'A sort of juridical phantasm' : the criminal law's (lack of) engagement with lesbianism

Caroline Louise Derry

School of Law

LAW
PHD

"A SORT OF JURIDICAL PHANTASM": THE CRIMINAL LAW'S (LACK OF) ENGAGEMENT WITH LESBIANISM.

CAROLINE LOUISE DERRY

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Abstract

This thesis examines the ways in which the criminal justice system of England and Wales has regulated, failed or refused to regulate lesbiainism. It identifies the overarching approach as one of silencing, in which lesbianism is not simply ignored or unimaginable but is deliberately excluded from legal discourses. However, the existence of such a policy cannot alone explain the complex ways in which lesbianism has been regulated, and so two particular issues are explored in detail. First, in what ways has the policy of silencing been breached? Historical and contemporary criminal prosecutions over three centuries are identified and their significance examined. That significance can be fully understood only in the context of surrounding social and legal developments which are also considered.

Second, the evolution of silencing itself is explored. From the profound changes in popular and medical understandings of sexuality which occurred in the eighteenth and nineteenth centuries to the growth of lesbian visibility and political activism in the twentieth and twenty-first, the contexts in which silencing operates have altered dramatically. Further, the law itself has moved for the first time to an avowedly non-discriminatory, gender-neutral approach with the Sexual Offences Act 2003. In consequence, silencing itself has also had to change. As simple denial of lesbianism's existence has ceased to be feasible, this thesis describes the new forms which silencing has taken in response.

Third, the thesis considers the implications of the criminal legal system's approaches for the theoretical underpinnings of lesbian theory and activism. Liberal theories, queer theories and radical feminism are all examined in this context. Their adequacy in explaining and responding to the criminal law's treatment of lesbianism is analysed, and the significance of this analysis for future directions in lesbian activism explored.

This thesis offers a significant contribution to knowledge in two respects. First, although many of the cases discussed here have been published elsewhere and subjected to varying degrees of academic analysis, this is the first systematic account of the regulation of lesbianism by the criminal justice system. Thus the discussion of common themes and historical developments is novel. Second, most of the cases have hitherto been considered from a historical rather than legal perspective, while many of the contemporary cases have not previously been considered from a broadly radical-

feminist perspective. Further, the analysis of the applicability of queer and radical feminist theories to this particular area of the criminal law is also new. This thesis therefore demonstrates the exercise of independent critical powers.

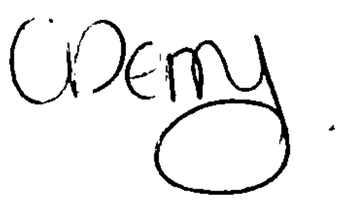
Declaration

I declare that this work is my own.

However, it would not have been possible without the assistance of the following people.

Thank you above all to my Director of Studies, Rosemary Auchmuty.

I also gratefully thank the following: my second supervisor Penny Green; colleagues including Judith Bourne, Janet Loveless, Maggie Conway and Alya Khan for discussions, ideas and support; many librarians, particularly those at London Metropolitan University, the Women's Library and the British Library; the staff of the London Metropolitan Archives, Public Record Office and Somerset County Records Office; members of the Victoria email list, especially Scott Rogers and Lesley A Hall; and my sister Angela, for endless help.



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Chapter 1
Introduction

This thesis aims to answer the question, how has the criminal law of England and Wales (not) engaged with lesbianism? In order to do so, it aims to produce an account of both the consistent factors and the significant developments in the law's approach over the course of three centuries. In particular, it problematises the assumption that lesbianism has simply been ignored, arguing that instead it has functioned as "a sort of juridical phantasm":[1] present but invisible, a source of acute anxiety. It demonstrates that there was an approach of deliberate silencing rather than accidental or unconcerned omission, and considers the significance of those cases in which that silence was broken. It then examines the ways in which the criminal justice system has responded to social and political changes which mean that straightforward silencing of lesbianism is no longer a realistic policy.

The thesis goes beyond simply describing what the law has done about lesbianism to examine the theoretical underpinnings and the consequences for lesbian legal theory of the law's approaches. In particular, lesbian feminism, liberal theories and queer theory are examined in the light of the criminal law's means of (not) engaging with lesbianism. The adequacy of these theories in explaining that engagement is analysed, and the practical consequences of each theory for lesbian politics in this area considered.

Rationale

Each chapter takes particular historical moments as entry points for an examination of the criminal justice system's approach to regulating lesbianism. The use of these entry points

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[1] Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York: Columbia University Press, 1993, p 6.

is a strategy for investigating the nature of the silencing of lesbian existence and experience in different historical periods. A more straightforwardly thematic or chronological approach would have been difficult to adopt because of the fragmentary nature of the evidence. Since lesbianism has never been an offence in its own name, there is no clear and visible body of prosecutions in the way that there is for sodomy, for example. Further, many cases which may have related to lesbianism are likely, historically, to have been prosecuted in the petty sessions, the records for which have rarely survived.

However, there are a number of relevant cases, incidents and themes which can be discerned, and these are what I discuss in this thesis. I cannot claim that my selection is either complete or a representative cross-section of what actually happened; we simply do not know, and much of the evidence which might have enlightened us further either no longer exists or was never in a potentially permanent form to begin with. I have therefore adopted a qualitative approach which draws on the strengths of the material which does exist. Each "key moment" illustrates one aspect of the overall thesis. By discussing these in depth and placing them within a wider historical and theoretical context, I hope to deal with the full breadth of evidence available, without obscuring either its limitations or its enormous possibilities.

This qualitative approach is one which has commended itself to many feminist legal historians. Kermode and Walker comment in the context of studying women, who "get lost in the broad overview", that

> It is becoming increasingly apparent that qualitative material can tell far more about the activities and attitudes of ordinary people than can aggregates of litigation alone.[2]

That point is particularly true for women's relationships with other women.

There is also an increasing awareness among theorists and historians of the deficiencies of metanarratives ("ahistorical normative theories about the transcultural nature of rationality or justice") and quasi-metanarratives ("very large social theories ... which claim, for example, to identify causes and constitutive features of sexism that

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[2] Garthine Walker and Jenny Kermode, 'Introduction', in Jenny Kermode and Garthine Walker (eds),

operate cross-culturally").[3] The weaknesses of these approaches have been well-rehearsed: in particular, metanarratives or "grand narratives" claim universal status, beyond any particular historical or social context; they use criteria assumed to be universal and objective which are in fact historically and culturally specific; they tend to be structured by dominant discourses, "often both androcentric and Eurocentric";[4] and they "falsely universalize features of the theorist's own era, society, culture, class, sexual orientation, and ethnic, or racial group."[5]

I hope to avoid these weaknesses in this thesis, and my methodology of focusing upon particular historical moments, using them to identify changes in legal discourse and social context, is perhaps the most important corrective. The case studies also require attention to be paid to the specific experiences of women who fell outside dominant norms of class, race and sex. Additionally, the thesis is geographically specific: the policy of silencing described here is one which was not followed, or was applied in very different ways, outside England and Wales. One should also be aware that although the term "metanarrative" tends to be associated with postmodernism,[6] it has long been a concern of feminist historians (in common with other social historians) to focus upon the specificity of experiences: the very foundation of such approaches is the awareness that one "grand theory" cannot be applied to all, regardless of sex, race, class, period and so on.[7]

However, my approach is explicitly feminist and feminism has itself been criticised as a metanarrative, relying upon essentialist conceptions of "woman".[8] As I will

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Women, Crime and the Courts in Early Modern England, London: UCL Press, 1994, pp 1-25 at p 5.

[3] Nancy Fraser and Linda J Nicholson, 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism' in Linda J Nicholson (ed), *Feminism/Postmodernism*, London: Routledge, 1990, pp 19-38 at p 27.

[4] Chris Weedon, *Feminist Practice & Poststructuralist Theory* (2nd edition), Oxford: Blackwell Publishers, 1997, p 172.

[5] Fraser and Nicholson, 'Social Criticism without Philosophy', p 27.

[6] See in particular Jean-François Lyotard (trans. Geoff Bennington and Brian Massumi), *The Postmodern Condition: A Report on Knowledge*, Minneapolis: University of Minnesota Press, 1984.

[7] To take just one example, the London Feminist History Group introduced their 1983 collection of essays by stating "we see history as a dynamic process of struggle and change. Male domination is not a fixed monolithic system, but it changes in form and intensity in response to social and economic transformations ... it also changes in response to women's resistance"; they specifically refer to race and access to social and economic power as relevant factors (London Feminist History Group, *The Sexual Dynamics of History: Men's power, women's resistance*, London: Pluto Press, 1983, p 1).

[8] See Carol Smart, 'Feminist Jurisprudence' (1991) in *Law, Crime and Sexuality: Essays in Feminism*, London: SAGE Publications, 1995, p 167. Such criticisms are common elsewhere, often first setting up a

argue later in this thesis, such a criticism is unjustified in the case of much radical feminism, which has emphasised the constructed nature of sex roles and highlighted their historical and cultural specificity as one way of demonstrating this. Denise Thompson formulates the issue thus: since feminism is the struggle against male domination, "the question of 'feminine gender identity' ... does not arise as a general theoretical problem for feminism": women do have a common interest, "in opposing male domination whatever its particular manifestations".[9]

With perhaps more justification, feminism has also been criticised for producing quasi-metanarratives, universalising from the experience of "white, middle-class, heterosexual women" and thereby excluding the experiences of "poor and working-class women, women of colour, and lesbians".[10] Even in making those criticisms, however, Fraser and Nicholson accept that recent years have seen a significant change in approach; I would go further and suggest that to assume that this is a valid blanket criticism of earlier feminist work is itself a false universalisation which ignores the work both of working class, ethnic minority and lesbian feminists, and of those other feminists who took such experiences into account in their work. To take just one example, Marilyn Frye in 1983 introduced her book *The Politics of Reality* (whose chapters included 'On being white: Thinking toward a feminist understanding of race and race supremacy') by cautioning that

> Any theorist would be a fool to think she could tell another woman exactly how the particularities of that other woman's life reflect, or to what extent they do not reflect, the patterns the theorist has discerned ... such illumination cannot be delivered complete and clear by one individual onto another's history and situation.[11]

In any event, one should be cautious of allowing concerns about false universalising in such narratives to prevent the making of valid and important

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"straw woman" of biologically essentialist radical feminism: for example, Chris Weedon attacks radical feminism – conceived of by her as including only certain strands of American separatist thought, notably the work of Mary Daly - as a "totalizing strategy ... in which a new version of true, biological femaleness replaces patriarchal definitions" (*Feminist Practice & Poststructuralist Theory*, p 130).

[9] Denise Thompson, *Radical Feminism Today*, London: SAGE Publications, 2001, p 120.

[10] Fraser and Nicholson, 'Social Criticism without Philosophy', p 33.

[11] Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory*, New York: The Crossing Press, 1983.

connections. As historian Andrew Scull warns in a slightly different context (the history of psychiatry),

> we need to be careful lest in our fascination with the details we find ourselves retreating back into a sort of neo-solipsism, a narrow and constricted vision that flattens and distorts our sense of perspective and leaves in obscurity aspects of historical reality that acquire meaning only when placed in a larger contextual frame.[12]

Frye argues that women form one such contextual frame: "women constitute something like a caste that cuts across divisions such as race and economic class .. although the forces which subordinate women would be modified, deflected and camouflaged in various ways by the other factors at play in our situations, we still ought to be able to describe those forces in ways which help make sense of the experiences of women who live in all sorts of different situations".[13]

In my thesis, such forces and connections are identified not so much across cultures as across time: I seek to draw out common links as well as important patterns of change over almost four centuries. While I hope that I do not fall into the trap of ignoring significant differences between these periods (or between the women I discuss, who also vary as to ethnicity, class, age, and economic and social circumstances),[14] there is an equally dangerous trap to be avoided: that of seeking to create only micro-narratives and to ignore the wider themes and commonalities, which in this area are often striking. The past may be another country, but it is one to which we all have strong links, and it is further a country whose culture (in whatever partial and misunderstood form) is mother to our own. Indeed, the legal system claims to derive its authority in large part by the

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p xiii.

[12] Andrew Scull, 'Rethinking the History of Asylumdom' in Joseph Melling and Bill Forsythe (eds), *Insanity, Institutions and Society, 1800-1914: A social history of madness in comparative perspective*, London: Routledge, 1999, pp 295-315 at p 298.

[13] Frye, *The Politics of Reality*, p xiii.

[14] I make no ambitious claims to complete success. In particular, since recent theorising seems to have collapsed increasingly into a search for the essentialism in others' work at the expense of the more constructive effort to construct positive connections and ways forward, it would be a foolhardy writer indeed who would claim to be immune to such attacks. As far back as 1990, Susan Bordo argued "I believe that feminism stands less in danger of the 'totalizing' tendencies of feminists than of an increasingly paralyzing anxiety over falling (from what grace?) into ethnocentrism or 'essentialism'." ('Feminism, Postmodernism, and Gender-Scepticism' in Linda J Nicholson (ed), *Feminism/Postmodernism*, London: Routledge, 1990, pp 133-156 at p 142.

doctrine of precedent and the continuance of tradition: it actively looks to the past as a way of maintaining its dominion in the present. For this reason, the links between past and present are particularly strong in legal history.

What this thesis does not do

The best way to explore those links is not, I would argue, to concentrate upon the better-known cases. Among the most notable in this regard are those of Marianne Woods and Jane Pirie, Maud Allen, and Radclyffe Hall. However, although the best-known in the field of lesbian studies, they are not as germane to this thesis as may at first be assumed: although all involve allegations of lesbianism, none are in fact criminal prosecutions of the women concerned. Consequently, while they are not ignored, none of them seemed appropriate entry points here.

Miss Marianne Woods and Miss Jane Pirie v Dame Helen Cumming-Gordon is perhaps the most famous pre-twentieth century case, above all because of Lilian Faderman's book *Scotch Verdict*.[15] Woods and Pirie, two teachers who owned a school in Edinburgh, were accused by a pupil of engaging in sexual activity with each other. The pupil was the half-Indian granddaughter of Dame Helen Cumming-Gordon, whom she was bringing up following her son's death. Upon hearing the girl's allegations, Cumming-Gordon withdrew her from the school and advised other parents to do likewise. Faced with the collapse of their school, Woods and Pirie sued her for libel. The case is therefore not an appropriate entry-point for two reasons: first, Woods and Pirie did not themselves face criminal prosecution; and second, the case was primarily conducted in the Scottish courts, only ending up in the English House of Lords after several years. However, it is a rich resource in terms of attitudes to race, class and sex, and will therefore be used for what it does have to tell us about the policy of silencing in that period.[16]

Another well-known case, this time from the beginning of the twentieth century, also falls outside the direct subject matter of this thesis since it, too, was a libel case and

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[15] *Scotch Verdict: Miss Pirie and Miss Woods V Dame Cumming Gordon*, New York: William Morrow, 1983. The full transcript of the case is published as *Miss Mariann Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon*, New York: Arno Press, 1975. The case was also the inspiration for Lillian Hellman's 1934 play (filmed in 1961), 'The Children's Hour'.

although criminal (since defamatory libel was an offence carrying up to two years' imprisonment), the alleged lesbian was here the prosecutor not the defendant.[17] In 1918 Maud Allen, a well-known dancer, brought libel proceedings against Noel Pemberton-Billing.[18] The extreme right-wing, anti-Semitic Independent MP for East Herts, he was also leader of the Vigilante Society and founder of the journal *Imperialist*, later the *Vigilante*. In that journal, he had published an article accusing Allen of belonging to the 'Cult of the Clitoris' or, in other words, of being a lesbian. His allegation, which arose out of her proposed appearance in a private production of Oscar Wilde's play *Salome* (then banned from public performance by the Lord Chamberlain), was the more serious since he had already published the claim that 47,000 such known lesbians and homosexual men were being exploited by German agents.[19] Thus, in the closing months of the First World War, lesbianism was linked with espionage and threats to the security of wartime Britain. Allen lost her case following a number of defence arguments, including that her very knowledge of the word "clitoris" implicated her as a lesbian: while she admitted that she and her friends understood the word, Pemberton-Billing claimed that "out of twenty-four people who were shown that libel, including many professional men, only one of them, who happened to be a barrister, understood".[20]

A publication, rather than a person, was also the focus of Radclyffe Hall's case. Her novel *The Well of Loneliness* was the subject of criminal proceedings in London in 1928. However, the defendants were the publishers, Jonathan Cape, not the author, and the background is a little complicated. Cape had already voluntarily discontinued British

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[16] See in particular my more detailed discussion of the case in Chapter 3.

[17] Civil libel existed at this time (the *Woods and Pirie* proceedings were civil), but proceedings for criminal libel were more common since under the Libel Act 1843, once it was proved that he had published a serious defamatory statement a defendant would only be acquitted upon proving both the truth of the libel and that it was for the public benefit that the matter should be published.

[18] On the Maud Allen case, see for example Alison Oram and Annmarie Turnbull, *The Lesbian History Sourcebook: Love and sex between women in Britain from 1780 to 1970*, London: Routledge, 2001, pp 162-163; Michael Kettle, *Salome's Last Veil: The Libel Case of the Century*, London: Granada Publishing, 1977; Jodie Medd, '"The Cult of the Clitoris": Anatomy of a National Scandal' (2002) 9(1) *Modernism/Modernity* 21-49. Noel Pemberton-Billing's particular interest in Parliament was air policy, and he is perhaps better remembered now for his interest in aviation; Supermarine, the aeroplane company he founded, would go on to produce the Spitfire (Kettle, *Salome's Last Veil*, p 3; Airminded, 'Noel Pemberton-Billing', http://airminded.org/biographies/noel-pemberton-billing/, accessed 29 August 2006; The Spitfire Society, 'The History of Supermarine', 1999, http://www.spitfiresociety.demon.co.uk/supermar.htm, accessed 29 August 2006).

[19] 'The First 47,000', *Imperialist*, 26 January 1918, quoted in Kettle, *Salome's Last Veil*, p 7.

[20] Cross-examination of Maud Allen, 29 May 1918, quoted in Kettle, *Salome's Last Veil*, p 68.

publication on the Home Secretary's advice. Nonetheless, they had the book printed in Paris and imported, as a result of which they were summoned to Bow Street Magistrates' Court to show cause why copies of the novel should not be destroyed as obscene. Their representations and subsequent appeal failed and the books were destroyed.[21] In summary then, the proceedings were brought against the publisher, not the author, and her role was that of potential witness rather than defendant. They also concerned the "obscene" nature of the book rather than the author's own lifestyle. The case was thus very different in nature from those upon which I concentrate in this thesis, where a woman is prosecuted and, if convicted, punished for her actual relationship with another woman.

As with case studies, so with the inclusion of ideologies and theories, too, selectivity is vital. To take one example, Havelock Ellis' theories of sexuality will be discussed in some detail but those of others such as Freud will not. Whatever his impact more generally, there is little evidence to suggest that Freud's theories in relation to lesbianism had significant influence on either popular attitudes or law.[22] As I will explain in Chapter 5, Havelock Ellis' descriptions of lesbianism largely meshed with popular stereotypes and to some extent, dominant ideologies. By contrast, Freud's explanations of lesbianism did not enter the consciousness of the general public or legal profession in the same way. Indeed, as becomes apparent in the following chapters, Freud's theories with their emphasis upon an initial state of polymorphous perversity and subsequent development towards a male or female object choice directly confronted many popular understandings of lesbianism as largely innate.[23]

I will end this list of what I am not going to do by emphasising that I am not

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[21] There is an extensive literature on this case: see for example Diana Souhami, *The Trials of Radclyffe Hall*, London: Weidenfeld, 1998; Laura Doan and Jay Prosser (eds), *Palatable Poison: Critical Perspectives on the Well of Loneliness*, New York: Columbia University Press, 2001; Michael Baker, *Our Three Selves: The Life of Radclyffe Hall*, New York, William Morrow, 1985; Vera Brittain, *Radclyffe Hall: a case of obscenity?*, London: Femina Books, 1968; Sally Cline, *Radclyffe Hall: A Woman Called John*, London: John Murray, 1997 (criticised by Andrea Dworkin for its treatment of Hall's fascism: 'Shadowy corners in the Hall of fame', *The Times Higher Education Supplement*, 12 September 1997, p 23).

[22] Freud's theories have, on the other hand, had a significant influence upon (and been challenged by) the work of some queer theorists, notably Judith Butler; for a critique of her use of his work, see John Hood Williams and Wendy Cealy Harrison, 'Trouble With Gender' (1998) 46(1) *The Sociological Review* 73-94 esp pp 83-90; Elizabeth Grosz further criticises the usefulness of psychoanalytic theory to an understanding of lesbian desire ('Refiguring Lesbian Desire', in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 67-84, at pp 70-74).

[23] Although such understandings have frequently been confused by being held along with notions of the possibility of "corruption", Havelock Ellis's theory of born inverts and pseudo-lesbians could

attempting to provide a complete history of all attitudes to lesbianism (or female autonomy or sexuality more generally) for all the periods discussed. Such a project, even if possible, would certainly be considerably more extensive than one thesis could encompass. In particular, attitudes to sexuality (and most other issues) varied enormously between and within classes, ethnic groups, political and religious movements and so forth. It should be taken as given that no one ideology enjoyed complete dominance in any one period: conservatives and radicals, feminists and their opponents, people of different regions, ethnicities and classes, all had very different attitudes.

Dominant ideologies

My concern is rather with the dominant ideologies affecting the legal treatment of relationships between women: those which had the greatest influence upon the legislature and judiciary at any given period. When one examines the criminal justice system, the attitudes and ideologies of white, upper-middle class men must be brought to the fore as these were the only people who for much of history had the power to make and administer criminal law. This it was the views of this group which found concrete form in the processes of the criminal justice system (albeit in inconsistent and even contradictory ways). Even today, that small group retains the majority of power. Naturally there are differences within this group, as will become apparent at the beginning of the next chapter, but one can at least identify broad ideological themes which enjoyed precedence at particular times.

Even within those limits, ideas on different aspects of women's lives such as their sexuality, intellect, public role and so forth changed at different rates so that dominant views on one topic were often inconsistent with those on another. Not everybody was subject to the same ideologies in the same ways: some people fell outside their ambit, others actively resisted them, and so on (they are, after all, ideologies rather than laws of nature). As Marilyn Frye puts it,

> If "Women's anger is forbidden" is some sort of cultural truth, that would not imply that the force

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accommodate such confusions rather more straightforwardly than Freudian theories.

of that proscription is always and equally upon every individual in every situation.[24]

Rather than simply throw up one's hands in despair at such a multiplicity of attitudes, ideologies and conflicting realities, however, the answer pursued here is to highlight key themes and major changes. The reader should of course bear in mind that not everyone, nor even every white male member of the ruling classes, would share all of these ideas at the same time or at all. However, they are discussed because enough people of influence shared enough of them at close enough times for them to have had influence upon the criminal justice system's approach to lesbian relationships.

Defining "lesbian"

> Lesbian identity is something I have known, have felt, have recognized across a room and across years.[25]

Any definition of lesbianism will inevitably be extremely political in whom it includes and excludes. Further, as the quotation above indicates, we frequently use the term knowing what we mean by it but not in a way which admits of precise definition. As a lesbian politics and identity is built from a position of heteropatriarchal impossibility, it is difficult to define the term in heteropatriarchal language. However, some attempt must be made here.

- **A sexual or political definition?**

Traditionally, lesbianism has been defined in sexual terms. Thus the Oxford English Dictionary offers, "Of a woman: homosexual, characterized by a sexual interest in other women."[26] Increasingly, however, lesbians' own definitions have moved away from the purely sexual. Feminism created a new type of definition of lesbianism, whose focus was

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[24] Frye, *The Politics of Reality*, pp xii-xiii.
[25] Ruthann Robson, *Sappho Goes to Law School*, New York: Columbia University Press, 1998, p 13.
[26] 2nd edition (2004). http://athens.oed.com, accessed 9 October 2005. See also the sociological definitions quoted by Annabel Faraday, 'Liberating lesbian research' in Ken Plummer (ed), *The Making of the Modern Homosexual*, London: Hutchinson, 1981, pp 112-132 at pp 115-116.

both wider and more political. Margaret Hunt offers such a political approach which focuses not upon particular relationships but upon a way of life:

> To search for lesbians is to be on the loookout for agency, whether of an economic, political, spiritual or sexual sort.[27]

Lesbian feminism in particular has emphasised lesbianism as something other than a series of sexual acts. For historian Lilian Faderman,

> "Lesbian" describes a relationship in which two women's strongest emotions and affections are directed toward each other. Sexual contact may be a part of the relationship to a greater or lesser degree, or it may be entirely absent.[28]

Such a definition has a relatively long history: in 1970, the Radicalesbians defined lesbianism as "the primacy of women relating to women, of women creating a new consciousness of and with each other which is at the heart of women's liberation, and the basis for the cultural revolution."[29] Similarly, Ann Ferguson summarises Adrienne Rich's concept of lesbian identity as "the sense of self of a woman bonded primarily to women who is sexually and emotionally independent of men".[30] This positive emphasis upon the bonds between women, in preference to a sexual definition, has been taken up by other theorists. Christine A Littleton recognises "women who nurture women" as a crucial (albeit not sufficient) part of a definition of lesbianism.[31]

Thus the definition is not principally, or even necessarily, sexual: one does not have to prove genital sexual activity with another woman in order to establish a lesbian

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[27] Margaret R Hunt, 'The Sapphic Strain: English Lesbians in the Long Eighteenth Century' in Judith M Bennett and Amy M Froide (eds), *Singlewomen in the European Past 1250-1800*, Philadelphia: University of Pennsylvania Press, 1999, pp 270-296 at p 273.

[28] Lillian Faderman, *Surpassing the Love of Men: Romantic friendship and love between women from the Renaissance to the present*, London: The Women's Press, 1985, p 18.

[29] 'The Woman-Identified Woman', Pittsburgh: Know, Inc (1970).

[30] 'Patriarchy, Sexual Identity, and the Sexual Revolution' (1981) 7(1) *Signs* 158-172. Ferguson herself is critical of this definition and, from a socialist feminist perspective, argues that it ignores both the importance of social and group aspects of lesbian identity, and the absence of an explicit lesbian identity (as opposed to lesbian practices) before the late nineteenth century. This latter notion of lesbian identity as a recent development has itself been increasingly criticised by lesbian historians such as Emma Donoghue (*Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993). One could also ask *why* a self-conscious lesbian identity is required.

identity.[32] Conversely, such sexual activity would not automatically make a woman a lesbian. However, sexuality is part of the definition because it is an area of life in which one's attentions are focused perhaps particularly intensely upon someone else: it is therefore a significant area of one's interpersonal relationships. It is not, however, a discrete one which can be separated from other areas of interpersonal interaction.

A vital difference between this valuing of the sexual element of many lesbian relationships and that of many other definitions is that it does not give primacy to the sexual. A woman is no less a lesbian because she is not sexually active, or because she is in a loving relationship with another woman which does not include sexual activity. What is important is her prioritising of women and with it, her rejection of heteropatriarchal expectations: as Sheila Jeffreys phrases it, "women's resistance to heterosexuality as an institution".[33]

- **What is sexual?**

I would also argue for a wider, less defined concept of sexual activity than that used by some lesbians: the sexual is not defined by a list of activities broadly analogous to heterosex, or by the use of equipment which has been designated as falling within the category "sex toys". There is no sharp and simple dividing line between sexual and non-sexual interactions. Indeed, this integration of the sexual into one's whole life is central to the revolutionary potential of lesbianism:

> Lesbian sex does not hurt men. Indeed it has been employed by men in brothels and in pornography from time immemorial so that they can gain erections. It is lesbian love including sex which is separate from men that is seen as disloyal because such separation removes members of

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[31] 'Double and Nothing: Lesbian as Category' [1996] *UCLA Women's Law Journal* 1-25, fn 15.

[32] Just as one does not have to prove genital activity with the opposite sex in order to establish heterosexuality (see Sheila Jeffreys, 'Does It Matter If They Did It?' in Lesbian History Group, *Not a Passing Phase: Reclaiming Lesbians in History 1840-1985*, London: The Women's Press, 1989, pp 19-28). Note that this definition functions in an almost exactly opposite way to the approach of some SM theorists, such as Leo Bersani (cited in Valerie Traub, *The Renaissance of Lesbianism in Early Modern England*, Cambridge: Cambridge University Press, 2002, p 365, fn 21) whose "stated goal ... is to locate non-genital potentials of pleasure and pain on the body's surface" (Traub, p 13): an approach which hugely expands and thereby increases the emphasis upon and the apparent importance of the sexual.

[33] *The Lesbian Heresy: A feminist perspective on the lesbian sexual revolution*, London: The Women's Press, 1993, p 9. She was speaking in the context of identifying historical lesbians, where the use of a definition which is not centred upon proof of genital sexuality is of course particularly crucial.

> the slave class of women which forms the foundation of male power and provides a connection between women which can be the basis of resistance.[34]

Sexual activity in this context is the intense physical connection between women which involves the exploration of each other's bodies with each other's bodies, rather than through the distracting intermediary of accessories, prescriptive scenarios, and even the setting of goals (such as that bizarrely prioritised by Annie Sprinkle, of achieving female ejaculation: a definition of female sexual "power" arrived at by direct comparison to a male norm).[35] In contrast to many queer theorists, I would also suggest that the mind is fully present too, that a mind/body split is neither desirable nor sustainable, so that a sexual utopia would not be one of "pleasures that took the entire body as the surface and depth of its operation"[36] as if the body were the limit, the whole "depth" of the experience and the mind which is fundamentally part of it somehow lost all substance and identity. Lesbian sexual activity has the potential to be a concentration and a presence which creates an energy and connection without need or want of those outside props which turn powerful interactions into a commercial opportunity. In the words of Sheila Jeffreys, lesbian sexuality at its best is:

> innovative, imaginative, self-taught, low-tech, [does] not cost any money or provide any sex industrialists with an income. ... providing a possible alternative vision of what sex could be when it [is] not centred on penises, goal orientation, objectification, dominance and submission.[37]

Unsurprisingly, that is not the story of lesbian sexuality which is told by the courts. They seem overtly to have concentrated upon a definition of lesbianism which centres upon the performance of particular sexual acts. Thus in court, a woman may have been openly acknowledged to be a lesbian if genital sexual activity was proved (above all

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[34] *Ibid*, p 193.
[35] See for example her foreword to Deborah Sundahl, *Female Ejaculation and the G-Spot*, Alameda, California: Hunter House Publishers, 2003.
[36] Judith Butler, 'Revisiting Bodies and Pleasure' (1999) 16(2) *Theory, Culture & Society* 11-20 at p 11. Her vision of "unmarked bodies, bodies that were no longer thought or experienced in terms of sexual difference, and pleasures that were diffuse, possibly nameless, intense and intensifying. pleasures that took the entire body as the surface and depth of its operation" is otherwise an attractive one, but I will criticise her development of this vision in later chapters.
[37] Jeffreys, *The Lesbian Heresy*, pp 20-21.

if that activity involved penetration of one woman by another using a substitute "penis") but without such proof, recognition of her lesbianism has been resisted.[38] An effect of this focus upon sexual acts analogous to heterosexual intercourse is that the definition of the sexual is not expanded beyond its heteropatriarchal parameters. The revolutionary potential of the egalitarian, intense and uncommercial lesbian sexuality discussed above is thereby kept hidden. Instead, an attempt is made to portray lesbians as pale imitations of heterosexuals, mimicking "real" sex although they can never match it, but are instead forced to rely upon artificial substitutes for the irreplaceable penis.

Under the terms of such a definition, it is also easy to obscure prosecutions since historically, what has actually been prosecuted in many cases is not a lesbian's sexual activity *per se*, but the adoption of a lesbian lifestyle. Some writers on lesbian history have partly recognised this by suggesting that transvestism has been the major factor in prosecution: in other words, that the visible taking on of male prerogatives has been the cause of legal disapprobation.[39] However, I will argue in this thesis that it is separation from heteropatriarchal control systems which attracts censure, rather than the assumption of certain male prerogatives alone. This understanding clarifies why, historically, the adoption of a male identity alone has not invariably been punished, and may even have been treated sympathetically. Factors such as a willingness to resume female garb or evidence (however flimsy) that the identity was assumed from necessity rather than choice have been significant in avoiding prosecution upon discovery.[40] In other words, in deciding who is subject to sanction, the legal system has directed its attention to those women who choose to prioritise other women in their lives and, as far as they are able, step outside male control.

- **Should we use 'lesbian' at all?**

The use of a radical-feminist definition of lesbianism is controversial, however. One particular issue, particularly for historical analysis, is whether we can meaningfully describe women who lived before the twentieth century as lesbians at all. The starting

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[38] See for example the case of *Spicer v Spicer (Ryan Intervening)* [1954] 1 WLR 1051, where the court was quick to emphasise that a physical relationship between the wife and another woman had not been established, yet still found that the friendship amounted to cruelty to the husband.
[39] For example Faderman, *Surpassing the Love of Men*, p 54.

point for this concern is often the work of Foucault, who suggested that the idea of "the homosexual" is relatively new, and that prior to 1870 there was no such thing as a homosexual: instead, sodomy was seen as conduct which any man might engage in.[41] Foucault did not concern himself with lesbianism, but the same argument has been applied in this context: that "the lesbian" did not exist until the sexologists' publications and the self-conscious lesbian subculture of the early twentieth century. For example, Ann Ferguson argues that the term "lesbian" can only be applied meaningfully to women who so identify. She suggests that prior to the existence of lesbian identity in the twentieth century, women could not identify as lesbian in any meaningful way, although they may have identified as sexually deviant.[42]

I would suggest that such a notion is overly restrictive. In particular, it is unclear that a woman involved in a relationship or relationships with other women would have conceived of herself in quite such a way: would she really have seen herself as deviant in the same way as a male homosexual, for example? What if we can show that a group of such women met at that time? Or that there was a term applied to such women, either by others or by themselves? Is the existence of a particular word so important, anyway? One can make a decision to live in a particular way even if one does not have a name for that lifestyle. It seems patronising at the least to assume that women who chose to live with other women in previous centuries had no consciousness of themselves as living in a particular way which differed not only from heteropatriarchal norms, but also from that of other "deviants".

Valerie Traub seeks to avoid the problem of definition by focusing upon "manifestations of erotic desire"[43] rather than upon categories of person. Her objection to the use of the term lesbian in a seventeenth-century context is a more subtle one than the Foucauldian "date of birth" argument that there was no lesbian identity before the late nineteenth century. Rather, she suggests that the "concept of erotic orientation"[44] was itself alien to the seventeenth century: such identities were only just beginning to form,

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[40] See Chapter 4 for more detailed discussion.
[41] Michel Foucault, trans. Robert Hurley, *The History of Sexuality, Vol 1: An Introduction* (1976), London: Penguin, 1990, p 43.
[42] 'Patriarchy. Sexual Identity, and the Sexual Revolution'.
[43] Traub, *Renaissance*, p 13.
[44] *Ibid*, p 14.

making the term lesbian itself premature. The notion of a move from same-sex behaviour as conduct which anyone might engage in, to conduct engaged in by particular people who might share a common identity, is one which has been developed by various historians and which I discuss further in Chapters 4 and 5.

While such insights are important, I would suggest that they may have more validity for men prosecuted for sodomy than for the women whose prosecutions I discuss here. All these women were engaged in more than a specific kind of sexual behaviour: they were engaged in relationships (sometimes long-term and often alleged to be one of a series of such relationships) which were fundamentally structured according to the sex of both parties. To suggest, then, that their identity was unaffected and that they saw themselves as no different to other women, is to apply a generalisation to them which does not seem to fit at all with their lives. Indeed, I would suggest that the model applies better generally to cultural norms of male sexuality as involving engagement in sexual activity with a number of partners. The long-term, often monogamous relationships or passionate friendships engaged in by many women must have had some impact on their concepts of themselves in a fundamental way (albeit that not all of them would have had or sought a term such as lesbian to describe this). In particular, and contrary to the implicit image of the socially isolated, pre-conscious lesbian, many such women lived and worked within extensive social networks containing large numbers of single women and lesbians.[45]

A further, more recent response is to seek to move away from the term "lesbian" altogether. Postmodern theory posits that such identities are both incoherent and overly restrictive in suggesting that sexuality is fixed rather than fluid. Valerie Traub explains the latter objection thus:

> Despite the common-sense appeal of finding in the biological sex of one's erotic partner the prime indicator of "sexual orientation", desire, I believe, is not so easily oriented. Both desire and its related gender identifications can transit across identity categories and, following indeterminate trajectories, produce configurations of eroticism eccentric to the binaries of sex (male/female),

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[45] For an account of several such intersecting networks, see Rosemary Auchmuty, 'By Their Friends We Shall Know Them: The lives and networks of some women in North Lambeth, 1880-1940' in Lesbian History Group, *Not a Passing Phase: Reclaiming Lesbians in History 1840-1985*, London: The Women's Press, 1989, pp 77-98.

> gender (masculine/feminine), and sexuality (hetero/homo).[46]

Such critiques are largely based upon the work of Eve Kosofsky Sedgwick, herself following Gayle Rubin,[47] which argues for the separation of gender and sexuality. Sedgwick argues that sexuality is not in fact tied to gender, "that the question of gender and the question of sexuality, inextricable from one another though they are in that each can be expressed only in the terms of the other, are nonetheless not the same question ... [d]istinct, that is to say, no more than minimally, but nonetheless usefully."[48] Indeed, to conflate gender and sexuality is to risk (if not ensure) heterosexism:

> It may be, as well, that a damaging bias toward heterosocial or heterosexist assumptions inheres unavoidably in the very concept of gender. This bias would be built into any gender-based analytic perspective to the extent that gender definition and gender identity are necessarily relational between genders – to the extent, that is, that in any gender system, female identity or definition is constructed by analogy, supplementarity, or contrast to male, or vice versa.[49]

A lesbian identity is also seen as creating a false unity, which ignores both great differences between women in terms of race, class, and so on, and differences in erotic practices (practitioners of sado-masochism have been particularly influential in this regard).[50]

Judith Butler goes further, arguing that the adoption of a fixed lesbian identity is in itself potentially politically damaging:

> [I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that

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[46] Traub, *Renaissance*, p 14.
[47] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' (1984) in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality*, London: Pandora, 1989, pp 267-319.
[48] Eve Kosofsky Sedgwick, *Epistemology of the Closet*, California: University of California Press, 1990, p 30.
[49] *Ibid*, p 31.
[50] A criticism of sado-masochism does not form part of my thesis, but I would note here that the responses of queer theory and lesbian feminism to it are very different. It is seen by queer theorists as a fundamentally "queer" practice which plays with roles and power; lesbian feminists, in contrast, point out that it mirrors very clearly the structures of dominance and submission which are fundamental to a patriarchal society, and therefore eroticises and reinforces them rather than challenging them: see for example Jeffreys, *The Lesbian Heresy*, Appendix; Robin Ruth Linden, Darlene R Pagano, Diana E H Russell and Susan Leigh

> very oppression. This is not to say that I will not appear at political occasions under the sign of lesbian, but that I would like to have it permanently unclear what precisely that sign signifies.[51]

Such criticisms are based upon an insistence upon the socially constructed nature of gender, a common factor between much queer theory and lesbian feminism. However, a radical difference in approach arises from the respective ways in which each theory responds to gender as socially constructed. Essentially, lesbian feminism recognises the need to change existing structures, allowing for the possibility of creating new definitions, structures and forms of society to do so. Queer theory argues that we must accept these structures as defining us and providing our subjectivity, with political action largely limited to subverting them by performing their terms differently within them, thereby hoping to destabilise them. The efficacy of each approach is a highly-contested issue explored further throughout this thesis.

Elizabeth Grosz takes a promising approach to sidestepping the problems of definition, one which is laudable in its extension of the sexual beyond genital meanings to what might be called the sensual, extending to relationships with food, textures, writer to page and so on. In particular, she emphasises the relational aspects of lesbianism:

> The question is not am I – or are you – a lesbian but, rather, what kinds of lesbian connections, what kind of lesbian-machine, we invest our time, energy, and bodies in, what kinds of sexuality we invest ourselves in, with what other kinds of bodies, with what bodies of our own, and with what effects? What it is that together, in parts and bits and interconnections, we can make that is new, that is exploratory, that opens up further spaces, induces further intensities, speeds up, enervates, and proliferates production (production of the body, production of the world)?[52]

However, this definition continues to share two problems of much postmodern and queer theory: first, it concentrates upon the sexual (albeit very widely defined), and secondly, it poses questions without answers. Those questions themselves indicate the vision Grosz has of lesbian sexuality, but nonetheless serve to suggest that lesbianism somehow can and should be devoid of political content, should validate any and all variations.

Star (eds), *Against Sadomasochism: A Radical Feminist Analysis*, Palo Alto: Frog in the Well, 1982.

[51] 'Imitation and Gender Subordination', in Sara Salih (ed), *The Judith Butler Reader*, Oxford: Blackwell Publishing, 2004, Chapter 4, at p 121.

More robust is Terry Castle's response, that

> if in ordinary speech I say, "I am a lesbian," the meaning is instantly (even dangerously) clear: I am a woman whose primary emotional and erotic allegiance is to my own sex ... [T]he meaning of *lesbian* is in practice more stable and accessible than some of its would-be deconstructors would allow ...[53]

Returning to the point made at the beginning of this section, any definition of "lesbian" is inherently political. To allow a meaningful discussion of our history, our present and our future, we need some specificity as well as the space to include those whose self-definitions and genital sexual activity we may be unsure of. Indeed, if lesbianism is to be more than an empty category of behaviour, it must involve more than genital activity. For these reasons, then, the most appropriate definition is the radical feminist one: a lesbian is a woman whose primary emotional and sexual energies are directed towards other women.

Crime and criminals: some notes on terminology

Another essential question of definition is that of crime: what do we mean by this word? "The very definition of 'crime' must be vigorously questioned."[54] It is all too easy, while criticising the processes and assumptions of the criminal courts, to forget to examine those definitions of crime to which they owe their existence. Do we accept that all those convicted of offences should be so stigmatised? Or that all those who have technically committed no offence ought to be legally blameless? The recognition of what the courts define as crime should not be allowed to slip into an unquestioning acceptance of their legal definitions.[55] Instead, one should always keep in mind an awareness of what is

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[52] Grosz, 'Refiguring Lesbian Desire', pp 80-81.

[53] Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York: Columbia University Press, 1993, p 15.

