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Joey L. Mogul

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THE DYKIER, THE BUTCHER, THE BETTER: THE STATE'S USE OF HOMOPHOBIA AND SEXISM TO EXECUTE WOMEN IN THE UNITED STATES

Joey L. Mogul*

We are trying to show that [Bernina Mata] has a motive to commit this crime in that she is a hard core lesbian, and that is why she reacted to Mr. Draheim's behavior in this way.

A normal heterosexual woman would not be so offended by such conduct as to murder.

— Assistant State's Attorney Troy C. Owen's argument during Ms. Mata's capital murder trial in Boone County, Illinois, in 1999.¹

INTRODUCTION

Bernina Mata was accused of stabbing John Draheim to death after she met him at a bar the night of his murder. According to the State, Ms. Mata killed Mr. Draheim because he made an unwanted pass at her that caused her, as a so-called “hard core lesbian,” to kill him.² Ms. Mata, on the other hand, stated that she

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* A partner at the People's Law Office in Chicago, Illinois, specializing in civil rights, criminal, and capital defense litigation with a focus on anti-queer bias, as well as a co-founder of Queer to the Left, a LGBT organization that works for racial, sexual, and economic justice, including the abolition of the death penalty and eradication of discrimination in the criminal justice system. She is a proud graduate of Oberlin College and the City University of New York School of Law.

I gratefully acknowledge the assistance and guidance provided by Belkys Raquel Garcia, a *juris doctorate* candidate from the City University of New York School of Law in 2006, for this piece would not have been published without her enormous contributions, which include her insights, patience, and hard work. I thank the organizers of this symposium, particularly Penelope Andrews for a wonderful conference, and the staff of the New York City Law Review. I am indebted to Sarah Waxman, a *juris doctorate* candidate from University of Chicago's School of Law in 2008, for her continual edits of this piece. I am also deeply grateful to Gina Olson, Gail Cooper, Jane Bohman, and Charles Hoffman for their comments on this piece and support of this work.

¹ Transcript of Record at 2133, 2135, *People v. Mata*, No. 98-CF-110 (Cir. Ct. Boone County, Ill. Oct. 7, 1999) (unpublished transcript, on file with author); *see also* *People v. Mata*, 819 N.E.2d 1261 (Ill. App. Ct. 2004). Bernina Mata's death sentence was commuted to a term of natural life imprisonment without the possibility of parole by Governor Ryan in January of 2003. At the time of publication, Ms. Mata's appeal of the Illinois Appellate Court's decision to deny her request for a new sentencing hearing on the basis that it was moot was pending in the Illinois Supreme Court.

² Prosecutor Troy C. Owens argued to the Court, “One of our theories is that—

acted in self-defense.³

Various facts and circumstances regarding the motivations and the events that led to Mr. Draheim's death are hotly debated by the parties. What is beyond dispute is that the State consistently raised Ms. Mata's sexuality throughout the criminal proceedings and deliberately argued Ms. Mata's sexual orientation caused her to kill. Ms. Mata was subsequently convicted of capital murder and sentenced to die by a jury in Boone County.⁴

After her trial and direct appeal, I was appointed to represent Ms. Mata in post-conviction proceedings in the State of Illinois. Upon reviewing the prosecutor's bold, inflammatory, and prejudicial arguments that Ms. Mata's lesbianism motivated her to murder, I looked nationwide for other criminal cases involving evidence or argument of a defendant's sexual orientation. I was surprised to find that post-*Furman*⁵ there has been a disturbing pattern of cases where prosecutors have improperly injected evidence of a defendant's real or perceived sexual orientation into proceedings or argued that a defendant's queer⁶ identity warrants his or her conviction and/or execution.

Based upon my representation of Ms. Mata, research, consultation, and support in other capital and criminal cases involving queer defendants, it is my belief that many prosecutors deliberately and shamelessly raise a defendant's queer identity or manipulate stereotypes of queers to prejudice defendants before juries and inflame them into delivering a death sentence. In this paper, I offer support for this argument as it pertains to lesbian defendants.

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this would be the primary theory—that she was infuriated by this conduct [John Draheim's attempt to date her and touching her shoulder and thigh] because she is a lesbian or she is primarily a lesbian, and we would prove that for her—because she was offended by his behavior, that is this—trying to say this nicely—trying to date her or whatnot, she lured him home under the theory, under the belief he was quote 'going to get lucky' and she killed him for that . . . . We need to prove as our theory that she is a lesbian . . . ." Transcript of Record, *supra* note 1, at 2130-34.

³ Detective Kurt Diztler testified that during his interrogation of Ms. Mata, she stated that she acted in self-defense in response to John Draheim attempting to rape her. *Id.* at 2789.

⁴ *Id.* at C. 567.

⁵ In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court struck down the death penalty finding that its imposition constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman* was subsequently reversed and the death penalty as a punishment was reinstated in *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶ The use of the word "queer" in this piece indicates the individual may be lesbian, gay, bisexual, or transgender (hereinafter "LGBT"), or have a gender appearance that does not match that person's biological sexual organs. The term has been reclaimed by LGBT communities and is not used in a derogatory manner.

First, I will review both the legal standards and discretion involved in selecting capital cases. Second, I will touch on the courtroom dynamics in capital trials and illuminate how racism and homophobia can taint capital convictions and sentences. Part III will specifically address women and lesbians on death row, and the role homophobia and sexism play in sentencing women to death. To illustrate this point, the paper focuses on the trials of Bernina Mata and Wanda Jean Allen. Lastly, I humbly take the opportunity of this symposium issue to thank Ruthann Robson for her scholarship, guidance, and inspiration with regard to her work and dedication to lesbians, queers, and justice.

I. SELECTION OF DEATH PENALTY CASES

In the United States, the death penalty is a punishment allegedly reserved for only the most heinous criminals, the worst of the worst.⁷ In the vast majority of cases, punishment by death is only imposed for the crime of murder.⁸ The commission of murder alone, however, does not warrant one's execution. Rather, the accused must commit a murder considered particularly violent and egregious—a "murder plus."⁹ In order to distinguish the class of

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⁷ *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (limiting capital punishment to those offenders who commit "a narrow category of the most serious crimes").

⁸ The death penalty is generally reserved and most often imposed for intentional murder offenses. Since 1976, in the post-*Furman* era, the Supreme Court has found execution for the rape of an adult or unintentional killing violates the cruel and unusual clause of the Eighth Amendment. See *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (abolishing the death penalty for a rape of an adult); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (abolishing the death penalty for a defendant convicted of felony murder where defendant did not kill, attempt to kill, or intend to kill). However, there are still some states that have laws on the books that allow an individual to be executed if convicted of aircraft piracy and other related offenses. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 206627, CAPITAL PUNISHMENT 2003 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>. See also the Death Penalty Information Center's website for a break down of crimes punishable by death by the state at <http://www.deathpenaltyinfo.org/article.php?did=144&scid=10> (last visited July 13, 2005). Many of these non-murder related provisions have not been used or directly challenged post-*Furman*.

