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## NINE

*The focus of much lesbian legal theorizing has been lesbian discrimination. Thus, theory and strategy about lesbians and the law have tended to be developed with a particular sort of lesbian in mind. In this essay, Ruthann Robson argues that, as a result of this focus, the specific context of lesbian criminal defendants and prisoners has been left unaddressed. With her article she seeks to begin a dialogue to remedy this situation. Robson, first considering lesbian criminality in the context of equality theory, then explores the construction of lesbian identity in criminal trials. In a final section she begins to envision a lesbian legal theory of criminal justice.*

# Convictions: Theorizing Lesbians and Criminal Justice

*Ruthann Robson*

THOSE of us engaged in the practice of lesbian legal theorizing have been disinclined to address the multitude of issues provoked by the lesbian as criminal defendant. In the explicitly sexual context, the dominant assumption has been that lesbians were rarely, if ever, prosecuted for sexual crimes; I have elsewhere argued that this assumption is mistaken.<sup>1</sup> In the nonexplicitly sexual context, two contradictory assumptions coexist. First, the pairing of the words “lesbians” and “criminal” is metaphorical at best,<sup>2</sup> with lesbians inhabiting a gendered realm of privatized tranquillity. Second, the pairing of these terms is stereotypical at worst, with lesbians being stock characters in films and fiction about vampires, prisons, and axe murders. Yet these assumptions are not the only deterrents to theorizing lesbians as criminal defendants. More importantly, conceptualizations of equality and identity often operate as obstacles to theorizing lesbians accused or convicted of nonsexual crimes. This piece is an attempt to articulate and confront these obstacles, as well as to begin a specifically lesbian legal theorizing of the relationships between lesbianism and criminal justice.

I am grateful to Victoria Brownworth for sharing her work, information, and insights on lesbians and murder. I am also grateful to participants who commented upon earlier portions of this work during presentations at CUSH (Columbia University Seminar on Homosexualities) and Colloquium CLAGS (Center for Lesbian and Gay Studies, City University of New York), as well as at the conference on Homosexualities and Social Sciences, New York. I am also grateful for the editorial comments of Didi Herman and Carl Sychin.

### The Politics of Equality

Politically, it has seemed most urgent for lesbian, gay, and bisexual legal theorists to theorize equality, with the result that many other projects are relegated to a subordinate status. The political importance of theorizing equality, however, is not only an obstacle in terms of allocating energies and resources, for the theorizing of lesbians as criminal defendants may be incompatible with a political agenda of achieving equality.

To theorize legal equality is to theorize the necessity of a departure from legal censure, especially the criminal penalties that have attached to lesbianism. The criminalization of lesbians through statutes that outlaw our sexual expressions is often considered the foundation upon which our discrimination rests. In cases involving the custody of children, for example, the existence of a sodomy statute supports the cross-examination of the lesbian parent regarding her sexual conduct and a judicial finding that she is an admitted felon as well as a sexual deviant. Repeal of the so-called sodomy statutes has thus been an explicit goal of the lesbian and gay legal reform movement: Distance from criminality is a necessary condition of equality.

The pursuit of equality has a rhetorical inconsistency with criminality. By focusing on equality, the lesbian and gay civil rights movement has sought to present images of what I call "but for" lesbians, who, "but for" their lesbianism, are "perfect." These "but for" images of lesbians are intended to contradict the pathological depictions of lesbians advanced by conservatives. However, conservatives have evinced the ability to pathologize even these "but for" images, often relying upon lesbian- and gay-produced theorizing, cultural production, and research. For example, lesbian and gay work on the economic status and political power of our communities is routinely harnessed against antidiscrimination laws in a strategy with disturbing similarities to stereotypical anti-Semitism.<sup>3</sup> Such a climate understandably produces a reluctance to theorize on issues so easily manipulated by conservatives. While our own theorizing might attribute the disproportionate number of lesbians on death row in the United States<sup>4</sup> to social biases and discrimination, conservative explanations would certainly link lesbianism and murder as social—and moral—pathologies, both deserving state condemnation through legal mechanisms.

