmountable obstacles to obtaining appropriate housing. Numerous lawsuits brought by transgender women have resulted in placement in genderaffirming housing while incarcerated. In fact, after President Trump issued his Executive Order, several transwomen incarcerated in the BOP filed a lawsuit seeking to halt their transfer to a men’s facility, arguing that it violated the Eighth Amendment’s prohibition of cruel and unusual punishment. Less than three weeks after the Executive Order, federal judges in Boston and Washington, D.C. blocked the BOP from conducting those transfers.

5. THE RIGHT TO ADEQUATE MEDICAL AND MENTAL HEALTH CARE

HOUSING

Incarcerated people of all genders receive substandard medical care in most states. But when prisons fail to provide for women's unique health needs, they place women at greater risk of infection, illness, or death.

At the most basic level, it is often challenging for women to access adequate menstruation products in many prisons. Prisons do not provide enough sanitary pads each month, for example. In some cases, women must make do with alternatives such as tissues.⁴² In other states, they must purchase tampons from the commissary at astronomically high rates. Such conditions are deeply degrading.

Moreover, women who are going through menopause frequently receive little assistance with this transition and often are housed in conditions that make menopausal symptoms particularly challenging. Kwaneta Harris, a journalist and incarcerated woman in Texas, has described in detail the "hell" of experiencing a hot flash in a Texas summer heatwave with no air or ventilation in her cell:

"Searing heat radiates from my chest and spreads to my limbs. Sweat gathers at my hairline, pools in the crooks of my elbows and crawls down my back. I grab a big bowl I keep filled with water for this very purpose and pour it over my head. Instant relief follows. Unlike most women going through menopause, I can't rush to adjust the thermostat. I'm having another hot flash in solitary confinement at a Texas women's prison. There is no air conditioning, no escape from the heat."⁴³

Access to women's health services is even more problematic. According to the World Health Organization, "Women are at greater risk than men of entering prison with HIV, hepatitis B and/or hepatitis C." Incarcerated women are also at higher risk of cervical cancer, yet rarely receive regular screenings.⁴⁴ Gynecological and obstetric care is frequently non-existent for incarcerated women.⁴⁵

Women prisoners are also more likely to have severe mental illnesses that remain untreated in detention, in part because of the exceedingly high rates of gender-based violence in their lives before they are thrust into the criminal legal system. They are at higher risk of depression, selfharm, and suicide.⁴⁶ Knowing this, you should be particularly attuned to your client's mental and medical health needs. Whenever possible, advocate for your client's needs by meeting with prison medical staff, correctional officers, and wardens.

6. VIOLENCE IN PRISONS AND POLICE STATIONS

Women prisoners often suffer sexual harassment and violence. Although international standards require that women prisoners remain under the authority of female prison staff, prisons do not always respect these norms. Prison guards may subject women prisoners to rape, sexual touching, intrusive pat-downs and strip searches, and other forms of sexual humiliation. In some prisons, correctional officers have elicited sexual favors from women in exchange for basic care. One woman in a Texas prison explained that during a heatwave, incarcerated women showed officers their breasts in order to obtain a cup of water.⁴⁷

Women are also vulnerable to sexual violence in police stations. Women who are held on criminal charges may be raped, tortured, or subjected to sexual humiliation, such as being forced to strip before male officers.⁴⁸

Defense teams representing women need to build enough trust with their clients to speak with them about their experiences in police stations and prisons. Women may be reluctant or ashamed to report these experiences, may fear exposure and humiliation, and may fear retaliation for sharing these experiences. We encourage you to draw on the information in Chapters 3-5 and CCDPW's gender-sensitive interview protocol when approaching these conversations.

7. LGBTQ+ WOMEN

All LGBTQ+ women prisoners—and transgender women in particular—face heightened rates of discrimination, abuse, and sexual assault from the moment that they come into contact with the criminal justice system.⁴⁹ There is a long history of police violence against LGBTQ+ women nationwide.⁵⁰ A 2015 study revealed that 58% of transgender people who interacted with law enforcement that year alone reported experiences of harassment, abuse, or other mistreatment by the police.⁵¹

Violence against LGBTQ+ people is perpetrated both by staff and other incarcerated people. One study found that one in three LGBTQ+ prisoners nationwide had been physically assaulted by staff, one in ten were pressured to provide sexual favors, and one in ten was sexually assaulted by staff.⁵²

Abuse and violence committed by other inmates is even more prevalent—almost 60% of transgender women housed in men’s prisons have reported sexual abuse while incarcerated.⁵³

What’s more, when LGBTQ-identifying female clients report abuse, they are often disbelieved, dismissed, or blamed for the abuse by staff. Transgender women prisoners who have been assaulted report that staff often express that the prisoner deserved to be victimized or was “asking for it.” Additionally, upon reporting abuse, LGBTQ+ clients are often subjected to selective, arbitrary, and indefinite solitary confinement or other form of retaliatory punishment.⁵⁴

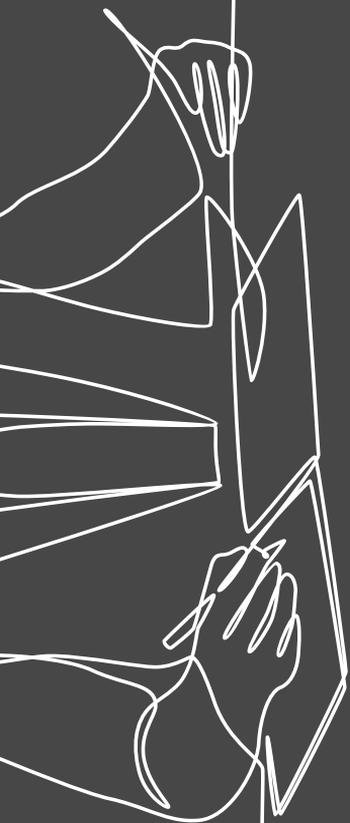
Defense teams must be aware of the heightened risk of discrimination, abuse, and violence by both other prisoners and staff when representing LGBTQ-identifying female clients and, in turn, advocate for their clients’ safety and fair treatment. Consider working with an expert who can help you understand your client’s distinct experiences of incarceration and always advocate for your client’s health, safety, and wellbeing.

08

WOMEN IN THE CRIMINAL LEGAL SYSTEM

“For Black clients, the only peers
in the courtroom are often those
sitting in the back,
waiting for their turn.”

-- Jhody Polk



THIS CHAPTER FOCUSES ON HOW GENDER AFFECTS WOMEN'S INTERACTIONS WITH POLICE, PROSECUTORS, AND COURTS. WE BEGIN BY DISCUSSING PATTERNS IN WOMEN'S CRIMES OF CONVICTION AND WITH THEIR CODEFENDANTS. WE THEN DISCUSS HOW VARIOUS STATE AND COURTROOM ACTORS RESPOND TO WOMEN AND QUEER DEFENDANTS IN THE CRIMINAL LEGAL SYSTEM, BEGINNING WITH POLICE INTERROGATIONS BEFORE MOVING ON TO COMMON PROSECUTORIAL NARRATIVES. FINALLY, WE HIGHLIGHT THE MYRIAD WAYS THAT WOMEN CAN EXPERIENCE DISCRIMINATION ON THE BASIS OF MULTIPLE MARGINALIZED IDENTITIES.

1. Common patterns in women's cases

Each client is unique—no single theory can be brought to bear on the case of every woman and queer person in the criminal legal system. There are, however, striking commonalities that you should be aware of when defending women, queer, and gender diverse clients.¹ Gender-based violence, poor mental health, motherhood, and complex sexual histories are experiences that are near ubiquitous in the pre-incarceration lives of women facing extreme sentences, as we have seen in Chapters 3 through 6. Here, we turn to commonalities in women's experiences of the criminal legal system, exploring patterns in their crimes of conviction, those they are accused of harming, and their co-defendants in these offenses.

