

*Fourteenth Amendment — Due Process — Habeas Corpus —
Andrew v. White*

Women face distinct challenges throughout the justice system.¹ Among many other inequities, prosecutors frequently employ sexual stereotypes against female defendants, especially in capital cases.² Prevailing law sets a high bar for federal courts to grant writs of habeas corpus to defendants convicted in state criminal proceedings.³ While the Eighth Amendment and the Fourteenth Amendment’s Due Process Clause provide some protections from prosecutors wielding unfairly prejudicial evidence against defendants, the Court has not consistently affirmed strong versions of these protections.⁴ Last Term, in *Andrew v. White*,⁵ where the state trial court admitted several concededly irrelevant pieces of evidence about the defendant’s sex life,⁶ the Supreme Court held that “clearly established law provide[s] that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair.”⁷ However, the per curiam’s reasoning stretched due process doctrine more than it acknowledged, reflecting a justice-grounded decision potentially swayed by the uniquely misogynistic facts of the case.

In November 2001, Rob Andrew was shot and killed after he followed his estranged wife, Brenda Andrew, into their garage.⁸ Ms. Andrew was also shot in the arm and later alleged to police that she and her husband had been attacked by two armed individuals.⁹ Shortly thereafter, Ms. Andrew traveled to Mexico with her romantic partner at the time, James Pavatt, and her two children.¹⁰ Mr. Pavatt eventually

¹ *Women’s Justice: A Preliminary Assessment of Women in the Criminal Justice System*, COUNCIL ON CRIM. JUST. (July 2024), <https://counciloncj.org/womens-justice-a-preliminary-assessment-of-women-in-the-criminal-justice-system> [<https://perma.cc/J765-BN5S>] [hereinafter *Women’s Justice*].

² See Brief of Eight Legal Organizations and Seven Legal Scholars Working on Gender Justice in the Legal System as *Amici Curiae* in Support of Petitioner at 13–14, *Andrew v. White*, 145 S. Ct. 75 (2025) (No. 23-6573) [hereinafter *Gender Justice Amici Brief*]; *Women’s Justice*, *supra* note 1 (“Gender-based stigma and stereotypes significantly affect women’s experiences within the criminal justice system at every point of contact.”).

³ See Nathan Nasrallah, Comment, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RESV. L. REV. 1147, 1167–69 (2016).

⁴ Compare *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (holding that actions by the state to minimize the role of the jury in imposing a death sentence may violate the Eighth Amendment), with *Romano v. Oklahoma*, 512 U.S. 1, 11–13 (1994) (holding that the admission at sentencing of concededly irrelevant evidence of a defendant’s prior death sentence did not violate the Eighth and Fourteenth Amendments).

⁵ 145 S. Ct. 75 (2025) (per curiam).

⁶ *Id.* at 79–80.

⁷ *Id.* at 83.

⁸ See *id.* at 84–85 (Thomas, J., dissenting).

⁹ *Id.* at 78 (per curiam).

¹⁰ *Id.* at 85 (Thomas, J., dissenting); *id.* at 78 (per curiam).

confessed to the shooting but denied Ms. Andrew's involvement.¹¹ Both were charged with capital murder and tried separately.¹² Mr. Pavatt was convicted and sentenced to death.¹³

At Ms. Andrew's 2004 trial, to prove that she had conspired with Mr. Pavatt to murder her husband, the prosecution introduced evidence that included: testimony that Ms. Andrew called a friend the night before the murder just to convey how much she hated Mr. Andrew;¹⁴ forensic evidence that the gunshot wound to her arm was superficial and "staged" to divert suspicion;¹⁵ circumstantial evidence that Ms. Andrew had helped hide Mr. Pavatt in her neighbor's house after the murder;¹⁶ and testimony from Mr. Pavatt's adult daughter that Ms. Andrew had asked Mr. Pavatt to kill Mr. Andrew.¹⁷ In addition to offering this evidence, during the guilt phase of trial, for reasons contested by the parties, "the prosecution elicited testimony about [Ms.] Andrew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car."¹⁸ Driving home these themes, the prosecution "display[ed] [Ms.] Andrew's 'thong underwear' to the jury" during closing arguments, "remind[ed] the jury of [her] alleged [college] affairs," and contrasted her behavior with Mr. Andrew's devotion to God.¹⁹ The jury delivered a guilty verdict.²⁰ At sentencing, the prosecutor drew on similar themes, and the jury sentenced Ms. Andrew to death.²¹

