

Lesbianism and the Death Penalty: A “Hard Core” Case

Ruthann Robson

Bernina Mata was sentenced to death in Illinois in 1999 for being a lesbian—or, as the prosecutor labeled her, a “hard core lesbian.”

Such a declaration strains credibility. 1999? Illinois? Sentenced to death? Is this really a claim of a direct causal link?

In my previous scholarship investigating lesbians and the criminal justice system, I interrogated the prosecutorial use of lesbianism in trials and sentencing and often, not surprisingly, discovered bias against lesbians (Robson, p. 1998). Nevertheless, I concluded that I could not sustain any claim of legal causation and argued that positing lesbianism (and other identities) “as the cause of prosecution and conviction is facile,” and it was more important to consider statistical overrepresentation and the tropes which prosecutors use to dehumanize the lesbian defendant (*ibid.*, p. 46–47). Analyzing the transcripts of two lesbians who were then on death row—Aileen Wuronos, who has since been executed, and Ana Cardona, who has since had her sentence reversed—I thought that “the-lesbian-as-man-hater is never explicitly articulated but virtually floats from the transcript pages” (*ibid.*, p. 36).

Yet when I read the transcript in the case of Bernina Mata, I confronted a trial and sentencing hearing in which the-lesbian-as-man-hater was no mere floatational trope. Instead, it was the prosecution’s theory of guilt of first-degree murder and the prosecution’s justification for the death sentence. Given the facts of the case—a stabbing relating to a sexual encounter and involving a third party—it seemed to me that the only real reason the jury could have convicted Ms. Mata of first-degree murder and sentenced her to death was the prosecutorial (mis)use of her lesbianism.

I became aware of the case of Bernina Mata through a former student and now practicing attorney, Joey Mogul, of The People’s Law office in Chicago, Illinois. Ms. Mogul was representing Ms. Mata in a clemency hearing, as part of the individual clemency hearings ordered for every death-row inmate by then-Governor George Ryan. After reading the transcripts, I agreed to become an “expert” on the bias in Bernina Mata’s trial and sentencing hearing.

The next section of this piece contains the affidavit submitted on Bernina Mata's behalf. After the affidavit, section three illuminates the process of writing the affidavit and some of the issues it raised. Finally, the last section considers the outcome of the hearing and Ms. Mata's present situation.

Affidavit

PARDON DOCKET NO. 23679
BEFORE THE ILLINOIS PRISONER REVIEW BOARD
FALL TERM, 2002
ADVISING THE HONORABLE GEORGE RYAN
IN THE MATTER OF BERNINA MATA

AFFIDAVIT

1. My name is Ruthann Robson. I am a Professor of Law at the City University of New York School of Law and a member of the Florida Bar. My legal training and experience consists of a J.D. degree, a LL.M. degree, a clerkship with the Honorable William J. Castagna, United States District Court for the Middle District of Florida, a clerkship with the Honorable Peter T. Fay, United States Court of Appeals Judge for the Eleventh Circuit, and a practice with Florida Rural Legal Services. I have been teaching at the City University of New York School of Law since 1990 in the areas of constitutional law, including equality and the first amendment, sexuality and the law, and family law.

2. The bulk of my scholarship has been in the area of lesbian legal theory. This work appears in several books I have authored including *Lesbian (Out) Law* and *Sappho Goes to Law School* (Columbia University Press, 1998), in over fifty articles in law reviews, anthologies, and encyclopedias, and has been cited in excess of three hundred instances in various law reviews and anthologies in the United States and abroad. Additionally, I have spoken about lesbian legal issues at a multitude of law schools, universities, academic conferences, and other venues in the United States, Canada, Great Britain, Australia, and New Zealand. I have been cited and quoted by numerous periodicals as an expert on lesbian legal issues.

3. I am familiar with death penalty jurisprudence and doctrine. I have co-authored articles which appeared in *The California Law Review* and *The Florida State Law Review* on specific constitutional

aspects of the imposition of the death penalty. During my clerkships, I worked on numerous habeas corpus cases involving capital punishment and criminal issues.

4. Given the confluence of these interests, my previous research has included a consideration of the possibility of bias in the imposition of the death penalty against lesbians and other sexual minorities. I have also more generally investigated prejudice against sexual minorities in various aspects of the criminal justice system, including sexual minorities accused of crimes and sexual minorities as victims of crimes.

5. The materials I have read regarding the imposition of the death penalty against Bernina Mata, including portions of the trial transcript and the arguments of counsel, convince me that Ms. Mata was sentenced to death based in large part because of the prosecutorial portrayal of Ms. Mata as a lesbian.