WOMEN'S CRIMES OF CONVICTION

Recent research has shown that women are rarely convicted and incarcerated for killing strangers.² In fact, women's homicide offenses overwhelmingly involve people known to them. In capital cases, over 85% of women defendants currently on death row had a prior relationship with the deceased person.³ Most of the women on death row were convicted of crimes resulting in the death of a family member. The two most common victim groups in women's capital cases are intimate partners and children in the women's care.⁴ These patterns underscore how important it is for us to understand women's prior relationships when defending them.

It is also important to understand women's prior offenses and how your client's history may relate to broader patterns for women defendants. In general, women in the criminal legal system are far less likely than men to have a prior criminal record and far less likely to have histories of violence.⁵ In capital cases, research has shown that over 90% of women currently on death row had never been convicted of a crime of violence before they were arrested and charged with capital murder.⁶ Of those capitally-sentenced women who do have prior convictions, the vast majority are for nonviolent offenses such as DUIs, forgery, and driving offenses.⁷ We note these patterns because women's lack of prior violent convictions can lead prosecutors resort to other means—such as biased narratives—to portray women defendants as violent and dangerous.

WOMEN AND CO-DEFENDANTS

You should pay particular attention to your client's relationship with any co-defendants and alleged co-conspirators, as these relationships are often critical to understanding her story. Of the women currently on death row, over 60% had at least one male co-defendant.⁸ The majority of these co-defendants were abusive intimate partners.⁹ This data underscores the importance of developing a comprehensive sexual and relationship history as part of your representation, including the effect of relationships on your client's physical and mental health profile. Chapters 4 and 5 discuss how you can do this.

GENDER OF COURTROOM ACTORS

In spite of the inherently gendered features of women's cases, women are largely prosecuted by men, defended by men, and judged by men. Research into capital cases reveals stark imbalances: over 90% of women on death row were prosecuted under a male defense attorney, 88% were tried before a male judge, and 69% were defended by all-male defense teams.¹⁰ Indeed, of the forty-five women on death row nationwide as of July 1, 2024, more than one-third (36%) were prosecuted, defended, and judged exclusively by men.¹¹

The masculine makeup of the courtroom makes it all the more important that you carefully consider your team composition and build a gender-sensitive team, as we explain in Chapter 2. It also means that you must be equipped to educate other courtroom actors and decisionmakers on the importance of gender in your client's case, and you need to be prepared to counter gendered narratives in the courtroom. While the presence of male judges and attorneys does not automatically mean they will show gender bias, it does mean that there are fewer people involved in your client's legal proceedings who have lived experiences that may map on to hers and in whom she can see her experiences reflected.¹²

2. Sex work and trafficking

Our research indicates that at least 15% of capitolly-sentenced women have either engaged in sex work or have experienced child sex trafficking.¹³ This figure is likely an underestimate as women's experiences in the sex industry remain a source of stigma. Given the prevalence of sex work among those facing extreme sentences, defense teams must be familiar with sex work, trafficking, and the applicable legal frameworks. At the same time, they must be skilled in navigating the landscape of power, biases, and the strategic considerations surrounding the investigation and presentation of such evidence.

While sex work and trafficking are distinct, there is a strong relationship between the two. Sex work is defined broadly as any work conducted by an adult of any gender over the age of 18 that involves the exchange of sexual services for money, goods, or services.¹⁴ Sex trafficking may sometimes look like sex work, but it is distinct because it involves at least one perpetrator using force, fraud, or coercion against another person of any age or gender for sexual purposes, often transporting them across state or national borders.¹⁵ Any exchange of money, goods, or services is typically between the trafficker and the client, either directly or indirectly. While adult sex work may be consensual, advocates should be mindful that some sex workers' life circumstances may compromise freedom of choice. Sexuality, gender identity, race, immigration status, socioeconomic circumstances, addiction, and childhood trauma are all examples of factors that may have influenced how someone chose sex work or became vulnerable to trafficking.¹⁶

Children are unable to consent to sex. Federal law mandates that the government treat people under the age of 18 who are trading sex as victims of trafficking and their "clients" as traffickers.¹⁷ A child is also a victim of sex trafficking when an adult manages, organizes, or facilitates sex with the child. Regardless of the jurisdiction in which a client faces charges, attorneys and advocates should emphasize that children cannot consent to sex and should clarify that the client is a victim of child sex trafficking, not a "child prostitute."

Women who have engaged in sex work face high risks of sexual violence.¹⁸ Both sex work and sex trafficking carry significant risks of rape, sexual abuse and exploitation, arrest, robbery, murder, and other physical violence.¹⁹ These risks are inherent in trafficking because of the use of force, coercion, or fraud.²⁰ The risk of such violence against non-trafficked sex workers is strongly correlated to the criminalization of consensual work.²¹ Sex workers' vulnerability is compounded for marginalized people, particularly trans, immigrant, and low-income sex workers: in 2022, half of murdered trans people were sex workers.²² Police are more likely to perceive trans victims of sex trafficking as criminals rather than victims, making incarceration a much more likely result of contact with police than protection.²³ In general, intersectional identity factors, such as race, sexuality, migration status, and economic security coincide to increase the risk of violence for sex workers.

BEST PRACTICES

Effective practices include understanding and addressing the biases against sex workers and the unjust, gendered and racial frameworks that prosecutors weaponize in front of judges and juries. For example, prosecutors will often cast children as willing participants in their own exploitation. Defense teams must be ready to move to preclude, object, challenge, and counter the weaponization of exploitation. This may include specific strategies on use of language at trial for motions in limine or an approach to jury selection that removes jurors with biases relating to sex work or trafficking.

As mentioned in other parts of this manual, it is a best practice for a defense team to have at least one member who has life experiences that mirror the critical life experiences of the client. In the context of defending a client who has traded sex or survived trafficking, this can mean a defense team member who is personally (not just professionally) familiar with this type of survival. Composing a defense team to include lived expertise relevant to your client and her life creates a closer bond with the client, increases understanding, and strengthens the strategic acumen of the defense team.

Understanding your client's history in connection to sex work or trafficking may also affect defense strategy at the culpability and penalty phases of a trial. Depending on the issues in the case and the defense theory, it may involve calling defense witnesses to testify about your client's history of coercive control, gender-based violence, or duress. Mitigation investigations should encompass a deep understanding about your client's life history and experiences with sex work. In capital cases, this is essential for litigating the penalty phase.

COMMUNICATING WITH YOUR CLIENT ABOUT SEX WORK AND TRAFFICKING

Gender- and trauma-sensitive interviewing is critical to establish trust, as we discuss in Chapters 3, 4, and 5. Let your client determine the language to describe her experiences. Your client may prefer the term "sex worker," or she may prefer the word "prostitute" or "street worker."²⁴ Be non-judgmental in tone and word choice. Your client will not be able to open up to you if they feel you are judging them for her history or choices. Not only will this undermine your relationship, but it will risk further traumatizing your client. Instead, help your client take control of her narrative. Open-ended questions over the course of multiple conversations will allow your client to tell her story in their own words. For more information on sex work and trafficking, consult our fact sheet on Sex Work and Human Trafficking.