Ms. Andrew appealed her conviction, arguing that the introduction of irrelevant character evidence regarding her relationships, clothing choices, and more violated the Eighth Amendment and the Fourteenth Amendment.²² The Oklahoma Court of Criminal Appeals (OCCA), Oklahoma's highest criminal court,²³ concluded that some of the prosecution's evidence was irrelevant and admitted in error.²⁴ It also determined that some of the defense's evidence was wrongly excluded.²⁵ But

¹¹ *Id.* at 78 (per curiam).

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.* at 86 (Thomas, J., dissenting).

¹⁵ *Id.* at 85.

¹⁶ *See id.*

¹⁷ *Id.* at 84.

¹⁸ *Id.* at 78–79 (per curiam).

¹⁹ *Id.* at 79.

²⁰ *Id.*

²¹ *See id.*

²² *Andrew v. State*, 164 P.3d 176, 207 (Okla. Crim. App. 2007) (A. Johnson, J., concurring in the result in part and dissenting in part).

²³ *Court of Criminal Appeals*, OKLA. SENATE, <https://oksenate.gov/education/senate-artwork/court-criminal-appeals> [<https://perma.cc/5QSC-JXNY>].

²⁴ *Andrew*, 164 P.3d at 192, 205.

²⁵ *Id.* at 205.

the OCCA held that the errors did not individually or cumulatively require relief.²⁶

Ms. Andrew filed a petition for a writ of habeas corpus with the U.S. District Court for the Western District of Oklahoma, requesting judicial review of the legality of her incarceration.²⁷ The district court denied the writ²⁸ under the standard provided in the Antiterrorism and Effective Death Penalty Act of 1996²⁹ (AEDPA).³⁰ Under AEDPA, a federal court reviewing a state court’s ruling on the merits may grant habeas relief only if it determines that the state court adjudication “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts.”³¹ The district court found that *Payne v. Tennessee*³² — a 1991 case that held “the Eighth Amendment erects no *per se* bar” to the admission of victim impact statements at sentencing³³ — had clearly established that the Due Process Clause of the Fourteenth Amendment protects defendants against the admission of “unduly prejudicial” evidence that “renders . . . trial[s] fundamentally unfair.”³⁴ But the court ruled that Ms. Andrew did not sufficiently demonstrate that the evidence admitted at her trial made the trial fundamentally unfair.³⁵

The Tenth Circuit affirmed while disagreeing with the district court on whether the law was clearly established.³⁶ Judge Phillips,³⁷ writing for the court, noted “that *Payne* didn’t ‘clearly establish the applicable legal framework for wrongfully-admitted trial evidence.’”³⁸ Finding no “clearly established federal law,” the circuit court denied Ms. Andrew’s claim that she was deprived of her right to due process.³⁹ The court analyzed several of Ms. Andrew’s other claims but held that she had failed to show the district court’s habeas denial “was objectively unreasonable under” AEDPA.⁴⁰ In dissent, Judge Bacharach argued that Ms. Andrew was deprived of her right to due process,⁴¹ as the prosecution’s

²⁶ *Id.*

²⁷ *Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525, at *1 (W.D. Okla. Sep. 9, 2015).

²⁸ *Id.* at *58.

²⁹ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

³⁰ *Andrew*, 2015 WL 5254525, at *4, *46, *58.