[54] Ruthann Robson, 'Convictions: Theorizing Lesbians and Criminal Justice' in Didi Herman & Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men, and the Politics of Law*, Philadelphia: Temple University Press, 1995, pp 180-194 at p 190.

[55] Indeed, the borderline between criminal and non-criminal law is one which the courts themselves have often found difficult to define. For one aspect of this problem, see the caselaw on what amounts to a criminal rather than civil sanction (eg *Steel and Others v United Kingdom* (1998) 28 EHRR 603 (ECHR); *R (on the application of McCann) v Manchester Crown Court* [2003] 1 AC 787 (HL)). For another, consider the changing legal approaches to, for example, marital rape (which became illegal, without legislative

being censured and a consideration of whether this is in fact behaviour which ought to be condemned. I discuss further (and in particular, historical) issues around the term "crime" in the next section.

It is partly because of this definitional uncertainty that I prefer to refer to lesbians who are criminal defendants or who have been convicted of crimes rather than to lesbian criminals. Even more crucially, the term "criminal" is not generally perceived as a neutral description of somebody who has been convicted of an offence or offences. It suggests somebody whose very character is antisocial, who is categorised as deserving of censure. Historically (and to some extent, currently) it has done more, identifying the person so labelled as a member of a distinct "criminal class". We should be wary of using the term uncritically, without consideration of whether a particular lesbian with criminal convictions is deserving of such blanket condemnation. The issue is one to which we might be especially sensitive when the conviction arises out of a lesbian relationship, as in most of the cases considered here, and particularly given the extent to which simply being lesbian can in any event be associated with criminality.[56]

The term "criminal" also functions to create a lesbian "other". This is undesirable for two reasons. Firstly, it allows us to view a particular lesbian through the filter of this criminality, without taking a more holistic view of her life, conduct or personality, or of the circumstances of her offending. Such an approach encourages the very stereotyping and prejudice which we are anxious to overcome in other areas of interaction.

Second, by using "criminal" we obscure that fact that lesbians with criminal convictions are not simply those who have committed crimes, but more specifically, those who have been caught, prosecuted and convicted. This allows us to side-step the issue of which lesbians are most likely to be suspected of, prosecuted for and found guilty of offences; yet that issue is of vital importance and involves questions of race, class, gender and sexuality which should be uppermost in our minds. The separation of lesbians into "criminals" and "the rest of us" allows us to forget that very few people have never

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change, in *R v R* [1992] 1 A.C. 599 (HL), a decision upheld by the ECHR in *SW v UK* [1995] ECHR 95). Finally, I discuss below the question of offences whose commission effectively depends upon the discretion of those enforcing them.

[56] See Chapters 4 and 5, where I discuss in particular the existence of non-legal historical sources characterising lesbianism as "criminal", and the overlap of the lesbian and the criminal in the "scientific" writings of the late nineteenth and early twentieth century.

committed a crime. One's own criminal behaviour may have been quite trivial (taking stationery home from work, smoking cannabis, an angry argument in a public place) but convictions are frequently for just such trivial offences. Therefore by dividing women into the "them" who are "criminals" and the "us" who are not, we obscure the fact that the difference between us may not be our behaviour, but the circumstances, stereotypes and prejudices which affect whether we are brought into the criminal courts. In other words, there is no great divide between the "criminal lesbian" and the "respectable lesbian"; the real difference may well be the attitudes and biases of others (although a criminal conviction in itself can be a factor which leads many women to move further and further outside the law in their lifestyle). Again, this issue is highlighted in later chapters by a careful consideration of just which lesbians have been prosecuted for their relationships.

Defining "crime"

As Clive Emsley notes,

> A definition of crime which embraces all of its different perspectives and which satisfies every generalisation and nuance is probably impossible.[57]

An emphasis upon the definitions offered by the criminal law does not take sufficient account of the discretion of those responsible for enforcing it. In effect, behaviour may only become criminal if those policing it think that it ought to be, an issue I will consider in more detail when discussing the prosecution of Mary Hamilton. Distinctions can also be made between "real" and regulatory crimes (few people think of themselves as criminal because they have been caught speeding, to take a common contemporary example); between "real" crime and political protest; between "real" crime and socially accepted behaviour (Emsley instances theft of water in mid-nineteenth century Manchester),[58] and so on.

To take an alternative angle and say that "crime" is behaviour punished by the criminal courts is also not as straightforward as it initially appears. For at least the earlier

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[57] Clive Emsley, *Crime and Society in England 1750-1900*, (2nd edition). London: Longman, 1996, p 2.
[58] *Ibid*, pp 2-3.

parts of the period I consider (notably the seventeenth and eighteenth centuries) the idea of a separate criminal justice system was in its infancy, and the word or concept "crime" lacked legal meaning.[59] The courts which dealt with crime also dealt with any number of other matters: the business of the quarter sessions would include, for example, road repairing obligations;[60] bastardy orders; and refusals to act as night watchmen.[61] Even today, the contemporary magistrates' courts deal with a number of matters which would not generally be defined as criminal.[62]

A third approach is to move away from legal definitions and instead concentrate upon popular attitudes towards behaviour.[63] Such an approach is to some extent appropriate in order to exclude regulatory offences, as mentioned above. However, to rely upon it altogether would raise more questions than it could possibly answer: how do we ascertain what popular attitudes are to any particular behaviour at any particular time? Generally, where a behaviour is on the borderline between criminal and non-criminal behaviour, it will be very controversial and so a single attitude will not exist. Whose attitudes should we look at? Not everyone has had an influence on the courts or upon who can be criminalised: should we give equal value to the views of an impoverished and illiterate labourer on one hand, and a senior judge on the other? What of behaviour that has never been criminal according to the strict letter of the law, but has been viewed differently in wider society? This approach could certainly give a very different account of the criminality of lesbianism.[64] Given these uncertainties and difficulties, this approach is not one which I intend to pursue in this thesis.

Although these three approaches have dominated in legal history, criminology has offered many more; John Hagan identifies seven approaches ranging from legal-consensus (criminality as legally constructed), through statistical (high-frequency behaviours are considered normal, low-frequency behaviours deviant) to utopian-

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[59] G R Elton, 'Introduction: Crime and the Historian' in J S Cockburn (ed), *Crime in England 1550-1800*, London: Methuen & Co, 1977, pp 1-14 at p 2.
[60] J M Beattie, *Crime and the Courts in England 1660-1800*, Princeton: Princeton University Press, 1986, p 6.
[61] *Ibid*, p 6.
[62] For example family law issues, anti-social behaviour orders, liquor licensing.
[63] See, for example, Beattie, *Crime and the Courts*, p 4.
[64] Many references exist to lesbian sexual activity as "criminal", although it was not legally a crime (see Chapter 4).

anarchist (deviance as a purposeful attempt to correct social injustice) and human rights (denial of rights should be categorised as criminal).[65] A comprehensive survey of these wide-ranging definitions is outside the scope of this thesis, but a few examples show how varied the definitions of crime can be. One issue which I raise later in this thesis is the way in which lesbianism was popularly viewed as criminal even when no such offence existed in law; another, the way in which once seen as suitable for criminal prosecution, lesbian sexual conduct could be criminalised despite the absence of a prohibition. Such issues are reflected in labelling theory, which focuses attention not upon how crime is legally defined but upon how one becomes labelled a criminal. In Howard Becker's famous words,

> deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label.[66]

However, given the silencing surrounding lesbianism within the criminal justice system, such an approach is of limited assistance here: my focus is often upon what is not labelled rather than what is, an analysis which requires careful consideration of legal provisions and the creation of offences as much as of the people labelled as criminal.

Radical criminologists again turn attention away from legal definitions of crime, challenging the way that both the criminal justice system and traditional criminology concentrate upon the crimes of the poor and ignore those of the powerful.[67] Again, this analysis is important in emphasising that criminalisation is about a great deal more than contravening legal definitions. However it has been criticised on many grounds,[68] and notably by feminist criminologists such as Carol Smart who refuse to accept sexual

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[65] John Hagan, *Modern Criminology: Crime, Criminal Behaviour and its Control*, Toronto: McGraw-Hill, 1985, pp 42-48.
[66] Howard Becker, *Outsiders*, New York: Free Press, 1963, p 9.
[67] For a recent defence of radical criminology, see Michael J Lynch and Paul B Stretesky, 'The New Radical Criminology and the Same Old Criticisms' in Stuart Henry and Mark M Lanier, *The Essential Criminology Reader*, Boulder, Colorado: Westview, 2006, pp 191-202.
[68] Lynch and Stretesky themselves list some of those grounds; for others, see Paul Rock, 'Sociological Theories of Crime' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th ed), Oxford: Oxford University Press, 2007, pp 3-42 at pp 24-25.

violence in particular as inconsequential;[69] radical criminology's emphasis upon political economy leads to a focus upon crimes with economic roots or consequences, a viewpoint which renders much sexual and domestic violence invisible. It also offers little scope for understanding the (non-)criminalisation of lesbian relationships, and thus has limited value for this thesis. Nonetheless, it is important in bringing to the fore the question of whose interests are served by placing particular activities within or outside the remit of the criminal justice system, an issue which does permeate the following chapters.

Given my focus upon the operation of the criminal justice system, and upon why lesbians were *not* criminalised, I take something of a middle road between the first two approaches and look at what was defined as criminal by the law, or prosecuted as such by the courts. I do not try to pin down an exact definition, but deal with behaviour which could or did become the focus of proceedings which aimed at a punitive outcome (ie their primary purpose was to punish the offender rather than make restitution to the injured party or community) and which carried stigma (thereby excluding regulatory offences). Although this definition is equally applicable to historical and contemporary criminal proceedings, its importance is greatest in the former. In the twentieth and twenty-first centuries, in this particular context of sexual offending, the distinction between criminal and non-criminal behaviour is much clearer, generally being defined by statute. The difficult issues of a borderline depending upon discretion,[70] of regulatory offences, of political offences and of a blurred boundary between criminal and civil jurisdictions do not tend to arise in these cases (although they remain important in other areas of the criminal and civil law).

Arrangement of chapters

I do not take a strictly chronological approach in this thesis. Instead, Chapter 2 reviews the literature in this field, while the subsequent chapters examine a series of entry points to examine the ways in which the criminal justice system has (not) regulated relationships between women. Chapter 3 takes as its entry point the 1921 parliamentary debates upon a

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[69] Carol Smart, *Women, Crime and Criminology*, London: Routledge & Kegan Paul, 1976.

[70] Note that this is different to the question of a discretion as to whether or not to prosecute what is unambiguously a breach of the criminal law, an issue which does continue to arise and is discussed in Chapter 8.

proposed amendment criminalising "gross indecency" between women. Those debates serve to highlight many of the issues around the policy of silencing which historically underpinned the legal approach to regulating lesbianism (and has not entirely disappeared now). The chapter therefore provides an overview of the general policy pursued by the criminal justice system.

However, it is often the exceptions to such a general policy which are most revealing, and it is to those I turn in the following four chapters. Chapter 4 considers prosecutions arising from lesbian relationships which did take place in the seventeenth and eighteenth centuries, identifying a small but discrete body of cases. These all related to "female husbands", and raise questions of just what was being punished: the assumption of male dress and prerogatives, the rejection of patriarchal control, the sexual conduct between two women, the fraudulent nature of the relationship, its financial implications (since marriage brought a husband ownership of all his wife's goods), or some combination of these. In seeking answers to those questions, the exploration extends to the position of "wives" as well as the wider social and legal context of the time.

In Chapter 5, I go on to investigate the changes brought about in the nineteenth century, and for that purpose take two entry points: the trial of "Bill" Chapman in the early part of the century and the prosecution of "Colonel Barker" a hundred years later. These two cases neatly bookend that period in the nineteenth and early twentieth centuries when notions of gender and sexuality were radically transformed through changing social, medical and scientific models and approaches.

Chapter 6 ends my consideration of "female husband" cases by examining two relationships based upon male impersonation which occurred only a few years ago. I analyse both continuities and changes between recent cases and those of three centuries ago. In particular, changes in the offences available both reflect and illustrate parallel and fundamental changes in women's and lesbians' position in society. A consideration of those cases is completed by a discussion of what lessons they have for contemporary lesbian politics.

The legal changes raised in Chapter 6 have also led to a change in emphasis, from prosecuting primarily cases of male impersonation to prosecuting under age of consent

legislation. One of the latter cases, *R v Allen,* forms the entry point for Chapter 7 and for a discussion of the ways in which formal legal equality has served to mask very real inequality in the courts.

Chapter 8 brings us to the present by examining the relevant provisions of the Sexual Offences Act 2003. It argues that this Act, based on principles of gender neutrality, fails to herald a new era of fundamental equality. Instead, the lesbian is rendered invisible once more, although in a different way: not as a sub-group of the class of women but as a sub-group of the gay (male) community. The limitations of both liberal and queer theory are examined in this context.

The conclusion will draw together these themes and arguments to demonstrate that the criminal justice system has regulated lesbianism through deliberate non-engagement: the policy of silencing. It will highlight the ways in which the policy has nonetheless been neither static nor absolute, as indicated both by the prosecutions which have taken place and by the significant changes resulting from developments in gender ideologies during the eighteenth and nineteenth centuries, and the growing visibility of lesbianism during the twentieth. Finally, the implications of lesbian legal history and the present situation for lesbian legal theory are considered.

Chapter 2

Literature review

Introduction

Having explored the questions of definition, and thus established some parameters for this thesis, it is now appropriate to review the published literature in this area. In fact, outside the sphere of lesbian history, very little has been published upon lesbians within the criminal justice system. Even within it, "[h]istorical analysis of the legal position of the lesbian is in its infancy".[1] In view of that near-absence of material directly upon the topic of my thesis, this literature review will concentrate upon the literature in two related areas: lesbian history and lesbians and the law. Both fields are relatively recent, and there is therefore very little material whose publication pre-dates the 1970s.

Lesbian history

Lesbian history began to appear possible in 1975, with Carroll Smith-Rosenberg's essay 'The Female World of Love and Ritual' which described a "historical phenomenon that most historians know something about, few have thought much about, and virtually no one has written about": intimate friendships between nineteenth-century women.[2] Importantly, she asserted that "the essential question is not whether these women had genital contact":[3] accepting the need to prove such contact would of course have made lesbian history virtually impossible, although the issue with its anti-lesbian undercurrents has not gone away.[4]

A very different area of the lesbian past was brought to light by the publication of Louis Compton's article 'The Myth of Lesbian Impunity' in 1980.[5] Using sources from across Europe and America, he demonstrated that the assumption lesbians had been unaffected by the criminal law was false. His emphasis upon executions effectively excluded England and Wales from significant consideration; but this

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[1] Oram and Turnbull, *The Lesbian History Sourcebook*, p 155.

[2] Carroll Smith-Rosenberg, 'The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America' (1975) 1(1) *Signs: Journal of Women in Culture and Society*, reprinted in *Disorderly Conduct: Visions of Gender in Victorian America*, Oxford: Oxford University Press, 1986, pp 53-75 at p 53.

[3] *Ibid*, p 58.

[4] See for example Jeffreys, 'Does It Matter If They Did It?'.

[5] Louis Crompton, 'The myth of lesbian impunity: capital laws from 1270 to 1791', (1980) 6(1-2) *Journal of Homosexuality* 11-25.

omission was more than corrected the following year by what remains the most extensive account of lesbian history.

Lesbian history effectively became recognised as a viable field of study upon the publication of *Surpassing the Love of Men* by Lilian Faderman in 1981.[6] Any comprehensive history of lesbianism had hitherto been considered barely feasible given a paucity of evidence (the sparseness of which was, as Faderman demonstrated, exaggerated). Faderman's influential volume provided evidence of an extensive lesbian past, extending across Europe and the United States, from the sixteenth century to the present day. Further, that history was considered from a lesbian feminist perspective, and the criminalisation of lesbians was to some extent addressed, at least in the context of "female husbands". Faderman concluded that

> At the base it was not the sexual aspect of lesbianism as much as the attempted usurpation of male prerogative by women who behaved like men that many societies appeared to find most disturbing.[7]

Such a conclusion was of importance for two reasons. First, it implicitly rejected the hitherto dominant assumption that lesbians had faced neither censure nor prosecution for their relationships,[8] and second, it recognised that lesbianism was seen as threatening not so much for its sexual content as for the challenge which it posed to patriarchal power. The condemnation of female cross-dressing was set in the context of sixteenth- and seventeenth-century anxieties about masculine dress among women and its perceived threat to the patriarchal social order.[9] It was explained by Faderman as a seizing of male prerogatives, punished on that basis:

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[6] *Surpassing the Love of Men: Romantic Friendship and Love between Women from the Renaissance to the Present*, New York: William Morrow and Company, 1981; London: The Women's Press, 1985. My references are to the latter edition.
[7] Faderman, *Surpassing the Love of Men*, p 17.
[8] However, Faderman does fall into the trap of regarding the punishments of English lesbians as lenient since "despite societal disapproval, the combination of these social sins [transvestism and use of a dildo] did not invariably mean that a woman would receive the death penalty." (*Surpassing the Love of Men*, p 52). I dispute such an approach to punishments including whipping and the pillory in Chapter 4.
[9] *Ibid*, p 48.

> The claim of male prerogative combined with the presumed commission ... of certain sexual acts, especially if a dildo was used, seem to have been necessary to arouse extreme societal anger.[10]

However, Faderman's attention in *Surpassing the Love of Men* was primarily upon romantic friendships, and English "female husband" cases were dealt with relatively briefly.[11] There was also an assumption in this work that non-transvestite lesbians generally did avoid legal or social censure (an assumption I question throughout this thesis, and particularly in Chapters 3 and 5).

A major focus of Faderman's work was the challenging of a primarily sexual definition of lesbianism. Instead, she argued that lesbianism centred upon the direction of women's emotions and affections towards each other (whether including genital expression or not).[12] Such a lesbian feminist understanding was further expanded, and the history of English lesbians and their historical place within feminism explored in greater depth, in the Lesbian History Group's 1989 publication *Not a Passing Phase*[13] and Sheila Jeffreys's account of Victorian and early twentieth century feminists' campaigns around sexuality, *The Spinster and Her Enemies*.[14]

The 1980s and 1990s saw the continuing growth of lesbian history, both academic and popular. A few examples will show the diversity of the field: editions of the diaries of Ann Lister, an early-nineteenth-century lesbian, which described her relationships with other women (helping to put to rest the myth that genital contact between women was a sexological creation);[15] popular histories such as Rose Collis' *Portraits to the Wall*[16] and Emily Hamer's *Britannia's Glory*;[17] biographies of lesbians both famous[18] and hitherto largely unknown;[19] Lilian Faderman's book-

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[10] *Ibid*, p 52.

[11] *Surpassing the Love of Men* deals with a number of English and European cases, and their historical context, at pp 47 – 61 (just 15 pages of a 415-page narrative).

[12] See the definition in *Surpassing the Love of Men*, p 18, quoted above.

[13] *Not a Passing Phase: Reclaiming Lesbians in History 1840-1985*, London: The Women's Press, 1989.

[14] Sheila Jeffreys, *The Spinster and Her Enemies: Feminism and Sexuality 1880-1930*, Melbourne: Spinifex, 1985.

[15] Jill Liddington, *Female Fortune: Land, Gender and Authority: The Ann Lister Diaries and Other Writings, 1833-36*, London: Rivers Oram Press, 1998; Helena Whitbread (ed), *I Know My Own Heart The Diaries of Ann Lister 1791-1840*, London: Virago, 1988; Helena Whitbread, *No Priest But Love: The Journals of Ann Lister from 1824-1826*, Otley: Smith Settle, 1992.

[16] Rose Collis, *Portraits to the Wall: Historic Lesbian Lives Unveiled*, London: Cassell, 1994.

[17] Emily Hamer, *Britannia's Glory: history of twentieth-century lesbians*, London: Cassell, 1995.

[18] Cline, *Radclyffe Hall*; Diana Souhami, *The Trials of Radclyffe Hall*; Rose Collis, *A Trouser-Wearing Character: the life and times of Nancy Spain*, London: Cassell, 1997.

length account of the Woods and Pirie libel trial at the turn of the nineteenth century;[20] and a growing presence in mixed anthologies such as *Hidden From History*.[21]

As the literature has grown, so readings of the same events have proliferated. In particular, interpretations of historical cross-dressing cases have varied widely between authors. To take one example, both Faderman and Donoghue discussed the cross-dressing of "female husbands" in terms of lesbianism and the assumption of male privileges and freedoms.[22] Julie Wheelwright, whose book includes many examples of cross-dressing women who do not appear to have been lesbians, characterises these women as engaged in "rebellion" against the social constraints upon women, with the claiming of the right to love another woman as just one privilege among many.[23] However, she is careful to point out that such rebellion was individualistic, with the women concerned engaging in strong male identification rather than female solidarity or a wider awareness of oppression.[24] Fraser Easton, however, divides the range of women discussed by Wheelwright into two types: the woman warrior who represented an acceptable option for plebeian women, and the female husband who "was paradoxically viewed as either impossible ... or ... shocking and unjustifiable".[25]

Alison Oram takes a different approach in looking at the ways in which cross-dressing intersects with lesbianism and transgender, arguing that their interrelationship has diverged only relatively recently.[26] Marjorie Garber similarly suggests that cross-dressing is related to homosexuality, "the repressed that always returns", but that it is at the same time a "third term" which "offers a challenge to easy notions of binarity, putting into question the categories of 'female' and 'male'" and

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[19] Judith C Brown, *Immodest Acts: The Life of a Lesbian Nun in Renaissance Italy*, New York: Oxford University Press, 1986 (Sister Benedetta Carlini); Kate Summerscale, *The Queen of Whale Cay*, London: Fourth Estate, 1997 (Joe Carstairs).

[20] Lillian Faderman, *Scotch Verdict: Miss Pirie and Miss Woods V Dame Cumming Gordon*, New York: William Morrow, 1983

[21] Martin Duberman, Martha Vicinus and George Chauncey Jr (eds), *Hidden From History: reclaiming the gay and lesbian past*, London: Penguin, 1991.

[22] Faderman, *Surpassing the Love of Men*; Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993.

[23] *Amazons and Military Maids: Women Who Dressed as Men in the Pursuit of Life, Liberty, and Happiness*, London: Pandora, 1989, p 3.

[24] Wheelwright, *Amazons and Military Maids*, p 11.

[25] Fraser Easton, 'Gender's Two Bodies: Women Warriors, Female Husbands and Plebeian Life' (2003) 180 *Past and Present* 131-174, p 133.

[26] Alison Oram, 'Cross-dressing and Transgender' in H G Cocks and Matt Houlbrook, *The Modern History of Sexuality*, London: Palgrave Macmillan, 2006, pp 256-285.

thus having "transgressive force".[27] James Vernon, in discussing the case of Colonel Barker, goes further in suggesting that "Barker's sexual and gender orientation has to remain indeterminate, undecidable and unknowable";[28] his concentration instead upon others' responses to her is not dissimilar to my own methodology as discussed above, but comes from an explicitly queer approach. Judith Halberstam, meanwhile, moves away from the category of lesbian to attempt a history of female masculinities which are not necessarily tied to lesbian conduct or identity (and indeed she disputes "lesbian" as a meaningful or useful term in the historical context).[29]

One important strand of lesbian history, increasingly prominent since the mid-1990s, has concentrated primarily upon literary sources. While many such works are centred upon fictional representations and are thus of limited value for this thesis, some have a great deal to teach us about the reality as well as the representation of lesbian lives. Perhaps the most important such work is Emma Donoghue's *Passions Between Women*, the first to use this approach in order to produce a detailed account of the visibility of lesbians during a particular historical period (the eighteenth century). In the course of the book, she successfully refutes the idea that a lesbian identity (albeit not necessarily named as such) could not exist before the late nineteenth century.

A more recent publication is Valerie Traub's study of the early modern period (particularly the seventeenth century), *The Renaissance of Lesbianism in Early Modern England*.[30] In going back even further in time, it again forms a valuable counter to the arguments that neither the sources nor the necessary concepts exist to allow us to trace lesbians so far back into the past. However, unlike Donoghue's work, this is much more closely grounded in literary criticism and takes less account than it might of previous historical, rather than literary, scholarship. Traub takes issue with the "standard critical orthodoxy" that lesbianism was historically invisible.[31] Instead, she argues that in the early modern period,

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[27] Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety*, London: Routledge, 1992, pp 5, 10, 71. For my critique of the "transgressive force" of the female husband, see Chapter 6.
[28] James Vernon, 'For Some Queer Reason: The trials and tribulations of Colonel Barker's masquerade in interwar Britain', (2000) 26(1) *Signs* 37-62 at p 38.
[29] Judith Halberstam, *Female Masculinity*, Durham: Duke University Press, 1998; see in particular Chapter 2. Note that her use of the term "female husband" is unusually broad, encompassing Ann Lister.
[30] Cambridge: Cambridge University Press, 2002.
[31] *Ibid*, p 3.

On the one hand, women's erotic desires for other women were considered improbable, implausible, insignificant, subject to all the force of negativity condensed within the early modern definitions of impossibility: that which cannot be, inability, and impotence. On the other hand, such desires were culturally practiced and represented in a variety of ways, although often according to a governing logic that attempted to reinscribe their impossibility.[32]

I would not disagree with that analysis, and would argue that in its essentials, it could be extended into the late modern period up until the early twentieth century.

However, what should be disputed is that this is a new recognition, taking over from a scholarly tradition of assuming complete invisibility. Traub differentiates her approach from the comments of male historians in *The Gay and Lesbian Literary Heritage*[33] to the effect that in literature, lesbianism was invisible, unthinkable and silent.[34] Lesbian historians, though, have argued for some time that the silence which was imposed upon lesbianism was by no means complete, and Faderman and Donoghue in particular have uncovered a great deal of material showing otherwise. Terry Castle's book *The Apparitional Lesbian* engaged directly with ways in which lesbianism has been both present and silenced within our culture, again focusing primarily upon literary sources. Indeed, Traub herself cites Louis Crompton whose work elsewhere directly contradicts "the myth of lesbian impunity" in the criminal courts.

What is particularly ignored in Traub's book (and in other recent scholarship)[35] is that the lesbian feminist concept of the silencing of lesbianism necessarily does not suggest that the silence was complete: women have resisted such silencing, while ruling men have happily allowed certain representations to appear.[36]

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[32] *Ibid*, p 6.

[33] Claude Summers (ed), New York: Henry Holt, 1995; Traub cites entries by Louis Crompton, David Lorenzo Boyd and Claude Summers.

[34] Traub, *Renaissance*, p 3.

[35] There is a tendency, particularly among some queer theorists, to write as if lesbian feminist theory posited a few simple and monolithic theses which made no allowance for women's agency, for the complexities of power relationships (either between rulers and ruled, or men and women, or in terms of race and class), or for historical specificities, or for the constructed nature of gender. Such a tendency does a great injustice to lesbian feminist theory, much of which addressed many of these issues some time before queer theory became dominant in this field. This is an issue which I develop further later in Chapter 8.

[36] In particular, representations of lesbianism for men's consumption as pornography have a long

Central to the concept of silencing is that idea that there was something to silence: that lesbian representations existed but were both discouraged and, where they did leak through, were somehow undermined or neutralised. This theme forms the core of my thesis, and I will demonstrate that it has an academic pedigree extending back long before 2002. Nonetheless, Traub's book is valuable for its detailed consideration of representations of lesbianism in the seventeenth century, and for her nuanced criticism of the ways in which lesbianism was both represented with increased frequency and reinforced as impossible.

In this brief outline of key texts and significant developments in lesbian history, I can do little more than pick out edited highlights, particularly those which bear most closely upon my own research. The literature of the history of lesbianism has burgeoned, even venturing into hitherto opaque or ignored areas such as the mediaeval period,[37] and a full survey of the field would be a substantial piece of work in its own right. Nonetheless, little attention has been paid to the history of criminal prosecution of lesbians. Indeed, the lack of specific prohibitions and consequent lack of material has meant that the legal status of lesbians remains a relatively neglected area. However, one honourable exception is the *Lesbian History Sourcebook*, which has a chapter dedicated to lesbians and the law.[38] Its authors note the lack of research in this area, and offer a starting point in their collection of materials including case reports, parliamentary debates and state papers. It is to be hoped that this heralds the beginning of a new literature focused specifically upon the legal history of lesbianism, to which I hope this thesis will also contribute.

Lesbians and the law

However, I am concerned not only with history but also with the contemporary treatment of lesbians within the criminal justice system. The other body of literature

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history (see Chapter 4). However, in this thesis I will consider a different example in some detail: the occasional visibility of lesbians within the criminal justice system.

[37] For example, Jacqueline Murray, 'Twice Marginal and Twice Invisible: Lesbians in the Middle Ages' in Vern L Bullough and James A Brundage (eds), *Handbook of Medieval Sexuality*, New York: Garland Publishing, 1996; Bernadette J Brooten, *Love Between Women: Early Christian Responses to Female Homoeroticism*, Chicago: University of Chicago Press, 1998; Francesca Canade Sautman and Pamela Sheingorn (eds), *Same Sex Love and Desire Among Women in the Middle Ages*, Palgrave Macmillan, 2000; Anna Klosowska, *Queer Love in the Middle Ages*, Basingstoke: Palgrave Macmillan, 2005 (a literary history). It is disappointing, given this growing body of scholarship, that Sautman has had nonetheless to reiterate the failure of queer studies to address love between women in her contribution to Glenn Burger and Steven F Kruger (eds), *Queering the Middle Ages*, Minneapolis: University of Minnesota Press, 2001.

upon which this review will therefore focus is that concerning lesbians and the law. Again, this field of study is of relatively recent origin, and grew out of feminist legal studies. While feminists turned their attention to the many and complex ways in which women and the law interacted, it was notable that lesbians received comparatively little attention. To take an example from my own field, the criminal justice system, Frances Heidensohn's book *Women and Crime* is a vital feminist text,[39] and she herself is credited with being a pioneer in feminist criminology.[40] Indeed, she led the way in developing feminist approaches and helped make much later criminological work, including that centring lesbians, possible. Her book is comprehensive, covering not only women's experiences as criminal defendants but also a critique of criminological theories and the basis of a feminist criminology. Nonetheless, it is worth noting that when she came to consider the regulation of lesbianism, she suggested that lesbianism was immune from legal intervention, and that "assumptions that render female homosexuality innocuous" operated as legal "protection".[41]

However, it was not just the excitement and the limitations of feminist legal scholarship which stimulated the development of lesbian legal studies. Equally important were the practical issues lesbians were regularly facing in court and elsewhere; a notable example is the position of lesbian mothers, first in relation to the children of previous heterosexual relationships and second, in terms of the legal position of lesbian families. Thus in 1984, Rights of Women published a report on lesbian mothers which was largely a descriptive and practical account;[42] by 1995, the collection *Legal Inversions* included several contributions on the law and lesbian parenting of greater factual and theoretical complexity[43] (as well as Cynthia

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[38] Oram and Turnbull, *The Lesbian History Sourcebook*, Chapter 5.
[39] *Women and Crime*, London: Macmillan, 1985. It is credited as the standard work by, for example, the editors of the *Oxford Handbook of Criminology* (Mike Maguire, Rod Morgan and Robert Reiner, *Oxford Handbook of Criminology 3e Resources*, 'Chapter 15 selected further reading', http://www.oup.com/uk/orc/bin/9780199249374/resources/reading/ch15/, accessed 5 September 2006).
[40] Mary Eaton, 'A Woman in Her Own Time: Frances Heidensohn Within and Beyond Criminology', (2000) 12(2/3) *Women & Criminal Justice* 9-28.
[41] Frances Heidensohn, *Women and Crime*, Second Edition, London: Macmillan, 1996, p 39.
[42] Rights of Women, *Lesbian Mothers on Trial: A Report on Lesbian Mothers and Child Custody*, London: Rights of Women, 1984.
[43] Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law*, Philadelphia: Temple University Press, 1995. See Katherine Arnup and Susan Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood', pp 77-101 and Shelley A M Gavigan, 'A Parent(ly) Knot: Can Heather Have Two Mommies', pp 102-117; lesbian access to reproductive technologies and legislative discourse around the family are also explored in Davina Cooper and Didi Herman, 'Getting "The Family Right": Legislating Heterosexuality in Britain, 1986-

Petersen's discussion of lesbian jurisprudence and Ruthann Robson's essay on lesbians and criminal justice, both of which I discuss below).[44] In 1997, Lynne Harne and Rights of Women published the second edition of their guide for lesbian mothers, now substantially expanded.[45] The literature has continued to develop, addressing legal changes such as the courts' recognition of the non-biological mother as a parent.[46]

Similar developments have occurred in other areas of law too: in her 1997 review of the literature, Rosemary Auchmuty referred to areas including violence against women, employment, section 28, lesbians and the state and legal theory in addition to family law.[47] Further areas continue to develop: to take two examples, analysis of lesbian civil partnerships and same-sex marriage has been stimulated by the Civil Partnership Act 2005,[48] while areas with perhaps less obvious but nonetheless crucial impact upon lesbian lives such as property law are also falling under the academic gaze.[49] Indeed, the scope of the literature around lesbians and the law is now such that a comprehensive review would be a substantial piece of work in its own right.

Beyond responding to the practical legal needs of lesbians, a literature of lesbian legal theory is also developing. That is not to say that there is a common approach to such theory; indeed, issues debated are as fundamental as whether a

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91', pp 162-179. As is apparent from their titles, the scope of these articles extends beyond the question of custody rights on leaving a heterosexual relationship, the focus of Rights of Women's earlier publication.

[44] Cynthia Petersen, 'Envisioning a Lesbian Equality Jurisprudence', in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law*, Philadelphia: Temple University Press, 1995, pp 118-137; Robson, 'Convictions'.

[45] Lynne Harne and Rights Of Women, *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997

[46] For a recent example, see Leanne Smith, 'Principle or Pragmatism? Lesbian parenting, shared residence and parental responsibility after *Re G (Residence: Same Sex Partner)*' (2006) 18(1) *Child and Family Law Quarterly* 125.

[47] Rosemary Auchmuty, 'Lesbian Law, Lesbian Legal Theory' in Gabriele Griffin and Sonya Andermahr (eds), *Straight Studies Modified: Lesbian Interventions in the Academy*, London: Cassell, 1997, pp 39-56.

[48] See Rosemary Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14 *Feminism and Psychology* 101-126; Rosemary Auchmuty, 'Out of the Shadows: Feminist silence and liberal law' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements*, Abingdon: Routledge-Cavendish, 2007, pp 91-124; Lisa Glennon, 'Strategizing for the Future through the Civil Partnership Act', (2006) 33(2) *Journal of Law and Society* 244-76; Nicola Barker, 'Sex and the Civil Partnership Act: the future of (non) conjugality?' (2006) 19 *Feminist Legal Studies* 241-259.

[49] See for example Rosemary Auchmuty, 'When Equality is Not Equity: Homosexual Inclusion in Undue Influence Law' (2003) 11 *Feminist Legal Studies* 163-190; Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' (1995) 3 *Feminist Legal Studies* 105-121.

specifically lesbian legal theory is either possible or desirable, and how discrimination against lesbians should be understood. It is precisely in the fundamental nature of such debate, of course, that much of its interest lies: as the very bases of our campaigns and critiques are challenged and debated, not only current concerns but also our future tactics, aims and approaches are developed and refined. Lesbian legal studies, then, are showing a theoretical maturity to match the grounded nature of their concerns with actual lesbian lives and experiences.

The first sustained study of lesbians and the law was Ruthann Robson's *Lesbian (Out)law*,[50] which argued that feminism alone could not adequately address lesbians' legal position, and that what is needed is a specifically lesbian-centred theory. The debate was taken up by others, notably Didi Herman who reasserts the importance of feminist theory in understanding the relationship between gender and sexuality and in problematising heterosexuality;[51] Diana Majury who argues that the legal treatment of lesbianism is in fact best understood as "sex discrimination at its most extreme";[52] and Cynthia Petersen who rejects the usefulness of identifying a primary source of oppression, arguing that while the conceptualisation of lesbian oppression as sex discrimination is useful, it should not be used to the exclusion of theorising other relevant forms of oppression such as race.[53] Meanwhile, queer theory challenges the very terms of the debate through its scepticism towards identity categories such as "lesbian".[54]

- **Lesbians and criminal law**

However, a gap still remains in the literature of lesbian legal studies. There is almost no published lesbian legal theory addressing the position of lesbians as

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[50] Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law*, Ithaca, New York: Firebrand Books, 1992.

[51] Didi Herman, 'A Jurisprudence of One's Own? Ruthann Robson's Legal Theory' in Angelia R Wilson (ed), *A Simple Matter of Justice? Theorizing Lesbian and Gay Politics*, London: Cassell, 1995, pp 176-192.

[52] 'Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context', (1994) 7 *Canadian Journal of Women and Law* 286-317 at p 311.

[53] Petersen, 'Envisioning a Lesbian Equality Jurisprudence'. For further discussion of this debate, see Chapter 8.

[54] However, legal theory perhaps more than many other areas of queer theory has accepted a role for such identities: see for example Carl F Stychin's argument that identity categories, while provisional, "must also be recognised as politically necessary and personally liberating ... assertion of coherent identity categories can also be *legally* enabling" (*Law's Desire: Sexuality and the Limits of Justice*, London: Routledge, 1995, p 154).

criminal defendants. One of the few such pieces, an article by Ruthann Robson,[55] does not seek to draw conclusions but rather focuses primarily upon the difficulties of this work. I borrow and consider Robson's reasons here, as well as adding my own.

Robson suggests that a (perhaps the) major reason for the paucity of theory in this area is that "the theorizing of lesbians as criminal defendants may be incompatible with a political agenda of achieving equality."[56] As such theorising will involve a focus upon lesbian criminals, it may seem to play into oppressive stereotypes of lesbianism as pathological. Thus the fear of feeding ammunition to the Right inhibits the development of lesbian legal theory focusing upon lesbians alleged to have contravened criminal laws and thereby to have engaged in behaviour generally perceived as anti-social.

Even more fundamentally, the success of strategies seeking formal equality is dependent upon producing what Robson describes as the "but for" lesbian. This lesbian would have been welcomed as the ideal employee/mother/tenant/whatever, but for being a lesbian. Thus the issue is clear, with the lesbian plainly deserving of equal treatment thanks to her otherwise exemplary lifestyle. Lesbians accused of crimes are usually not exemplary, and so cannot fit into this model. Indeed, a criminal conviction may in itself be a barrier to many benefits and rights.

Most women caught up within the criminal justice system as defendants are marginalised in some way or number of ways, for example by being poor, homeless, or addicted to alcohol or drugs. Many are also subject to discrimination on grounds other than their lesbianism: an obvious example is the over-representation of black women among criminal defendants. "This submersion of lesbian identity into another disparaged identity renders methodological purity impossible."[57] Thus it is difficult or impossible to isolate the effect of lesbianism from that of the defendant's being black, or inarticulate, or dressed in a way considered inappropriate by the court, or addicted to alcohol or illegal drugs.

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[55] Robson, 'Convictions'. One might also mention Gail Mason, '(Out)Laws: Acts of Proscription in the Social Order' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford: Oxford University Press, 1995, pp 66-88, which begins by highlighting the non-criminalisation of lesbianism as a form of disqualification of lesbian subjectivity. I have excluded the few publications focusing upon substantive criminal law in the USA from this literature review, as US criminal law has treated and continues to treat lesbianism very differently.

[56] Robson, 'Convictions', p 181.

[57] Robson, 'Convictions', p 188.

An issue which must constantly be in the mind of anyone attempting to write theory in this area is that of ethics. "By theorizing, we risk exploiting and sensationalising real lesbians involved in ugly and tragic events who often face prolonged incarceration."[58] As Robson points out, the power relationship between theoriser and theorised is deeply unequal. This issue of power should be given particular attention when considering how far our theoretical writing may sensationalise its subjects, either by using them as lurid examples of evil or by glamorising lesbian offenders as outlaws, whose lives and actions are divorced from any social context.

The next major stumbling block facing the lesbian legal theorist is that of defining what is meant by lesbian defendant: "the problem of identifying a lesbian presence ... what criteria do we use?"[59] In addition to the difficulties of defining "lesbian" which I have discussed above, specific issues arise in two situations: where the woman first defines herself as lesbian at some point after the trial and sentencing processes are complete, or alternatively, where she does not so identify at all but the prosecution contend as part of their case that she is a lesbian.

"Any self identity must always be evaluated in the context of the relevance of lesbian identity at trial."[60] That is to say, just because a woman identifies as lesbian at some later date, one should be wary of assuming that she did so at trial, or that her lesbianism was ever an issue (directly or indirectly) in the courtroom. Robson cites the example of death row as a situation where a lesbian identity might be constructed subsequent to sentencing as a means of survival in extreme circumstances.[61]

Where a woman does not admit to being a lesbian, but her alleged lesbianism forms part of the case, the problem can seem even more intractable. This is particularly so as "the evidence used to prove lesbianism is extremely troublesome and clichéd".[62] Should a woman be co-opted into our theorising on the basis of an identity which she contests and which has been proved only if one accepts blatant and offensive stereotyping as evidence? The theorist may find herself extremely reluctant to appear to follow the conclusions reached by a prosecutor on the basis of oppressive stereotypes.

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[58] Robson, 'Convictions', p 184.
[59] *Ibid*, p 185.
[60] *Ibid*, p 185.
[61] *Ibid*, p 185.
[62] *Ibid*, p 186.

My approach is to look at the issues raised in the course of the trial and sentencing process. If a defendant's lesbianism, implied, alleged or admitted, is intrinsic to the case against her then that case is relevant to this project whether or not the woman herself adopts a lesbian identity. The issue may appear relatively clear-cut in contemporary cases, since we are more aware of the relationships, sexual conduct, and sometimes also the self-identification of the women concerned. More difficult is the question of when we can label historical cases as involving lesbianism. There is an argument put forward by some scholars that the term is anachronistic, as they argue that no lesbian identity existed prior to the turn of the twentieth century; I consider this argument in Chapter 4. For the moment, I would note that as mentioned above, it seems unlikely that being in a committed relationship with another woman had no effect upon one's identity even if that effect was not given the name "lesbianism". In any event, the risk of anachronism seems a lesser evil than an inability to articulate what is a fundamental feature of these cases.