ADDITIONAL RECOMMENDATIONS:

- If your client is accused of trafficking, be sure to explore how she herself may have been a victim of trafficking.
- Consider how a childhood or life history of sexual coercion may help establish a narrative context of normalized sexual violence in adulthood.
- In legal proceedings, consult with your client on the best terminology to use. The language that is appropriate to use in proceedings may differ from the language with which you communicate with your client, but all linguistic choices should be made with input from your client.
- Consider that coercion and/or sex trafficking may be the basis of defenses of duress or necessity.
- Challenge stereotypes that sex workers are inherently dishonest or criminal.
- Object to the relevance and admissibility of consensual sex as evidence at trial.
- Connect your client, if she so desires, as early on as possible, to tailored services and resources that can help her on the journey of healing from the trauma of trafficking.

3. Interactions with state actors

a. Women and Police Interrogations

Women—particularly gender nonconforming women and women from minority cultures—are vulnerable to sexual abuse, harassment, and coercive interrogations by law enforcement. In the United States, police sexual violence against women is “widespread, underreported, and under addressed.”²⁵ Women are most vulnerable when they are alone in police custody, before they have access to the courts or legal counsel. There, police may wield their power to extort sexual favors, intimidate women into confessing, or simply exploit the vulnerability of women who are under their control and incapable of fighting back.

Many victims of police sexual violence never report the crime, either out of shame, fear of retaliation, or the sense that they will not be believed.²⁶

Queer and gender diverse people experience pervasive and severe police harassment and violence. Frequently, police use other purportedly neutral laws²⁷ and policies, such as stop-and-frisk,²⁸ to disproportionately and discriminatorily target queer people²⁹. Once arrested, LGBTQ+ people are often subjected to violence and harassment by law enforcement officials.³⁰

Police sexual violence also disproportionately affects women of color—particularly Black women and girls.³¹ It is important that you specifically ask your clients whether, at any time while they were in police custody, they were touched, insulted, or subjected to any kind of sexual overtures or innuendo. Such behavior may be criminal, and it is also directly relevant to the admissibility of any statement your client may have made to the police.

Even where the police do not engage in violence or sexual harassment, women may be vulnerable to coercive police tactics. Most women and queer people who come into contact with the criminal justice system are victims of trauma—and frequently, their trauma is tied to mistreatment by authority figures in their lives. Research shows that past trauma is associated with heightened suggestibility among individuals who falsely confess to crimes.³² Similarly, survivors of intimate partner violence may have “automatic, often unconscious habits of obedience,” making them vulnerable to authority figures.³³ Survivors of gender-based violence are also more apt to internalize guilt, meaning they are more apt to acquiesce to aggressive questioning by police. In turn, this heightens the risk that they will falsely confess to a crime they did not commit.³⁴ You must be acutely aware of these dynamics and educate yourself on the relationship between abuse, trauma, and coerced confessions, given the prevalence of gender-based violence among incarcerated women.

You should also be attuned to how the gender bias of law enforcement officials can shape their perceptions of your client and any male co-defendants. This is particularly important in cases involving the death of children in your client’s care.

When Melissa Lucio and her partner Robert were interrogated following the death of their child, the police had no evidence that either parent had abused Mariah. Both parents shared caretaking responsibilities for Mariah, but the police treated Robert as a victim and Melissa as a suspect from the outset—even though Robert had a history of familial violence. After hiring a linguist to analyze the transcripts of the interrogations, Melissa’s defense team presented the unmistakable evidence of gender bias in their clemency petition:

To begin with, the two police officers interrogating Robert Alvarez displayed empathy, deference, and camaraderie. Before asking a single question, Officer Villarreal expressed sympathy for Robert’s loss. Referring to Robert as “sir,” Officer Villarreal apologetically stated that he must ask some “uncomfortable” questions, then asked if Robert had hurt Mariah. After Robert responded “no,” the officers did not press him further. . . . Throughout the interrogation, the police allowed Robert to speak without interruption. They asked how he disciplined his children, and he admitted to spanking them. Rather than bringing out a doll to ask Robert to demonstrate his disciplinary methods (as they did with Melissa), they merely asked a few follow-up questions before focusing their questioning on Melissa’s disciplining of the children. . . . Not once did they directly accuse Robert of killing his daughter, beating her, causing her bruises, or otherwise harming her.

[The] police repeatedly invoked Melissa’s caretaking role during their interrogation, seeking to provoke self-blame—and a confession—for failing to live up to her role as a mother. They repeatedly pressured her to confess “as a mom:” “You need to come out clean and tell us. At least as, as a mom, do it for Mariah.” “[I]t should come out from you. You’re the mom. . . .” “If you’re such a good mother, you need to stand up for her right now and tell us exactly what happened.” “Can you even speak out as a mom? . . . They also criticized her mothering, including the nutritional content of the meals she fed Mariah. With Robert, by contrast, they did not attempt to assign blame or provoke a sense of shame over his failures as a father. Rather, the police interviewer expressed sympathy for the stress of being a father: “I can identify with it. I have only two kids. But they take so much time.” These differences underscore how police targeted Melissa, at least in part, because she was a mother

b. Prosecutorial narratives

Prosecutors cannot rely on gendered tropes about how a person should behave, dress, and present to secure convictions and sentences. The Supreme Court recently recognized the unconstitutionality of such prosecutorial tactics in *Andrew v. White*, a case brought by Brenda Andrew, a woman condemned to die in Oklahoma. The Court explained that “[t]he State spent significant time at trial introducing evidence about Andrew’s sex life and about her failings as a mother and wife” before holding that the Due Process Clause forbids the introduction of such unduly prejudicial evidence at criminal trials.³⁵

The California Supreme Court recently underscored the damaging impact of gender bias in the case of *People v. Collins*, involving a woman sentenced to fifteen-to-life for failing to prevent her partner from killing their child. The Court noted that biased notions of motherhood affected the treatment of Ms. Collins:

Here, police questioned Collins about her “mother intuition.” They asked about her “gut” as a mother and remarked how she was “built” with a maternal instinct to protect her child and know what was happening to Abel without direct observation. Assumptions about what Collins should have done based on outmoded, gendered notions of a mother’s — as compared to a father’s — role in caring for a child are not proper in determining a mother’s liability for murder based on a failure to protect. . . . While the statements noted above occurred during the police interrogation, prosecutors and courts must take care to ensure that this type of gender bias does not infect our criminal justice system.”³⁶

A concurring opinion by Justice Liu echoed the majority’s concerns:

“I write to express concern that failure-to-act liability carries a significant risk of unfairly punishing women who do not live up to gendered and class-based expectations of motherhood. In many ways, our society valorizes motherhood, but it also comes down hard on “bad mothers.” An awareness of this potential bias, as with any bias, properly informs our review of this case.”³⁷

Narratives relying on gendered tropes, however, remain commonplace. Women and queer people are demonized precisely because they “are perceived to have betrayed traditional gender roles.”³⁸ You must therefore be well-equipped to defend your client from gender bias by courtroom actors.

Narratives about sex

Prosecutors’ weaponization of stereotypes about women and queer people’s sexual expression is all too common in criminal trials. In capital trials, prosecutors have:³⁹

- Presented evidence about women’s choice of underwear. In one trial, the state displayed the defendant’s “thong underwear” to the jury during closing argument.
- Talked about the number of sexual partners the defendant has had.
- Speculated about whether the defendant needed lubricant before having sex.
- Elicited testimony about where and how frequently the defendant had sex with extramarital partners.
- Presented evidence of the defendant’s “flirtatious” behavior.
- Presented evidence about the defendant’s choice of clothing, honing in on outfits that show “cleavage” or describing a defendant as “all sassed up in her little pink outfit.”