The "but for" lesbian is not merely a rhetorical strategy; she is necessary doctrinally, especially as discrimination theory has developed in the United States. In the relatively rare event that there exists a legal bar to discrimination on the basis of sexual orientation, a discrimination plaintiff must demonstrate that "but for" her lesbianism,

she would have been granted the benefit, such as housing or employment. The lesbian with a criminal conviction is not a preferred plaintiff under these circumstances. As employers and others become more sophisticated, the articulation of an acceptable reason to discriminate becomes more important. A criminal conviction is not only socially unacceptable, it is enshrined in the positive law of many jurisdictions: Conviction of a felony can foreclose the right to vote and own a firearm, and is admissible as evidence of veracity. Thus, the lesbian "criminal" is inconsistent with particular litigation to achieve equality, just as a more general focus on lesbian criminality is inconsistent with the overall rhetorical strategy of normalization to achieve equality.

The overarching nature of equality discourse is also implicated in a propensity to conceptualize lesbians as victims (persons being subjected to homophobic violence) rather than as possible perpetrators of violence: rights for innocent victims are much more palatable than special rights for morally culpable actors. Even violence between lesbians is often articulated in terms of equality: The battered lesbian is entitled to the same social services, legal remedies, and criminal defenses as her heterosexual counterpart. The lesbian perpetrator remains relatively untheorized, except to the extent that she is implicitly subjected to an equality claim that she should be treated as her heterosexual counterpart—the male batterer—and prosecuted to the full extent of the law. She must thus be delesbianized: She is a "common criminal," a "stranger," a "man." In the context of criminal justice, our theoretical and political energy is directed almost exclusively to the lesbian we can valorize as the victim.

Even when a lesbian perpetrator is theorized, she tends to be recast as a victim. The case of Annette Green is illustrative. Green is reportedly the first American lesbian allowed to raise a battering defense in the prosecution for the murder of her lover. The judge accepted the defense argument that battered "woman" meant battered "person," thus allowing evidence of battering. The prosecutor argued that the battering defense was inappropriate, despite his admission that Green had been "battered. She was shot at before by the victim. She had a broken nose, broken ribs." The jury rejected the battering defense summarily, taking only two-and-a-half hours to deliberate, which included the time necessary to agree upon a jury foreperson. One interpretation of the failure of the battering defense in the case of a lesbian is due to a reluctance to believe that lesbians can be victims.<sup>5</sup>

The lack of success of victimization as a trial strategy for individual lesbians is certainly worth exploring. However, I am interested in the import of the strategy's insistence on a formal and neutral version

of equality—as well as further reifying the already rigid American model of equality—that rejects (or hopelessly distorts) previous theoretical formulations of domestic violence that rely upon a gendered dynamic of power. In the convoluted scenario exemplified by Annette Green, the perpetrator—this time the lesbian who has been murdered—is again relegated to the realm of the untheorizable.

The situation of Green as well as many other lesbian criminal defendants demonstrates the disjuncture at the metatheoretical level between equality paradigms and criminal justice concerns. Theorizing lesbians involved in the criminal justice system does not fit neatly into equality structures, because there is no congenial category of similarly situated persons who are consistently being afforded more favorable treatment. Feminists have confronted a similar problem in attempting to theorize female criminals; the male criminal is not an appealing normative category and may even be afforded less favorable treatment in some circumstances.<sup>6</sup> Further, many feminists have correctly identified equality itself as a problem, rather than a solution, for women. For example, women accused of murdering their male partners could rarely meet the classic male-defined criteria for self-defense. In response, feminists developed the battered-woman-syndrome defense, the same defense Green sought unsuccessfully to translate into the lesbian context.

Despite its problems, equality retains a fundamental appeal. Some feminist legal theorists have, for example, criticized the battered-woman-syndrome defense on the basis that it is predicated upon (and therefore perpetuates) female inequality.<sup>7</sup> Some feminist criminologists have posited an equality, or liberation, theory of female criminality linking women's claims for equality with hypothesized increases in women's criminal activity. Empirical findings that women are prone to be convicted more frequently, receive harsher sentences, and remain incarcerated for longer periods validate the theoretical subject; just as similar empirical findings regarding lesbians in comparison to nonlesbian women validate the theoretical subject. Such invocations of equality suggest their own problems: The battered women's syndrome defense has assisted some women; the liberation theory is consistent with an anti-equality backlash; and contrary or inconclusive empirical data trivialize any theoretical inquiry.

