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LESBIANISM IN ANGLO-EUROPEAN LEGAL HISTORY

Ruthann Robson*

I. THE PERSONAL PROCESS


Continents of meaning between these oceanic words. Dissertations on the possibility of history. Lectures on the methodology of research.

A universe of imaginable answers to an inquiry concerning past relationships between lesbians and law. The convenient yet arbitrary narrowing of that inquiry within time and space: to recorded legal history and to North America and Europe. This time becomes too short for reflection; this small space becomes smaller. The answer is singular: a never; a nowhere. There is no European or American legal history of lesbianism.

Or is there?

I had planned a short chapter on the roots of the present legal status of lesbians and lesbianism in a book entitled LESBIAN LAW.¹

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I. LESBIAN LAW is a book of both a practical and theoretical nature intended for an intelligent lay audience. It is forthcoming from the independent lesbian/feminist press, Firebrand Books, next year. While much of my work on lesbian legal theory is producing articles suitable for law reviews, see e.g., infra notes 2-4, I remain committed to reaching lesbians and interested others outside legal
This chapter would be a bridge between the first very theoretical chapter on the plausibilities of lesbian jurisprudence2 and more practical concerns such as lesbian relationships,3 lesbian battering,4 and discrimination. This chapter would be short. An interlude. A connection. Background, but a background of absence.

But as I began to gather materials, I also began to sense that it might not be so simple. I began to think that lesbianism in legal history might be obfuscated by patriarchal legal history. Not an unfamiliar phenomenon. More disturbingly, however, I also began to sense that lesbian legal history might be obscured by what could be called women’s legal history and by what could be called homosexual legal history.

Omissions of lesbian legal history in “women’s” or “homosexual” secondary sources treating legal history are numerous, even where one would expect to find some mention of lesbianism.5 When lesbianism is mentioned, the references may indicate their contentlessness: “Traditionally, European culture had condemned male homosexuality and ignored female homosexuality;”6 or, less emphatically: “Historically, there is less hostility to lesbianism than to male homosexuality.”7 Even in work devoted specifically to lesbianism, this notion that lesbianism and legal history are mutually exclusive is repeated: “Commonly, however, lesbians have been ignored in [these] legal processes.”8 Yet in the work of the same academia. Therefore, a version of this article, titled as Legal Lesbicide will appear in the anthology Femicide: The Politics of Woman Killing (D. Russell & J. Radford eds. 1991).

5. See, e.g., MAJOR PROBLEMS IN AMERICAN WOMEN’S HISTORY (M.B. Norton ed. 1989); J. SOCHEN, HERSTORY: A WOMAN’S VIEW OF HISTORY (1974); WOMEN AND THE LAW: The Social Historical Perspective (D.K. Weisberg ed. 1982) (Volumes I & II) (no references in this two volume work); WOMEN IN AMERICAN LAW: VOLUME I (M.S. Wortman ed. 1985) (No index entry for lesbian; no documents or text in this “interpretative anthology” refer to lesbians. At some points, for example when discussing “Crime and Deviance” in various historical periods, the omission of lesbianism is especially glaring).
7. V. BULLOUGH, HOMOSEXUALITY: A HISTORY 117 (1979). Unlike many other writers on homosexuality, however, Bullough devotes an entire chapter to lesbianism in this book. He has been similarly inclusive in his other works.
8. Reese, The Forgotten Sex: Lesbians, Liberation and the Law, 11 WILLAMETTE L. J. 354, 356-7 (1975). The author supports her thesis with references to the interpretation and prosecution of sodomy in Anglo law. Reese posits a feminist, and I think quite plausible, explanation for lesbian invisibility. “These attitudes toward the lesbian reflect the lower value placed upon women.” Id. at 358. This conclusion further supports the author’s position that the “discussion of law in relation to the lesbian is more accurately placed in the context of the legal treatment of women
commentators who minimized the connection between lesbianism and European and Anglo legal history, as well as in the works of others, I was also finding evidence about historical incidents in which lesbianism and the law had a very real relationship. Lesbians have been executed for committing lesbian acts.

As I began to look for more references about lesbian executions, I noticed I felt rewarded when I found such references. Such is the perversity of the researcher. Real pain, real death, is eclipsed. The research project has a life of its own. Its existence is hegemonic.

In my role of researcher, when I searched for references to lesbianism in European and Anglo legal history, I became entangled in the problems of being an historian: the one who decides what counts and what does not. What does it mean to focus on executions? Does that mean that floggings and banishments are inconsequential; for who? from what point of view? If I were writing a legal history of murder, would I consider only executions? Even if I were writing a legal history of the death penalty, would only its implementation be worthy of attention?

And how to define a lesbian anyway? The issue, difficult enough in contemporary intellectual discourse, becomes extremely complicated when I attempt to reinterpret the past through my post-

than in the context of the legal treatment of male homosexuals.” Id. at 354. This position, a logical one, has not gained momentum in either case law or legal literature, although there is some argument that homosexuality, both male and female, should be considered a gender/sex equality issue. See, e.g., C. Mackinnon, Toward a Feminist Theory of the State 248 (1989) (“Gay and lesbian rights would be recognized as sex equality rights [in feminist jurisprudence]; D. Rhode, Justice and Gender 146 (1989) (“The same principles that apply to discrimination on the basis of sex should be equally applicable to discrimination on the basis of sexual preference.”).

9. Current debates concerning lesbian identity center along two intersecting chasms: the essentialist/constructionist chasm and the political/sexual chasm. The essentialist/constructionist debate divides theories advocating innate lesbianism (essentialism) from theories advocating socially constructed lesbianism (constructionism). See, e.g., Stimpson, Afterword: Lesbian Studies in the 1990's, in LESBIAN TEXTS AND CONTEXT: RADICAL REVISIONS 377, 381 (K. Jay & J. Glasgow eds. 1990) (discussing the division between essentialists “who often see” lesbians as “a common theme throughout history” and social constructionists who “argue that all such sexual categories are socially constructed”). The political/sexual debate divides theories advocating lesbian identity rooted in politics and theories advocating lesbian identity rooted in sexual practices. See, e.g., Stimpson, supra at 380 (posing questions of lesbianism as “public”, as “erotic” or as a “transgressive way of behaving within larger societies”). See also, S. PheLAN, IDENTITY POLITICS (1989).

While the essentialist/constructionist and political/sexual debates inform much of contemporary intellectual discourse, lesbian theorists are attempting to escape from such (false) dualities. See, e.g., N. BROSSARD, THE AERIAL LETTER (Wildeman translation 1988); Card, Pluralist Lesbian Separatism, in LESBIAN PHILOSOPHIES AND CULTURES 125 (J. Allen ed. 1990); Stimpson, supra at 377; Robson, lesbian lesbian: a text on lesbian identity with a subtext on essentialism/constructionism, 10 OUT/LOOK: THE NATIONAL LESBIAN & GAY QUARTERLY 26 (1990).
Stonewall, post-feminist kaleidoscope of lesbian experience.\textsuperscript{10} The historian as researcher decides whether or not to pursue references to cross dressing as inclusive of lesbians.\textsuperscript{11} The historian as researcher decides whether pre-contemporary lesbians are more properly found in an unmanageable “morally insane” housemaid who had “the habit of holding her hands to her genitals at night, and even went so far as to invite her aunt, with whom she shared a bed . . . and even to try to force her to do it together as man and woman,”\textsuperscript{12} or in a romantic “friend” who authors elaborate love letters.\textsuperscript{13} This essentially class conflict\textsuperscript{14} has special resonancy for at-

\textsuperscript{10} The problem of the researcher attempting to impose one’s own conceptualizations on the past is recognized by lesbian researchers, see, e.g., Stimpson, supra note 9, at 381 (asking “am I not imposing my own, 1980’s, United States vocabulary [of lesbian] on the past?”).

\textsuperscript{11} My own conceptualizations are the products of the post-Stonewall era, named for the Stonewall riots which occurred on my thirteenth birthday:

It has become common to date the gay liberation movement from Friday, June 27, 1969, when the Stonewall Inn, a popular gay men’s bar in the Greenwich Village section of New York City, was raided by police. The patrons of the bar, who in the past had docilely submitted to such raids, reacted in anger and fought the police, who were forced to barricade themselves inside the bar until assistance arrived . . . . The next night a crowd of homosexuals and sympathizers gathered in the vicinity of Sheridan Square to protest the vice-squad action. The police again gathered and there was another confrontation. Confrontation went on for four more nights before things finally quieted down, but the gays no longer were content to be as docile as they had been, and out of the Stonewall riots came the Gay Liberation Front.

\textsuperscript{12} V. Bullough, supra note 7, at 63.

My own conceptions are equally a product of the feminist movement. Despite media publicized “bra-burnings,” the feminist movement—or as it was also called, the Women’s Liberation Movement—had no single “historical” definitional event. Important events included the founding of the National Organization for Women in 1966, the first demonstration and protest of the Miss America Pageant in Atlantic City in 1968, demonstrations across the United States protesting the illegality of abortion in 1968-1972, and the publication of SISTERHOOD IS POWERFUL, edited by Robin Morgan, in 1970.

\textsuperscript{13} See infra notes 73-77 and accompanying text.

\textsuperscript{14} Everard, Lesbian History: A History of Change and Disparity, 12 J. of Homosexuality 123, 129-30 (1986).


\textsuperscript{14} The conflict is expressed and resolved by Faderman thusly: Everard found the true ancestor of the lesbian in Magdalena van W., a woman discussed in an 1882 medical journal article on insanias moralis, who led a life of vagrancy, street fighting, thievery, and prostitution, which brought her into regular contact with police and corrective institutions. Magdalena is undoubtedly a spiritual ancestor to many women who identify as lesbian today, not only women of the lower class, but women who were born into the middle class and have declassed themselves, often out of disgust with social institutions. Many other contemporary lesbians, however, find they have much less in common with hard-drinking, rough and ready street women like Magdalena, and much more in common with
tempts at a European and Anglo legal history of lesbianism. If I choose the writer of love letters as the predecessor, I might easily conclude that lesbianism was unpunished and unpunishable. If I choose the housemaid, I might conclude that lesbianism was censured by the law, although perhaps under different rubrics, such as "vagrancy" or "moral insanity."

By the time I had reached such weighty considerations, I was suffering from a failure of nerve. "Researching lesbian history presents enormous challenges of defining lesbian relationships, decoding closeted sources, and transcending layers of censorship." I was not sure I wanted a challenge, enormous or otherwise, in the realm of research or history. I am an attorney. I am a law teacher. I am a writer.

But I am not an historian. The history I learned in public schools was shallow and partial. The history I devoured at night was read for the stories I could find of interesting people (of women? of lesbians?), more like a novel than nonfiction. As a philosophy major in college, I enrolled in a philosophy of history course, but the only "concept" I can remember is an oblique reference that Homer may have been a woman.

And I am not a researcher. I will admit to having taught law students legal research, but as any law student knows (even ones I did not teach), legal research is not research. Legal research is relentlessly trendy. If an authority has not appeared (either originally or by incorporation) since 1970, it is questionable and might be worthless. There are certainly times when a lawyer might trace the origins of a doctrine, but these times are more rare than one might expect and are predicated upon continued vitality (confirmed by recent cases) of the doctrine. Further, legal research, at least as it is taught in the United States, requires facility solely in modern English; even the venerable Latin phrases which populated lawyering not very long ago are being exterminated by the rush to eliminate legalese and affect "plain English."

By training, I was neither historian nor researcher. So, what

Aagje Deken [mentioned in the Everard article], who longed to "live next to her with whom my heart is already jointed." But then, perhaps we each have a right to define for ourselves who is our spiritual predecessor.

Id. at 140-1. Faderman's resolution that "perhaps" we have the right to define lesbian predecessors for ourselves does not entirely answer the question for this novice researcher historian. If I feel more identification with "lower class" Magdalen, am I justified in ignoring Aagje Deken? Or if I feel more comfortable reading love letters than clinical records, does that mean I should limit myself to the literate classes?

17. After completing this Article, I realized that my predicament was hardly unique. As one lesbian scholar notes:
was I doing trying to research history? It should be left to the experts.

Subject matter illiteracy is an idea I first heard voiced by Rebecca Gordon, a lesbian writer, during a workshop on literacy during the Second Women-In-Print Conference in 1985.\(^{18}\) If literacy means access to information, then denial of such access is illiteracy. Being subject matter illiterate is when although one might be able to obtain access to information (find it and read it for oneself), one denies oneself access on the basis of a belief that the subject matter is so “complicated” that only an “expert” could be “literate” in the area. Gordon stated that subject matter illiteracy was just as damaging as illiteracy. Gordon’s message was that literate people should refuse to be subject matter illiterates.\(^{19}\)

Incorporating Gordon’s lesson became less difficult as I became more critical. At times, I operated on “instinct.”\(^{20}\) I was also immeasurably buoyed by an article entitled “The Myth of Lesbian Im-

Contemporary lesbian history has been almost entirely written by lesbians, and often by women who are not trained or practicing historians. We have searched the past with an urgency that can only be felt by those who have been denied a history.