³¹ 28 U.S.C. § 2254(d)(1)–(2).

³² 501 U.S. 808 (1991).

³³ *Id.* at 827.

³⁴ *Andrew*, 2015 WL 5254525, at *13 (quoting *Payne*, 501 U.S. at 825).

³⁵ *Id.* at *52.

³⁶ *Andrew v. White*, 62 F.4th 1299, 1314–16 (10th Cir. 2023).

³⁷ Judge Phillips was joined by Judge Hartz.

³⁸ *Andrew*, 62 F.4th at 1314 (quoting *Holland v. Allbaugh*, 824 F.3d 1222, 1229 (10th Cir. 2016)).

³⁹ *Id.* at 1316 (citing *House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008)).

⁴⁰ *Id.* at 1353.

⁴¹ *Id.* at 1354 (Bacharach, J., dissenting).

“focus portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals . . . [and] plucking away any realistic chance that the jury would seriously consider her version of events.”⁴² He believed an accumulation of errors — including the prosecution’s introduction of irrelevant evidence regarding Ms. Andrew’s sex life,⁴³ the improper exclusion of several defense witnesses,⁴⁴ and a violation of Ms. Andrew’s *Miranda*⁴⁵ rights⁴⁶ — rendered Ms. Andrew’s trial “fundamentally unfair.”⁴⁷

The Supreme Court vacated and remanded for further proceedings.⁴⁸ In a per curiam opinion, the Court held that it had clearly established the federal law in *Payne*: The Fourteenth Amendment’s Due Process Clause provides relief when the introduction of prejudicial evidence “renders [a] trial fundamentally unfair.”⁴⁹ The majority opinion began with a synthesis of the facts, focusing on the prosecution’s efforts to elicit testimony at trial about Ms. Andrew’s sexual conduct.⁵⁰ After summarizing the lower courts’ procedural postures,⁵¹ the majority specified that under AEDPA, the “clearly established [f]ederal law”⁵² must arise from the Court’s “holdings, as opposed to [its] dicta.”⁵³ Further, an “unreasonable application” of said law must be “one with which no fairminded jurist would agree.”⁵⁴

According to the *Andrew* majority, when the “Court relies on a legal rule or principle to decide a case, that principle is a ‘holding’ of the Court for purposes of AEDPA.”⁵⁵ In *Payne*, the Court overturned its precedent prohibiting victim impact statements from being used at sentencing.⁵⁶ The *Andrew* majority observed that *Payne* was willing to hold that the Eighth Amendment did not create a “*per se* bar on victim impact statements[] in part *because*” the Due Process Clause “remained available [to protect] against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair.”⁵⁷ Accordingly, the *Payne* Court’s statement on the Due Process Clause was “indispensable” to its decision.⁵⁸

⁴² *Id.* at 1366.

⁴³ *Id.* at 1365.

⁴⁴ *Id.* at 1368.

⁴⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁶ *Andrew*, 62 F.4th at 1367 (Bacharach, J., dissenting).

⁴⁷ *Id.* at 1368.

⁴⁸ *Andrew*, 145 S. Ct. at 83.

⁴⁹ *Id.* at 80 (alteration in original) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

⁵⁰ *See id.* at 78–79.

⁵¹ *See id.* at 79–80.

⁵² *Id.* at 80 (quoting 28 U.S.C. § 2254(d)(1)).

⁵³ *Id.* (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)).

⁵⁴ *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

⁵⁵ *Id.* at 81 (citing *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)).

⁵⁶ *See Payne v. Tennessee*, 501 U.S. 808, 817, 827 (1991).

⁵⁷ *Andrew*, 145 S. Ct. at 81.