The problems and appeals of theorizing equality have been articulated by feminists as the sameness/difference conundrum. This conundrum also structures lesbian/gay legal theorizing and strategizing.<sup>8</sup> As many have argued, this conundrum, with its concomitant requirement of rights, often rigidifies our theorizing and stalls our activism. Such arguments have a magnified resonance in the criminal justice

context. In criminal law, the other side of the equality equation is always the state—not other criminal defendants.<sup>9</sup> Thus, we must be especially skeptical of the capacity of civil rights equality discourse to dominate our theorizing and our ultimate goals in the criminal context.

In one circumstance, however, the politics of equality should be given more attention rather than less in the criminal justice context. The theorizer and the theorized subject occupy a vexing relation of inequality. By theorizing, we risk exploiting and sensationalizing real lesbians involved in ugly and tragic events who often face prolonged incarceration. Such theorizing inures to the benefit of the relatively insulated and privileged academic or other writer and ultimately entertains (often through educative pleasure) the audience.

The most flagrant example is Aileen Wuornos, known (incorrectly) as the first female serial killer.<sup>10</sup> Even to attempt to theorize about her is to risk further exploiting and sensationalizing a person who has been so repetitiously exploited and sensationalized that her very exploitation is sufficiently notorious to warrant a documentary film: *Aileen Wuornos: The Selling of a Serial Killer*. Most media accounts are not so self-conscious, of course. The media frenzy over Wuornos produced a superficially fictionalized American made-for-TV movie, *Overkill: The Aileen Wuornos Story*, as well as segments on U.S. TV tabloid shows such as “Hard Copy,” “Dateline,” and “Inside Edition,” a segment on Court TV, talk show interviews, and pieces in popular magazines such as *People*, *Glamour*, and *Vanity Fair*.

Such media exploitation and sensationalization are not independent of the legal process. In Wuornos’s case, for example, how is the legal process affected when sheriffs and an (ex)lover/co-defendant are marketing the story; a public defender is negotiating a deal with a producer; a producer is paying childhood acquaintances for exclusive rights to their memories; and an “adopted mother” and new attorney are negotiating interviews from death row? Given such events, the court proceedings not only become secondary but may also become more subject to the forces of market than the interests of justice.<sup>11</sup> Unfortunately, Wuornos’s situation is not unique.<sup>12</sup>

I am not suggesting that lesbian theorists occupy exactly the same position as those betraying confidences for movie deals. Neither am I suggesting that defendants or prisoners possess no agency, personality, or power, nor that lesbian theorists should refrain from theorizing about lesbian criminal defendants. What does worry me, however, is that our treatments of lesbians accused or convicted of murder will be distinct but not sufficiently different from more obvious types of exploitation. The power differentials between theorist and inmate are vast.

Our possible exploitation of theorized subjects is related to the political dangers of promoting an aestheticization of violence through sensationalization. This aestheticization has attached to our cultural notions of serial killers in particular and of murderers in general.<sup>13</sup> The social problems derived from being a woman, from being a lesbian, and from being economically disadvantaged are sublimated into a romanticized version of the outlaw. The outlaw is supremely individual, effectively erasing the social aspects of her condition. She can then be romanticized through "true crime" books, media reports, and even theories. She becomes an excitingly individual problem solved through resort to the rationalized procedures of criminal investigation and prosecution. Even as we criticize and theorize these criminal justice processes, her peril may still become our profit. Notions of equality, then, in terms of this relation, continue to be useful and relevant.

### Conceptualizing Identities

In addition to the political and ethical problems with theorizing lesbians and criminal justice, there are methodological problems that are concretized versions of the postmodernist problematics of identity that have so preoccupied lesbian and "queer" theorizing. The first layer is the problem of identifying a lesbian presence in newspaper reports, trial transcripts, and appellate opinions; what criteria do we use? For example, the identification of lesbians on death row in the United States depends upon an (implicit) articulation and application of operative criteria. Of the 17 women who are "implicated as lesbians" by Victoria Brownworth, only a few have consistently maintained a lesbian self-identity before the circumstances leading to their conviction, during the trial and related proceedings, and as prisoners on death row. While sexual identity is arguably always socially constructed, it is difficult to fathom more "constructing" circumstances than the threat of being executed. In other words, if one's very life is at stake, it seems one might reconceptualize one's identity to comport with identities that maximize the chance of survival. At the very least, living on death row, isolated from previous communities and intimacies, might cause one to change one's sexual identity.