These tropes turn women's trials into titillating and salacious explorations of her sexual expression. They portray the defendant as hypersexual and immoral, ultimately asking jurors to pass judgment on her not for the alleged offense, but for her transgressions of gendered norms about sex and gender presentation. **Your client's moral culpability and guilt should not be influenced by judgments of her gender presentation and sexual expression, and you must be prepared to guard against such damaging narratives.**

Narratives about motherhood

Other tropes relate to women's roles as mothers.⁴⁰ As one scholar notes, "[t]he penalty phase proceedings of women's capital trials—where juries are asked to weigh whether a defendant should be sentenced to die—can sometimes read like a referendum on women's mothering skills."⁴¹ Prosecutors have: ⁴²

- Brought evidence about the books that a defendant gave her children to read.
- Elicited testimony about a defendant's failure to leave work to attend to her sick child.
- Talked about a defendant's decision to stay out past midnight when "somebody else was taking care of her kids."
- Asked witnesses repeatedly whether the defendant behaved as a "good mother" should behave.

Notably, prosecutors often elicit evidence about motherhood in response to defense attempts to humanize their clients. While such evidence may sometimes be relevant where women are accused of killing their own children, in other cases "it serves no other purpose than to tie women's intrinsic worth (or lack thereof) to their societal role as caregiver."⁴³ In all cases, prosecutorial narratives about women as mothers ask decisionmakers to condemn women for failing to conform to societal norms.

Narratives about gender-based violence

Women's experiences of gender-based violence are routinely discredited, dismissed, and minimized at trial.⁴⁴ Prosecutors rely on long-debunked stereotypes to discredit women's accounts of childhood sexual abuse, rape, and intimate partner violence. They discredit women's accounts of violence for lack of corroboration, despite extensive research showing that gendered violence routinely happens in private, and women frequently cannot or do not choose to report it, as we discuss in Chapter 3. Prosecutors have: ⁴⁵

- Suggested that a defendant's account of abuse is false because it is not "verified" and that the abusers should be interviewed to check the veracity of the defendant's account.
- Determined that the defendant's account is false because abusers were family members and close friends.
- Repeatedly berated a defendant for not filing a report of her abuse with the police.
- Argued that a witness able to verify the defendant's account could not be believed because the witness was "a lesbian friend."

Narratives about gender-based violence

Where prosecutors are unable to completely discredit women's accounts, they have argued that the defendant did not behave as a victim should and therefore is not a "real" victim. Examples include:⁴⁶

- Argument that the defendant, who presented extensive evidence of severe abuse, is not a "legitimate" victim because she had "hardly any injuries" and "fights back."
- Argument that the defendant is not a victim because she had a "violent temper."
- Distinguishing the defendant from other women who "clearly . . . fit[] into that category [of battered women's syndrome]" unlike the defendant.

Prosecutors also minimize women's experiences of violence where they cannot discredit or dismiss them outright. Prosecutors have:⁴⁷

- Called evidence about gender-based violence an "excuse."
- Argued that the defendant only presented evidence of abuse to "exploit" the jury.
- Characterized a defendant, who was repeatedly raped by a man twice her age while she was an 11-year-old child, a "mature 11-year-old" who engaged in a "consensual relationship."
- Argued that the defendant's rape can't have been so bad because she didn't experience any "sexual dysfunction" later in life.

Each of these narratives about gender-based violence ultimately seeks to reduce empathy for survivors who become defendants and increases the likelihood that jurors will convict and condemn them.

So how should we respond to these prosecutorial narratives? Most importantly, you must build a relationship of trust with your client so that she is able to disclose important and sensitive information about her life with you. Chapters 3, 4, and 5 discuss this in greater depth. Research has shown that defense attorneys routinely fail to uncover and present evidence of their client's experiences.⁴⁸ Sometimes, defense teams fail to present any evidence of prior relationships and abuse at all, and other times defense teams present gap-filled narratives about their clients' sexual lives or experiences of abuse.⁴⁹ Not only are jurors more likely to reject such "half-baked" explanations or stories,⁵⁰ but these incomplete pictures leave prosecutors to fill in the gaps with their own narratives. When we do not comprehensively investigate and present our clients' life histories, we leave prosecutors room to exploit biased narratives to our clients' detriment.

You must also be sure to understand and explain to decisionmakers the consequences of your client's victimization, particularly on her physical and mental health. Because gendered violence is so normalized,⁵¹ many decisionmakers may be inclined to minimize the impact of abuse on your client's health. You need to be proactive in educating yourself and explaining the full impact of her life history.

Where the state does weaponize gendered tropes, be sure to object and preserve these issues for future litigation. Identifying gendered narratives in real time is challenging, particularly when prosecutors introduce such evidence periodically over a trial. Being well versed in gendered narratives and the stereotypes they rely on can help you identify such narratives when they occur. For this reason, you should also take action to proactively prevent the state from using gendered stereotypes. Consider filing pretrial motions or applications to the court to prevent prosecutors from using your client's deviation from traditional gender roles as evidence of her guilt or moral blameworthiness. In particular, request that the court bar the state from:

- Introducing evidence of your client's mothering abilities when it is irrelevant to her alleged crime.
- Referring to your client's gender identity or sexual orientation.
- Introducing evidence of your client's sexual history.
- Introducing evidence of your client's failure to conform to traditional roles in her partnership or marriage.

4. Intersectional discrimination in women's criminal cases

Throughout this manual, we refer to the intersectional forms of discrimination that women experience in the criminal legal system. The concept of "intersectionality" refers to the fact that some people experience distinct forms of oppression that coincide to amplify the discrimination the person suffers.⁵² We close this chapter by highlighting some of the ways that women and queer people with multiple marginalized identities experience harm in the criminal legal system.

a. Women from Racial or Ethnic Minorities

Women from racial or ethnic minorities experience discrimination both because they are women and also because of their race or ethnicity.⁵³ The UN Committee on the Elimination of Racial Discrimination has recognized that "some forms of racial discrimination have a unique and specific impact on women" and that racial and gender discrimination are "interlinked."⁵⁴ Prosecutors exploit these intersections to create additional barriers to justice for clients of color.

Erica Sheppard: A Victim of Intersectional Discrimination

Erica Sheppard, a survivor of child abuse, domestic violence, and multiple rapes, was sentenced to death in Texas when she was just nineteen. At the time of her arrest, Erica had three children, she was homeless, and her mental health was severely deteriorating. As a young Black girl growing up in poverty, she had little social support from caregivers, authority figures, and state actors throughout her life.

At seventeen, Erica met Jerry Bryant. Throughout their two-year relationship, Bryant beat her repeatedly, held a gun to her face, and threatened to kill her. She twice went to the police for help, and each time they failed to arrest Bryant—a common response when Black women report incidents of domestic violence. Erica sought refuge at a battered women's shelter, where she hoped to receive counseling and assistance. But the shelter would not keep her. Twenty-seven days later, she encountered a man who coerced her into participating in a robbery where he killed a woman. In court, Erica received a state-appointed lawyer who was inept, inexperienced, and had never tried a capital case.

Judge Carolyn King, a federal appellate judge, described Erica's life history as "horrific," "traumatic," and "abusive." Yet the prosecution ridiculed Erica's trauma, accusing Erica of making up the assaults: "Any bruises, any scratches? Any fear? She was not physically abused; but even if she was, what kind of excuse is that?" The prosecutor called her a "jackal" and exaggerated her role in the offense, downplaying her youth and lack of criminal record. The jury never heard about her extensive history of trauma and its impact on her mental health, and they sentenced her to death.

Today, Erica observes, "Using capital punishment or incarceration as the sole response to violence fails to achieve justice for all because you're simply sending people, especially Black and brown people, into a system that's already failed them."

