

## What's Law Got to Do with It? Legal Records and Sexual Histories

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SCHOLARS RESEARCHING SOCIAL AND CULTURAL history have long been captivated by the possibilities of court records. Legal records seem to describe behavior not easily uncovered in other sources. As Edward Muir and Guido Ruggiero suggest, court proceedings produce texts that “generate little dramas about human conflicts and dilemmas, that resurrect the otherwise hidden life of the street, gaming hall, counterfeiter’s workshop, priest’s bedroom, and prison cell,” that record the voices of the illiterate, of workers, and of women, and that allow the historian to “hear people talking about love, emotional and sexual intimacy, power, betrayal, and broken promises.”<sup>1</sup> Most beguiling of all, court records can take the researcher beyond the crime itself into the social and cultural worlds in which the act

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The category of court records includes sources generated by both secular and religious courts. However, since my focus is on the modern period, after secular courts had supplanted church courts, I will not explore those distinctions or give particular attention to court records. I also do not include as court records case files generated by agencies related to the courts such as probation records or prison records, which are of a different character and the products of different discursive practices than court records.

<sup>1</sup>Edward Muir and Guido Ruggiero, “Introduction: The Crime of History,” in Edward Muir and Guido Ruggiero, eds., *History from Crime* (Baltimore, Md., 1994), vii; Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880–1929* (Chicago,

took place. The pervasive use of the metaphor of legal sources as a window captures the allure of that possibility.<sup>2</sup>

At the same time, scholars have long been aware of how prone to distortion such a window can be. Legal institutions and officials, by allowing sexual behavior to be discussed only in terms of the law, by “limit[ing] what can be asked, what can be answered, what can be admitted as evidence, what can be considered in a verdict,” have distorted the accounts offered by defendants and witnesses. In particular, court records usually deal with sexual acts, shorn of the participants’ motives and understandings of those acts and without reference to their lives beyond the moment in which the act took place. Even in regard to the act, court records offer “evidence that has been polluted with authority.” Many of those involved in legal proceedings were forced to participate and did so under the threat of punishment. All who testified might have had reasons to lie: to establish innocence or guilt, to pursue animosities or protect friendships, to please the powerful or thwart them.<sup>3</sup> Extracting evidence of the behavior and ideas of nonelite subjects from legal records is thus a difficult task.

The distortions and biases of elite sources are a problem faced by all those who study history from below, and, like other social historians, historians of sexuality who use court records have responded by reading against the grain, that is, “for reasons other than those the record-takers intended and for the clients’ voices.”<sup>4</sup> This method rests on the assumption that, as Jennifer

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1993), 4. For just a selection of similar statements see Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Chapel Hill, N.C., 1995), 4; Richard Godbeer, *Sexual Revolution in Early America* (Baltimore, Md., 2002), 12–13; William Peniston, “Love and Death in Gay Paris: Homosexuality and Criminality in the 1870s,” in Jeffrey Merrick and Bryant Ragan, eds., *Homosexuality in Modern France* (New York, 1996), 129; Michael Rocke, *Forbidden Friendships: Homosexuality and Male Culture in Renaissance Florence* (New York, 1996), 8–9; Randolph Trumbach, *Sex and the Gender Revolution, Volume One: Heterosexuality and the Third Gender in Enlightenment London* (Chicago, 1998), 12–13; Sharon Ullman, *Sex Seen: The Emergence of Modern Sexuality in America* (Berkeley, 1997), 16.

<sup>2</sup>Steven Maynard, “‘Horrible Temptations’: Sex, Men and Working-Class Male Youth in Urban Ontario, 1890–1935,” *Canadian Historical Review* 78, no. 2 (1997): 197; Dayton, 4; Muir and Ruggiero, “Introduction,” ix; Dubinsky, 4; Martha Hodes, *White Women, Black Men: Illicit Sex in the 19th-Century South* (New Haven, Conn., 1997), 11; Franca Iacovetta and Wendy Mitchinson, “Introduction,” in Franca Iacovetta and Wendy Mitchinson, eds., *On the Case: Explorations in Social History* (Toronto, 1998), 6.

<sup>3</sup>Muir and Ruggiero, “Introduction,” ix. For similar comments see Peter Boag, *Same-Sex Affairs: Controlling and Constructing Homosexuality in the Pacific Northwest* (Berkeley, 2003), 8–10; Alan Bray, *Homosexuality in Renaissance England* (London, 1982), 38–42; Dubinsky, 114; Hodes, 11, 216 n. 21; Louise Jackson, *Child Sexual Abuse in Victorian England* (London, 2000), 29, 32, 92–93; Rocke, 8–9.

<sup>4</sup>Iacovetta and Mitchinson, “Introduction,” 13. Natalie Davis associates this method with the effort of historians to be “scientific,” although her metaphor for the approach is that of “peel[ing] away the fictive elements in our documents so that we could get at the real facts” (*Fiction in the Archives* [Stanford, Calif., 1987], 3).

Terry put it in an article particularly influential within the history of sexuality, “the dominant account is never fully capable of containing the subaltern it launches, nor fully able to stabilize itself.” Reading against the grain focuses on moments of misunderstanding and conflict—ruptures in the legal process, departures from legal forms, formulas, and language, and information that has not been shaped to fit the terms of the law. In those moments, in those places in texts, can be found the voices of ordinary people.<sup>5</sup>

But this method provokes the criticism that the acts dealt with by courts are, by definition, not aspects of “normal behavior,” for the accused are atypical in their behavior or at least in being caught committing such acts. As such, claim scholars Alan Bray, Randolph Trumbach, and Lawrence Stone, legal records can tell us little about the majority of people and their behavior.<sup>6</sup> Using them for that purpose, a recent scholar of gay history has complained, produces “a grim and antiquated picture” that places homosexuals in the “same sexual zoo as exhibitionists, paedophiles, and sex-murderers.”<sup>7</sup>

It is my contention that legal records can be analyzed in ways that overcome those problems. To advance that claim, this article focuses on legal records themselves and offers a primer for how to read them. The first section looks critically at the methods that historians of sexuality have employed in using legal sources, focusing on nineteenth- and twentieth-century records.<sup>8</sup> The alternative approach I outline in the second section involves a greater engagement with law and greater self-consciousness about our sources and how we use the evidence that they provide. Engaging with the law involves both paying attention to legal rules and institutions, rather than pushing them into the background, and not simply taking the law on its own terms as a closed system but looking critically at how it works in practice.

In foregrounding law in practice, engaging with the law also directs attention to the relationship between law and society. Historians of sexuality, by showing that ordinary people in the twentieth century continued to use the law, rather than simply being subject to it, have already begun to depart from the concept of law as a self-referential discourse, a singular, closed system of formal rules and statutes. In the final section I suggest ways to

<sup>5</sup>Jennifer Terry, “Theorizing Deviant Historiography,” *differences* 3, no. 2 (1991): 57–59, quote on 58. For other statements of this method see Muir and Ruggiero, “Introduction,” ix; and Carolyn Strange, *Toronto’s Girl Problem: The Perils and Pleasures of the City* (Toronto, 1995), 12.

<sup>6</sup>Bray, 41–42; Trumbach, 13; Stone cited in Hodes, 11.

<sup>7</sup>Graham Robb, *Strangers: Homosexual Love in the Nineteenth Century* (New York, 2003), 17. That comment is part of a long, trenchant attack on the excessive reliance on legal records by historians of sexuality, a largely misdirected critique in that Robb’s target is a quantitative analysis rather than the qualitative approach employed by most historians of sexuality.

<sup>8</sup>This discussion does not offer a comprehensive survey of the use of legal records by historians or even by historians of sexuality. I had ambitions to offer such a review, but the literature proved just too large, the legal records and institutions too diverse in nature.

build on that insight by employing the concept of legal culture and the constitutive theory of law. My aim in that brief discussion is to offer points of entry into the literature on those frameworks, a sense of where to begin the process of rethinking the way that the law matters in the history of sexuality and to the lives of the people we study.