My opinion is specifically directed to the prosecutor's incessant characterization of Ms. Mata as a lesbian, and I offer no opinion about whether Ms. Mata should, in fact, be accurately described as a lesbian rather than as a bisexual, given the other evidence of her sexual relationships with men, possibly including the victim.

6. 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 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 potential 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" (p. 37). 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 (ibid.).

Given the statistics supporting jury bias, it is not surprising that one of the very few empirical studies to address the specific issue of discrimination against lesbians in the criminal justice system concludes that lesbians are more likely to be convicted than heterosexual women (Leger, 1987).

7. The most frequent negative stereotypes of lesbians in popular culture fantasize lesbians as violent and man-hating. As a 1991 Report from GLAAD, the Gay and Lesbian Alliance Against Defamation, found, the depiction of lesbians on television and movies is "almost uniformly negative," citing as an example that "out of a total of the four lesbians appearing on series television last season, two were portrayed as murderers, and one as a murder victim in which the other lesbians are under suspicion for the murder" (Rhue, 1991, p.3). The Report concludes that in summary, "lesbian images in film and television depict us as man-hating, society-destroying, sex-driven or sexless creatures who have no hearts, homes, families, values, or reasons to live" (ibid., 4).

8. In my opinion, the prosecutor in the case against Ms. Mata capitalized on this prejudice against lesbians and the negative stereotypes of lesbians as man-hating murderers to convince the jury that Ms. Mata's acted in a cold, calculated, and premeditated manner, the only permissible and possible aggravating factor which the jury found in this case (a factor which the Illinois Governor's Commission has recommended be abolished). It is also my opinion that the prosecution's reliance on Ms. Mata's lesbianism served as a de facto impermissible aggravating factor in the imposition of the death penalty.

9. Specifically, the prosecutor's introduction of books from Ms. Mata's house, with titles such as *Call Me Lesbian* and *Best Lesbian Reading* (Trial Record (hereinafter R) 3036-3039), demonstrates the impermissible use of negative stereotypes to influence the jury members. In the prosecutor's own words, the prosecutor introduced the books to "show that she has a motive to commit this crime in that she is a hard core lesbian" (R2135), and argued that "these books have been the most direct route to show that she is a lesbian and is motivated to commit this crime." (R2140). This evidence should have been excluded as irrelevant.

As I have previously theorized, there are instances in which a defendant's sexual relationships and identity are relevant to the circumstances of the crime, and in such instances, the prosecution should introduce this evidence in the most factual and least biased manner as possible. However, in Ms. Mata's trial, her sexual identity is absolutely irrelevant to the crime. The only possible "relevance" of Ms. Mata's sexual identity as a lesbian depends upon an acceptance of the stereotype of all lesbians as man-hating murderers.

10. In my opinion, the introduction of books with titles such as *Call Me Lesbian*, as well as the frequent references to Ms. Mata's lesbianism, operated to impermissibly prejudice the jury in two distinct ways. First, the arguments regarding Ms. Mata's lesbianism constitute the basis for the sole aggravating factor found by the jury: that the murder was committed in a cold, calculated, and premeditated manner. The prosecution repeatedly emphasized Ms. Mata's lesbianism in its argument at trial (R4947-948; R4952-954; R4959). It was the prosecutor's explicit theory argued to the jury that Ms. Mata, because "she is a lesbian," was "infuriated" by a man's sexual advance in a bar, and therefore decided to murder him, first luring him to her home under the pretense that he was "going to get lucky" (R2132-2133). Absent the negative stereotypes of lesbians as man-haters, there is little credible evidence to support a finding that the male victim was killed pursuant to a cold, calculated, and premeditated plan. Indeed, the evidence concerning the victim's death by stabbing occurred in Ms. Mata's bedroom under circumstances which indicate a sexual relationship, whether consensual or not, between Ms. Mata and the male victim, with the involvement of another party. Such a scenario more typically reflects a second-degree murder charge or conviction, not a first-degree murder charge or conviction. The imposition of capital punishment in such a situation is an anomaly, explicable by of the prosecutorial pandering to prejudice against lesbians.

11. Secondly, the prosecutorial arguments regarding Ms. Mata's lesbianism comprise an impermissible de facto aggravating circumstance that the jury then improperly considered in its death sentence. Based upon the negative stereotypes of lesbians as persons having "little reason to live," the jury was prompted to determine that Ms. Mata deserved to die because, as the prosecutor phrased it, she was not "a normal heterosexual person." The dehumanizing of a criminal defendant as a person not worthy of living may be an accepted strategy of prosecutors seeking the death penalty; however, the use of Ms. Mata's lesbianism to dehumanize

her demonstrates a level of bias and prejudice that should not be tolerated.