Recently in Louisiana, Patrick Kennedy was convicted of an aggravated rape of his eight year old step-daughter and sentenced to death pursuant to a state law, which provides that a defendant convicted of aggravated rape of a victim twelve years or under may be subjected to a death sentence. LA. REV. STAT. ANN § 14:42(d); *State v. Kennedy*, 803 So. 2d 916 (La. 2001).

Federal criminal laws reserve the death penalty for acts of treason, sedition, espionage, or attempting, authorizing, or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise, regardless of whether such a killing actually occurs. 18 USCS §§ 2381, 794, 3591(b)(2).

⁹ *Atkins*, 536 U.S. at 319.

individuals susceptible to execution for a “murder plus” from those accused of a garden-variety murder, there must be an aggravating circumstance.¹⁰ Aggravating factors vary from state to state, but they often include the murder of a police officer, multiple individuals, or a minor, or a murder during the course of a violent felony.¹¹

Although these circumstances certainly play a role in determining who is eligible to be charged with a capital crime, evidence of such circumstance(s) does not require the accused be charged or executed. The death penalty is never mandatory or automatic.¹² In fact, regardless of the heinous circumstances implicit in the taking of any human life, only 1.2% of all murders are capital cases.¹³

Thus, the law alone does not dictate who will be executed for a capital crime. Instead, prosecutors essentially have unfettered discretion in deciding who should be charged with a capital crime, and jurors and judges have a great deal of latitude in determining who should be killed. Such discretion allows for impermissible bias to influence these life or death decisions. It should be well known that racism and poverty influences who is charged, sentenced, and killed by execution in the United States.¹⁴ What is less recognized

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¹⁰ See *Gregg v. Georgia*, 428 U.S. 153, 193-195 (1976); *Lockett v. Ohio*, 438 U.S. 586, 602-606 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). See also Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT'L J. SEXUAL ORIENTATION L. 104, 110-11 (1995), <http://www.ibiblio.org/gaylaw/issue1/streib.html>. Streib's article provides a well-written description of how the death penalty functions regarding the interplay of aggravating and mitigating factors.

For a further example of such interplay, see Illinois's First Degree Murder statute, 720 ILL. COMP. STAT. 5/9-1 §§(b)(1), (3), (7), (14) (1961); and the Death Penalty Information Center's website or each jurisdiction's capital murder statutes' aggravating factors at <http://www.deathpenaltyinfo.org/state/>.

¹¹ See Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=144&scid=10> (last visited Nov. 27, 2005).

¹² *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (holding that mandatory imposition of the death penalty violates the Eighth and Fourteenth Amendments to the Constitution in part because “one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common law practice of inexorably imposing a death sentence upon every person convicted of a specified offense”); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (holding that mandatory imposition of death for the first degree murder of a police officer violates the Eighth and Fourteenth Amendments to the Constitution).

¹³ Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE, Mar. 20, 2001, at 39.

¹⁴ Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 435 (1995) (arguing that “virtually all [of those selected for execution] are poor; about half are members of racial minorities; and the overwhelming majority are sentenced to death for crimes against white victims. . . . But race and poverty continues to determine who dies.”). See also NATIONAL COALITION TO ABOLISH THE DEATH PENALTY & LISALYN R.

is that homophobia, sexism, and anti-gender variant bias can also taint these decisions.¹⁵

JACOBS, RACIAL DISPARITIES AND RACIAL DISCRIMINATION IN CAPITAL SENTENCING IN THE UNITED STATES 7 (2001) (reporting that since the death penalty was reinstated in 1976, almost half of the inmates executed have been people of color and almost sixty percent of the juvenile offenders sentenced to death between 1973 and 2000 have been people of color).

¹⁵ While this paper focuses on two capital cases of lesbians, there have been numerous cases involving men where prosecutors have injected irrelevant evidence of a defendant's gay sexual orientation into the trial or sentencing proceedings to prejudice the defendant before the jury and inflame the jury to give a death sentence. A few examples of such cases include those discussed below.

Jay Wesley Neill, a white gay man, was convicted of four murders and injuring three others during a bank robbery in Geronimo, Oklahoma. *Neill v. Gibson*, 278 F.3d 1044, 1049-50 (10th Cir. 2001). During his sentencing hearing in 1992, the Oklahoma prosecutors urged the jury to consider Neill's sexual orientation in determining whether to mete out a death sentence. The prosecutor's pink baiting is revealed by the words he shamelessly uttered during the penalty phase argument to the jurors:

I want you to think briefly about the man you're setting [*sic*] in judgment on and determining what the appropriate punishment should be . . . . *I'd like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you're sitting in judgment on - disregard Jay Neill. You're deciding the life or death of a person that's a vowed [*sic*] homosexual. . . . But these are areas you consider whenever you determine the type of person you are setting [*sic*] in judgment on . . . . The individual's a homosexual.*

Id. at 1065-66 (emphasis added). Although the Tenth Circuit Court of Appeals found the comments to be illegitimate and improper, it did not find that this prosecutorial misconduct rendered Neill's death sentence proceedings fundamentally unfair. *Id.* at 1061-62. Neill was subsequently executed in Oklahoma in December 2002. Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Sep. 7, 2005).

Stanley Lingar, a white gay man, was convicted of the murder of Thomas Scott Allen in St. Francois County, Missouri in 1986. *State v. Lingar*, 726 S.W. 2d 728, 730 (Mo. 1987). The key evidence against Lingar was provided by his co-defendant David Smith, who, pursuant to a plea deal with prosecutors, testified against Lingar in exchange for a 10-year prison sentence. Smith testified he and Lingar picked up Allen, who was hitchhiking at the time, and drove him several places, including to a lake outside of town. While driving outside of town, Lingar allegedly forced Allen to disrobe and masturbate. Later when Allen was urinating outside of the car, Lingar repeatedly shot Allen with a rifle, struck him repeatedly with a tire iron, and drove over him with the car. *Lingar v. Bowersox*, 176 F.3d 453, 455-56 (8th Cir. 1999). Smith's testimony was subsequently undermined by expert testimony of pathologist Dr. Jay Dix, presented during a post-conviction hearing, that there were no injuries consistent with the victim being struck by a tire iron or run over by car. Brief for Appellant-Defendant at 6, *Lingar*, 176 F.3d 453 (No. 96-3609).