Finally, there is the problem of where theorising upon lesbians and crime leads us in terms of activism. Strategies of value elsewhere may be detrimental to lesbians here. A particular theme which pervades this thesis is that of visibility and silence/silencing. While in general, visibility has been seen as a desirable political aim and silence as oppressive, matters can be more complex in the context of the criminal justice system. For example, when presenting a defendant's personal circumstances in mitigation, one always gives a heavily edited version, choosing only those elements relevant to an attempt to minimise the sentence (namely the aspects of a defendant's lifestyle which will appeal to or invite the sympathy of the court). Thus when a client refers to her female flatmate, there may be no value for her in pursuing the strategy of visibility by identifying that flatmate as a girlfriend, lover or partner. The defendant's sexuality is perhaps of no direct relevance to the crime, and in terms of sentencing will rarely be helpful and may be harmful.[63]

However, one must also be aware that the whole process of appearing in court can be extremely disempowering for a defendant, who gets little opportunity to speak

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[63] A similar conflict between the interests of the individual defendant and the wider political interests of women arises in other areas, notably many cases of battered women who kill. While the use of a defence of diminished responsibility, stigmatising such women (and by extension all women) as unstable and irrational, can reinforce damaging stereotypes, it would be unreasonable (to say the least) to expect any individual defendant to risk life imprisonment in pursuit of a political aim which may not be significantly forwarded by their case alone. In the same way, we cannot expect any individual lesbian defendant to risk a significantly higher sentence in order to pursue a general aim of visibility.

(and then only when spoken to) and is in an unfamiliar situation which operates according to complex rules and a strict hierarchy. The decision to be open about her lesbianism can therefore be an important assertion of strength in this context. Thus just as the pressure to be "out" is inappropriate here, equally any concerns that revealing her lesbianism may serve only to strengthen the equation of lesbianism with criminality[64] should be addressed by challenge to the system as a whole rather than by attempting to silence any lesbian. Great sensitivity is needed in applying political strategies in this area: they must be used with care, or can all too easily seem a very blunt instrument to the lesbian on the receiving end of our injunctions, however well-meant.

Given the difficulties involved, it is perhaps unsurprising that few authors have yet written on this area. In the English context, the first comprehensive contemporary surveys of lesbian women's position at criminal law were those of Tony Honoré in 1978 and Susan S M Edwards in 1981.[65] Honoré began his chapter on homosexuality by warning that "[s]ince ... homosexual relations between women are generally not criminal, and since most of the studies concern sex between men, what follows is mainly about men";[66] his discussion of lesbianism under the law was directed toward supporting different legal treatment of male and female homosexuality. Edwards was therefore the first British legal writer to treat lesbianism and the criminal law as a matter of interest purely in its own right. Her account, though brief and not entirely accurate, gave the topic visibility and provided a basis from which to develop further accounts.

For example, the two relatively recent publications on this area (Matthew Waites's analysis of the history of the lesbian age of consent and Anna Marie Smith's discussion of the 1991 Jennifer Saunders case)[67] both explicitly reference Edwards.

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[64] See Chapter 5.

[65] Tony Honoré, *Sex Law*, London: Duckworth, 1978, pp 84 *et seq*; Susan S M Edwards, *Female Sexuality and the Law: A study of constructs of female sexuality as they inform statute and legal procedure*, Oxford: Martin Robertson, 1981, pp 43-45. Note that these were also among the very first studies to treat sexual offences as a field of major interest (Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship*, Basingstoke: Palgrave Macmillan, 2005, p 61). A fleeting earlier reference comes in I Mackesy's article, 'The Criminal Law and the Woman Seducer' [1956] *Crim LR* 446-456: "Since it would be no defence for a woman charged with having indecently assaulted a girl under sixteen to prove that the girl consented to the act of indecency, it follows that lesbianism is to some extent punishable in English law; this is often overlooked" (p 448).

[66] Honore, *Sex Law*, p 84.

[67] Matthew Waites, 'Inventing a "Lesbian Age of Consent"? The history of the minimum age of consent in the United Kingdom' (2002) 11(3) Social & Legal Studies 323; Anna Marie Smith, 'The Regulation of Lesbian Sexuality Through Erasure: The Case of Jennifer Saunders' in Karla Jay (ed),

Waites's article covers wider ground than Smith's, dealing with age of consent laws and prosecutions from the nineteenth century to the present, although it is focused upon just one aspect of the history of the legal regulation of lesbian sexuality. (This is not to undervalue the article, which is important for its sustained account of a surprisingly complex aspect of the criminal law). In discussing that history, Waites places the age of consent in a wider social context of "the continuing social invisibility of lesbianism",[68] a crucial point which deserves much greater attention: in particular, this thesis will dispute his assumption that such invisibility arose out of lesbianism being "unthreatening" prior to the 1920s.

Anna Marie Smith's article on the Jennifer Saunders case draws out some threads in the legal treatment of lesbians,[69] in particular "the erasure of lesbianism in official criminal discourse"[70] and the incredibility of Saunders' defence simply because "it was already de-authorized within the hegemonic framework of contemporary ... legal discourse".[71] While the first point overlaps with my discussion of silencing in Chapter 3, however, Smith does not develop her discussion of lesbian erasure beyond criticising its logic in relying upon stereotypes of "masculine" and "feminine", and especially of female sexual passivity. As I will argue in Chapter 3, silencing has both a broader basis than Smith suggests, and a wider historical context.

However, the long histories of both silencing and cases of male impersonation are not addressed in Smith's article. As a result, her conclusions are sometimes questionable, in particular when she states firmly that "there would have been no trial at all if the alleged victims had been ... working class". This assertion is contradicted by the history of such prosecutions; it would later be disproved by the prosecution of Kelly Trueman, whose victim's family appear not to have been middle class.[72]

Lesbian Erotics, New York: New York University Press, 1995, pp 164-179. I discuss the Jennifer Saunders case in Chapter 6.

[68] *Ibid*, p 324.

[69] As I will discuss more fully in Chapter 5, the article contains some important inaccuracies: for example, Smith suggests that the Court of Appeal "fully accepted" the prosecution version of events (Smith, 'The Regulation of Lesbian Sexuality Through Erasure', p 167), when in fact they had no choice but to proceed on that basis since the appeal was against sentence only; and later discusses the charge as one of rape (*ibid*, p 174) while it was in fact one of indecent assault, which is very different in its scope and legal consequences.

[70] *Ibid*, p 169.

[71] Smith, 'The Regulation of Lesbian Sexuality Through Erasure', p 168.

[72] See Chapter 6. Since the newspaper reports do not specifically refer to the victim's class (as they did in the Saunders case also discussed in that chapter) and the victim cannot be identified, we cannot be sure of her social background. However, the area she lives in and the information we do have suggest a working class background for her. The victim met Trueman in the playing field of nearby Waingroves Primary School, whose local area is described in its OFSTED report as "a mix of some privately owned

Smith's assumption that upper-class lesbians enjoy greatest invisibility and working-class lesbians least is simplistic and holds only partly true for the criminal justice system, even less so for surviving written records. In part, these criticisms reflect the inevitable limitations of a single article; however, they also reflect Smith's approach which is grounded largely in Foucauldian and postmodern theories. I address these theoretical issues in greater depth later in this thesis, and in particular at Chapters 6 and 8.

Conclusion

Having examined the literature in this area, and identified gaps within it, the remainder of this thesis will aim to fill some of those gaps through a detailed analysis of the interactions between lesbianism and the criminal justice system. As this review has highlighted, the first challenge identified by the literature has been a relative lack of sources. The following chapter will consider the reason for that lack, placing it in the context of a policy of silencing, before subsequent chapters analyse those cases which did reach the courts and thereby aim to contribute to the hitherto scant literature upon lesbians in the criminal courts.

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but predominately local authority housing" (Mr P Bilston, *Inspection Report: Waingroves County Primary*, OFSTED, www.ofsted.gov.uk/ reports/112/112704.pdf, 1998, accessed 14 December 2004); the village is classified under ACORN as "established home owning workers", ie "blue-collar" working-class (CACI, 'ACORN profile' on UpMyStreet, http://www.upmystreet.com/overview/index.php3?l1=DE5+9td&l2=&location1=DE5+9, accessed 14 December 2004).

Chapter 3

The 1921 parliamentary debates: a policy of silencing

Lesbianism has never been the subject of an explicit prohibition in English criminal law. Instead, this thesis argues that a policy of deliberate silencing has been followed. In other words, lesbianism was not publicly discussed or prohibited, in the belief that hiding its existence would be a more effective way of dealing with it than prohibition. Behind this legal approach were a number of social, political and cultural factors which varied over time even as the fundamental policy remained constant.

In order to investigate that policy further, I take as my entry point for this chapter the occasion upon which an offence criminalising sexual conduct between women was almost created: the parliamentary debates on the Criminal Law Amendment Bill of 1921. In these debates, somewhat paradoxically, the policy of silencing lesbianism was publicly articulated and analysed. Thus, while by no means the earliest in time of the events I will examine, the debates are an appropriate first entry point since they make explicit what was hitherto unspoken, and articulate the ideological background against which the events of the following chapters were played out.

The 1921 debates

The debates on the regulation of lesbianism centred upon a proposed amendment to the Bill which would have created an offence of gross indecency between women. The clause, mirroring the Labouchère amendment[1], was worded as follows:

> Any act of gross indecency between female persons shall be a misdemeanour and punishable in the same manner as any such act committed by male persons under section eleven of the Criminal Law Amendment Act, 1885.[2]

The Criminal Law Amendment Bill 1921 had its origins in three bills introduced into the House of Lords in 1920 (the Criminal Law Amendment Bill, the government's Criminal Law Amendment (No. 2) Bill, and the Sexual Offences Bill). They had been referred to a Joint Select Committee, whose proposals were then

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[1] Criminal Law Amendment Act 1885, section 11, which created the offence of gross indecency between males.

introduced as a single Criminal Law Amendment Bill, a House of Lords private member's bill.[3] It aimed to tighten the law on sexual offences and thereby provide greater protection to women, and to young girls in particular. The Criminal Law Amendment Act 1885 had introduced some measures aimed at protecting young girls from juvenile prostitution,[4] including raising the age of consent for sexual intercourse to 16.[5] However, there were significant shortcomings, including a three-month time limit for the bringing of prosecutions[6] (raised to six months by the Prevention of Cruelty to Children Act 1904, section 27); a defence of reasonable cause to believe the girl was over 16;[7] and the continuation of a lower age of consent (thirteen) for indecent assault.[8]

The 1921 Bill would have raised the ages of consent, abolished the reasonable belief defence, and increased the time limit for prosecutions. There was no mention of lesbianism in the original text, which was expected to pass without difficulty. However, the Bill was not uncontroversial, attracting opposition because in abolishing the defence of reasonable belief it "took away from an accused person a ground of defence ... [and thus] made blackmail easy"[9] and was "a Bishop's Bill".[10] Implicit in these objections was a view of the Bill as an unnecessary feminist attack upon men: to Horatio Bottomley MP, "[t]he only thing that appealed ... was the attempt to maintain the purity of our women."[11] Lieutenant Colonel Moore Brabazon later made clear the

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[2] Hansard, House of Commons Debates, 5th Series, Vol 145(8) Column 1799, 4 August 1921.
[3] The Earl of Malmesbury, Hansard House of Lords Debates, Volume 46, Column 568, 15 August 1921. For further background information on the Bill, see Matthew Waites, 'Inventing a 'Lesbian Age of Consent'? The History of the Minimum Age for Sex between Women in the UK' (2002) 11(3) *Social and Legal Studies* 323 – 342 at p 330; Sheila Jeffreys, *The Spinster and Her Enemies: Feminism and Sexuality 1880-1930*, Melbourne: Spinifex Press, 1997, pp 80-82.
[4] Jeffreys, *The Spinster and Her Enemies*, p 55.
[5] Section 5 (1).
[6] Section 5, Criminal Law Amendment Act 1885.
[7] Sections 5 and 6, Criminal Law Amendment Act 1885.
[8] The age had been established by the earlier Criminal Law Amendment Act 1880, section 2.
[9] Major Lowther, quoted in *The Times*, 16 July 1921, p 10.
[10] Mr Bottomley, quoted in *The Times*, 16 July 1921, p 10. The Bill was literally introduced by a Bishop, but the term seems designed to have conveyed a sense of moralistic, perhaps unworldly, meddling.
[11] *The Times*, 16 July 1921, p 10. Horatio Bottomley was an unlikely person to talk about purity, given that he would soon be known as the "swindler of the century". Having grown up in an orphanage, he rose in financial and social stature to become a Liberal MP in 1906 before having to resign six years later upon being declared bankrupt; he returned to Parliament in 1918 as an Independent MP. He also owned 'John Bull' magazine and ran a variety of apparently successful, but usually fraudulent, businesses. One of these, the "John Bull Victory Bond Club", failed in 1921; as a result, he was convicted of fraud in 1922 and sentenced to seven years' imprisonment (Gerald Rawlings, 'Swindler of the Century', (1993) 43(7) *History Today* pp 42-48; John Rennie, 'Horatio Bottomley of Bethnal Green, http://www.eastlondonhistory.com/bottomley.htm, accessed 19 September 2006).

anti-feminist nature of such opposition when he characterised government support for the reforms as the home secretary's submission to feminist "henpecking".[12]

In a busy parliament with scarce time, the Bill was only allowed to proceed on the basis that it was agreed.[13] Parliamentary time to debate amendments at length was unlikely to be given by the government. Lesbianism, then, became a means to scupper the Bill since the proposal to outlaw it would be controversial.[14] The "gross indecency between females" clause was introduced by the Conservative MP Frederick Macquisten[15] in order to defeat the Bill as a whole.[16]

The consequence of introducing this amendment on gross indecency between women was that the Bill was no longer agreed. Indeed, not only Parliament but also those campaigning for the Bill were divided upon the amendment.[17] The amendment was passed by the House of Commons on 4 August 1921[18] but rejected by the House

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[12] Parliamentary Debates, 5 July 1922, cited in Jeffreys, *The Spinster and Her Enemies*, p 83.

[13] "The Earl of Crawford ... said that if the measure continued to maintain the non-controversial character with which it left their lordships' House, the Government would be glad to do its best, at a later stage of the Session, to pass it into law" (*The Times*, 13 May 1921, p 6).

[14] The Lord Bishop of Norwich, Hansard House of Lords Debates, Volume 46, Columns 565-566, 15 August 1921. See also Jeffreys, *The Spinster and Her Enemies*, p 82. Unfortunately, some commentators have assumed the opposite, as when Martin Pugh argues that "feelings [against lesbianism] ran so high that members preferred to lose the entire measure rather than pass it without the anti-lesbian cause" (*Women and the Women's Movement in Britain* (2nd edition), Basingstoke: Macmillan Press Ltd, 2000, p 79).

[15] Frederick Alexander Macquisten KC was the Conservative MP for Argyllshire between 1924 and his death in 1940. His overwrought rhetoric was not confined to the subject of lesbianism: according to *Time Magazine*, "Frederick Alexander MacQuisten, M.P. [was the] ingenious apostle of 'man's sacred right to make his own refreshment.' He championed roads against railways, independent buses against combines. Of pasteurized milk he once cried (inaccurately) in the House of Commons: 'If you give it to cows, they die. If you give it to rats, they fail to reproduce their species. It's a form of birth control!'" ('Half-Year Mark', 11 March 1940, http://www.time.com/time/archive/preview/0,10987,789657,00.html, accessed 16 May 2005; *Who Was Who, 1929-1940*, second edition, London: Adam & Charles Black, 1967, p 886).

[16] In the House of Lords debate, the Lord Chancellor strongly hinted that the amendment's purpose was "to destroy the bill .. a pretext to encompass its destruction" (Hansard House of Lords Debates, Vol 46, Column 570). When the bill was withdrawn, Sir D MacLean and Viscountess Astor were agreed that "the intention [of the amendment] was to wreck the Bill" (*The Times*, 18 August 1921, p 10). Feminists interpreted the amendment in the same way: an editorial in *The Shield*, journal of the Association for Moral and Social Hygiene, characterised it as "a new clause of a purely wrecking character" (November/December 1921, quoted in Annabel Faraday, 'Lesbian Outlaws: past attempts to legislate against lesbians' (1988) 13 *Trouble and Strife* 9-16, p 15) while the National Council of Women concurred that "there existed in the House of Commons a number of men who were absolutely determined to protect their sex in assaults on young girls" (*The Times*, 28 September 1921, quoted in Faraday, 'Lesbian Outlaws', p 15).

[17] Sheila Jeffreys identifies one of the main organisations, the Association for Moral and Social Hygiene, as neutral (*The Spinster and Her Enemies*, p 82); their varied comments on the provision are discussed by Annabel Faraday, 'Lesbian Outlaws', p 15. The Bishop of London, whose Bill it was, indicated in a letter to Lord Onslow that he was "prepared to accept the Commons' amendments to the Bill as it would seem the only chance of getting this important measure through" (Letter of 2 August 1921, HO 45/12250/361664/113).

[18] Hansard House of Commons Debates, Volume 145(8), Column 1807.

of Lords shortly afterwards:[19] as a result, the Bill failed.[20] (Nonetheless, a government Bill was successfully passed the following year and made many of the proposed changes, although the "reasonable belief" defence was retained for men under 24 years of age; it did not include any mention of lesbianism).

These events formed a moment when the usually-unarticulated policy of silencing became a topic of public discussion. They therefore raise a number of questions which I will consider in the rest of this chapter. First, why was the issue of lesbianism chosen as best suited to fatally damage the bill? Second, what did the debates themselves reveal about the attitudes of the ruling class towards lesbianism? Third, what was the effect of silencing in the criminal justice system? Fourth, why was this policy favoured for women but not for men? And finally, what was the significance for lesbians of the policy of silencing?

Why was the issue of lesbianism chosen?

The primary purpose of the "gross indecency" amendment was to introduce controversial material to the Bill which would prevent its being passed quickly as an agreed bill. However, that point only partly answers the question of why lesbianism was chosen: what was it about this topic which made it so appropriate to the proposers' purposes?

First, the regulation of lesbianism was a complex topic in that there was general consensus that lesbianism was a bad thing, but little appetite for formally discussing or enacting that view. The subject was therefore sure to prove controversial because, once the issue was raised, its regulation would appear only appropriate to many (since the hitherto largely effective silence was being breached by the very debate itself), while others would remain wedded to the traditional approach of silencing.

Second, there was a political point being made. Since the impetus for the Bill came from feminist campaigns, this amendment could be presented as another form of sex equality.[21] If men were to be punished for such behaviour, then shouldn't women

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[19] Hansard House of Lords Debates, Volume 145, Column 577, 15 August 1921.

[20] See *The Times*, 18 August 1921, p 10: "Mr Chamberlain said that the amendment of the Lords in rejecting the clause which had been accepted by the promoters of the Bill had destroyed the compromise on which the House had been proceeding."

[21] A similar proposal was also put forward by pro-feminist magistrate Cecil Chapman, discussed below (rather than seeking a "tit for tat" measure or to undermine the proponents of the Bill, he simply sought some form of legislative provision in order to protect young girls from older women in the same way

face equal sanctions? The suspicions of lesbianism attached to many prominent feminists were grounds for hoping that the topic would be an embarrassing one for them.[22]

Third, as I will discuss in more detail in Chapter 5, the policy of silencing was already showing some signs of fracture. The new "science" of sexology had discussed and described the lesbian, and that information was moving gradually out of the scientific realm and into public discourse. It would of course do so most dramatically a few years later, with the furore surrounding the publication of Radclyffe Hall's *The Well of Loneliness* in 1928.[23]

Finally, although there had been no real discussion about, let alone campaign for, regulating lesbianism, it had not gone entirely unmentioned during the Bill's genesis. The issue had already been raised by one witness to the Joint Select Committee of 1920: Cecil Maurice Chapman, Metropolitan Police Magistrate for Westminster. He argued that gross indecency should be extended to sex between women since

> I have had very serious cases in my experience in which women have been in the habit of getting girls to their flats and houses in London, and I remember a case that took place in Bournemouth, where girls were practically being treated as if they were prostitutes. It is an offence which people speak of as if it was almost unknown to the public, but it is very well known to the police, and it is very well known to many people who are students of criminology that women as well as men corrupt girls. There is no question about it that in regard to all these acts there ought to be absolute equality between the sexes as far as is humanly possible. There cannot be a doubt about it if there is an act of gross indecency between a woman and a girl. I may tell you that I know of a Home which was started for the reformation of girls where the police had to interfere because of the girls being corrupted by the woman controller of the Home.[24]

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that they were protected from older men, although he opposed the offence of gross indecency between adults of either sex).

[22] Sheila Jeffreys discusses the extent to which spinsters were prominent in the feminist movement of the period in *The Spinster and Her Enemies*, pp 86-93, highlighting the explicitly political reasons given by women such as Christabel Pankhurst, Cicely Hamilton and Lucy Re-Bartlett for not marrying. Laura Doan discusses the lesbianism of prominent members of the Women Police Service in '"Gross Indecency between Women": Policing Lesbians or Policing Lesbian Police?' (1997) 6(4) *Social & Legal Studies* 533-551 at p 543.

[23] See Chapters 1 and 5.

[24] Mr Chapman, evidence to the Joint Select Committee 1920, para 1479.

It should be noted first and foremost that Chapman's examples were carefully chosen, since his concern was for the vulnerability of young girls to abuse by older women, some (such as the controller of the Home) in positions of power over them.[25] He also phrased his suggestion in terms of "absolute equality of the sexes" which reflects his support for women's suffrage[26] and Lesley A Hall's description of him as "a magistrate of impeccable feminist credentials".[27] Unfortunately, those who would seemingly take up his concerns in parliament had very different agendas, as I consider in some detail below. In particular, the focus of their amendment and their speeches was upon punishing all lesbian relationships for their supposed perversion, rather than upon the protection of young girls, who went unmentioned in the debates.

Although Chapman proposed that some lesbian sexual conduct should be made an offence, he placed lesbianism within the realm of professional knowledge: police and criminologists, but not the general public, were aware of it. The type of woman involved was not identified, although interestingly his example of women getting girls to their houses and flats suggests that the adults were middle-class at the least, since they had their own, relatively sizable, homes. The girls remained somewhat more vague, although one suspects that they were working class by implication (and explicitly in the case of those girls who were in need of "reformation" – that is to say, who had already behaved in ways deemed morally or sexually inappropriate). The social position of the controller of the home was more ambiguous: although some such women were middle-class reformers, others were of low social status.[28]

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[25] That he did not have a wider agenda of persecuting "perverts" was indicated by his denunciation elsewhere of the sentences passed under the Labouchère amendment (cited in Lesley A Hall, *Sex, Gender and Social Change in Britain Since 1880*, Basingstoke: Macmillan Press, 2000, p 102) and by his emphasis upon offences committed by women upon girls: none of his examples relate to, or suggest a desire to criminalise, consensual relations between adult women.

[26] Chapman was a supporter of women's suffrage from his student days (Cecil Chapman, *The Poor Man's Court of Justice: Twenty-five Years as a Metropolitan Magistrate*, London: Hodder and Stoughton, 1925, p 58). He was chairman of the Men's League for Women's Suffrage, although he eventually gave up this position in order to remain a magistrate following Home Office intervention (A V John, 'Between the Cause and the Courts: The Curious Case of Cecil Chapman' in C Eustance, J Ryan and L Ugolini (eds), *A Suffrage Reader: Charting Directions in British Suffrage History*, Leicester: Leicester University Press, 2000, pp 145-161).

[27] *Sex, Gender and Social Change*, p 102. Indeed, throughout his career as a magistrate he sought to forward women's interests including through public speaking and publications on women and law (*The Poor Man's Court of Justice*, pp 214-5; *Marriage and Divorce: Some Needed Reforms in Church and State*, London: David Nutt, 1911). His other political role was serving as a Conservative councillor for Chelsea on London City Council between 1896 and 1898 (*Who Was Who, 1929-1940*, second edition, London: Adam & Charles Black, 1967, p 239).

[28] Louise A Jackson, *Child Sexual Abuse in Victorian England*, London: Routledge, 2000, p 133.

It would seem probable that one reason why Chapman's concerns were not taken seriously (as I explain below) was that they involved the corruption of working-class girls by middle-class women, a reversal of the dominant discourse of protecting middle-class girls from those who were other in terms of race and class. Working from a pro-feminist analysis of the situation, his motives were to protect the vulnerable rather than to prohibit a form of sexuality which he knew did in fact exist amongst middle-class white women. The fact that his suggestion was couched in such ambiguous terms, and so liable to be misunderstood in a way which could damage the position of all lesbian women, reflects the limits of such a formal equality approach. However, more problematic for the proposal was that his audience's politics were rather different: it would not be until the end of the decade that the existence of lesbianism among upper-middle class women would gain some degree of public acceptance. His final scenario suggests that he may have realised this difficulty and attempted an example which could make sense in the context of the prevailing ideology: although the girls in the reformatory home would have been working class, so too might the controller.

Laura Doan suggests another agenda underlying Chapman's intervention: the Metropolitan Police's hostility to the independent Women Police Service (WPS).[29] One of several women's policing organisations formed during the First World War, and led by former suffragettes, after the war they lobbied for official recognition and continued to operate in competition with the official women's police force (the Metropolitan Women Police Patrols) which had been formed in 1918 but largely excluded WPS women from its ranks.[30] The WPS's aim of operating as a separate force enjoying full equality with male police officers was a particular reason for official police hostility.[31] Some of its leaders also suspected that their lesbianism was a further reason for that hostility.[32]

However, as Doan herself points out, Chapman was in fact a supporter of the WPS. Although she finds hints in his comments to the Committee that he may have raised the issue of "gross indecency between females" at the instigation of the Metropolitan Police,[33] more likely is his own explanation that "there ought to be

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[29] Doan, 'Gross Indecency between Women', p 535.
[30] *Ibid*, pp 536-537.
[31] *Ibid*, p 541.
[32] *Ibid*, p 543.
[33] *Ibid*, p 545.

absolute equality between the sexes as far as is humanly possible."[34] Girls should be protected from women no less than from men: all his examples are based on such a situation, rather than on sexual behaviour between adult women (and as Doan points out, no definition was ever given: he and the committee members referred throughout to "it").[35] At least one contemporary feminist newspaper agreed with Chapman that such an amendment "is on the right lines in so far as it equalises the sexes in this respect".[36] While one might have strong reservations about straightforward formal equality as necessarily achieving feminist ends (in this case, given the existing offence of gross indecency between men, the opposite was quite likely), nonetheless the motives of Chapman and those who agreed with him were diametrically opposite to those of the amendment's promoters.

Chapman's remarks were not taken terribly seriously by the Joint Committee, according to the Earl of Malmesbury who had been a member:

> [T]here was only a very brief reference to this disgusting subject throughout the whole of those proceedings. I believe that I was responsible, in consequence of something that was said, for raising this question, and moreover the impression, a very strong one, which was left on my mind was that this subject did not require serious attention, and that such stories as we heard were exaggerated. In fact, I was more than satisfied that the particular subject did not need our further consideration.[37]

Nonetheless, while the Joint Committee may have dismissed the subject, that would not in fact be an end to the matter. When the Bill's opponents sought a subject controversial enough to wreck it, lesbianism was selected and thus would become the focus of open parliamentary debate for the first time in English history.

The 1921 debates and attitudes towards lesbianism

It is important to bear in mind that what was being discussed throughout these debates was the need for intervention by the criminal law, not the existence of lesbianism per

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[34] Mr Chapman, evidence to the Joint Select Committee 1920, para 1479.
[35] Doan, 'Gross Indecency between Women', p 547.
[36] *The Woman's Leader*, 1921, pp 401-2, cited in Doan, 'Gross Indecency between Women', p 546. This magazine was the publication of the National Union for Societies of Equal Citizenship (NUSEC), the post-1918 name for the National Union of Women's Suffrage Societies. Ironically, this group would itself suffer a split in the 1920s due to disagreements over formal equality and protective legislation.
[37] Hansard House of Lords Debates, Volume 46, Column 567, 15 August 1921.

se. There was no real dispute that such cases existed, although estimates of their prevalence did vary wildly from the Lord Chancellor's certainty that 999 women in a thousand had not heard of lesbianism[38], to assertions that this was a growing problem and that experts came across such cases "every now and again",[39] or even that "this is a very prevalent practice": "no week passes that some unfortunate girl does not confess" such a relationship to one leading "nerve specialist".[40]

However, several approaches were offered to dealing with the reality of lesbianism. Lieutenant-Colonel Moore-Brabazon set out three options:

> There are only three ways of dealing with perverts. The first is the death sentence. That has been tried in old times, and, though drastic, it does do what is required – that is, stamp them out. The second is to look upon them frankly as lunatics, and lock them up for the rest of their lives. That is a very satisfactory way also. It gets rid of them. The third way is to leave them entirely alone, not notice them, not advertise them. That is the method that has been adopted in England for many hundred years ...[41]

Expanding upon this "third way", Moore-Brabazon insisted that

> these cases are self-exterminating. They are examples of ultra-civilisation, but they have the merit of exterminating themselves...[42]

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[38] Hansard House of Lords Debates, Volume 46, Column 574, 15 August 1921.
[39] Macquisten, Hansard House of Commons Debates, Volumn 145(8), Column 1800.
[40] Sir Ernest Wild, Hansard House of Commons Debates, Volumn 145(8), Column 1803.
[41] Hansard House of Commons Debates, Vol 145(8), Columns 1802-1803. John Theodore Cuthbert Moore-Brabazon (1884-1964) was an aviation pioneer as well as a Conservative MP with a particular interest in the aircraft industry (he made the first flight by a British pilot in Britain, and later won the Daily Mail's £1,000 prize for the first 1-mile flight in a British aeroplane). Minister of Transport and Minister for Aircraft Production during the Second World War, he was forced to resign after a speech at a private luncheon in which he allegedly expressed the hope that the German and Russian armies would annihilate each other was leaked to the press. However, he then sat in the House of Lords after being made Lord Brabazon of Tara in 1942, in recognition of his ministerial work. He would also be President of both the Royal Institute and the English Golf Union (See Kenneth Rose, 'Brabazon, John Theodore Cuthbert Moore-, first Baron Brabazon of Tara (1884-1964)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/32018, accessed 18 Sept 2005; Pilotfriend, 'Century of Flight: JTC Moore-Brabazon', http://www.airracinghistory.freeola.com/PILOTS/Brabazon.htm, 2000, accessed 16 May 2005; Dr C F Parsons, 'The Birthplace of British Aviation', http://www.colinfparsons.btinternet.co.uk/twinp/colhome/eastchurch/default.htm, 2001, accessed 16 May 2005; RAF Museum, 'British Civil Aviation in 1909', http://www.rafmuseum.org.uk/milestones-of-flight/british_civil/1909.html, accessed 16 May 2005; Tom Brearley, 'Those Magnificent Men', http://www.thosemagnificentmen.co.uk/men/#brab, accessed 16 May 2005).
[42] Hansard House of Commons Debates, Vol 145(8), Column 1805.

The Earl of Malmesbury concurred that "all these unfortunate specimens of humanity exterminate themselves by the usual process".[43] This imagery of extermination is notable for its brutality: while it may refer to the assumed failure of the lesbian to procreate,[44] it suggests something more, suicide or some other sudden and premature death. Indeed, the relish with which the lesbian's self-extermination is posited can be contrasted with the argument being made elsewhere that one of lesbianism's very risks was the decline in the birth rate.[45] What could have seemed an almost benign neglect of the sterile lesbian becomes the vicious fantasy of presumably very threatened men.

The supporters of the amendment offered a fourth option, criminalisation, on the assumption that rather than being self-exterminating, lesbianism was growing in prevalence.[46] Such concerns were not new: campaigning journalist W T Stead had privately expressed concern in 1895 that since "[t]he law is absolutely indifferent to any amount of indecent familiarity taking place between two women ... the result is that many women give themselves up to this kind of thing without any consciousness of being wrong."[47] Although this fourth way was accepted by a majority of those present in the House of Commons that late evening,[48] largely with the motive of killing the Bill rather than actually criminalising lesbianism, it was utterly rejected by the House of Lords even at the expense of the Bill.[49]

Lesbianism was depicted in those debates as "other" in terms of race and class. The problem was formulated as one of ensuring that it did not spread from those women outside the white, upper-middle and upper classes to those within. Indeed, it was posited as posing a very direct and fundamental threat to the interests of the white upper classes of Britain: when "these moral weaknesses ... grow and become prevalent in any nation or in any country it is the beginning of the nation's

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[43] Hansard House of Lords Debates, Vol 46, Column 570.

[44] See for example Sir Ernest Wild, Hansard House of Commons Debates, Vol 145(8), Column 1804: "it stops child-birth".

[45] See Arabella Kennealy, *Feminism and Sex Extinction*, 1920, cited in Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (2nd edition), London: Quartet Books, 1990, p 106.

[46] Macquisten, Hansard House of Commons Debates, Vol 145(8), Columns 1799-1800; Sir Ernest Wild, Hansard House of Commons Debates, Vol 145(8), Columns 1802-1803.

[47] Letter, 22 June 1895, cited in Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914*, London: Penguin, 1995, p 289.

[48] The amendment was passed with 148 votes in favour to 53 against (Hansard House of Commons Debates, Vol 145(8), Column 1806): this means that only about a third of MPs voted.

[49] Lord Bishop of Norwich, Hansard House of Lords Debates, Volume 46, Column 577. He sought to withdraw his motion supporting the amendment since no one present, including himself, had spoken in

downfall";[50] "it saps the fundamental institutions of our society ... [it] must tend to cause our race to decline."[51] Women's sexual morality was represented explicitly as the foundation upon which any great empire depended:

> The falling away of feminine morality was to a large extent the cause of the destruction of the early Grecian civilisation, and still more the cause of the downfall of the Roman Empire. ... [T]his horrid grossness of homosexual immorality ... [is] an evil which is capable of sapping the highest and the best in civilisation.[52]

By what means "immorality" brought down mighty empires was never explained. Two possibilities suggest themselves: either this was Edward Gibbon's argument from the eighteenth century that decadence led to the decline of Rome,[53] or it was a rather more contemporary reference to eugenics, a movement whose advocacy of scientific breeding for the betterment of the race, and bearing children as the duty of every healthy woman attracted followers from a wide range of political viewpoints.[54] Thus according to the feminist and social reformer Ellice Hopkins:

> the rapid decadence of Greece, despite her splendid intellectual life, was due to moral causes. Speaking of the decay of the Athenian people, Mr Francis Galton says: we know, and may guess something more, of the reason why this marvellously gifted race declined ... many of the more ambitious and accomplished women were avowed courtesans, and, consequently, infertile and the mothers of the incoming population were of a heterogenous class.[55]

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agreement with the substantive proposal.

[50] Macquisten, House of Commons, Hansard Vol 145, 4 August 1921, columns 1799-1800.

[51] Sir Ernest Wild, House of Commons, Hansard Vol 145, 25 July – 5 August 1921. Lesbianism was also treated as racially "other" in that (knowledge of) it was imputed to non-white women: see for example the discussion of *Woods and Pirie* below, and the 19th century law in India formulated by Lord Macaulay, which did prohibit lesbianism (section 377 of the 1860 Indian Penal Code, which criminalised "carnal intercourse against the order of nature with any man, woman or animal").

[52] Macquisten, Hansard House of Commons Debates, Vol 145(8), Columns 1799 and 1800

[53] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, London, 1776-1778.

[54] Among the proponents of eugenics were the sexologist Havelock Ellis as well as a number of socialist and feminist writers, in addition to those concerned with the future of the British empire (see Weeks, *Coming Out*, p 91; Angelique Richardson, *Love and Eugenics in the Late Nineteenth Century: Rational Reproduction and the New Woman*, Oxford: Oxford University Press, 2003). Eugenic concerns were also advanced elsewhere in the debate, as when Major Farquharson argued that the protection of 13 to 16-year-old girls was essential to "the welfare of [England's] own stock at home" (reported in *The Times*, 16 July 1921, p 10).

[55] Ellice Hopkins, *The Power of Womanhood*, cited in Richardson, *Love and Eugenics*, p 56. (Jane) Ellice Hopkins was a prominent feminist campaigner against prostitution and founder of the Ladies' Association for the Care of Friendless Girls, which aimed at tackling the causes of prostitution rather than intervening only after women had "fallen", and the Church of England Purity Society which urged chaste behaviour upon men (see further Sue Morgan, *A Passion for Purity: Ellice Hopkins and the politics of gender in the late-Victorian church*, Bristol: CCSRG Monograph, 1999.

Lesbianism was portrayed then as a potent threat, and to many MPs and peers it was one best kept secret, lest hitherto innocent women be tempted to try it.

> To adopt a Clause of this kind would do harm by introducing into the minds of perfectly innocent people the most revolting thoughts.[56]

The Earl of Desart spoke at some length on this issue, suggesting that

> the mere discussion … tends, in the minds of unbalanced people, of whom there are many, to create the idea of an offence of which the enormous majority of them have never even heard … Suppose there were a prosecution … It would be made public to thousands of people that there was this offence; that there was such a horror.[57]

Similarly, Labour MP Colonel Wedgwood described lesbianism as "a beastly subject… being better advertised by the moving of this Clause than in any other way."[58] The passing of the clause would make matters worse since "calling the policeman to suppress a vice is the best way to encourage the knowledge of that vice and the spread of it."[59] Knowledge is fatal, Sir Ernest Wild agreed, because "it is a well-known fact that any woman who indulges in this vice will have nothing whatever to do with the other sex", leaving them to childlessness, debauchery, neurasthenia and insanity.[60] The most succinct summary was perhaps that of the Earl of Malmesbury that "[t]he more you advertise vice by prohibiting it the more you will increase it".[61]

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[56] Lieutenant-Colonel Moore Brabazon, House of Commons, Hansard Vol 145, 25 July – 5 August 1921.

[57] Hansard House of Lords Debates, Vol 46, Columns 572-573. Although sitting as a Lord, he spoke with the authority of a former Director of Public Prosecutions.

[58] Hansard House of Commons Debates, Vol 145(8), Column 1800. It is unsurprising that Wedgwood opposed the spoiling amendment since he was not an opponent of feminism: he had moved from the Liberal to the Labour Party two years earlier, in part because of his support for the suffragettes and dismay at government treatment of them. He would later become a Labour cabinet minister, and was offered a peerage by Winston Churchill in 1942, becoming Baron Wedgwood of Barlaston. Wedgwood was the great-grandson of the famous potter Josiah Wedgwood, and grandfather of Tony Benn (who rejected the title).

[59] Hansard House of Commons Debates, Vol 145(8), Column 1801.

[60] Hansard House of Commons Debates, Vol 145(8), Column 1804. The Conservative MP Sir Ernest Wild, already a KC and judge of the Norwich Guildhall Court of Record, would become Recorder of London the following year (*Who Was Who, 1929-1940*, second edition, London: Adam & Charles Black, 1967, p 1455).

[61] Hansard House of Lords Debates, Vol 46, Column 570.

Of course, such an approach had not been taken in respect of other forms of "vice", notably male homosexuality, as I discuss in more detail below.[62] The reason that such a difference in approach was possible was the assumption that men might know about sodomy but women would be unaware of lesbianism. It was a secret, and women in general were not in on this secret:

> [T]he overwhelming majority of the women of this country have never heard of this thing at all … of every thousand women, taken as a whole, 999 have never even heard a whisper of these practices.[63]

Such innocence was the bedrock of women's social behaviour: "if twenty women were going to live in a house with twenty bedrooms, I do not believe that all the twenty bedrooms would be occupied, either for reasons of fear or nervousness, and the desire for mutual protection."[64] Worse, young women's "romantic, almost hysterical friendships" might become a basis for prosecution or blackmail.[65]

However, the secret was one which could be known among privileged men, if not their wives.[66] Men's social habits were not dependent upon naivety: unlike the Earl of Malmesbury's twenty women with twenty bedrooms, "when men take shooting boxes the first enquiry is that each shall have a room to himself if

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[62] Note however that when the Incest Bill was passed, similar concerns were raised: "Everyone who is familiar with the administration of the criminal law is well aware that the publicity given to an offence at one Assize Court produces a crop of similar offences at other Assizes; and these are cases which it is inadvisable to drag into the light of day" (Lord Chancellor, 16 July 1903, Hansard, Parliamentary Debates, Vol 125, Column 822). Here again, giving inappropriate knowledge to women seemed to be a primary concern: "in regard to an offence of a similar character, charges were brought by young girls which had no foundation whatever in fact" (Mr Staveley-Hill, 26 June 1908, Hansard Parliamentary Debates, Vol 191, Column 282); again, a threat to patriarchal structures was also involved since knowledge and prosecution of incest risked undermining the position of the patriarchal paterfamilias.

[63] The Lord Chancellor, Hansard House of Lords Debates, Vol 46, Column 574.

[64] Earl of Malmesbury, Hansard House of Lords Debates, Vol 46, Columns 569-570.

[65] Earl of Desart, Hansard House of Lords Debates, Vol 46, Columns 572-573.

[66] This is not to say that parliamentarians found it easy to say the L-word: all the speakers in the debate – with the exception of Macquisten's reference to "this horrid grossness of homosexual immorality" (Hansard House of Commons Debates, Vol 145(8), Column 1800) and Wedgwood's to "Lesbian vice" in the classics (Hansard House of Commons Debates, Vol 145(8), Column 1801) - managed to discuss the whole issue through a series of convolutions, quotations from others, and euphemisms. This combination of reluctance to speak and fascination with the topic are by no means extinct: see Rosemary Auchmuty's discussion of *Tinsley v Milligan* [1994] 1 AC 340, where Lord Goff cites Lord Nicholls citing the trial judge describing the parties as "lovers for about four years" ('When Equality is Not Equity: Homosexual inclusion in undue influence law' (2003) 11(2) *Feminist Legal Studies* 163-190 at p 171).

possible."[67] The Lord Chancellor was unusual in taking this discussion beyond the world of mansions and shooting boxes to the living conditions of the working classes:

> [I]n the homes of this country, where, in all innocence, and very often as a necessary consequence of the shortage of small houses, they have to have the same bedroom, and even sleep together in the same beds, the taint of this noxious and horrible suspicion is to be imparted.[68]

In the same way as the courts had assumed a century earlier that the subject could be safely discussed in languages other than English,[69] so the House of Commons also viewed lesbianism as an area of privileged male knowledge. Colonel Wedgwood doubted whether "any members of the Labour Party ... know in the least what is intended by the Clause." By contrast, "the ordinary boy who goes to a public school learns at that public school from the classics which he reads about what is known as Lesbian vice."[70]

Although Parliament articulated and ultimately upheld the approach of silencing (even the proposers of the amendment themselves probably did not seriously intend or expect to breach it), the mere fact of the debate indicated that such a policy was coming under threat. The increased visibility of lesbianism in the twentieth century, which made a policy of secrecy more difficult to sustain (and would force it to change fundamentally by the end of the century) was initially stimulated by the work of the sexologists. These new "experts" created a new discourse of lesbianism, in which it was not so much a moral as a medical and psychological issue.[71] Their influence was already apparent in the 1921 debates. In introducing the amendment, Macquisten made reference to the increasing medicalisation of lesbianism: "it is ... a

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[67] Earl of Malmesbury, Hansard House of Lords Debates, Vol 46, Column 570.