18. I attended the workshop because at that time I was a practicing attorney with a poverty law organization, Florida Rural Legal Services, and was greatly concerned with female illiteracy. Rebecca Gordon had recently returned from Nicaragua, where literacy campaigns had been quite successful.


20. Instinct is a recognized tool of the lesbian researcher:
It is up to us as lesbians to establish our own historiography and promulgate it until the old [homophobic and heterosexist] are replaced. At least for women of backgrounds similar to our own, we as lesbians have “instincts” about identifying other lesbians, and these instincts can be articulated in terms of evidence . . .

Lesbian historians may absorb these details almost unconsciously, but nonlesbians always seem to miss them or discount them as insufficient evidence. Furthermore, since there is no single criterion for establishing lesbianism, perhaps we should talk about patterns of evidence. For ourselves as lesbian-feminist biographers, we need to establish the limits of the validity of the . . . signs in terms of distinctions of class, race, age, date and geographical location. We also need to establish rules of evidence for cultural settings other than those with which we are familiar.

punity" authored by a nonlesbian. I became committed to exploring the sources for statements implying lesbianism had no existence in Anglo and European legal history.

As explicative of my process, I offer three examples of tracing and disagreeing with statements implying the legal nonrecognition of lesbianism. I offer these examples not as attempts to "trash" other authors, in fact, I believe that these pieces in particular are solid, exemplary contributions. I offer these examples to show that even in excellent work, we may be repeating and therefore supporting a pervasive fantasy that may rest on less stable ground than we imagined.

In a recent and excellent article on lesbian mothers and custody in Canada, for example, the author writes that "[u]nlike homosexual men, lesbians have seldom been subject to criminal prosecution." The author then describes Queen Victoria's stance of ignorance on lesbianism which resulted in the 1885 Criminal Law Act not covering sexual activity between women and the 1921 refusal by the British House of Lords to mention such activity, concluding the paragraph with an observation that "silence on the question of lesbianism continues to this day." The author's footnote states:

The reasons for differential treatment of lesbianism and homosexuality are extremely complex and far beyond the scope of this paper. In Canada, The Criminal Law Amendment, S.C. 1968-69, c.38, 149A, decriminalized private homosexual relations between consenting adults aged twenty one or more. Gay men continue to be arrested and prosecuted for sexual activities taking place in bars, washrooms, and other "public places." That legislation was never intended to apply to lesbians.

When reading this footnote in the context of the author's text, it seemed clear that an act decriminalizing certain sexual activity "was never intended to apply to lesbians" because in fact such sexual activity had never been criminalized. But my research of Canadian criminal law yields a different conclusion.

According to Tremeear's CRIMINAL ANNOTATIONS, the law proceeded thusly:

The offence of gross indecency in s. 149 stemmed from the Crimi-

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I'm about to submit to the archivists greater wisdom, when something pulls me over to the file on police reports. Sure enough, there's footage . . . .


23. Id.

24. Id. at 19, n.4.

25. thank Margot Young, a Canadian attorney, for her assistance in researching Canadian Law.
nal Law Amendment Act, 1885 (U.K.) c. 19 s. 11, which went beyond laws enforcing decency and struck at grossly indecent acts between males "in public or private." . . . Meanwhile, the offence was taken into 1890 (Can.) c. 37 s. 5, with an increase in the maximum sentence, from a two year term to one of five years and a whipping. [28] The section was carried down to 1927 Code, s. 206.

The Criminal Code Revision Commission redrafted it after hearing a suggestion as to indecent acts between females. Whipping was dropped, as s. 641 forbids this punishment for females. But revised s. 149, [27] as enacted, read: "Everyone who commits a gross indecency with another person." [28]

It seems that Canadian law did originally adopt Queen Victoria's view concerning lesbian sexuality, but then chose to include lesbianism, mandating a change of punishment since women could not be whipped. All this occurred prior to the 1968-69 decriminalization; therefore this decriminalization applied to lesbianism because the then-existent law applied to lesbianism.

Within the whole of history, or even within Canadian history, the fifteen or so years of Canada's criminalization of sexual activity between two lesbians is not monumental. However, it is also not the

26. Chapter 37, s. 5 (1980) provides in full:
Every male person who, in public or private, commits, or is a party to a commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, is guilty of a misdemeanor and liable to five years imprisonment, and to be whipped.

27. Section 149, Chapter 51, 2-3 Elizabeth II (1953-54) reads in full:
Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to punishment for five years.

Similarly, the buggery and bestiality section was also changed from "male" to "every one," so that section 147, chapter 51, 2-3 Elizabeth II (1953-54) reads in full:
Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Interestingly, other crimes, such as assaulting another person with intent to commit buggery or indecently assaulting another male person, section 148, and sexual intercourse with "step-daughter, foster daughter or female ward," section 145, and seduction of female passengers on vessels, section 146, remained confined to "male persons."

28. L. Ryan, Tremear's Criminal Annotations 169 (1980). See also, Gigeroff, The Evolution of Canadian Legislation with respect to Homosexuality, Pedophilia and Exhibitionism, 8 [Canadian] Crim. L. Q. 445, 449 (1966) (stating that the offense of gross indecency "has been structurally changed but in such a way as to cover many more different types of sexual acts including male homosexual, female homosexual, heterosexual, and homosexual and heterosexual pedophilic acts.") (emphasis added).

29. Decriminalization means that an act of gross indecency is not indictable if each person is over the age of 21 and the act occurs in private. The statute provides that an "act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present." Can. Stat. Chapter C-46, section 162.
“never” I had assumed from reading the piece on lesbian mothers and custody in Canada.

Another example is Sylvia Law’s recent article, *Homosexuality and the Social Meaning of Gender*[^30], where she discusses the history of homosexuality in terms of male homosexuality until the nineteenth century when she states: “Lesbians were censured by silence; sexual acts between two women were unimaginable.”[^31] Law supports this statement with a footnote to the infamous Woods and Pirie Libel suit against a woman who had accused them of lesbian acts[^32] and then states

The traditional common law and religious condemnation of homosexuality did not encompass women. The Christian principles, incorporated into the 1535 Act of Henry VIII, which first transferred sodomy from the Ecclesiastical law to the civil law, condemned acts between men and beast, man or woman. Acts between women (or between beasts) were not addressed.[^33]

Sylvia Law makes essentially two claims: first, that in the nineteenth century Anglo tradition, lesbian sexuality was unimaginable and second, that this unimaginability is a reproduction of the silence on the issue of lesbianism in the entire history of traditional common law and religious principles. Both claims bear scrutiny.

The nineteenth century claim, illustrated by the Pirie and Woods case, is not unique[^34] but is nevertheless troublesome. While a single case may be representative of an entire century, I am skeptical of such symbolism. Law suits are complex and individualistic and rendering them into ciphers can be misleading.

Sylvia Law explains the Woods and Pirie case thusly:

In the 1800’s, a British school girl accused two mistresses of a lesbian encounter. The women denied the charges and sued the girl’s family for slander. The courts upheld the claim, asserting that “no such crime was ever known in Scotland, or in Britain,” and the charge “is certainly unparalleled in any court, since the

[^31]: Id. at 202.
[^32]: See infra notes 35-47 and accompanying text.

Faderman’s extended discussion in *Surpassing the Love of Men* as well as in her earlier treatment of the trial, *Scotch Verdict*, do reveal the complexities of the case, including the class elements: “If the women had been actresses or prostitutes or of the decadent aristocracy, it would have been conceivable that they were prone to any sort of debauchery.” *Surpassing*, *supra*, at 153. Yet other sources citing Faderman’s work obscure the complexities.
creation of time."\textsuperscript{35}

Law does not misrepresent the judicial reasoning, but the representation is partial. A different impression results from excerpts such as the following:

These Ladies were accused of gross immorality and shameful indecency, by the saying and doing certain things, as specially set forth in the condescendence. There the facts were so gross, incredible, brutish, beastly and absurd, that I could give not the slightest credit to them. But still I must have believed them if well proved. But when I saw that the supposed confirmation of the story, by what was attributed by the maid fell to the ground, and also saw something by which to account for the general circumstances, the whole story lost its coherency.\textsuperscript{36}

In the Woods and Pirie case, much of the reasoning is quite specific. Woods and Pirie had brought an action of defamation and damages against Lady Cumming Gordon of Altyre, stemming from Lady Cumming Gordon’s withdrawal of her daughter from the Woods and Pirie school and her subsequent accusations made directly to other parent/guardians that Miss Woods and Miss Pirie engaged in improper and criminal conduct with each other.\textsuperscript{37} Pirie and Woods allege that due to these accusations, the school was ruined within 24 hours.\textsuperscript{38}

The actual issue before the court centered on what Miss Cumming Gordon’s defense would have to prove to prevail against the defamation charge. The petitioners (and the majority of the judges agreed) that in Lady Cumming Gordon’s statement of the particulars her defense rested on her proving the commission of the actual offense she had alleged: \textit{venus nefada}, unnatural lust, the most infamous of all offenses.\textsuperscript{39} The defense rested on the premises that words are not actionable without intent to defame, and spent an inordinate amount of pages painting Lady Cumming Gordon actions

\textsuperscript{35} Law, supra note 30, at 202, n.75 citing Arno Press, Miss Marianne Woods and Miss Jane Pirie Against Dame Helen Gordon Cumming (1975) (sixth transcript at 109; fifth transcript at 2).

\textsuperscript{36} Id. (Speeches of the Judges at 56, Lord Justice Clerk (Hope)).

\textsuperscript{37} The improper conduct is lesbian conduct, although the word "lesbian" is rarely, if ever, used.

\textsuperscript{38} Arno Press, supra note 35 (State of the Process at 8). This allegation would dispute the notion that lesbian acts were "unimaginable" to at least the parents and guardians of the girls attending this school in 1811.

\textsuperscript{39} As the transcript reflects: the defense is broadly and plainly \textit{veritas convinci}; - the truth of the charge, not of any impropriety, or of any indecency, or of any irregularity of conduct, but the infamous crime of \textit{venus nefada}, - of unnatural lust, - of the most infamous of all offenses.

\textit{Id.} (The Additional Petition of Miss Mary-Ann Woods and Miss Jane Pirie at 21; Speeches of the Judges at 41).
as correct and dutiful responses to the stories told to her by her
granddaughter and theoretically corroborated by the other witness.

Lord Meadowbank, Ordinary in the Outer-House and the first
member of the judiciary to handle any aspect of the case, at first
refused the possibility (both morally and physically) that any Scotch
ladies could act in such a manner, prompting the defense to present
a twenty page list of "Authorities with Regard to the Practice of
Tribadism." This lawyerly research compelled the judges to con-
clude that Lady Cumming Gordon was resting her defense on veritas
convinci, and that if she could prove the crime she had alleged, she
would prevail.

As to the existence of the actual crime of venus nefada, the judges
have differing and often complex and convoluted reactions. There
is often an initial stated disbelief that this "crime" exists (is physi-
cally possible), exists in civilization (Scotland), exists without the
right equipment (either large clitori or "tools"), or exists among
women such as Woods and Pirie (educated, good families, solid
class backgrounds, Christian). These stated rejections of lesbianism
are not simplistic, bounded as they are by geography, circumstance,
class, education and religion. Further, accompanying the discussion
of these factors, there are extensive (often twenty to thirty pages)
fact-specific discussions. The judges evaluate the veracity of wit-
nesses, the probability that the acts occurred where they were said
to have occurred rather than someplace else, the state of mind of
Woods and Pirie, and the worth of the evidence. Thus, while

40. Id. (Authorities with Regard to the Practice of Tribadism).
41. This resulted in extensive (149 pages) Answers to the Petition for
Lady Cumming Gordon which alternately attempted to prove the charges (by extensive
use of repeating deposed testimony, by attempting to claim the maid-servant per-
jured herself because of pressure from Woods and Pirie, by maligning thepetition-
ers, reiterating the quotes in the letters between them) and claiming that the
defense need only prove either, that they attempted acts of gross immorality
(whether or not they accomplished them) or only that Lady Cumming Gordon ac-
ted in good faith. By attempting to prove that at least acts of gross immorality
occurred (laying on top of one another and moving in an attempt to produce sen-
sual pleasure) the defense sought to prove that Lady Cumming Gordon acted
dutifully.
42. Arno Press, supra note 35 (Speeches of the Judges at 7-8, (Lord
Meadowbank). The judge states that "there is no sort of doubt, that women of a
peculiar conformation, from an elongation of the clitoris, are capable of both giving
and receiving venereal pleasure, in intercourse with women, by imitating the male
in copulation; and that in some countries this conformation is so common, that
circumcision of the clitoris is practised as a religious rite. Id. Thus, in addition to
class biases, the racism of the judges also reveals itself.
43. See infra note 47. (noting that once Lady Cumming Gordon's grand-
daughter had spread the story her future in society dependent on adhering to it).
44. See infra note 47. (Judge's disbelief that Woods and Pirie would engage in
such acts with others around when they could have easily arranged for privacy and
security).
45. Much is made by several judges that during the period of time the students
some of the judges in the Woods and Pirie case do express disbelief as to the crime of lesbianism, to imply that the court merely rejected the possibility of such a crime is overly simplistic: not all the judges agreed that lesbian sexual acts did not occur and even those who did engaged in case-specific reasoning.47 Reducing the Woods and Pi-

claimed to have seen all these things, Woods and Pirie were documented as having major fights over the running of the school. ARNO PRESS, supra note 95 (Speeches of the Judges at 10, 11, 19, 35, 61, 67, 93).