Any self-identity must always be evaluated in the context of the relevance of lesbian identity at trial. Lesbian identity can be important as part of the prosecution's theory of the case. In the example of murder, the importance of the defendant's lesbian identity can vary with the gender of the victim. If the victim is a woman, then the (lesbian) defendant committed the crime out of sexual passion: The victim was the defendant's lover, former lover, or sexual threat to the defendant's

relationship. If the victim is male, then the (lesbian) defendant committed the crime out of her antipathy for men.

A few recent murder prosecutions in the United States demonstrate this. In Annette Green's case, the prosecutor secured her conviction for the murder of her lover by stressing the defendant's intimate relationship to the victim, alluding to sexual jealousy rather than self-defense as the motive for Green's violence. In the cases of Aileen Wuornos and Ana Cardona, both presently on Florida's death row for murdering males, the lesbian-as-man-hater approach is never explicitly articulated but virtually floats from the transcript pages. Thus, sexualized banalities of lesbians—and women in general—as jealously possessive (“hell hath no fury”) or as man-haters may fluctuate with the gender identity of the victim, but can be marshaled toward a finding of guilt.

Another problematic aspect of lesbian identity as deployed in prosecutions is its proof. In the cases of Green, Wuornos, and Cardona, the defendant's lesbianism was not contested by the defense. In cases in which the defendant does contest her lesbian identity, the prosecutor must prove it in order to sustain that portion of the theory of its case. In the absence of a living lesbian lover who can testify to the existence of her relationship with the defendant—an issue discussed below—the evidence used to prove lesbianism is extremely troublesome and clichéd. One type of evidence is that of gender conformity. The defendant “dressed like a man, kept her hair cut like a man, wore men's clothing, including men's shoes.”<sup>14</sup> While this strategy may become less effective in contemporary urban courtrooms, many women remain imprisoned for crimes proved in part by such references. Another type of evidence is that of nonheterosexuality. The defendant has no apparent heterosexual activity—no “boyfriend”—so must therefore be a lesbian. This strategy may be gaining ascendancy, if its popularity outside of the criminal context is any indication.<sup>15</sup>

Defining and applying criteria for lesbian identity do not entirely resolve the methodological issues posed by identity problems. An additional difficulty arises from determining the relevance of lesbian identity. This question is usually posed to me as, “Are you saying that these women are convicted *because* they are lesbians?” While I cannot sustain any claim of legal causation, it would also belie credulity to maintain that lesbianism plays no role in convictions. One of the few empirical studies that has been done concludes that lesbians are more likely to be convicted and serve longer sentences than heterosexual women.<sup>16</sup> The statistical abnormality of the number of women “implicated as lesbians” on death row in the United States is also probative.<sup>17</sup> As one death row expert has cautiously opined, “all other things being

equal, a female offender's lesbianism would be a disadvantage rather than an advantage in the capital punishment process."<sup>18</sup>

Nevertheless, numerical correlations are ultimately unsatisfactory for theorizing lesbians in the criminal justice system. Problems of methodology include not only defining lesbian identity but isolating lesbianism as a factor. Similar to other lesbians, a lesbian criminal defendant is not exclusively a lesbian. Statistically, a lesbian who is a criminal defendant is probably also a woman of color and disadvantaged economically.<sup>19</sup> Positing ethnic, racial, or class status as the cause of prosecution and conviction is facile; however, empirical data that point to the statistical overrepresentation of disempowered groups within the criminal justice system confirm a social observation. There is little reason to suspect that lesbianism operates radically differently from other minority identities as a derationalizing, dehumanizing wedge between the criminal defendant and the criminal justice system as embodied by prosecutor, judge, and jury.