⁵⁸ *Id.*

The per curiam asserted that, prior to *Payne*, the Court had held several times that prosecutors' actions that rendered trials fundamentally unfair could violate due process.⁵⁹ The per curiam also pointed to a more recent case where the Court had relied upon *Payne*.⁶⁰ In remanding, the Court instructed the Tenth Circuit to inquire as to “whether a fairminded jurist reviewing this record could disagree with [Ms.] Andrew that the trial court’s mistaken admission of irrelevant evidence was so ‘unduly prejudicial’ as to render her trial ‘fundamentally unfair’” and to apply this test to both the guilt and sentencing phases of the trial.⁶¹ The Court further advised the Tenth Circuit to “consider the relevance of the disputed evidence to the charges or sentencing factors, the degree of prejudice [Ms.] Andrew suffered from its introduction, and whether the trial court provided any mitigating instructions.”⁶²

Justice Alito wrote a brief concurrence in the judgment to agree with the majority’s assessment of the established law, but “express[ed] no view on whether [the] very high standard [of the ‘fundamentally unfair’ test was] met here.”⁶³

Justice Thomas, joined by Justice Gorsuch, dissented.⁶⁴ Justice Thomas criticized the majority for construing Court “precedents at too high a level of generality” and for not “carefully distinguish[ing] holdings from dicta.”⁶⁵ Specifically, Justice Thomas argued that *Estelle v. McGuire*⁶⁶ “reserved the very question that the [majority] says *Payne* resolved.”⁶⁷ The dissent then delved into the facts in detail.⁶⁸ Justice Thomas suggested that the prosecution offered evidence of Ms. Andrew’s sexual relationships with two of the witnesses to support the credibility of their testimony that she had told them she wanted her husband dead.⁶⁹ He also noted that the prosecution gave evidence of Ms. Andrew’s “failings as a mother”⁷⁰ in response to the defendant first offering evidence of her virtues as a mother.⁷¹ Justice Thomas stated that AEDPA “forecloses relief unless all ‘fairminded jurists’ would agree that the OCCA’s ‘decision conflicts with this Court’s precedents’”⁷² and that a fairminded jurist could conclude that *Payne* did not clearly

⁵⁹ *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Caldwell v. Mississippi*, 472 U.S. 320, 338–40 (1985); *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986)).

⁶⁰ *Id.* at 82 (citing *Kansas v. Carr*, 577 U.S. 108, 123 (2016)).

⁶¹ *Id.* at 83 (quoting *Payne*, 501 U.S. at 825).

⁶² *Id.*

⁶³ *Id.* (Alito, J., concurring in the judgment).

⁶⁴ *Id.* (Thomas, J., dissenting).

⁶⁵ *Id.*

⁶⁶ 502 U.S. 62 (1991).

⁶⁷ *Andrew*, 145 S. Ct. at 84 (Thomas, J., dissenting).

⁶⁸ *See id.* at 84–87.

⁶⁹ *See id.* at 86.

⁷⁰ *Id.* at 86–87 (quoting *id.* at 78 (per curiam)).

⁷¹ *Id.* at 87.

⁷² *Id.* at 87–88 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

establish a protection against overly prejudicial evidence.⁷³ This assessment contrasted with the majority's assertion that the fairminded jurist standard applies only to the *application* of the clearly established law, rather than to the identification of clearly established law.⁷⁴ He also indicated that *Payne*'s holding was its rejection of a per se bar on victim impact evidence, while its due process language was a mere "one-sentence . . . caveat" that "did not [even] apply in *Payne* itself."⁷⁵ Justice Thomas further criticized the majority for summarily vacating, "[for] the first time," a lower court's determination under AEDPA that federal law was not clearly established.⁷⁶ In conclusion, Justice Thomas expressed his belief that the Tenth Circuit on remand "still will find that the state court reasonably applied the principle the Court . . . identified, no matter what it thinks of the specific facts of [Ms.] Andrew's trial."⁷⁷