46. Witness claimed to have watched through a key hole, but the door was found not to have a key hole. Id. (Additional Petition at 14, 15; Speeches of the Judges at 45-6, 56).

47. Statements from various judges elucidate the complexity of their reasoning.

Lord Meadowbank, the Ordinary that first heard the cause expressed high disbelief that the charges could be true in his statement, but also dwelled at length upon the particulars of the case. He stated how unlikely it would be for these women to prejudice their school: "Your lordships cannot suppose, that these women were not perfectly aware, that the slightest suspicion of lewdness or indecency in their manners or deportment, was nothing short of absolute ruin to both." Id. (Speeches of the Judges 8); and "There is no doubt that unnatural lusts have been often gratified, or attempted to be gratified, at the expense of character, fortune and even life itself; but I believe it never was heard of, that when the gratification was completely in the power of the parties concerned, and ample opportunity afforded them to indulge in every excess, without the hazard of detection, they preferred taking the enjoyment at the risk of the most fatal consequences, and under apprehensions . . . to taking it in security, privacy and without constraint." Id. (Speeches of the Judges at 9). Lord Meadowbank also alludes to the death penalty for what has been charged "I felt as I should have done had I been sitting in another Court, and a person whose life was staked upon the issue, had (as in former times might have happened) been under examination." Id. (Speeches of the Judges at 21).

Another judge, Lord Boyle, responds to the authorities regarding tribadism by seeking a special immunity for Scotland, but also by being quite case specific: "The very extraordinary, and not withstanding the authorities referred to, the hitherto, in this country, almost unheard of nature of the imputation against the pursuers, the no less extraordinary manner in which these acts of criminality are stated to have been committed, their previous good character and irreproachable conduct, the excellent system of education practised by them, their utter absense of all consciousness of guilt, and their instantaneous and fearless institution of this action, seem to establish so strong a moral impossibility of the justice of the charge against them . . . ." Id. (Speeches of the Judges at 42). Lord Boyle also discussed the deficiencies of Miss Jane Cumming (Lady Cumming Gordon's granddaughter) as a witness, that she was a poor student, that their was no backing up of her story by the servant, that once she had spread the story and her grandmother had acted on it that "her future status in society . . . as well as veracity were at stake in supporting those previous statements on which defense of this action rested." Id. (Speeches of the Judges at 42-43).

Another judge, Lord Justice Clerk (Hope) reasons that "If you say that the pursuers have committed a crime, I may suppose it, if stated to have been committed with a man. If you accuse them of gross indecency, I can suppose either of them capable of it. But if you tell it under circumstances that are incredible, I dont care what the fact itself is." Id. (Speeches of the Judges at 55). See also text accompanying notes 45-46 supra.

Lord Justice Clerk (Boyle) stated: "but I will say to your Lordships, that when I
rie case to a simplistic silhouette adds to the erasure of lesbianism in Anglo and European legal history.

Further, in the nineteenth century, as in most centuries, we should be wary of making generalizations about women’s sexuality. The Victorian mentality that posited women as “passionless” (or perhaps, more accurately, posited that women should aspire to passionlessness) was not applicable to all women. As stated by Estelle Freedman and John D’Emilio:

In nineteenth-century thought, sexual control helped differentiate the middle class from the working class, and whites from other races ... For the middle class, an elaborate ideal of femininity emphasized sexual purity as a means of controlling male excess and stressed women’s domestic and maternal roles. Women who did not achieve the ideal of purity were considered to have “fallen” into a lower class. If poor, they might even be arrested for committing such “crimes against chastity” as “lewd and lasciv-

... recollect the nature of the case, the *locus delicti*, the time, manner, and circumstances in which the act alleged are said to have been done; the situation in which the pursuers stood to each other at the time, and both before and after it, and their conduct after it was brought to light; I do state to your Lordships with as much confidence as I ever stated anything, that a more improbable or unlikely accusation never in my apprehension came before a court of justice.” *Id.* (Speeches of the Judges at 110).

Lord Woodhouselee stated: “Let us examine a little particularly what are those facts which in this case we are called upon to believe; and here, I think, there is such a mass and complication of improbabilities brought together in one story as no ordinary force of testimony, even if that testimony were of the purest and most unsuspicious kind, is sufficient to render probable.” *Id.* (Speeches of the Judges at 65). Woodhouselee also discusses the background of Woods and Pirie, reasoning that it would be improbable that having gotten such a wonderful pure reputation that they should all of a sudden “throw off the mask” they had worn for years; that it is unlikely that they would madly embrace financial ruin; that since they were charged with abandoning themselves to unnatural lust that they could control themselves enough to remain respectable and unnoticed by all the rest of their students.

At least a few of the judges would have held that the defendant was not libel for accusing Woods and Pirie of lesbian acts. In Lord Craige’s speech, he states: “To prove that the pursuers had acted as no modest women would do, is to prove the defense; and it appears to me that the defender has proved this, not only so as to convince the mind of an individual like the defender herself, but also the conscience of a Judge, by legal proof and testimony.” *Id.* (Speeches of the Judges at 88). In Lord Glennlee’s speech, he states “for I will say, that to my mind it is infinitely more probable that the pursuers should have been guilty of the offense charged against them than that Miss Cumming, even supposing her to have been ever so much corrupted in her morals, should have been able to invent such a story.” *Id.* (Speeches of the Judges at 105, 106). Lord Newton states that although the “monstrous improbability struck with me, not of their being guilty of such offences, but that they should choose such a scene for it, and doing it in the way that they did, in the bed with a young lady, instead of getting a bed to themselves,” *Id.* (Speeches of the Judges at 15), he would still find for the defendant on grounds that Lady Cumming Gordon was justified in spreading the story although he would find pursuers “not proven” if tried for crime.
ious behavior.”

Prostitution flourished in both Britain and the United States, and the discourse on purity made “virgin prostitutes” the most expensive. As it has been argued that during this period ‘homosexuals’ became a class, it also seems that prostitutes became a class in a movement from women who supplemented their incomes by sexual services, to women viewed solely in terms of their services. There is a historical connection, legal and otherwise, between lesbians and prostitutes. It is interesting to consider not only how

48. J. D’EMILIO & E. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 57 (1988). See also id. at 46 (“the idea of innate female virtue, or of sexual passionlessness, applied primarily to native born, middle class women; working class, immigrant and black women continued to be seen as sexually passionate, and thus sexually available.”); Id. at 85-100 (describing how native american women were routinely raped and prostituted; describing the sexuality of black women); G. LERNER, THE LADY AND THE MILL GIRL: CHANGES IN THE STATUS OF WOMEN IN THE AGE OF JACKSON, 1800-1840, reprinted in A HERITAGE OF HER OWN 182, 190-191 (N. COTT AND E. PLECK EDs. 1979).

49. As one feminist commentator notes, Perhaps the most unique aspect of prostitution during the Victorian period and the one that most reflects the view of women at the time, was the popularity of the virgin. The virgin, for the Victorians, was the epitome of everything desirable in woman; she was innocent, pure, ignorant, she was something to be conquered and possessed . . . . In the male ideology, the prostitute was the exact opposite of the ‘pure’ woman who was honored, but also offered men power over her body for a price. The virgin prostitute, then, was their best combination . . . . In 1885, the going price for a virgin in a ‘top’ brothel was 25-25 pounds, a fantastic sum against the cost of living.

50. This insight is attributed to Foucault: We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal’s famous article of 1870 on “contrary sexual sensations” can stand as its date of birth—less by a type of sexual relations than by a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.


See also, D. GREENBERG, supra note 34, at 321. (In the early years of the eighteenth century in France, “tribades were sometimes detained by the police or
many lesbians supported themselves by prostitution, but how many lesbian sexual acts were prosecuted as lewd and lascivious conduct.

Although not specifically mentioning lesbian sexuality, Estelle Freedman notes, there was a "wide range of behavior, including lewd and lascivious carriage, stubbornness, idle and disorderly conduct, drunkenness and vagrancy, as well as fornication and adultery" that were within the definition of women's sexual offenses.52 One modern example supports the intuition that lesbian sexual acts were punished under the rubric of prostitution and lewd and lascivious conduct:

In the early decades of the twentieth century, Lesbians and prostitutes were often confused in the popular and legal imagination. Mabel Hampton, who lived as a Lesbian from her early teens on, tells how she was arrested in 1920 at a white woman's house while waiting for a friend. Because of an anonymous tip that a wild party was going on, "three bulls" came crashing through the door; even though Ms. Hampton was clearly a "woman's woman," she was arrested for prostitution and sent to Bedford Hills Reformatory for two years at the age of nineteen. According to Ms. Hampton, many of the girls arrested for prostitution were, in fact, Lesbians.53

Thus, I think it is at best a partial view to measure the response of the legal system to lesbianism based upon a trial against two school teachers and based upon ideas of sexuality applicable to only upper class white women. I also think it is at best a partial view to measure the response of the legal system to lesbianism based upon a comparison to the response of the legal system to male homosexuality. It might be possible that "prostitution" was an umbrella term for women's sexual transgressions just as "sodomy" was an umbrella term used to condemn men's sexual transgressions.

I also think we should be wary of male homosexual constructions of lesbianism. This is not to imply that I think such reports are inherently untrustworthy, in fact, the two most helpful sources I found regarding lesbianism in Anglo-European history are male au-


thored.\textsuperscript{54} Nevertheless, I think that male homosexual scholarship may have a less ambitious agenda for lesbianism in legal history than I think is necessary. For example, in Jeffrey Week's work, relied upon by Sylvia Law, we read: "A lesbian subculture did exist, but was a pale version of the male, and even more overwhelmingly upper class."\textsuperscript{55} I suggest that lesbians such as Mabel Hampton and Magdalena van W. would not agree.\textsuperscript{56}

I also suggest that a conclusion of invisibility perpetuates itself. In his section on lesbians\textsuperscript{57} entitled "Invisible Women," Weeks tells us that if male homosexuals are the "‘twilight men, of twentieth century history, lesbians are by and large the ‘invisible women.’"\textsuperscript{58} Weeks grounds at least a partial explanation for this invisibility in legal history: "One reason for the absence of knowledge is the legal situation—the fact that lesbianism was not generally subject to legal sanctions—and thus there were no pillorying scandals to seize the public imagination."\textsuperscript{59} Yet some pages later, Weeks alludes to "a series of public pilloryings of lesbians in the 1920's and afterwards."\textsuperscript{60} These pillorying are not discussed, not documented; they remain invisible, unclaimed.

Like Sylvia Law's affirmation that lesbianism is legally unimaginable in the nineteenth century, her application of this affirmation to "traditional common law and religious" canons bears closer scrutiny. As a short background to his history of homosexuality in Britain from the nineteenth century to the present, Weeks considers the 1533 Act of Henry VIII "which first brought sodomy within the scope of statute law, superseding ecclesiastical law, adopted the same criterion as the Church" and concludes that "les-

\begin{itemize}
\item \textsuperscript{54} I am referring to Crompton, supra note 21, at 11 and Gay American History: Lesbians and Gay Men in the U.S.A. (J. Katz ed. 1976). When originally thinking about these issues, I also remembered reading the fascinating account in Arthur Evan's book Witchcraft and the Gay Counterculture which was published by Fag Rag Books in 1978.
\item \textsuperscript{55} J. Weeks, supra note 33, at 87. Weeks supports this assertion by discussing the Paris of Radcliffe Hall, Natalie Barney and Una Troubridge, as well as a single reference to the London 'vapour bath' on Ladies Day. Weeks acknowledges Jeanette Foster's pioneering work on lesbianism in literature, J. Foster, Sex Variant Women in Literature (1958) [most recently issued and updated in 1985], but reflexively concludes that the sparsity and negativity of lesbianism in literature was mirrored in the "milieu". The possibility of a lesbian nonliterary milieu remains unmentioned.
\item \textsuperscript{56} See supra notes 14 and 53 and accompanying text, for a discussion of Magdalena van W. and Mabel Hampton, respectively.
\item \textsuperscript{57} Again, Weeks is not being singled out as an especially egregious example. I am using his work because it is relied upon by Sylvia Law. Unfortunately, it is necessary to emphasize that Weeks should be credited for treating the issue of lesbianism as extensively as he did.
\item \textsuperscript{58} J. Weeks, supra note 33, at 88.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. at 95.
\end{itemize}
bianism, as usual in criminal codes, was omitted."\(^{61}\) Yet the 1532 Constitution of the Holy Roman Empire criminalized impurity of among others, "a woman with a woman" describing the penalty "after the common custom, be sentenced to death by burning."\(^{62}\) Similarly, other religious and civil acts criminalized acts between women.\(^{63}\) In the Pirie trial itself, there is a twenty page list of authorities "with regard to the practice of tribadism" submitted by the defendant to prove both the legal sanctions for lesbianism and its existence.\(^{64}\) The extent to which Henry VIII departed from or conformed with contemporary or antecedent definitions of sodomy and lesbianism is a matter for serious historical research. It is not sufficient to ascribe it to the "usual" criminal code, or to thereafter infer that lesbianism was not encompassed by traditional common law or religious doctrine. Reasoning backward from the nineteenth century constructions about female sexuality may lead us to overlook, or to fail to look diligently enough, into legal history.\(^{65}\) Our nineteenth century constructions are not only partial, but they lead to partial results when used to interpret the past.