The examples I employ to articulate my approach to legal records come largely from North America and from the nineteenth and twentieth centuries, the context with which I am most familiar. It is also the case that the approach I am suggesting is best suited to the rich legal sources produced in the last two centuries. But even when faced with the more fragmentary legal records of earlier periods and other historical contexts, we need to foreground our sources and the process by which we reconstruct the past.

#### UNPICKING SEAMLESS NARRATIVES

The legal records that I have studied, the closed case files of the New York County (Manhattan) district attorney (DA) from the first half of the twentieth century, arrive from the warehouse of New York City's Municipal Archives in file boxes so dirty that they blackened my hands the moment I touched them. Each box contains numerous legal-size cardboard envelopes, the precise number dependent on the thickness of the envelopes. Before I entered the archives I read a variety of works in the history of sexuality that analyzed legal records, but that reading did not prepare me at all for what I found when I opened those envelopes—or, at least, not the thick ones. Opening the thin files generally revealed only a copy of the affidavit recording the charge made by the complainant in the Magistrate's Court, some basic demographic information about the parties to the case, and, unless the grand jury dismissed the case, the indictment. By the 1940s a thin case file also contained a one-page form on which a prosecutor recorded the basic circumstances of a case, through answers to a series of questions and some additional remarks, generally amounting to a short paragraph.<sup>9</sup>

But the thick files contained much more. When I spread out in front of me the various documents typically contained in a thick file, I found myself facing a bewildering variety of narratives. In most instances there was a brief prepared by the New York Society for the Prevention of Cruelty to Children (NYSPCC), a private organization that cooperated with legal officials and helped run the legal system. This brief summarized the statements of the prosecution witnesses and was occasionally accompanied by the NYSPCC officer's notes and the NYSPCC's case file, consisting of a copy of the complainant's statement and a record of how the case had been

<sup>9</sup>In addition, on the outside of the file envelope were the file number, the defendant's name and address, as well as annotations and, later, stamps recording the disposition of the case.

investigated. The assistant district attorney (ADA) assigned to a case also took statements from witnesses, the transcripts of which are present in some files. Less often present are transcripts of the defendant's arraignment in the Magistrate's Court and the hearing in the grand jury. Rarest of all are trial transcripts. Since my subject was sexual violence, almost every file I examined included a physician's report of a medical examination of the complainant. Some file envelopes, in addition, yielded correspondence from the defense attorney or interested social agencies, reports of psychiatric examinations, and items of evidence such as letters, address books, and photographs.<sup>10</sup> It was not simply that variety of material for which I was unprepared; it was the incoherence of those texts and the lack of consistency between them. Given that the scholarship I had read spent little if any time discussing the process of constructing narratives out of legal sources, I had expected that the files would contain an obvious narrative that could be easily recovered.

It is true that the DA's records are richer than most court records, but the difference is one of degree. Files from the Court of General Sessions, which had jurisdiction over the felonies dealt with in the DA's closed case files, do include less material than the equivalent DA's file. In particular, the court records lack the witness statements and items of evidence found in the prosecutor's file. However, they still contain multiple texts—Magistrate's Court affidavits and transcripts, briefs prepared by the NYSPCC, and transcripts of sentencing hearings, the latter not present in the DA's records. Nor is the presence of a variety of documents unique to modern legal records. At least as far back as the early modern period, court records contain a range of different documents. Legal dossiers from early-seventeenth-century Frankfurt, for example, contain "statements by suspects, witness accounts, detailed torture proceedings, legal opinions by the city's advocates, private pleas, and summaries of the various judicial meetings."<sup>11</sup> The records generated by the English legal process in the early modern period are generally less comprehensive than Continental dossiers, but even in that case the assize depositions that a justice of the peace was required to gather came in two forms, the examinations of defendants and the depositions of plaintiffs and witnesses.<sup>12</sup>

<sup>10</sup>Although such items appeared only rarely, they disrupted the sense of distance from the event that I often felt in the face of the layers of text and procedure produced by the legal process. It was profoundly unsettling to turn a page and find myself staring into the face of an accused rapist or to pull from a crumpled brown paper bag a pill container and rubber tube and suddenly realize I was holding the tools that a woman had been accused of using to perform an abortion.

<sup>11</sup>Maria Boes, "On Trial for Sodomy in Early Modern Germany," in Tom Betteridge, ed., *Sodomy in Early Modern Europe* (Manchester, 2000), 27. See also Muir and Ruggiero, "Introduction," viii.

<sup>12</sup>Miranda Chaytor, "Husband(ry): Narratives of Rape in the Seventeenth Century," *Gender and History* 7, no. 3 (1995): 380. See also Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge, 2000), 21–22.

So, what have historians done with the rich variety of sources that they have found in legal records? Most often they have crafted them into a seamless narrative, with little if any explicit discussion of where within the records they drew specific details. Consider this example from Karen Dubinsky's important study of sexual violence in turn-of-the-century Ontario, the first history-of-sexuality monograph based on modern legal records:

Mary P. was an eighteen-year-old factory worker, recently arrived in Peterborough from England, to join her parents. One Friday evening at the end of May 1907 she had a date with a fellow to go to a concert. She waited for him for an hour outside the opera house, but, according to Mary, he stood her up. She had started for home when she was approached by Hubert M., who asked her for a walk. She accompanied him to Jackson Park, where he raped her. He chided her for resisting, telling her that "all girls do it." At her request he then walked her home and asked her for another date. She refused, telling him she thought her father would not allow it.<sup>13</sup>

Dubinsky describes the legal records that she analyzed as "surprisingly rich," including stories told to police officers and justices of the peace as well as trial transcripts, but offers no account of where among that collection of documents she drew her narrative.<sup>14</sup> To do so would have been at odds with her aim of recovering the social/sexual experiences of ordinary people. Such evidence could only be found, she argued, by peeling away the distortions produced by categories, institutions, and processes that reflected the perspectives of the elites who shaped the law, by reading against the grain. Since the multiple texts found in legal records were products of the workings of the legal system, they had to be left out in order to present the experiences of ordinary people free of distortions. There is also no denying the appeal of shaping evidence into a good story of the kind told by Dubinsky. Whenever I opened a case file and spread out the various documents it contained in front of me, I felt a powerful urge to solve the puzzle, reconcile the contradictions, and put together the pieces so that they formed a consistent and complete narrative.

However, presenting evidence in the form of a seamless narrative obscures the interpretative choices that the historian who created it made about what to take from which document, denying readers the opportunity to assess those decisions. It also provides no opportunity to take account of the context from which individual elements of the narrative are drawn. In effect,

<sup>13</sup>Dubinsky, 45. In the following paragraph Dubinsky provides the additional details that the case was only reported because Mary's mother discovered her stained chemise the next day and that Hubert told police that Mary was "willing enough" and changed her story when caught by her parents.

<sup>14</sup>Ibid., 6-7. Elsewhere in her book Dubinsky does allude to details drawn from trial testimony and cross-examination.

historians who construct their narratives in this manner have repressed the multiple texts that make up a legal record.<sup>15</sup> In doing so they transform the method of reading against the grain into a “process of dissection,” to use John Brewer’s evocative metaphor, involving “a lot of ripping and tearing: facts that historians think are relevant are torn out of their context and transplanted to the ‘true’ story. Victory is achieved at the price of the mutilation of all others.”<sup>16</sup> When the sources are legal records, the historians performing such dissections risk slipping into “the role of retrospective judges who render verdicts by deciding who is telling the truth.” As such, it implicates the historian in the work of the criminal justice system and puts him or her in the ironic position of responding to multiple narratives with yet another version.<sup>17</sup> Presenting a single, seamless narrative also reinforces the notion of a prosecution as a story with an objective ending and thereby “obscures as much as it clarifies” and “offers answers where there should be questions.”<sup>18</sup>

Even narratives based on trials, which at first glance appear not to repress their sources in the manner of narratives based on statements, memorandum, and other documents, on closer examination pay little attention to

<sup>15</sup>The idea that historians repress any self-consciousness about their sources comes from Cynthia Herrup, *A House in Gross Disorder: Sex, Law and the 2nd Earl of Castlehaven* (New York, 1999), 8. This is true of perhaps the most influential social history analysis of case file evidence, Linda Gordon’s study of family violence in the twentieth-century United States. Gordon claims to have told “whole stories rather than excerpts from stories” in order, in part, “to maximize the reader’s opportunity to ‘see’ my interpretation and to argue with it.” However, those whole stories prove to be narratives constructed, in an act of interpretation that she does not show the reader, out of the caseworker’s notes, interagency memoranda, and notes from clients that make up social agency case files. See Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* (London, 1989), 13, 17; for examples of these narratives see 119–20, 168–70.