12. There is an evolving norm regarding the introduction evidence regarding a defendant's sexuality during criminal trials, including cases involving the imposition of the death sentence, which prohibits the use of sexual materials to inflame and prejudice the jury. For example, the Arizona Supreme Court in *State v. Grannis*, 900 P.2d 1 (Az. 1995), reversed the conviction and death sentences of two defendants because of the admission at trial of certain photographs of male homosexual pornography found in one of the defendant's closets. The court found that the photographs were only marginally relevant and that the photographs may have "repulsed many of the jurors" so that their "verdict may well have been improperly influenced by their revulsion and not entirely based upon a belief that the state proved the elements of the crime." (*ibid.*, p. 6.)

Although the trial judge in Ms. Mata's case determined that "looking at the photos of the books," there "does not appear to be anything that's shocking value to them" or "pornographic or sexually explicit," in seeking to introduce the books into evidence, the prosecutor confusingly stated that "these aren't picture books. These are books about lesbianism, books with one woman visually depicted performing lesbian acts upon another woman. It's not like this is books [sic] about living a lesbian life and such?" And, as in the Grannis trial from Arizona, the prosecutor in Ms. Mata's trial sought to prove the defendant's sexual orientation by the most repulsive means possible. Indeed, the prosecutor proclaimed on behalf of the state that "We don't have to accept any form of stipulation," as to Ms. Mata's sexuality. Instead, the prosecutor sought to introduce and reintroduce and reintroduce evidence of Ms. Mata's lesbianism for the purpose of inflaming and prejudicing the jury.

13. Additionally, there is an evolving norm regarding the level of bias and prejudice against lesbians, gay men, and other sexual minorities that will be tolerated by members of society. For the Illinois Prisoner Review Board to refuse to commute Ms. Mata's death sentence despite the prosecutor's prejudicial use of Ms. Mata's lesbianism as the motive for her crime and support for the aggravating circumstance(s) meriting the death sentence is to continue to perpetrate an injustice not only against Ms. Mata, but against the lesbian and gay communities of Illinois and this nation. Indeed, a non-commutation in Ms. Mata's case announces to members of the

lesbian and gay community that our sexual orientation constitutes a motive for us to murder and a rationale for us to be sentenced to death according to the State of Illinois. It tells us that our relationships, sexual or otherwise, with those of our own gender are tantamount to our desire and willingness to "lure" members of the opposite sex to their death. It tells us that the books on our shelves—or perhaps even the books that we have authored—are admissible and proper evidence of our propensity to murder and our unfitness for life.

14. Based on the foregoing, it is my opinion that the death sentence imposed on Ms. Bernina Mata was largely, if not exclusively, based upon the prosecutorial characterization of her as a lesbian. Given such bias and prejudice, I support the Illinois Prisoner Review Board's commutation of the death sentence imposed on Bernina Mata.

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SWORN TO AND SUBSCRIBED BEFORE ME
this ___ day of October, 2002

Confronting the Politics of Identity

In this section, I will examine some of the issues raised in the composition of the affidavit. In my analysis of the transcripts and contemplation of writing the affidavit, two issues in particular plagued me, both revolving around Ms. Mata's identity as a lesbian. The first problem I had was that Ms. Mata seemed to me to be more accurately labeled as bisexual. According to the transcripts, she lived with the co-defendant, her male roommate with whom she seemed to be having a sexual relationship. Moreover, she met the male victim at a bar and brought him to her house.

Describing her identity as bisexual would stress the heterosexual dimensions of the encounter which led to the victim's death. Whether the explanation for the killing was sexual jealousy between the two men or whether the explanation was that the male victim became sexually aggressive and the male roommate acted in her

defense, the facts would sustain a second-degree murder charge committed in the "heat of passion," but not a premeditated first-degree murder charge of which she had been convicted and which led to the death sentence. In sum, I thought that referring to Ms. Mata as "bisexual" throughout the affidavit would undercut the prosecutor's arguments on both the facts and the law.

Yet the use of the term "bisexual" was deemed confusing and objectionable by several persons who reviewed the affidavit. While I was initially reluctant to abandon the term, I decided to eschew use of the label while raising the issue but rendering no conclusion. I did not want to be guilty of the same act of which I was accusing the prosecutor—viewing a situation and declaring the sexual orientation of Ms. Mata to suit my own purposes.