In addition to its connection with other identities, lesbianism is difficult to isolate as a consistent factor within the criminal justice system, because crimes and their trials are exceedingly particularized. Variables include the circumstances of the crime, the situations of the defendant and victim, and the location of the trial. The manner in which lesbianism is deployed may be inconsistent with its deployment in a different trial or even within the same trial. The criminal defendant may not be the only incarnation of lesbian identity, and the prosecution may also have to grapple with lesbianism. In some instances, the victim may be implicated as a lesbian; the prosecutor must thus maintain that a crime against such a person is worth punishing. In other instances, the prosecution's star witness may be a lesbian, in which case the prosecution must maintain that she is credible. In such situations, neither the prosecution nor defense strategy can consist of a simple condemnation (or valorization) of lesbian existence. Thus, it becomes necessary to differentiate between good lesbians (worthy of protection and believable) and bad lesbians (worthy of punishment and disbelief).

As used by the prosecution, the tropes manipulated to differentiate between good lesbians and bad lesbians demonstrate an amazing versatility.<sup>20</sup> One of the most interesting manipulations occurred in the prosecution of Ana Cardona for the murder of her child. Cardona was portrayed as a feminized, attractive, and popular lesbian as contrasted with her (former) lover, Olivia Gonzalez-Mendoza, who was portrayed as mesmerized by Cardona. Such a construction reverses the stereotypical one of identifying the bad lesbian as the more "male"-identified partner, lack of gender conformity being a sign of deviance, and male-

ness being an indicator of a propensity toward violence.<sup>21</sup> Interestingly, however, the construction of Ana Cardona was consistent with the *femme fatale* trope so prominent in murder prosecutions of heterosexual women.

Further, the *femme fatale* construction was conjoined in the Cardona case with another trope prominent in murder prosecutions of heterosexual women: the bad mother.<sup>22</sup> For although the defense argued that the actual murderer of the child was Gonzalez-Mendoza and although there was testimony to support such an argument (especially at the separate penalty phase of the trial, in which the jury considered the imposition of the death penalty), Cardona, as the biological mother of the victim, was the person prosecuted, convicted, and sentenced to death for a capital crime. The state attorney offered Gonzalez-Mendoza a relatively generous plea bargain in exchange for her agreement to testify against Cardona. As an editorial from the *Miami Herald*, entitled "Deserved the Death Penalty," opined: "Cardona may have been the weaker partner in this union, but she was something that Gonzalez was not. She was Baby Lazaro's mother. She had the moral, legal, and every other responsibility for his welfare. She was not too weak to call the police, or HRS [the state agency responsible for child welfare], or somebody to come and get the baby."<sup>23</sup> In a similar case in California, the court held that the biological mother's "legal duty" to protect the child from the behavior of her lesbian lover satisfied the requirements for first-degree murder, although there was no evidence the biological mother ever physically harmed the child.<sup>24</sup>

Yet lesbianism itself may be understood as a trope in the murder prosecution of Cardona. From a different perspective, centering the trope of bad mother, lesbianism becomes an enhancement of that category. Especially in the press accounts of Cardona's trial, "lesbian" functioned as a suppressed intensifier, not unlike "cocaine-user" or "selfish." Similarly, in the prosecution and press coverage of Aileen Wuornos, "lesbian" functioned as an adjective for "prostitute," negating the possibility that Wuornos was any storybook "heart of gold" streetwalker. In both the Cardona and Wuornos cases, the lesbian identity amplified another identity—(bad) mother or prostitute—and became submerged into it.

This submersion of lesbian identity into another disparaged identity renders methodological purity impossible. Perhaps this submersion is a testament to the progress—or at least superficial shift—in contemporary life that renders it publicly treacherous to link lesbianism and murder as correlated pathologies. From a prosecutor's perspective, such an explicit linkage could risk losing the conviction (depending on the attitudes of the jurors, judge, or appellate judges) or some political

prestige (depending on the attitudes of one's superiors, the local press, and voter population). Thus, as in discrimination discourse, legal actions that are detrimental to lesbians can appear to be only coincidentally related to their lesbian identities. The assertion of the irrelevance of lesbianism can serve the state's interest.<sup>25</sup>

The danger for lesbian legal theorists, reformers, and activists is that we will be daunted by methodological complications. Theorizing lesbians within the criminal justice system is a rather messy project given the blurring of lesbian identities and the relevance of such identities. Despite these methodological obstacles and the political and ethical problems previously discussed, I believe we must move toward theorizing the connections between lesbianism and criminal justice systems.