<sup>16</sup>John Brewer, *A Sentimental Murder: Love and Madness in the Eighteenth Century* (New York, 2004), 292–93. My concern about reading against the grain is somewhat different from the poststructuralist critique. That position argues that reading against the grain assumes, as Maynard puts it, that “once gender, class and race biases of the legal system and its records are accounted for, their subject will be there in the sources, already constituted, waiting to be revealed” (198), that, for example, evidence of the homosexual experience will become visible. Critics, most notably Joan Scott, have argued that there are no “fixed identities visible to us as social or natural facts,” no individuals who have experience, only subjects who are constituted through experience. Case files, they argue, thus reveal not already constituted individuals but the process of identity production. See Joan Scott, “The Evidence of Experience,” *Critical Inquiry* 17 (Summer 1991): 773–97. That argument is theoretical; my critique is methodological.

<sup>17</sup>Muir and Ruggiero, “Introduction,” ix–x.

<sup>18</sup>Herrup, 6. Prefacing such narratives with an account of the institution that produced the records from which they are derived and how that institution worked does not effectively remove that barrier to analysis. That approach does reveal more about the nature of documents that underpin narratives but nothing about the interpretative choices made in the extraction of facts or the construction of narratives from those documents.

the trial context. Accounts of trials, given that they generally incorporate extracts from testimony or exchanges between lawyers or judges and witnesses and rely on a single document that records what was said in the courtroom, also appear to conceal few interpretative decisions. However, to see transcripts in that way is to slip into seeing a trial as a familiar legal landscape, as transhistorical, rather than as an occasion shaped by historically specific rules. Historians do generally display some sense that a trial “is not an occasion on which anything can happen or anything can be said and recorded.” But, as Cynthia Herrup points out, the rules that govern a trial and that shape the content of the documents that recorded the proceeding are rarely part of the story told by historians.<sup>19</sup>

That those rules can be radically different in nature from modern practice creates a further imperative for their analysis. Consider Herrup’s account of early modern English practices: “Criminal justice aimed at exemplary rather than comprehensive justice. Few rules excluded evidence; jurors with prior knowledge of the defendant were welcomed rather than avoided. Lawyers’ language struggled shakily against more popular vernaculars. Defendants usually had no right to counsel, no ability to call sworn witnesses, and no mechanism for appeal.”<sup>20</sup> The strangeness of this and other unfamiliar legal contexts needs to attach itself to the testimony given there, but historians rarely ensure that happens.

Analyses of trial transcripts likewise often give the impression that those records are verbatim transcripts, containing all that was said in the courtroom. Until at least the nineteenth century, this was often not the case. Instead, transcripts are summaries or notes of testimony only, with the questions to which witnesses responded omitted.<sup>21</sup> Winthrop Jordan, who faced such a transcript in his account of a slave conspiracy that occurred in Mississippi in 1861, *Tumult and Silence at Second Creek*, is one of the few historians to foreground the difficulties of interpreting such a text: at one point, in an effort to “aid our hearing the logic of the responses,” Jordan inserts questions into the record to reconstruct something like the dialogue obscured by the transcript. He also suggested that other aspects of the proceeding were hidden behind the transcript, arguing that a doodle—one slave’s name written eleven times—in fact recorded that the slave in question had been recalled for examination and, despite being whipped, had not offered any testimony to be recorded.<sup>22</sup>

<sup>19</sup>Ibid., 8.

<sup>20</sup>Ibid., 7.

<sup>21</sup>As David Sabeau put it, “What appears as direct testimony in a judicial text may well be a paragraph redaction of something that took quite a long time to say” (quoted in Gaskill, 24).

<sup>22</sup>Winthrop Jordan, *Tumult and Silence at Second Creek: An Inquiry into a Civil War Slave Conspiracy* (Baton Rouge, 1993), 96–98, 139–43. At another point Jordan uses a passage in which a phrase was crossed out as evidence of the jumbled collection of thoughts and feelings that the slaves’ testimony provoked in the white audience (169–70). Thanks to



Even when the source is a stenographic transcript, it is more mediated and less complete than it appears. Transcripts produced by stenographers working in New York City's criminal courts at the end of the nineteenth century, for example, recorded only what was said and sometimes only what was admitted into evidence. In a trial in 1886, during the cross-examination of the fifteen-year-old complaining witness in an abduction case, the prosecutor offered to admit that the girl "was not as pure as she might be." He could make such an offer because the statute required only that the girl be under the age of sixteen when the defendant had intercourse with her, not that she be chaste or have resisted him. Nonetheless, his statement would have affected not only the court's perception of whether the girl was entitled to the protection of the law but also her reputation. Not surprisingly, she burst into tears and had to be excused from the witness stand. However, since the magistrate refused to allow the prosecutor's offer, neither what was said nor the girl's reaction appears in the transcript. They can be found only in press accounts of the hearing.<sup>23</sup>

The other aspect of trials masked in these transcripts was the work of interpreters. Many witnesses were immigrants unable to testify in English. The court employed interpreters for that situation, but their presence in a trial often went unrecorded. Only testimony given in English was taken down, making it easy to forget that those in the courtroom heard two voices where the transcript records only one. The occasions on which the translation broke down—when jurors or attorneys challenged the translation of particular phrases and the interpreter suddenly appears in the transcript speaking for himself rather than as the witness—are thus jarring reminders of the distance between the transcript and what actually occurred in the courtroom.<sup>24</sup>

Historians often add to that distance by rendering trial testimony as a monologue rather than as the dialogue that it was. Sharon Ullman, for example, includes in her revealing book, *Sex Unseen: The Emergence of Modern Sexuality in America*, this quotation from the testimony of a man accused of assault with intent to rape in Sacramento, California, in 1896:

I asked her what she wanted, and she slapped me in the face and laughed. I never touched her. . . . She as much as told me to take it. . . . I says, "What do you want?" . . . [S]he continued to fool around with me laughing all the time. . . . I was scared for fear she was too small. . . .

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Shane White for this reference. The influence of white reactions to the testimony of slaves accused of insurrection on how that testimony was recorded and presented is also at the heart of Michael Johnson's revisionist interpretation of the trial of Denmark Vesey. See Michael Johnson, "Denmark Vesey and His Co-Conspirators," *William and Mary Quarterly* 58, no. 4 (October 2001): 915–76. Thanks to Frances Clarke for this reference.

<sup>23</sup>See my *Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880–1960* (Chapel Hill, N.C., 2005), chap. 4.

<sup>24</sup>See *ibid.*, chap. 6; and Gordon, 14, 24.