Our assumptions of invisibility and nonexistence become the realities of misconstruction and imperceptibility. Many of the sources, including the ones I discussed above, take lesbianism in legal history as nonexistent because neither lesbianism nor legal history is the focal point. Yet the official version is repeated so often it obscures any other version.\(^{66}\) It is the version that I subscribed to before I began this work.

Beginning this digging made me critical of the above sources, but it also made me critical in another way. I found that in sources which did not render lesbianism in legal history imperceptible, the perception was often altered. As the third and last example of my process of becoming critical of sources, commentaries about the 1721 trial of Catharina Margaretha Linck and Catharina Margaretha

\(^{61}\) Id. at 12, cited in Law, supra note 30, at 202 n.75.
\(^{62}\) See infra notes 109-111 and accompanying text.
\(^{63}\) See infra notes 112-128 and accompanying text.
\(^{64}\) See supra note 40 and accompanying text.
\(^{65}\) This will be especially true if the Victorian century version of women's sexuality was an anomaly. As argued by historian Nancy Cott,

Acknowledging that notions of women's sexuality was never monolithic, I would nonetheless emphasize that there was a traditionally dominant Anglo-American definition of women as especially sexual which was reversed and transformed between the seventeenth and nineteenth centuries into the view that women (although still primarily defined by their female gender) were less carnal and lustful than men.

Cott, Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850, in A Heritage of Her Own supra note 48, at 162.

\(^{66}\) See, e.g., Developments—Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1513 n.16 quoting Law, supra note 30 ("Lesbians were censured by silence, sexual acts between two women were unimaginable.").
Muhlhahn demonstrate how lesbianism becomes inconsequential when not imperceptible.

The trial record was first published in 1891 by a physician at Bayreuth in Bavaria. It was translated from the German and appeared in English within the last ten years.\(^6\) As accurately characterized by Louis Crompton, whose essay on “The Myth of Lesbian Impunity” remains an isolated classic,\(^7\) the trial record displays “something of the fascination of a play by Bertolt Brecht in its humanity, bawdiness, comedy, pathos and horror” and shows how the court applied “legal, theological and physiological principles.”\(^8\)

The trial record reveals that Linck, or Lincken as she is also called, disguised herself in men’s clothes, gained and lost the gift of prophesy, joined the troops as a musketeer, deserted, reenlisted, vacillated between wearing male and female attire, made flannel, did spinning and printing, again adopted male attire and went to work for a stockingmaker where she met the co-defendant, Muhlhahn. The two were married in 1717. The trial record relates the sexual experiences of the women, the abuse by Linck of her lover, the couple’s poverty, the discovery of Linck’s gender by Muhlhahn’s mother and the “explanations” and “confessions” of both women, perhaps obtained by torture.\(^9\)

Much of the trial record, however, concerns a discussion of the proper punishment to be administered to Linck: hanging with the body burned afterward versus put to death by the sword versus burning alive. “It is only fair to determine the penalty according to the seriousness of the crime.”\(^10\) The judicial reasoning in this record, like the judicial reasoning in the Pirie/Woods trial and like modern judicial reasoning, is an application of the authorities to the facts of the case. The facts which caused the decisionmakers the most consternation concerned the evidence of a “leather instrument” used by Linck during sexual acts, thus making it unclear what degree of sodomy (and thus what punishment) should be applicable.\(^11\)

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68. Crompton, supra note 21.
69. Id. at 21.
70. The trial record specifically mentions torture only with regards to the co-defendant: “Muhlhahn, however, was to be given second degree torture in order to arrive at the truth in her case.” Erickson, supra note 67, at 37.
71. Id. at 39.
72. The record does contain a discussion that the death penalty should not be imposed because when sodomy is not committed for the purpose of emission of semen the proper punishment is flogging rather than death, or that the sodomy requires an “actual fleshy union” not possible with “these types of instruments.” Id. at 40. This “dissenting” view was apparently not adopted. However, the Bayreuth physician who located the documents reports that Linck was “beheaded.” Id. at 28.
Yet at least one commentator on the trial and execution of Linck, however, minimalizes the prosecution by attributing it to something ‘above and beyond’ her lesbianism. In The Women’s History of the World, the author describes the Linck trial:

As late as 1721 in Europe, a German woman, Catharina Margarethe Linck, was burned at the stake for attempting to pass as a man and marrying another woman. This case illustrates the true nature of patriarchal outrage, however, which emerges equally from all other comparable examples. Linck’s offense was not to have made love to her ‘wife,’ but to have usurped male attire to do so.\(^73\)

In this commentator’s view, the “real” crime is cross dressing or transvestism; the adoption of male attire. Lesbian sexuality is minimalized.

In the process of becoming critical of explanations which minimalized lesbianism, either in comparison to the punishment of male homosexuality or in comparison to the “real” crime, I was again confronted with the problem of defining the “lesbianism” I was attempting to locate within Anglo and European legal history. The issue is not as simple as deciding whether I was researching women who dressed as men or whether I was researching women who related sexually to women. Crossdressing and lesbian sexuality are intertwined. This is neither to contend that all crossdressers are lesbians, nor that all lesbians are crossdressers, either in this century or in previous ones. Yet many lesbian sources attest to the significance of crossdressing to lesbian history,\(^74\) and at least one researcher of crossdressing found “rather unexpectedly” that the study of cross dressing provided “new ideas and insights into the history of female homosexuality.”\(^75\) The “balanced” view seems to be that judicial authorities considered lesbian relationships and cross dressing in “combination” to be extremely serious.\(^76\)

Thus, when considering (and attempting to document in part two) the legal history of lesbianism, I have chosen not to omit cross-

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74. See, e.g., J. Allard, Legende: The Story of Philippa and Aurelie (1984) (fictional recreation of a legend of two women who lived together in a marital relationship, one of the women posing as a male sailor); J. Grahn, Another Mother Tongue 82, 96, 120 (1984) (connecting lesbian and gay crossdressing to ancient and tribal ceremonies); J. Nestle, supra note 51; Newton, The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman, 9 Signs 557 (1984); Archer, This Great Drama 35 Sinister Wisdom 86 (1988) (discussion of two women who passed as men, a slave who passed as a white man to escape to Philadelphia and a white woman who passed as a mulatto soldier, contained in an issue devoted to the subject of “passing”).
76. Transvestism, supra note 75, at 80. See also Surpassing, supra note 34, at 51-53.
dressing. I think such incidents are important. I also do not think they can be explained purely in terms of “usurping of the male role,” for as has been pointed out, crossdressing was not always punished.77

I do not mean, however, to disparage our efforts to consider the meaning of prohibitions, punishments or pronouncements about crossdressing, lesbian sexuality or any other facet of lesbian existence. I believe feminist theories of gender and power are quite appropriate in this context. Feminist insights into the relationship between Anglo European legal history and lesbianism abound, but I think one of the best expressions is by lesbian writer Jane Rule:

If love between men were also being considered, much more information could be used, but it would be a distortion of history to suggest that laws clearly made for men also applied to women. Women have lived not so much outside the law as beneath it. Men invented structures of justice for themselves while preserving rights of ownership over women and children, which varied from place to place as much as property rights do. Since disciplining of women was left to the individual men who owned them, there is no clear record what offenses were punishable by death or divorce, though adultery and barrenness seem to have been the greatest irritants. At those times when women have been specifically included in the public law, often the penalties have been less severe than those for men, a distinction which may reflect men’s protective sympathy for women or their low opinion of women’s moral nature or the lesser seriousness of women’s behavior.78

To a great extent, I agree with Jane Rule. But I also think Rule might agree with my following claim as a basis of lesbian legal history.

I think we need to question all sublimations of lesbianism into dual-gendered theories where feminism is women defined vis-à-vis men. I also think we need to question all comparisons of lesbianism with male homosexuality, especially where the results make men the “measure of all things” and make women’s experience “invisible” or “less” or “pale.” I think we need to ask whether even a single lesbian was punished for her love for another woman (any other woman, including herself). And I suggest that if even one woman was executed for being a lesbian, if even one woman was banished or pilloried or flogged or incarcerated, then that is not incidental. It is not incidental even if that one lesbian was illiterate or dark-skinned or lower class. It is worth recognizing even if the “crime” of that one lesbian was prostitution or transvestism or lewdness. The punishment of one lesbian is not trivial or isolated or pale. It is a matter

77. See, e.g., SURPASSING, supra note 34, at 54-5 (describing women of “wealth and influence” or “eccentricity” or known as “characters” who could “remain untouched by law”).
of great import. It is not less than the loss of a great woman artist; not less than the discovery of one.

I offer the following chronological findings in that spirit. I am not arguing that Anglo-European legal history has been preoccupied with lesbianism, or that it has unremittingly devoted its considerable energies over the centuries to eradicating lesbianism. I am making a claim that lesbianism might not so cavalierly and categorically be relegated to extra-legal status. I am also making the more radical claim that based upon even one of the following findings, there is an Anglo-European legal history of lesbianism. And that history is not necessarily benign.

II. THE HISTORICAL FINDINGS

A. Ancient Greece and Rome; The Old and New Testaments

Ancient Greece, home of Sappho, apparently accepted lesbian relations. However, in Plato's pragmatic jurisprudence, Laws, it is stated:

Whether these matters are to be regarded as sport, or as earnest, we must not forget that this pleasure is held to have been granted by nature to male and female when conjoined for the work of procreation; the crime of male with male, or female with female, is an outrage on nature and a capital surrender to lust of pleasure.\(^79\)

For Plato then, lesbian sexuality is unnatural and therefore to be prohibited.

In Roman civilization, one commentator states that if a lesbian was found to have engaged in any sexual activity (even mutual caressing) with another woman and had not produced the requisite number of children she was accused of adultery and could be tried as an adulteress. "Elder Seneca suggested that any woman married


Plato's Laws is a pragmatic jurisprudence, especially as contrasted with Plato's more inspirational dialogue, The Republic. As one noted Plato scholar opines:

For whoever disregards the laws would throw matters only into a worse state than that which the written has seem to have brought about. After all, laws are the precipitation on the much experience, and good counselors urged people to write them down. Laws are "copies of the truth" (Greek phrase omitted). Strictest observance of the laws is the "second best journey" (Greek phrase omitted), when the best is impossible. If ignorant people presume to live without a law, this would truly be a bad copy of that pure wisdom which, in the ideal state, would make written law superfluous. Here the contrast between the two greatest Platonic writings on the state becomes apparent: the Republic constructs the kind of state in which true wisdom prevails and which, therefore, does not need laws; the Laws, proceeding along a "second way," since the first, the way "for gods and sons of gods," cannot be realized, is designed to preserve the structure of this second best state through the strictest rules.

to a man who was caught in the act of commission or participating in a lesbian sexual expression [sic] be put to death as a just penalty for her crime."80 Thus, the death penalty for lesbian sexual acts was the same as for heterosexual acts: a husband could kill the offending parties without legal difficulties. However, this same commentator notes that "lesbianism was excused by general Roman populace as being the result of drunkenness."81 An influential poet argued that Roman lesbians should lose their property and possibly their lives.82

Early Greek and Roman proclamations are interesting, but as another commentator notes, "though Roman legislation on the subject of homosexuality probably dates from as early as the third century B.C., it is the imperial legislation of Christian Rome that has most influenced modern western attitudes."83 The sixth century encyclopedic collection of Roman law, Corpus juris civilis, served as basis for canon law (the law of the Christian church) and civil law (both European and English), and stated that "those guilty of either adultery or giving themselves up to 'works of lewdness with their own sex' were to receive the death penalty."84 Many ecclesiastical jurists of the Middle Ages revived and researched Roman law, including Cino da Pistoia, who interpreted an early Roman edict prohibiting certain sexual transgressions to include "when a woman suffers defilement in surrendering to another woman."85

Christian Rome derived much of its law from Biblical sources. There is apparently no mention of lesbianism in the Old Testament, only the prohibition against witchcraft86 and crossdressing.87 In the

80. A. Ide, supra note 51, at 49 (1985) citing The Elder Seneca 1.2.23.
81. A. Ide, supra note 51, at 50. The author notes that the fear of women drinking and its accompanying problem of lesbianism led to a "general blood bath" in which thousand of women (and men) were sentenced to death for participating in Bacchic rites. The women were handed over to male relatives to be put to death privately while the men were executed publicly. Id. at 50-2.
82. Id. at 62, citing Martial 7.67, 70.
83. V. Bullough, supra note 7, at 31-32.
84. Id.
85. See infra notes 101-106 and accompanying text.
86. The precise meaning of the prohibition against witchcraft is interesting to consider in light of its sexual context:
16. And if a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife.
17. If she father utterly refuse to give her unto him, he shall pay money according to the dowry of virgins.
18. Thou shalt not suffer a witch to live.
19. Whosoever lieth with a beast shall be put to death.
Exodus 22:16-19. Compare Deuteronomy 18:9-12 (describing as an abomination any one who uses divination, or an observer of times, or enchanter, or witch, or charmer, or wizard).
For a further discussion of the connection between lesbian sexuality and witchcraft, see infra notes 158-172 and accompanying text.
87. "A woman shall not wear that which pertaineth unto a man, neither
New Testament, Paul’s Epistle as textualized in Romans 1:26 provides the basis for the condemnation of lesbian sexuality. While the Biblical passage is rather enigmatic, referring to women changing the natural into the unnatural, early Christian commentators unequivocally interpreted the passage as a condemnation of lesbianism. St. Ambrose (d. 397), for example, stated that “God being angry with the human race because of their idolatry, it came about that a woman would desire a woman for the use of foul lust.” Another influential Christian theologian, St. John Chrysostom (d. 407), preaching on Romans 1:26 at Antioch about 390 A.D., paraphrased the passage by declaring that, in Paul’s day, “even women again abused women, and not men only,” and added that “it is even more shameful that the women should seek this type of intercourse, since they ought to have more modesty than men.” In the seventh and eight centuries, lesbian sexual acts are specifically identified as sins, and therefore subject to punishment.