You must consider the different forms of oppression that your client faces at every step of her legal proceedings. Exploration of the historical, political, and cultural context of your client's life must be a central component of your mitigation investigation. Educate yourself on the discrimination faced by minority racial and ethnic groups in your jurisdiction, understand how discrimination affected your client's life prior to her offense, and use all the tools at your disposal—such as challenging peremptory strikes—to oppose discrimination based on race and gender in your client's case. The American Bar Association's toolkits on combating racial bias in the courtroom are a helpful resource:

<https://www.americanbar.org/groups/diversity/resources/implicit-bias/>.

b. LGBTQ+ People

Queer and gender diverse people face pervasive violence and discrimination at every stage of the criminal legal process. From arrest to sentencing to incarceration, LGBTQ+ youth and adults are overrepresented in the criminal justice system.⁵⁵ Queer people experience disproportionate contact with the criminal justice system. Lesbian and bisexual women, for example, are four times more likely than straight women to be arrested⁵⁶ and 47% of Black transgender people have been incarcerated at some point in their lives.⁵⁷

This high rate of contact with the criminal legal system is due to “[a] history of bias, abuse, and profiling toward LGBTQ+ people by law enforcement.”⁵⁸ High rates of poverty, homelessness, and discrimination in housing (including homeless shelters) and the workplace also contribute to the criminalization of LGBTQ+ people.⁵⁹ As regards young people, these conditions are compounded by family rejection, homelessness, hostility in state-run homes and institutions, and discrimination in schools lead.⁶⁰ For many LGBTQ+ people, these conditions and social stigmatization thrust them into survival economies, such as sex work, which, in turn, are criminalized.

At trial, prosecutors will often weaponize harmful sexist, homophobic, and transphobic stereotypes to dehumanize LGBTQ+ clients and obtain the most severe penalty. In Bernina Mata's case, for example, the prosecutor suggested that the her lesbian identity was the motive for the crime—specifically, that because Ms. Mata was such “a hard core lesbian” who “by nature loathed men,” she murdered the male victim after he made a pass at her.⁶¹ In the case of Wanda Allen, a Black lesbian, the prosecutor “relied on sexist, racist stereotypes regarding Ms. Allen's butch identity and masculine appearance to defeminize, dehumanize, and prejudice her in front of the jury, thus ensuring her death sentence.”⁶² Prosecutors have also used clients' lesbian and transgender identities to diminish the severity of their punishment if incarcerated by implying that incarceration with individuals of the same sex assigned at birth would be sexually enjoyable. This argument not only mischaracterizes and misunderstands LGBTQ+ identities and relationships, but it also grossly minimizes the fact that LGBTQ+ prisoners often face physical and sexual violence and discrimination in housing, medical care, strip searches, and solitary confinement.

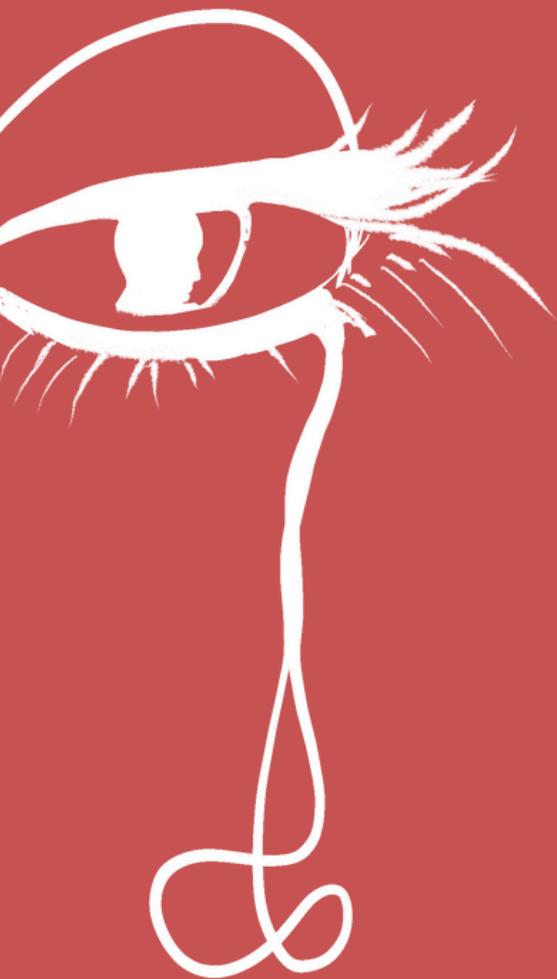
c. Women in Poverty

Many women in the criminal justice system, and the vast majority of those on death row, are from poor and marginalized communities. Without the resources to hire a lawyer, they are wholly dependent on state-appointed legal counsel.⁶³ Poor education, marginalized identities, and lack of resources leave poor women more vulnerable to discrimination, coercion, and exploitation. Criminalized women are subject to gendered systems of oppression that often push them into economic insecurity. Women disproportionately occupy part-time, low paying jobs⁶⁴ with short-term contracts or no contracts at all and little opportunity for career progression—in other words, precarious work.⁶⁵ This labor market gender segregation is partly attributable to discrimination by employers, who may be less likely to hire or promote women because they expect women to leave the labor market when they have children.⁶⁶

In most cultures, women are also responsible for providing care and financial support to both their immediate and extended family. This unpaid care burden is exacerbated for single mothers, who make up the majority of one-parent households⁶⁷ and face significantly higher poverty risks than average. Single mothers must support their family on a sole income, which is often inadequate, and they often struggle to juggle paid and unpaid work. They also face additional challenges due to their gender, such as pay gaps and motherhood pay penalties.⁶⁸

Understanding the economic hardships that your client has faced will help you provide context for her actions, particularly if she is charged with a crime involving financial gain, such as burglary or robbery. It will also help you explain why she may have been under additional psychological strain at the time of the crime.

09



GENDER AND HUMAN RIGHTS

“The criminal legal process
itself is just as impactful on
a client as the final
outcome.”

-- Jhody Polk

THIS CHAPTER WILL ILLUSTRATE HOW YOU CAN USE HUMAN RIGHTS LAW TO ADVOCATE FOR YOUR CLIENT. IT WILL ALSO SHOW HOW HUMAN RIGHTS LAW ALLOWS YOU TO CONTEXTUALIZE YOUR CLIENT'S OFFENSE IN THE FULLER FABRIC OF HER LIFE. OFTEN, IT IS DIFFICULT FOR JUDGES AND JURORS TO SEE WOMEN DEFENDANTS AS BOTH VICTIMS AND PERPETRATORS. A HUMAN RIGHTS FRAMEWORK CAN HELP YOU OVERCOME THIS CHALLENGE, AND IN SO DOING, YOU CAN SHIFT THE NARRATIVE OF YOUR CLIENT'S CASE FROM ONE THAT EXCLUSIVELY EXAMINES WHAT SHE DID WRONG TO ONE THAT HIGHLIGHTS HOW THE STATE FAILED HER.

1. Human Rights Law and Women's Death Sentences

Every major international and regional human rights treaty prohibits discrimination on the basis of sex. In addition, there are both international and regional treaties that focus on the human rights of women, such as the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. While these treaties do not address capital punishment, they are directly relevant to how states treat women both before their arrest, during their trials, and after their convictions and sentences are imposed. Where treaties and protocols recognize women's rights, states have corresponding obligations to respect and protect those rights.