[S]he threw hints at me just as much as to say you can have it, and I thought she was too small. . . . Then with that she opened her drawers. She started to laugh and she sat down on the chair and I touched her on the cheek. She slapped my face and started to laugh, and I started to say something and touched her on the breast, and with that she started to open her pants, and she was ready to take it.<sup>25</sup>

Despite describing the testimony as presented by the defendant and his attorney, Ullman uses ellipses to obscure the attorney's questions. In doing so she allows only the defendant to speak, effectively portraying the testimony as simply his story. Yet the narrative Ullman presents, in circling back on itself, betrays other influences. Whereas the uninterrupted testimony at the end of the quotation simply describes actions, the earlier accounts of his actions strung together with ellipses is intermixed with explanations for why he acted as he did—"she as much as told me to take it," "she threw hints at me"—and expressions of how he felt, his fears that she was too small. Such breaks in the defendant's narrative are likely the result of the intervention of the attorney and reflect the story he wanted told, but Ullman obscures that influence on the defendant's testimony. Like many other historians, she includes the questioning that shaped testimony only when her concern is the relationship between witness and attorney rather than the substance of the testimony.<sup>26</sup> Otherwise, Ullman gives priority to telling her story, to constructing a narrative.<sup>27</sup>

#### TELLING A DIFFERENT KIND OF STORY: ENGAGING WITH THE LAW

Legal records require and reward an approach that engages with the law and is self-conscious about the sources being analyzed. To engage with the law is not to be narrowly focused on the law or to treat it entirely on its own terms; I am not suggesting that we all need to become legal historians. That

<sup>25</sup>Ullman, 29.

<sup>26</sup>Ibid., 34–35.

<sup>27</sup>This point applies also to microhistory, an approach that re-creates an event in great detail, crafting the evidence into a story, complete with portraits of the individuals involved, that explains the broader culture. The explanatory power of that approach comes from grounding an event in "thorough, multi-dimensional contextualization" (Richard Brown, "Microhistory and the Post-Modern Challenge," *Journal of the Early Republic* 23, no. 1 [Spring 2003]: 18). Two excellent recent examples of histories of sexuality that take such an approach are John Pagan's study of the case of Anne Orthwood, which explores the litigation resulting from an illegitimate birth, and Irene Quenzler Brown and Richard Brown's examination of the case involving Ephraim Wheeler, which looks at an incest case in early-nineteenth-century Massachusetts (John Pagan, *Anne Orthwood's Bastard: Sex and Law in Early Virginia* [New York, 2003] and Irene Quenzler Brown and Richard Brown, *The Hanging of Ephraim Wheeler* [Cambridge, Mass., 2003]). As fine as these studies are, their concern to construct a compelling story leaves little room for explicit reflection on how that narrative was created, for self-consciousness about sources.

approach has its own problems. Most legal history is at the other extreme from the lack of engagement with the law that I have been discussing in that it treats law as a closed system, at best impinged on by society and culture but never fully part of it.<sup>28</sup> When legal historians look beyond legal texts and doctrines, they tend to produce institutional histories, charting how the legal system worked on its own terms, not looking at it critically or as part of culture. In effect, they cast the law as a distinct realm.

To engage with the law is instead to attend to the broader context of legal categories, legal doctrine, and legal institutions rather than concentrating narrowly on a particular offense or legal setting. Such an approach requires a redistribution of research effort, the framing of the period or focus of a study in sufficiently narrow terms to allow an effective analysis of the sources. The payoff for that change is the ability to offer a richer, fuller story. Telling such a story also requires self-consciousness about our sources. As John Brewer has commented, we might be unable to avoid constructing a master narrative, but we need to expose that circumstance. Writing history, he argues, is “both a historical and literary act, which our writing should explore and display rather than overlook and conceal.”<sup>29</sup>

Engaging with the law begins with the adoption of a broad view when looking for evidence. Often scholars look only at a single crime, implicitly assuming that the law’s categorization of acts into discrete offenses was like a process of chemical separation. However, examining an offense in isolation is more like pulling a thread out of the fabric of the law. Elements of the larger pattern, such as the relationships among offenses, are lost, in particular, the gaps and the tangles of overlapping threads, the inconsistencies and contradictions that exist notwithstanding the law’s claims to coherence. Some historians have attended to the broader fabric of the law to the extent of looking for evidence of specific acts in prosecutions for offenses beyond those that specifically target that behavior. Karen Dubinsky, for example, looked for—and found—cases of heterosexual conflict not only in prosecutions for rape, attempted rape, carnal knowledge, and indecent assault but also in offenses that dealt with consensual sexual relations—abduction and seduction—and in cases of abortion, infanticide, libel, and sex-related murder.<sup>30</sup> That dispersal resulted not from ignoring the law but from the choices about how to categorize the sexual acts that the law presented prosecutors and other legal officials.

However, Dubinsky stopped short of pursuing the possibilities opened up by her significant insight. She did not analyze how behavior came to be dispersed throughout the law in this way. Interested not in the development

<sup>28</sup>Here I borrow Cynthia Herrup’s formulation of this issue (153).

<sup>29</sup>Brewer, 293.

<sup>30</sup>Dubinsky, 6. For another example of this approach and how it can change how legal records are interpreted see Annalee Golz, “Uncovering and Reconstructing Family Violence: Ontario Criminal Case Files,” in Iacovetta and Mitchinson, 289–311.

or interpretation of the law but rather in social/sexual experiences, Dubinsky opted not to organize her study “as court records are structured, by legal categories.” In taking that position she effectively conflated her topic and methodology. Even if the law was not the subject of her research, Dubinsky could not account for the role that legal meanings played in shaping experience without attending to the law when she analyzed legal case files. In the end, because she pushed the statutes to the background of her story, she was brought to the conclusion that little qualitative change occurred in either experiences of sexual danger or women’s treatment in the legal system in the fifty years covered by her study.<sup>31</sup>

Dubinsky’s conclusion helped me recognize the need to pay attention to the law in my analysis of statutory rape prosecutions in New York City in the same period. My findings illustrate the importance of attending to the legal categories employed to prosecute particular acts. District attorneys’ decisions about how to prosecute men who had sex with girls under the age of consent of eighteen years changed dramatically in the first decades of the twentieth century. In 1892 the New York Legislature amended the rape law to create two categories of rape. Rape in the first degree replicated the existing definitions, except that relating to the age of consent; sexual intercourse with a woman under the age of consent in “circumstances not amounting to rape in the first degree” (i.e., without the use of what the law recognized as force) became second-degree rape, an offense that carried a lesser sentence. These amendments were coupled with a new clause that defined as first-degree rape any act of sexual intercourse with a female when, “by reason of mental or physical weakness, or immaturity, or any bodily ailment, she does not offer resistance.”<sup>32</sup> In law, then, the decision about which charge to bring in a particular case required weighing both the circumstances and the age and maturity of the victim, but in practice that decision came to focus on age alone.

In 1896 all the men charged with sexual assaults on underage girls were prosecuted for first-degree rape, reflecting new ideas about childhood that saw girls as children until they reached physical maturity in their late teens. But prosecutors failed to convince jurors, who looked to a girl’s understanding before her age or physical maturity, to see teenage girls as children and won fewer convictions than in cases involving younger girls. So, by the early twentieth century, while men who had sexual intercourse with girls ten years of age and younger were still charged with first-degree rape, increasing numbers of those who committed the same act with girls in their teens were charged only with second-degree rape. By 1921 prosecutors charged all the men accused of acts with girls in their teens with committing second-degree rape, including those who allegedly used force. No change had occurred in the circumstances of the assaults, just as Dubinsky found

<sup>31</sup>Dubinsky, 7, 10.