### **Toward a Lesbian Legal Theory of Criminal Justice**

Identifying the obstacles to theorizing lesbians and criminal justice marks a preliminary path. Some of the equality-related problems of theorizing lesbians as criminals can be surmounted by a more expansive and radical interpretation of equality. The adages about a society being appropriately judged by its treatment of its criminals and freedom being realized only when the least fortunate are free are applicable to lesbian legal theorizing. Theorizing for the exclusive benefit of "but for" lesbians is partial at best. Thus, I maintain that we must attempt to theorize—and incorporate in our legal reform agendas—lesbians accused or convicted of crimes, including violent crimes. While the project of theorizing lesbians and criminal justice with "lesbian" as its centrifugal force arguably reinstates the previously discussed obstacles to theorizing, lesbian legal theory must take up the case of criminal justice in general and criminal defendants in particular. If it does not, then it risks being a "but for" theoretical position, which "but for" its lesbian emphasis, could be a normalized theory. Lesbian legal theory in this regard should take heed of feminist legal theory's history, a history considered by many to be marred by its accentuation of legal issues important to professionalized women. Nevertheless, in making criminal justice an important subject of inquiry and advocacy, we should not make equality a shibboleth that obscures the differences between civil rights and criminal justice.

Our ambitions of equality should also appropriately extend to our own work. Our theorizing must not only address but must reflect an attention to the possibilities of exploitation of criminal subjects. Further, we must be wary of the sensationalization and aestheticization of

violence. Lesbians convicted of murder should not be glamorized as outlaws just as they should not be dismissed as irrelevant. Both options tempt the theorist, who can make particular crimes into a "sexy" presentation at a prestigious conference, or who can decide that the issue of crime is not one that deserves attention in the present scholarly climate. The issue of advocacy in cases in which lesbianism is implicated also merits examination. While I believe our practical intercession in the area is important, I remain uncertain about the terms and conditions of that intercession. As always, it seems to me that subjecting our own involvements to rigorous reflection is extremely vital. I am not suggesting a spectacle of mutual trashing, or even self-flagellation. Instead, I believe we can aspire to (if not always achieve) an ethical consciousness about the impact and consequences of our own stake as theorizers in the realm of criminal justice.

Methodological obstacles resulting from the imposition of identity criteria can be surmounted by adopting expansive definitions. I suggest that we should be less interested in the consistent or even articulated self-identified lesbian identities of various actors than in the specter of lesbianism whenever it is introduced into criminal justice proceedings, however obliquely. Ultimately, I am less concerned with whether an individual defendant is "really" a lesbian than with the manner in which her lesbianism becomes pertinent. The question I am thus interested in posing is: To what effect is lesbianism—as trope, stereotype, theory of the case, prejudice—articulated during the criminal process?

This expansive definition of identity also means that combinations of identities, be they ethnic, racial, economic, or constructed as similar to "prostitute" or "bad mother," also merit attention. Nevertheless, I believe we must be wary of the way in which other identities are utilized to trump lesbian identity. Lesbianism becomes irrelevant for those who argue that a particular case is really about prostitution or mothering or economic status. My wariness extends to the manner in which theories of the female offender can suppress considerations of lesbianism. My argument is certainly not that prostitution or mothering or economic status or gender is irrelevant. My argument is simply that we must consistently entertain the relevance of lesbianism.

Further, we must expand our methodologies. We must address complicated and particularized situations as such. While statistics can be useful, we must be wary of reasoning from statistics. We should also be wary of adopting criminal justice definitions as our own. The very definition of "crime" must be vigorously questioned. Given the erratic and bizarre ways in which our sexual acts have been and continue to be defined as crimes, we have more than sufficient cause to be similarly dis-

trustful of other constructions of crime. In terms of our inquiries, we must also expand our concerns from the more easily researched and potentially glamorous crimes such as murder to the more mundane crimes of shoplifting, fraud, and drug offenses. We must also expand the subject positions to be theorized. While the purpose of this essay has been to focus upon lesbians as criminal defendants, the positions of all lesbians within the criminal justice system merit interrogation. The position of the lesbian as victim of a crime has received the most previous attention, and we should not abandon that project. However, I believe further expansion is necessary. For example, what does it mean for a lesbian to prosecute other lesbians within the criminal justice system?