The per curiam's reasoning stretched existing doctrine more than it acknowledged, potentially reflecting a justice-grounded decision swayed by the uniquely misogynistic facts of the case. Although the Court maintained that the relevant Supreme Court precedent was "clearly established,"⁷⁸ it is not clear that the pre-*Andrew* standard would have considered that law "clearly established."⁷⁹ Further, the Court in *Andrew* newly clarified at least two parts of the relevant due process doctrine: The Court articulated that the Due Process Clause protects against fundamental unfairness at both the guilt and sentencing trial phases and created a test for whether the protection should be triggered.⁸⁰ These developments may indicate that the Court was driven to stretch the meaning of "clearly established." Evidence that this Court's decision was potentially rooted in justice concerns can be found in the per curiam's sparring with the dissent's detailed discussion of the facts⁸¹ and in Justice Alito's concurrence in the judgment.⁸² Due process cases are often quite fact specific,⁸³ and the Court's holding and focus on the facts suggest particular concern with the misogynistic unfairness in Ms. Andrew's case.

En route to expanding the due process doctrine, the Court fleshed out its interpretation of what constitutes "clearly established [f]ederal

⁷³ See *id.* at 90–92.

⁷⁴ See *id.* at 82 (per curiam).

⁷⁵ *Id.* at 88 (Thomas, J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Id.* at 89.

⁷⁸ *Id.* at 83 (per curiam).

⁷⁹ *Id.* at 89 (Thomas, J., dissenting).

⁸⁰ *Id.* at 83 (per curiam).

⁸¹ See *id.* at 79 nn. 1–2.

⁸² *Id.* at 83 (Alito, J., concurring in the judgment).

⁸³ See, e.g., *The Supreme Court, 2006 Term — Leading Case: Carey v. Musladin*, 121 HARV. L. REV. 335, 343–44 (2007); *Recent Case, McNeill v. Polk*, 476 F.3d 206 (4th Cir. 2007), 120 HARV. L. REV. 2246, 2252 n.54 (2007).

law”⁸⁴ for the purposes of AEDPA. Professor Ursula Bentele observes that pre-*Andrew* AEDPA jurisprudence indicated that the Supreme Court must have, “at the time the state court ruled on the case, *announced* the pertinent federal law *with sufficient specificity* to amount to ‘clearly established [f]ederal law.’”⁸⁵ In her view, as of the late aughts, the Roberts Court construed its AEDPA holdings as fact specific and narrow⁸⁶ — and therefore often not clearly established for the purposes of the case at hand — though she argues that courts should instead draw on “general” and “fundamental principles.”⁸⁷ The *Andrew* majority took her recommendation, stating that “[g]eneral legal principles can constitute clearly established law.”⁸⁸ Citing *White v. Woodall*,⁸⁹ the Court also wrote that “[a] legal principle is clearly established for purposes of AEDPA if it is a holding of this Court.”⁹⁰ Yet, *Woodall* merely stated that “[c]learly established [f]ederal law’ [under AEDPA] includes only” holdings of the Supreme Court.⁹¹ On its face, this statement means that *only* Supreme Court holdings can constitute clearly established federal law for the purposes of AEDPA, but it does not mean that *all* holdings are automatically clearly established federal law. Tying these two threads together, the Court in *Andrew* seemed to be saying that all extant holdings of the Court, as well as certain other general legal principles, are “clearly established [f]ederal law[s]”⁹² for the purposes of AEDPA. This interpretation of the statute, which is well within the Court’s authority to decide,⁹³ took some of the pressure off whether *Payne*’s specific holding established a Fourteenth Amendment protection against fundamental unfairness, because its general principles could clearly establish the law. By modestly broadening the “clearly established” standard, the Court helped facilitate the two ways in which it stretched due process doctrine.

First, the majority stretched the doctrine by holding that the Due Process Clause protects against fundamental unfairness at both the guilt and sentencing phases of trial.⁹⁴ Many of the cases the per curiam cited as evidence of the law being clearly established⁹⁵ — including *Caldwell*

⁸⁴ 28 U.S.C. § 2254(d)(1).