B. The Middle Ages

The Christian legal tradition continued to accept the Pauline proscription against lesbian sexuality. Gratian’s Decretum (1140) incorporated a passage from the Contra Jovinianam ascribed to Augustine:

Acts contrary to nature are in truth always illicit, and without a doubt more shameful and foul, which use the Holy Apostle has condemned both in women and in men, meaning them to be understood as more damnable than if they had sinned through the

shall a man put on a woman’s garment, for all that do so are abomination unto the Lord thy God.” Deuteronomy 22:5.

88. “God gave them up into vile affections: for even their women did change the natural use into that which is against nature.” Romans 1:26.

89. Crompton, supra note 21, at 14, citing 1567 text. See also J. Brown, supra note 34, at 6. (St. Ambrose translated Romans 1:26 to mean relations between women because “He (Paul) testifies that, God being angry with the human race because of their idolatry, it came about that a woman would desire a woman for the use of foul lust”).

90. Crompton, supra note 21, at 14.

91. St. John Chrysostom, In Epistolam ad Romanos, the full text of the fourth homily is translated and reproduced in J. Boswell, Christianity, Social Tolerance and Homosexuality 359-62 (1980). See also J. Brown, supra note 34, at 6.

92. The early penitential (manuals of penance) listed lesbianism in the catalogue of sins, including those of Theodore of Tarsus, the seventh century Archbishop of Canterbury, see D. Bailey, Homosexuality and the Western Christian Tradition 102 n.9 (1955) and accompanying text; J. Brown, supra note 34, at 167 n.10; Crompton, supra note 21, at 14; H.M. Hyde, The Love That Dared Not Speak Its Name 31 (1970); those of 8th century Pope Gregory III, see J. Brown, supra note 34, at 167 n.10; and those of the Venerable Bede, compiled before 734 A.D., see Crompton, supra note 21, at 14; D. Bailey, supra at 102 n.9, 10.

93. See Crompton supra note 21, at 14 (“an extensive search through early commentaries has as yet yielded no examples of commentators who read the passage [Romans I:26:27] in other than a lesbian sense.”).
natural use by adultery or fornication.\textsuperscript{94}

St. Anselm (1033-1109) and Peter Abelard (1079-1142) both glossed and reinforced Pauline doctrine condemning lesbian sexuality.\textsuperscript{95} St. Albertus Magnus (1206-1280) included female sodomy among the worst sexual sins.\textsuperscript{96} St. Thomas Aquinas (1225-1274), in the influential \textit{Summa Theologia}, adopted the view that lesbianism is included in the vice of sodomy by specifying both male with male and female with female acts as included in the vice \textit{concupitus ad non debitum sexum}.\textsuperscript{97} The Penintentials continued to proscribe lesbian sexuality.\textsuperscript{98}

Canon law and Catholic moral theology had a very considerable influence in shaping medieval secular law; some Carolingian Kings actually promulgated the canons of various church councils as laws of the realm.\textsuperscript{99} One of the most infamous secular laws against lesbian sexual activity is found in the 1260 Code, \textit{Li Livres di justice et de plet}, for the district of Orleans, France, which provided:

22. He who has been proved to be a sodomite must lose his testicles. And if he does it a second time, he must lose his member. And if he does it a third time, he must be burned.

23. A woman who does this shall lose her member each time, and on the third must be burned. (Feme qui le fet doit a chescune foiz perde membre er la tierce doit estre arsse.)\textsuperscript{100}

Secular jurists during this period also relied upon Roman law to

\textsuperscript{94} Crompton, \textit{supra} note 21, at 14.

\textsuperscript{95} Id. "Writing at the beginning of the twelfth century, St. Anselm of Canterbury explained Paul's sentence [in Romans 1:26]: "Thus women changed their natural use into that which is against nature, because the women themselves committed shameful deeds with women." A few years later Peter Abelard glossed Paul's reference to women's acts against nature even more forcefully: "Against nature, that is, against the order of nature, which created women's genitals for the use of men and conversely, and not so women could cohabit with women." (citations omitted). See also J. Brown, \textit{supra} note 34, at 6.

\textsuperscript{96} 

\textsuperscript{97} See D. Bailey, \textit{supra} note 92, at 116. See also J. Brown, \textit{supra} 34, at 7 (St. Thomas Aquinas's \textit{Summa theologia}, "the most widely influential book to guide Christian thought on the subject" subsumed four categories under Lust of vice against nature including "copulation with an undue sex, male with male and female with female"); Crompton, \textit{supra} note 21, at 15 ("Thus Aquinas set his seal on the received interpretation of Paul and placed lesbianism unequivocally in the same moral category with male relations.").

\textsuperscript{98} See D. Bailey \textit{supra} note 92, at 160 ("The Penitential punish tribadism, including the use of an artificial phallus; councils at Paris at 1212 and at Rouen in 1214 prohibit nuns from sleeping together); J. Brown \textit{supra} note 34, at 7-8 (Archbishop of Florence, St. Antonius (1363-1451) included lesbianism as 8th of 9 lustful sins; St. Charles Borromeo's penitential, written in late 16th century provided that "If a woman fornicates with herself or with another woman she will do 2 yrs penance").

\textsuperscript{99} Crompton, \textit{supra} note 21, at 15, citing V. Bullough, \textit{supra} note 96, at 353.

\textsuperscript{100} Crompton, \textit{supra} note 21, at 13; D. Bailey, \textit{supra} note 96, at 142;
criminalize lesbian sexuality. Two commentators of this school were regularly cited by later authorities to justify the punishment of lesbians. Cino da Pistoia, in his *Commentary* on the Code of Justinian which he published in 1314, interpreted an imperial edict of 287 A.D. as referring to lesbianism.¹⁰¹ Bartholomacu de Saliceto in his *Lectures* of 1400 refers to an earlier gloss on the *lex foedissimam* (which may well be Cino's) in applying the law to the defilement of women by women, and prescribes the death penalty.¹⁰² Saliceto's glosses on these edicts remained standard references until the eighteenth century.¹⁰³

Since, according to Roman tradition, the opinions of eminent jurists often had the force of law, it would have been possible by using these dicta, to argue for the death penalty for lesbianism even in parts of the continent with no national or local legislation.¹⁰⁴ In Italy, for example, the influence of Roman Law was all-pervasive. In Spain, the *Partidas* were largely based on Roman law. In France, the kings fostered the revival of Roman law. Even in Germany, after 1500, and Scotland after 1600, Roman law enjoyed remarkable if belated triumphs.¹⁰⁵ Thus, throughout Europe, "lawyers trained in Roman law and imbued with Levitical-Pauline principles were encouraged to write provisions for the killing of lesbians into the civic, regional, and imperial codes they drafted during the late Middle Ages and the Renaissance."¹⁰⁶

C. The Renaissance, The Enlightenment, and Lesbianism in Law

As an historical period, the Renaissance overlaps with the Middle Ages, but is generally dated at the fourteenth through seventeenth centuries. The Enlightenment is generally dated at the eighteenth century, exemplified by patriarchal philosophers such as Locke. During these historical periods, religious and secular law remained intertwined, although there was a gradual movement toward separation.¹⁰⁷ Roman law also continued to be revitalized during the late medieval and Renaissance periods and with it the proscription against lesbianism. Generally, "In Europe before the French Revolution, however, notably in such countries as France, Spain, Italy, Germany, and Switzerland, lesbian acts were regarded as legally

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¹⁰¹ Crompton, *supra* note 21, at 15.
¹⁰² Id. at 16.
¹⁰³ Id.
¹⁰⁴ Id.
¹⁰⁶ Id.
¹⁰⁷ "In the 16th century . . . much of the moral legislation which had been under the control of the medieval Church came to be a prerogative of the state. Sexual activity in general and homosexuality in particular became a matter of civil legislation." V. Bullough, *supra* note 7, at 34.
equivalent to acts of sodomy and were like them, punishable by the death penalty.”

During the Renaissance and Enlightenment, the proscriptions against lesbian sexuality relinquish some of their vagueness. In the Holy Roman Empire under Emperor Charles V (1591-1556), the Constitution explicitly states that an impurity of “a woman with a woman” merits a sentence of death by burning.109 A small town near Venice, Italy adopted a statute in 1574 which proscribed sexual relations of “a woman with a woman if they are twelve or more” mandating the punishment that “she shall be fastened naked to a stake in the street of Locusts and shall remain there all day and night under a reliable guard and the following day shall be burned outside the city.”110 Lodovico Maria SinistrariK, a Franciscan, attempted to codify punishment for sodomy in Peccatum Mutum (1700), but only defined sodomy as the use of an enlarged clitoris to penetrate another woman and prescribed the appropriate punishment as torture on the rack.111

In Spain, lesbianism is distinctively stated to be a capital crime.112 This gloss on Spanish law is further glossed by another jurist, Antonio Gomez (1501-?) who, like the Italian jurist Prospero Farinacci (Farinaccius, 1554-1618), demarcates appropriate punishments depending on the sexual activities.113 These distinctions had great influence on later theologians and lawmakers. Gomez “felt that burning should be mandatory only in cases in which a woman has relations with another woman by means of any material instrument.”114 If a “woman has relations with another woman without an instrument” then her punishment was arbitrary: she might for example, be beaten as delinquent women were in Granada.115 Similarly, in Italy, Farinaccius decreed that if a woman behaved “like a

108. Crompton, supra note 21, at 11.


110. Crompton, supra note 21, at 18. See also J. Brown, supra note 34, at 14, citing Crompton.

111. Surpassing supra note 34, at 35, 418 n.13. Presumption of this type of lesbian activity if two women were accused of sleeping together and upon physical examination one has what is considered a “sufficiently large clitoris” and the women have known to lay with one another. Id.

112. In Spain, Gregorio Lopez’ mid sixteenth century gloss on the country’s basic law code, Las Siete Partidas (1256), reflected this hardening stance by extended the death penalty to women: “Women sinning in this way are punished by burning according to the law of their Catholic Majesties which orders such a penalty, especially since the sail law is not restricted to men, but refers to any person of whatever condition who has unnatural intercourse.” J. Brown, supra note 34, at 14 citing Las Siete Partidas Del Sabio Rey Don Alonso el Nono, Nuevamente Glosadas por el Licenciado Gregorio Lopez 17 (Salamanca 1829-31; reprint of 1565 ed.).

113. Surpassing, supra note 34, at 36, 419 n.14.

114. Id.; J. Brown, supra note 34, at 165-6 n.5; Crompton, supra note 21, at 17.

115. Crompton, supra note 21, at 19.
man with another woman she will be in danger of the penalties for sodomy and death." However, if a woman only made overtures, she is to be publicly denounced; if she "behaves corruptly with another woman only by rubbing," she is to be unspecifiedly "punished." If she "introduces some wooden or glass instrument into the belly of another," she is to be put to death. The Portuguese extended their death penalty to Brazil in 1521, broadening it to include lesbian acts in 1602.