Human rights law also outlines internationally-agreed parameters for the application of the death penalty. The UN International Covenant on Civil and Political Rights (ICCPR) protects all individuals' right to life.¹ Because the right to life is fundamental, the international community has limited the legal application of the death penalty, for example by exempting certain categories of offenders from capital punishment. Among these exempt categories are people with intellectual disabilities, people under the age of 18, and pregnant women.²

2. Using Human Rights Law to Reframe the Narrative

Our clients' experiences of gender-based violence and discrimination constitute human rights abuses.³ These human rights abuses, where known to the state or perpetuated by the state, trigger obligations on the part of the state to protect the victim's human rights and to support her. The state's obligations are known as "due diligence" obligations.

a. What is the due diligence framework?

All people have the right to be free from discrimination and to equality before the law, regardless of their gender. Common forms of gender-based discrimination against women include, but are not limited to: sexual abuse, rape, physical violence, psychological abuse, and coercive control. Some women are more vulnerable to gender-based discrimination because of their race, ethnicity, class, sexuality, or other identity, as the previous chapter discussed.⁴ For example, Black women may face discrimination on the basis of both race and gender. International human rights law obliges states to act in the face of such human rights violations.

To uphold women's human rights, states must:

- Refrain from engaging in gender-based discrimination.
- Act to prevent all forms of gender-based discrimination by private and state actors, whether direct or indirect.
- Investigate forms of discrimination where they occur.
- Provide redress for women who experience forms of gender-based discrimination.⁵

Under the due diligence framework, states should not merely abstain from violating women's right to be free from gender-based discrimination, but must also adopt affirmative measures to protect women's rights.⁶ Such measures can include:

- Passing protective legislation.
- Training law enforcement on responding to violence against women.
- Establishing resources for women who have experienced gender-based abuse, such as sexual violence shelters.⁷

These requirements arise when a state knows or should know that a woman is at risk of gender-based violence. For example, a woman may contact state or local authorities about physical abuse, she may seek medical treatment because of an injury inflicted by her intimate partner, or a girl may speak to her schoolteachers about an assault. In all of these cases, the state has a due diligence obligation to act because state actors know that a woman is at risk of further harm.

Importantly, the United States has a heightened due diligence obligation with respect to girls. Many human rights instruments require states to provide girls—defined as women under the age of 18⁸—with special protection, in recognition of their particularly vulnerable status.⁹ Accordingly, child marriage is a form of gender-based discrimination under international human rights law.¹⁰ All women have the right to be free from child marriage, but child marriage, early marriage, and relationships with substantial age gaps remain common among women facing extreme sentences. If your client was married before she reached the age of 18, the state has failed to take effective measures to protect her human rights.

In essence, when a state knows of gender-based discrimination and fails to take adequate action, the state has failed to discharge its due diligence obligation. A state's failure to act with due diligence not only violates numerous human rights treaties, but it denies women their human rights.

b. Why does the due diligence framework matter?

The due diligence framework is helpful for capital defenders in two ways: (i) it shifts the burden to the state to defend its failure to protect your client's human rights, and (ii) it creates space for you to frame your client's narrative within a larger context of gender-based discrimination and violence, as opposed to focusing exclusively on her individual culpability.

First, the due diligence framework concerns itself with state action. The question at the heart of a due diligence analysis asks: how did the state fail my client? In uncovering instances in which state actors knew or should have known about your client's gender-based discrimination yet failed to respond, your analysis highlights state failures. This moves the burden onto the state to respond to its failures and positions your client as a victim of human rights abuses. Such an analysis does not seek to present excuses for your client's offense, but rather to contextualize her actions and to hold the state accountable for its role. Critically, a due diligence analysis draws a connecting line between the state's failure to protect your client and her offense. The circumstances of women's lives before their convictions and incarceration influence their life trajectories and are frequently inseparable from the offenses for which they are incarcerated.

Second, the due diligence framework allows you to frame your client's narrative beyond her position as a defendant. It allows you to humanize your client by presenting her as a victim rather than a perpetrator. A due diligence framework will also help you, as the advocate, determine which questions you need to ask your client about her life history. Even at trial, where you may or may not make a formal argument that the state violated its due diligence obligations, you can increase judges' and jurors' empathy for your client by explaining how she was harmed by either (1) the absence of systems to protect her from violence; or (2) the failure of systems (and individual actors) to carry out their obligations to protect her, take action against those who harmed her, and provide redress. By doing so, you establish a degree of collective blame for the circumstances that led to her crime and help re-direct the anger of judicial decision-makers away from your client.

Consider the following prompts in developing a due diligence framing of your client's story:

- Familiarize yourself with national and local laws designed to protect women from genderbased violence. Were they implemented in the region where your client lived? Did local and state authorities comply with their obligations under relevant laws?
- What red flags should have alerted state actors about your client's experiences of discrimination or violence? For example, a pediatrician who treats a child for an STD is aware that she is likely a victim of sexual abuse, and state law may require them to report that finding.
- How would the action of authority figures to protect your client from discrimination have affected your client's life?
- How might state resources have helped your client's physical and mental recovery and healing?
- Can understanding your client as a victim of human rights abuses help you contextualize her life, actions, and demeanor?

10

NARRATIVE CONSTRUCTION AND ADVOCACY

“I always viewed attorneys and the legal system as us against them, but narration and construction of storytelling gave me a new lens and a reimagination of what the system can really look like.”

– Dorian “Didi” Bess



Crafting a persuasive narrative is a critical component of our representation. Narrative construction is especially important in the cases of marginalized people because those marginalized identities are routinely weaponized by state actors, as we discuss in Chapter 8. Context is critically important to understanding our clients' actions and how decision makers (courts and juries) may view them. Societal issues—such as the minimization of women's stories of abuse, racial injustice and violence, the criminalization of poverty—shape the criminal legal system's responses to women and gender diverse clients. In this context, defense teams must craft narratives that contemplate the complex identities of their clients, resist common tropes, and confront the implicit and explicit biases pervasive among everyone involved in the case. Meaningful narrative construction stems from a space of trust and partnership between the defense team, the client, and the community.

Stories are critical to communicating facts, building empathy, evoking emotion, and increasing understanding.¹ In criminal cases, we are asking decision makers to listen to an incomplete story and then provide the ending themselves. We want the listener to be invested in who the client is, in her story, and in the outcome of that story.

Storytelling is an art and a skill. It is also specific to the case, client, and circumstances of litigation. This chapter addresses some of the core considerations when building a narrative in the cases of women, queer, and gender diverse clients. We then discuss broader-based movement building and close with some guidance on media advocacy.

1. Whose story is it anyway?

Your client is the world's leading expert on her own life, regardless of her education, profession, or literacy levels. She is the first, and most important, source of information for developing the themes, theory, and narrative arc of the case. This is why the defense team must engage the client as the expert in her own life story and present as many meaningful opportunities for partnership as possible. Creating collaborative conditions for crafting a powerful narrative will transform your representation and your practice. In practical terms, this means creating space for the client to have input in the shaping and telling of her story. Building a narrative requires gender-sensitive and trauma-informed conversations with your client, as discussed in Chapters 4-6. You should be meeting with your client regularly to get to know her deeply, to listen to her ideas, and to develop her life history.