⁸⁵ Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 743–44 (2010) (emphases added) (quoting 28 U.S.C. § 2254(d)(1)).

⁸⁶ See *id.* at 742–43; see also Nasrallah, *supra* note 3, at 1179–81.

⁸⁷ Bentele, *supra* note 85, at 764.

⁸⁸ *Andrew*, 145 S. Ct. at 82.

⁸⁹ 572 U.S. 415 (2014).

⁹⁰ *Andrew*, 145 S. Ct. at 82–83 (citing *Woodall*, 572 U.S. at 419).

⁹¹ *Woodall*, 572 U.S. at 419 (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012)).

⁹² 28 U.S.C. § 2254(d)(1).

⁹³ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁹⁴ *Andrew*, 145 S. Ct. at 83.

⁹⁵ See *id.* at 81–83.

v. Mississippi,⁹⁶ *Payne*, *Romano v. Oklahoma*,⁹⁷ and *Kansas v. Carr*⁹⁸ — were focused on alleged unfairness at the sentencing phase of trial.⁹⁹ Although the initial cases in the lineage, *Donnelly v. DeChristoforo*¹⁰⁰ and *Darden v. Wainwright*,¹⁰¹ applied the Due Process Clause to the guilt phase of trial,¹⁰² the Court's more recent cases,¹⁰³ as well as its statement in *Romano*,¹⁰⁴ muddied the waters as to whether the Due Process Clause applied beyond the sentencing phase. Given the most on-point cases applied the Due Process Clause only at the sentencing phase, its application at the guilt phase may have been less “clearly established” at the time of the OCCA's decision in Ms. Andrew's case. Professor Colin Miller wrote a few months prior to the *Andrew* decision that although “courts have extended *Payne*'s due process test to . . . sentencing hearings, they have refused to apply it to the guilt/innocence phase of trial.”¹⁰⁵ The Court's clarification in *Andrew* thus stretched the doctrine favorably for Ms. Andrew, as the bulk of the prosecutorial misconduct she alleged occurred at the trial's guilt phase.¹⁰⁶

Second, the Court expanded the doctrine by articulating a test for lower courts to apply and hinting that they should favor defendants.¹⁰⁷ Instead of requiring a standard that all fairminded jurists must agree that the trial was fundamentally unfair, the Court said the test “is whether a fairminded jurist could *disagree* that the evidence ‘so infected the trial with unfairness’ as to render the resulting conviction or sentence ‘a denial of due process.’”¹⁰⁸ This inversion matters. The default assumption becomes that the trial was fundamentally unfair. Defaults shape outcomes.¹⁰⁹ Even though this is a mental exercise for appellate judges and not a jury instruction, this language suggests the Court may be offering a degree of support to defendants. On remand, or on

⁹⁶ 472 U.S. 320 (1985).

⁹⁷ 512 U.S. 1 (1994).

⁹⁸ 577 U.S. 108 (2016).

⁹⁹ See *Caldwell*, 472 U.S. at 323; *Payne v. Tennessee*, 501 U.S. 808, 817 (1991); *Romano*, 512 U.S. at 12; *Carr*, 577 U.S. at 111, 123.

¹⁰⁰ 416 U.S. 637 (1974).

¹⁰¹ 477 U.S. 168 (1986).

¹⁰² See *Donnelly*, 416 U.S. at 639–42; *Darden*, 477 U.S. at 170.

¹⁰³ E.g., *Payne*, 501 U.S. at 825; *Carr*, 577 U.S. at 123.

¹⁰⁴ *Romano*, 512 U.S. at 12 (“It is settled that [the Due Process Clause of the Fourteenth Amendment] applies to the sentencing phase of capital trials.”). Interestingly, despite Justice Thomas's insistence that *Estelle* “reserved the very question the majority asserts *Payne* resolved,” *Andrew*, 145 S. Ct. at 92 (Thomas, J., dissenting), Justice Thomas himself joined this *Romano* opinion three years after *Payne* and *Estelle*, *Romano*, 512 U.S. at 2.