At the sentencing phase, the State presented evidence that Lingar was gay, and he had a consensual sexual relationship with Smith, the co-defendant. The prosecutor stated in his opening penalty phase argument, "The only evidence we'll have to offer you at this stage, we'll recall David Smith, who will basically tell you that . . . from . . . April of 1984 until the time of this homicide, *there was a homosexual relationship that existed between him and Lingar.*" *Lingar*, 176 F.3d at 457 (emphasis added). In response to defense counsel's objections, the State successfully argued that evidence of Mr.

II. THE HUMAN DYNAMICS IN CAPITAL TRIALS

Imposition of the death penalty requires the prosecution to convince a jury or judge to kill a human being. This is not always an easy feat. To succeed, as noted by Victor Streib, the prosecution must demonize, dehumanize, and “other” the defendant to the jury.¹⁶ This becomes easier when the defendant is of a different race,¹⁷ class,¹⁸ or sexual orientation¹⁹ than the jurors or judge. The prosecutor’s task is also greatly enhanced when a defendant belongs to a class stigmatized in society as abnormal, deviant, and pathological.

Therefore, it is easier to kill a person of color than a white person because in many cases defendants of color are tried before all or predominantly white juries.²⁰ In such cases, the State benefits from racist stereotypes, particularly those of African-Americans, that people of color are morally inferior and prone to acts of violence.²¹ Such false stereotypes help build a case that people of

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Lingar’s gay relationship was relevant to the motive of the crime and the evidence revealed Lingar’s character. *Id.* However, they failed to present or argue such evidence during the guilt phase. Brief for Appellant-Defendant at 6, *Lingar*, 176 F.3d 453 (No. 96-3609). The prosecutor was ultimately successful in admitting evidence of a consensual sexual relationship and inferring this constituted aggravating evidence warranting Lingar’s execution. The Missouri state courts found there was no error by the admission of such evidence and the Circuit Court of Appeals for the Eighth Circuit found that any error was harmless. *Id.* Lingar was subsequently executed in February 2001.

Calvin Burdine, a white gay man, was convicted of killing his lover, W.T. Wise, and sentenced to die in Harris County, Texas, in 1994. Many may be aware of Mr. Burdine’s case because of the decision by the Fifth Circuit Court of Appeals affirming his conviction and sentence despite the fact that his trial attorney fell asleep on five different occasions during his trial. Most, however, are not aware of the prosecutor’s homophobic assertion as to why he should be executed. The prosecutor argued that the jury had to sentence Mr. Burdine to death rather than life in prison because “sending a homosexual to the penitentiary certainly isn’t a very bad punishment for a homosexual.” Goldstein, *supra* note 13, at 38. Burdine’s capital sentence was subsequently reversed, on grounds other than the homophobia, and he subsequently plead guilty to receive a life sentence.

¹⁶ Streib, *supra* note 10, at 111 (“Prosecutors in capital cases ultimately have to get a jury to vote to take a human life—the defendant’s. Prosecutors commonly attempt to finesse this awesome stumbling block by arguing that the defendant is not really human. They will refer to the defendant as an animal and the crimes as monstrous. The prosecutor’s assumption is that a jury will not be as hesitant in concluding a mad dog must be exterminated as they would be in concluding that a human being must be put to death.”).

¹⁷ See *supra* note 14.

¹⁸ *Id.*

¹⁹ See *infra* Part II; see also Streib, *supra* note 10.

²⁰ See Bright, *supra* note 14, at 436.

²¹ *Id.*; see also Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery*

color kill in a violent and heinous manner and are less likely to kill as a result of a mental disturbance, considered by many to be less blameworthy and therefore mitigating.²²

Similar dynamics that operate in cases involving defendants of color also manifest in cases involving queer defendants. Often, queer people are tried before juries that have no queer people sitting on them, and whose members often have blatant and unabashed beliefs that queer people are deviant and immoral. For example, in 1998, the *Chicago Sun Times* conducted a survey and found that potential jurors were “more than three times as likely to think they could not be fair or impartial toward a gay or lesbian defendant as toward a defendant from other minority groups, such as Blacks, Hispanics, or Asian-Americans.”²³ In cases involving real

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and *Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1018 (1994).

²² The United States Supreme Court has noted this phenomenon by recognizing that unconscious racism and fear of Black people may be stirred up when viewing a violent crime in *Turner v. Murray*, 476 U.S. 28, 35 (1986) (“More subtle, less consciously held racial attitudes could also influence a juror’s decision in [the] case. Fear of blacks, which could easily be stirred up by the violent facts of [the] crime, might incline a juror to favor the death penalty.”).

²³ Will Lester, *Jurors Say They Follow Beliefs, Not Instructions*, CHI. SUN TIMES, Oct. 24, 1998, at 37. This statistic was brought to my attention by Ruthann Robson in the affidavit she submitted on behalf of Bernina Mata’s clemency petition to commute her death sentence filed with the Illinois Prisoner Review Board in September of 2002. As Robson stated:

Bias against lesbians and other sexual minorities is well documented. For example, the American Enterprise Institute (AEI) for Public Policy Research Reports that in 1973, when the National Opinion Research Center at the University of Chicago first polled people about the sexual relations between persons of the same sex, 73% characterized such an event as ‘always wrong.’ According to AEI’s own polls in the years 1996, 1998, and 2000, the percentage of persons judging sexual relations between persons of the same sex as ‘always wrong’ was reported at 60%, 58%, and 59% respectively.

Members of juries are composed from this population of those who disapprove of homosexuality. Thus, it is not surprising that a disproportionate number of jurors admit to being biased against lesbian and gay defendants in the criminal context. As reported in the *Chicago Sun Times* in 1998, the year prior to Ms. Mata’s trial, potential jurors were “more than three times as likely to think they could not be fair or impartial toward a gay or lesbian defendant as toward a defendant from other minority groups, such as Blacks, Hispanics, or Asian Americans”. This finding, based on the Juror Outlook Survey, conducted by the National Law Journal and Decision Quest, a national trial consulting and legal communications company, is especially striking given that more than 40 percent of those polled and more than 70 percent of blacks polled believe that minorities are treated less fairly than others” in the criminal justice system, meaning that sexual minorities are treated even less fairly.

or perceived queer defendants, the State also benefits from, capitalizes on, and panders to anti-queer stereotypes that queers are immoral, deviant, and pathological. These sentiments are fueled by negative portrayals of lesbians, gay men, and queers in mainstream media, particularly in movies.²⁴

Such hostile sentiments amongst jurors and segments of the media provide one explanation of why prosecutors have introduced irrelevant evidence of a defendant's queer identity or marshaled anti-queer sentiments in capital proceedings; many prosecutors are aware that such evidence and arguments are likely to prejudice the defendant and influence the jurors to impose a death sentence.