Resisting simple stories

At the same time, your client is a complex person whose life exists beyond the confines of her case. Her story must resist the simple narrative that the state wants to tell about a crime, but equally her story cannot become a single narrative of trauma. Pathologizing a client or reducing her to her trauma history not only does a disservice to her humanity, but it is unlikely to help decisionmakers invest in her story and therefore combat the simple narrative of the state. For this reason, we should strive to build empathy, not sympathy, with the client. When we resist the single story, we encourage decisionmakers to see a whole person, with aspirations and dreams. Well-developed narratives also challenge the state's weaponization of biases. As discussed in Chapter 8, reductive portrayals of our clients, relying on gender and intersectional biases, pervade the criminal legal system. Stories are a powerful vehicle through which to challenge the use of stereotypes—we can wield narrative as both a sword and shield. As mentioned above, your client's story, in full color, helps decisionmakers to empathize with her and invest in her. It also helps decisionmakers understand her as a whole person and counteracts the state's attempts to reduce her actions and behaviors to stereotypes. Women and queer people's identities are far more than the sum of their relationships or actions, and presenting stories that flatten women and queer people's characters only serves to lean in to stereotypes. One example of this is the trope of women as caretakers. At the penalty phase, defense teams sometimes characterize their women clients as good mothers or caretakers, which gives prosecutors free rein to attack the defendant's mothering skills (e.g., "Would a good mother kill their child's father?"). Similarly, common myths around intimate partner violence rely on easy tropes around victimhood (e.g., "If the abuse was so bad, she would have left."). To counteract these damaging myths, you can use well-developed narratives to explain why a survivor may have stayed in an abusive relationship, why a client may not have been able to report abuse, and who is and isn't permitted the protections of victimhood in your client's community.

Consider the following topics as prompts for developing conversations about your client's story that move beyond the trauma of her case:

- What does your client look forward to?
- What are your client's strengths?
- How does she demonstrate resilience?
- How does she tell her own life story?
- What are key moments or turning points in her life?

The Cornell Center on the Death Penalty Worldwide has developed a [toolkit of self-reflective narrative prompts](#) that can help clients contemplate their own stories and assist defense teams with developing those stories.

2. Constructing Compelling Narratives

CHARACTER

Constructing a compelling narrative starts as early as possible in the case. It begins with the client relationship. Your client is the main character in her story, and character is essential to conveying a powerful narrative. Contemplate the following prompts:

- How has your client been characterized in proceedings thus far?
- How does your client characterize herself?
- How does she perceive others' characterizations of her?
- Who, in the story so far, is characterized as having agency and who is without agency?
- Who is characterized as the hero?
- What is the story behind the narrative so far?
- What has the client never been asked about the case and their life?
- In what ways is the client's character relatable?

PLOT

As you develop your cast of characters, consider who and what is driving the plot. The story's ending will ultimately be decided by your audience, and incarceration (or death) must not feel like an inevitable answer. We must also consider whose point of view the story has to appeal to, and from whose point of view the story is being told. How can your narrative shape how decisionmakers interpret the facts? How can the decisionmaker step into your client's shoes? What will resonate with them? These are all facets to consider when constructing a narrative with your client.

CONTEXT AND TIMELINES

Context is key in every story, none more so than the stories of our clients' lives. We must ground decisionmakers in the context so that they can begin to understand incidents that are out of their range of experiences—incidents that otherwise seem incomprehensible to them. Here, the magic is in the details. Help your audience see, hear, smell, and taste the scene. Consider picking vignettes that encapsulate certain experiences in your client's life and dive into the details. Telling a rich story, replete with word pictures, will draw your audience in more deeply than listing statistics or life events.

Consider, too, when your story starts. The criminal legal system often seeks to impose a narrow timeframe around the offense as the story worthy of consideration, but your client's story begins far before that timeline. As the ABA Guidelines explain, the bio-psycho-social

investigation in capital cases should go back three generations, because a multi-generational history informs what happens in the present day.² Similarly, in non-capital cases, the life history investigation—and, therefore, your client’s story—begins before she was even born. Intergenerational trauma, environmental factors influencing the client’s development in utero, and systemic biases affecting a community are all critical context underpinning your narrative.

EMOTION AND VALUES

Lastly, consider the mood that you want to build and the feelings you want to evoke. How does your client want the decisionmaker to feel? How do race, gender, and sexuality affect the values that you want your audience to act on? Consider, too, how decisionmakers feel about their power to act on feelings around injustice and unfairness. These are all components of storytelling that can shape your narrative construction.

3. Movement Building and Working with the Media

GRASSROOTS ORGANIZERS

Occasionally, and in partnership with your client, it may be appropriate to galvanize a public facing campaign around her case. Partnering with grassroots organizations and working with the media can be powerful tools in disseminating your client’s story. Grassroots organizations and coalitions often have years of experience in campaigning around issues relating to gender justice, queer justice, racial justice, and socioeconomic justice. The expertise of organizers often stems from their proximity to the issues and affected community, which can be invaluable in your defense—whether you and your client seek to build a movement around her case or shine a light on a particular injustice. Developing partnerships with grassroots organizations requires intentional relationship building, so that there is mutual trust and respect between all involved. At the same time, working with grassroots organizations can carry risks, as you lose the ability to tightly control the narrative of your client’s case. Carefully vetting any organizations you work with is key. Partnering meaningfully with trusted grassroots organizations also requires alignment around shared values, commitments, and approaches to the work.

When joining movement building efforts with organizers, defense teams should recognize the power differences and dynamics that may be at play, particularly where some labor is professionalized and paid for, and some is given on a voluntary basis. Experienced organizers often have vast knowledge and expertise that is not covered by a law degree. Consider hiring an expert who can help you with your movement building and community outreach endeavors, as we contemplate in Chapter 6.

MEDIA COVERAGE

Media coverage of your client’s case can be an invaluable tool in your advocacy efforts. News and social media outlets serve as a primary source of information for adults all over the country, putting journalists in a unique position to frame the public perception of your client. Media coverage can also be ruinous. Journalists can intentionally demonize your client (as in tabloid coverage of women accused of murder), or they can inadvertently contribute to narratives that are inconsistent with your defense strategy. It is difficult to shift public perception of your client once she is demonized in the press. As a result, you should approach all media work with great care. We encourage you to consult our toolkit on working with the media.

a. Media coverage of accused women

Studies on media coverage of accused women indicate that stories about women who kill are of great public interest. This is in large part because women who engage in violent acts behave contrary to stereotypical expectations. Prevalent societal norms dictate that violence is incompatible with femininity and womanhood.³ A woman who kills transgresses gendered expectations of women as caregivers and dutiful spouses because she challenges assumptions about her capacity to nurture others.⁴ There is a substantial public appetite for stories about such women because their actions represent the ultimate transgression of gender norms. Many journalists feed that appetite in their coverage of women who are charged with violent crimes.

In other cases, the media may portray women and queer defendants as vengeful, manipulative, hypersexual, or as having sensational sexual histories.⁵ Media accounts can frequently simplify complex narratives; for example, they may cast a woman who kills her partner as a “jealous wife” without explaining the long history of domestic violence that predated the offense. Media outlets also reproduce cultural tropes about women who are victims of violence, such as covering a woman’s background of abuse by focusing on the woman’s conduct that “invited” that abuse.⁶ These narratives are harmful to our clients because they influence how media consumers—including decisionmakers—subconsciously view our clients.⁷

b. Working with the media

As noted above, it is essential that you approach working with the media with care. If at all possible, retain a communications expert. If you don’t have the funding for a communications expert, you must prepare for media engagement just as you would for a court hearing. You must have a thorough understanding of your client’s case, including her background and mitigating factors. Develop a strong theory of the case and be prepared for media narratives to challenge this story. Research media outlets and journalists who will be receptive to your client’s case. Ultimately, the coverage that will have the strongest impact will come from mainstream news sources that reach the greatest number of readers/viewers/listeners. That said, it is often difficult to obtain sensitive, nuanced coverage from these outlets (particularly broadcast television). Think about cultivating relationships with sympathetic journalists from smaller outlets, including online publications, and be creative in your approach to ally-building.