¹⁰⁵ Colin Miller, *A Constitutional Right to Exclude Evidence*, 12 TEX. A&M L. REV. 317, 369 (2024).

¹⁰⁶ See *Andrew*, 145 S. Ct. at 78–79.

¹⁰⁷ See *supra* text accompanying notes 61–62.

¹⁰⁸ *Andrew*, 145 S. Ct. at 83 (emphasis added) (quoting *Romano*, 512 U.S. at 13).

¹⁰⁹ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: THE FINAL EDITION* (2021) (showing, inter alia, studies demonstrating that default plans increase retirement contributions and default options increase organ donor registration).

reappeal, judges sympathetic to Ms. Andrew’s argument may draw on this test’s framing to grant her relief. Regardless of its significance in practice, establishing this test and articulating it in this manner indicates that the Court recognized its doctrine was underdeveloped and may be sympathetic to defendants seeking constitutional protection.

These contributions to due process doctrine are not insignificant, yet the majority did not purport to break new ground. Indeed, that the Court found the law to be “clearly established”¹¹⁰ was particularly notable given the many recent habeas cases where the Court had not done so.¹¹¹

This decision to quietly stretch the doctrine may speak to the Justices’ reluctance to deny judicial review of this particular set of facts — where prosecutors deployed obvious sex stereotypes. Despite the question being one purely of law, the majority sparred with the dissent’s characterization of the facts across multiple footnotes, indicating that those facts may have served as an underlying rationale for the decision.¹¹² Another indication is Justice Alito’s concurrence in the judgment. Although the per curiam opinion purported to make no judgment on whether the petition for a writ of habeas corpus would succeed on remand, Justice Alito’s concurrence — which emphasized that the fundamental unfairness test is a “very high standard” and that he “express[ed] no view” on whether that standard was met in Ms. Andrew’s case — may have indicated his belief that the majority would have found the admitted evidence ran afoul of due process protections.¹¹³ The dissent spent four pages reciting its interpretation of the factual record,¹¹⁴ in a move that is similarly notable given the disputed holding was simply that “clearly established” federal law exists. Justice Thomas was explicit that he believed the circuit court on remand, even applying the “fundamentally unfair” principle, would find no error in the state court’s conclusion.¹¹⁵

The extensive use of sex stereotypes against Ms. Andrew represented a particularly egregious example of a distinct form of unfairness that could unconstitutionally inhibit defendants’ rights to a fair trial. The Court has long recognized sexual activity and sexuality as demanding heightened privacy protections.¹¹⁶ This heightened privacy speaks to the social propensity to make judgments based on the disclosure of such

¹¹⁰ *Andrew*, 145 S. Ct. at 83.

¹¹¹ *See, e.g.*, *Dunn v. Madison*, 138 S. Ct. 9, 11–12 (2017); *Woods v. Donald*, 575 U.S. 312, 313 (2015); *Kernan v. Cuero*, 138 S. Ct. 4, 6 (2017).

¹¹² *See Andrew*, 145 S. Ct. at 79 nn.1–2.

¹¹³ *See id.* at 83 (Alito, J., concurring in the judgment).

¹¹⁴ *See id.* at 84–87 (Thomas, J., dissenting).

¹¹⁵ *Id.* at 89.