<sup>32</sup>*Laws of New York, 1892*, chap. 325, 681.

to be the case in Ontario. Without reference to the law, then, we would have been led to conclude that little qualitative change had occurred in the experience or treatment of girls who had been sexually assaulted. Engaging with the law, however, reveals significant shifts in how those girls were perceived and treated and how rape was defined, first in response to new ideas about childhood and then in reaction to working-class New Yorkers' resistance to those ideas.<sup>33</sup>

A similar broad perspective needs to be applied to legal institutions. The standard approach has been to focus on a single institution, most often a trial court but occasionally a legislature or an appellate court (although the latter are more often left to legal historians). Yet exactly what happened in trial courts cannot be determined without an awareness of what should have happened, a framework generated by higher courts as much as legislatures. By the same token, the significance of appellate court decisions depends in part on the extent to which the cases being decided were representative of the caseload of the lower courts. In addition, the meaning of those rulings derived in part from their impact—or lack of impact—on cases other than the one at issue, on legal practice more broadly.<sup>34</sup>

Juxtaposing trial and appellate courts is only the most obvious way to engage broadly with legal institutions. Lisa Lindquist Dorr's arresting insights into black-on-white rape in twentieth-century Virginia illustrate what can be found by analyzing more than one legal institution, in this case trials and petitions for executive clemency. The state's governor had the power to commute sentences and issue conditional pardons; each individual who held that office determined how to employ that power, with most requiring convicted men to serve between one third and two thirds of their sentences, or twelve years in the case of those sentenced to life imprisonment, before they could apply for pardon.<sup>35</sup> Whereas trials were "public performances in which white juries . . . acted out their role as protectors of white women" and that allowed for popular participation in the punishment of black men, Dorr found that considerations for pardon "represented the efforts of some elite whites to 'correct' the justice imposed by the trial jury, adjusting the punishment to reflect more accurately their perceptions of the seriousness of the crime." Only at this point in the legal process did questions contradictory to southern whites' rhetoric about the inevitability of black men's

<sup>33</sup>This paragraph summarizes the argument of my "Age of Consent Law and the Making of Modern Childhood in New York City, 1886–1921," *Journal of Social History* 35, no. 4 (Summer 2002): 781–98.

<sup>34</sup>My research on the role of medical evidence in early-twentieth-century rape prosecutions offers an example of what can be revealed by looking to both trial and appellate courts. See my "Signs, Marks and Private Parts: Doctors, Legal Discourses and Evidence of Rape in the United States, 1823–1930," *Journal of the History of Sexuality* 8, no. 3 (January 1998): 372–86.

<sup>35</sup>Lisa Lindquist Dorr, *White Women, Rape, and the Power of Race in Virginia, 1900–1960* (Chapel Hill, N.C., 2004), 252–53 nn. 16, 18.

sexual violence and the impossibility of white women's consent to black men appear in legal records. In legal officials' consideration of pardon petitions, judgment shifted to the actions of white women rather than black men, to questions about women's character and consent, with black men released when women were held not to have abided by rules of appropriate behavior. As a result of widening her perspective to take in a legal institution other than the trial court, Dorr is able to show how prosecutions worked to police not only blacks and interracial relationships but also the nature of whiteness and white sexuality.<sup>36</sup>

It is also necessary to look not just vertically, up through the legal process, but horizontally, across the various courts that oversaw different areas of the law. Such a perspective is necessary if historians of sexuality are to substantiate broad claims, such as Timothy Gilfoyle's argument that the nineteenth-century United States saw a sexual revolution supported by official toleration and leniency. The problem in Gilfoyle's case, as William Novak points out, is that he looked only at criminal court records, not at other legal sites such as nuisance laws and equity courts, where prostitution could be, and was, regulated.<sup>37</sup> Given that it was possible for victims of many sexual offenses to sue for damages in civil courts as well as to bring criminal charges, looking beyond criminal to civil courts also has the potential to significantly expand our understanding of sexual meanings.

Historical studies of seduction highlight what can be revealed by looking across the legal system, namely, the variety of legal options available to betrayed women. Most attention has focused on the civil action for seduction, a tort based on a husband's or master's loss of a woman's services as a result of her becoming pregnant, or when women gained the standing to sue in their own right, on a woman's loss of chastity. A criminal form of the offense also existed in many jurisdictions, enacted in response to the campaigns of early-nineteenth-century moral reformers.<sup>38</sup> Karen Dubinsky's path-breaking analysis of prosecutions for criminal seduction in Ontario, still the only such analysis undertaken in the North American context, highlights the predominance of cases of courtship gone awry

<sup>36</sup>Ibid., 5, 28, 114. Dorr, however, offers no analysis of either the institution of the gubernatorial pardon or the nature of the records, discussing only what the decisions reveal about relationships. She simply notes that petitions contained "descriptions and interpretations of actions that resulted in black men's arrests and convictions and often included legal officials' re-evaluation of the seriousness of those actions" and also "frequently included the defendant's own account of events, and statements by judges and state officials regarding the meaning of a jury's verdict" (54).

<sup>37</sup>Timothy Gilfoyle, *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790–1920* (New York, 1992); William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, N.C., 1996), 165–66, 317–18 n. 98.

<sup>38</sup>For the civil action in the U.S. context see Lea VanderVelde, "The Legal Ways of Seduction," *Stanford Law Review* 48 (April 1996): 871–901; Jane Larson, "'Women Understand So Little, They Call My Good Nature 'Deceit'': A Feminist Rethinking of Seduction," *Columbia Law Review* 93 (1993): 374–472.

among seduction prosecutions while also noting that “seduction charges were filed when sex was both forced and voluntary.” She also found that courts believed and acted on stories of coerced sex far more often than they did complaints of sexual betrayal. In the civil courts, by contrast, betrayed women had far more success, in part because the different requirement of proof generally earned them a more sympathetic hearing. Why, then, did some women opt to bring criminal charges rather than civil actions? Dubinsky argues that those women were involved with men without the resources to pay financial compensation.<sup>39</sup> My work also suggests that when a woman’s goal was to have the man punished, charging the crime of seduction did not require meeting the strict definitions of force and resistance associated with charging rape. Women also often sought marriage rather than, or in preference to, punishment, in which case a criminal charge was a more effective means of putting pressure on a poor man than a civil action. At least in New York City, the low conviction rate for seduction masked the fact that as many cases ended in marriage as ended in conviction.<sup>40</sup>

Looking across the legal system can reveal not simply what choices the law offered to plaintiffs but also the multifaceted nature of legal regulation. The situation of unmarried teenage mothers in New York City in the second quarter of the twentieth century illustrates that dimension of the law. Not only did they figure as complainants in both statutory rape prosecutions and criminal paternity proceedings seeking child support, but they also often found themselves accused of sexual delinquency or incorrigibility in juvenile courts. Looking at the treatment of girls across the legal system, as Mary Odem does in a study of both criminal and juvenile court prosecutions in California, makes clear the limited protection provided to them by the courts. The punitive questioning of girls about their moral character and sexual experience in criminal courts is to some extent balanced by the punishment of the men accused of having sexual intercourse with them. When coupled with the prosecution of the girls in the juvenile courts, however, that punitive treatment looms larger, particularly given that the incarceration and rehabilitation imposed on the girls was often as harsh as if not harsher than the sentences given to the men convicted of sexually assaulting them.<sup>41</sup>

While engagement with the law can produce insights such as recognition of just how punitively the early-twentieth-century legal system treated sexually active teenage girls, a self-consciousness about the sources identified by that approach is necessary to avoid the distortions produced by historians

<sup>39</sup>Dubinsky, 71–81.

<sup>40</sup>See my “Seduction, Sexual Violence and Marriage in New York City, 1886–1955,” *Law and History Review* 24, no. 2 (forthcoming, Summer 2006).

<sup>41</sup>Mary Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920* (Chapel Hill, N.C., 1995).

“pulling pieces of information willy-nilly from the different documents of the file as it suits the demands of their narrative.”<sup>42</sup> Achieving that self-consciousness begins with differentiating among the many documents that typically make up a legal case file, particularly in the twentieth century. As Steven Maynard has pointed out, modern legal records are different from other case files in that, rather than being rooted in the discourse of a single agency or discipline, they contain a number of disparate case histories and documents. Each of those documents has its own distinct provenance and textual form.<sup>43</sup>

The texts most readily recognized as having a distinctive origin are those generated by physicians and psychiatrists: reports of medical examinations of complainants and psychiatric reports assessing the sanity or psychopathology of defendants. The report of a medical examination that appeared in the rape case files I examined illustrates the need to explore the provenance of particular documents. On the surface, those documents are formulaic and relatively straightforward, uniform in their expression of a physician’s findings as “signs of penetration of [a girl’s] genital organs by some blunt instrument.” Locating them in the practice of medical jurisprudence reveals that the uncertain nature of their conclusions reflected judicial decisions rather than how physicians would have chosen to report their findings. Not that physicians were certain of the causes of the conditions they found when they examined children who had been sexually assaulted. As medical jurisprudence textbooks recorded at length, doctors recognized a variety of possible causes for the physical signs they found in girls and could not reliably determine which of them was responsible for what they identified in a particular examination.