While there is a certain explicitness to legal texts concerning lesbian sexuality, the commitment to silence remained entrenched. For example, a fifteenth century rector Jean Gerson relied upon Aquinas to conclude that lesbianism was a crime against nature, but described it as a sin in which "women have each other by detestable and horrible means which should not be named or written." This silence extended to secular authorities. Germain Colladon, a famous sixteenth century jurist, advised Genevan authorities who had no prior experience with lesbian crimes that the death sentence should be read publicly but that the customary description of the crime should be omitted: "A crime so horrible and against nature is so detestable and because of the horror of it, it cannot be named." Thus, when a lesbian was drowned for her crime in 1568, Colladon stated "that it is not necessary to describe minutely the circumstances of such a case, but only to say that it's for the detestable crime of unnatural fornication." Her official sentence dwells on blasphemy and fornication, adding that she had also committed "a detestable and unnatural crime, which is so ugly that, from horror, it is not named here." Thus, it might very well be possible that more women were punished for lesbian sexual acts but their crimes were unnamed or misnamed in official records.

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117. D. Greenburg, supra note 34, at 304.
118. J. Brown, supra note 34, at 7, 19.
120. Apparently the usual punishment was burning. Colladon had argued that lesbianism equalled sodomy, "Such a detestable and unnatural case deserves the punishment of death by fire, according to imperial law." Colladon was referring to the Carolina the revised code of 1532 which made both male and female homosexuality capital crimes. See Monter, supra note 119, at 48. Punishment by drowning for lesbianism is also reported in Germany, see infra note 127, and accompanying test.
121. Monter, supra note 119, at 48 n.22, appendix I listing this crime, Series of Proces Criminels at Archives d'Etat, Geneva, also listing a "protestant lesbian burned as a witch at Neuchatel in 1623." 60 Archives de l'Etat, Neuchatel 765-70 (Criminal Trials, 1535-1667).
122. See also V. Bullough, supra note 7, at 33 citing St. Antonino, Confessionale 57-58 (1514). ("Generally there was a reluctance to spell out in any detail what was meant by sodomy lest people get ideas about how to engage in forbidden activ-
Nevertheless, throughout Europe during the Renaissance and Enlightenment, there are references to executions and other punishments of women for lesbian sexual acts and cross dressing. In Spain, two nuns were burned for using “material instruments.” In France, a transvestite was burned in 1536 for “counterfeit[ing] the office of husband,” a case of lesbian sexuality was brought before the parliament of Toulouse in 1553 and another in 1555, and two other women were tried and tortured but eventually acquitted for insufficient evidence. In Germany, a girl was drowned at Speier in 1477 for “lesbian love.” In Italy, a woman was hanged in 1580 for “engaging in a lesbian love affair.”

Most of the above cases are preserved through accident. For example, the last mentioned, the hanging in Italy, is recorded in Montaigne’s diary. One of the best documented cases, that of a lesbian nun in Renaissance Italy was found “by chance, while leafing through an inventory of nearly forgotten documents in the State Archive in Florence.” The researcher was drawn to the document because it was related to a town about which she was writing, and to its title: “Papers relating to a trial against Sister Bendedetta Carlini of Vellano, abbess of the Theatine nuns of Pescia, who pretended to be a mystic, but who was discovered to be a woman of ill repute.”

According to the papers discovered by the researcher, while Bendedetta Carlini’s claim to mystical status was under investigation, her “special companion during the previous years” testified that for the last two years, at least three times a week,

Benedetta would grab her by the arm and throw her by force on the bed. Embracing her, she would put her under herself and kissing her as if she were a man, she would speak words of love to her. And she would stir on top of her so much that both of them corrupted themselves.

The special companion, Bartolemea, also testified in some detail concerning the lack of material instruments (important for punishment purposes), and Bendedetta’s kissing of her breasts and their

ity. Sodomy was never restricted to homosexual activity but rather included several different types of sexual conduct of ‘man with man, a woman with a woman, or a man with a woman outside of the fit vessel’; infra notes 171, 172 and accompanying text.

123. Crompton, supra note 21, at 17.
124. Id. at 17; Surpassing, supra note 34, at 51.
125. J. Brown, supra note 34, at 6, 165 n.5.
126. Crompton, supra note 34, at 17.
127. Id.
128. J. Brown, supra note 34, at 165 n.5.
129. Crompton, supra note 21, at 17.
130. J. Brown, supra note 34, at 3.
131. Id. at 3-4.
132. Id. at 117.
mutual masturbation.\textsuperscript{133} Perhaps because Bartolemea's account emphasized that she acted under duress, she may have escaped punishment.\textsuperscript{134} Sister Benedetta Carlini spent the rest of her life, thirty-five years, in prison.\textsuperscript{135}

A well-documented secular trial is the previously discussed\textsuperscript{136} trial of Linck in Germany in 1721. This trial resulted in the execution of Linck and a sentence of imprisonment and banishment for her lover. The trial records were apparently located by a nineteenth-century researcher.

Secular trials of lesbians in the Netherlands have been discovered by Dutch historians researching female transvestism as a "by product of our more regular historical research."\textsuperscript{137} Restricted in scope, their research is a study of 119 cases of women who dressed as men in the Netherlands between 1550 and 1839, mostly through criminal records, judicial archives and maritime records. The authors posit that cases of cross dressing were treated very differently when the woman had a relationship with another woman; such women were suspected of sodomy or tribady which was a capital offense.\textsuperscript{138}

For example, in 1606, Maeyken Joosten was tried for sodomy. Joosten had been married for thirteen years and had four children when she fell in love with Bertelmina Wale. Joosten left her husband, traveled to Zeeland and returned to Leiden dressed as a man. The two women were married in March and they had "sexual contact." By November, Joosten was on trial for sodomy. "The death penalty was demanded but the penalty was exile for life."\textsuperscript{139}

In a later trial, Dutch jurists continued their disinclination to impose the death penalty, but only after serious consideration. In

\textsuperscript{133} Id. at 120.
\textsuperscript{134} Id. at 135. The knowledge about the punishment comes from the diary of an anonymous nun.
\textsuperscript{135} Id. at 136. What prison life was like, we can well imagine from a variety of sources. "No sister in prison must be spoken to by any nun, save those who act as her wardens," St. Theresa commanded. "Nor must they send her anything under paid of suffering the same penalty." A sister in prison should have her veil and scapular taken away. She should be let out only to hear mass and to follow the other nuns to where they disciplined themselves with their whips. On those days she might be allowed to eat on the floor of the refectory, near the door, so that others might step over her as they left the room. Several times a week she should receive only bread and water for sustenance.

\textit{Id.} (footnotes omitted).
\textsuperscript{136} See \textit{supra} notes 67-72 and accompanying text.
\textsuperscript{137} Transvestism \textit{supra} note 75, at xi.
\textsuperscript{138} Id. at 4, 77-78. See also, D. Greenburg, \textit{supra} note 34, at 313. ("two women were flogged and banished for lesbianism and transvestism" between 1533-1700 in Leiden). The Greenburg estimate is clearly low, and Greenburg admits he was "not able to examine Dekker and Van de Pol." \textit{Id.} at n.75.
\textsuperscript{139} D. Greenburg, \textit{supra} note 34, at 313.
1641, Hendrickje Lamberts van der Shuyr\(^1\) and Trijntje Barents stood trial for sodomy. They had begun their affair as two women, but later one began dressing as a man. Both women were tried and found guilty. The ultimate sentence was whipping for both, twenty five years exile from the city for Hendrickje Lamberts van der Shuyr, and to enforce separation, Trijntje was forced to remain in the city.\(^2\)

In yet another Dutch case, which the authors describe as "a clear example of a lesbian relationship which drew attention to itself unnecessarily,"\(^3\) two women married officially by one of them cross dressing, but two years later they both dressed in women's garments. They stood trial in Leiden in 1688 and were given the "rather light" punishment of 12 years exile and a prohibition against their living together again.\(^4\)

Also in the 1600's, Barbara Adrianes adopted a male persona, married a woman who revealed her husband's gender during an argument at an Inn. Barbara was then "made sport of and treated roughly by the by-standers" and sentenced to twenty four years of exile from the city of Amsterdam.\(^5\) While in exile, Barbara Adrianes apparently cross dressed, married, and appeared in court again.\(^6\)

Finally, in another well documented case, Maria van Antwerpen was tried in 1769 for "gross and excessive fraud in changing her name and quality and mocking holy and human laws concerning marriage." She had previously been tried for these same offenses in 1751. She was banished both times.\(^7\)

Because of the conflation of cross-dressing and lesbianism in the previous Dutch records, the authors date 1792\(^8\) as the beginning of the Dutch public and police recognition of lesbianism in a noncrossdressing context.\(^9\) This choice of date is predicated on a murder trial in which two women were arrested for murdering a third in what might be termed a lesbian love triangle. "This sensational case was followed by some ten other arrests of women in Am-

\(^1\)supra note 75, at 52-53.
\(^2\)Id.
\(^3\)Id. at 59.
\(^4\)Id. at 59-60.
\(^5\)Id. at 61-2.
\(^6\)Id. at 62.
\(^7\)Id. at 1-4.
\(^8\)See D. GREENBERG, supra note 34, at 321 n.127.
\(^9\)Transvestism, supra note 75, at 70.
sterdam in the next six years, who were accused of dirty caresses of one another. The accused were all very poor, marginal women.”

This connection between criminal sanctions for lesbian sexuality and class needs further exploration, in a context of class consciousness without class bias.

D. The Confluence of Christian and Secular Laws in Witchcraft

A discussion of lesbianism in Anglo-European legal history would be incomplete without a reference to witchcraft, which also must be subjected to a rigorous class analysis. For centuries, sec-

149. Id. citing T. van der Meer, *Liefkozeryen en Vuyligheeden*, Groniek 12 (1980). The authors also note that among their 119 cases of cross dressing, “As far as we know, practically all our disguised women came from the lower classes.” Id. at 11.

Also citing van der Meer, another scholar states that there were five court cases involving twelve women in Amsterdam between 1792 and 1798 accused of “foul sodomitical behavior” and also notes that “practically all of these women were from the lowest social strata—street vendors, prostitutes, women with no sure means of support.” Everard, supra note 12, at 123, 127. Again citing van der Meer, another author notes, “Of the eleven women prosecuted for ‘dirty acts’ with one another in Amsterdam 1795-97, only one was affluent and married. The others were peddlers, collectors of dry wood, or prostitutes.” D. Greenberg, supra note 34, at 321 n.126.

150. As the authors of *Transvestism* supra note 75, at 58, note: Lillian Faderman described exalted; but nonsexual friendships between women from the middle and upper classes, which were quite usual since the Renaissance. In Dutch literary history there is a famous example of such a friendship between the eighteenth century writers Betje Wolff and Aagje Deken. Their life long relationship was close enough to be called love, and a recent biographer has classified it as lesbian, although it was certainly not expressed sexually.

Lower-class women had a means of dealing with sexual feelings for another woman by the tradition of cross-dressing, whereby women took up lives as men. Once transformed into a man, one’s sexual feelings fell into place. The fact that some women who fell in love with other women transformed themselves into men and even officially married should not be seen as an unnecessarily risky sort of deception, but rather as a consequence of, on the one hand, the absence of a social role for lesbians and the existence of, on the other hand, a tradition of women in men’s clothing.

The implications of such passages are disturbing. First, the implication is that middle and upper class women “certainly” do not engage in sexual expression. Second, the implication is that lower class women necessarily engage in such expression. Third, the economics of the situation are ignored; earning a living disguised as a man was much easier than as a woman and quite distinct from any placing of sexual feelings.

Further, although in this passage the authors warn against judging crossdressing lesbians as being unnecessarily risky, their own judgment of two women tried in 1688 as a “clear example of a lesbian relationship that drew attention to itself unnecessarily,” ignores its own advice. Id. at 59. See supra note 142, and accompanying text.

151. Arthur Evans, in *Witchcraft and the Gay Counterculture* 42-9, 61 (1978) engages in some class analysis concerning the persecution of “the surviving
ular and religious legal institutions combined their considerable powers for the purpose of legally eradicating witchcraft by punishing its practitioners. Although there are many explanations for this legal phenomenon, most authorities agree that the accused practitioners of witchcraft were predominantly women.\footnote{For example, Mary Daly posits that the witch trials served to “purify” society, and quotes one scholar as stating that the “trials served a function, delineating the social thresholds of eccentricity tolerable to society and registering of a fear of a socially indigestible group, unmarried women . . . . Until single women found a more comfortable place in the concepts and communities of Western men, one could argue that they were a socially disruptive element.” M. Daly, supra note 151, at 184 quoting H.C.E. Midelfort, Witch Hunting in Southwestern Germany, 1562-1684: The Social and Intellectual Foundations 3 (1972). Another contemporary scholar approaches the situation from an opposite direction: The plagues and famines, with their concomitant shifts in population distribution—the countryside being in some measure abandoned for the prosperous towns—may have put women in a peculiarly difficult position. Women tend to outlive men; often the old or even middle-aged mother, aunt or grandmother may have been left at home and alone in the village while the family went off to town to get better work. Perhaps the plague had carried off most of her contemporaries, increasing her sense of isolation and bitterness. Reliable demographic statistics are lacking, but men may conceivably have suffered greater mortality in the plagues, increasing the number of women that were left alone. If women did in fact feel particularly anomalous and helpless in the changing society of the fourteenth and fifteenth centuries, they might well have tended more readily to participate in the antisocial frenzies of the dancers or the rites of the witches. J.B. Russell, Witchcraft in the Middle Ages 202 (1972) [footnote omitted].\} The accused
were stereotypically women who were somehow not encompassed by male authority. This stereotypical definition resonates with at least some of the modern definitions of lesbians. Witchcraft is also linked with heresy, an accusation often lodged against males, and linked with sodomitical practices.