[68] Hansard House of Lords Debates, Vol 46, Columns 574-575.

[69] *Miss Mariann Woods and Miss Jane Pirie against Dame Helen Cumming-Gordon* (1810), New York: Arno Press, 1975. Briefly, this Scottish case concerned allegations that the two plaintiffs, who ran a girls' boarding school, engaged in lesbian sexual activity together. Much of the case centred on discussion of whether such activity was possible by such women and in such circumstances; the defendant's lawyers compiled a range of sources on lesbianism, all reproduced in their original languages (including Latin and Spanish) without English translations.

[70] Hansard House of Commons Debates, Vol 145(8), Columns 1800-1801. The latter part of his argument was echoed by Asquith J in his judgement in *Kerr v Kennedy* [1942] 1 KB 409 at p 412: "I should be much surprised if, under whatever name, the parliamentary draftsmen of the 1890's were ignorant of [lesbianism's] existence. To assume this to be the case one must assume that they had little or no knowledge of the literature of the ancient world: an assumption which I make bold to repel."

[71] I discuss these theories and developments in more detail in Chapter 5.

matter for medical science and for neurologists".[72] Lieutenant-Colonel Moore-Brabazon agreed that lesbianism was "not ... crime at all ... [but] abnormalities of the brain."[73] Likewise, Sir Ernest Wild referred his fellow MPs to "any neurologist, any great doctor who deals with nerve diseases" for confirmation that "this is a very prevalent practice."[74] Indeed, he quoted "one of the greatest of our nerve specialists" (whom he did not name), who directed him to the sexological literature:

> It would be difficult to recite the various forms of malpractices between women, as it would be impossible to recite them in the House. If you wish for these it would be best to obtain a copy of Kfraft-Ebing [*sic*] "*Psychopathia Sexualis*" or Havelock Ellis's work on sexual malpractices.[75]

Thus, while the 1921 debate marks an articulation of the longstanding policy of silencing, it also marks the entry of the theories of the sexologists into public political debate. Of course, the very fact of that articulation marked the beginning of silencing's end. At the moment the policy was made explicit, so was the cause of its downfall: the reformulation of lesbianism as a subject for public professional discussion. However, in this chapter, it is the history of the policy which I will review.

The effect of silencing

Because there are few reported prosecutions arising from women's lesbianism, and because English law does not have (and has not had) a law specifically prohibiting lesbian sexual activity,[76] the temptation is to conclude that lesbians have been looked upon kindly by the English criminal law, and at worst have been subject to a kind of benign neglect. This view is supported by the apocryphal story that Queen Victoria refused to believe in lesbianism's existence, ensuring that there was no legislative

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[72] Hansard House of Commons Debates, Vol 145(8), Column 1799.
[73] Hansard House of Commons Debates, Vol 145(8), Column 1802.
[74] Hansard House of Commons Debates, Vol 145(8), Column 1803. In his maiden speech in the House of Commons, debating the Aliens Bill, he stated that "homo-sexual offences have multiplied: refinements of vice are prevalent ... Britaqin has no monopoly of virtue, but its very vice has been 'Continentalised'" (quoted in Robert J Blackham, *Sir Ernest Wild K.C.*, London: Rich & Cowan, 1935, p 115).
[75] Hansard House of Commons Debates, Vol 145(8), Column 1803.
[76] Although it should be noted that armed forces regulations did contain such a prohibition until the European Court of Human Rights ruled that investigations under those regulations breached the right to privacy under Article 8 of the European Convention on Human Rights (*Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR 548). The government implemented the decision on 12 January 2000 by lifting the ban on lesbians and gay men serving in the armed forces (*Armed Forces Code of Social*

prohibition in the Criminal Law Amendment Act 1885 (in which the Labouchère amendment was enacted as section 11, criminalising "gross indecency" between men).[77]

However, this silence is only part of the picture. Contrary to common belief, lesbian sexuality is not outside the ambit of the criminal law. In addition to statutory and common laws regulating public expressions of sexuality,[78] the criminal law

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Conduct, 2000).

[77] This story is referred to, for example, in Jeffreys, *The Spinster and Her Enemies*, p 114. Ronald Pearsall offers a variation on this myth: "Lesbianism ... was not incorporated into the 1885 Criminal Law Amendment Act because no one had thought of a way female homosexuality could be explained to Queen Victoria" (in *Public Purity, Private Shame: Victorian sexual hypocrisy exposed*, London: Weidenfeld and Nicholson, 1976, p 182). Stanley Weintraub examined the story in his biography of Victoria and concluded that it is apocryphal:

> When the bill was presented to the Queen for her scrutiny, she allegedly read a provision as implicitly recognizing the existence of such behavior between females. 'Women don't do such things,' she is reputed to have said; and rather than explain otherwise, her Ministers altered the bill to refer only to males. Another version of the same account has lesbianism excluded because no one was willing to explain it to Victoria. Very likely both stories belong in the same category as George Washington and the cherry tree. The Queen's informal intelligence network, as with Gladstone's very different proclivities, kept her well informed, despite literary and social taboos affecting a variety of sexual 'indecencies.' Victoria may have been conservative in many social matters, but she had lived too long and was far too inquisitive to have remained an innocent.

(*Victoria: An Intimate Biography*, New York: Dutton, 1987, p 535). Nonetheless, it has gained a hold on the popular imagination and reappears unexpectedly from time to time: in an article on Antony and the Johnsons, Alexis Petridis remarks that "I Am a Bird Now detours into areas of gender and sexuality that can leave the average listener feeling as uninformed as Queen Victoria was on the subject of lesbianism" ('After the Gold Rush', *The Guardian*, 16 September 2005, http://www.guardian.co.uk/filmandmusic/story/0,,1570565,00.html, accessed 9 October 2005). Perhaps its persistence is explained by Lesley A Hall's comment that in this story, "[t]he Queen surely stands as a metonym for the reluctance of the Victorian age to conceive of sexual autonomy in women" (*Sex, Gender and Social Change in Britain Since 1880*, Basingstoke: Macmillan Press, 2000).

[78] Notable in this regard is *Masterson v Holden* [1986] 3 All E.R. 39, in which two gay men were found guilty of "insulting behaviour" because their conduct (kissing at a bus stop on Oxford Street) was perceived as insulting by passers-by. The court's argument that this interpretation could apply to heterosexual couples too, for example where a "young girl" passes by, is disingenous to say the least. It is unlikely that a heterosexual couple would in reality be prosecuted, let alone convicted, in such circumstances: such behaviour is indulged in at bus stops on Oxford Street with enormous frequency yet there have not to my knowledge been any prosecutions in consequence. One should also note that it is a young *girl* who is to be "insulted", a rather stereotyped view of female and male sexuality. Although the case was decided under s 54 of the Metropolitan Police Act 1839, Smith and Hogan suggest that it would also apply to "insulting" behaviour under section 5, and possibly section 4, of the Public Order Act 1986 (Smith and Hogan (Sir John Smith), *Criminal Law*, Ninth Edition, London: Butterworths, 1999, p 749). Although the case has not been overruled, David Ormerod in the most recent edition of Smith and Hogan suggests that such an interpretation would now be incompatible with the Human Rights Act 1998 "since it is unrealistic to assume that similar displays of heterosexual behaviour would be prosecuted" (Smith and Hogan (David Ormerod), *Criminal Law*, Eleventh Edition, Oxford: Oxford University Press, 2005, p 979). Alternatively, a charge might be brought for the common law offence of outraging public decency (*R v Knuller* [1973] AC 435; Archbold 20-278 – 285) which covers a wide range of conduct from oral sex witnessed by members of the public (*Keith Rose v DPP* [2006] EWHC 852) to the public exhibition of earrings made with freeze-dried human foetuses (*R v Gibson* [1991] 1 All ER 439); there is no authority relating directly to the prosecution of lesbians but sexual conduct between men is certainly within the scope of the offence. The Sexual

intervenes by creating an age of consent.[79] This age is the same for lesbian as for heterosexual and gay male activity: a person under the age of sixteen cannot consent in law to any sexual activity.

Indeed, a careful consideration of history shows a rather different story to the myth of untroubled neglect. Instead of benign ignorance, there has been a deliberate policy of silencing lesbian possibility. In other words, the silence was not an accidental one born of ignorance and unconcern, but a deliberate one aimed at hiding a knowledge felt too dangerous to share (particularly with women). As Terry Castle comments,

> The law has traditionally ignored female homosexuality – not out of indifference, I would argue, but out of morbid paranoia. ... Behind such silence, one can often detect an anxiety too severe to allow for direct articulation. ... The result of such denial: the transformation of the lesbian into a sort of juridical phantasm.[80]

This was the approach explicitly discussed and endorsed in the 1921 parliamentary debates`, although it had been implicit in the law's approach since a much earlier date.

- **Statute of Artificers**

The 1921 debates are one example of how those making the law have decided against making lesbianism an offence. It has been suggested that parliament's approach in that instance reflected societal change: that "the association of lesbianism with the changing social status of women rendered it profoundly threatening."[81] However, while the issue may have become much more prominent in the 1920s, the attitude taken by the criminal justice system was not in fact new. Regulation had been an issue for some centuries, albeit one which was rarely openly acknowledged. The policy of silencing was a longstanding one; lesbianism was neither unknown and therefore unregulated, nor known but tolerated. Silencing in this context, then, has a long legal history in England and Wales.

Offences Act 2003 also contain a specific and gender-neutral offence of sexual activity in a public lavatory (section 71).

[79] Section 9, Sexual Offences Act 2003, and see discussion below.

[80] Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York: Columbia University Press, 1993, p 6.

[81] Waites, `Inventing a `Lesbian Age of Consent'?', p 327.

It is important to note that silencing does not mean toleration. The absence of a clear and explicit prohibition does not mean that lesbianism has gone unpunished under other guises. The treatment of individual lesbians as criminal while lesbianism itself had no legal status has been a persistent thread for some centuries. Although most prosecutions of which we are aware date from the late seventeenth and early eighteenth centuries, I would argue that this is more likely to reflect a lack of evidence for other periods than to indicate an absence of prosecutions. In addition, women were subject to forms of legal control which, while not overtly criminal, could function effectively to punish and prevent lesbian relationships. One potential, even probable, area of regulation is raised by Sara Mendelson and Patricia Crawford in their discussion of the 1563 Statute of Artificers.[82] The relevant provision stated:

> And be it further enacted ... that two justices of peace, the mayor ... of any city, borough, or town corporate, and two aldermen ... shall and may, by virtue hereof, appoint any such woman as is of the age of twelve years[83] and under the age of forty years and unmarried and forth of service, as they shall think meet to serve, to be retained or serve by the year or by the week or day, for such wages and in such reasonable sort and manner as they shall think meet. And if any such woman shall refuse so to serve, then it shall be lawful for the said justices of peace, mayor, or head officers to commit such woman to ward until she shall be bounden to serve as aforesaid.[84]

The effect of the Act was that unmarried women between the ages of twelve and forty could be ordered into domestic service. Such provisions were not altogether new (for example, in 1492 an ordinance in Coventry provided that single women under 50 and in good health were not to live alone or with others but were to go into service until married),[85] but the Act did universalise hitherto local regulation. Mendelson and Crawford comment that "[t]he patriarchal assumptions behind the statute are underlined by the fact that daughters living with mothers were often ordered into service, but those with fathers were not."[86] There was also a strong class element to the use of the Statute which, as we shall see, echoes the bias in this and

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[82] *Women in Early Modern England*, Oxford: Oxford University Press, 1998, pp 96-98 and 246-247.
[83] Twelve years was the earliest age at which women could marry.
[84] Statute of Artificers 1563, Statutes of the Realm, IV, 414 f.: 5 Elizabeth, c. 4.
[85] Bridget Hill, *Spinsters in England 1660-1850*, New Haven: Yale University Press, 2001, p 123.
[86] Mendelson and Crawford, *Women in Early Modern England*, pp 96-7.

later centuries towards prosecution of working-class women for their lesbian relationships:

> Women above a certain social level were exempt from the constraints of the Statute of Artificers. Although the author of *The Lawes Resolutions of Womens Rights* cited the statute's provisions for women, he denied its relevance to his propertied female readership, explaining that the statute applied only to 'day laborers'.[87]

Mendelson and Crawford suggest that the Act was used primarily against all-female households, which were "objects of suspicion"[88] although already earning their own living. The Statute thus functioned as a means of patriarchal control over women over and above its stated function of managing single women's impact upon the economy (particularly the supply of women for employment in service and the wages they earned). For example, Quaker women who were economically self-sufficient appear to have been targeted primarily because of their religious non-conformity:

> Four women of South Milton who had kept themselves comfortably 'by their own honest employment of spinning which they followed many years' were told to put themselves into service. Jane and Anne Wright, 'both single persons living only upon their labour' were taken from home.[89]

The use of the Statute to control and even eradicate suspect female households does suggest that it was likely to have been used where the relationship between the women was considered suspicious. More certain is that households attaining the level of self-support and female autonomy necessary for, in particular, working class and lower-middle class lesbian relationships were liable to attract the attention of those enforcing these provisions.[90]

The Statute of Artificers was primarily used in this way during the seventeenth and early eighteenth centuries. It was finally repealed in 1814, although by that time

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[87] *Ibid*, p 97. The relevant passage of *The Lawes Resolution of Womens Rights* is more ambiguous than this interpretation suggests, but the author certainly assumes that the Statute is of marginal practical relevance to his intended readership.

[88] *Ibid*, p 246.

[89] *Ibid*, p 247, citing *The Great Book of Sufferings*, London: Friends' Library, p 331.

[90] While the terms "working class" and "middle class" are somewhat anachronistic in this context, the concepts are not since at least by the later part of the Act's effective operation, there was a group clearly identified as the "middling sort"; implicit in this notion was the idea of lower and upper classes

its effects were felt primarily by the artisans whose incomes it had protected under its other provisions.[91] However, such economic sanctioning of single women did not end with the Statute's demise; in particular, Marjorie Levine-Clark highlights the way in which application of the Poor Laws depended upon marital status. Able-bodied workers suffered the full harshness of the laws, while those who were dependent and not expected to work could receive assistance outside the workhouse. Although dominant medical discourses saw all women as not really healthy, due to their reproductive functions, only married women appear to have benefited from such assumptions. They were generally treated as dependent; "it was single women and widows without young children who were measured by the able-bodied model".[92]

- **Sodomy**

The offence of sodomy was used to prosecute a range of "unnatural" acts, which covered not only homosexual but also heterosexual anal intercourse, as well as bestiality by either men or women. It has a long history, beginning outside the criminal justice system. In the middle ages, issues of morality including sexual offences had been seen primarily as matters for the ecclesiastical courts. Since sexual offences were largely a matter of religious concern rather than an issue for the secular courts, the church rather than the state had responsibility for enforcing these prohibitions. Thus the sources for mediaeval attitudes to and punishments of lesbianism tend to be penitentials and convent rules rather than reported cases. The evidence can be incomplete and difficult to assess, but Jacqueline Murray notes concern to avoid lesbian relationships amongst nuns expressed explicitly or implicitly in convent rules, and occasional mention of lesbian sexual activity in penitentials.[93]

Johansson and Percy discuss how the mediaeval notion of sodomy originated in *Genesis* 19, the destruction of the city of Sodom, but broadened to include all those

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either side of such "middling" people. (See for example Margaret Hunt, *The Middling Sort: Commerce, Gender and the Family in England, 1680-1780*, London: University of California Press, 1996).

[91] Clive Emsley, *Crime and Society in England 1750-1900* (second edition), London: Longman, 1996, pp 37 – 38.

[92] Marjorie Levine-Clark, '"Embarrassed Circumstances": Gender, Poverty and Insanity in the West Riding of England in the Early-Victorian Years' in Jonathan Andrews and Anne Digby (eds), *Sex and Seclusion, Class and Custody: Perspectives of Gender and Class in the History of British and Irish Psychiatry*, Amsterdam, New York: Rodopi, 2004, pp 123-148 at p 128.

[93] Jacqueline Murray, 'Twice Marginal and Twice Invisible: Lesbians in the Middle Ages', in Vern L Bullough and James A Brundage (eds), *Handbook of Medieval Sexuality*, New York: Garland Publishing, 1996, pp 191 – 222 at pp 196-7

"sinning against nature".[94] Thus Latin Christians classified sodomy into three subdivisions,

> *ratione generis,* "by reason of species," that is to say with brute animals; *ratione sexus*, "by reason of sex," with a person having the genitalia of the same sex; and *ratione modi*, "by reason of manner," namely with a member of the opposite sex but in the wrong orifice, any one that excluded procreation, which was thought the sole legitimate motive for sexual activity.[95]

One of the leading theological authorities on sexual matters was the fifth-century Saint Augustine. His position was clear: while marriage was good, sexual activity was not, and therefore only sexual intercourse within marriage for the purpose of reproduction was acceptable. All non-reproductive sexual activity (including lesbianism) was therefore a sin against nature and thus the most immoral kind of sexual conduct.[96]

Murray suggests that by the thirteenth century, lesbianism was included within the category of sodomy, and notes that Thomas Aquinas' *Summa Theologiae* includes male and female homosexuality in one of four categories of unnatural acts. Three of Aquinas' categories reflect those of the Latin Christians, listed above; he also adds a fourth, masturbation.[97] Within the penitential literature, "lesbian activity was frequently ignored, marginalized, or subsumed under categories of male homosexual sins" but did receive rare attention in its own right, generally juxtaposed with prohibitions on female masturbation. "It is the absence of the male partner that unites conceptually masturbation and lesbian sexual activity."[98]

The sixteenth century saw an increasing secularisation of the punishment of sexual offences,[99] although Peter Bartlett suggests that the underlying "sense of

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[94] Warren Johansson and William A Percy, 'Homosexuality', in Bullough and Brundage (eds), *Handbook of Medieval Sexuality*, pp 155-190 at p 156. Unfortunately, this article elides 'homosexuality' almost entirely with male homosexuality, only mentioning that "[l]esbian relations are scarcely mentioned [in penitentials]." (p 166). It is not only in the primary sources that lesbians are "twice marginal and twice invisible", the title of Jacqueline Murray's essay on lesbians in the same volume.

[95] Johansson and Percy, p 156.

[96] *De bono coniugali* 9;9; *Epistle* 211.13–14; *De opere monachorum* 32.40; discussed by Bernadette J Brooten, *How Natural is Nature? Augustine's Sexual Ethics*, Berkeley: Centre for Lesbian and Gay Studies, http://www.clgs.org/3/brooten_lecture.pdf, accessed 15 January 2005, p 5; and see Vern L Bullough *Sexual Variance in Society and History* New York: John Wiley & Sons, 1976, p 355.

[97] Murray, 'Twice Marginal', pp 199-200

[98] *Ibid*, p 197

[99] This change was part of the Reformation's shift of power from Church to State (in 1532 the House of

sodomy as a religious/moral threat of social order ... remains constant" until the end of the nineteenth century.[100] Before considering the secular approach to sodomy however, it should be mentioned in passing that the consistory courts (religious courts) would remain important for some considerable time in the punishment of other moral and sexual misconduct.[101] A notorious example was the 1612 prosecution of the "Roaring Girl" Mary Frith, who went about in male clothing and indulged in masculine pastimes such as visiting alehouses, tobacco shops and playhouses in her disguise. Sexual misconduct was also alleged, although heterosexual in nature (she was said to have "drawn other women to lewdness by her persuasions and by carrying herself like a bawd"). She was made to do penance at Paul's Cross.[102]

In 1533, regulation of sodomy passed from the ecclesiastical to the secular courts; this secularisation of the punishment of sexual offences was at least in part "to assert royal prerogative against the papacy".[103] The Act for the Punishment of the Vice of Buggery did not actually define the offence beyond describing it as "the detestable and abominable vice of buggery committed with mankind or beast". A more precise definition of sodomy is hard to reach as it appears to have always included some grey areas, although it was certainly narrower than the broad mediaeval definitions. In particular, seventeenth-century jurist Edward Coke was adamant that sodomy by both anal intercourse and bestiality required penile penetration,[104] although the Castlehaven case had found (very controversially) that emission alone sufficed.[105] The emphasis upon such penetration or emission ensured

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Commons opposed the authority of the ecclesiastical courts; the 1533 Act in Restraint of Appeals codified England's legal independence from Rome. The process would continue with the Act of Supremacy, passed in November 1534, and the dissolution of the monasteries between 1536-1540).

[100] Peter Bartlett, 'Silence and Sodomy: The Creation of Homosexual Identity in Law' (1998) 61(1) *Modern Law Review* 102 at p 108.

[101] Edward J Bristow dates their decline to the seventeenth century (*Vice and Vigilance: Purity Movements in Britain since 1700*, Dublin: Gill and Macmillan, 1977, p 11).

[102] Anthony Fletcher, *Gender, Sex & Subordination in England 1500-1800*, New Haven: Yale University Press, 1995, p 9.

[103] Kenneth Borris (ed), *Same-Sex Desire in the English Renaissance: A Sourcebook of Texts, 1470-1650*, London: Routledge, 2004, p 79.

[104] Coke asserted that as for rape, penetration (however slight) was required: women's liability for the offence arose because their presence (being penetrated) amounted to abetting the offence, thereby making them liable as principals. See Edward Coke, *The third part of the Institutes of the laws of England : concerning high treason, and other pleas of the crown, and criminal causes* (1644), London: W. Rawlins, 1681, pp 58-59.

[105] Lord Castlehaven had argued the need for penetration at his trial in the House of Lords in 1631, but it was held that emission without penetration sufficed (of course, this definition also excluded lesbian sexual activity). He was also convicted of rape due to his procuring the rape of his wife by several servants, and there were in addition political reasons for his trial including his suspected Catholicism. (See for example Cynthia Herrup, 'Finding the Bodies', (1999) 5(3) *GLQ: A Journal of Lesbian and*

that lesbianism fell outside the definition and was effectively rendered not just marginal, but invisible.

Commentators before and after Coke were not always so clear as to whether bestiality by a woman required penile penetration, but those who followed him relied heavily upon his work for precedents. The following bizarre extract from a legal textbook of the period (citing a case quoted by Coke as the leading authority on bestiality by a woman) suggests that prosecution remained at least more likely where there was evidence of penetration having taken place:

> Buggery with Man or Beast, is Felony in Women as well as Men. The Case of a Lady of Quality, who committed this Crime with a Baboon, and conceived by him, may be read in 3 *Co. Inst.* 59.[106]

The allegation of conception makes it clear that on the facts alleged, the "Lady of Quality" was penetrated by the animal's penis. Even clearer were Stubbs and Talmash, who specified that "[s]ome Kind of Penntration and Emmission [*sic*] is to be proved; but any the least Degree is sufficient."[107] Another legal guide of the period, however, fails to mention women as participants in sodomy at all:

> THIS is an Offence committed by one Man with another against the Order of Nature, or by a Man with a Beast; 'tis made Felony without Benefit of Clergy; by the Statute 25 *H.* 8. *cap.* 6.[108]

On any of these lawyers' accounts (and the first are probably the more legally accurate), emphasis upon the unnatural use of the penis meant that no suggestion appeared of the offence applying to sexual acts between women. Indeed, from 1781 it

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Gay 255-265; Rictor Norton, 'The Trial of Mervyn Touchet, Earl of Castlehaven, 1631', *The Great Queens of History*, 27 September 2001, http://www.infopt.demon.co.uk/touchet.htm, accessed 2 February 2005; Borris, *Same-Sex Desire*, pp 101-113).

[106] Anon, *The Lady's Law: or, a Treatise of Feme Coverts Containing All the Laws and Statutes relating to WOMEN, under several HEADS*, (Second Edition), London: Henry Lintot, 1737, p 52. Intriguingly, the only detail Coke added was to follow "conceived" with a mysterious "&c." We are therefore left none the wiser as to the circumstances or outcome of the case. Note that in this report, the terms 'sodomy' and 'buggery' seem to be used interchangeably for what we would now term sodomy (see Edward Coke, *The third part of the Institutes of the laws of England: concerning high treason, and other pleas of the crown, and criminal causes*, London: W. Rawlins, 1681, pp 58-59 for a particularly clear example of such usage).

[107] W Stubbs and G Talmash, *The Crown Court Companion*, London, 1738, p 289.

[108] Michael Dalton, *The Country Justice: Containing The Practice, Duty and Power of The Justices of the Peace, As well in as out of Their Sessions*, London: Henry Lintot, 1742, p 45.

was well-established that the law required "penetration and the emission of seed" to be proved.[109] In contrast to the jurisprudence of other European legal systems,[110] the English law restricted sodomy not only to penetration but more specifically, to penetration by actual penises and did not extend the offence to the use of "instruments" which could be viewed as artificial penises.

At the beginning of the nineteenth century, the statutory definition of sodomy was widened, but only to include acts with "animals" rather than "beasts".[111] While the emphasis remained firmly upon sodomy as "that horrible sin against nature, and the ordinance of the Almighty, which the English law (in the language of the indictment for the offence) most fitly describes as one not even to be named among Christians",[112] it remained true that only those unnatural sins involving penile penetration of the anus, or else bestiality, were within its compass.[113]

The next major change would be the Offences Against the Person Act 1861, which reduced the maximum penalty from death to life imprisonment. E Ling-Mallison summarised the offence as one which

> consists either of the penetration of the male organ *per annum* [*sic*] of either a male or a female ... The other aspect of the crime contemplated by section 61 of the Offences against the Person Act, 1861, is bestiality – which is the penetration of the male organ either in the

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[109] *Hill's Case*, 1 East P.C. 649. (Nikki Sullivan suggests that this was a statute in *A Critical Introduction to Queer Theory*, Edinburgh: Edinburgh University Press, 2003, p 3. In fact, as H Montgomery Hyde explains (*The Other Love: An Historical and Contemporary Survey of Homosexuality in Britain*, London: Heinemann, 1970) it was a common law decision in the case of one Mr Hill).

[110] However, silence seems to have played its part in other jurisdictions too: for example, in seventeenth century France, where sodomy was more widely defined to include lesbian acts, "all legal documents relating to sodomy trials were generally burned alongside the convicted 'sodomite' him or herself" (Joseph Harris, '"La Force du Tacte": Representing the Taboo Body in Jacques Duval's *Traité des Hermaphrodits* (1612)' (2003) 57(3) *French Studies* 311-322 at pp 313-314).

[111] Offences Against the Person Act 1828. "The 9 Geo. IV. C.31. s. 15. Enacts, "That every person convicted of the abominable crime of buggery, committed either with mankind or with any *animal*, shall suffer death as a felon." This act differs from the former acts upon this subject, by having the word *animal* instead of beast." (Richard Matthews, *A Digest of the Law Relating to Offences Punishable by Indictment*, London: William Crofts, 1833, p 60).

[112] Edward E Deacon *A Digest of the Criminal Law of England; as altered by the recent statutes and the consolidation and improvement of it*, London: Saunders and Benning, 1831, p 1235. For a discussion of this injunction to silence and how it "works alongside and in relation to a requirement to speak of such things" (p 35), see Leslie J Moran, *The Homosexual(ity) of Law*, London: Routledge, 1996, Chapter 4. H G Cocks analyses the ways in which "discussions of [male] same-sex desire enter[ed] the culture" via the criminal law in his article 'Making the Sodomite Speak: Voices of the Accused in English Sodomy Trials, c. 1800-98' (2006) 18(1) *Gender & History* 87

[113] It was now clear to Deacon at least (Matthews does not comment) that bestiality involved penile penetration: included were "carnal knowledge ... by man or woman in any manner with beast, or (by the new statute of 9. *G.4.* c.31. 154.) with any animal whatever" (Deacon, p 1236).

> natural orifice or *per annum* [*sic*] with an animal or the sexual relationship of a male animal with a woman.[114]

Other homosexual activity tended to be prosecuted as attempted buggery,[115] until the Labouchère amendment to the Criminal Law Amendment Act 1885 made gross indecency between males a separate offence punishable by a maximum of two years' imprisonment with hard labour.[116] Sodomy became legal in some circumstances under the Sexual Offences Act 1967,[117] and was fully legalised between consenting adults in the Sexual Offences Act 2001. Gross indecency between men ceased to be an offence following the Sexual Offences Act 2003.

- **Woods and Pirie**

The desire for silencing made explicit in sodomy's status as an offence "not even to be named" further emphasises the even greater silence imposed upon "unnatural" sexual acts between women.[118] The failure to explicitly regulate sexual behaviour between women is particularly unsurprising when one considers that ruling-class men not only had, but recognised that they had, good reasons to deny the possibility of lesbianism among their own acquaintance. Evidence of such a recognition predates the 1921 debates: at the very beginning of the nineteenth century, the Scottish courts and ultimately the House of Lords addressed this issue when they were called upon in *Woods and Pirie v Cumming-Gordon*[119] to decide whether lesbian sexual activity had occurred between two teachers. They implicitly widened the issue to whether it was possible among British women of good social position at all.[120]

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[114] E Ling-Mallison, *Law Relating to Women*, London: The Solicitors' Law Stationery Society Ltd, 1930, p 49.

[115] Borris suggests that the charge was "assault with intent to commit unnatural crimes" (*Same-Sex Desire*, p 85).

[116] Section 11, Criminal Law Amendment Act 1885.

[117] This Act decriminalised private acts between consenting men aged over 21 (thus sodomy in other circumstances, such as where more than two men were present, or between a man and woman, remained illegal; and the age of consent was five years higher than that for heterosexual or lesbian sexual activity).

[118] For further discussion of the discourse of silence around sodomy, see Leslie J Moran, *The Homosexual(ity) of Law*, London: Routledge, 1996 and the critique of this book by Peter Bartlett, 'Silence and Sodomy: The Creation of Homosexual Identity in Law' (1998) 61(1) *Modern Law Review* 102.

[119] *Miss Mariann Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon*, New York: Arno Press, 1975 (a facsimile reproduction of the original case papers).

[120] There was less dispute that it was possible between women of other races and, to some extent, other classes. The same views of the lesbian as "other", ie of a different race and class to the upper- and

Mariann Woods and Jane Pirie were young teachers, running their own girls' school in Edinburgh. Among their pupils was Jane Cumming, the daughter of a since-deceased British gentleman and an Indian woman. She had been brought to Scotland aged seven by her paternal grandmother, Dame Helen Cumming-Gordon, who placed her at the school when she was sixteen. She later told her grandmother that various sexual activities had taken place between her teachers; Cumming-Gordon passed this information on to others who had girls at the school, forcing it to close.

Woods and Pirie brought an action for libel against Cumming-Gordon, who was forced as part of her defence to prove that the alleged sexual activity had taken place. The judges' scepticism was based not, as is sometimes assumed, upon a disbelief that women could do such things at all. Instead, the judges doubted that those particular women (British, white, middle-class, apparently respectable schoolmistresses) would have done so in those circumstances (in the school dormitory with pupils sleeping nearby, and sometimes with a child actually sharing the bed).[121] Once again, the denial was race- and class-specific, aimed at denying lesbian possibility for respectable white women. There was no general denial that lesbianism could be possible in other places, at other times or among other classes.[122] More particularly, the accuser in this case was a half-Indian girl,[123] supported in her account by the school's maid. There was an assumption that the former's early Indian upbringing would enable her to know of activities indulged in by other races but outside the knowledge or experience (and perhaps even the ability) of white British women;[124] while the latter's class made her unreliable, and her account was characterised as "the malignity and arts of some corrupt domestic."[125]

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middle-class Englishmen who debated it, were apparent in the 1921 Parliamentary debates discussed above.

[121] See for example the detailed factual analysis on these points in *Miss Mariann Woods and Miss Jane Pirie*, 'Lord Ordinary's note of 30 January 1811'.

[122] Indeed, much of the judges' approach to the case seems to be based on the fact that the accuser would know of such things due to her early Indian upbringing (and most particularly the instruction of "Hindoo female domestics": 'Speech of Lord Meadowbank', *Miss Mariann Woods and Miss Jane Pirie*...), and that servants might by reason of their class, but white, respectable Scottish women would not. On the same grounds, it was assumed that the girl would lie readily and for little reason while her teachers would not.

[123] Jane Cumming was described by Lord Meadowbank as "one unfortunately wanting in the advantages of legitimacy and a European complexion" ('Speech of Lord Meadowbank', *Miss Mariann Woods and Miss Jane Pirie*...).

[124] The Lord Ordinary hearing the case at first instance found that "It is ... a crime, which, in the general case, it is impossible *in this country* to commit [emphasis mine]" since almost no British women had the enlarged clitoris required for "copulation" while on his analysis, the facts precluded the use of fingers, tools or tribadism (Lord Ordinary's note of 30 January 1811, *Miss Mariann Woods and Miss Jane Pirie*...). Lord Meadowbank performed a similar analysis, although going so far as to claim

A consistent theme throughout the case was the undesirability of publicity: Lord Meadowbank clearly identified secrecy as being in the public interest

> for the values, the comforts, and the freedom of domestic intercourse, mainly depend on the purity of female manners, and that, again, on their habits of intercourse remaining as they have hitherto been, free from suspicion. ... [Y]our Lordships, impressed with similar apprehensions, have taken every precaution within your power, though necessarily with small hopes of success, to confine this cause by the walls of the Court, and keep its subject and its investigations unknown in general society.[126]

This case, then, did not find that lesbianism was impossible: far from it. Instead, lesbianism and lesbian sexual activity were accepted as possible, but as something to be kept carefully from the knowledge of middle- and upper-class women. It was located, both physically and in terms of knowledge, amongst those of other races and classes. The role of the courts (and of others such as the guardians of young girls who had an interest in the matter) was to keep lesbianism silenced within their own circles. Indeed, the comfort of men depended upon it:

> I would rather believe Miss Cumming, and almost Lady Cumming herself perjured, than I would believe the statement about *the wrong place* to be true, especially with regard to women of good character.[127]

However, despite judicial reticence on the subject of female sexual relations, it would be highly unlikely that women's sexual misdemeanours would invariably have gone unpunished. Ruthann Robson suggests tentatively that in the USA, prostitution

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rather improbably that the "vice" was unknown in Britain ('Speech of Lord Meadowbank', *Miss Mariann Woods and Miss Jane Pirie...*); to Lord Boyle it was only "almost unheard of" ('Speech of Lord Boyle', *Miss Mariann Woods and Miss Jane Pirie...*). The characterisation of India as a training ground for sexual vice persisted for centuries, before and after this case: Janet Todd notes the use of lesbianism in eighteenth-century travellers' tales to make "the Indian custom more strange" (*Women's Friendship in Literature*, New York: Columbia University Press, 1980, p 320) while in 1930, a former police officer would relate in his memoirs that "[t]he wife of a soldier was driven mad by her husband's practices upon his return from India" (Cecil Bishop (Late of the CID), *Women and Crime*, London: Chatto & Windus, 1931, p 170).

[125] Lord Ordinary's note of 30 January 1811, *Miss Mariann Woods and Miss Jane Pirie...*

[126] 'Speech of Lord Meadowbank', *Miss Mariann Woods and Miss Jane Pirie...*

[127] 'Speech of the Lord Justice-Clerk (Lord Hope)', *Miss Mariann Woods and Miss Jane Pirie...* The statement about "the wrong place" was one allegedly made during the two women's sexual relations and implied digital penetration of the anus.

may have been "an umbrella term for women's sexual transgressions".[128] Some hint of a similar approach is contained in E Ling-Mallison's *Law Relating to Women* which suggests, by analogy to *R v Boulton & Park* 12 Cox 87, that a woman dressed as a man for sexual motives might be charged with inciting others to prostitution (although no authority is cited).[129] I will discuss in the next chapter how in early modern England, vagrancy appears to have carried similar connotations; indeed vagrancy laws developed so that by the end of the nineteenth century, the Vagrancy Act 1898 was largely concerned with sexual offences. Even in the early eighteenth century, many of those women committed to Houses of Correction for vagrancy offences were guilty of idleness or lewd behaviour; in such crimes, "the boundaries between acceptable and unacceptable forms of behaviour were notably indistinctly drawn".[130] It is possible that lewdness in particular could have operated to include sexual behaviour between women, though I am not aware of any reports of it being applied to lesbian sexual conduct. Such reports would in any event have been unlikely to survive, since first, few petty sessions records remain in existence and second, the use of an offence of lewdness would mask the real nature of the conduct being punished.

- **Sexual offences legislation**

In the latter part of the nineteenth century, growing feminist concern and campaigning around the sexual abuse and prostitution of children led to a series of acts aimed at protecting the young, and young girls in particular, from abuse. I consider this legislation in more detail in Chapter 6, but it is relevant here to note that the legal status of sexual activity between women was (perceived as) ambiguous. Indeed, the issues would not be fully resolved until 1934,[131] nearly three-quarters of a century after the Offences Against the Person Act 1861 first created an offence of indecent assault. Arguably this reflected not only the silencing of lesbianism, but also more widely a general denial of female agency which served to reinforce the myth of

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[128] Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law*, Ann Arbor: Firebrand Books, 1992, p 32.
[129] Ling-Mallison, *Law Relating to Women*, p 50.
[130] Joanna Innes, 'Prisons for the Poor: English bridewells, 1555-1800', in Francis Snyder and Douglas Hay (eds), *Labour, Law and Crime*, London: Tavistock Publications, 1987, p 102.
[131] *R -v- Hare*, [1934] 1 KB 354 established *obiter* that the perpetrator of an indecent assault upon a female could herself be female. The earlier *Armstrong Abduction Case* established a similar precedent but in rather unusual circumstances. See Chapter 6 below.

female sexual passivity.[132] In 1885, the Labouchère amendment criminalized gross indecency (ie all sexual activity in public and private) between males, but was not extended to sexual activity between females.[133] An attempt by one MP in 1913 to introduce legislation specifically addressing sexual conduct between women failed since the Home Secretary refused to consider it.[134] As we have already seen, a further attempt in 1921 did reach parliament but did not pass into law.

When the issue was considered again in the legislative context, matters ought to have been very different. The Wolfenden Committee sat in 1957, by which time lesbianism was acknowledged to exist among all classes of society. The Committee was investigating both homosexuality and prostitution, and thus was not exclusively focused upon male offenders. Indeed, the Wolfenden Committee's terms of reference on homosexual offences included indecent assault against women[135] and the evidence heard by them included a number of references to lesbianism, both when it was raised by witnesses and when members of the committee themselves asked questions on the issue.[136] However, the report itself has very little to say about lesbianism beyond stating that no acts between women "[exhibit] the libidinous features that characterise sexual acts between males",[137] a distinction which witnesses before the committee

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[132] Kim Stevenson, 'Observations on the Law Relating to Sexual Offences: the Historic Scandal of Women's Silence' [1999] 4 *Web JCLI*, http://webjcli.ncl.ac.uk/1999/issue4/stevenson4.html, accessed 2 February 2005, and see Chapter 5.

[133] The reasons Labouchère put forward this amendment, later section 11 of the Criminal Law Amendment Act 1885, are controversial. Alan Hunt suggests that it was aimed at ridiculing the Act (*Governing Morals: A Social History of Moral Regulation*, Cambridge: Cambridge University Press, 1999, fn 42, p 238); there may have been longstanding animosity since "when W. T. Stead went on the moral warpath [against alleged adulterer Sir Charles Dilke] ... Labby alone in the press of his time exposed the hypocrisy of his age", describing Stead as "pruriently pure" (Hesketh Pearson, *Labby (The Life and Character of Henry Labouchere)*, London: Hamish Hamilton, 1936, p 164). H Montgomery Hyde argues that since he simply took the clause from the French penal code he intended it to have the same effect of protecting young people against sexual interference (*The Other Love*, p 135); while Edward Bristow puts forward both a long-standing interest in the topic and a desire to criminalise homosexual assaults (Edward J Bristow, *Vice and Vigilance: Purity Movements in Britain since 1700*, Dublin: Gill and Macmillan, 1977, p 155).

[134] Colonel Wedgwood, Hansard House of Commons Debates, Volume 145(8), Column 1802. This is also mentioned in Paul Ferris, *Sex and the British: A Twentieth-Century History*, London: Michael Joseph, 1993 and Laura Doan, 'Gross Indecency between Women', p 545.

[135] Matthew Waites, 'Inventing a 'Lesbian Age of Consent'?' p333.

[136] In contrast to the neglect of lesbianism in the final report, the committee raised the issue numerous times when hearing evidence from witnesses. In just one of the three files of transcripts, I found references in twelve separate meetings with witnesses, some brief and some lengthy (Public Record Office, HO 345/13, questions 1164, 1342, 1375-1376, 1760-1764, 1960, 2396-2399, 2607, 2630, 2912-2916, 2936, 3024-3025, 3084, 3111-3121, 3223-3224, 3336-3339). In particular, the lack of parity in the law between male homosexuals and lesbians was seen as a significant issue; and the lack of information about lesbianism was also raised. None of this, however, appeared in the final report.

[137] Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, London: Her Majesty's Stationery Office, 1957, p 38.

often had difficulty in making or refused to make.[138] Thus even at a time of very public debate about the legal regulation of sexuality, and even when relevant evidence had been taken from a number of witnesses, open discussion of lesbianism was avoided.[139] That approach would also be followed by the Policy Advisory Committee on Sexual Offences, whose final report in 1981 failed to mention sexual activity between women at all.[140] When putting forward his own proposals for law reform, Tony Honoré would adopt this characterisation of lesbianism as less libidinous (as well as lesser in numbers, attracting less hostility, less socially visible, and less economically damaging).[141]

Indeed, lesbianism became the centre of legislative attention for the first time since 1921 as recently as the debate over section 28 of the Local Government Act 1988. I do not propose to discuss this provision in any detail as it did not create any criminal offences. However, there are some points about the passing of the section and its subsequent history which are relevant to the policy of silencing. I therefore refer to them briefly in order to highlight some of the changes in approach which began to become apparent in the 1980s and beyond.

Section 28 prohibited the "promotion" by local authorities of homosexuality as a "pretended family relationship". It was particularly targeted at schools, and was a response to the growing visibility of lesbians and gay men, particularly radical feminists.[142] Ironically, the legal effect of the section was largely symbolic rather than practical,[143] and in standing as a symbol of lesbian and gay oppression, actually prompted political activism and debate which further increased lesbian visibility.