Theorizing lesbians and criminal justice as a matter of lesbian legal theory must put lesbians at the center of its theoretical perspective. In this regard, such theorizing is no different from theorizing child custody or immigration as a matter of lesbian legal theory. At least as I conceptualize it, lesbian legal theory allows lesbians to become the centrifugal force around which all else is problematized.<sup>26</sup> Thus, in the criminal justice system context, it requires an examination of the entire system in light of its impact upon lesbians and its use of "lesbianism" in the achievement of its own goals. Such a project can benefit from the extensive work done by criminal justice critics, including feminist criminologists who continue to examine the complicated impact on women of the criminal justice system and its use of gendered stereotypes. If we consider the criminal justice system from the perspective of lesbianism—and more particularly of the survival of lesbians and lesbianism—what theoretical conceptualizations of criminal justice do we develop? If we apply our politics of equality and our interrogations of identity to the categories "criminal" and "justice" as rigorously as we have applied them to the category "lesbian," how do our theories of crime and punishment alter? Once we begin the serious task of taking criminal justice as a subject for lesbian legal theory, perhaps we will be able to intervene in actual criminal trials in ways that promote lesbian survival.

## NOTES

1. Ruthann Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (Ithaca, NY: Firebrand Books, 1992), pp. 29–45.

2. The power of this perception was demonstrated to me by another gay/lesbian legal scholar who assumed that my presentation entitled "Lesbians as Criminals" concerned lesbians and child custody.

3. In the legal literature, this argument was recently made in Robert Duncan, "Who Wants to Stop the Church: Homosexual Rights Legislation,

Public Policy, and Religious Freedom," *Notre Dame Law Review* 69 (1994): 393, 407-11.

4. There are approximately 2,887 persons on death row—convicted of a capital crime and sentenced to death—in the United States. Of this number, 41 are women (approximately 1.4%); however, of the 41 women approximately 17 are 'implicated' as lesbians (approximately 41%). See Victoria Brownworth, "Dykes on Death Row," *The Advocate*, June 15, 1992, pp. 62-64.

5. Green's defense attorney, William Lasley, believes that the verdict is explainable by homophobia. Lasley also reports that prospective jurors were heard expressing the desire to be selected as jurors in order to "hang that lesbian bitch" and that Green was subjected to homophobic treatment by state personnel.

The statements of the prosecutor, Assistant State Attorney Bob Johnson, are quoted in *Gay Community News*, September 17-23, 1989, p. 1. The prosecutor also charged Green with the highest degree of murder allowable under the applicable law, despite circumstances that comprise classic examples of lower degrees of murder, such as battering, mutual fighting, intimate relation, and diminished capacity (because of alcohol). I further discuss this case in Robson, *Lesbian (Out)Law*, pp. 158-60.

6. The feminist literature on female offenders is vast. Important works include: Freda Alder, *Sisters in Crime: The Rise of the New Female Criminal* (New York: McGraw Hill, 1975); Susan S. M. Edwards, *Women on Trial* (Manchester: Manchester University Press, 1984); Coramae Richey Mann, *Female Crime and Delinquency* (Birmingham: University of Alabama Press, 1984); and Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (London and New York: Routledge, 1990). A comprehensive anthology including women as offenders, victims, and workers is Barbara Raffel Price and Natalie J. Sokoloff, *The Criminal Justice System and Women*, 2nd ed. (New York: McGraw Hill, 1995). A useful overview of two decades of the literature occurs in Sally S. Simpson, "Feminist Theory, Crime, and Justice," *Criminology* 27(4) (1989): 605-31.

7. See, e.g., Phyllis Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense," *Harvard Women's Law Journal* 8 (1985): 121; and Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," *Women's Rights Law Reporter* 9 (1986): 195.

8. For a discussion of this conundrum in the context of family, see Brenda Cossman, "Family Inside/Out," *University of Toronto Law Journal* 44 (1994): 1.