Although often casually referred to as the “witchcraze,” the legal dimensions of the phenomenon must be remembered in any discussion of the witch persecutions. While the prosecution of women for witchcraft has many elements that moderns might consider extra-rational or extra-legal, the proceedings often strived for rationality and legality. For example, this passage from the infamous “witch manual” the Malleus Maleficarum, might sound familiar to law students of evidence:

But if it is asked whether the Judge can admit the mortal enemies of the prisoner to give evidence against him in such a case, we answer that he cannot; for the same chapter of the Cannon says: You must not understand that in this kind of charge a mortal personal enemy may be admitted to give evidence. Henry of Segusio also makes this quite clear. But it is mortal enemies that are spoken of; and it is to be noted that a witness is not necessarily to be disqualified because of every sort of enmity. And a mortal enmity is constituted by the following circumstance: when there is a death feud or vendetta between the parties, or when there has been an attempted homicide, or some serious wound or injury which manifestly shows that there is mortal hatred on the part of the witness against the prisoner. And in such a case it is presumed that, just as the witness has tried to inflict temporal death on the prisoner by wounding him, so he will also be willing to effect his


153. See infra note 167. Additionally, the Malleus Maleficarum provides metaphorical support for the proposition that witches were women who disrespected male power. According to this influential tract, witches were able to “deprive” a man of his “virile member,” not by actual castration or any material change, but by deluding the man and confusing his interior and exterior senses. Documentary, supra note 152, at 145-7.

154. For example, a lesbian is a woman during MALE-FUNKTALIZATION did not lose all of her Ovarian intellect; that is her body rejected some of the maleness imposed on her by the patriarchy, leaving her with enough female principle to love the female in her and other women. She is out of line; she is a woman of resistance; she is fighting against the cop inside her. What will patriarchy do to control her now?

Tudee', The Agent Within, in For Lesbians Only: A Separatist Anthology (S.L. Hoagland and J. Penelope, eds. 1988).

155. But see infra notes 162-167, and accompanying text (discussing Joan of Arc).

156. See, e.g., Monter, supra note 119; Bullough, Heresy, Witchcraft and Sexuality, 1 J. of Homosexuality 183 (1974).
object by accusing him of heresy, and just as he wished to take away his life, so would he be willing to take away his good name. Therefore the evidence of such mortal enemies is justly disqualified.

But there are other serious degrees of enmity (for women are easily provoked to hatred), which need not totally disqualify a witness, although they render his evidence very doubtful, so that full credence cannot be placed in his words unless they are substantiated by independent proofs, and other witnesses supply an indubitable proof of them.\footnote{157}

The legalism of the witch prosecutions, however unpleasant, should not be eradicated from Anglo-European legal history.

Similarly, the connections between lesbian sexuality and witchcraft should not be obscured in legal history. These connections are both sociological (the stereotype of witches as women living independent of men) and legal (evidence of lesbian sexuality considered as evidence of the crime of witchcraft).\footnote{158} The association of male and female homosexuality with witchcraft is documented in a 1460 tract which appeared during the trial of accused witches in France:

Sometimes indeed indescribable outrages are perpetrated in exchanging women, by order of the presiding devil, by passing on a woman to other women and a man to other men, an abuse against the nature of women by both parties and similarly against the nature of men, or by a woman with a man outside the regular orifice and in another orifice.\footnote{159}

Earlier accounts of the orgies so plentiful in witchcraft accounts also include mentions of homosexuality and bisexuality.\footnote{160} Apparently, the phrase "\textit{femina cum feminus}" was common place in witch trials.\footnote{161}

One of the most famous trials was that of Joan of Arc, charged

\footnote{157} Malleus Maleficarum Part II, reprinted in DOCUMENTARY, supra note 152, at 154-55 (1972).

\footnote{158} Cf. Fed. R. Evid. 602 (testimony of interested persons); Fed. R. Evid. 608 (impeachment on the grounds of bias).

\footnote{159} A. EVANS, supra note 151, at 76 citing R. ROBBINS, ENCYCLOPEDIA OF WITCHCRAFT AND DEMONOLOGY 468 (1959).

\footnote{160} See, e.g., J.B. RUSSELL, supra note 152, noting that an 1114 account of witchcraft first mentions the allegation of homosexuality which became commonplace in later trials \textit{vir cum viris and femina cum feminus}; \textit{id.} at 94-95; discussing the fifteenth century theorist Tinctor who specified that the orgies of the witches were homosexual, \textit{id.} at 239, but nevertheless concluding that "homosexuality was not a deviation ordinarily alleged against the witches," \textit{id.}; at 219; and that "homosexuality, a common charge against the Catharists, was less commonly associated with the witches, whose lechery was directed by the ancient tradition of incubi and succubi in a healthy, natural fashion toward demons of the opposite sex," \textit{id.} at 239.

\footnote{161} \textit{Id.} at 95.
with heresy and witchcraft. At sixteen, Joan of Arc refused, against her father’s wishes, to marry and she was sued by her “betrothed” for breach of contract (promise to marry), defended herself in court and prevailed. During her later successful career as a soldier, Joan’s transvestism, her wearing of male attire including armor, was laudable and served to protect her. After her capture, the Inquisition focused on her male attire as proof of criminality. The judges also inquired into Joan’s relationships with other women, including the woman who Joan lived with after she left her parents and another woman with whom Joan admitted to sleeping with for two nights.

Joan of Arc’s lesbianism remains an unsolved historical inquiry. Certainly, she adopted male attire. Supposedly, she had relationships with women. Interestingly, she experienced her spirituality in a manner which might be termed lesbian. Whatever

162. There were originally 70 charges against Joan of Arc; these were shortened to 12. A. Dworkin, Intercourse 90 (1987).
163. Id. at 86.
164. As witchcraft historian Arthur Evans notes: In the summer of 1424, Joan had left her parents against their will and went to live with another woman, La Rousse (“The Red”), who lived in Neufchateau. La Rousse, it turns out, was an innkeeper, which is interesting since inns in the middle ages were often brothels. In article eight, the judges accused Joan of hanging out with prostitutes: “Toward her twentieth year, Jeanne of her own wish, and without the permission of her father and mother, went to Neufchateau, in Lorraine, and was in service for some time, at the house of a woman, an innkeeper named La Rousse, where lived women of evil life, and where soldiers were accustomed to lodge in great numbers. During her stay in the inn, Jeanne sometimes stayed with these evil women” [citing T. Douglas Murray, Jeanne D'Arc 344 (1902)].

The judges also questioned Joan about her relationship with another woman, Catherine de la Rochelle. Joan admitted to the judges that she had slept in the same bed with Catherine on two successive nights, but that her reason for doing so was religious. Joan claimed that Catherine told her she often had visions of “a lady” at night, and Joan said she wanted to see this lady too. Whatever her reason, Joan admitted to sleeping twice with Catherine [citing The Trial of Joan of Arc 97 (trans. W.S. Scott 1956)].

A. Evans, supra note 151, at 6.

165. The question of whether Joan of Arc was a “woman-identified-woman” is an interesting one. The temptation, I think, is to conceptualize her as “male-identified” based upon her soldiering and adoption of what was then an exclusively male lifestyle. One remark supports at least a partial male-identification, or perhaps stated more accurately, a failure of female-compassion:

She had contempt for the women who followed the soldiers as consorts or prostitutes. She expressed this contempt in outright physical aggression against the women—physically chasing them away from the soldiers and, on at least one occasion, drawing a sword on a woman who was, of course, unarmed.

A. Dworkin, supra note 162, at 99.

166. Her two “special voices, guides and consolation, were St. Catherine of
one terms Joan of Arc, however, it is clear that her refusal to succumb to male authority resulted in her being burned at the stake.\footnote{167}

Other less documented trials than that of Joan of Arc include the Italian trial of Maria "la Medica," charged in 1480 for "having been a witch for fourteen years" during which time she regularly attended witches' assemblies, copulating with other witches.\footnote{168} Maria received the "unusually light punishment of life imprisonment."\footnote{169} In another later case in Ireland, Florence Newton was brought to trial in 1661 and accused of aggressively kissing and bewitching a young servant woman, Mary Longdon.\footnote{170} In 1582, witches in Avignon were condemned by the Inquisition for having committed "actual sodomy and the most unmentionable crime."\footnote{171}

The "unmentionable crime" and the vagueness of sodomy descriptions serve to obscure accusations of lesbian sexuality during the trials of the Inquisition. Yet, when we remember that the witch defendants were predominantly women, warnings by theologians and inquisitors that sodomy was a crime that leads to witchcraft or condemning the connection between sodomy and witchcraft,\footnote{172} should be understood, I think, as references to lesbian sexuality.

Alexandria and St. Margrate of Antioch." \textit{Id.} at 92. Both saints were virgins who were desired by male heads of state and having refusing the men were tortured and decapitated.

Asked if she had ever kissed or embraced Saint Catherine or Saint Margaret, She said she had embraced them both. Asked whether they smelt pleasant, She replied: Assuredly they did so. Asked whether in embracing them she felt warmth or anything else, She said she could not embrace them without feeling and touching them. Asked what part she embraced, whether the upper or the lower, She answered: It is more fitting to embrace them above than below.

\textit{Id.} at 94-5\textsuperscript{108} quoting \textit{The Trial of Joan of Arc Being the Verbatim Report of the Proceedings from the Orleans Manuscript} 127 (W.S. Scott trans. 1956).

\footnote{167} Rather than engaging in analysis of the "real" reason Joan of Arc was executed, I think is important to make connections between lesbian sexuality, crossdressing and paganism, all of which are threats to male authority. Arthur Evans explicitly notes Joan of Arc's relationship with women as constituting part of the charges against her, A. Evans, \textit{supra} note 151, at 6, and also makes an important connection between crossdressing and paganism:

For one thing, the emphasis on transvestism at Joan's trial is important because transvestism played a major role in the religion of Europe before Christianity. The historian Pennethorne Hughes put it this way: "The wearing of clothes appropriate to the opposite sex was always one of the rites of witchcraft, as it has been of primitive [sic] peoples, during their fertility festivals throughout the history of the world."


\footnote{168} J.B. Russell, \textit{supra} note 152, at 260 ("At the witches' assembly, there was habitually a feast followed by an orgy including both normal sexual acts and acts against nature. The witches copulated both with one another and with Lucibel.").

\footnote{169} \textit{Id.} at 261 [citations omitted].

\footnote{170} A. Evans, \textit{supra} note 151, at 77\textsuperscript{109} citing R. Robbins, \textit{supra} note 159 at 352-3.

\footnote{171} A. Evans, \textit{supra} note at 151, at 168.

\footnote{172} \textit{Id.}. 
E. Lesbians, the Law and the New World

While the Inquisitors subjugated lesbian expressions by prosecutions of witchcraft in Europe, the “Conquisitidors” and other European colonists were quelling the lesbian sexuality they found among the native peoples of the new world. The indigenous peoples of the Americas were not monolithic in culture or custom. There is mention of a respected tradition of lesbianism and male homosexuality among the tribal peoples;\(^173\) there is also mention of laws among the Aztecs and “pre-Conquest Mexicans” that mandate the death penalty for lesbianism.\(^174\) However, one commentator notes that “Gay people were often the first Indians killed and that even when tribes were tolerated by the white people, their Gay people were mocked and persecuted to the point of changing their behavior for the safety of their people.”\(^175\) One missionary details the

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\(^{173}\) The tradition is neither simplistic nor identical with modern lesbian identities. For an excellent discussion, see Allen, Lesbians in American Indian Cultures, 7 CONDITIONS 67 (1981), reprinted in A RETROSPECTIVE 16 CONDITIONS 84 (1989). In seeking to make analogies, Paula Gunn Allen notes:

It might be that some American Indian women could be seen as “dykes,” while some could be seen as “Lesbians,” if you think of “dyke” as one who bonds with women in order to further some Spirit and supernatural directive, and “Lesbian” as a woman who is emotionally and physically intimate with other women. (The two groups would not have been mutually exclusive.)

The “dyke” (we might also call her a “ceremonial Lesbian”) was likely to have been a medicine woman in a special sense.

\(^{174}\) See also GAY AMERICAN HISTORY, supra note 54, at 302-3, 304-11, 317-8, 320, 321-5, 327; J. GRAHN, supra note 74, at 49-72.