The section was significant in the context of silencing for two reasons. First, lesbians had demanded and achieved visibility for themselves, thereby rendering a

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[138] See for example questions 1375, 1376, 3111-3120, 2912-2916, 3224, 3336.

[139] For ways in which the Wolfenden Committee was implicated in an "economy of silence" more generally, see Moran, *The Homosexual(ity) of Law*, pp 48-56.

[140] Policy Advisory Committee on Sexual Offences, *Report on the Age of Consent in Relation to Sexual Offences*, London: Her Majesty's Stationery Office, 1981.

[141] Tony Honoré, *Sex Law*, London: Duckworth, 1978, pp 87, 100-110 (the argument in relation to economic damage is itself interesting: it is suggested that men who choose a gay lifestyle and do not marry thereby deny a woman economic support: p 103).

[142] See for example Davina Cooper, *Sexing the City: Lesbian and Gay Politics within the Activist State*, London: Rivers Oram Press, 1994; Lynn Alderson, 'Clause 29: radical feminist perspectives' (1988) 13 *Trouble and Strife* 3-6, p 6.

[143] Although note that the section did have a significant informal effect upon local authority policies and their funding of lesbian and gay projects (see Anna Marie Smith, 'Resisting the Erasure of Lesbian Sexuality: A challenge for queer activism', in Sexualities' in Ken Plummer (ed), *Modern Homosexualities: Fragments of lesbian and gay experience*, London: Routledge, 1992, pp 200-213 at p 201).

continued policy of denying the existence of lesbianism unsustainable. Section 28 was a response to this increased visibility,[144] and therefore represented a (largely unsuccessful) attempt to reimpose silence on the issue. Second, it grouped lesbians and gay men together as an undifferentiated group. The result was a more subtle form of silencing: where lesbians do not seize the initiative (as they did, very effectively, throughout the campaign against the section), they now tend to be subsumed as a sort of subcategory of gay men. As I will argue in greater detail in Chapters 7 and 8, this has become the preferred method of silencing lesbians: the treatment of lesbianism as an inferior version of male homosexuality.

Why has the criminal law used a policy of silencing for women but not men?

In 1921, Parliament was not discussing an entirely novel offence. Gross indecency between men was already on the statute books, and the 1921 amendment would have simply enacted a provision in the same terms but applicable to women. An obvious question which arises from the legal policy of silencing lesbianism is why such an approach was used for women but not men. Although we have seen that some lip-service was paid to not publicising the nature of sodomy charges, in reality there was little secrecy about the existence of an offence of sodomy.[145] The reasons for such a divergence in approaches to male and female homosexuality are deeply rooted in patriarchal ideologies of different roles for men and women.

First, since the law was concerned primarily with silencing lesbianism as an option for middle- and upper-class women, the differing education of women and men of those classes was crucial. Although there were exceptions, the majority of women did not receive the education in Latin or Greek which was considered essential for most higher-class men.[146] In consequence, such men were given access to texts describing lesbianism and male homosexuality as part of a thorough classical

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[144] Davina Cooper, *Sexing the City: Lesbian and gay politics within the activist state*, London: Rivers Oram Press, 1994.

[145] Notably, both exposure in the pillory and public hanging were used as punishments. The details of the offence might, however, be concealed as in an account of the 1631 trial of Lord Castlehaven, which moved from English to Latin when discussing sex between men, but not when discussing rape or adultery (*The Arraignment and Conviction of Mervin, Lord Audley* (1642), discussed in Borris, *Same-Sex Desire*, p 105): an approach which mirrors that of the courts in *Woods and Pirie*.

[146] Of course, the actual content of a classical education was also important. Anthony Fletcher notes that even those girls' schools which taught classics "were primarily educating their charges for the marriage market" (*Gender, Sex & Subordination*, p 374). Indeed, when I studied classical Greek and Latin at my own (co-ed but mostly male) school in the 1980s, some passages in our set texts which contained sexual references were omitted from the exam syllabus; the supposed explanation was that

education; untranslated, they were inaccessible to the majority of their sisters, wives and daughters.[147]

Even in the seventeenth and earlier eighteenth centuries, when men and women were seen as having the same physiology differently arranged, the silencing of lesbianism had a role to play in maintaining the distinctions between the sexes. As Jones and Stallybrass point out, the absence of female sodomy laws made medical and legal definitions of the hermaphrodite less important.[148] The courts did not therefore have to undertake detailed examinations of where the boundary between male, female and that troubling "third sex" should be, with all the uncertainties such scrutiny might raise.

Men and women were also assumed to have very different sexual roles, particularly from the latter part of the eighteenth century when female orgasm was no longer considered crucial to conception.[149] Homosexual and heterosexual men could both be sexually active, defined as having sexual desires rather than simply "submitting" to their partner's wishes, and as being the penetrator rather than the penetrated. This is not really a double definition: the penis was seen as the essence of active sexuality while the vagina was a hole to be filled.[150] With the clitoris considered unimportant, women appeared therefore to have no site of active sexual desire. The most famous legal example of such an attitude is the Punishment of Incest Act 1908, with its language of men *having* sexual intercourse and women *permitting* sexual intercourse.[151] Women's assumed sexual passivity and lack of autonomous sexual desire were perfectly consistent with heterosexual intercourse (since they could

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they were considered unsuitable for girls' schools.

[147] Eighteenth-century French scientific author Charles Ancillon set out this point explicitly in his 1707 work on eunuchs: "il est difficile, je l'avoue, de parler des Eunuques sans dire certaines choses capables de choquer un peu la pudeur d'une femme", the answer is to express "ce qu'on dit de libre & de natural ... en Latin, qui est une Langue peu entendue parmi elles" (*Traité des Eunuques, dans lequel on explique toutes les differentes sortes d'Eunuques, quel rang ils ont tenu, & quel cas on en a fait, & c* (1707) pp 3-4, cited in Joseph Harris, '"La Force du Tacte": Representing the Taboo Body in Jacques Duval's *Traité des Hermaphrodits* (1612)' (2003) 57(3) *French Studies* 311-322 at p 317).

[148] Ann Rosalind Jones and Peter Stallybrass, 'Fetishizing Gender: Constructing the Hermaphrodite in Renaissance Europe' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity*, London: Routledge, 1991, pp 80-111 at p 89.

[149] See Chapter 4.

[150] This was also broadly true of earlier (eg Galenic) notions of sexuality, which I discuss in more detail in the following chapter. While women were seen as having voracious sexual appetites, it was specifically the greater "heat" of the male which they craved: they were the passive recipients of a higher, more active form of energy and power. In that formulation also, active female sexual activity was not feasible although active female sexual desire was, and so lesbianism was already virtually incomprehensible.

[151] This Act has now been replaced by sections 25-29 of the Sexual Offences Act 2003, which are

just "lie back and think of England"), but not with lesbianism where at least one woman would have to assume a sexual role defined as active. By contrast, male homosexuality did no violence to the myths: the active male was acting his assigned role, albeit with the wrong partner; and since passivity required mere inaction, for a man to allow himself to be penetrated would be immoral and improper but not impossible. But since any active sexual behaviour was constructed as impossible for women, this ideological construct depended upon lesbianism being kept silent.

Equally, male homosexuality did no violence to the myth of sex as necessarily centring upon the penis. Again, while the recipient was of the wrong sex, the sexual conduct could be assumed to depend upon the presence of a penis. In the same way, we will see in the following chapter that the cases of lesbianism which were prosecuted involved allegations or insinuations of pretended sexual intercourse using a fake penis of some kind.

Silencing was also a culturally logical approach to limiting women's "undesirable" behaviour. Susan S Lanser comments upon the refusal of eighteenth-century anti-spinsterhood discourses to connect single women with lesbianism She argues that

> to acknowledge the possilbility of homosexual desires in the 'old maid' would dismantle and expose the entire system of old-maid ideology, in which the singlewoman's physical and moral deficiencies rest on the presumption of her heterosexual desire – on the presumption that she wants a man and cannot get one.[152]

In the nineteenth century, the notion of "protecting" women by keeping them ignorant for their own (supposed) good was prevalent, and indeed used by the courts in other contexts.[153] This concept located women in an inferior, immature role which unfitted them for exposure to knowledge which might disturb their naivety. From the mid-nineteenth century, these myths came under concerted attack, particularly from feminists.[154] Women no longer accepted relegation to the patriarchal private sphere

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couched in gender-neutral terms.

[152] Susan S Lanser, ' Singular Politics: The Rise of the British Nation and the Production of the Old Maid' in Judith M Bennett and Amy M Froide, *Singlewomen in the European Past 1250-1800*, Philadelphia: University of Pennsylvania Press, 1999, pp 297-323 at p 315.

[153] Some of these were surprising: for example, the denial of the vote to women was characterised in *Chorlton v Lings* (1886) LR 4 CP 374 as "a privilege of the sex" upholding female decorum.

[154] Notable examples include women's efforts to enter professions such as law and medicine, professions with privileged access to such knowledge, and high-profile campaigns such as that led by Josephine Butler against the Contagious Diseases Acts, in which women as well as men spoke publicly

with its concomitant denial of women's moral responsibility and agency; and significantly, challenged such notions of "protection" as not only silencing middle-class women but also as preventing sisterhood between women of different classes. Thus Josephine Butler argued for the need to end women's forced silence upon the issue of prostitution, and men's assumed right to discuss and regulate:

> when men, of all ranks, thus band themselves together for an end deeply concerning women, and place themselves like a thick, impenetrable wall between women and women, and forbid the one class of women entrance into the presence of the other, the weak, outraged class, it is time that women should arise and demand their most sacred rights in regard to their sisters.[155]

Such women's challenges to silence on matters of sexuality tend to be forgotten when set against the attacks upon these ideologies in the twentieth century. While the latter may have had the most direct impact upon the policy of silencing lesbianism, and I discuss the changes which resulted in Chapters 6 and 7, the resistance of earlier feminists should not be forgotten or minimised. There is a continuity in feminist history which is often overlooked: Butler, for example, would serve as an inspiration to the feminists of the late nineteenth and twentieth centuries "for breaking mid-Victorian taboos against frank discussions of female sexuality and sexual transgression."[156] Further, such accounts form an important corrective to any assumption that the ideology of female purity and innocence was universal and unchallenged.

However, I finish here by considering what it means to talk of silencing as a policy. When discussing laws made by a wide range of men in both judicial and political roles, over a period of several centuries, can we meaningfully consider them as emanating from a single policy? Douglas Hay has addressed this issue:

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about both female and male sexuality (for example, over a hundred women including Florence Nightingale and Harriet Martineau signed a 'Women's Protest' in 1870, published in the national press: Josephine Butler, *Personal Reminiscences of a Great Crusade*, London: Horace Marshall and Son, 1896, pp 18-19). However, Butler acknowledged the conventions even as she transgressed against them: "I leave it to you to think how painful it must have been to a delicate and pure minded woman to speak on such a subject in public; but the solemn convicton that she was speaking for God, as well as for her fellow-women, gave her courage and strength" ('Letter to my Countrywomen, Dwelling in the Farmsteads and Cottages of England', 1871, p 163, cited in Roxanne Eberle, *Chastity and Transgression in Women's Writing, 1792-1897: Interrupting the Harlot's Progress*, Basingstoke: Palgrave, 2002, pp 207-208).

[155] *'Letter to my Countrywomen'*, pp 436-437, cited in Eberle, *Chastity and Transgression* p 208.

[156] Eberle, *Chastity and Transgression*, p 218.

> The difficulty for the historian of the laws is twofold. He [*sic*] must make explicit convictions that were often unspoken, for if left unspoken we cannot understand the actions of the men who held them. Yet in describing how convictions and actions moulded the administration of justice, he must never forget that history is made by men, not by the Cunning of Reason or the Cunning of System. The course of history is the result of a complex of human actions – purposive, accidental, sometimes determined – and it cannot be reduced to one transcendent purpose. *The cunning of a ruling class is a more substantial concept, however, for such a group of men is agreed on ultimate ends.*[157] [Emphasis mine]

This agreement on ultimate ends is certainly deducible in the context of lesbianism. Even when disagreement was voiced over the most effective method of containing the lesbian threat (notably in 1921), no dissension was uttered to the proposition that lesbianism was something which should be prevented from spreading.

I would argue that, with a few exceptions, the method of control has quite clearly been to prevent public naming of lesbianism outside a fictional or fictionalised context (and even then, that fiction was usually addressed to a male audience). Thus lesbianism was generally kept in the realm of upper-class male knowledge (since these men's education gave them access to those versions of lesbianism appearing in Latin and Greek literature as well as in various publications of the seventeenth and eighteenth centuries, designed for upper class audiences), while efforts were made to prevent it reaching the ears of women, particularly those who were "respectable". When accounts of lesbian existence did leak through, emphasis tended to be placed upon the need for a facsimile phallus, the women's inability to have successful heterosexual relationships, and any dissension or deceit within the women's own relationship. Either a return to heterosexuality or some kind of punishment tended to end the account.[158] In summary, great effort was expended to prevent women from discovering the notion of autonomous lesbian existence.

What is the significance of whether the law criminalises sexual behaviour?

The 1921 debates illustrated the reluctance of the legislature to explicitly prohibit lesbianism. They further articulated the policy of silencing lesbianism as the preferred

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[157] 'Property, Authority and the Criminal Law' in Hay, Linebaugh, Rule, Thompson & Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, Harmondsworth: Penguin Books, 1975, pp 17-63 at p 53.

[158] Such accounts are discussed in the following chapter.

method for dealing with it. If lesbians were not generally being prosecuted, and we can safely assume that silencing was not entirely effective in that women did continue to enter into relationships with each other, does that mean that lesbian relationships have been unsanctioned? Unfortunately, it does not. I have already discussed the difficulty of knowing the extent to which women were in fact penalised by the law for lesbian sexual activity or relationships. However, we can be more certain that there were a number of other sanctions which served to punish women who did, or to discourage women who might, choose to live as lesbians.

The first and most obvious such sanctions were social. Lesbianism was generally disapproved of and frequently referred to as "criminal", which reflected popular attitudes even if it did not represent legal fact. The records of *Woods and Pirie v Cumming-Gordon* show a working-class nurse expressing such an attitude: "do you know they are worse than beasts, and deserve to be burned".[159] Among other classes, allegations of lesbianism could be aimed at destroying a woman's reputation, as with the publication of Jack Cavendish's *A Sapphick Epistle* in 1790, a satire attacking Anne Conway Damer.

Women were particularly vulnerable to economic pressure, given their already disadvantaged economic status. While many working-class women would have been in paid employment during the last three centuries, their wages could be and usually were lower than those of men, and hence often inadequate for survival. Middle- and upper-class women were often dependent upon family support, although some would have independent incomes and (less usually until the twentieth century), paid employment adequate for their support. Married women of all classes had the status of *feme covert* which meant that, until the late nineteenth century, neither their earnings and savings nor their personal or real property were their own, but belonged to their husbands. For most women, then, it was extremely difficult to attain the economic independence required to live in a lesbian relationship. Further, some ostensibly economic measures were used specifically to control women who attempted to live outside the patriarchal family, as we have seen in the discussion of the Statute of Artificers.

While contemporary women enjoy much greater financial independence and employment prospects, lesbian women continue to suffer economic disadvantage. In

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[159] Defence statement, *Miss Mariann Woods and Miss Jane Pirie Against Dame Helen Cumming*

particular, women continue to earn less than men so that an all-female household is likely to be poorer than one in which there is a male wage-earner.[160] Further, lesbians have enjoyed less job security than heterosexual women, and a great deal less than heterosexual men, since discrimination against lesbians in the workplace only became illegal in 2003.[161] Prior to that, a woman dismissed from her employment or disadvantaged within it because of her lesbianism was without effective legal recourse.

From the nineteenth century, the medical profession (particularly its psychiatric branch) played an increasing role in the regulation of female sexuality, which I discuss in Chapter 5. That role continues today; it most closely overlaps with the functions of the criminal justice system within special hospitals (secure psychiatric hospitals). Many of the women detained within these hospitals are held there not for a specified term but until the supervising psychiatrists deem them suitable for release. However, Ann Lloyd has documented the extent to which assessments of women can depend upon their conformity to feminine stereotypes.[162] Thus lesbian patients are pressured into wearing "feminine" clothes and cosmetics, and showing an interest in men at social events.

However, regulation of women's sexuality need not be so overtly coercive. Women's sexuality is increasingly seen as a field for professional intervention, from the reading of magazine advice columns by medically-qualified "agony aunts" to individual consultations with medical professionals or therapists. The sexual is conceptualised as an area where professional help can benefit women; in consequence, problems are medicalised so that an aversion to sexual intercourse becomes the medical condition of vaginismus, a condition which has been extended to encompass the use of dildos by lesbians.[163] Women are thus taught that certain preferences are not merely normal but healthy; others (particularly reluctance to engage in sexual activity with the expected frequency, or to take part in particular activities) are presented as medical or psychological problems.

Gordon, New York: Arno Press, 1975.

[160] Average full-time hourly earnings are 18% lower for women than for men (Equal Opportunites Commission, *Facts About Women and Men in Great Britain 2005*, London: Equal Opportunities Commission, 2005, p 1).

[161] Under the Employment Equality (Sexual Orientation) Regulations 2003.

[162] *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women*, London: Penguin, 1995, pp 156-159.

[163] See Sheila Jeffreys, *The Lesbian Heresy: A feminist perspective on the lesbian sexual revolution*, London: The Women's Press, 1993, p 69.

As recourse to therapists is seen as normal, and reading "expert" advice becomes an integral part of the entertainment offered by women's magazines, so women's sexuality is increasingly regulated by medical and quasi-medical professions. The consequences affect all women including lesbians, who are increasingly expected to conform to a male model of sexuality centred around penetration, "adventurousness", and the adoption of stereotypically – and oppressively – feminine behaviour to "keep your partner interested". Thus while lesbianism may be increasingly accepted, or even celebrated, by these advisers, its sexual content is brought towards a heteropatriarchal norm of vaginal penetration and sexual availability.

What is the significance of silencing?

Foucault argues that sexuality was produced, not simply repressed, by legal prohibitions.[164] While his argument that such production of the homosexual occurred only from the late nineteenth century (indeed, he gives a "date of birth", 1870)[165] has been comprehensively criticised,[166] the suggestion that legal prohibition allowed identities and discourses to develop is of interest here. He does not pay attention to lesbians, and therefore fails to consider the consequences of not prohibiting their behaviour. The effect of such a silence both highlights a flaw in his theory (that it simply overstates the matter: lesbian identity was produced independently of overt prohibition) and provides a different angle on some of the arguments in this chapter. In effect, the courts and legislators of England and Wales appear to have reached a

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[164] Michel Foucault, trans. Robert Hurley, *The History of Sexuality, Vol 1: An Introduction* (1976), London: Penguin, 1990, p 18.

[165] Foucault, *The History of Sexuality*, p 43.

[166] See for example the discussion in Mary McIntosh, 'Queer Theory and the War of the Sexes' in Joseph Bristow and Angelia R Wilson (eds), *Activating Theory: Lesbian, gay, bisexual politics*, London: Lawrence & Wishart, 1993, pp 30-52 at pp 41-44. Lillian Faderman makes the argument that the sexologists were responsible for self-conscious lesbian identification (at least among those who would formerly have considered themselves romantic friends) in *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America*, New York: Columbia University Press, 1991, p 35. By contrast, Emma Donoghue (in *Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993) argues that lesbian identities developed in the eighteenth century; Terry Castle makes a similar argument in *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York: Columbia University Press, 1993, pp 8-10, and surveys the literature at fn 10, p 242. Randolph Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity*, London: Routledge, 1991, pp 112-141 at pp 135-6, fn 2 also pushes back lesbian identity earlier than Foucault's "birth date". Sedgwick offers a more sophisticated version of Foucault's argument, proposing that "[w]hat *was* new from the turn of the century was the world-mapping by which every given person, just as he or she was necessarily assignable to a male or a female gender, was now considered necessarily assignable as well to a homo- or a hetero-sexuality" (Eve Kosofsky Sedgwick, *Epistemology of the Closet*, California: University of California Press, 1990, at p 2).

similar insight to Foucault, that to prohibit lesbianism explicitly would be to advertise and enable it. A failure to prohibit was, therefore, more repressive in its effects since no official discourse was created and thus no subversion (of the law at least) was possible. As Lacey puts it, "lesbian sexuality ... enjoys the dubious privilege of literal legal unspeakability".[167]

Louis Althusser's notion of interpellation, as interpreted by Judith Butler, is of similar relevance here. She explains that according to this notion, it is the interpellation of the policeman ("hey you!") which socially constitutes the subject.

> The reprimand does not merely repress or control the subject, but forms a crucial part of the juridical and social *formation* of the subject. ... In the reprimand the subject not only receives recognition, but attains as well a certain order of social existence, in being transferred from an outer region of indifferent, questionable, or impossible being to the discursive or social domain of the subject.[168]

Denied such interpellation, then, the lesbian is also denied the status of subject. Thus part of the power of the police officer is also (although Butler does not develop this point) to refuse interpellation, to fail to recognise the lesbian as a wrongdoer and hence to deny her the possibility of being a recognised subject of the law. I would suggest that this theory is not perfect, since lesbian identities appear to have been produced without such (overt) interpellation,[169] or "enabling violation";[170] but it does nonetheless highlight important ways in which lesbian invisibility was damaging rather than enabling. These are developed by Leslie Moran:

> The silence and indifference of the criminal law to genital relations between women have produced a certain invisibility and thereby made it more difficult to achieve a representation in

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[167] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*. Oxford: Hart Publishing, 1998, p 103.

[168] Judith Butler, *Bodies That Matter: On the discursive limits of "sex"*, New York: Routledge, 1993. p 121, discussing Louis Althusser, 'Ideology and Ideological State Apparatuses'. Note that in *The Psychic Life of Power*, California: Stanford University Press, 1997, she would point out two problems with Althusser's example: first, that it is "constrained by a notion of a centralized state apparatus", and second (and crucially) that there is no explanation of *why* the person so hailed turns round. Foucault's notion of discourse aimed therefore "to counter the sovereign model of interpellative speech ... but also to take account of the *efficacy* of discourse" (pp 5-6).

[169] Althusser, of course, also argues that individuals are always-already subjects, from before birth, a point which Butler would appear not to accept (see for example her use of the concept of the "abject").

[170] Gayatri Spivak, cited in Butler, *Bodies That Matter*, p 122 in reference to "that estrangement or division produced by the mesh of interpellating calls and the 'I' who is its site ... not only violating, but enabling as well".

> law of the embodied genital female as an autonomous subject with a capacity to act in law. Thereby the recognition of legal subjectivity in general and the representation of their rights, interests and duties in particular has been made problematic.[171]

However, Moran's formulation implies that such invisibility might be almost accidental. By contrast, Sedgwick has concentrated upon precisely these silences as speech acts in their own rights, with their own particularity: the silence of the closet, for example, is "strangely specific".[172] In consequence, "silence is rendered as pointed and performative as speech ... ignorance is as potent and as multiple a thing ... as is knowledge"[173] and should not be subjected to "scornful, fearful, or patheticizing reification" or to "sentimental privileging ... as an originary, passive innocence."[174] Indeed, ignorance (actual or wilful) can be a function of power just as knowledge can: it is important to remember, as this thesis of course emphasises, that the ignorance of the privileged is indeed a form of power over the less privileged.[175]

Is an end to silencing, then, inevitably a positive step towards subjecthood? Sheila Sullivan is critical of any straightforward equation between invisibility and oppression which assumes that visibility is liberation.[176] She notes that academics have an investment in visibility, since the work of the academic is to bring to light. She criticises the two narratives which have tended to result:

> either endlessly circular--becoming visible happens over and over again in a movement in which dominance is always both threatened and reconfirmed--or simplistically progressive--becoming visible produces new subjectivities and freedoms.[177]

In particular, she highlights the gendered nature of visibility which produces very different meanings for the visible middle-class woman and middle-class man. Such a

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[171] Moran, *The Homosexual(ity) of Law*, p 12.
[172] Sedgwick, *Epistemology of the Closet*, p 3.
[173] *Ibid*, p 4.
[174] *Ibid*, p 7.
[175] Sedgwick provides a further example, that of rape, where male ignorance is similarly privileged (*Epistemology of the Closet*, p 5): this example is particularly apt here, since it concerns another legal discourse of gender and sexuality. For another pertinent example, see Adrian Howe's discussion of the "homosexual panic" defence, 'Homosexual Advances in Law: Murderous Excuse, Pluralised Ignorance and. the Privilege of Unknowing' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena*, London: Athlone Press, 2000, pp 84-99.
[176] '"What is the Matter with Mary Jane?" Madeleine Smith, Legal Ambiguity, and the Gendered Aesthetic of Victorian Criminality' (2002) 35 *Genders* www.genders.org, para 6, accessed 25 August 2004.
[177] *Ibid* para 7.

critique is of relevance to silencing: in highlighting its oppressive nature, we should not assume that visibility is a panacaea.[178] In the criminal context, of course, the problems of visibility are all too obvious and I have discussed these in relation to sodomy; I will consider them further in relation to the changing legal approaches to lesbianism discussed in the final two chapters. As for the advantages of invisibility, they are readily apparent: if one's behaviour is rendered invisible by the criminal justice system, one is not usually prosecuted for it. Many authors have therefore seen lesbian invisibility in the criminal law not as oppressive but as generally beneficial.[179] It is this assumption that invisibility has been advantageous for lesbians, in the criminal justice context at least, that I examine and problematise in this thesis. The following chapters will focus upon ways in which lesbians have suffered under the criminal law despite the supposed protection of silence.

Conclusion

This chapter has established the background against which the events of the following chapters were played out: namely a policy of silencing of lesbianism. In other words, the absence of lesbianism from the criminal law is a result neither of accident nor of toleration, but of deliberate suppression. Sexual knowledge was to be kept in the male realms of classical literature, science and medicine; women's best protection against perversion was not threat and punishment, but ignorance.

Lesbianism had to be categorised as perversion and discouraged accordingly because of the threat it posed to the centrality of the penis as the site of active sexuality. This is an issue which is discussed in more depth in the following chapters. However, we have already seen that this focus upon penile penetration excluded

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[178] For example, Gail Moran describes "a consistent lesbian response to this negating and hostile environment" as "the subversion of such power through strategic employment of the assumption of non-existence" ('(Out)Laws: Acts of Proscription in the Social Order' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford: Oxford University Press, 1995, pp 66-88 at p 78).

[179] To take just a few examples, Susan Atkins and Brenda Hoggett suggested a lack of "male interest in the punishment of female homosexuality. For the most part it is an unthreatening curiosity" (*Women and the Law*, Oxford: Basil Blackwell, 1984, p 67). Lynn Friedli asserts that "[s]exual relations between women rarely attracted the attention of the courts, and neither women who merely dressed as men, nor those who married, were the focus of public disapproval in the way that Molly Clubs and effeminate men were" ('"Passing women" – A study of gender boundaries in the eighteenth century' in GS Rousseau and Roy Porter, *Sexual underworlds of the Enlightenment*, Manchester: Manchester University Press, 1987, pp 234-260 at p 235). Sullivan, in her analysis of the Madeleine Smith murder trial, highlights one situation in which visibility was not beneficial for the middle-class woman, hitherto confined to the private sphere: reconstructed as a mystery and a problem, the middle-class female criminal provided both titillation and a focus for expert interventions aimed at reinforcing the ideology of separate spheres rather than a direct challenge to that ideology (see in particular paras 42-43).

lesbian activity (with or without use of "instruments") from the definition of sodomy, in contrast to the approaches taken elsewhere in Europe. Instead, sanctions from outside the criminal law (for example, use of the Statute of Artificers against suspect female households) was preferred.

However, as our case study of the 1921 parliamentary debates illustrates, such an approach was only tenable while women's ignorance could be assumed, at least among the upper and middle classes. By the early twentieth century, greater attention was already being given to lesbianism in the professional realm. The 1921 debates show fractures in official silencing, as those MPs supporting the amendment forced public discussion. The fractures would increase and become wider as the century went on, so that little remains of the original approach today.

The remainder of this thesis will look at how the policy of silencing first allowed some prosecutions to take place nonetheless, and later gave way under the pressure of changes both within the realms of professional knowledge and in wider society. However, its contention is that that history, and indeed the position of lesbianism in the criminal justice system today, can only be understood in the context of this policy.

Chapter 4

Mary "Charles" Hamilton:

the historical prosecution of "female husbands"

In the previous chapter, I discussed the ways in which parliament and the criminal justice system have silenced lesbianism. In consequence, there were no offences which explicitly criminalised lesbian sexual activity or relationships. However, despite the policy of silencing, there have historically been prosecutions arising directly from lesbian relationships.[1] In particular, there was a cluster of cases in the late seventeenth and early eighteenth centuries: this chapter analyses those prosecutions.

What is the significance of these prosecutions in terms of an overarching policy of silencing? We will see in this chapter that some cases lent themselves to prosecution both by their serious nature and by the particular nature of the relationships involved: that of marriage in which one of the partners was a woman disguised as a man. More generally, such cases emphasise the distinction between silencing and toleration. While lesbianism was to be kept as secret as possible within the criminal justice system, that did not mean that lesbians could not be, or were not, punished for their relationships.

I begin with the case of Mary Hamilton, chosen both for the availability of the original case papers and a range of contemporary retellings, and for the interesting ways in which it both resembles and differs from similar cases of this period. Mary Hamilton was arrested in 1746 and charged under the Vagrancy Act 1744 with imposing upon his Majesty's subjects. Her case was tried at the Quarter Sessions, and she was sentenced to four public whippings and six months' imprisonment with hard labour. While these bare facts are unremarkable, the full circumstances of the case are of great interest to our consideration of the criminal law's engagement with lesbianism: disguised as a man, Mary Hamilton had married a woman, Mary Price, who allegedly did not discover that her "husband" was in fact female for several months. When she did, she made public complaint and prominent local citizens brought the case on her behalf before the Taunton Quarter Sessions.

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[1] Contemporary prosecutions are considered in Chapters 6 and 7.

Mary "Charles" Hamilton

Hamilton's case was reported in the local newspaper, the *Bath Journal*, as well as the *Gentleman's Magazine*,[2] the *Annual Register* and the *Newgate Calendar*.[3] However, it was brought to wider public attention by the publication of an anonymous pamphlet[4] (written by Henry Fielding)[5] which claims to set down Hamilton's own account. In fact, the pamphlet is almost entirely fictional.[6] This is perhaps surprising given Fielding's own legal background and personal connections. First, the prosecuting lawyer, Henry Gould, was his cousin. Second, he was not only from a legal family (his brother Sir John Fielding was a distinguished magistrate) but very much interested in the criminal law himself: he would become Bow Street's Chief Magistrate just two years later in 1748 and found the Bow Street Runners in 1753.[7] In that same period, he wrote a further publication to which he did put his name: *An Enquiry into the Causes of the late Increase of Robbers.*[8] This work was considered one of the leading contemporary analyses of crime and society.[9]

The case was therefore reported in an unusually wide range of sources, although they all shared to varying extents the characteristics Terry Castle attributes to Fielding's pamphlet: "a narrative which at once describes and doesn't describe, tells and doesn't tell".[10] In considering contemporary reactions to Mary Hamilton's case, however, the starting point is Thomas Hughes' letter of 6 October 1746 on behalf of the Corporation of Glastonbury:

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[2] November 1746, p 612.

[3] GT Crook (ed), *The Complete Newgate Calendar*, Vol III, London: Navarre Society Ltd, 1926, pp 136-7.

[4] *The Female Husband: or, The surprising history of Mrs Mary, alias Mr George Hamilton, who was convicted of having married a young woman of Wells,* London: M Cooper, 1746.

[5] See for example Terry Castle, 'Matters not fit to be mentioned: Fielding's *The Female Husband*' (1982) 49(3) *ELH* 602-622 at p 602. Castle notes that the pamphlet sold out immediately and was reprinted.

[6] Sheridan Baker calculates the factual content at 13 per cent in 'Henry Fielding's *The Female Husband*: Fact and Fiction', (1959) 74 (3) *Publications of the Modern Language Association of America* 213-224. Unfortunately, despite his work, this fictionalised retelling has been taken as fundamentally factual by many later writers (reflecting the amount of history of sexuality carried out in the context of literary studies rather than history): see for example Julie Peakman, *Lascivious Bodies: A Sexual History of the Eighteenth Century*, London: Atlantic Books, 2004, pp 184-186; Frank McLynn, *Crime and Punishment in Eighteenth-Century England,* London: Routledge, 1989, p 130.

[7] Lance Bertelsen, *Henry Fielding at Work: Magistrate, Businessman, Writer*, Basingstoke: Palgrave, 2000, p11.

[8] London, 1751.

[9] Donald Low notes that it was recommended to magistrates by Sir William Blizard in 1785; it was referred to by Fielding's own son (then also a magistrate) before a Select Committee on the Police of the Metropolis in 1816; Horace Walpole called it an "admirable treatise"; and its views on policing were adopted by Edwin Chadwick in 1829 ('Mr Fielding of Bow Street' in K G Simpson (ed), *Henry Fielding: Justice Observed*, London: Vision Press, 1985, pp 13-33 at pp 17-18, 21).

The Guild of the Corporation of Glaston as well as the principal Inhabitants, are Desirous that the woman impostor who was sometime since committed sho[d] be punished in the severest manner the Quarter sessions can, have sent you a plea to advice and assist therein; My Clerk will show you the Information and the Wench imposed on attends, if necessary, to give Evidence of the Imposition – If she be well whipt, will be Satisfactory;[11] I hope to hear from you soon after the Session.[12]

Both Mary Hamilton and her "wife" Mary Price gave depositions prior to her trial.[13] Hamilton stated that she was born in Somerset, although she did not know precisely where (this may have been true, but could also have been seen by her as beneficial since an apparent connection to the area could be relevant under the Vagrancy Act).[14] She moved as a child to Angus in Scotland, travelling to Northumberland and

> in Northumberland entered into the service of Doctor Edward Green, a Mountebank and Continued with him between two and three years, & then entered into the Service of Doctor Hinly Green & Continued with him near a twelve month and then set up for a Quack Doctor herselfe, and travelled through Severall Counties of England, and at length came to the County of Devonshire, and from thence into Somersetshire afores[d] in the Month of May last past where she have followed y[e] aforesaid business of a Quack doctore, continueing to wear mans apparell ever since she put on her brothers, before she came out of Scotland.[15]

In Somerset, Hamilton came to Wells where she was known as Charles Hamilton. There, she lodged with a Mary Creed and her niece Mary Price. Hamilton "made her addresses"[16] to Price and proposed marriage. Upon Price's consenting,

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[10] Castle, 'Matters Not Fit to be Mentioned', p 603.
[11] The vagrancy charge could lead to such a result since, under the Vagrancy Act 1744, "imposing on His Majesty's Subjects" led to being "deemed Rogues and Vagabonds within the true Intent and Meaning of this Act", the consequence being that if found to be a rogue and vagabond at the next Quarter Sessions, they could be imprisoned in a House of Correction for up to six months, and "be corrected by Whipping, in such Manner, and at such Times and Places within their Jurisdictions, as according to the Nature of such Person's Offence, [the magistrates] in their Discretion shall think fit".
[12] Somerset Record Office (SRO), Roll 314(7)(3).
[13] Depositions were records of the examinations of the victims, witnesses and accused, written down by the magistrate at a preliminary hearing (J M Beattie, *Crime and the Courts in England 1660-1800*, Princeton: Princeton University Press, 1986, p 21).
[14] The *Bath Journal* (number 136, Monday, September 29 1746, p 111) stated "we hear that she was born at Yeovil in Somersetshire" but did not specify from whom they heard it, and there is no corresponding information in the court record.
[15] Deposition of Mary Hamilton, SRO, Quarter Sessions Roll 314(7)(5).
[16] Deposition of Mary Price, SRO, Quarter Sessions Roll 314 (7)(6).

banns were read and the two women were married in St Cuthbert's parish church, Wells on 16 July 1746 by the curate, Mr Kingston.

Following the marriage, the two women travelled around Somerset as a couple. They

> lay together several Nights, and ... the said pretended Charles Hamilton (who had married her as aforesaid) entered her Body several times, which made [Mary Price] believe, at first, that the said Hamilton was a real man, but soon had reason to Judge otherwise[17]

as a result of which discovery she had Hamilton arrested and brought before the Justices of the Peace. The *Newgate Calendar* discusses the evidence given by Mary Price in terms of thinly veiled incredulity. Whether the surprise is directed at Price's naivety or at Hamilton's skilful male impersonation is not clear, but the tone is unmistakable:

> They bedded and lived together as man and wife for more than a quarter of a year; during all which time, so well did the impostor assume the character of a man, [Price] still actually believed she had married a fellow-creature of the right and proper sex.

Hamilton first appeared before a court on 13 September 1746. On that occasion, Hamilton's deposition was taken and following a later guilty plea, she was held in custody at Shepton Mallet until the next Quarter Sessions.[18] During her remand, she became (if the *Bath Journal* can be believed) something of a tourist attraction: "great Numbers of People flock to see her in Bridewell, to whom she sells a great Deal of her Quackery".[19] Meanwhile, the lawyer Henry Gould was engaged by the Corporation of Glastonbury, one of whom, Thomas Hughes, wrote the letter of instruction quoted above on 9 October.

According to Fielding's account, Gould advised on the charge as there was considerable uncertainty as to the offence committed. The surviving sources on Hamilton's trial make the process of finding an offence to fit the facts somewhat explicit. Although Fielding is by no means a reliable source, in this instance his claim

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[17] Deposition of Mary Price.

[18] These apparently took place during the second weekend in October. The record of her being "confined 'till next General Quarter Sessions of ye Peace having withdrawn her Plea & Confessed her Indictment'" (SRO, Roll 314(9)(1)) is dated 13 October 1746. Her sentence is recorded in the 'General Kalendar of the Prisoners and Fines' for 7 October 1746.

is supported by the engagement of a lawyer (uncommon at this date) and by comments in other reports. A near-contemporaneous report in the *Bath Journal* stated that "[t]here was a great Debate for some Time in Court about the Nature of her Crime, and what to call it, but at Last it was agreed, that she was an uncommon notorious Cheat".[20] As for later versions, the *Newgate Calendar* discussed the incidents largely in terms of bigamy, on the basis of the rumour that Hamilton married a total of fourteen wives.[21] It did, however, express the same concern as the Corporation letter as to how to "frame an indictment to meet the gross offence, because the law never contemplated a marriage among women." Likewise, the *Gentleman's Magazine* echoed the *Bath Journal* and reported "a debate of the nature of the crime, and what to call it," following which "it was agreed that she was an uncommon, notorious cheat".[22]

Given that there had been similar cases in the past, in which the "husband" had been charged with financial fraud (see discussion below), it is perhaps surprising that there was an apparent absence of awareness of such precedents. This bemusement indicates at the least that such cases had not attracted widespread attention; but perhaps more than that, it reflects the status of the female husband as "at once present and absent, notorious and unmentionable, sublime and taboo."[23] That ambiguous status, I will argue later, is crucial to understanding how these cases could safely be prosecuted.[24]

Thomas Hughes' offer of attendance by Mary Price, "the Wench" (a term carrying class connotations, since it could refer to "a girl of the rustic or working class", as well as implications of the invalidity of the relationship, through its other meaning of "a girl, maid, young woman")[25] was clearly accepted, since Mary Price made a deposition dated 7 October 1746 (indeed, since this pre-dates the letter, the

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[19] *Bath Journal*, Number 135, Monday, September 22, 1746, p 107.
[20] *Bath Journal*, Number 142, Monday, November 3, 1745, p 132.
[21] According to the *Bath Journal* report of 3 November 1745, this was claimed by Gould in his opening speech; but no trace of the claim survives in the court records.
[22] November 1746, p 612.
[23] Castle, 'Matters not fit to be mentioned', 602.
[24] Tim Hitchcock has criticised Castle in particular, arguing that it is difficult to accept the courts suppressed knowledge of lesbianism given "[t]he profoundly unsubtle nature of the eighteenth century legal system", for which he cites the Bloody Code as evidence (*English Sexualities, 1700-1800*, Basingstoke: Macmillan, 1997, p 78). However, this argument ignores the particular nature of the Bloody Code offences, which were overwhelmingly concerned with the protection of property rather than morality and were the result of legislative efforts by interest groups rather than legal interpretation in the courts: a different approach to sexual offences is both plausible and probable.
[25] Oxford English Dictionary, 2nd edition (2004), http://athens.oed.com, accessed 1 November 2004.

offer was presumably unnecessary). The reports in the *Bath Journal* are concise, but cut to the heart of the matter: it is made clear to readers that the two women had sexual relations, since "the said Price thought the Prisoner a Man, owing to the Prisoner's using certain vile and deceitful Practices, not fit to be mentioned."[26] Apparently there was little need to mention them, since the information has been given that Hamilton "did enter her [Price's] body"[27] and contemporary readers, including Henry Fielding in his fictionalised pamphlet on the case, had no difficulty in assuming that this meant some kind of fake penis.[28]

It is of interest that we have no account of this aspect of the relationship from Hamilton herself: in her deposition she gave a full account of her life up to and including the marriage, admitted travelling as Price's husband thereafter, but "further this examinant saith not."[29] She therefore said nothing about either the details of married life or the degree of knowledge Price had of her "husband's" sex: whether this was in an attempt to protect herself (although she had already made numerous damaging admissions), or to shield Price, cannot be known. The matters were not further considered at trial because at some time between the examination and the Quarter Sessions, Hamilton changed her plea to one of guilty; again, the reasons are unknown.