9. There is an argument that the other side of the equality equation is always the state, even in civil litigation. However, even to the extent that we recognize the state's implicit position with regard to civil litigation, such a recognition undergirds rather than diminishes any recognition of the power of the state's explicit position in criminal law.

10. For a discussion of whether Aileen Wuornos fits any criteria of a serial killer, such as killing for pleasure, see Phyllis Chesler, "A Woman's Right to Self Defense: The Case of Aileen Carol Wuornos," *St. John's Law Review*

66 (1993): 933, 946–48. Even if Wuornos does fit the criteria, she is certainly not the first woman to do so; see *ibid.*, p. 946, citing Eric Hickey (between 1800 and 1988 a total of 34 female serial killers have existed). See also Ann Jones, *Women Who Kill* (New York: Holt, Rhinehart & Winston, 1980), esp. pp. 129–39 (discussing many cases, including Belle Paulson, a woman who lured a succession of men to her farm and murdered them for pecuniary gain).

11. Chesler outlines some of these events in "A Woman's Right," pp. 961–62. Her most damaging observation is that because childhood acquaintances were offered payments for exclusive interviews with a producer, they may have interpreted the terms of these deals to include not cooperating with Wuornos's defense attorneys.

12. In a case involving the death sentence for a woman accused of the kidnapping murder of a young girl with whom she had sex, the defendant argued at trial that she suffered from battered-woman-syndrome and had procured and killed the girl at the insistence of her husband. In a recent appeal, she contended that her attorney's negotiation of publicity contracts directly influenced his trial strategy. At trial, the attorney conducted a four-day direct examination of the defendant, eliciting "lurid facts" previously ruled inadmissible. Such facts were central to his "copyrighted, 400-plus page 'appellate brief' that he has attempted to market as the basis of a book or movie." *Neelley v. State*, 1994 W.L. 248245 (Ala. June 10, 1994).

13. The work of Jane Caputi, *The Age of the Sex Crime* (Bowling Green, OH: Bowling Green University Press, 1987), articulates this point with relation to male serial murderers whose victims are predominantly women.

14. *Perez v. State*, 491 S.W. 2d 672, 673, 675 (Tex. Crim. App. 1973).

15. As I discuss elsewhere, this strategy was employed in recent U.S. politics to raise the specter of lesbianism on unmarried women nominated for political office. See Ruthann Robson, "The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorizing," *St. Thomas Law Review* 5 (1993): 433.

16. Robert Leger, "Lesbianism Among Women Prisoners: Participants and Nonparticipants," *Criminal Justice and Behavior* 14(4) (1987): 448.

17. See n. 4.

18. Victor Streib, "Death Penalty for Lesbians," *National Journal of Sexual Orientation Law* 1 (1994): (an electronic journal).

19. See generally Pat Carlen, *Women, Crime, and Poverty* (Milton Keynes: Open University Press, 1988); and Coramae Mann Richey, "Minority and Female: A Criminal Justice Double Bind," *Social Justice* 16(3) (1989): 160–72.

20. Defense strategies have been less explicit because of the burden of the prosecution to prove its case and the complimentary lack of burden on the part of the defense.

21. This stereotyped construction is most operative in cases in which the "bad" lesbian is accused of murdering her lesbian partner.

22. Marie Ashe examines the legal construction of the bad mother in "The 'Bad Mother' in Law and Literature: A Problem of Representation," *Hastings Law Journal* 43 (1992): 1017. For a discussion of how the criminal law "enforces the subordinating aspects of motherhood and punishes women's resis-

tance," see Dorothy E. Roberts, "Motherhood and Crime," *Iowa Law Review* 79 (1993): 95.

23. Editorial, *The Miami Herald*, April 3, 1992, p. 26A.

24. *People v. Martin*, 4 Cal. Rptr. 2d 660 (5th Dist. 1992).

25. For example, the state objected to the National Center for Lesbian Rights' motion for leave to file an amicus brief on behalf of Aileen Wuornos relating to the homophobia that may have denied her a fair trial. The state argued that lesbianism was irrelevant.

26. My notions of lesbian legal theory here depend on my earlier work, notably Robson, *Lesbian (Out)Law*.