III. LESBIANS ON DEATH ROW

A. *Women as Capital Defendants*

In order to appreciate the forces at play in cases involving lesbian defendants, it is helpful to understand the dynamics at work in capital cases involving women in general. Women, as a class of defendants, are underrepresented in capital cases and comprise less than two percent of America's death row.²⁵ There are various theories as to why women are underrepresented. Several lawyers and academics, most notably Elizabeth Rapaport, assert that women's under-representation stems from the reality that women commit less death-eligible crimes than men.²⁶ Indeed, statistics in-

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Ruthann Robson, *Lesbianism and the Death Penalty: A "Hard Core" Case*, WOMEN'S STUD. Q., Fall/Winter 2004, at 181, 183 (internal citation omitted).

In addition, also see the USA Today/CNN/Gallup poll in the summer of 2003, which found that 49% of Americans polled said homosexuality should not be considered an acceptable alternative lifestyle compared to 46% who said it should, and that 46% of those polled thought that homosexual relations among consenting adults should not be legal compared to 48% who thought they should be. Susan Page, *Gay Rights Tough to Sharpen into Political "Wedge Issue"*, USA TODAY, July 28, 2003, at 10A, available at <http://www.usatoday.com/news/polls/tables/live/2003-07-28-poll-gays-issues.htm>.

²⁴ Just a few examples include *CRUISING* (United Artists 1980), *SILENCE OF THE LAMBS* (MGM 1991), and *BASIC INSTINCT* (TriStar Pictures 1992). See also VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* (1981).

²⁵ Victor L. Streib, *Death Penalty For Female Offenders, January 1973 through August 31, 2005*, available at <http://www.law.onu.edu> (last modified Sept. 7, 2005) (explaining that while women account for one out of every ten arrests for murder, they only account for one in fifty-one (2%) of the death sentences imposed at trial, one in sixty-eight (1.5%) of people on death row, and one in ninety-eight (1%) people executed in the modern era).

²⁶ Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 582 (2000) (arguing that "[d]emonstrably, the single most important explanatory factor accounting for the representation of

dicating that women commit fewer violent crimes, less frequently kill multiple victims, and kill fewer strangers.²⁷ Generally, when women kill, they kill family members or lovers.

Regardless of the sex of the killer, cases involving murdered family members rarely become capital cases, in part because they lack the necessary aggravating circumstances.²⁸ The public often perceives these crimes as having been committed in the heat of passion, often construed to be a mitigating circumstance.²⁹ Consequently, intrafamilial murders are rarely seen as premeditated and cold, factors more likely to indicate that the defendant is a dangerous individual worthy of death.

But the comparatively small number of women on death row may not be fully explained by the fact that women commit less death-eligible crimes. It may also be a consequence of sexist stereotypes in American society that define women as mothers, nurturers, passive, and submissive. Such false notions make women, particularly white heterosexuals with money, difficult to execute.³⁰ These women are not easily susceptible to being portrayed as aggressive, violent, or cold-blooded. The public, as well as jurors and judges, are more likely to feel sympathy for these women, as they often view them as victims worthy of mercy despite the heinous crimes of which they are accused. Commutations of death sentences nationwide support this phenomenon; nationwide, women have had a greater number of life-sparing clemency petitions

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women on death row is the low rate of the commission of death penalty echelon offenses by women”).

²⁷ *Id.* at 583 (explaining that “[m]ore than 75% of those on death row killed in the course of committing a violent felony such as rape or robbery. These offenses, in which women’s rates of participation are very low, are most severely condemned by our society. Women commit 4%, or slightly less, of killings by strangers, of robbery-murders, and of rape-murders. They commit 7.2% of killings with multiple victims.”) (internal citation omitted); see also Streib, *supra* note 25.

²⁸ *Id.*

²⁹ Rapaport, *supra* note 26, at 582-583 (explaining that “two-thirds of the women who kill, kill family members and lovers”) (internal citation omitted). See also Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1426 (1997) (arguing that “most intrafamilial murders are viewed as less blameworthy because they often lack the qualities of cold-bloodedness or predatoriness”).

³⁰ Carroll, *supra* note 29, at 1418 (arguing that “[t]he chivalry theory seeks to explain the most striking characteristic of women in the capital punishment system: their relative scarcity. It identifies as one explanation the gender stereotype of women as the weaker, more passive sex, both submissive and dependent on men. This stereotype has multiple effects. Generally, it creates a more protective attitude toward women. . . . In the context of capital sentencing, this chivalrous attitude towards women manifests itself in a cultural reluctance to sentence women to death.”).

granted than their male counterparts.³¹ This subset of white, wealthier women is practically immune to being capital charged, and such women are rarely sentenced to die.

The women who end up on death row are not necessarily the women who have committed the worst murders. Instead, they are women who do not conform to sexist notions society has proscribed for women. Consequently, they are not afforded the protectionist notions accompanying these sexist stereotypes.³² The women on death row are the ones who are easily portrayed as unfeminine, aggressive, possessed of poor mothering skills, or sexually promiscuous. Simply put, these women appear “unladylike.” They are dehumanized by being defeminized.³³

As Joan Howarth notes, “[p]roper femininity is found more easily in white women than in women of color, in heterosexual women instead of lesbians, and in middle-class women rather than poor women.”³⁴ With widespread acceptance of these racist and sexist pre-conceived notions, women of color are often falsely perceived as more aggressive, more violent and less apt or able to take care of their children than white women.³⁵ This serves to explain

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³¹ Joan W. Howarth, *Executing White Masculinities: Learning From Karla Faye Tucker*, 81 OR. L. REV. 183, 214 (2002) (arguing that it has been shown that “[r]egarding clemency. . . , women have received a disproportionately high number of the post-Furman, merit-based grants of clemency—seven of forty-four”) (internal citation omitted).

³² Carroll, *supra* note 29, at 1413, 1436-37; see also Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 512-13 (1990) (arguing that “when a woman is perceived as guilty of a severe or ‘male’ offense she loses the advantage of her gender and is more harshly punished because of her violation of stereotypical gender expectations”).

³³ Streib, *supra* note 10, at 110 (“When the capital defendant is a woman, it would appear that sentencing juries are even more reluctant to order death than when the defendant is a man. In such cases prosecutors first must defeminize the defendant, trying to show that her crime is more ‘manly’ more like an episode from Bonnie and Clyde than from Arsenic and Old Lace.”).

³⁴ Howarth, *supra* note 31, at 204.