¹¹⁶ *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

private information.¹¹⁷ Moreover, misogynistic tropes have a long history in the American courtroom.¹¹⁸ They also impact women's interactions with other state institutions, from healthcare providers to child protective services.¹¹⁹ The blatant nature of the prosecution's tactics in Ms. Andrew's case could well have triggered the per curiam Justices' sense of injustice and been an implicit motivation behind their decision.¹²⁰ Amici presented the Justices with a similar substantive justice argument at the certiorari stage, arguing that the "Court should grant certiorari because a State actor expressing overt bias against a defendant based on sex stereotypes raises grave due process concerns."¹²¹

Why not make this reason explicit? First, indicating any motivation beyond wishing to correct a misinterpretation of the law would have directly undercut the majority's argument that the law was clearly established and would have foreclosed the relief sought by Ms. Andrew under AEDPA. Second, it is possible the Court sought to preserve the potentially fragile majority coalition. Making further comments about the nature of the allegedly unfair prejudice would have been weighing in on the issue before the Tenth Circuit has had the chance to make this determination. If the case is reappealed after the Tenth Circuit decides it, and the Court grants certiorari, we may see several Justices more expressly articulate that sexual stereotypes can rise to the level of rendering a trial fundamentally unfair.

Despite facially only affirming existing law, *Andrew's* holding offers a clarified basis for the exclusion of evidence prejudicial to the

¹¹⁷ See Jaimie Arona Krems et al., *Lay Beliefs About Gender and Sexual Behavior: First Evidence for a Pervasive, Robust (but Seemingly Unfounded) Stereotype*, 32 PSYCH. SCI. 871, 871 (2021).

¹¹⁸ See DAVID V. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY 81, 94–99, 153 (2016). See generally Charles Elliott, *Juries, Sex, and Emotional Affect*, 35 L. & PSYCH. REV. 37 (2011) (examining the effects of "juror sex, prosecutor sex, and closing argument content," *id.* at 37, on trial outcomes); HEATHER R. HLAVKA & SAMEENA MULLA, BODIES IN EVIDENCE: RACE, GENDER, AND SCIENCE IN SEXUAL ASSAULT ADJUDICATION (2021) (discussing the prevalence of gendered stereotypes in sexual abuse trials); Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1 (2024) (examining abortion criminalization laws and the surveillance of women's bodies).

¹¹⁹ See Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 615, 628 (2020); I. Bennett Capers, *Policing "Bad" Mothers*, 136 HARV. L. REV. 2044, 2049, 2058 (2023) (book review). The impact of sexist stereotypes is often intersectional and also occurs outside the American context. See, e.g., Suzanne C. Robertson, Carey Sinclair & Andrew R. Hatala, *Indigenous Mothers' Experiences of Power and Control in Child Welfare: Families Being Heard*, 22 J. SOC. WORK 303, 316–17 (2022) (discussing how interactions between Indigenous women and the Manitoba Child and Family Services are shaped by, and shape, racialized and gendered stereotypes).

¹²⁰ See *Andrew*, 145 S. Ct. at 78–79.

¹²¹ Gender Justice Amici Brief, *supra* note 2, at 22.

defendant.¹²² Whether or not it does so in potential future adjudications of Ms. Andrew's case, the Court's holding and dicta may be used to defend against unfair prosecutorial tactics supported by irrelevant character evidence. Beyond its legal implications, the *Andrew* case should also serve as a catalyst for greater attention on how government agents and private actors alike weaponize sexist archetypes against women to deprive them of their status, their children, and their liberty, inside and outside of the courtroom.

¹²² See Britt Houston Lindsey, *In Andrew v. White, The Supreme Court Weighs in on Undue Prejudice and Due Process*, TEX. DIST. & CNTY. ATT'YS ASS'N (Mar.–Apr. 2025), <https://www.tdcaa.com/journal/in-andrew-v-white-the-supreme-court-weighs-in-on-undue-prejudice-and-due-process> [<https://perma.cc/6SQ7-4PYG>]. Federal Rules of Evidence 402 and 403, which together bar the admission of irrelevant and some unfairly prejudicial evidence at trial, see FED. R. EVID. 402 & 403, provide a first layer of protection for defendants, though they generally apply to individual pieces of evidence rather than to evidence's cumulative impact on a trial, see Miller, *supra* note 105, at 363–64.