Nonetheless, outside the legal system they drew definitive conclusions about whether sexual intercourse or rape had occurred. Only in court, in response to judicial decisions that on the basis of the uncertainty of their knowledge denied them the status of experts, did they employ the ambiguous formula found in the reports in the DA’s files. But using the terms in which physicians cast their findings in court to describe the meaning of medical evidence in rape trials would be misleading. Jurors gave no indication that they took seriously the possibility that the “blunt instrument” described in a physician’s testimony was anything other than a penis. Instead, they carried into the courtroom the attitude they displayed outside the legal system, where working-class New Yorkers treated doctors as able to establish the “truth” about what had happened to a child.<sup>44</sup>

There are other less obvious distinctions among the documents that appear in most legal records that need to be considered in any analysis of

<sup>42</sup>Steven Maynard, “On the Case of the Case: The Emergence of the Homosexual as a Case History in Early-Twentieth-Century Ontario,” in Iacovetta and Mitchinson, 83 n. 3.

<sup>43</sup>Ibid.

<sup>44</sup>See my “Signs, Marks and Private Parts.”



them. The depositions of the parties in a case, for example, appear at first glance to be a single kind of document. However, as Miranda Chaytor pointed out in her analysis of seventeenth-century English assize depositions, a complainant's statement typically differs from those of the defendant and of the witnesses. A complainant's account often took the form of a full narrative; although almost certainly mediated by both the input of an investigator or a prosecutor asking questions, the clerk or legal official recording such narratives generally strove to retain much of the structure and language used by the complainant.<sup>45</sup> The files I studied, as is common in modern legal records, often included several different versions of a complainant's statement, not only a statement recorded by an NYSPCC agent, a full narrative like those analyzed by Chaytor, but also the story a child told an ADA. That document included the ADA's questions and the child's answers. In questioning a complainant, a prosecutor focused on drawing out his or her story, revealing a prior knowledge of that story probably gleaned from the NYSPCC files, knowledge that allowed him or her scope to develop a narrative. Children often answered in less colloquial language than they used in talking to the NYSPCC and employed more of the terms and phrases used in the legal system, reflecting the context and their exposure to the legal system. Statements by witnesses are much more like interrogations and, as Chaytor points out, offer less in the way of narrative. The questioning is more structured, confined to specific, usually legally relevant issues, and the witnesses are given little opportunity to develop their answers, let alone offer their own story.<sup>46</sup> In contrast to the complainant's deposition, such statements have to be read as revealing the questioner's understanding of the case more than that of the deponent.

Both styles of statement also appeared in another form in many case files, summarized in the trial brief prepared by the NYSPCC. A trial brief "positioned itself above the other materials," as Carolyn Strange insightfully noted in regard to a similar summary document that appeared in the capital case files that she studied, and was "a means by which many voices, often in opposition, were reduced to one voice in a coherent case narrative."<sup>47</sup> That one voice belonged to the NYSPCC agent who authored the brief. The statements of the child and the other witnesses provided the details, but the emphases, structure, and much of the language came from him—and need to be analyzed as such. In line with the NYSPCC's concern to win convictions,

<sup>45</sup>Chaytor, esp. 380–81. For a further elaboration of how the specific legal context of early modern England shaped the depositions discussed by Chaytor see Garthine Walker, "Rereading Rape and Sexual Violence in Early Modern England," *Gender and History* 10, no. 1 (April 1998): 1–25.

<sup>46</sup>Natalie Davis made a similar point about criminal depositions: witnesses were supposed to confine themselves to what they had seen or heard of a crime, and their stories often lacked a beginning and an end (5–6).

<sup>47</sup>Carolyn Strange, "Stories of Their Own Lives: The Historian and the Capital Case File," in Iacovetta and Mitchinson, 34.

briefs offered narratives designed to fit how the NYSPCC thought jurors understood rape rather than accounts that reflected the meanings given to that act by a child and the others who provided evidence. Thus these records allow historians to do more than make sense of a specific case; they allow us to explore larger cultural attitudes and institutions.

My study of statutory rape cases offers an example of what attention to the nature of a summary document can reveal. Despite the relative slimness of the case file put together by the DA's office for the prosecution of Louis Morelli in 1916, for example, it contains not one but three accounts of the story told by Rosa Colletti, a fifteen-year-old embroidery factory operative who had run away from her home. Rosa's statement to an NYSPCC officer described an encounter with Morelli in which she set some of the terms of their subsequent relationship. When Morelli asked, after meeting Rosa in a restaurant, whether she wanted to become his "friend," Rosa, taking the initiative, replied that he would first need to obtain a furnished room. But when Morelli said that he had such a room, it was Rosa's companion Anna, not Rosa, who suggested that they go to see it. It was also Anna who, by agreeing to leave without Rosa, created a situation in which Rosa was left alone with Morelli. Rosa's statement as to what happened next is opaque, making it difficult to determine whether she remained with Morelli and later had intercourse with him because he compelled her to. The NYSPCC officer's summary of Rosa's statement in his investigation report omitted her conversation with Morelli in the restaurant as well as the information that she had stayed on in Morelli's apartment after they had intercourse, "keeping house" for several days and accepting food and trips to shows from Morelli. Rosa was presented, instead, as a passive object whom Morelli "brought" to his home to "perpetrate an act of intercourse upon." In the summary of Rosa's statement in the trial brief the officer did include the restaurant conversation, but, as he recounted it there, Rosa played no role when the terms of her relationship with Morelli were being set. In this second narrative Morelli told Rosa "if she would be his friend he would take her to stay with him in his furnished room." The NYSPCC officer's two renditions of Rosa Colletti's story evinced a clear concern to make her appear passive. The definition of statutory rape, the crime with which Morelli was charged, required only that a girl be less than eighteen years of age to receive legal protection. However, ADAs believed that jurors expected such passivity, and the innocence and ignorance it connoted, from a girl in order for her to warrant that treatment.<sup>48</sup>

Summary documents such as trial briefs highlight the need not only to differentiate the documents that make up a legal record but also to examine them in relation to one another and to where they fit in the legal process. A legal case file is not simply a collection of different documents, it is a record of a process, the effort to make a case, a single narrative that warranted the

<sup>48</sup>This example is drawn from my "Age of Consent Law," 781–82.

punishment of the defendant. A trial brief was not the end of that process. It was the story that prosecutors sought to tell, a script awaiting production. Such documents need to be read in relation to what was done with them: evidence of how well a narrative constructed from a case file actually fit what jurors needed to hear in order to vote for a conviction and how well it fit the complainant can be found in either an ADA's decision to accept a plea bargain or in the conduct and verdict of a trial. The outcome of a case alone reveals little; it is in the process that produced the result that the relationships between different narratives and groups can be seen.<sup>49</sup> Thus, to return to the example of statutory rape, it is plea bargains and trials that reveal the failure of prosecutors' efforts to present teenage girls like Rosa Colletti as passive children and indicate that it was the physically mature appearance of such girls and their use of sexual language, terms like "sexual intercourse," that led jurors to instead see them as adults, entitled to legal protection only if they had a good character.<sup>50</sup>