³⁵ Carroll, *supra* note 29, at 1423, 1436-37 (arguing that “[w]omen of color suffer an additional bias because they are viewed first through the lens of their racial and ethnic identity and then through the lens of ‘perfect womanhood’ they can never achieve. . . . [W]omen who are sentenced to death are women who exist furthest from the collective center of traditional social and female roles. Their racial or socio-economic status preclude them from the protection of their sex long before they engage in crime because their poverty, race, or social situation makes it impossible for them to conform to the social ideal of womanhood. . . . They are a risk not just because they are poor or uneducated, or even because they are of a low social class, but because they defy society’s traditional image of womanhood with a combination of their violence and their marginality.”); see generally Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (1995).

why we see a disproportionate number of women of color on death row. Women of color comprise forty-six percent of women on the row: thirty-two percent are Black, twelve percent are Latina, and two percent are Native American.³⁶

Protectionist notions of femininity do not include lesbians as well.³⁷ The labeling of a woman as a lesbian often falsely brands her as a man hater, aggressive, and deviant,³⁸ and thus more capable of committing a crime than a heterosexual woman. Such negative perceptions of lesbians help to explain the disproportionate number of lesbians and perceived lesbians on death row. Forty percent of the women on death row have had some implication of lesbianism used against them at trial regardless of whether it was true or not.³⁹

In light of the sexist and homophobic conditions at play, it is my belief that prosecutors improperly inject or manipulate evidence of a defendant's lesbianism, perceived lesbianism, or non-feminine gender representation to dehumanize and other the defendant before the jury. The State banks on jurors' anti-lesbian and anti-gender variance bias, understanding that such prejudices may further motivate jurors to impose a death sentence.

B. The State's Use of Lesbian and Anti Gender Variance Bias in Capital Cases

1. Bernina Mata's Capital Trial: A Case Study in Anti-Lesbian Bias

In cases involving female suspects and male victims, prosecutors seek to raise irrelevant evidence of the defendant's alleged les-

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³⁶ Streib, *supra* note 25. See Death Penalty Information Center, Women in the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=230&scid=24#facts>. See also Howarth, *supra* note 31, at 221-22 (noting that "[a]lthough we have too little social science data on the women of death row, one study suggests that 'death sentenced women of color and lesbians are over-represented in the kinds of murders that, according to prior research, are at low risk of resulting in the death penalty'" (internal citation omitted)).

³⁷ See *supra* note 32.

³⁸ Streib, *supra* note 10, at 110 ("It would seem that to a typical Southern Baptist jury in a small southern town, an effective means of defeminizing a female capital defendant is to show the jury that she is a lesbian. The more 'manly' her sexuality, her dress, and her demeanor, the more easily the jury may forget that she is a woman. In essence, she is defeminized by her sexual orientation and then dehumanized by her crime. The jury is left with a gender-neutral monster deserving of little or no human compassion.").

³⁹ Goldstein, *supra* note 13, at 40; Victoria A. Brownsworth, *Dykes on Death Row*, ADVOCATE, June 1992, at 64 ("out of the nation's 41 female death-row inmates, at least 17 are lesbians").

bianism to buttress their claims that the defendant acted maliciously and violently, and was motivated by bias or ill will to kill. This strategy is exemplified in Bernina Mata's case.

Ms. Mata, a Latina lesbian, was accused of murdering John Draheim, a white heterosexual man. The evidence indicated the two met at a bar where they were seen talking and drinking together.⁴⁰ They left the bar together and returned to Ms. Mata's apartment.⁴¹ Later that night, Mr. Draheim was stabbed in Ms. Mata's apartment while Ms. Mata and her male roommate and co-defendant, Russell Grundmeier, were present. Both Ms. Mata and Mr. Grundmeier took several steps to conceal Mr. Draheim's

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⁴⁰ Transcript of Record, *supra* note 1, at 2403 (according to the bartender Linda McDuff's testimony).

⁴¹ *Id.* at 2295. Russell Grundmeier was the State's star witness against Ms. Mata and her co-defendant. He testified that Ms. Mata was his girlfriend, he had a sexual relationship with her, and he was in love with her. *Id.* at 2286-87. This is striking considering that such evidence contradicted the State's theory that Ms. Mata was a lesbian or lesbianism made her prone to kill men.

Mr. Grundmeier admitted he was mad when he witnessed what he perceived to be Ms. Mata and the victim flirting together at the bar, and that he was jealous and angered by the victim's behavior. *Id.* at 2296-98, 2356, 2374. He also testified that he attacked the victim moments before he died, struggled with him, and held him down while Ms. Mata allegedly stabbed him with a knife he acknowledged he owned. *Id.* at 2299, 2496.

Although there was substantial evidence Mr. Grundmeier committed or participated in Mr. Draheim's homicide and that he had a motive to harm the victim, he was not charged with murder. Rather, he was given immunity for his participation in the crime and a four-year sentence for concealment of Mr. Draheim's death. *Id.* at 2522. The court noted his participation in the victim's death when sentencing Russell Grundmeier for concealment of a homicidal death:

Had he not taken violent action against the victim in this case, he very well, may very well have lived. There would not have been a homicide. His actions set into motion a lethal set of circumstances. . . . Yeah, I think he did believe that he was participating in a murder, in a homicide. I think he felt that he would be fingered in that homicide. And that's what motivated him to take the action that he took to conceal it, to dispose the body . . . This is a case where I think it's basically the police must have believed your story. Why, I don't know. The facts and circumstances are such that it might very well have been a murder charge. They may have chose to disbelieve you given the fact that you didn't tell them the full truth the first time around. . . . Boy, the facts and circumstances of this case tell me a lot more than just concealment of a homicidal death. Under the facts and circumstances there's much more to it than that.

Transcript of Record at 82, 84-85, *People v. Grundmeier*, 98 CF 111 (Cir. Ct. Boone County, Ill. Oct. 27, 1998).

Mr. Grundmeier, a white heterosexual man, is a free today, while Ms. Mata was sentenced to die and is currently serving a life sentence. Such testimony and evidence leaves serious lingering questions as to how anti-lesbian bias may have influenced the investigation and prosecution of Ms. Mata's entire case.

death.⁴²

To assert Ms. Mata had a motive to kill and justify the admission of evidence of her sexual orientation, the State argued Ms. Mata's lesbianism caused her to kill. Specifically, Prosecutor Owens stated that she was a "hard core" lesbian, and that a lesbian was more likely to kill a man who made an unwanted pass at her than a heterosexual woman.⁴³ As he stated: "A normal heterosexual woman would not be so offended by such conduct as to murder."⁴⁴

Despite the inaccuracy of lesbianism as proof of motive, as well as the irrelevancy of Ms. Mata's sexuality to the criminal proceedings, the State raised her lesbianism at every critical stage of the litigation, including before the grand jury,⁴⁵ at her bond hearing,⁴⁶ and at her motion to suppress evidence hearing.⁴⁷

At trial, the State bombarded the jury with an avalanche of evidence of Ms. Mata's lesbianism.⁴⁸ Prosecutors paraded ten witnesses before the jury to testify she was a lesbian.⁴⁹ They also removed three books from her home and read the titles of these books to the jury: "*The Lesbian Reader*," "*Call Me Lesbian*," and "*Homosexuality*."⁵⁰ According to the State, these books were not only evidence of her lesbianism, but of her motive to kill.⁵¹ The prose-

⁴² Transcript of Record, *supra* note 1, at 2317-18.