\(^{175}\) See also GAY AMERICAN HISTORY, supra note 54, at 283. Katz writes:

Gregorio Garcia, writing in 1604, says it was the law that those who committed the nefarious sin should die. The Indians of New Spain kept this law, without missing one point, and they executed it with great severity; they had the same penalty with the woman who laid down with another, because it was also against nature.

A work on Mexican native history (1698) says that the laws of pre-Conquest Mexicans declared that “the man who dressed like a woman, or the woman who dressed like a man were handed . . . .” (ellipses in original).
questions a priest should ask his Indian penitents during confession as including “woman with woman, have you acted as if you were a man?,”¹⁷⁶ and other missionaries likewise inquired into lesbian sexuality.¹⁷⁷

Like Catholic missionaries, the Protestants also sought to suppress lesbian sexual acts within their jurisdictions. In 1636, Reverend John Cotton prepared, upon request from the General Court of Massachusetts, legislation for the colony. Cotton included lesbianism, “woman with woman”, in his capital offense of sodomy, but this legislation was not adopted.¹⁷⁸ Soon thereafter, the Governor of Massachusetts Bay Colony wrote to Plymouth theologians requesting an opinion concerning “what sodomitical acts” were to be punished by death. At least one theologian, the Rev. Charles Chauncy, who later became president of Harvard University, included “women with women” as a capital offense.¹⁷⁹

The recorded punishments for lesbian sexual acts in Massachusetts at this time, however, are apparently not capital: A 1642 record from Essex County, Massachusetts Bay reveals that Elizabeth Johnson (a servant) was to be severely whipped and fined for “unseemly practices betwixt her and another maid” and other “crimes.”¹⁸⁰ A 1649 Plymouth Court Record reveals a case involving Sara Norman, the wife of Hugh Norman and Mary Hammon, a fifteen year old woman recently married. Hammon is not punished, but Sarah Norman, who has already been abandoned by her husband, must make a public acknowledgment of her wrongdoing.¹⁸¹

¹⁷⁶. Gay American History, supra note 54, at 286-87 citing F. Pareja, Confessionario (c.1600). The Franciscan missionary Pareja served in North Florida with the Timucuan Indians from 1595-1616.

¹⁷⁷. Gay American History, supra note 54, at 283. Katz lists a “Mexican confessionary written in 1565,” a confessionary written in 1599, and confessionaries of 1634 and 1697 as all inquiring into lesbian sexuality.

¹⁷⁸. Id. at 20.

¹⁷⁹. Id. at 20-1; Oaks, Defining Sodomy in Seventeenth Century Massachusetts, 6 J. of Homosexuality 79, 81 (1980-81).

¹⁸⁰. Gay American History, supra note 54, at 85.

¹⁸¹. Whereas the wife of Hugh Norman of Yarmouth, hath stood presented [in] divers Courts for misdemeanor and lewd behavior with Mary Hammon upon a bed, . . . the said Court have therefore sentenced her, the said wife of Hugh Norman, for her wilde behavior in the aforesaid particulars, to make a public acknowledgement, so far as conveniently may be, of her unchaste behavior, and have also warned her to take heed of such carriage for the future, lest her former carriage come in remembrance against her to make her punishment greater.

Id. at 92. See also Surpassing, supra note 34, at 50 citing II Records of the Colony of New Plymouth 137 (N. Shurtleff ed., published by the Order of the General Court, William White, Printer 1855-1861) referring to a nontransvestite woman caught “in flagrante delicto, in Plymouth 1649 brought before the court ‘for leud behavior each with the other upon a bed’ one got off with no punishment (the married one) and the other was sentenced to make public acknowledgement . . . of her unchaste behavior”.


In the New Haven Colony, the published body of laws generally followed the laws of the Massachusetts Bay Colony, but departed by specifically mandating the death penalty for lesbian sexual acts.\footnote{182}{GAY AMERICAN HISTORY, supra note 54, at 23. The law provided, in part, that: And if any woman change the natural use into that which is against nature, as Rom. I.26. she shall be liable to the same sentence, and punishment, or if any person, or persons shall commit any other kind of unnatural and shamefull filthiness, called in Scripture the going after strange flesh, or other flesh than God alloweth, by carnell knowledge of another vessel then God in nature have appointed to become on flesh, whether by abusing the contrary part of grown woman, or child of either sex, or unripe vessel of a girle, wherein the natural use of the woman is left, which God hath ordained for the propagation of posterity, and Sodomitical filthinesse (tending to the destruction for the race of mankind) is committed by a kind of rape, nature being forced, though the will were inticed, every such person shall be put to death.} In Virginia, a law authored by Thomas Jefferson arguably proscribed lesbianism by providing that “whosoever shall be guilty of Rape, Polygamy, or Sodomy with a man or woman shall be punished, if a man, by castration, if a woman, by cutting thro’ the cartilage of her nose a hole of one half inch in diameter in the least.”\footnote{183}{Id. at 23-4.} Whether the Connecticut and Virginia laws acted as effective deterrents, whether such laws remained unenforced, whether prosecution records were not kept or were destroyed or have not yet been located is unclear. Yet what does seem clear is that America’s early legal history of lesbianism cannot be said to be one of total neglect.

F. Modern Lesbian Legal History

As previously discussed, the stereotype of the nineteenth century is that lesbianism is unimaginable and therefore beyond the purview of the law. I will not reiterate my problems with such a stereotype, but only resuggest that the stereotype is both partial and class-biased.

The stereotype also colors twentieth century perceptions and modern renderings of lesbianism in legal history. For example, it is true that a 1921 amendment to a British bill sought to penalize any act “of gross indecency between female persons.” It is also true that the bill to which this amendment was tacked failed to pass. In the context of a general discussion positing the unimaginability of lesbianism, such a piece of legal history is easily assimilated.

Yet at least one modern scholar provides a different perspective. Quoting from debates by the members of Parliament (MPs), Sheila Jeffreys posits that the choice to ignore lesbianism was a deliberate one selected as the best method for eradicating “perverts”: the death penalty would “stamp them out,” and locking them up as
lunatics would "get rid of them," but ignoring them was best because "these cases are self-extirpating."\textsuperscript{184} The MPs explicitly recognized the danger of lesbianism, stating that it did cause the "destruction" of the Greek civilization and the "downfall" of the Roman Empire, it could cause "our race to decline," and it would cause the sexual unavailability of women to men ("any woman who engages in this vice will have nothing whatsoever to do with the other sex").\textsuperscript{185} A decision by lawmakers that the danger of mentioning an act outweighs the danger of not criminalizing the act belongs in the annals of legal history.\textsuperscript{186}

Another example is the fate of lesbians under the Third Reich, a government with a plethora of laws and legal codes. While lesbianism is usually ignored,\textsuperscript{187} at least one scholar researching the treatment of male homosexuals recounts that although paragraph 175 of the Nazi Code banning homosexual acts did not encompass women (despite the best efforts of the Nazi attorney who provided many of the ideological underpinnings for the laws against homosexuality), there were nevertheless persecutions of lesbians. "Some SS officers had arrested and sentenced lesbians" for treason, sent them to a prisoner of war camp, and other prisoners of war were promised a "bottle of snapps" for each lesbian they "penetrated."\textsuperscript{188} While lesbians may not have been wearing the pink triangle of the homosexuals, one writer suggests that they may have been wearing the black triangle of the asocials,\textsuperscript{189} as did prostitutes.

Even as we make legal history today, we continue to perpetuate the stereotype of lesbianism as irrelevant in legal discourse. In 1986, the United States Supreme Court decided \textit{Bowers v. Hardwick}\textsuperscript{190} and rejected the constitutional challenge to Georgia's sodomy law by a gay man. This case prompted an outpouring of commentary in the legal journals; commentary which is overwhelmingly critical of the opinion\textsuperscript{191} and overwhelmingly silent on the sub-

\textsuperscript{184} S. Jeffreys, \textit{The Spinster and Her Enemies} 114 (1985), quoting speeches of the Members of Parliament.
\textsuperscript{185} \textit{Id. quoting} speeches of the members of Parliament.
\textsuperscript{186} The decision does not appear to be unique. \textit{See supra} notes 118-122, and accompanying text.
\textsuperscript{188} R. Plant, \textit{The Pink Triangle} 114 (1986). Plant provides other examples of the "arbitrary punishment of real or presumed lesbian relationships" and refers to interviews being conducted by Ilse Kokula, a Berlin social worker and journalist with lesbian survivors of Hitler's regime.
\textsuperscript{189} J. Nestle, \textit{supra} note 51, at 174.
\textsuperscript{190} 478 U.S. 186 (1986).
\textsuperscript{191} Of the 33 commentaries focused exclusively on \textit{Hardwick} that I have read, only one treats the majority's decision approvingly. \textit{See Comment, Bowers v. Hardwick: Balancing the Interests of the Moral Order and Individual Liberty}, 16 CUMBERLAND L. REV. 555 (1986). There are many more commentaries that treat \textit{Hardwick} extensively, but do not focus exclusively on the case. \textit{See, e.g.,} Coleman, \textit{Disordered Liberty:}
ject of lesbianism. In a few commentaries, lesbianism is mentioned, usually by a citation to the Georgia case which had previously held that the terms of the statute did not apply to acts between women and in conjunction with a discussion of heterosexual sodomy. Sodomy prosecutions may be exceedingly rare for both men and women, but women have been prosecuted and convicted.

While it is beyond the scope of the present article to document modern incidents of lesbianism in contemporary law, it is one purpose of this article to remind us that we are making legal history now. Lesbians are not presently invisible in the law, but there is still a tendency to collapse lesbianism into male homosexuality when treating legal issues other than "lesbian motherhood" and "lesbian custody."

III. THE IMPERATIVE CONCLUSIONS

My plea is one for the future: we are living legal history and we must not allow lesbianism to be obfuscated in that history, whether by deliberate concealment or benign neglect. We must not allow the lives of real lesbians who are impacted upon by the legal system to be obscured or diminished. We must not measure lesbians' legal injuries against that of male homosexuals or nonlesbian women. We must not reason that lesbians are "only" denied custody of their children and are not being arrested for public sex and therefore do not have standing to challenge sodomy laws; or that lesbians are "only" engaging in "mutual combat" with their lovers and not being beaten by physically stronger men and therefore do not need access to domestic violence legislation. We must demand a place


195. See State v. Young, 193 So. 2d 243 (1967) ("Oral copulation between two women constituted 'unnatural carnal copulation.'")

See also Rubenfeld, Lessons Learned: A Reflection upon Bowers v. Hardwick, 11 NOVA L. REV. 59, 62 (1986) (discussing representation of a woman serving two and a half years in prison for engaging in consensual sex under state sodomy law). Abby Rubenfeld's article, originally delivered as a speech at Nova Law School, is an exception to the silence surrounding lesbianism in discussion of Hardwick.
for lesbians in the legal history of the future by demanding a place in the legal history of the moment.

We must also recover, discover and uncover lesbianism in legal history. Lesbianism is not the hollow in Anglo-European legal history that I once assumed. This text is an attempt to survey some incidences of lesbianism within Anglo-European legal history, but that territory needs to be more fully explored. Too many of the authors of sources I relied upon explained that they had located their materials by accident or only in relation to other work.\textsuperscript{196} Too many of the primary sources I attempted to locate were inaccessible to me.\textsuperscript{197}

In addition to more in depth research, research of a much wider scope is needed. I self consciously limited this text to Anglo-European legal history, but even within that restriction, I omitted at least the entire continent of Australia. Further, the limit itself is rather indefensible. What about lesbianism in Chinese legal history? In Egyptian, Nigerian, Assyrian legal histories? I will no longer accept an answer that says there is nothing to say. There are continents and centuries in which lesbians lived their daily lives in interaction with legal systems. That is a part of our legal history.

It is my claim in this text that our legal history must include lesbianism, in an honest and careful manner that does not diminish lesbians by comparisons. It is my claim that if even one lesbian was impacted upon by the law, that is a matter of great import for legal history. This remains my claim even if that one lesbian lived long ago, or was poor, or worked as a prostitute, or dressed as a man. This remains my claim even if that one lesbian was not executed, but was "only" banished and forbidden to live with her lover ever again.

\textsuperscript{196} See, e.g., supra notes 129, 130 and accompanying text.
\textsuperscript{197} For example, I attempted to located the source material for the following: One source that reported homosexual activity between women was a manuscript by Cristobal de Chaves entitled "Relacion de las cosas de la carcel de Sevilla y su trato," Tomo-B in AMS, Papeles del Conde de Aguila, Seccion Especial. The second source was an addenda to a report for 1624, AMS, Seccion Especial, Tomo 20.

Perry, The "Nefarious Sin" in Early Modern Seville, 16 J. OF HOMOSEXUALITY 67, 86 n.20 (1988). I wrote Dr. Perry, who graciously answered my inquiry, but nevertheless could not provide much assistance because "the two archival documents in footnote 20 are in Seville's city hall, where there were no facilities for either microfilming or xeroxing." Letter from Dr. Mary Elizabeth Perry (October 24, 1989).