However, Hamilton suffered heavily for the imposture's subsequent failure. Following the Quarter Sessions, she was

> Confined as a vagrant for Six Months to hard Labour, and to be Whipped publickly as follows (that is to say) at Taunton aforesaid the Eleventh instant as usual; At Glastonbury in y^e^ said County the first day of November next from the Higher Conduit to y^e^ Market House Street: At y^e^ city of Wells in y^e^ said County the Twenty Second day of November aforesaid as usual there: And at Shepton Mallet aforesaid, the nineteenth day of December there next ensuing also as usual there.[30]

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[26] *Bath Journal*, No. 34 of Vol III, Monday, 3 November 1746, p 132.
[27] Examination of Mary Price, 7 October 1746.
[28] Indeed, Fielding added a passage describing its discovery and use in evidence, an incident entirely absent from the actual records of the case.
[29] Examination of Mary Hamilton, 13 September 1746.
[30] 'General Kalendar of the Prisoners and Fines'. The *Bath Journal*, *Gentleman's Magazine* and *Newgate Calendar* reports suggested that she was also "to find security for her good behaviour for as long time as the justices at the next quarter sessions shall think fit", but there is no reference to this in the case papers recording her sentence. We have evidence that the sentence was duly carried out: the

The case of Mary Hamilton gives rise to a number of questions which this chapter will address. First, what was the position of the other woman centrally involved, Hamilton's "wife"? Second, how did this case fit in with other prosecutions of "female husbands"? Third, how did it fit in with the eighteenth-century criminal justice system as a whole, notorious as it was for its 'Bloody Code'? In particular, what is the significance of the use of whipping as punishment? Fourth, why did such cases arise at this time: what social conditions helped to produce them? Fifth, when they did arise, why were they seen as uniquely suitable for public censure and punishment?

The 'wife'

It is notable that Mary Price, despite giving an account of the events in her deposition, is accorded little attention in these accounts. At most, she is the stock gullible girl duped by a fraudster's charms and her own naivety who features briefly in the *Newgate Calendar* account. However, overall the emphasis is upon Hamilton, and is firmly kept there by the decision of the town Corporation to take over the prosecution (thus denying Price agency in the process as well as visibility); by the rumours of ever-increasing numbers of previous wives; and by the lack of any enquiry into her own conduct. One should note here that as the Corporation, rather than Price, was bringing the prosecution arising from the marriage, charges against Price were legally possible; and that magistrates felt able to censure those whom they did not convict as well as those they sentenced,[31] but never seem to have done so in relation to the "wives" in these cases.

Such an approach was important if these cases were not to damage the overarching policy of silencing lesbianism. By keeping the wife firmly in the role of innocent (legally and sexually), the notion that two women could choose to share all aspects of their lives, including the sexual, was unspoken. Instead of a relationship, and one which might challenge patriarchal norms and structures, the case became that of one individual, both ridiculous and wicked, who could be safely dismissed as an aberration. To suggest the complicity of the "wife" would be to challenge such a comforting and unthreatening view.

Bath Journal (number 147, Monday, December 8, 1746, p 152) confirms that "Mary Hamilton ... will be publickly whipp'd at Shepton-Mallet (it being the last Time) on Friday the 19th. Instant."

[31] See for example the case of Sarah Paul below.

Unfortunately, both the nature of the sources and the fascination of many historians with the more colourful, more obviously rebellious and non-conformist parties have meant that contemporary attention also remains on the "husband" in these cases (a rare exception is Liberty Smith's article, 'Listening to the "Wives" of the "Female Husbands": A Project of Femme Historiography in Eighteenth-Century Britain').[32] However, in considering the criminal justice system's approach to lesbianism it is as important to note that there was no attempt to censure those who retained their expected female role as to consider the punishment of those who did not.[33]

There are also further questions to which we do not have the answer, but consideration of which might help us appreciate a little more fully the role of the wife in these cases. In particular, what did it mean for those women who knowingly married such partners? They, as much as the their "husbands", faced exposure should the truth be discovered (it is perhaps in large part for this reason that the cases which came before the courts were those where the alleged discovery was made early in the marriage: the longer the relationship, the harder it would be to claim ignorance). They also faced reactions while the marriage subsisted ranging from pity to contempt for their apparent "barrenness", since there would be no children of the marriage. They bore the disadvantages without the concomitant benefits of (albeit precarious and fraudulently obtained) male privilege. Nonetheless, at least some women freely chose to live in and even acknowledge such relationships. One example is Mary Parlour, the wife of Sarah Paul who, as described below, refused to continue the prosecution

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[32] (2002) 6(2) *Journal of Lesbian Studies* 105-120. Unfortunately, this article both depends heavily upon the literary (discussing Fielding's fictional account of the Hamilton case rather than the newspaper and court records), and makes some rather improbable claims, notably that "attending to the wives … allow[s] a reading of the wives and their husbands as collaborators in their projects of challenging heteronormativity" (p 107). That the couples discussed in this chapter had any such projects is unlikely, but perhaps no more unlikely than Smith's suggestion that the article "acts as an initial location for forming … imagined coalitions" between such wives and contemporary femmes, "spanning temporal difference" (p 107). Perhaps my own imagination is failing me here, but I find it hard to envisage a meaningful coalition in which one party is necessarily passive and silent, and find it offensive to contemplate imputing improbable political and sexual identifications to women whose lives had their own very specific problems, issues and identifications.

[33] This was true even where the "husband" was dead and thus beyond prosecution: the case of James Allen presents many features similar to those which were prosecuted, but was found at post-mortem to be female; "his" wife Abigail was questioned informally but assumed innocent (for a full account of the case see Anonymous, *An authentic narrative of the extraordinary career of James Allen, the Female Husband, who was married for the space of twenty-one years, without her real sex being discovered, even by her wedded associate*, London: I S Thomas, 1829; Susan Clayton, 'L'habit ferait-il le mari? L'exemple d'un *female husband*, James Allen (1787-1829)' (1999) *CLIO: Histoire, femmes et sociétés*, http://clio.revues.org/document254.html, accessed 7 February 2007).

against her. Another, even clearer example is that of the unnamed wife described in a *London Chronicle* report:

> [Barbara Hill, disguised as a man] about five years ago married a woman at Bolton Piercy, with whom she has lived very agreeably ever since, acting sometimes as a farmer's servant, and at other times as a bricklayer's labourer. On her sex being discovered after her enlisting [and subsequent discharge after she was recognised], her supposed wife came to town in great affliction, begging that they might not be parted.[34]

The name of the wife was Ann Steel; Barbara Hill was known as John Brown.[35] Little is known of what happened after the nature of their marriage was discovered, beyond that Brown was "of course separated from the said Ann Steel"[36] who apparently remarried, again in Bolton Piercy, in 1765 (five years after her first marriage ended).[37] However, it is notable that Steel is unnamed in the published accounts of the incident, and is allowed no agency in relation to her relationship: the couple were separated despite her very clear wishes otherwise.

The deceived woman found herself in a difficult position. A crucial aspect of these prosecutions is the position of the "wife" bringing or bearing witness in the case. Motivation would have to be strong and, equally importantly, the prosecutrix would need to feel confident that she would not herself become liable to criminal sanction for her part in the relationship. The "female husband" cases potentially fulfilled both conditions. First, marriage gave a husband legal ownership of all his wife's goods including clothes and personal possessions, whether obtained before or during the marriage. Divorce could be obtained only by private act of parliament, a remedy effectively available only to the wealthy and rarely used.[38] Thus, in order to regain control of her own property and earnings, however humble, the "wife" would

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[34] *London Chronicle*, 31 January – 2 February 1760, reproduced in Rictor Norton (ed), 'Some Cross-Dressing Women', *Homosexuality in Eighteenth-Century England: A Sourcebook*, 6 December 2003, updated 3 May 2005, http://www.infopt.demon.co.uk/1760lesb.htm, accessed 7 September 2005.

[35] Borthwick Institute, University of York Library and Archives, 'The Story of Barbara Hill', *Lesbian, Gay, Bisexual & Transgendered History*, http://www.york.ac.uk/inst/bihr/guideleaflets/lbg/doc2.htm, accessed 7 September 2005.

[36] Parish register of baptisms, marriages and burials, Bolton Piercy, cited in Borthwick Institute, 'The Story of Barbara Hill'.

[37] Borthwick Institute, 'The Story of Barbara Hill'.

[38] Only with the Matrimonial Causes Act 1857 would divorce be available from the civil courts; it would remain an expensive option and required the husband to prove adultery or the wife to prove aggravated adultery (adultery with incest, bigamy, or unnatural vice).

need to establish that no valid marriage had existed. A prosecution for fraud would be an effective way of doing this.[39]

Second, the role of the "husband" provided protection from censure for the prosecutrix. She could claim that she had been deceived by the disguise and was an innocent victim. There were powerful motivations for the court to believe, or at least appear to believe, this to be the case. To do so was to reinforce the message that lesbianism did not really exist as an option for women. Additionally, there was strong cultural support for the idea that relationships between women would not last and that the parties involved (or at least those who retained some femininity) would return to heterosexuality. As Faderman remarks, "[t]he ephemerality of lesbian relationships was a notion cherished by male writers throughout the centuries."[40] Since male writers were generally from the same class and background as male lawyers (indeed many male lawyers such as Fielding, a magistrate, were also writers), these attitudes could reasonably be presumed to be found in the law courts too.

To bring a case against her "husband", then, brought benefits; but it also carried significant disadvantages. A criminal case was very public: a "wife's" vulnerability to deception would become common knowledge, possibly exaggerated through gossip, and difficult to defend herself against. Her status would be ambiguous: simultaneously a woman who had been married, and often sexually active, yet without having experienced either marriage or sexual activity in a socially-recognised form. Returning to the case of Ann Steel, the personal consequences of her public appeal are unknown, but the gap of five years before her second marriage is suggestive.

We should therefore attempt to keep at the forefront of our minds an understanding that there were two people actively involved in these relationships. The

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[39] The other option for ending such marriages which would allow for remarriage was a declaration of nullity from the consistory courts. However, the only record of such a procedure is for the London Consistory Court's 1682 annulment of the marriage of Amy Poulter/James Howard to Arabella Hunt. Hunt brought the case on the grounds of Poulter's pre-existing marriage, her cross-dressing and hermaphroditism; Poulter denied the latter but admitted having disguised herself as a man and married Hunt for a joke. The fact that Hunt was a lutenist and soprano in the royal court who was favoured by the Queen and taught singing to Princess Anne, and for whom Purcell wrote music, suggests that the declaration of nullity was a resort for higher-class women while poorer wives would resort to the criminal courts. The Consistory Courts' powers to impose punishment for immoral conduct may have been a further disincentive should the wife be concerned about scrutiny of her own behaviour. (See Patricia Crawford and Sara Mendelson, 'Sexual Identities in Early Modern England: The Marriage of Two Women in 1680' (1995) 7(3) *Gender and History* 362-377; for Hunt's career, see Olive Baldwin and Thelma Wilson, 'Purcell's Sopranos' (1982) 123 *Musical Times* 602-609).

wife's disappearance into passivity and the private realm reflects wider patriarchal attitudes, and reproduces contemporary attitudes to married women generally. We should seek to avoid replicating those attitudes here in the same way that we are careful to criticise and problematise contemporary condemnations of female husbands.

Female husbands

One might imagine from the difficulty in finding a charge for Mary Hamilton's offence that such a case was entirely novel. That was not in fact the case. Far from being an isolated prosecution, Mary Hamilton's was one of a cluster of "female husband" cases which appeared in the last half of the seventeenth and first half of the eighteenth centuries. The number of known cases is small; any attempt to calculate how complete or representative a sample they are can be little more than guesswork. I therefore discuss these cases not as a comprehensive collection of such prosecutions but as representative of those which not only came to court, but also received some degree of publicity. The compelling questions, then, are: why did these cases enter the public domain? And does the fact that they did so pose a challenge to the notion of a policy of silencing, or complement and support it? It is my argument that in these cases, the dangers of publicising relationships between women were seen as outweighed by either the need for, or the benefits of, prosecuting the particular case. Almost all such cases are "female husband" cases, and I will argue that it is no coincidence that these cases were the ones most likely to be prosecuted.

On 10 July 1694, Anthony à Wood wrote in a letter to a friend of how, on 7 July,

> appeared at the King's Bench in Westminster hall a young woman in man's apparel, or that personated a man, who was found guilty of marrying a young maid, whose portion he had obtained, and was very nigh of being contracted to a second wife. Divers of her love letters were read in court, which occasion'd much laughter. Upon the whole she was ordered to Bridewell to be well whipt and kept to hard labour till further order of the court.[41]

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[40] Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present*, London: The Women's Press, 1985, p 47.
[41] Anthony à Wood (abridged by Llewellyn Powys), *The Life & Times of Anthony à Wood*, London: Wishart & Company, 1932, pp 306-307.

The combination of attributing a financial motive to the marriage and the mocking of the relationship were devices which were frequently used to undermine and ridicule these relationships, thus neutralising any threat they might otherwise pose. On this occasion, the offence with which the unnamed young woman was charged is not specified by à Wood, but the emphasis upon the marriage portion and the second marriage which the defendant allegedly planned serve to suggest that it was a financial crime.

In 1720, Sarah Ketson was convicted of trying to defraud Ann Hutchinson into marriage.[42] According to Randolph Trumbach, "Constantine Boone in the previous year had also been convicted of a fraudulent marriage; in her case there may have been an anatomical basis for her behavior, since she was also exhibited as an hermaphrodite at Southwark Fair."[43]

Up to this point, many marriages were highly informal, but the Hardwicke Marriage Act 1753 imposed stringent requirements upon legal marriages as well as penalties for their breach. However, female husbands were apparently not deterred. In 1759, Sarah Paul alias Samuel Bundy was committed to Southwark Bridewell "for defrauding a young woman of money and apparel, by marrying her".[44] The case was reported in the *London Chronicle* and the *Annual Register*. The *Annual Register* begins its account[45] by explaining that the couple had not had sexual relations since "Samuel Bundy" had pretended to be undergoing a cure for "a bad distemper". Her "wife", Mary Parlour, was perhaps persuaded to "uncommon patience"[46] in awaiting sexual relations because when dressed in male attire, "Samuel" made "a very good figure of a man".[47] However, the couple's neighbours were less impressed or patient,

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[42] Randolph Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity*, London: Routledge, 1991, pp 112-141 at p 122.

[43] Trumbach, 'London's Sapphists', p 122. It appears to have been settled law that hermaphrodites could marry; the law did, however, require that they choose their gender and thereafter remain permanently within it.

[44] *London Chronicle*, March 1760, cited in Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993., p 67. In light of this charge, it is surprising that Fraser Easton argues that the case (along with Hamilton's) illustrates a departure from a view of female husband cases as representing financial frauds to a perception of them as involving lesbian sexuality and disorderly behaviour charged as "cheating" and other forms of vagrancy. In fact, financial rather than vagrancy charges persisted after Hamilton's case as this section makes clear; I therefore find his argument unconvincing (see Fraser Easton, 'Gender's Two Bodies: Women Warriors, Female Husbands and Plebeian Life' (2003) 180 *Past and Present* 131-174 at pp 149-157).

[45] *Annual Register*, Vol. 3, 1760, pp. 84-5.

[46] *Ibid*, p 84.

[47] *Ibid*, p 85.

and "insisted upon searching him; when, to their great surprise, the bridegroom proved a female."[48] The obvious implication is that the neighbours could not believe in an unconsummated marriage, and that the "wife" was therefore the subject of some scorn in the neighbourhood.

It does later become apparent from "Samuel's" account that Mary Parlour may have known her "husband" was a woman much sooner; she certainly wished to continue the relationship after the public discovery, but the article has already begun by attempting to set her up as an innocent victim. The happy ending is placed firmly within the context of a return to feminine propriety since the article concludes that Sarah Paul "has made herself known, sent for her mother, and appears to be a very sensible woman."[49] Furthermore, she has placed herself within an appropriate framework of innocent and victimised heterosexual womanhood by giving an account of being put into men's clothes by her seducer to avoid discovery and "Declar[ing] she never knew any other man than her seducer".[50] Quite why such a model of sexual propriety would then enter into a marriage with another woman is not discussed.

Sarah Paul had been charged with a financial fraud because, after Paul lost her job, her spouse had pawned her clothes and used her money to support them both. The *London Chronicle* described it thus: "Quitting her master upon some dispute between them, [Paul] was obliged to depend upon her wife for support, who expended her money and pawned her clothes for her mate's maintenance, which is the fraud she is charged with".[51] When the case came before the justice, Mary Parlour, who was prosecutrix, failed to appear, so Paul was discharged. However, the Justice still felt able to order Paul's masculine clothes to be burned.

Paul alleged that Parlour had discovered her true sex soon after the marriage, but for some time chose not to expose her. The *Annual Register* report acknowledged that "there seems a strong love and friendship" on both sides, and that her "wife" was keeping Sarah Paul company in prison. There, Paul was described as having taken up appropriate pursuits of painting and shoe-making.

This case is unusual in that we catch a little more of a glimpse of the "wife" and her motivations than is usual. Mary Parlour was clearly more than an innocent

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[48] *Ibid*, p 84.
[49] *Ibid*, p 85.
[50] *Ibid*, p 85.
[51] In Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993, p 67.

dupe: she made a conscious decision to retain her relationship with Paul even after her neighbours discovered the truth. That decision gives the lie to claims that the relationship was primarily economic. Indeed, given the degree of public embarrassment she had suffered, first for failing to consummate her marriage and then for having married another woman, the decision to remain with her partner demonstrates a great deal of commitment, affection, and strength of character. What is surprising is not that more "wives" did not take a similar course of action if their relationships had been based upon mutual affection, but rather that anyone had the resolve and strength of character to behave so in that situation despite the disapproval of their acquaintances, the courts and the popular press. Additionally, of course, whatever the original state of such relationships, the fact that they ended in the court at the "wife's" instigation was generally a sign of their having broken down utterly. By contrast, Paul's prosecution was instigated by others, not by her partner.

On 5th July 1777,

> A woman was convicted at the Guildhall, Westminster, for going in man's cloaths, and being married to three different women by a fictitious name, and for defrauding them of their money and cloaths: She was sentenced to stand in the pillory at Charing-cross, and to be imprisoned six months.[52]

Emma Donoghue identifies this woman as Ann Marrow.[53] The circumstances of her case are unclear, since there are no depositions surviving and the *Newgate Calendar* offers little information. However, one fact of interest revealed by the court papers is that the prosecutor was a schoolmaster, George Field, of Hammersmith.[54] We do not know what his interest in the case was, but it was certainly sufficient for him to involve himself in proceedings at some distance from his home and to enter into a recognizance for £40, a substantial sum.[55] The only other fact ascertainable from the

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[52] *Annual Register*, 1777, pp 91-2. This is in fact simply a reproduction of an article which appeared in the *Daily Advertiser* on Tuesday 8 July 1777, the only difference being the beginning: "On Saturday last a Woman was convicted..." (reproduced in Rictor Norton (ed), 'Some Cross-Dressing Women'. *Homosexuality in Eighteenth-Century England: A Sourcebook*, 6 December 2003, updated 3 May 2005, http://www.infopt.demon.co.uk/1760lesb.htm, accessed 7 September 2005).

[53] The court records, however, name her variously as Ann Marlow (Recognizance of prosecutor, May 1777, London Metropolitan Archives JM/SP/1777/05/029), Ann Marowh (Recognizance of prosecutor; list of 'Persons in Custody' in Middlesex Sessions Session Book, June 1777, London Metropolitan Archive, MJ/SB/B/0257); Ann Marrish (Petition of Ann Marrish, July 1777, London Metropolitan Archive, MJ/SP/1777/07/026).

[54] Recognizance of prosecutor, May 1777, London Metropolitan Archives JM/SP/1777/05/029.

[55] *Ibid.*

court records is that Ann was also known as Charles, and this is revealed only by accident: the recognisance of George Field is "to prosecute ~~Charles~~ Ann Marlow".[56] She was convicted of fraud and sentenced to six months' imprisonment at Clerkenwell House of Correction, standing in the pillory within the first month.[57] The more significant part of the sentence was the exposure in the pillory, and indeed this was the element which she sought to have remitted in an petition to the court.[58] However, despite her description of being "struck with the most alarming terror at that truly shameful and most dangerous punishment",[59] her appeal was clearly unsuccessful.

The pillory was a relatively unusual punishment, occurring on average five times a year at this period, primarily for "unnatural" sexual offences and perjury.[60] It was also very much a public punishment, aimed at the "public labelling of the recipient as deviant" and the damaging of their reputation;[61] for that purpose, Charing Cross was a popular site as it had "markets and considerable traffic".[62] The audience was actively involved, throwing various items ranging from dirt, to rotten eggs, to dead cats, to brick and stones.[63] However, one of the policy concerns of the period was the control this method of punishment gave to the crowd:[64] some received approval and collections of money from the crowd,[65] while others were killed.[66]

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[56] *Ibid.*

[57] Persons in Custody, Middlesex Sessions, June 1777 Session Book, London Metropolitan Archive, MJ/SP/1777/07/026. More detail appears in the Petition of Ann Marrish, which states the sentence as "to be imprisoned in the house of Correction at Clerkenwell for 6 months and between the hours of Eleven and two on some day within the first month of the s^{d} term to be set in the pillory for the space of one hour at Charing Cross." The brief account in the *Newgate Calendar* wrongly gives the custodial element as three months' imprisonment (GT Crook (ed), *The Complete Newgate Calendar*, London: Navarre Society Ltd, 1926, Vol IV, p 113).

[58] Petition of Ann Marrish.

[59] Petition of Ann Marrish. This petition raises further questions, since it is written in a confident and educated hand and in standard and formal terms. It is therefore unclear whether it was written for Ann Marrish (perhaps the most likely explanation) or whether she was an unusually educated woman (possible, since the writing of her signature does not differ greatly from the handwriting of the petition itself; although of course the signature might likewise not be her own).

[60] Robert S Shoemaker, 'Streets of Shame? The Crowd and Public Punishments in London, 1700-1820', in Simon Devereaux and Paul Griffiths (eds), *Penal Practice and Culture, 1500-1900: Punishing the English*, Basingstoke: Palgrave Macmillan, 2004, pp 232-257 at p 240; McLynn, *Crime & Punishment*, p 283.

[61] Shoemaker, 'Streets of Shame?', p 232; Frank McLynn, *Crime & Punishment*, p 282.

[62] Shoemaker, 'Streets of Shame?', p 233.

[63] *Ibid*, p 235.

[64] *Ibid*, p 245.

[65] For example, John Williams in 1765 and Daniel Eaton in 1812, both convicted of sedition (Shoemaker, 'Streets of Shame', p 245); and a Mr Parsons who invented a "ghost" to haunt his creditor: when pilloried, the crowd gave him money to pay the debts (Frank McLynn, *Crime and Punishment*, p 282).

[66] Two people died in the pillory between 1775 and 1799, although for one of these, William Smith in

As mentioned above, Marrow was left blind by the rubbish thrown at her in the pillory, indicating a level of hostility which goes some way to rebutting the idea that lesbians lived in a haven of ignorant toleration.[67] The *Newgate Calendar* suggests that this was an illustration of how "great was the resentment of the spectators, particularly the female part".[68] That might not have reflected greater female than male disapprobation though, since by the latter part of the century policing of crowds at the pillory was much stricter, and apparently at Charing Cross only women were generally allowed to pass the cordon of constables to pelt the offender.[69]

There are some other reports in the Annual Register and other sources which are very short; these tend to set out no more than a clear financial motive (usually bigamously repeated, a device used as in the Hamilton case to undermine the seriousness of the current relationship) and the discovery by a wife or third party. I would suggest that the ability to remove all sexual motivation and instead present these as purely financial fraud made them "safe" and unthreatening to the readership, and thereby eliminated the need for more detail of the kind I've just discussed. Thus for example,

> 19th June 1773,
>
> A young woman dressed in man's cloaths, was carried before the Lord-Mayor, for marrying an old woman. The old woman was possessed of 100l. and the design was to get possession of the money, and then to make off; but the old lady proved too knowing.[70]

Without further information, this appears to be a more straightforward case than most of financial fraud. However, with such sparse details and the presumption already discussed that such cases were inspired by financial rather than emotional motives, it is difficult to assess it properly.

Hamilton, of course, was charged with a different offence: unlike all these cases where financial fraud was charged, her conviction was for vagrancy. However,

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1780, the death may in fact have been due to an improperly set-up pillory rather than the actions of the crowd (Shoemaker, 'Streets of Shame?', pp 244-245).

[67] However, the *Daily Advertiser's* report the following day made no mention of her injuries (whose extent presumably only became apparent later): on Wednesday 23 July 1777 they reported that "Yesterday a Woman stood in the Pillory at Charing-Cross, for going in Mens Cloaths, marrying three Women, and obtaining a Sum of Money from each." (reproduced in Rictor Norton (ed), 'Some Cross-Dressing Women').

[68] Crook (ed), *The Complete Newgate Calendar*, Vol IV, pp 113-114.

[69] Francis Place, cited in Shoemaker, 'Streets of Shame?' p 250.

[70] *Annual Register*, 1773, p 111.

that was also an offence which served a primarily economic purpose. Its major function was to control persons claiming parish relief, so that only a parish to which a pauper had strong links would be required to support her.

It is easy to assume that a conviction under the Vagrancy Act implied that she was literally a vagrant: a wandering person of no fixed abode.[71] However, the Act also covered other offences, including the general category of "rogue and vagabond", as well as prostitution. The conviction may therefore have had sexual undertones despite the fact that these were not made explicit. The specific charge of "imposing upon His Majesty's Subjects" also potentially alluded to the use of disguise, since "impose" could have not only its more familiar contemporary meaning of "to intrude, presume upon" but also "[t]o practise imposture; ... to cheat or deceive by false representations".[72] Indeed, the particular context of this phrase in the Vagrancy Act 1744 is one of deception:

> ... all Persons pretending to be Gypsies, or wandering in the Habit or Form of Egyptians, or pretending to have Skill in Physiognomy, Palmestry, or using any subtil Craft to deceive and impose on any of His Majesty's Subjects, or playing or betting at any unlawful Games or Plays ...

Again, the Vagrancy Act might also have served as something of a catch-all: Beattie suggests that in some times and places, vagrancy legislation was used "to commit men and women suspected of theft to brief periods of hard labor in houses of correction".[73] A final feature of such a conviction is that it encapsulated what made a typically urban offence[74] possible in a rural area which still had the tighter social controls of the small community:[75] Hamilton was an outsider, leading a fairly itinerant lifestyle.[76] Indeed, her profession of quack carried the air of deceit in itself: Dr Johnson's *Dictionary*

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[71] For example, Ann Rosalind Jones and Peter Stallybrass suggest that "She was simply and literally out of place, a vagrant" ('Fetishizing Gender: Constructing the Hermaphrodite in Renaissance Europe' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity*, London: Routledge, 1991, pp 80 – 111 at p 90).

[72] Oxford English Dictionary, 2nd edition (2004), http://athens.oed.com, accessed 1 November 2004.

[73] Beattie, *Crime and the Courts*, p 18.

[74] See the discussion below: the other cases discussed were all brought in London, suggesting that they were more common in cities than more rural communities. (Cases in London were, of course, more likely to be reported because of the active publishing industry there; but the existence of local presses and the reports sent in to the London journals by correspondents throughout the country suggest that the near-complete absence of other non-metropolitan cases is significant).

[75] See for example Beattie, *Crime and the Courts*, pp 241-242.

[76] See the extract from her deposition, below, in which she describes her career as a travelling quack

defined a quack as "a vain boastful pretender ... an artful, tricking practitioner".[77] This is, of course, the sense in which the word survives today, defined in the *Oxford English Dictionary* as "[a]n ignorant pretender to medical or surgical skill".[78]

Sexual offences and the 'Bloody Code'

The criminal law of the period was substantially different from that of today. The criminal statutes of the eighteenth century are generally referred to collectively as the "Bloody Code" because of the sheer number of capital offences enacted (estimated to have increased from 50 to over 200 in the course of the century).[79] However, one must also be aware that the harshness of statute law was partially mitigated by, first, the frequent pardoning of offenders; second, the very specific nature of the offences created (for example, separate offences for the destruction of separate bridges); and third, the often strict judicial interpretations of them.[80] This latter characteristic was fundamental to the legal system including the lower courts such as the Quarter Sessions where Hamilton's trial took place. Emsley points out that not only class interests and prejudices but also the judiciary's belief in impartiality, independence, and equality before the law would have influenced their conduct.[81] Hay goes further, arguing that the attention to legal technicalities and legalistic argument enabled the law to become

> something more than the creature of a ruling class – it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, of course, the law was The Law. ... When the ruling class acquitted men on technicalities they helped instil a belief in the disembodied justice of the law in the minds of all who watched.[82]

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doctor, which continued after her marriage.

[77] Cited in Roy Porter, 'Before the Fringe: Quack medicine in Georgian England' (1986) 36(11) *History Today* 16-22.

[78] OED online, accessed 25 June 2005.

[79] Douglas Hay, 'Property, Authority and the Criminal Law' in Hay, Linebaugh, Rule, Thompson & Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Penguin Books,1975, pp 17-63; McLynn cites similar figures calculated by Radzinowicz, of a rise from about 50 in 1688 to about 225 by 1815 (*Crime and Punishment*, p xi, citing Leon Radzinowicz, *A History of Criminal Law and its Administration from 1750* (1948-86), vol 1 p 4).

[80] Hay, 'Property, Authority and the Criminal Law', esp pp 21-23 and 32-33; see also the discussion by Clive Emsley of the often complicated backgrounds to these offences (in *Crime and Society in England 1750-1900*, (2nd edition), London: Longman, 1996, pp 10-11 and notes 33 and 34, p 19).

[81] Clive Emsley, *Crime and Society*, p 15.

[82] Douglas Hay, 'Property, Authority and the Criminal Law', p 33. However, he notes that justices of the peace might take a somewhat less rigorous approach (although they were generally careful to

Most of the Bloody Code offences were property crimes.[83] This concentration upon property crime came in the context of a new emphasis upon industry and capital. These were, after all, the early days of the Industrial Revolution. Political theory reflected this priority, with theorists such as John Locke explicit in their assertion that "Government has no other end but the preservation of property."[84] By legislating to that end, parliament will achieve the common good:

> Political power, then, I take to be a right of making laws with penalties of death, and, consequently, all less penalties for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, ... and all this only for the public good.[85]

Even when one considers that the term "property" had a wide meaning, including one's own life[86] and personal liberty,[87] this philosophy offered little impetus to attempt to extend criminal legislation into the purely moral realm.

This may seem an unlikely century, then, for the prosecution of lesbians. Indeed, there was no specific law addressing their behaviour and so the exercise of some ingenuity was required to frame an appropriate indictment in any particular case.[88] Nonetheless, justices of the peace faced with offences of morality not covered

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appear to act legally), p 34. Further, the use of pardons worked on the principles of patronage and social position which served the ruling class's interests more generally (pp 43-39).

[83] For example, McLynn refers to "a plethora of laws on stolen property, receiving, embezzlement, fraud, and the obtaining of goods on false pretences" (*Crime and Punishment*, p xii).

[84] *The Second Treatise of Government*, London, 1690, section 94. Likewise, under his theory of a social contract, tacit consent to submit to such government is based upon possession of property, since "every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent ... whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect, it reaches as far as the very being of any one within the territories of that government" (section 119). Note that Locke's views were by no means universally accepted; his *Second Treatise* was written in the context of a debate with Sir Robert Filmer over absolute monarchy and the divine right of kings (see for example section one of the *Second Treatise*), and of the turbulence of the ousting of James II by William and Mary in 1688. However, since he was a supporter of the 'Glorious Revolution' of 1688, his arguments did reflect the dominant political developments of the period.

[85] *Second Treatise*, section 2; also cited in Peter Linebaugh, *The London Hanged: Crime and civil society in the eighteenth century*, second edition, London: Verso, 2003, p 50.

[86] Since "every Man has a Property in his own Person" including his labour (*Second Treatise*, section 27).

[87] For example, Locke sometimes defined property to include life and liberty, although Douglas Hay argues that material wealth remained paramount ('Property, Authority and the Criminal Law', pp 18-19, fn 4).

[88] The Quarter Sessions, like the Assizes, tried cases on indictment: the indictment was

> the formal charge against the prisoner that was normally drawn up by a clerk of the court,

by legislation clearly did feel the need to inflict punishment,[89] and so the efforts made in the Hamilton case and others were seemingly not unique:

> Complaints are made to magistrates, with respect to a thousand immoral and wicked actions, over which they have no jurisdiction whatever. In such cases, it will be prudence to conceal the infirmity of their authority: but they will frequently find that [the statute against swearing] has been violated by one or both parties. I should then recommend, that they should exert their full authority in the punishment of *this* offence; and to dismiss the parties, with an admonition or a reprimand, where the law has given them no power to act.[90]

It was not that all sexual offences were ignored. Men convicted of sodomy or of rape[91] and sentenced to death faced rates of execution which varied but were significantly higher than for those convicted of property offences (with the exception of forgery); although one must also bear in mind the much lower numbers of convicted offenders, which may have been some incentive to take these relatively unusual crimes more seriously. Significantly for this thesis, the two crimes thus viewed as most serious both involved penile penetration. We will see that this particular consideration has been central to the criminal justice system from the eighteenth century to the present day.

It was against this background of some legal antipathy to sexual "immorality" combined with an increasing emphasis upon the protection of property that the century saw a number of "female husband" cases. In addition, changes at all levels of the criminal justice system[92] meant that a court would not wish to lose authority by suggesting it did not have the power to deal with something viewed by the populace

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written on parchment (until 1733 in Latin, thereafter in English), and read in summary form in court when the prisoner was arraigned. (Beattie, *Crime and the Courts* p 19)

[89] The majority of cases were dealt with by justices of the peace (magistrates) who presided over the two lowest ranks of courts, the petty and quarter sessions. Although the powers of these courts were wide-ranging, they could not impose the death penalty. The most serious cases went to the Assizes, where they were heard before a judge and jury, and where capital sentences were available. See for example Beattie, *Crime and the Courts*, pp 4-5. Justices of the peace were gentlemen who served unpaid and without formal legal training (see John H Langbein, *The Origins of the Adversary Criminal Trial*, Oxford: Oxford University Press, 2003, p 46 where he describes them as "local amateurs", albeit ones bringing local knowledge to their work).

[90] Edward Christian, *Charges Delivered to Grand Juries in the Isle of Ely, upon Libels, Criminal Law, Vagrants, Religion, Rebellions, Assemblies, &c. & c. for the Use of Magistrates and Students of the Law* (second edition). London: W Clarke and Sons, 1819, p 291.

[91] Rape was, however, in origin a property offence. See William Blackstone, *Commentaries on the Laws of England*, Volume 4, 1769, pp 210-212; Sir Matthew Hale, *The History of the Pleas of the Crown*, Volume 1, London, 1736.

[92] As I discuss below, the legal system at this time was becoming more professionalised.

as a crime. These three factors help us to understand the particular way in which eighteenth century "female husbands" were treated by the courts. While lesbianism remained legally invisible, individual lesbians who came to the courts' attention could be punished through the use of existing offences.

- **Corporal punishment of women**

The *Newgate Calendar*'s account of the trial of Mary Hamilton ends with the assurance that she "was imprisoned and whipped accordingly, in the severity of the winter of the year 1746". [93] This reference to the harsh weather is designed to recall to the reader's mind that Hamilton would have been naked to the waist when whipped publicly through the street. Such evocation of her nakedness and public humiliation, in the same sentence as a reference to her sexual monopolisation of women, is sadistic and sexualised in tone. Given the pitch of the rest of the passage, it seems unlikely that such allusion was accidental. One also suspects that this sexually sadistic response may have been a factor in the desire of Glastonbury's prominent (male) citizens to see Hamilton whipped. Judith Knelman has made the point (in the context of nineteenth-century hangings) that the punishment of women often had a sexual component for male viewers:

> It is highly likely that men got a sexual thrill out of seeing a once aggressive woman subdued, quaking in terror and then submitting to the relentless, devastating force of the law ...[94]

The visceral physicality and sadism directed towards lesbians may be related to the fact that their presence in literature of the seventeenth and eighteenth century was largely in pornographic and semi-pornographic writing aimed at men.[95] Of course, there were other possible representations, ranging from the story of the Ladies

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[93] GT Crook (ed), *The Complete Newgate Calendar*, Vol III,London, 1926, p 136.

[94] Judith Knelman, *Twisting in the Wind: The Murderess and the English Press*, Toronto: University of Toronto Press, 1998. The sexual component of women's corporal punishment has also been acknowledged elsewhere: VAC Gatrell notes that "[t]o the male mind regressing freely into unchecked association, the bucking female body as it hanged could elicit obscene fantasies." (*The Hanging Tree: Execution and the English People 1770-1868*, Oxford: Oxford University Press, 1994, p 264).

[95] See for example the publications listed in Terry Castle, 'Matters Not Fit to be Mentioned', pp 612-613. She notes that pornography "has always been a segregated form of cultural discourse". Lillian Faderman points out that "[t]he female transvestite was not a figure in sixteenth- through eighteenth-century erotic literature and evidently presented a far more serious problem" (*Surpassing the Love of Men*, p 47).

of Llangollen[96] (retold both positively and negatively, but always with an emphasis upon romantic friendship and chaste virtue which precluded any assumption of a genital relationship)[97] to Samuel August André David Tissot's *Onanism, or, A Treatise upon the Disorders Produced by Masturbation*, an account of the horrors of autonomous female sexuality and their inevitable consequences of "emaciation, langour, pain and death".[98] The latter is close to the tradition which saw women's sexuality attracting physical punishment; and it has been suggested that many readers of such treatises did in fact use them as pornography.

Although some historians have argued that lesbians were lightly treated in the context of the time,[99] I take issue with this on four grounds. First, as discussed above, the fact that many offences were capital does not mean that offenders were invariably hanged. When seen in the context of the wide range of punishments being administered in practice, those meted out to female husbands do not seem so negligible. In particular, the majority of criminal cases were dealt with by the lower courts (the Petty and Quarter Sessions) which did not have the power to impose

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[96] Sarah Ponsonby and Eleanor Butler, two conservative and upper-class Irishwomen, ran away together and lived in Llangollen for over fifty years. There, they were well-known and attracted attention including from authors such as William Wordsworth, Sir Walter Scott, Lady Caroline Lamb, and Anna Seward. A less positive view was expressed in the *General Evening Post* which they considered suing for libel (Faderman, *Surpassing the Love of Men*, pp 120-125; Elizabeth Mavor, *The Ladies of Llangollen: a study in romantic friendship*, London: Penguin, 1973).

[97] The controversy over how to categorise the relationship persists in recent scholarship, with interpretations placing them in varying traditions, notably that of (potentially non-genital) "romantic friendship" (see for example Lillian Faderman, *Surpassing the Love of Men*, pp 120-125). Terry Castle argues that they have become "the official 'mascots' of the no-sex-before-1900 school" to which she perhaps unfairly consigns Faderman, whose conclusion was more ambiguous than Castle recognises (*The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York: Columbia University Press, 1993, p 93). Castle suggests that their presumed celibacy was the result of careful cultivation by the ladies themselves and appears to concur with their contemporary Ann Lister who concluded, "I cannot help thinking surely it was not platonic" (*The Apparitional Lesbian*, pp 93-95 and Helena Whitbread (ed), *I Know My Own Heart: The Diaries of Ann Lister 1791-1840*, London: Virago, 1988, p 210). Later interpretations have gone even further, seeking to claim them as "queer romantics" (Fiona Brideoake, '"Extraordinary Female Affection": The Ladies of Llangollen and the Endurance of Queer Community' (36-37) Nov 2004 – Feb 2005, *Romanticism on the Net*, http://www.erudit.org/revue/ron/2004/v/n36-37/011141ar.html#re1no1, accessed 5 October 2005).

[98] Trans: A Hume, London, 1776, pp 46-47, cited in Janet Todd, *Women's Friendships in Literature*, New York: Columbia University Press, 1980, p 321.

[99] Notably Faderman, *Surpassing the Love of Men*, p 52; Anthony Fletcher, *Gender, Sex & Subordination in England 1500-1800*, New Haven: Yale University Press, 1995, p 85; Hitchcock, *English Sexualities*, at p 77 where he goes further and claims that no lesbians were prosecuted *qua* lesbians, interpreting the Ann Marrow case (below) as straightforward fraud; criminologist Frances Heidensohn, *Women and Crime*, Second Edition, London: Macmillan, 1996, p 39, where she suggests that lesbianism was immune from legal intervention, and that "assumptions that render female homosexuality innocuous" operated as legal "protection"; Peakman, in *Lascivious Bodies*, similarly argues that "[s]ex between women did not pose the same threat to social order as did sodomy, and consequently it was never made illegal" (p 193).

capital punishment.[100] More and more offences were being dealt with by these lower courts: Hay notes that "cases involving grain, wood, trees, garden produce, fruit, turnips, dogs, cattle, horses, the hedges of parts and game" could all be tried summarily.[101] It is a mistake, then, to assume that because property offences might result in the death penalty, such convictions were the norm and a sentence to whipping accordingly lenient. Since the death penalty was not available to the Petty or Quarter Sessions, more common as a punishment in these courts was whipping. In 1819, the sentencing options for the misdemeanour of obtaining money etc by false pretences were "to be fined and imprisoned, or to be put in the pillory, or publickly whipped, or to be transported for seven years, as the Court shall think fit."[102] The pillory was rarely resorted to, and transportation was not generally available at the time of the cases discussed above: thus whipping of these offenders was absolutely in line with the punishment of others convicted of frauds. As for Hamilton, her sentence was the maximum available for her offence of vagrancy.[103]

A more credible variation of this argument is to point out that English lesbians were treated less harshly than their Continental counterparts, and there is indeed truth in this argument (explained by the specificity of the policy of silencing, which was not generally adopted in other countries, as well as differing definitions of sodomy). For example, Marie de Marcis was convicted of sodomy in early seventeenth-century France for penetrating another woman with her clitoris and sentenced to be burned at the stake until Dr Jacques Duval gave evidence that she could ejaculate masculine semen.[104] Another Frenchwoman, from Fontaines, disguised herself as a man, married a woman and lived with her for two years until her dildo was discovered, following which she was arrested, confessed, and was burned alive.[105] Also in France, a woman from Chaumone en Bassigny decided in 1580 to dress as a man and married a woman, but was hanged "for using illicit devices to supply her defect in sex".[106] In the Netherlands, Henrika Schuria was sentenced by a Dutch court to be burned as a tribade for sexual activity involving her enlarged clitoris, but her sentence was later

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[100] Emsley, *Crime and Society*, p 249.
[101] Hay, 'Property, Authority and the Criminal Law', p 59.
[102] Christian, *Charges Delivered to Grand Juries in the Isle of Ely*, p 114.
[103] See John Adolphus, *Observations on the Vagrant Act*, London: John Major, 1824, pp 7-8.
[104] Thomas Laqueur, *Making Sex: body and gender from the Greeks to Freud*, Cambridge, Massachusetts: Harvard University Press, 1990, pp 136-137; Fletcher, *Gender, Sex & Subordination*, p 84; Jones & Stallybrass, 'Fetishizing Gender', pp 88-89.
[105] Faderman, *Surpassing the Love of Men*, p 51.
[106] *Ibid*, p 51; Fletcher, *Gender, Sex & Subordination*, p 84.

reduced to removal of the clitoris and exile.[107] The German woman Catherina Margaretha Linck disguised herself as a man and eventually married, only to be executed following her mother in law's discovery of her sex and use of a dildo.[108] Finally, in the ecclesiastical context, we have the case of the Italian nun Benedetta Carlini who engaged in sexual activities with another nun; in consequence of both this and having allegedly faked visions and stigmata, she was imprisoned for life.[109] However, to point out that women in other European countries were treated more harshly does not take us much further since both the legal systems and underlying policies for addressing lesbianism were significantly different.