⁴³ *Id.* at 2135.

⁴⁴ *Id.* at 2133.

⁴⁵ *Id.* at 23-26.

⁴⁶ *Id.* at 155.

⁴⁷ *Id.* at 277, 529.

⁴⁸ Prior to trial, the State sought to admit a massive amount of evidence to prove she was a lesbian. The defense consented to stipulate she was a lesbian in order to save the time and effort necessary to prove this fact. The State rejected the offer.

⁴⁹ The following people testified: Russell Grundmeier, her co-defendant and roommate; Tarra Lawton, a neighbor; Michael Lanning, a neighbor; James Clark, a neighbor; Detectives Dizzler and Wagner who interrogated Ms. Mata; Officer Ditzler who transported Ms. Mata to the jail; and Henrietta Glover, Olicia Taylor and Angela Wright, all three jail house snitches. Transcript of Record, *supra* note 1, at 2286, 2665, 2695, 2723, 2830, 2871, 3265, 3392, 3450, 3520.

⁵⁰ The State elicited testimony from Crime Technician Daniel Liston of the Winnebago County Sheriff's Police that he recovered three books from Ms. Mata's home including *The Lesbian Reader*, *Homosexuality*, and *Call Me Lesbian* over the defense counsel's objections. The court admitted the titles of the books into evidence, but did not allow the books themselves to go back to the jury. *Id.* at 3036-39.

⁵¹ The court summarized the State's theory when it denied the defense's motion in *limine* and granted the State the right to read the titles of the books to the jury: "I recall the theory that the State propounded at the first time we had the motion, and that was to show that because of her sexual preference she was offended by the conduct of John Draheim and that provided the motive for her to kill him." *Id.* at 3032.

Had the jury been allowed to see those texts instead of merely having their titles read (and in one case incorrectly) they would have seen that they were literary and

cutors referenced her lesbianism on seventeen separate occasions

sociological accounts of lesbian and gay men's lives, completely devoid of murder or man-hating implications. *The Lesbian Reader* is a magazine of both fiction and non-fiction essays edited by Gina Covina and Laurel Galana. *Call Me Lesbian* is a non-fiction text by Julia Penelope regarding lesbians' lives and culture. The last book, entitled *Homosexualities: A Study of Diversity Among Men and Women*, is a sociological text described as an official publication of the institute for sex research founded by Alfred Kinsey, which was incorrectly and incompletely read to the jury as "Homosexuality."

As the court noted in *Guam v. Shymanovitz*, the mere possession of reading material is not indicative of any propensity to commit any acts, whether they are illegal or not. *Shymanovitz*, 157 F.3d at 1158-59. There, the defendant was convicted of several counts of illegal sexual conduct with minors. During the trial, the State introduced portions of the defendant's pornography collection found in his home, which included detailed descriptions from *Stroke*, a gay male magazine. The court found the admission of such evidence reversible, stating:

There are even more fundamental reasons why the *Stroke* magazines and the fictionalized articles were inadmissible. The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401. . . . [N]either the defendant's possession of the *Stroke* magazines, nor of any of the articles contained therein, was probative of whether the touching of the alleged victims' genitals was intentional or whether the touching actually was or could be construed as being for sexual purposes . . . At the very most, Shymanovitz's possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind. In any event, propensity evidence is contrary to "the underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is."

Criminal activity is a wildly popular subject of fiction and nonfiction writing—ranging from the *National Enquirer* to *Les Misérables* to *In Cold Blood*. Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct. Under the government's theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov's *Lolita*, and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside.

In this case the government offered into evidence the text of two out of the dozens of articles from the four *Stroke* magazines and none of the articles from the *Playboy* or *After Midnight* magazines. Undoubtedly there was other reading material in Shymanovitz' residence that was discovered but neither seized nor introduced into evidence. To allow prosecutors to parade before the jury snippets from a defendant's library—the text of two magazine articles and descriptions of four magazines—would compel *all* persons to choose the contents of their libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith prosecutions.

Id. at 1158-59 (internal citations omitted).

throughout their arguments to the jury,⁵² which included assertions that she was “overtly homosexual,” “flaunting” her sexuality, and “proclaiming her sexuality to anyone who would listen.”⁵³ The prosecutors flaunted Ms. Mata’s sexuality before the jury because they knew some jurors would find it distasteful and others would deem her to be sick, perverted, and more worthy of death.

The State’s manipulation of Ms. Mata’s sexuality also provided the State with an argument to prove the requisite aggravating circumstance—that she acted in a “cold, calculated premeditated manner pursuant to a preconceived plan, scheme or design”—the only aggravating factor available for her death eligibility.⁵⁴ The State’s task of proving evil intentions on the part of Ms. Mata was greatly enhanced when depicting her as a “hard core lesbian,” who by nature loathed men, was repulsed by men, and would harm a man who dared to touch her. It then became much more plausible that Ms. Mata hatched a devious plan of revenge to lure the victim to her home and kill him for making an unwanted pass at her.⁵⁵

The circumstances of their encounter and the murder, however, belied support for the assertion that Ms. Mata killed in cold blood or deserved the death penalty. There was little time for Ms. Mata to have hatched an elaborate plan to kill when she met the victim hours earlier at the bar the night of his murder. There was also substantial evidence that she was under extreme emotional distress at the time of the crime. Ms. Mata suffered from post-traumatic stress disorder stemming from the repeated sexual abuse she suffered as a child at the hands of her stepfather,⁵⁶ and she had an extensive history of mental illness that included numerous hospitalizations and treatment with psychotropic medication.⁵⁷ Moreover, according to Ms. Mata, she experienced flashbacks of her

⁵² Transcript of record, *supra* note 1, at 2182, 2187, 4721, 4734, 4750, 4756, 4765, 4952-54, 4959.

⁵³ *Id.* at 4953.

⁵⁴ 720 ILCS § 5/9-1(b)(11) (“the defendant murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom . . .”).

⁵⁵ Transcript of Record, *supra* note 1, at 2130-34.

⁵⁶ The testimony at trial indicated Ms. Mata was diagnosed as having Post Traumatic Stress Disorder (PTSD) stemming from being raped by her stepfather at age four which required that she undergo surgery to repair the vaginal lacerations she suffered. *Id.* at 3741-55, 4082-84, 4114-16, 4477-78, 4565, 4620-28, 4585.