To examine the documents in a legal file in relation to one another also serves to direct attention away from the trial. Such a move is crucial to efforts to get at the evidence of nonelite attitudes offered by legal records. As Malcolm Gaskill has argued in regard to crime in early modern England, it is in the pretrial phases of the legal process that "one most vividly sees the ideas, initiatives, and responses of ordinary people." Whether a community cooperated and participated in the effort to take a case to trial was determined by "a complex and contingent web of choices, priorities, and responses" shaped by neighborhood pressures as well as law.<sup>51</sup> Sharon Block, for example, has shown how in eighteenth-century British America "the decision to prosecute a sexual assault was a personal, legal, and, perhaps most importantly, social decision" shaped by "layers of unwritten cultural practices" and preceded by extensive negotiations. It depended upon the reactions of those whom a woman told, of their assessment of public reaction, of the impact of public legal recourse on the victim's reputation, and of the legal system itself. Successfully initiating a prosecution for rape also required a male household head to accompany the woman to court, to provide a link to the all-male legal system. "Ironically," Block found that "the cases that might be most successfully prosecuted"—incestuous sexual assaults and cases involving child victims—"were often the most difficult for victims to bring to court."<sup>52</sup>

Attention to records from prior to the trial also reveals decisions that did not simply focus on the outcomes formally provided by the law. Block notes that the families of rape victims could also opt to "try to seek redress

<sup>49</sup>Herrup, 6.

<sup>50</sup>See my "Age of Consent Law," 788–92.

<sup>51</sup>Gaskill, 24.

<sup>52</sup>Sharon Block, "Bringing Rapes to Court," *Common-Place* 3, no. 3 (April 2003), <http://www.common-place.org/vol-03/no-03/block>.

outside the legal system, redress that could range from private settlements to their own version of justice.”<sup>53</sup> Even within the legal system individuals and families could seek outcomes other than those provided in statute books, as my work on statutory rape illustrates. A century after the cases described by Block, working-class New Yorkers charged men with rape in an attempt to force them to marry ruined and pregnant girls, continuing efforts that had begun outside the legal system. The legal context in which they operated was different from those that Block analyzes, differences precisely intended to prevent such use of law by ordinary Americans. In the second half of the nineteenth century institutional and structural changes had placed control of the process of criminal justice in the hands of salaried city officials: professional police, district attorneys, and magistrates. Those professionals, however, shared families’ beliefs that girls who had sexual intercourse outside marriage were ruined, that marriage was the only way to remedy that condition, and that girls in their teens were sufficiently mature to enter into such a marriage. Those ideas sometimes led judges to disregard legal rules and stretch legal categories, or endorse the efforts of others to do so, in an effort to obtain that remedy. The broader significance of this example is the evidence it offers that ordinary people’s use of law was not a behavior limited to the period before the twentieth century.<sup>54</sup>

The move to look beyond trials to pretrial procedures needs to be matched by a similar move to look past the verdict and sentence to the impact of prosecutions on legal institutions and law. In the words of Cynthia Herrup, “Law is not the white noise of social confrontation; it is made as well as used in every application.” The same can be said of legal practice, the approach of prosecutors and legal officials.<sup>55</sup> If an individual case rarely had such an impact, cases that formed consistent patterns more often did. Statutory rape cases in early-twentieth-century New York City provide an example of how law changed in response to the character of prosecutions. Jurors’ increasing refusal to treat teenage girls as children and to convict men who had sexual intercourse with them of rape not only produced the changes in how ADAs prosecuted rape that I have already discussed but also eventually changed the law on the books. By the second quarter of the twentieth century, even prosecuting such cases as second-degree rape failed to secure an indictment, let alone a conviction. In the 1930s and 1940s jurors treated only a narrow set of circumstances as requiring punishment: men much older than the girls with whom they had had sexual intercourse

<sup>53</sup>Ibid.

<sup>54</sup>See my “Making Right a Girl’s Ruin: Working-Class Legal Cultures and Forced Marriage in New York City, 1890–1950,” *Journal of American Studies* 36, no. 2 (2002): 199–230. Odem, by contrast, although recognizing parents’ attempts to use the law, emphasized the failure of those efforts and parents’ loss of control once a case entered the legal system.

<sup>55</sup>Herrup, xiv. See also Edward Muir and Guido Ruggiero, “Afterword: Crime and the Writing of History,” in Muir and Ruggiero, 227.

and men who failed to provide for the child born as a result of their sexual activity. In 1950 the New York Legislature amended the rape law in a way that brought it more into line with how it was being applied in practice. The new offense of statutory rape applied only to a man over the age of twenty-one years who had sexual intercourse with a female under the age of eighteen years. Men under the age of twenty-one years who had intercourse with an underage female in circumstances that did not constitute forcible rape committed only a misdemeanor.<sup>56</sup> Shaped as it was in the image of what had been happening in practice, this narrowed definition of statutory rape was part of the process contained in the DA's case files and needs to be analyzed alongside those legal records.

### HOW DOES LAW FIT INTO THE BIGGER STORY?

#### RETHINKING THE RELATIONSHIP OF LAW AND SOCIETY

The careful, contextual, and self-conscious readings of legal records I am proposing here open up questions about the relationship between law and society. Yet historians of modern sexuality have not taken up the possibility of exploring such questions. When historians of sexuality have looked at law they have tended to conceptualize it in terms of an opposition of law and society. Following the lead of social history and a generation of socio-legal scholarship, it is not the way law works as a means of social control but the gap between laws and their enforcement that has framed the way that historians have thought about the law.<sup>57</sup> Increasingly, they have also highlighted ordinary people's efforts to use the law. Some of those analyses leave the formal law at the center, concentrating on ordinary people's efforts to use what is laid down in the statute book.

Other accounts, however, make clear that ordinary people also brought their own ideas to the law.<sup>58</sup> One such idea was the belief that marriage was the appropriate remedy when men had sexual intercourse with teenage girls discussed above. An emphasis on the ideas that plaintiffs brought to the legal system casts law as one of a myriad of legalities, as part of a broader legal culture made up of a "plurality of authorized behaviors and authorizing

<sup>56</sup>This example is drawn from chapter 9 of my *Crimes against Children*.

<sup>57</sup>On this focus see Bruce Mann, "Afterword," in Christopher Tomlins and Bruce Mann, eds., *The Many Legalities of Early America* (Chapel Hill, N.C., 2001), 442–47; Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics," *California Law Review* 89 (May 2001): 666–67, and Novak's brief skewering of some scholars' tendency to too readily assume that such a gap between the law on the books and the law in practice exists (274 n. 46).

<sup>58</sup>For two recent works in the history of colonial America that insightfully explore the interrelation of custom and law see Kirsten Fischer, *Suspect Relations: Sex, Race and Resistance in Colonial North Carolina* (Ithaca, N.Y., 2002), and Joshua Rothman, *Notorious in the Neighborhood: Sex and Families Across the Color Line in Virginia, 1787–1861* (Chapel Hill, N.C., 2003).

discourses,” “a multitude of possibilities, arguments, strategies, positions, located in various institutions and in the imaginations of a complex and diverse citizenry,” and the relationships between all these elements.<sup>59</sup> The crucial conceptual move here is the notion that “legalities are not produced in formal legal settings alone.”<sup>60</sup> As John Philip Reid concluded after studying the words and conduct of nineteenth-century Americans, “the definition of binding ‘law,’ vesting rights and imposing obligations, was not limited to a command or set of commands from the ‘sovereign’ backed by threats or force. . . . Law was the taught, learned, accepted customs of people.”<sup>61</sup>

In order to place law more fully in society, this view of law as neither autonomous nor a consistent and unified whole needs to be wedded to the constitutive theory of law that has been developed by scholars in sociolegal studies, the law and literature movement in literary criticism, and the Critical Legal Studies movement.<sup>62</sup> Heavily indebted to Clifford Geertz’s argument that law is “a mode of giving particular sense to particular things in particular places (things that happen, that fail to, things that might),” this approach conceives law as operating “as much by shaping the way people understand the world as by coercing or rewarding them.” Rather than seeing the law as a “tool” used to realize goals and purposes that are independent of the law, a constitutive perspective views “social practices as not logically separable from the laws that shape them and . . . social practices [as] unintelligible apart from the legal norms that give rise to them.” An analysis of law thus must focus on “the operation of law and of various legal institutions and actors in the generation and reproduction of structures of meaning” and “attend to the links between law and society at the level of networks of specific legal practices on the one hand, and clusters of beliefs on the other.”<sup>63</sup>

Conceiving the law as constitutive usefully directs attention to “social practices produced by legal sanctions rather than the social practices or

<sup>59</sup>William Forbath, Hendrik Hartog, and Martha Minnow, “Legal Histories from Below,” *Wisconsin Law Review* (1985): 764–65; Christopher Tomlins, “Subordination, Authority, Law: Subjects in Labor History,” *International Labor and Working-Class History* 47 (1995): 66–67.