The second issue relating to Ms. Mata's identity which caused me incredible consternation was the manner in which the prosecutor proved her lesbianism—through the titles of books on her bookshelves. *Call Me Lesbian*, introduced into evidence at Ms. Mata's trial, is a book of lesbian theory by Julia Penelope which I have on my own shelves, in addition to many other books about lesbian issues. As an avid reader and collector of books, as an author of books, and as a law professor who teaches a course on the First Amendment, I found this highly unsettling. I knew that there was nothing inherently unlawful about introducing books or other written texts in a criminal trial to prove particular facts, especially to prove intent (often incorrectly referred to as "motive") on the part of the defendant. Nevertheless, I spent countless fruitless hours researching this point and trying to develop a legal argument.

What I wanted to ask the members of the Prisoner Review Board was whether they would want to be judged by the book titles on their shelves. After all, I assumed that given their positions, it might be likely that their shelves would hold books on serial murderers, child molesters, and psychiatric disturbances. However, to pose a rhetorical question to the decision-maker is as dangerous as one of the first lessons one learns as a trial attorney: do not ask a hostile witness a question on cross-examination to which one does not already know the answer. In this case, it might be that the members of the panel would be nonreaders without books or they could be perfectly willing to be judged by the books—or *The Book*—on their shelves.

I thus decided to insert myself into the affidavit, although this could be an equally treacherous ploy. As an attorney, one is an advocate and one's position is clear, but one's credentials and opinions are not proffered. On the contrary, as an expert one is asked to offer

an opinion, which is based on an examination of the facts, but also on one's credentials, background, and training. The first few paragraphs of the affidavit seek to establish my qualifications as an expert and this type of information is typical in an expert affidavit or opinion at trial. Equally important, however, the expert should be impartial. In many trials, the opposing counsel seeks to discredit the expert and her opinion by seeking to elicit facts which demonstrate the expert's bias. A common strategy would be questioning the expert regarding her remuneration. Unpaid experts, however, can be vulnerable to an even more devastating method of impugning our objectivity: that we have a political stake in our conclusions.

Clearly, however, I did have a political stake. Rather than attempt to obscure it, I decided to deploy it in a rather personalized manner by trying to construct a relationship between the members of the board and myself. A non-commutation, I argued, was not solely about Ms. Mata, but was a judgment that every lesbian, including a lesbian law professor who possessed or who had authored books about lesbian life, was a man-hater with a propensity to murder men and deserved the death penalty. In this regard, I thought that one of the books I have written, *Lesbian (Out)Law*, was particularly relevant, but I ultimately decided that its use detracted from the point by making it overly specific (Robson, 1992).

This argument also seeks to remind the Prisoner Review Board of the political stakes involved in their determination of Ms. Mata's fate. By using the word "our" and invoking "the lesbian and gay community," I hoped to single out Ms. Mata's case for special scrutiny in the midst of the already highly charged atmosphere in which the Prisoner Review Board's hearings were taking place. Moreover, this reference was meant to reinforce other material in Ms. Mata's file urging her commutation, including several advertisements and letters from various lesbian, gay, bisexual, and transgender groups which were obtained and organized by the Chicago-based group Queer-to-the-Left and a letter signed by LGBT law professors whom I had marshaled.

Moreover, even apart from advocacy, I believe it is an important political stance of solidarity for those of us who are workers in the legal system not to distance ourselves from those of us who are "objects" of the legal system. Too often I have heard LGBT activists deny any relationship with LGBT persons who have been convicted of crimes. Certainly, it can seem more palatable to identify with the victim of a crime than with the perpetrator, even assuming the person deemed the perpetrator is always guilty. Yet the "evolving norm"

of nondiscrimination that I declared to be true in the affidavit—somewhat brashly, I admit—must encompass criminal defendants, prisoners, and others in the criminal justice and civil justice systems.

Commutation Without Resolution

On January 11, 2003, 48 hours before his term as the Governor of Illinois expired, Governor George Ryan commuted the sentences of the 163 men and 4 women who were occupants of the state's death row.

Governor Ryan issued the blanket clemency because he concluded the system was fundamentally flawed and unfair: "haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die" (Wilgoren, 2003, p.1).

Thus, Bérnina Mata is no longer on death row.

Justice, however, remains incomplete. Ms. Mata's appeal to the state's highest court, pending for over a year at the time Governor Ryan issued the clemency, still has not been decided. Even more problematic is the conundrum in which Ms. Mata finds herself. Should any of Ms. Mata's appeals be successful and a new trial ordered, the state could again seek the death penalty.

Moreover, without a judicial opinion that the prosecutorial use of lesbianism to prove intent or "motive" is impermissible, Ms. Mata—and all lesbians—remain in danger of having our sexuality used as the real basis for conviction and sentencing.

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