⁵⁷ Ms. Mata’s extensive history of mental illness included hallucinations, paranoia, borderline personality disorder, some forms of depression diagnosed as chronic depressive disorder, major depression or dysthmic disorder, and alcohol dependence

stepfather when she encountered Mr. Draheim and believed that he attempted to rape her in her apartment.⁵⁸ Ms. Mata was also highly intoxicated at the time of the crime.⁵⁹ Typically, these factors serve to convince a jury not to impose a death sentence. Here, however, the State's demonization of Ms. Mata as a lesbian outweighed their mitigating potential.

In this case, Ms. Mata's lesbianism was not probative of her alleged intent or motive to kill nor should it have been proof of an aggravating circumstance.⁶⁰ The State offered no scientific evidence or expert testimony to substantiate its theory that lesbians are predisposed to hate men or kill. As we all know, a defendant's heterosexual orientation is not useful fodder for the State to exploit in a murder case. In fact, it would be absurd for a prosecutor to argue a defendant's heterosexuality caused that person to kill. It should have been impermissible for this prosecutor to argue Ms. Mata's sexual orientation caused her to kill. But as late as 1999, prosecutors advanced this precise argument to excuse the admission of a wealth of prejudicial irrelevant evidence to taint Ms. Mata before the jury.

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and cocaine abuse. She was treated with psychotropic and anti-depressant medications and hospitalizations. *Id.* at 3747-50, 4565.

⁵⁸ *Id.* at 2784, 4062, 4084.

⁵⁹ *Id.* at 2403, 2740 (according to the testimony of Russell Grundmeier and James Clark).

⁶⁰ Several courts have ruled a person's gay or lesbian identity is irrelevant to the crime or sentencing considerations, and that the prejudice stirred by such evidence far outweighs any probative value. *See, e.g.,* *People v. Sales*, 502 N.E.2d 1221, 1225 (Ill. App. Ct. 1986) (holding that the State's argument that the defendant's motive to rape and cut a woman stemmed from his bisexual orientation was improper and constituted prosecutorial misconduct, noting that "[h]omosexuality is a complex psychological condition which evokes powerful emotional responses from the ordinary man, and a layman cannot be permitted, with no evidentiary support, to argue to a jury his views as to its characteristics") (internal citation omitted); *Beam v. Paskett*, 3 F.3d 1301, 1310 (9th Cir. 1993) (finding that defendant's past sexual experiences, which included same-sex relations, was improperly considered as evidence of defendant's future dangerousness); *Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998) (finding that a defendant's gay sexual orientation was not probative of whether defendant engaged in illegal sexual conduct with minors, and was unduly prejudicial); *Jones v. U.S.*, 625 A.2d 281, 284 (D.C. App. 1993) (noting that "[e]vidence of homosexuality has an enormous proclivity for humiliation and degradation and, thus, poses a high risk of prejudicial impact on a jury . . . This is especially true where evidence of homosexuality is introduced against a criminal defendant who has a constitutional right to a fair trial.") (internal citation omitted). For an extensive discussion regarding the admissibility of a party's sexual orientation in various legal proceedings, see also Peter Nicolas, "*They Say He's Gay*": *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793 (2003).

2. Wanda Jean Allen's Capital Trial: A Case Study in Anti-Gender Variance Bias⁶¹

In other cases, a defendant's lesbianism may be relevant, particularly in cases where the defendant killed a lover. As discussed in Section II, the relationship between the victim and the defendant may reveal pertinent circumstances of the crime, specifically that it was a product of passion rather than evil or cruel motives. In these cases, appealing to the rank homophobic prejudices of the jurors does not serve the interests of the State.

In capital cases, the State must not only dehumanize the defendant, but must also valorize the victim. The State must convince the jury that the victim was a person worthy of the jury killing in her name. The State's arguments as to the defendant's character cannot simultaneously detract from the victim's character. In cases where a lesbian defendant kills her lover the State cannot simply attack the defendant as lesbian, because it undermines the victim's inherent value in the eyes of the jury.

In such cases, the State is more nuanced in its tactics when dehumanizing the defendant. The State does not highlight the defendant's sexuality *per se*, but focuses on her appearance and her failure to conform to her proscribed gender role: her gender "deviance." The State emphasizes how the defendant does not walk, talk, act, or appear as a proper woman should, which makes her immoral and perverted in addition to being a lesbian. Wanda Jean Allen's case exemplifies this strategy.

Wanda Jean Allen, an African-American lesbian, was convicted of killing her lover, Gloria Leathers, in Oklahoma City in 1989.⁶² On the day of the incident, Ms. Allen and Ms. Leathers had an argument over a welfare check, and Ms. Leathers decided to move out.⁶³ When Ms. Leathers returned to their residence, accompanied by police, a fight ensued over the ownership of property.⁶⁴ Upon the suggestion of one of the officers, Ms. Leathers went to

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⁶¹ See, e.g., Kendall Thomas, Derrick Bell Lecture at New York University School of Law: Race in American Society on "Condoleeza Rice and Wanda Jean Allen" (Nov. 4, 2004); City University of New York School of Law: "Imagining Lesbian Legal Theory" (Nov. 5, 2004). Kendall Thomas's scholarship on Wanda Jean Allen and her case (one piece of which is included in this Law Review) presents a thoughtful and cogent analysis of the dynamics that were at play in Ms. Allen's case, which included racism, poverty, ineffective assistance of counsel, borderline mental retardation, and Ms. Allen's other mental and physical health issues.

⁶² Allen v. State, 871 P.2d 79 (Okla. Crim. App. 1994).

⁶³ *Id.* at 86.

⁶⁴ *Id.*

the police station. Ms. Allen followed Ms. Leathers, and at the station, Ms. Allen shot Ms. Leathers once in the stomach, killing her.⁶⁵

The State asserted that Ms. Allen was the aggressor and intentionally killed Ms. Leathers who was the victim not only that day but also in the relationship.⁶⁶ Ms. Allen, on the other hand, claimed that she acted in self-defense. Ms. Allen testified she was physically attacked by her lover who slashed her face with a gardening rake when the two fought at their home earlier that day.⁶⁷ She also testified that when she arrived at the police station, Ms. Leathers approached her with the rake in hand, which prompted Ms. Allen to shoot to protect herself.⁶⁸ Ms. Allen further testified that she feared her lover, as Ms. Leathers had previously killed a woman in Tulsa, Oklahoma, ten years prior to this incident.⁶⁹

The prosecution had substantial evidence to attack Ms. Allen's claims of self-defense.⁷⁰ It was undisputed that Ms. Allen followed Ms. Leathers in her car and shot her on the steps of the police station. Such apparent flaws, however, were not enough. Instead, to win at any and all costs, the State 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.