Preparing a list of talking points is essential to guide your discussions with media outlets. Developing quotes in advance and sticking to your talking points is key. Think about the most sympathetic and gripping aspects of your client’s story and consider how her story should be told. What does the public need to understand about your client’s case? Which grave injustices should be addressed? Note that media outlets may not reproduce press releases that defense teams distribute. Be proactive in seeking out helpful journalists and engaging with them about your client’s case.

If you are in a jurisdiction where ethical rules preclude you from speaking to the media, think about whether someone else can serve as a media contact. Often, a representative of a sympathetic organization may be able to educate the media about core issues, such as gender-based violence or queer advocacy. In each case, you will need to evaluate the potential risks for each media contact and provide talking points where possible. One of the most effective ways to control media coverage of your case is to provide a series of written quotes from various sources (for example, a lawyer on the defense team, a civil society representative, and an expert on one of the topics that is central to your defense). In this way, you minimize any risk that your words will be taken out of context, or that you will inadvertently say something damaging to your case.

In all cases, and no matter the journalist, you should be extremely cautious about giving the media access to your client. Speaking to journalists can be detrimental to your client’s defense and to their mental health. Be aware that media outlets may reach out to your client directly; where this is the case, you should encourage her to decline all media requests and direct journalists to contact you. In post-conviction posture, if your client does consent to speaking with a journalist and you trust the journalist, you should insist on being present during the interview if the prison will allow it.

Endnotes

Chapter 1 Endnotes

- 1 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, UN Doc CEDAW/C/GC/35 (2017), https://tbinetnet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf
- 2 Sandra Babcock & Nathalie Greenfield, Gender, Violence, and the Death Penalty, 53 CAL. WEST. INT. L.J. 327, 334 (2023); THE SENTENCING PROJECT, NATIONAL BLACK WOMEN'S JUSTICE INSTITUTE, CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE, IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES 12 (2023).
- 3 Babcock & Greenfield, *supra* note 2, at 334.
- 4 *Id.*
- 5 Elizabeth Rapaport & Victor Streib, Death Penalty for Women in North Carolina, 1 ELON L. REV. 65, 83 (2009); Elizabeth Rapaport, Equality of the Damned: The Execution of Women on the Cusp of the 21st Century, 26 OHIO N. U. L. REV. 581, 583 (2000); Elizabeth Rapaport, The Death Penalty and Gender Discrimination, 25 L. & SOC'Y REV. 367 (1991).
- 6 Sandra Babcock, Nathalie Greenfield, & Kathryn Adamson, Women on Death Row in the United States, 46 CARDOZO L. REV. 1, 9 (2024).
- 7 Babcock, Greenfield, & Adamson, *supra* note 6, at 10.
- 8 *Id.* at 9.
- 9 *Id.*

Chapter 2 Endnotes

- 1 See, e.g., United Nations General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (stating that "special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs" and that "such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures"); *id.* ("States should take applicable and appropriate measures to ensure the right of women to access legal aid, including: (a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice; (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims"); *id.* ("States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid," which could include "provid[ing] cross-cultural, culturally appropriate, gender-sensitive and age-appropriate training to legal aid providers"); United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee's General Recommendation 19 (1992) (providing that "gendersensitive training of judicial officers is essential for the effective implementation of CEDAW"); Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field

- of Crime Prevention and Criminal Justice (ECOSOC resolution 2010/15, annex, adopted on 22 July 2010) (urging member states to "provide for or to encourage mandatory cross-cultural, gender and child-sensitivity training modules for police, criminal justice officials and professionals involved in the criminal justice system on the unacceptability of all forms of violence against women and on their harmful impact and consequences on all those who experience such violence (para. 20-a)); United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (the Bangkok Rules, ECOSOC resolution 2010/16, annex, adopted on 22 July 2010) (providing that "[i]n order for the principle of non-discrimination, embodied in the rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules" and "Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatization and negative impact of those women's confrontation with the criminal justice system (Rule 69)."); United Nations Office on Drugs and Crime, Gender in the Criminal Justice System Assessment Tool, at 1 (2010), <https://www.unodc.org/documents/justice-and-prison-reform/crimprevention/E-book.pdf> ("Identifying and understanding the realities of women and men in the community as well as the gender biases that may promote discrimination, limit access to justice and prevent women's full participation in the criminal justice system underpin any assessment of the criminal justice system").
- 2 American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 219, 1007-8, 1013 (2003) [hereinafter ABA Guidelines].
- 3 American Bar Association, Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677, 967-68 (2008) [hereinafter Supplementary Guidelines].
- 4 *Id.*
- 5 *Id.* (emphasis added).
- 6 *Id.* at 682-83.
- 7 *Id.*, Guideline 5.1(b).
- 8 *Id.* at 689.
- 9 Scharlette Holdman & Christopher Seeds, Cultural Competency in Capital Mitigation, 36 HOFSTRA L. REV. 883, 883 (2008).
- 10 *Id.* at 894, n.51.
- 11 *Id.* at 890.
- 12 *Id.* at 895.
- 13 Supplementary Guidelines, *supra* at 690.
- 14 For example, Black trans people have much higher rates of arrest, conviction, and incarceration than white cisgender women - in fact, 47% of Black trans people have been incarcerated at some point in their lives and Black transwomen are incarcerated at 10 times the rate of the general population. National Black Women's Justice Institute, Black LGBTQ+ women, girls, and gender-expansive people disproportionately impacted by criminal-legal system (June 9, 2024), [https://www.nbwjij.org/post/black-lgbtq-women-girls-gender-expansive-peopledisproportionately-impacted-by-criminal-legals#:~:text=Nearly%201%20in%202%20\(47%\)%20Black%20transgender,ce ll%20due%20to%20their%20gender%20identity/expression%20alone.](https://www.nbwjij.org/post/black-lgbtq-women-girls-gender-expansive-peopledisproportionately-impacted-by-criminal-legals#:~:text=Nearly%201%20in%202%20(47%)%20Black%20transgender,ce ll%20due%20to%20their%20gender%20identity/expression%20alone.)

Additionally, Black transwomen face higher rates of discrimination and harassment in the courthouse, such as having their transgender status inappropriately revealed in court, due to their intersectional identities.

15 BLACK AND PINK, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY (2015), https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issue_s_v36n03_cc1_guidelines_final.pdf.

16 Id.

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Chapter 3 Endnotes

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The ICD-11 also moved "gender incongruence" from the chapter on "Mental and behavioral disorders" to the new chapter on "Conditions related to sexual health," recognizing that individuals who are transgender and gender diverse are not necessarily mentally ill, but have specific health needs. At the same time, they experience barriers to accessing gender-affirming health care, and are at higher risk of exposure to violence and other health risks, such as sexually transmitted infections. See World Health Organization, WHO/Europe brief—transgender health in the context of ICD-11, available at <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11>.

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Chapter 9 Endnotes

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2 ICCPR, Article 6(5).

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4 Human rights bodies recognize the heightened risk of violence that some women face because of these intersecting forms of discrimination. See Gonzales, *Case 12,626*, at ¶¶ 113 (“The Commission has also recognized that certain groups of women face discrimination on the basis of more than one factor during their lifetimes, based on their . . . race and ethnic origin, among others, which increases their exposure to acts of violence. Protection measures are considered particularly critical in [these cases], since [these groups] may be at greater risk of human rights violations based on two factors...”).

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CCDPW has an extensive online bibliography containing a much broader selection of works that are grouped thematically. Our online library is here.

You can also email deathpenaltyworldwide@cornell.edu for access.



As discussed throughout this guide, CCDPW also has a number of toolkits and guides for you to consult in your representation of women, queer, and gender diverse clients. Please see our online publications or email us for access.

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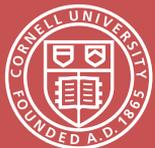
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