Second, while to modern eyes a conviction for fraud seems relatively minor, we have seen that in the eighteenth century, property offences were viewed as very serious indeed. Third, as Kenneth Borris points out,

> the State assumed that sexual acts between males other than anal coitus, and probably those between females as well, were deplorable corruptions that would incur divine retribution anyway. Such a situation cannot be considered tolerant.[110]

Fourth, I would argue that what is important is not the treatment of lesbians relative to the treatment of others convicted of offences, but simply the treatment of lesbians. What matters is not whether a lesbian was punished as harshly as some other convicted person, but whether, why and how a lesbian was punished at all.[111] Once one takes the approach of looking at the treatment of lesbians on its own terms one cannot but be struck by the violence inflicted upon these women. This is apparent not so much in the sentences of imprisonment (which were generally for terms of about six months), but in the collateral punishments: the public whippings and pillorying. These show great physical violence: Mary Hamilton herself was whipped publicly in four separate towns with only three weeks separating each occasion from the next.

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[107] Laqueur, *Making Sex*, p 137.
[108] Faderman, *Surpassing the Love of Men*, pp 51-52; Bridget Hill, *Women Alone: Spinsters in England 1660-1850*, New Haven: Yale University Press, 2001, p 139; Julie Peakman, *Lascivious Bodies*, pp 182-184.
[109] Judith C Brown, *Immodest Acts: The Life of a Lesbian Nun in Renaissance Italy*, New York: Oxford University Press, 1986.
[110] Kenneth Borris (ed), *Same-Sex Desire in the English Renaissance: A Sourcebook of Texts, 1470-1650*, London: Routledge, 2004, p 80. Although Borris is discussing a slightly earlier period, such religious views would not have changed by the eighteenth century.
[111] See for example Ruthann Robson, *Lesbian (Out)law: Survival Under the Rule of Law*, Ithaca, New York: Firebrand Books, 1992, p 34.

The *Bath Journal* nonetheless describes Hamilton after conviction as "bold and impudent": "She seems very gay and impudent, with Perriwig, Ruffles and Breeches, and it is publicly talked that she has deceived several of the fair sex by marrying them."[112] By November, Mary Price had been moved even further from the centre of the case, since there was gossip that she was by no means Hamilton's first spouse: the *Bath Journal* was claiming an incredible 14 wives for Hamilton.[113]

Why were these cases prosecuted?

One can only speculate whether this cluster of cases demonstrates a pattern of prosecutions not found in other periods, or whether the most unusual feature of these cases is their documentary survival and discovery by historians. I would suggest that both explanations apply; without more complete data, one can examine the relevant factors but do little more than guess as to their relative importance.

The early eighteenth century combined a rising and thriving periodical press, including the *Annual Register* and *Gentleman's Magazine*, with the last days of private prosecutions largely unaffected by intervention from the legal profession and state prosecution agencies. All but one of the cases discussed above were reported in national publications.[114] It seems probable that other cases in this and other periods have been prosecuted but not publicised. They lie undiscovered in Quarter Sessions archives, or have been lost forever in court records which have not survived. In particular, those of the lowest courts (the Petty Sessions, in which one or two justices of the peace sat without juries), have largely disappeared.

- **Social change**

Lynne Friedli, the first author to consider the eighteenth-century female husbands in depth, suggests another reason for the wider public interest in "female husbands" in this period:

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[112] *Bath Journal*, No. 27 of Vol III, Monday 22 September 1746, p 107.

[113] *Bath Journal*, No. 34 of Vol III, Monday, 3 November 1746, p 132; the claim was repeated by the *Newgate Calendar*.

[114] The intended readership of these periodicals was male and middle- or upper-class (as suggested by the very name of the *Gentleman's Magazine*). Given the increasing levels of female literacy, and the prevalence of reading aloud, we cannot assume that the actual readership was limited in this way. However, the content would have been chosen and written with this intended audience in mind.

> In Europe, the 18th century marks the beginning of a shift from a rural to an urban society, the beginnings of capitalist economy as we know it, a time of colonial expansion and imperialist propaganda, a time of the birth of institutions that still control our lives – hospitals, schools, prisons, asylums, and charity (usually called philanthropy). The need for labour, the need for every individual to contribute to the 'general good' of society was at the heart of a number of debates that deeply affected women, particularly in relation to children.[115]

She argues that it is in this context that there was a need to define male and female roles, which focused interest upon women who impersonated men. Particularly interesting is the further link she makes to a more general anxiety about fraud:

> A series of laws concerned with forgery, impersonation, fraud and copyright (either new laws or calls for severer penalties) suggest a general fear about deception and disorder.[116]

It may be that the decisions to charge defendants with financial offences in most such cases is in part a reflection of such wider concerns. However, the choice of offence also served a vital function in hiding the sexual and emotional realities of these cases.

It is also possible that the changes in society and the economy themselves caused more women to take on roles as "female husbands" in order to take up the new employment opportunities available to men. Increasing mobility as people moved from the countryside into the expanding cities may also have increased the opportunities for women to take on new identities: that, as much as the London bias of the leading periodicals, may be a factor in why so many of the cases of which we are aware were tried in London. Beattie notes that even when crime rates fell at the end of the seventeenth century in more rural areas, they continued to rise in London:

> [T]he capital presented a scene of deepening immorality, of persistent and pervasive theft, of occasional outbursts of violent crime. The metropolis was unlike the rest of the country.[117]

By contrast, in rural areas, women remained under closer surveillance both before and after marriage, thanks to the "smaller and more personal community", restraints on

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[115] 'Women Who Dressed As Men', *Trouble and Strife* Vol 6, Summer 1985, pp 25 – 28 at p 25.
[116] *Ibid*, p 28.
[117] Beattie, *Crime and the Courts*, p 14. McLynn takes this further, arguing that in this period "crime was overwhelmingly a London phenomenon" (*Crime and Punishment*, p 1).

the behaviour of unmarried girls aimed partly at the prevention of pregnancy, and the binding of married women "to work they could do in and around the house".[118]

Terry Castle links these factors to another feature of the eighteenth century: an increase in literary works with (usually hostile) lesbian content.

> Beginning in Western Europe in the eighteenth century, with the gradual attenuation of moral and religious orthodoxies, the weakening of traditional family structures, urbanization, and the growing mobility and economic independence of women, male authority found itself increasingly under assault. And not surprisingly, with such far-reaching social changes in the offing, the "repressed idea" – love between women – one can speculate – began to manifest itself more threateningly in the collective psyche.[119]

The opportunities which gave rise to these anxieties were thus to some extent seized by women, particularly those who exploited increasing mobility, urbanisation and new economic opportunities by disguising themselves as men.[120] At the same time, there were new economic pressures upon single women to consider such disguise. While urban opportunities for men might be increasing, rural women's incomes were falling drastically. Bridget Hill has highlighted how the eighteenth century saw falling agricultural wages for women; a drastic drop in earnings for the paradigm occupation for single women, spinning; very little poor relief for single unemployed women (in the hope of forcing them into service, itself reflecting an anxiety to keep them under patriarchal control as discussed in Chapter 3); and an increasing tendency to see unemployed single women as sexually suspect.[121] Given such circumstances, it is hardly surprising that many women chose to assume male garb and with it, the possibility of economic independence.

Ironically, the prosecutions coincide with a period when many women were choosing not to marry at all. Margaret R Hunt cites the demographic studies of Wrigley and Schofield to demonstrate that in the second half of the seventeenth century, around 15 per cent of men and women never married.[122] Most such single

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[118] J M Beattie, 'The Criminality of Women in Eighteenth Century England', (1975) 8 *Journal of Social History* 80-116 at pp 98-99. However, we should not assume that women in urban areas escaped legal or social surveillance: see Hill, *Women Alone*, pp 119-122.

[119] Terry Castle, *The Apparitional Lesbian: Female homosexuality and modern culture*, New York: Columbia University Press, 1993, p 62.

[120] For a more general discussion of the connection between urban life and increased female offending at this period, see Beattie, 'The Criminality of Women', pp 96-101.

[121] *Women Alone*, in particular pp 25-27; p 29; pp 96-97; and p 101.

[122] Margaret R Hunt, 'The Sapphic Strain: English Lesbians in the Long Eighteenth Century' in Judith

women in London described themselves as supporting themselves financially (albeit that many presumably lived with other family members).[123] The number of never-married women would drop in the mid-eighteenth century, only to rise again in the 1780s.[124] Again, this supports the suggestion that concern over women's independence was at the root of these prosecutions, rather than the uniqueness of the cases themselves.

- **Changing medical theories**

Crucially, there were also important changes in medical theory at this time. The profession was now divided between two competing models of gender. The older model, hitherto dominant but now under challenge, was an essentially one-sex model (albeit with significant differences according to whether one followed Aristotelian or Galenic principles). Galen of Pergamum, a second-century writer, believed that men and women shared one fundamental structure, differing only in its arrangement. It was their superior "vital heat" which made humans superior to other animals, and the greater heat of men which caused their genitalia to be placed externally. Women, being inferior to men in heat (and thus further from perfection), kept their genitalia internally. The heat itself depended upon the balance of four humours (blood, phlegm, yellow bile and black bile) corresponding to hot, cold, wet and dry characteristics.[125] According to Galen, "Turn outward the woman's, turn inward, so to speak, and fold double the man's, and you will find the same in both in every respect."[126] Thus the model is based upon hierarchy rather than biological difference: the organs are the same, but their all-important location is determined by superior male heat or inferior female coolness.

Aristotle also put forward a one-sex model; based in part upon Galen's later interpretations of it,[127] the suggestion is often made that he viewed the female as an

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M Bennett and Amy M Froide (eds), *Singlewomen in the European Past 1250-1800*, Philadelphia: University of Pennsylvania Press, 1999, pp 270-296 at p 278.

[123] *Ibid*, p 280, citing Peter Earle, *A City Full of People: Men and Women of London, 1650-1750*, London: Methuen, 1994, p 114.

[124] *Ibid*, p 278.

[125] Hitchcock, *English Sexualities*, p 42.

[126] Galen, *On the Usefulness of the Parts of the Body*, 14.6; also cited in various sources, for example Laqueur, *Making Sex*, p 25.

[127] Sophia M Connell, 'Aristotle and Galen on Sex Difference and Reproduction: A New Approach to an Ancient Rivalry' (2000) 31(3) *Stud Hist Phil Sci* 405-427 at p 420.

incomplete male, both intellectually and morally inferior.[128] However, Connell points out that in fact, Aristotle never uses the term "unfinished": he assumes that women's "semen" (menstrual blood) is inferior due to her lesser heat, but does not therefore assume women herself to be a defective version of the male.[129] Instead, suggests Laqueur, notions of sexual biology did not give rise to but rather acted as illustrations of wider truths: "[c]laims that the vagina was an internal penis or that the womb was a female scrotum ... are another way of saying, with Aristotle, that woman is to man as a wooden triangle is to a brazen one or that woman is to man as the imperfect eyes of the mole are to the more perfect eyes of other creatures".[130] By not mapping the female sexual role so literally onto the male one, Aristotle was able to account for women's different sexual responses: unlike Galen, he did not view female sexual satisfaction as essential to conception.[131] Aristotelian theory was less influential than Galenic, but important nonetheless.[132]

These models had profound implications for attitudes towards women's sexuality, which were well developed by later writers. The location by the Classical writer Areteaus of masculinity in the semen led to mediaeval concerns that "men could lose their masculinity with ejaculation ... making him more cool and wet, thus more feminine."[133] Feminisation could also occur, for example, if a man "submitted to a passive role in lovemaking, particularly by allowing penetration in a homosexual encounter ... Oral sexuality with a female partner was much condemned since it, too, inverted the social hierarchy."[134] Such a view was reflected in the early eighteenth century association of homosexuality with allowing penetration; penetrating another man was no more a threat to one's masculine role than penetrating a woman.[135] Thus sexual behaviour and the social order were seen as inextricably linked.

At the same time, under the Galenic module in particular, women were seen as sexually insatiable. Such a view may seem inconsistent with the belief that women

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[128] See for example Vern L Bullough, 'Cross Dressing and Gender Role Change in the Middle Ages' in Vern L Bullough and James A Brundage (eds), *Handbook of Medieval Sexuality*, New York: Garland Publishing, 1996, pp 223 – 242, p 225.
[129] Connell, 'Aristotle and Galen' pp 420-421.
[130] Laqueur, *Making Sex*, p 35.
[131] Connell, 'Aristotle and Galen', p 413.
[132] Hitchcock, *English Sexualities*, p 47.
[133] Joyce E Salisbury, 'Gendered Sexuality', in Vern L Bullough and James A Brundage (eds), *Handbook of Medieval Sexuality*, New York: Garland Publishing, 1996, pp 81-101 at p 83; see also Hitchcock, *English Sexualities*, p 44.
[134] Salisbury, 'Gendered Sexuality', pp 83-84.
[135] Vern L Bullough and Bonnie Bullough, *Cross Dressing, Sex and Gender*, Philadelphia: University

were essentially passive, and men active. However, the insatiability was seen as fundamentally passive in nature:[136] women did not act as sexual aggressors but rather were "open": "passive recipients of men's power"[137] who craved the "dry heat of male semen".[138] Their risk was to men rather than themselves: there was less concern, at least among medical writers, with female masturbation than male since while semen was a precious source of energy and masculinity, female secretions and in particular menstrual blood were toxic and thus better purged than conserved.[139]

The eighteenth century, however, saw dramatic changes to this conception of human sex differences. Such changes did not occur overnight, and it was at a time when both the Galenic or Aristotelian and the new two-sex models enjoyed currency that "female husbands" were at their most visible. Both scientific advances and the rise of liberalism focused attention upon the individual and in so doing, argues Stephan Ridgeway, needed fixed categories with which to justify inequalities.[140] One of these was sex, and so there was a move from the essentially "one sex" Galenic and Aristotelian models (where the flesh was fundamentally the same, although having reached an inferior arrangement for the female) to a "two sex" model.

Ornella Moscucci[141] cites Laqueur to argue that during the sixteenth and seventeenth centuries, the Galenic (one-sex) medical model saw the clitoris as the analogue of the penis, and therefore as the seat of women's sexual pleasure, "a healthy mark of female lustfulness"[142]. It was during the eighteenth century that the clitoris became "problematic", and its "capacity ... for homo- and autoeroticism was increasingly perceived as a threat to the social order".[143] In the nineteenth century, this

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of Pennsylvania Press, 1993, p 116.

[136] See for example Garthine Walker, 'Rereading Rape and Sexual Violence in Early Modern England' (1998) 10(1) *Gender & History* 1-25 at p 6: "Women's sexual activity was described in passive terms even when the woman concerned was thought to have actively sought it."

[137] Joyce E Salisbury, p 85.

[138] Hitchcock, *English Sexualities*, p 44.

[139] Salisbury, 'Gendered Sexuality', p 91.

[140] Stephan Ridgeway, *Sexuality and Modernity*, Sydney University, 1997, accessed at http://www.isis.aust.com/stephan/writings/sexuality/ on 19th April 2002.

[141] Ornella Moscucci, 'Clitoridectomy, Circumcision, and the Politics of Sexual Pleasure in Mid-Victorian Britain', in Andrew H Miller and James Eli Adams (eds), *Sexualities in Victorian Britain*, Bloomington: Indiana University Press, 1996, pp 60-78.

[142] *Ibid*, p 69. However, we should not idealise Galenic interpretations as necessarily more positive for women: Connell points out that under the Galenic model, women's sexuality was seen only through the lens of male sexual experience: "[t]he female body is mapped onto Galen's model of the male" ('Aristotle and Galen', p 413).

[143] Moscucci, 'Clitoridectomy', p 69.

perception of the clitoris as problematic would lead to the practice of clitoridectomy in the USA and, to a much more limited extent, in Britain.[144]

However, this argument may be rather too general, since there were two, competing one-sex models: while the Galenic assumed that both male and female contributed seed, and therefore the female's sexual satisfaction was as important as the male's to conception, the Aristotelian model assumed that only the man contributed the seed, and so the woman's sexual pleasure was irrelevant.[145] Further, even for followers of the Galenic model women's "lustfulness" was a threat and a danger to men except for those brief times when it was needed for the orgasm considered essential to conception, since, as already noted, excessive emission of semen was seen as dissipating men's vital heat.

The idea that emphasising women's sexual pleasure is necessarily more liberatory is in any event misguided: as Connell points out,

> Insisting that women achieve orgasm in order to ensure reproduction does not, of course, necessarily improve their status or experiences in society. ... When female pleasure is linked only to reproduction this means that women who may not want to have children are debarred from the freedom to participate in sexual relationships. Further, it tends to single out penetrative sex as the act that should give women the most pleasure.[146]

The legal implications of such an approach were made manifest in the claims of jurists that where there was conception there could not have been rape, as pregnancy could not result from an encounter which was not pleasurable to the woman.[147] More generally, the assumption that sexual intercourse in moderation was vital to women's health may have allowed them to be recognised as sexual beings, but only in limited and strictly heteropatriarchal terms: the only healthy activity was penile penetration of

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[144] See the discussion of Dr Isaac Baker Brown in the following chapter.
[145] See Salisbury, 'Gendered Sexuality', p 84.
[146] 'Aristotle and Galen', p 414.
[147] "If the party that is ravished, conceive by the Ravisher a child at the time of the Ravishment, this is no Rape, because she could not conceive, unless she assent." (John Brydall, *A Compendious Collection of the Laws of England Touching Matters Criminal*, London, 1675, p 53). For a detailed discussion of the evolution of this legal principle, see Elise Bennett Histed, 'Mediaeval Rape: a conceivable defence?' (2004) 63(3) *Cambridge Law Journal* 743-769; in the context of the movement within the legal sphere from one-sex to two-sex models, it is interesting that she dates the end of the principle of conception as a defence to rape to the late eighteenth century (at p 767).

the vagina, while "the ancient virgin, all her life deprived of this animating effluvia [semen], is generally consumed with infirmity, ill-temper, or disease."[148]

If the differences between men and women were more fundamental than a difference in "heat", and altered the very content and construction of their bodies, then how to explain those who did not conform to their expected roles? Randolph Trumbach looks at the changes over this period not in terms of the underlying models but in terms of the sexes and genders they in fact produced. He argues that the period saw a move from three biological sexes (male, female and hermaphrodite) and two genders (male and female) to two biological sexes (male and female) but four genders (male, female, effeminate homosexual "molly", and "sapphic") with the sapphic woman a later and less fully-incorporated "gender".[149] Mary McIntosh also identifies the late seventeenth century as the period when a male "homosexual role" emerged as one to be despised, thereby keeping the rest of society "pure".[150] More recent research, notably that of Emma Donoghue, has revealed the extent to which lesbian identities were also constructed in this period.[151]

- **Changes in the criminal justice system**

Finally, the criminal law itself was undergoing a critical transition, both in terms of its practices and of its underlying ideologies. There was a move towards liberalism, which represented a new focus upon rights and procedure which in turn influenced the development of criminal procedure. That liberal ideology was itself profoundly gendered: Sue Chaplin[152] identifies eighteenth-century legal discourse as based upon a liberal theory which not only emphasises individualism and independence, but also fears its potential opposite: "annihilation by the other".[153] Although I do not find her use of the concept of the sublime (defined as a profound crisis of human subjectivity, the possibility of "nothing further happening", and as characteristic of the post-modern human condition)[154] a useful one,[155] her discussion of liberal legal discourse

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[148] Ebenezer Sibly, *The Medical Mirror*, 2nd edition, London, 1796, p 43, cited in Roy Porter, 'Love, Sex and Madness in the Eighteenth Century' (1986) 53:2 *Social Research* 211-242 at p 239.
[149] Trumbach, 'London's Sapphists', pp 112-113.
[150] Mary McIntosh, 'The Homosexual Role' (1968) 16(2) *Social Problems* pp 182-192.
[151] See *Passions Between Women* generally.
[152] 'How the sublime comes to matter in eighteenth century legal discourse – an Irigarayan critique of Hobbes, Locke and Burke' (2001) 9(3) *Feminist Legal Studies* 199-220.
[153] *Ibid*, p 201, citing Robin West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* pp 1-67 at p 7.
[154] *Ibid*, p 200.

in this period as based upon a fear of the other (in the form of women, revolution or a state of nature), and more specifically the "untamed, revolutionary *female*"[156] is helpful.

In terms of practice, the courts were undergoing a very significant move from private prosecutions involving amateur justices of the peace and amateur constables to trials involving professional prosecution and defence counsel.[157] In the late seventeenth and early eighteenth centuries, the criminal justice system was very different from today's.[158] The norm was for private rather than state prosecutions (and the exceptions - some prosecutions for coining, treason and sedition[159] - are not relevant to this thesis). Thus a prosecution would be brought only when somebody, usually but not always the victim,[160] thought the time, expense[161] and inconvenience[162] (and in some cases, community outrage) merited. Prosecutions might not be brought where either community justice or direct compensation from

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[155] In fact, the fears were not of nothing happening, but of very specific risks: notably that lesbianism would become not only a viable but a popular choice for women and therefore threaten the basis of heteropatriachal society. I have not taken the psychological, Irigarayan approach elsewhere and do not propose to address it in detail in this thesis.

[156] Chaplin, 'How the sublime comes to matter', p 202.

[157] Langbein, *The Origins of the Adversary Criminal Trial*, p 4.

[158] Indeed, the idea of a separate system is itself somewhat misleading since, as discussed in Chapter 1, definitions of crime were vaguer and the courts less clearly separated on civil and criminal lines. Blackstone was one of the first jurists to attempt a legalistic definition of crime, as late as 1769 ("A crime, or misdemeanour, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it": *Commentaries* IV 5, cited in the *Oxford English Dictionary* (2004), http://athens.oed.com, accessed 19 September 2004), although Coke had referred to 'criminal causes' in his Institutes of 1681 (*The third part of the Institutes of the laws of England: concerning high treason, and other pleas of the crown, and criminal causes*, London: W. Rawlins, 1681).

[159] Emsley, *Crime and Society*, p 178.

[160] Emsley suggests that over 80% of prosecutions were conducted by victims of crime or by other private individuals acting on the victims' behalf. (*Crime and Society*, p 178, with reference to Douglas Hay, 'Controlling the English prosecutor', (1983) 21 *Osgoode Hall Law Journal* 165-86 at p 167). Hay notes in 'Property, Authority and the Criminal Law' that many prosecutions brought on behalf of poor men were funded by employers, landlords or local prosecution associations (pp 36-37).

[161] Beattie considers the costs of bringing a prosecution in some detail, noting that they could include subpoenas for witnesses, a warrant to have the accused brought in, fees for the recognizances which bound them to give evidence at trial, a fee for the drawing up of the indictment, and fees to court officers, as well as the cost of attending court including travel and lodging where the court was not in their own town, and possibly – as in Hamilton's case - of engaging a lawyer (Beattie, *Crime and the Courts*, p 41). Costs awards at the Surrey quarter sessions of 1767 ranged between seven shillings and a guinea, but probably did not represent the full cost of bringing the prosecution (Beattie, *Crime and the Courts*, pp 46-7). A rough translation into current money values places those costs as between £27.47 and £82.40 at 2002 values (Economic History Services, 'How Much is That Worth Today?', www.eh.net/ehresources/howmuch/poundq.php, accessed 29 September 2004); perhaps a more illuminating statistic is that a head housemaid would earn about £5 a year, so a prosecution would cost her around two months' wages (MS Coins, 'Costs and Wages in Great Britain', http://www.geocities.com/RodeoDrive/7503/greatbritainmoney.html, accessed 28 November 2006, using information taken from Christopher Hibbert, *The English: A Social History, 1066-1945* (1987)).

[162] Not the least such inconvenience could be the failure of the prosecution on a technicality, such as an incorrect name or date (Hay, 'Property, Authority and the Criminal Law', p 33).

offender to victim were available instead;[163] where the victim did not want to bring a capital charge against the offender; or where the victim was either too embarrassed or too intimidated by the offender and their associates to prosecute.[164]

Where a prosecution was brought, the private prosecutor had a great deal of discretion in choosing the charge (and hence the potential severity of punishment) and even whether to continue with the case at all. By dropping it, they would ensure that the alleged offender went unconvicted and unpunished.[165] Such a decision was taken by at least one "wife" of a "female husband", as discussed above.

The prosecutor rarely employed a lawyer, although some might engage a solicitor to prepare the bill of indictment (otherwise, the clerk of the peace would prepare it for the quarter sessions, the clerk of the assizes for the assize court).[166] The Treason Trials Act 1696 permitted defence counsel for the first time, and only in treason trials; from the 1730s, however, new prosecution techniques (including the use of prosecution lawyers) led to defence counsel being permitted to cross-examine prosecution witnesses in many more types of criminal trial.[167] The majority of known "female husband" cases, therefore, coincided with the last days of amateur prosecution. I would suggest that the change to professionalised trials with the growth of the state's role in investigation and prosecution of offences was also a factor in the apparent lessening of such prosecutions after the mid-eighteenth century, and was consistent with policies of silencing lesbianism.

That the absence of a criminal offence of lesbianism, and its exclusion from the definition of sodomy, did not prevent many people from regarding lesbian sexual activity as criminal is apparent from the various references to lesbian sexuality which term it such. Thus Hester Thrale defined 'Sapphist' as a woman who liked "her own sex in a criminal way";[168] an anonymous pamphlet talked of "Tommies" as committing "Unnat'ral Crimes";[169] James' *Medical Dictionary* defines "Tribads" as women with enlarged clitorises who "make Attempts to converse in a criminal

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[163] Emsley, *Crime and Society*, pp 178-181; Beattie, *Crime and the Courts*, pp 39-40.
[164] Emsley, *Crime and Society*, p 188; Beattie, *Crime and the Courts*, p 40.
[165] Hay, 'Property, Authority and the Criminal Law', p 41.
[166] Emsley, *Crime and Society*, pp 184-185.
[167] Langbein, *The Origins of the Adversary Criminal Trial*, pp 3-4.
[168] Hester Lynch Thrale Piozzi, *Thraliana: the Diary of Mrs. Hester Lynch Thrale (Later Mrs. Piozzi), 1776-1809*, ed. Katherine C Balderston, Oxford: Clarendon Press, 1951, cited in Donoghue, *Passions Between Women*, p 4.
[169] Anon, *The Adulteress*, London: S Bladon, 1773, pp 25-6, cited in Donoghue, *Passions Between Women*, p 5.

manner with other Women";[170] while the anonymous author of *Plain Reasons for the Growth of Sodomy* referred to women "criminally *amorous* of each other, in a *Method* too gross for expression".[171]

- **Motivations for marriage**

The eighteenth-century women prosecuted for their lesbian relationships (mostly "female husbands") were usually charged with financial offences: a consequence of the policy of silencing. The deception was generally the impersonation of a man in order to obtain the "wife's" marriage portion (which may have been as humble as her personal clothing) since under the law of coverture all her possessions became her husband's upon marriage. This attribution of a financial motive to the offence functioned to hide the emotional and sexual motivations for many, perhaps most, such relationships.

It is impossible to be certain of the motives of such "female husbands". They are rendered unclear by lack of evidence, by the need of the prosecutrix to deny that she was aware of her "husband's" true sex, and by the courts' determination to deny any emotional or sexual motivation for such marriages. Even contemporary analysts have sometimes continued the latter denial, as when Randolph Trumbach states "it is likely that most women who dressed and passed as men for any length of time, did not seek to have sexual relations with women and this was probably true even of those who married women".[172]

However, as Donoghue argues,

> When a woman passed as a man and married a woman, it seems fair to me to assume that one of her primary motives was erotic. (Women who married men in this period, on the other hand, were often clearly motivated by financial need.)[173]

Lesbian historians have frequently made the point that where there is no evidence of a sexual relationship, nonetheless an erotic relationship is readily assumed for a heterosexual couple. By contrast, positive proof tends to be demanded before a

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[170] Robert James, *A Medicinal Dictionary* London: T Osborne, 1743.
[171] London, 1728, quoted in Peakman, *Lascivious Bodies*, p 179.
[172] Trumbach, 'London's Sapphists', p 115.
[173] *Passions Between Women*, p 61.

relationship is accepted as having been lesbian.[174] Although we cannot be sure of the nature of the relationship between some of the women discussed here, and indeed there may have been no genuine emotional or sexual bond in some of the cases, they seem to deserve a place in lesbian legal history. First, the definition of lesbianism which I discussed in the Introduction does not depend upon evidence of genital sexual activity. Second, given the prejudices of the time, the policy of silencing and the partial, limited evidence which survives, such strong grounds as these cases do provide for suspecting that they belong in lesbian legal history must be sufficient, if our standards of proof are not to erase the possibility of lesbian history altogether.

A different issue is whether these women are better placed in lesbian or transgender history: Alison Oram suggests that while "[i]n the 1980s cross-dressers may have been claimed as lesbian or gay ... from the 1990s they are likely to be interpreted as transgender".[175] Of course, we cannot know for certain how all of these women identified themselves since the evidence which we have is mostly composed of observations and interpretations by others rather than the words of the women themselves. Further, Oram has discussed in some depth the difficulty of distinguishing between cross-dressing, transsexuality or (latterly) transgender, and lesbianism, and notes that the interrelationship between these has diverged only relatively recently.[176]

Rather than attempt to disentangle matters any further, I would argue that such cases belong in lesbian history even if they may have some relevance to transgender history too. Indeed, it is arguable that those marriages which came before the courts fit more comfortably into lesbian history given the general absence of recorded explanations suggesting any kind of nascent transsexual identity.[177] Although transsexuality was not a concept available to eighteenth-century women, that of hermaphrodism was, yet none of the women are reported as describing or considering themselves as hermaphrodite.[178] Hermaphroditism was very much a possibility in the

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[174] See for example Lesbian History Group, *Not a Passing Phase: Reclaiming Lesbians in History 1840-1985*, London: The Women's Press, 1989, pp 3-8.
[175] Alison Oram, 'Cross-dressing and Transgender', in H G Cocks and Matt Houlbrook, *The Modern History of Sexuality*, London: Palgrave Macmillan, 2006, pp 256-285 at p 259.
[176] *Ibid.*
[177] Of course, the court records are partial and selective: a great deal of what these women might have said about their motivations was not recorded.
[178] One exception was the case of Constantine Booth in 1719; she was convicted for a fraudulent marriage, but had also been exhibited as a hermaphrodite (Randolph Trumbach, 'London's Sapphists', p 122, and see above).

culture of the eighteenth century, and a common explanation of sexual relationships between women in both medical and popular literature,[179] one which would be likely to be within their knowledge and that of the courts. Instead, it seems that the women generally saw themselves as women masquerading as men, rather than people whose female bodies did not match a more fundamental male identity. More importantly, the courts saw them in that way too: as I discussed in the Introduction, if we are to develop a history of this area of the law, we must look at what the court perceived a particular relationship to be and (without assuming that the court's analysis is necessarily the correct one) take that as our starting point for analysing legal attitudes to such relationships. That the court may have made a mistake on a particular occasion in categorising a defendant simply as "a woman who married another woman" does not alter the fact that that case shows us a great deal about how the courts viewed marriages between women. On the limited evidence available, neither these women nor the courts appear to have disputed their gender and thus they cannot be presumed to fall more comfortably in a transgender rather than lesbian history. They may, of course, belong in both.

- **Masculine women and criminality**

The *Newgate Calendar* seemed to delight in the downfall and punishment of Hamilton; it gave equally short shrift to another woman, Hannah Dagoe. Though there is no overt suggestion of lesbianism in her case,[180] her masculinity is emphasised throughout the report. An Irish woman who worked at Covent Garden as a basket-woman, she burgled the home of a widow, Eleanor Hussey, whom she knew through her work. She was sentenced to death, and duly died by hanging on 4 May 1763. However, Hannah Dagoe did not allow her execution to go as planned. Instead, she

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[179] For further discussion of the hermaphrodite in the eighteenth century, see Jones and Stallybrass, 'Fetishizing Gender', pp 80-111; Emma Donoghue, 'Imagined More Than Women: lesbians as hermaphrodites, 1671-1766', (1993) 2(2) *Women's History Review* 199-216. Donoghue suggests that "the 'tribade' was a ... specific label which bound into an intimate couple the ideas of lesbian sex and hermaphroditical anatomy. This slippage between the two concepts went both ways; it was rare to find either mentioned without the other." (p 200). However, such a coupling was not typically apparent in the legal texts which I have considered (an exception can be found in some aspects of the judgements in the *Woods and Pirie* case discussed in Chapter 3); Donoghue's examples are literary and medical.

[180] Indeed another contemporary account provides her with an extensive heterosexual history: a marriage while imprisoned for debt to a Spanish seaman, Diego, from whom she took her surname, and a relationship or marriage with the prison keeper, William Connor (Anonymous, *A Genuine Account of the Remarkable Life and Transactions of John Rice, Broker, for Forgery. Paul Lewis, a Highwayman. And Hannah Dagoe, for stealing Goods out of a Dwelling-House. Also, their Behaviour, Confession, and Dying Words, (Who were Executed at Tyburn on Wednesday the 4th of May, 1763.) Written by a*

got her arms free and "gave [the executioner] so violent a blow on the breast that she nearly knocked him down", then gave away some of her clothes to the crowd "in order to revenge herself upon [the hangman], and cheat him of his dues".[181] Finally, "he got the rope about her neck, which she had no sooner found accomplished than, pulling out a hand kerchief, she bound it round her head and over her face, and threw herself out of the cart, before the signal was given, with such violence that she broke her neck and died instantly."[182]

The *Newgate Calendar* is partial, opinionated and colourful in its accounts of trials. It is not afraid to celebrate or sympathise with some of the criminals it discusses. However, the response to Hannah Dagoe contains no approval or admiration for her independence and rebellious behaviour. Instead, she is stigmatised as "daring", "a strong, masculine woman, the terror of her fellow-prisoners", violent, vengeful, and a cheat (incredibly, it is implied that she was treating the executioner unfairly).[183] The combination of unwomanliness, violence and fraudulence is therefore strongly echoed here. Indeed, it is possibly exaggerated since in another, anonymous account of her case, Dagoe is described as giving "her capuchin and some other little matters" to the crows, twice freeing her hands, pushing the executioner, and denying her crime, but finally being subdued and hanged alongside two others; behaving throughout with "a more than masculine boldness in her manner".[184]

Dagoe's unruly masculinity is further emphasised by the contrast with the victim, a "poor and industrious" widow whose household furniture is "creditable".[185] Since Hannah Dagoe earned her own living too, the main contrast appears to be between the victim's femininity and domesticity, linked to her heterosexuality, and the defendant's masculinity, reflected by the lack of any reference to her marital status and reinforced by her Irishness (and hence racial otherness). Although sexuality is not an overt issue, the woman who does not conform to patriarchal stereotypes nor accept her assigned role within patriarchal systems is vilified.

A further comparison, with Sarah Penelope Stanley,[186] is instructive. Stanley disguised herself as a man and served in the Ayrshire Fencible Cavalry for one year,

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Gentleman who attended them before their Execution. London: T Trueman, 1763, pp 23-24).

[181] Part of the hangman's payment would usually take the form of the executed person's clothes.

[182] *The Complete Newgate Calendar*, Vol IV, p 17.

[183] *Ibid*, Vol IV, p 17.

[184] Anonymous, *A Genuine Account of ... Hannah Dagoe*, pp 31-32.

[185] *The Complete Newgate Calendar,* Vol IV, p 16.

[186] *Ibid*, Vol IV, pp 221-222.

and was honourably discharged when her sex became known. She thereafter came to London, where she stole a cloak and was convicted of petty larceny. How is this thieving woman seen by the Annual Register? The answer, surprisingly, is with the greatest sympathy: she stole, we are told, "through mere necessity" and was given money by court personnel before leaving court. This sympathetic attitude appears to reflect her construction as deserving of sympathy and understanding because she donned male attire only after having to leave her "idle, dissolute" husband who had reduced them to poverty. She showed proper repentance for her crime and, critically, left court "promising henceforward to seek an honest livelihood in the proper habit of her sex". Thus, despite her "masculine appearance", Sarah Stanley had proven herself heterosexual and willing to return herself to patriarchal control. Any threat she potentially posed was neutralised by her own submission to the heteropatriarchy, a submission expressly refused by Hannah Dagoe and at the least, not offered by Ann Marrow. Her choice to live within the deeply hierarchical regiment, under direct male discipline, and her subsequent failure to live an effective independent life in London no doubt also helped.

Why were these women punished?

The reaction of the prominent citizens of Glastonbury to Hamilton's exposure is revealing. Their response, Thomas Hughes's letter to Gould, was both first in time and by someone particularly close (at least geographically) to those involved. It is notable that the terms of this letter show none of the indulgence or disbelief which some commentators have considered to have been the usual response to pre-twentieth century lesbians. Clearly, while there was no obvious offence committed, no doubt existed that the conduct was criminal. Further, it should attract not just a token punishment but "be punished in the severest manner the Quarter Sessions can". The desire to see Hamilton "well whipt" suggests a somewhat visceral aversion to her behaviour, and a desire for physical retribution to be exacted upon her. This wish to inflict personal violence upon lesbians was not unique to Glastonbury's "principal inhabitants", as I discussed above.

Faderman argues that what is being punished in these cases is transvestism with its explicit seizing of male prerogatives. Although she concludes that "[t]he claim of male prerogative combined with the presumed commission ... of certain sexual acts, especially if a dildo was used, seem to have been necessary to arouse

extreme societal anger" she suggests that the impersonation of men was considered "far more serious than simply having sex with other women".[187] Consistent with this is the courts' emphasis upon use of a dildo as an aggravating feature. Lynne Friedli takes a similar approach, focussing in particular upon the "implied rejection of the maternal role and appropriation of the sexual role of the male" to argue that prosecution "for fraud suggests that the major issue was deception and the consequent usurpation of rights and privileges, rather than sexual deviance in itself."[188]

The problem with such interpretations is that they fail to account for the lack of similar condemnation and punishment of other women who wore male garb: Julie Wheelwright, for example, has written a book-length account of women who lived with men, the majority of whom were soldiers and sailors.[189] They also ignore other more silenced forms of legal condemnation which probably affected non-transvestite lesbians, such as the use of the Statute of Artificers discussed in the previous chapter.

By contrast, Donoghue focuses upon the sexual behaviour involved, arguing that female husbands attracted the law's attention because lawmakers felt threatened by lesbianism and cross-dressing in combination: a "crime ... neither purely social nor purely sexual"[190] but containing both elements. Yet a third interpretation is the suggestion of Castle, in her analysis of Fielding's writing on women who cross-dressed, that transvestism was threatening both because "sexual hierarchy (and the maintenance of masculine domination) depend on the sexes being distinguishable" and because of "masculine fears of lesbianism".[191]

I would suggest that in fact what drove the courts to greater severity in these cases was the attempt of women to live together without male involvement. As we have seen in cases such as that of Sarah Penelope Stanley, cross-dressing was not in itself viewed with great hostility, and was frequently condoned. Indeed, Vern L

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[187] *Surpassing the Love of Men*, p 52.
[188] Lynne Friedli, '"Passing Women" – A study of gender boundaries in the eighteenth century' in GS Rousseau and Roy Porter (eds), *Sexual Underworlds of the Enlightenment*, Manchester: Manchester University Press, 1987, pp 234-260 at p 237.
[189] Julie Wheelwright, *Amazons and Military Maids*, London: Pandora, 1989 The case of Sarah Penelope Stanley is not untypical in this regard: there were numerous cases of women who entered the armed forces in male disguise, and were not punished when their masquerade was discovered: significantly, they tended to claim a heterosexual motivation for their actions, such as searching for a lover (for further examples, see Wheelwright, *Amazons and Military Maids*, and Faderman, *Surpassing the Love of Men*).
[190] Donoghue, *Passions Between Women*, p 61.
[191] 'Matters Not Fit to be Mentioned', p 615.

Bullough argues that in the middle ages, when masculinity was associated with greater intellect and spirituality, male impersonation was viewed favourably:

> The women who did cross dress seemed not only to gain higher status but were much admired for their ability to live among men as a man.[192]

While I have identified the eighteenth century as a period when attitudes to gender were changing and under challenge from new social, economic and medical models, such attitudes did not alter overnight.[193] Indeed, many surviving reports suggest that although the arena for male impersonation had generally changed from the religious community to the military, the response was very similar. An attempt by a woman to adopt the superior qualities of a man was understandable, and a successful attempt laudable; while a life under religious or military discipline did not place her outside patriarchal control.[194]

The difficulty for the male impersonator came when she went further than this, and rejected male authority. It is significant that our female husbands chose to establish their own homes, with wives: this meant not only a sexual component to the masquerade apparently absent in other cases, but also a failure to remain under direct male authority in the form of a religious superior or military officer. Such withdrawal or chosen separation from men was seen to pose a real threat and thus to be deserving of criminal sanction. Lesbian relationships which did not prevent the women involved from marrying and remaining firmly within patriarchal society were less problematic, as were cases of cross-dressing where the women involved demonstrated (or pretended) at least some willingness to submit to heteropatriarchal norms. What the courts needed to prosecute and punish was the adoption of a lifestyle based upon female self-sufficiency and mutual support and overt independence from men. The need to punish such lesbian relationships was based upon an understanding of the danger of public role models for female independence from heteropatriarchal relationships.

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[192] Bullough, 'Cross Dressing and Gender Role Change', p 229.

[193] Print literature was perhaps ahead of the courts here: as Castle notes, popular prints showed female warriors as symbols of the world turned upside-down - although at least some such prints may have been radical rather than condemnatory in intent - while writers such as Fielding attacked masculine women in print (Castle, 'Matters Not Fit to be Mentioned', p 615).