<sup>60</sup>Christopher Tomlins, “Introduction: The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History,” in Tomlins and Mann, 2. For critiques of this concept see Mann and Richard Ross, “The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History,” *William and Mary Quarterly* 50, no. 1 (1993): 32–39.

<sup>61</sup>Cited in Tomlins, “Introduction,” 3 n. 4.

<sup>62</sup>For the idea that law is constitutive see Jon-Christian Suggs, *Whispered Consolations: Law and Narrative in African-American Life* (Ann Arbor, Mich., 2000); Sally Engel Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago, 1990); Paul Kahn, *The Cultural Study of Law* (Chicago, 1999); Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York, 1993); Patricia Ewick and Susan Silby, *The Common Place of Law: Stories from Everyday Life* (New York, 1998).

<sup>63</sup>Austin Sarat, “Redirecting Legal Scholarship in Law Schools,” *Yale Journal of Law and the Humanities* 12 (2000): 134–37.

behavior those laws are meant to prohibit.”<sup>64</sup> For example, by 1930 the prosecution of statutory rape that I discussed earlier, in addition to its impact on men’s sexual activity with teenage girls, had altered social relations in New York City. In December 1930 Bruno Bizella and Peter Klein encountered Ruth Filakovsky in a cafeteria on 14th Street one month after she had run away from home. Unlike Louis Morelli fourteen years earlier in his encounter with Rosa Colletti, Bizella and Klein inquired as to Ruth’s age. The fifteen-year-old girl answered that she was nineteen, a lie intended, as she later admitted to an ADA, to make Bizella and Klein understand that she was “old enough.” Satisfied that Ruth was an adult, Bizella and Klein offered her a ride in their car, a ride that ended at an address in Broome Street, where Ruth had sexual intercourse with both men. As did many men in New York City by 1930, Bizella and Klein asked the age of the girl with whom they were seeking to have sexual intercourse because they recognized that even a girl who appeared to be sexually mature and to desire sex had to be eighteen years of age in order to engage in sexual intercourse. The slang term *jailbait*, which first appeared in the 1930s to describe underage girls like Ruth, makes clear that ordinary Americans understood the role of the law in constituting teenage girls as unable to consent to sexual intercourse and, therefore, at least in terms of their sexuality, as different from adult women. This neologism reminded men that prison awaited those who, holding to older ideas, paid attention to a teenage girl’s physical maturity and sexual desires rather than to her age.<sup>65</sup>

The continued life of the term *jailbait* long after enforcement of the age of consent declined in the 1940s and 1950s highlights the need to conceive the effects of law as going beyond those that result from enforcement and compliance with law. As Ryan Goodman recently elaborated, the narrow focus on enforcement, on the uses of the law, has been a key limitation in how the constitutive theory of law has been applied. Scholars have directed their attention almost entirely to the “formal impact” resulting from legal definitions: “whether people comply with the laws, whether arrests are made, and whether convictions occur.” In doing so they have overlooked other ways that law matters do not rely on its enforcement.<sup>66</sup>

In examining sodomy laws in South Africa Goodman developed an example of those effects that has particular relevance to historians of sexuality. He used survey evidence to analyze the basis of the claim that sodomy laws, “even when . . . not enforced . . . reduce gay men . . . to what one author has referred to as ‘unapprehended felons.’” What Goodman found was that, whether they resisted it or internalized it, the disapproval communicated through the law affected his respondents’ sense of personal identity and relationship to the community. The laws also framed and helped produce

<sup>64</sup>Goodman, 658, discussing the work of Jeb Rubenfeld.

<sup>65</sup>This example is drawn from my “Age of Consent Law,” 793–94.

<sup>66</sup>Goodman, 650.

conditions of hostility, supporting the threats posed by individuals and creating the need for self-monitoring in public space, particularly in regard to displays of public affection. Moreover, the criminal status sodomy laws accorded to gay men fractured their relations with police and precluded them from claiming state protection or filing complaints when they were targets of gay bashing or blackmail.<sup>67</sup>

Testimony to the broad salience of such a concept of the effects of law found its appearance in Justice Kennedy's majority opinion in *Lawrence v. Texas*, the case that, in 2003, declared American sodomy statutes unconstitutional. The opinion argued that "the stigma" resulting from making sodomy criminal would remain even if the law were unenforceable, that the "continuance [of the *Bowers v. Hardwick* decision upholding sodomy laws] as precedent demeans the lives of homosexual persons." Moreover, the opinion asserted, "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." Those arguments, however, were not part of the historians' brief submitted in support of the challenge to the Texas sodomy law.<sup>68</sup>

The historians' brief did, nonetheless, contribute a crucial part of the *Lawrence* decision. The majority opinion pointed to flaws in the historical premises on which the *Bowers* court relied in upholding the constitutionality of sodomy laws. Contrary to the claim that "proscriptions against that conduct have ancient roots," the opinion found "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." Instead, early American sodomy laws "sought to prohibit nonprocreative sexual activity more generally." The opinion went on to note: "Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private"; in fact, "laws targeting same-sex couples did not develop until the last third of the 20th century."<sup>69</sup>

That historical argument reflects both the achievements and limitations of the existing histories of sexuality that analyze legal records that I have examined in this article. It displays the close reading of statutes and attention to the gap between the law on the books and the law in practice that has been a feature of social history analyses of the law. At the same time it foregrounds the lack of research on the law in practice, on the law in society, in the twentieth century. The opinion had to rely on reported decisions for its conclusions about the lack of prosecutions in that period and, because

<sup>67</sup>Ibid., 684–711.

<sup>68</sup>*Lawrence et al. v. Texas*, No. 02-102, argued 26 March 2003, decided 26 June 2003, Opinion of the Court (delivered by Justice Kennedy) at <http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf>, 14; Brief of Professors of History at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/185.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/185.pdf).

<sup>69</sup>Opinion of the Court, 6–10.



of the limited details contained in those records, is unable to confidently assert that prosecutions focused on public behavior.<sup>70</sup>

Those limits in the historical literature created space for Justice Scalia to argue, in his dissent from the *Lawrence* decision, that the majority opinion had misrepresented the historical evidence. It did not matter that sodomy laws were not enforced against consenting adults acting in private, he asserted (at the same time pointing to the lack of evidence to support that claim), only that adults involved in consensual acts were prosecuted.<sup>71</sup> That contention relies on assumptions about what the law meant in practice, how it was understood, and its role in twentieth-century society, assumptions that historians, since they have not explored those issues, cannot overturn. I can think of no more compelling argument for the need for modern historians to direct their attention to legal records and to grapple with the methodological challenges posed by those sources.

<sup>70</sup>*Ibid.*, 9. The only other evidence provided in the historians' brief, reflecting the state of the literature, is limited quantitative evidence of prosecution of offenses other than sodomy and evidence of political persecution in the twentieth century. See Brief of Professors of History, 9–20.

<sup>71</sup>*Lawrence et al. v. Texas*, Dissent (delivered by Justice Scalia) at <http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf>, 12–13.