At trial, the prosecution presented evidence that Ms. Allen was the "man" in the "homosexual relationship with the decedent."⁷¹ To this end, the State literally argued she "wore the pants in the family," and when presenting a card Ms. Allen wrote to Ms. Leathers, the State emphasized that Allen spelled her middle name in a masculine way: G-E-N-E.⁷²

The State argued this evidence was relevant to show that Ms. Allen was the dominant party and Ms. Leathers the passive party in the relationship.⁷³ There was no scientific or expert testimony offered to demonstrate how Ms. Allen's appearance, or alleged mas-

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⁶⁵ *Id.*

⁶⁶ *Id.* at 95-97.

⁶⁷ *Id.* at 92.

⁶⁸ *Id.*

⁶⁹ *Id.* at 92. Although Ms. Allen was allowed to testify that she learned of the victim's prior act of murder from the victim, she was precluded from eliciting similar testimony from the victim's mother's to corroborate her testimony. *Id.*

⁷⁰ See the Oklahoma Criminal Court of Appeal's extensive discussion of what it determined was her fatally flawed defense of self-defense. *Id.* at 92-95.

⁷¹ *Id.* at 95.

⁷² *Id.* at 97. See also Goldstein, *supra* note 13, at 38.

⁷³ *Allen*, 871 P.2d at 96.

culine characteristics, proved she was the dominant person in the relationship or that such traits indicated she was more prone to commit acts of violence. The State's arguments, at best, were rank conjecture. At worst, they were a pretext to justify the injection of Ms. Allen's gender representation as masculine or butch to prejudice her before the jury. As Judge Lane noted in his dissent:

I also take exception to the majority finding the evidence the appellant was the "man" in her lesbian relationship has any probative value at all. Were this a case involving a heterosexual couple, the fact that a male defendant was the "man" in the relationship likewise would tell me nothing. I find no proper purpose for this evidence, and believe its only purpose was to present the defendant as less sympathetic to the jury than the victim.⁷⁴

Unfortunately, the State's exploitation of Ms. Allen's gender identity was never condemned or rectified. Despite numerous appeals and an intensive clemency campaign raising several meritorious issues, Ms. Allen was never granted relief from her death sentence. Ms. Allen was executed by the State of Oklahoma in January of 2001.⁷⁵

IV. CONCLUSION

Bernina Mata's and Wanda Jean Allen's cases are just two examples of the State's effective use of anti-queer bias to secure capital convictions. Although the breadth and depth of such prosecutorial misconduct remains unknown, it is apparent it has gone undeterred and uncorrected in one too many cases. Additional research and investigation is needed to discover other cases involving such bias and tactics.

The time is ripe for legal workers and those in the criminal justice communities to counter this bias forcefully in their cases and diffuse the State's attempts at presenting a defendant's queer identity as aggravating evidence. This may include various legal arguments to prevent the introduction of evidence where a defendant's sexual or gender identity is not relevant, or seeking to introduce expert testimony to educate jurors and the public as to the falsity of anti-queer sentiments. It is also the time for queers and LGBT organizations to not only recognize these abuses but to

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⁷⁴ *Id.* at 105

⁷⁵ Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=24&did=229> (last visited Sept. 16, 2005).

prioritize the fight to condemn these practices and prejudices in criminal cases.

V. RUTHANN ROBSON'S COMMITMENT TO QUEERS AND JUSTICE

I want to conclude with my remarks on Ruthann Robson. It is fair to say that I would not be here today as a queer, lesbian, capital defense attorney and abolitionist if it was not for her.

Prior to law school, I had the opportunity to work with the Southern Center for Human Rights on a capital case in Alabama where two African-American men were accused of killing a white woman. After several days of trial and several hours of jury deliberations, the jurors were deadlocked and a mistrial was declared. All eight white people on the jury voted to convict and wanted to kill, while all four African-Americans voted to acquit. During the weeks of preparation and trial for this cross-racial murder, I witnessed the entrenched racism in the criminal justice system and in that small town, and I finally understood what people meant when they used the term neo-slavery. I was profoundly moved by this case and the hard work and dedication of those who work at the Southern Center for Human Rights. I was determined to fight the racism embedded in the system, and this led to my decision to become a capital defense attorney.

I came to CUNY Law School to pursue this endeavor. The fact that I was a lesbian was somewhat immaterial to this work. I was, for the most part, clueless to the existence of homophobia in the criminal justice system and had not invested any time into investigating it. I privileged the fight against racism above all else.

I then had the opportunity to read Ruthann's work and to take her Sex and the Law Class at CUNY Law School. Due to her extensive research, thoughtful analysis, and principled commitment to all lesbians and queers, I was exposed to the homophobia in the criminal justice system and presented with a lesbian/queer analysis to address it.

Ruthann was not only the first, but is still one of the only lesbian or queer theorists to research and analyze anti-queer bias in the criminal justice system and to care about lesbian, gay, and queer defendants accused of violent crimes. Most gay rights advocates and activists ignore queer defendants. In the rare cases in which they acknowledge queer defendants, gay and lesbian advocates fail to truly assist in the fight to help or save their lives. As Ruthann has so eloquently articulated, too often those fighting discrimination and striving for equality try to package the queer liti-

gants as “normal” and just like heterosexual people. The advocates want to disassociate their clients and their causes from the negative stereotypes of queers as deviant, perverted, and pathological, which are too often glibly raised and bandied about in criminal cases. Unfortunately, this leaves too many queer defendants out in the cold without any advocates or community support.

Ruthann, on the other hand, has never forsaken nor left any queer behind. For as long as I have known Ruthann, she has never shied away from a righteous cause or a needy client because the cause may be messy or complicated.

As a result of Ruthann’s example and scholarship, I was compelled to take on Bernina Mata’s case. I am personally indebted to her for taking the time and energy to review the transcripts, tease out the homophobia, assist in formulating a strategy to counter the homophobic and sexist bias head on, and submit an expert opinion I could rely on at her clemency hearing for the commutation of her death sentence. I am also grateful to her for her efforts in penning a letter to Governor George Ryan and organizing law professors nationwide to sign on to urge him to commute Ms. Mata’s death sentence. I repeatedly return to her scholarship for insight in the midst of others queer defendants’ clemency campaigns. I am fortunate to walk with ease on the trail Ruthann has blazed.

Ruthann has profoundly affected my life and work, Bernina Mata’s life, and the life of so many others. The fruits of her labor are real, concrete, and ever so worthy. I am so glad to have this opportunity to publicly thank her and I hope we can inspire others to join us on this trail for justice.