[194] Fraser Easton notes that the woman warrior was "generally viewed as properly subordinate and industrious" ('Gender's Two Bodies: Women Warriors, Female Husbands and Plebeian Life' (2003)

The particular method of achieving that independence, by emulating heterosexual marriage, left the "husbands" in a uniquely vulnerable position, ironically because their use of the heteropatriarchal model for relationships neutralised much of the danger of prosecuting and thereby publicising their lesbianism. They could be presented not as offering an alternative to heteropatriarchal structures and households but rather as having attempted a poor, often laughable facsimile of them. Further, the nature of their disguise prevented any building of a network or movement, and as Wheelwright points out, "such staunch individualists ... presented little threat to the established order."[195]

The actual or alleged use in some cases of facsimile penises enabled the sexual elements of these relationships to be described without publicising the possibility of non-penetrative sex. Indeed, Fielding in his fictionalised account of the Hamilton case went so far as to invent the discovery and public production of such an item. Thus, overly public lesbianism could be punished, and even made notorious, with no or only minimal revelation of a lesbian alternative not modelled upon vaginal penetration by a dominant (pseudo-) male. By focusing upon the inferiority of the "husbands'" attempts to pass as male (the home-made phalluses, the feminine reliance upon youth and a pretty face), popular accounts portrayed these women as pitiful and/or laughable deceivers of gullible women rather than as strong role models for a life outside patriarchy. Consequently they elicit "recoil and fascination", in Terry Castle's phrase, but I would suggest that "the hypnotic power and subversiveness of the masquerade"[196] she also claims for Hamilton is in fact largely absent. The potential for subversion is undermined by the ultimate vulnerability of the husband, and the gullibility and hence inferiority of the wife.

Indeed, the way in which we are to interpret these women is another point of contention between historians. While Faderman, like Castle, claims female husbands as essentially feminist in their challenge to and seizing of male prerogatives,[197] to Donoghue they "do not sit comfortably on pedestals as early feminist rebels, nor can they be claimed by lesbian historians as wholesome women-loving women".[198] Like

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180 *Past and Present* 131-174 at p 133).

195 Wheelwright, *Amazons and Military Maids*, p 11.

196 Castle, 'Matters not fit to be mentioned', p 604.

197 *Passions Between Women*, p 61, quoted below.

198 *Ibid*, p 59. Similarly Mary McIntosh argues that "[w]omen who dressed as men are hardly the creditable foremothers that radical feminists would care to acknowledge", although her comment is perhaps intended more as a criticism of radical feminism than of passing women ('Queer Theory and

Donoghue, I have concerns about any wholesale adoption of women whose behaviour could be both deceitful and misogynistic towards other women as proto-feminists. In particular, a consideration of the position of their wives might temper Faderman's rather optimistic conclusion that

> Transvestites were, in a sense, among the first feminists. Mute as they were, without a formulated ideology to express their convictions, they saw the role of women to be dull and limiting.[199]

However, I am also aware that our views of female husbands cannot but be profoundly influenced by the (themselves misogynistic) accounts available to us. The only conclusion which can be responsibly reached, perhaps, is that some of these women did indeed deliberately challenge patriarchal expectations and enter into loving relationships with their "wives", while others seized not only the economic and social benefits of their disguise but also the position of dominance over other women which it lent to them. Given what I have already highlighted of the silence and lack of a consistent literary or legal approach to these women, it is unhelpful to attempt to reach any single interpretation of their motives and conduct: they were in no way a coherent group, and their motives and behaviour appear to have varied enormously.

What we can more realistically analyse, however, and what I have addressed here, are the reactions of the courts to those involved in these cases. I consider in Chapter 6 the challenges which they and their contemporary counterparts pose to our theorising, but I will conclude here by noting that the adoption of male disguise by the female husband ensured access to male privilege only for as long as it was not discovered. Once exposed, she and her "wife" were vulnerable to a simplistic reading of their relationship as fake, insubstantial and unthreatening: a failed imitation of the heterosexual ideal. Thus while such marriages certainly posed challenges to heteropatriarchal norms (for which the "husband" suffered vicious physical punishment), they could be revealed publicly precisely because of their vulnerability to derision and disdain.

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the War of the Sexes' in Joseph Bristow and Angelia R Wilson (eds), *Activating Theory: Lesbian, gay, bisexual politics*, London: Lawrence & Wishart, 1993, pp 30-52 at p 36.

[199] *Surpassing the Love of Men*, p 61.

Conclusion

In assessing the policy of silencing and its implications for the treatment of lesbians in the criminal justice system, these seventeenth- and eighteenth-century cases play a crucial role. They show both the extent to which silencing was used to mask the true nature of the crimes behind essentially financial charges, and the ways in which silencing failed to amount to criminal impunity for lesbian relationships.

At a time when legal silence was adhered to, and when extra-legal discourses upon sexuality also had little to say about lesbianism to non-male audiences, nonetheless women not only had relationships with each other but were also prosecuted for them. Not all relationships were prosecuted, but those which were shared significant common features. In particular, the close mimicry of heterosexual relationships enabled small breaches in the policy of silencing without danger of suggesting that truly autonomous and successful sexual relationships between women were possible.

Ending as we began, then, with Mary Hamilton's case, we can see that her impersonation of a man allowed her to pursue a career as a travelling quack, enjoying independence and geographical mobility. However, once she embarked upon a marriage with Mary Price, the impersonation became more dangerous and ultimately ended with her conviction and punishment. Her wife, despite being the chief witness and giving her own deposition, did not bring the prosecution herself and remains a shadowy figure in reports of the case. A failure to pay too much attention to her allowed her to remain portrayed as a duped heterosexual woman, thereby avoiding awkward questions about whether she might actually have chosen to marry a woman in preference to a man: a notion too threatening to be seriously entertained.

We can also see that Hamilton and Price were not isolated examples, but part of a wider context where women who disguised themselves as men might go unpunished and even admired, but where women who married other women suffered serious legal consequences through prosecutions for carefully non-sexual offences such as fraud, which hid the true motivations for their behaviour. Further, those punishments do not form anomalies or islands of leniency within the criminal justice system of the time and its 'Bloody Code' but rather reflect its concerns with deception and fraud, and its use of a wide range of largely corporal punishments beyond the notorious capital punishment upon which many analysts focus.

Silencing, then, did not (as some historians have suggested) leave lesbians unpunished and tolerated. Instead, it led to a more selective approach to prosecution and punishment. The cases which appeared in the courts and periodicals of the time were those which could leave the overall policy, and with it patriarchal power relations, unchallenged: those which showed a close but inadequate and ultimately unsuccessful mimicking of those very power relations and norms. We will see in the following chapters that those considerations effectively set a pattern for the following centuries, with remarkable consistency in the types of cases prosecuted even as the criminal justice system and wider social context changed.

Chapter 5

From Mary "Bill" Chapman to "Colonel" Barker: from passivity to deviance

In spanning the nineteenth and early twentieth centuries, this chapter sees significant changes in approaches towards female sexuality, and lesbianism in particular. The eighteenth century had brought a move from one-sex to two-sex models of sex; this growing belief in fundamental sexual difference between men and women continued to gain scientific acceptance, and helped to form the doctrine of female sexual passivity. However, while that was complementary to the policy of silencing, the end of the century saw a new, "scientific" conceptualisation of lesbianism as sexual deviance which was ultimately to prove a threat to that policy. Following that arc, I focus upon two rather different case studies marking either end of this period, the prosecutions of Mary Chapman and of "Colonel Barker" (Valerie Arkell-Smith).

In considering these two events, and contrasting them both with each other and with earlier prosecutions, we can analyse the development of the criminal justice system's discourses around lesbianism. We will see not only the changes in those discourses, but also the continuities which persisted across several centuries (and, as we will see in the next chapter, continue to persist into the present one).

Mary Chapman

Inspector Oakley brought Mary Chapman, alias Bill Chapman, before the court in Hatton Garden on 31 January 1835[1] for being a common cheat and impostor.[2] The basis of the charge was that she had (for at least ten years) dressed as a man, and travelled the country with her "wife" Isabella Watson, both working as ballad-singers. Mary Chapman was clearly working-class: she had a "rough manner", was "a crier of 'The last dying speeches,' &c" (ie she sold her ballads at public hangings), "known at every race-course and fair", wore a "smock-frock",[3] and lived in the notorious St Giles's in London.[4] Mr

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[1] 'Latest News in London', *The Bell's New Weekly Messenger*, 1 February 1835, p 73.
[2] Anonymous, *Sinks of London Laid Open*, London: J Duncombe, 1848, footnote to Chapter 10, p 69, reproduced in Lee Jackson, *The Victorian Dictionary*, www.victorianlondon.org, accessed 2 October 2004.
[3] According to *The Bell's New Weekly Messenger*, this was "the better to conceal her sex."

Bennett (the magistrate, although the report does not spell this out) expressed both his disapproval and his impotence:

> She may be a disorderly and disreputable character, which, in fact, her dressing as a man clearly shows, but I know of no law to punish her for wearing male attire ... I wish it was in my power to imprison her ... It is a case that puzzels [*sic*] me, but I must discharge the prisoner.[5]

His inability to act was the more galling since he suspected the motives of her masquerade: "She may have more than one reason for dressing in that manner, and passing as the husband of the woman Watson, and I wish it was in my power to imprison her."[6] It is notable that the hints of a sexual relationship appear to disturb him far more than clear evidence of domestic violence: his response to the officer's information that "whenever Watson gives her any offence, she beats her and blackens her eyes, though Watson is so much taller and apparently stronger" is simply to say, "It is a very extraordinary case."[7]

While the case appeared in newspapers,[8] the surviving court records show no trace of it, although there is in the "Indicted Now" list for 26 February 1835 a "Hale William Indicted now by the name of Harvey Ann Indicted now by the name of Harvey Mary Ann."[9] One can only speculate as to whether the records of the Chapman case are lost or whether the newspaper reports upon which the account is based may have changed Mary Harvey's name to Mary Chapman for reasons of their own.

"Colonel Barker"

In contrast to Mary Chapman, Valerie Barker was born into an upper-middle-class family, in Jersey in August 1895.[10] In April 1918, she married an Australian, Lieutenant Harold Arkell Smith,[11] but the marriage was not a success: her husband returned to

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[4] Anon, *Sinks of London Laid Open*, footnote to Chapter 10, p 69.
[5] *Ibid*, p 69.
[6] *Ibid*, p 69.
[7] *Ibid*, p 70.
[8] 'Latest News in London', *The Bell's New Weekly Messenger*, 1 February 1835, p 73.
[9] London Metropolitan Archives, document MJ/SB/B/0940.
[10] Rose Collis, *Colonel Barker's Monstrous Regiment: A Tale of Female Husbandry*, London: Virago, 2001, p 32.
[11] *Ibid*, p 52.

Australia in 1919, by which time she had fallen in love with his compatriot Ernest Pearce Crouch. She lived as his "wife" first in the outskirts of Paris and later on a farm in Sussex, and had two children by him.[12]

However, Crouch was violent and Valerie left him to live as a man since

> I felt that as a woman I was helpless ... I had dressed as a man because I found a man's clothes more comfortable and convenient for the work I was doing. ... I would be able to screen myself against all the tortures, miseries and difficulties of the past, and work out my own salvation. No man should ever come into my life again. No man should have it in his power to break and ruin me.[13]

She[14] was joined by her close friend Elfrida Haward, who had previously known her as a woman. Apparently, Barker told her that she was a man who had impersonated a woman following a war injury (this was certainly the story told to Haward's parents). Haward would later maintain that she believed this story:

> Even though I had known her as a woman it was easy to accept her statement that she was a man. Her figure, manner, handwriting, interests – every conceivable thing was masculine.[15]

Although the two women posed as fiancés, Haward's parents put pressure on them to marry for the sake of propriety. They did so in a Brighton church on 14 November 1923.[16] What happened next was a matter of public dispute; while Haward claimed that "everything proceeded in an entirely normal manner. My honeymoon was a perfectly normal one",[17] Barker insisted that "our friendship was purely platonic";[18] "we were never anything more than friends".[19] By 1937, she was even more emphatic: "throughout the whole story, one thing should be remembered, that never have I had unnatural

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[12] *Ibid*, pp 60-63.
[13] *The Leader*, 11 September 1937, p 7.
[14] I refer to Barker as 'she' throughout, both because the court treated her case as concerning a woman who had disguised herself as a man rather than as someone who had *become* a man, and because consistent use of a pronoun offers greater clarity than shifting between "he" and "she" on a fairly arbitrary basis.
[15] *Sunday Dispatch*, 10 March 1929, p 2.
[16] Collis, *Colonel Barker's Monstrous Regiment*, p 94.
[17] *Sunday Express*, 10 March 1929, p 3.
[18] "Colonel Barker", *Sunday Dispatch*, 10 March 1929, pp 1 and 5 at p 5.
[19] "Col. Barker", 'Man-Woman's Second "Wife"', *Sunday Dispatch*, 17 March 1929.

instincts, never have I in the slightest been a sexual pervert".[20] Haward gave further details to the police: "at the time of the honeymoon, sexual intercourse took place in a normal way, but in consequence of what had since transpired she is now of the opinion that artificial means were employed by Colonel Barker."[21]

Following the marriage, Barker moved between towns and jobs, including acting in Brighton Repertory Company, conducting an antique furniture business in Andover, acting again in Mrs Pat Campbell's Company in London, and working as secretary to Colonel Seymour, president of the "patriotic" and anti-Semitic National Fascisti Movement.[22] In this latter post, she came close to discovery in July 1927 when she and her employer were charged with firearms offences. She admitted that her name was not Barker, but claimed that there were family reasons for withholding her true identity. Perhaps in an attempt to gain the jury's sympathy, she attended court with bandages over her eyes claiming temporary blindness as a result of a war wound.[23] Barker was acquitted, largely on legal grounds, and although ongoing police inquiries uncovered rumours that "he" was a woman, these went unproved.[24]

Barker's sex was finally discovered in consequence of her next employment. She bought a café in Lichfield Street, Charing Cross Road, London from Edith Maud Roper Johnson. However, the café was unsuccessful: Barker abandoned the café without leaving a forwarding address and went to work as a reception clerk at the Regent Palace Hotel. Roper Johnson brought bankruptcy proceedings in respect of outstanding payments. The court documents in those proceedings were sent to the café, unknown to Barker who thus failed to attend court as ordered. She was arrested and imprisoned in HMP Brixton for contempt of court. Almost as soon as she arrived there on 28 February 1929, her sex was discovered:

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[20] *The Leader*, 11 September 1937, p 6.
[21] Inspector Walter Burmby, *Central Officer's Special Report*, 22 April 1929, PRO MEPO 3/439.
[22] Untitled report, PRO MEPO 3/439, pp 2-3.
[23] Letter from J Partridge to the Under Secretary of State, War Office, 20 August 1927, PRO MEPO 3/439; report of Inspector Briddon, 5 August 1927, PRO MEPO 3/439.
[24] See generally the documents in the second folder of PRO MEPO 3/439. Apparently some steps were taken to investigate the rumour, since according to Barker herself, "[i]t is said there had been rumours with regard to my sex, and this ex-police officer, a big burly fellow, was sent to the Mascot to find out the truth. I do not remember the incident, but I am told I satisfied the ex-policeman, who went away convinced I was a man" ("Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929).

> The usual inventory of property was taken, and prisoner was stripped, except the shirt. Prisoner was wearing a very deep belt under the shirt, and when told to remove it, said – "I can't take that off". I said "the Medical Officer will decide that" and prisoner was passed into the Medical Officer. Dr Brisby came out and informed me that it was a female.[25]

Dr Brisby himself gave more details of the examination, including the following intriguing exchange:

> "He" said "I do not want to be medically examined". I said "Why, are you a woman?" He said "No".[26]

Unfortunately, his statement does not elaborate further as to whether Dr Brisby actually suspected that Barker was a woman,[27] or simply used the suggestion of femininity as a standard barb when prisoners were uncooperative. Once he confirmed Barker's sex, she was taken to a room in the prison's Hospital and "[a]s soon as it was apparent that she was a female arrangements were made for her immediate transfer to Holloway Prison."[28]

Very quickly, details of Barker's past life were obtained:

> It appears she has been masquerading as a man for a number of years. She has held a post as a male Superintendent of a restaurant for some time. She has a son who calls her "Daddy" and has been living with a woman who I understand believes she was [*sic*] a man.[29]

Barker was subsequently charged with two perjury offences: the first for making a false entry in the marriage register and the second in respect of an affidavit sworn by her in the name of Victor Barker.[30] Ironically, by this time she and Haward had been living apart

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[25] *Minutes to Head Office: Leslie Barker. High Court, Report of John T Grace,* 1 March 1929, PCOM 9/272.
[26] Statement of Francis Herbert Brisby, MB, ChB, 9 March 1929, PRO MEPO 3/439.
[27] Two years earlier, Inspector Briddon had found Barker "undoubtedly effeminate in voice and in many of his actions" (Report, 5 August 1927, PRO MEPO 3/439).
[28] *Minutes to Head Office: Leslie Barker. High Court,* 1 March 1929, PRO PCOM 9/272.
[29] *Handwritten statement of R Morton, Governor and MO, HMP Brixton,* 6 March 1929, PRO PCOM 9/272.
[30] Inspector Walter Burmby, *Central Officer's Special Report,* 6 May 1929, PRO MEPO 3/439, p 1. The latter related to the false statements in an affidavit sworn during the bankruptcy proceedings "that she was truly named Leslie Ivor Victor Gauntlett Bligh Barker, and was a retired colonel in His Majesty's Army and had been an Officer in a cavalry regiment during the late War, and acted as Messing Officer to various

for some two years.[31] When her case came to court, both she and Haward had already given their versions of events to the newspapers.[32]

Barker's case was heard in 1929, thus following quickly upon the *Well of Loneliness* case the previous year. Radclyffe Hall, a novelist of some renown and a lesbian, had based her latest work upon sexological theories of congenital inversion.[33] Its main character, Stephen Gordon, was a masculine lesbian whose nature was apparent from earliest childhood, a war hero who acted nobly and self-sacrificingly and ended pleading for her right to exist. However, that plea found no response in the courts, who found the novel obscene and banned it. This was achieved through prosecution of the publishers for obscenity, and followed press reviews of the book: most famously, the Daily Express's editor James Douglas claimed that he "would rather give a healthy boy or a healthy girl a phial of prussic acid than this novel".[34] While the legal response reflected a clear wish to enforce silence upon the subject, the damage was done: the trial was widely reported, and the subject thus carried into the nation's homes.[35] It would be unlikely that anyone would have forgotten it the following year when Barker went on trial.[36]

Barker's case was heard at the Old Bailey, where she was defended by Sir Henry Curtis Bennett KC. The prosecutor was Percival Clarke, who had also prosecuted in the firearms case (when, he now admitted, he had not suspected her true sex). A plea of guilty on the charge relating to the marriage only was accepted, but witness evidence was

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Officers Messes during the late War" (Information laid 15 March 1929 at Marylebone Police Court, PRO MEPO 3/439).

[31] Statement of Edgar Haward (father of Elfrida Haward), 8 March 1929, PRO MEPO 3/439, p 2.

[32] "Mrs Barker", '*My* Story: By the Man-Woman's Wife', *Sunday Express*, 10 March 1929, pp 1 and 15; "Colonel Barker", 'My Story: By the Man-Woman', *Sunday Dispatch*, 10 March 1929, pp 1 and 5.

[33] Although the novel itself was based upon the work of Richard von Krafft-Ebing, the foreword was written by Henry Havelock Ellis.

[34] *Daily Express*, 29 November 1927.

[35] See in particular Diana Souhami, *The Trials of Radclyffe Hall*, London: Weidenfeld, 1998.

[36] For this reason among others, I am unconvinced by Laura Doan's argument that reporters did not associate Barker's masculine dress with lesbianism ('Passing Fashions: Reading Female Masculinities in the 1920s' (1998) 24(3) *Feminist Studies* 663-700 at pp 664-665). I accept that in general a straightforward leap from masculine dress (fashionable for 1920s women in general, as Doan demonstrates) to lesbian identity would be too simplistic. However, in this case not only was the question of Barker's sexual conduct raised at the sentencing hearing, which would surely have forced the association upon the attendant journalists, but the implication of lesbianism was in fact refuted by both Barker and Haward in their accounts to the press, as I discuss in this chapter; that the refutation was made strongly suggests that the issue had been raised. Further, Doan herself establishes that the masculine look went out of fashion and gained an association with lesbianism at the time of the *Well of Loneliness* trial in 1928.

nonetheless taken by the judge before sentencing. This included evidence from Dr Brisby of Brixton Prison and from Elfrida Haward.[37]

Haward was questioned by the Recorder as to her sexual relations with the prisoner[38] and appears to have given a somewhat contradictory account:

> [Barker] "confessed" that she was really a man and in the War had been severely wounded abdominally, and in consequence was incapable of the sexual act. These statements Miss Haward believed and in consequence "married" Barker. During the honeymoon at Brighton sexual relations occurred and Miss Haward thought that everything was perfectly normal. She had no idea until the matter was reported in the newspapers that the prisoner was a woman and not a man as she believed her to be.[39]

Percival Clarke, prosecuting, seems to have placed little emphasis upon the sexual undertones to the case. Rather, for him, its aggravating feature was the use of a church: "If she wanted to marry another woman she could have done that in a Register Office, but there is no justification, it is suggested, for her abusing the Church for the purpose." It was the judge who raised the question of "whether they lived together under the normal relations of husband and wife."[40]

On 15 April 1929 Barker was sentenced to nine months' imprisonment by Sir Ernest Wild, whom we met in Chapter 3. As an MP he had been one of those proposing the 1921 amendment to criminalise "gross indecency between women". In the ensuing debate, he had argued that lesbianism, "a very prevalent practice",[41] "saps the fundamental institutions of our society" and leads to childlessness, debauchery, neurasthenia and insanity.[42] The following year, he had become Recorder of London (the

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[37] Inspector Burmby, *Special Report*, p 1. For secondary accounts of the trial, see also '"Col. Barker" Guilty on One Charge', *Evening Standard*, 24 April 1929, 'Judge on Crime of "Col Barker"', *Evening News*, 25 April 1929, and Collis, *Colonel Barker's Monstrous Regiment*. For a strangely inaccurate account, in which the judge is named as prosecutor, the sentencing hearing as a trial, Barker demotes herself from Colonel to Captain rather than promoting herself from Captain to Colonel, and a possible charge "under the amendments to the 1920 Sexual Offences Act" is posited, see Julie Wheelwright, *Amazons and Military Maids: Women Who Dressed as Men in Pursuit of Life, Liberty and Happiness*, London: Pandora, 1989, pp 1-6.

[38] Inspector Burmby, *Special Report*, p 1.

[39] *Ibid*, pp 1-2.

[40] '"Col. Barker" Guilty on One Charge', *Evening Standard*, 24 April 1929.

[41] Hansard House of Commons Debates, Vol 145(8), Column 1803

[42] Hansard House of Commons Debates, Vol 145(8), Column 1804.

senior judge at the Old Bailey) in which role he now heard Barker's case. Unsurprisingly, he took an unsympathetic view, and although he was at pains to stress that he was sentencing only for the perjury charged, he saw the taint of perversion throughout. Thus the publicity around the case was "part of the punishment of your perverted conduct" which had "profaned the House of God ... outraged the decencies of nature, and ... broken the laws of man".[43]

How do the cases of Chapman and Barker compare to those of the preceding centuries? In considering the differences in their wider historical contexts, I will concentrate upon one ideology, that of female sexual passivity, and one practical development, the changing nature of the criminal justice system. Second, how did the law's approach come to change so drastically between the two cases? The answer here is to be found largely outside the criminal justice system itself, in two other developments: the growth of psychiatry as a means of controlling female sexuality, and the development of the disciplines of criminology and sexology with their claims to scientific authority.

Comparisons with earlier cases

- **The Chapman case**

We can see various common threads between the prosecution of Mary Chapman and those of the previous century's female husbands. Chapman's story bears particular similarities to that of Mary Hamilton. Both were in rather disreputable, itinerant working-class professions (seller of quack remedies and ballad-seller respectively). Their cases raised similar issues for the courts: the confusion over what Chapman could be charged with echoes the Hamilton case; while the police allegation that she was a "common cheat and impostor" is almost identical to the characterisation of Hamilton as an uncommon notorious cheat.

Chapman's wife Isabella Watson also had her eighteenth-century counterpart. Mary Parlour, "wife" of Sarah Paul/Samuel Bundy, similarly refused to co-operate with

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[43] 'Judge on Crime of "Col Barker"', *Evening News*, 25 April 1929. Note that lay reactions to the case were substantially more mixed: for example, Diana Mosley recalled in her autobiography that "[w]e loved this story which had filled the newspapers and I was considered very lucky to be going to see the place formerly hallowed by the presence of Colonel Barker. I soon discovered, however, that one must not mention Colonel Barker at Bailiffscourt; her name was taboo and Lady Evelyn preferred to forget that she had ever existed" (Diana Mosley, *A Life of Contrasts*, London: Hamish Hamilton, 1977, p 61).

the prosecution of her partner and thereby rendered conviction impossible. Both women publicly expressed their clear intention to continue their relationships even after the exposure and abortive prosecution of their "husbands".

The contrast between the serious approach of the courts and the ridiculing of the relationships in the media remained apparent too: while the magistrate expressed concern about and disapproval of the defendant's behaviour, the reports emphasised aspects such as the small size of Chapman relative to Watson. Again, the apparent bizarreness of the case is emphasised, as if it were in some way unprecedented (although that very same week, *Bell's Life in London* had published an account of an eighteenth century husband, Mary East,[44] albeit that there had been no prosecution in that case).[45]

However, the parallels should not be pushed too far. There are several important respects in which Chapman's case differed from those of the eighteenth century. First, the prosecution was brought by a police officer, Inspector Oakley of E Division,[46] rather than by (or even with the co-operation of) the defendant's "wife". On the contrary, she showed her support in court and declared after Chapman's discharge, "Never mind, my lad, if we live a hundred years it will be in this manner."[47] As we have seen in the case of Sarah Paul alias Samuel Bundy, without the active co-operation of the prosecuting "wife" a case would fail; Chapman's case indicates that such co-operation could be similarly decisive where the "wife" was not prosecutor but simply witness.

Another crucial feature of the case is that there is no evidence of any actual marriage ceremony having taken place (this is one factor where the co-operation of Watson might have made a great difference). Without a legal marriage there would be none of the apparent financial fraud which was central to the punishment of most eighteenth-century female husbands. The irregular life of the travelling ballad-singer (either in being far from where the marriage took place by the time of the prosecution or, more likely, in never having worried about a legal marriage in the first place) and the support of her "wife" thus made it more difficult to prosecute Chapman. Nonetheless, the

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[44] 8 February 1835, p 1.

[45] A ballad of this time takes a very similar approach: the women's marriage is "[s]uch a singular thing", but also "a bit of fun ... you'll laugh till all is blue" ('The Female Husband' of c 1838, reproduced in Alison Oram and Annmarie Turnbull, *The Lesbian History Sourcebook: Love and sex between women in Britain from 1780-1970*, London: Routledge, 2001, pp 21-23).

[46] Anon, *Sinks of London Laid Open*, footnote to Chapter 10, p 69.

contrast with Hamilton's case, where the vaguer vagrancy charges were used, does suggest a difference of approach in nineteenth-century London when compared to eighteenth-century Somerset.

- **The Barker case**

Barker was very different in class and social milieu to both Mary Chapman and the defendants in earlier cases, with her middle-class upbringing and occupations, claim to military and other titles, and fashionable lifestyle. For much of the 1920s, she was active in fascist politics. As Colonel Barker, she taught young recruits the public-school sports of boxing and fencing.[48]

The press accounts of Barker's trial are replete with echoes of *The Well of Loneliness*, itself the subject of a court case the previous year, and thus sexological discourse. Barker's own account of herself, while overtly resisting the label of "deviant" or "pervert", closely resembled the life of the "born invert" in its details. Like the leading character of *The Well of Loneliness*, she claimed that she "was brought up as a boy" and later drove ambulances in France during the First World War.[49] She described herself as "highly strung and temperamental".[50] Despite her heterosexual history of love affairs and marriage, she "had very little to do with men and was rather innocent ... [men] had been my best pals ... there had been no sex stuff."[51]

Yet, at the same time as she told a story parallel to that of the sexological invert, she felt obliged to vigorously defend herself against charges of perversion, that particular idea of sexual deviancy invented by the sexologists and now becoming common currency. By 1937, she was even emphasising her essential femininity: "I have always been a woman, inwardly yearning for the normal life of a woman ... I could wear a girl's clothes with grace".[52] In contrast to those unappealing female inverts, she portrayed

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[47] *Ibid*, p 70.
[48] Martin Pugh, *Hurrah for the Blackshirts! Fascists and Fascism in Britain Between the Wars*, London: Pimlico, 2005, p 54; "Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929.
[49] "Colonel Barker", *Sunday Dispatch*, 10 March 1929, pp 1 and 5 at p 5.
[50] *Ibid*, p 5.
[51] *Ibid*, p 5.
[52] Valerie Arkell-Smith, 'Col. Barker – the Man-Woman who Hoaxed the World', *The Leader*, 11 September 1937, p 6.

herself as attractive to men: "[t]hree times that year men proposed marriage to me".[53] Like certain of her eighteenth-century predecessors, she seems to have realised that safety was to be found in the promise of a return to heteropatriarchal norms; unfortunately, her enthusiasm for the masquerade and her choice to continue it beyond her release from imprisonment limited the credibility of such a claim.[54]

Common threads with earlier cases remained strong. The audience was led to believe that this case was "an unprecedented exploit".[55] Barker claimed economic motivations (dependent for employment upon her knowledge of horses and farmwork, "I simply had to become a man – I had to")[56] but also that classic form of mitigation, a disappointment in (heterosexual) love:

> The first tragedy of my life ... was when the man I loved and should have married was taken prisoner early in the war. He was a major in the infantry, 20 years older than myself. If I had married him this would never have happened. I was frightfully fond of him – now I am fond of nobody.[57]

Like her predecessors with their apparent aptitude for male occupations, appeal to women, and violent temperaments, Barker was endowed with a masculinity greater than that of actual men: according to Haward, "everything about her suggested that she was really a man", "extraordinarily handsome", "a marvelous cavalier", [58] who "could do a tremendous day's work, and lift weights and dig and plant in a way that would have exhausted any ordinary man" and once "carried [Haward] – with no more difficulty than if [she] had been a kitten".[59] The acclaim, she suggested, was not from her alone:

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[53] *Ibid*, p 6.
[54] Colonel Barker would twice in later years appear before the criminal courts under different names, but still in male guise. However, as neither of these later trials involved alleged relationships with women, they fall outside the scope of this thesis: for discussion of them, see Collis, *Colonel Barker's Monstrous Regiment*, and James Vernon, 'For Some Queer Reason: The trials and tribulations of Colonel Barker's masquerade in interwar Britain', (2000) 26(1) *Signs* 37-62.
[55] *News of the World*, 10 March 1929, p 9, cited in Collis, *Monstrous Regiment*, p 148.
[56] "Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929; "Col. Barker", 'Man-Woman's Second "Wife"', *Sunday Dispatch*, 17 March 1929.
[57] "Colonel Barker", *Sunday Dispatch*, 10 March 1929, pp 1 and 5 at p 5.
[58] "Mrs Barker", *Sunday Express*, 10 March 1929, pp 1 and 15 at p 1.
[59] *Ibid*, p 15.

"waiters used to surround him and show their admiration for his knowledge of wines and food" while "[in] every hotel we ever stayed at women had fallen in love with him".[60]

To a Mons veteran Barker was "the finest type of officer and gentleman".[61] She was an important member of the "militantly anti-semitic" National Fascisti,[62] part of a political movement whose appeal to the upper-middle and upper classes[63] suited her own role as "gentleman", and whose involvement in physical fights with communists again allowed for an excessive show of masculinity. Indeed, the very claims of the group were in their own way similarly excessive:

> They pose as super-patriots, a hundred percent British, yet they take their name and inspiration from a foreign movement utterly un-British in its ideas or methods.[64]

She "boxed with [members], taught them fencing and discussed the difficult problems of young men's lives with many of them",[65] and was "always ready to join in any of the fracas the young men had with the Communists".[66] Such exemplary masculinity of course carried with it a strong streak of misogyny: "it is difficult to express the loathing and contempt I felt as I watched some [women] preen and trick themselves out to capture the attention of some man".[67] Ironically, however, it is her very femininity which accounts for her masculine success with other women: "being a woman I knew exactly the little attentions which would appeal to them".[68]

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[60] *Ibid*, p 15.
[61] "Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929.
[62] Pugh, *Hurray for the Blackshirts*, p 53. This organisation did not attract a huge membership, but was visible and skilled at publicity (see Julie Wheewright, '"Colonel" Barker: A Case Study in the Contradictions of Fascism' in Tony Kushner and Kenneth Lunn (eds), *The Politics of Marginality: Race, the Radical Right and Minorities in Twentieth Century Britain*, London: Frank Cass, 1990, pp 40-48 at p 43.
[63] Members of the British Fascisti, which Barker originally joined and of which the National Fascisti was a splinter group, included the Earl of Glasgow and Viscountess Downe (Collis, *The Mounstrous Regiment*, p 115). Ironically, the founder of the British Fascisti, Rotha Lintorn-Orman, was herself known as the 'Man-woman' for her habit of wearing men's clothes and her enthusiasm for women learning unfeminine skills such as changing tyres (Pugh, *Hurrah for the Blackshirts*, pp 51 and 64).
[64] *Daily Herald*, cited in Collis, *The Monstrous Regiment*, p 116.
[65] "Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929.
[66] "Col. Barker", 'Man-Woman's Second "Wife"', *Sunday Dispatch*, 17 March 1929.
[67] "Col. Barker", 'I Become a Woman Again', *Sunday Dispatch*, 31 March 1929. It is only fair to mention that she was unimpressed by men, too.
[68] "Col. Barker", 'My Life as "Man About Town"', *Sunday Dispatch*, 24 March 1929.

The prosecution was on a novel charge, that of perjury, but the overall approach was familiar. She was not charged with any sexual offence, but the crime for which she was convicted nonetheless brought the law's focus, and ultimately condemnation, upon the marriage. Other charges would have been possible: not only was a second charge of perjury in relation to an affidavit actually brought but not proceeded with, but an offence relating to her claim that she had a DSO was also contemplated.[69] Despite the possibility of such charges which addressed the masquerade, but not the actual marriage with its sexual implications, the offence in relation to the marriage register was the only one upon which Barker was convicted. Thus a view was taken that the most serious element of the affair, the one most deserving of criminal punishment, was the marital relationship: again, we have clear evidence that while the sexual offence was silenced, it nonetheless weighed heavily upon the minds of those bringing a prosecution.

Having placed the marriage under legal scrutiny, it then took only a small leap to move to the sexual content of the offence: as in cases such as Hamilton, the next question was whether the marriage was consummated. Although legally irrelevant to perjury (as it had been to vagrancy or fraud), the issue was raised in court. Indeed, with a guilty plea, no evidence need have been heard at all but the judge specifically raised and sought further information upon the point.

Silencing had by no means been abandoned in 1929. Sir Ernest Wild might have supported an offence of gross indecency between women eight years earlier, but he appears to have been as certain in Barker's case as his parliamentary colleagues had been then that publicity would promote vice: when it came to evidence of any sexual relationship, he said

> [L]et me see it in writing. I do not want anything prurient to be stated in court.[70]

Although oral evidence from Elfrida Haward was in fact heard following a defence objection,[71] the issue was largely dealt with by showing her relevant passages of statements and asking her whether they were true or not. Through this device, nothing

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[69] Inspector Walter Burmby, *Central Officer's Special Report*, 19 March 1929, PRO MEPO 3/439.
[70] '"Col. Barker" Guilty on One Charge', *Evening Standard*, 24 April 1929.
[71] 'New "Col. Barker" Disclosures', *Daily Mail*, 25 April 1929.

prurient had to be stated yet the judge had privileged access to Haward's written statement which was rather less coy. In particular, it made reference to one of those invisible dildos so common in female husband cases: "she is now of the opinion that artificial means were employed".[72]

However little of Barker's alleged sexual conduct was spoken aloud, the suspicion not only lingered but continued. Just as contemporary reports suggested that Mary Hamilton continued her flirtatious ways in prison, so there were allegations that Barker would continue her sexual lifestyle after the court case had ended (although she herself denied any such conduct with other women). While serving her prison sentence, Barker was allocated sewing work. She petitioned to be allowed more mentally or physically strenuous work, in a kitchen or library, "which would keep my brain occupied, in fact anything that will not give me time to think and brood."[73] Her petition, which ultimately failed, was opposed by the governor of HMP Holloway on the basis that in the sewing room "she might work under the direct supervision of an officer, and thus be deprived of opportunities of *seducing another* pr[isoner]".[74] The evidence for this (such as it was) was provided in answer to a written question: that "there can be little doubt she is a pervert may seek opportunities of making converts".[75]

Finally, the "wife" remained a secondary figure in the courtroom, although the growth of print media allowed her some voice elsewhere. Elfrida Haward was mentioned relatively briefly in Sir Ernest Wild's judgement, and in such confused terms that her position was left more than a little ambiguous. He stated that Haward "gave her evidence before me, and I was impressed by it", but continued by saying that "[w]ithout expressing any views about the truth or falsehood of Miss Haward's evidence ... I am assuming in [Barker's] favour that Miss Haward must have known before the alleged marriage that [Barker was] a woman."[76]

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[72] Inspector Walter Burmby, *Central Officer's Special Report*, 22 April 1929, PRO MEPO 3/439.
[73] *Lillias Irma Valerie ARKELL-SMITH, "Colonel Barker", Petition from Prisoner*, 17 May 1929, HO 144/19128.
[74] *Lillias Irma Valerie ARKELL-SMITH, "Colonel Barker", Petition from Prisoner: Governor's Report*, 21 May 1929, HO 144/19128. Emphasis in the original.
[75] *Lillias Irma Valerie ARKELL-SMITH, "Colonel Barker", Petition from Prisoner: Note dated 31 May 1929*, HO 144/19128.
[76] 'Judge on Crime of "Col Barker"', *Evening News*, 25 April 1929.

However, although we can see historical continuity between the Chapman and Barker prosecutions and those which preceded them, we must not lose sight of the differences. Why was no way found of convicting Chapman, when a little legal creativity had seen successful prosecutions throughout the previous century? What had been the historical developments which resulted in Chapman's case barely making a stir, while Barker's returned to the front pages of the Sunday papers time and again for a decade? For an answer to the first question, we must look at the significant changes made to the criminal justice system in the early nineteenth century. As for the second question, the answer is to be found in the changes to dominant ideologies governing attitudes towards women's sexual behaviour.

Changes in the criminal justice system

By the 1830s, the criminal justice system was undergoing significant change. The idea of a more systematic and professional approach to prosecuting wrongdoers had begun to take hold in the eighteenth century and by the end of that century, a less individualised system of prosecution was starting to emerge. Some government departments had their own solicitors whose responsibilities included criminal prosecution, including the Solicitor to the Mint, the Treasury Solicitor, the Solicitor to the Bank of England, and the Solicitor to the Post Office,[77] although their roles were lmited to cases directly concerning their own departments. Prosecution societies (where members all paid a subscription to finance the prosecution of anyone who offended against one of their members) began to form in the late seventeenth century and became increasingly popular at the end of the eighteenth century.[78] However, these societies were generally concerned with property offences against those who had reason to fear them, such as tradesmen, farmers and gentlemen; they would be unlikely to have any interest in the prosecutions with which this thesis is concerned.

In the nineteenth century, the idea of a public prosecution service began to gain ground but, despite Peel's support and a number of bills and proposals, little progress was

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[77] John H Langbein, *The Origins of Adversary Criminal Trial*, Oxford: Oxford University Press, 2003, p 113.

made for some time.[79] Only in 1879 did the Director of Public Prosecutions come into being, and his role was primarily advisory for the remainder of the century.[80] He reviewed a small number of cases only, and prosecutions advised by him would be conducted by the Treasury Solicitor (these two roles were merged in 1884; they would be separated again by the Prosecution of Offences Act 1908).[81]

More important in nineteenth-century prosecution, then, was the growth of an official police force.[82] This affected not only policing as we now think of it, but also the bringing of prosecutions since these would be conducted by police officers until well into the twentieth century.[83] Thus in the Chapman case, the prosecutor was not an affected party but Inspector Oakley of E Division.[84] The change from victim-led prosecutions to those brought by the police allowed both the Chapman and Barker prosecutions to be brought without the co-operation of the wives (Chapman's wife supported her while Barker's had separated from her several years before). As late as 1954, a case was brought against two women without either's co-operation: Violet or Vincent Jones and Joan Lee were charged, convicted and fined £25 each following their marriage in Catford.[85]

The courts themselves were also in the process of changing and becoming professionalised, although perhaps more slowly than other elements of the system. The lowest courts, the Petty Sessions, were magistrates' courts (with one or two magistrates

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[78] *Ibid*, pp 131-136; Clive Emsley, *Crime and Society in England 1750-1900* (2nd edition), London: Longman, 1996, p 186; J M Beattie, *Crime and the Courts in England 1660-1800*, Princeton: Princeton University Press, 1986, pp 48-50.

[79] Emsley, *Crime and Society*, p 189.

[80] *Ibid*, p 190. The office was created by the Prosecution of Offences Act 1879.

[81] Crown Prosecution Service, 'The history of the Crown Prosecution Service', www.cps.gov.uk/about/history.html, accessed 16 September 2004.

[82] See Beattie, *Crime and the Courts*, pp 66-70; Emsley, *Crime and Society*, pp 216-222; and acts such as the Municipal Corporations Act 1835, the Lighting and Watching Act 1833, the Rural Constabulary Act 1839, and the County and Borough Police Act 1856.

[83] The police were the main prosecutors until the creation of the Crown Prosecution Service in 1986.

[84] Anon, *Sinks of London Laid Open*, footnote to Chapter 10.

[85] *Daily Herald*, 14 December 1954, and *News of the World*, 19 December 1954, p 2, cited in Alison Oram, 'Cross-dressing and Transgender', in in H G Cocks and Matt Houlbrook, *The Modern History of Sexuality*, London: Palgrave Macmillan, 2006, pp 256-285 at p 256. Oram does not state what offence the women were charged with. Note that although the judge referred to the women's "unnatural passions", Jones' explanation of her behaviour was that she was transsexual and had attempted to obtain medical treatment.

sitting, rather than three as today). They "became increasingly formal and regularised during the period [1750 to 1900]."[86]

Lawyers would become more common in the higher courts[87] as the nineteenth century progressed: John H Langbein identifies the eighteenth century as the period in which lawyers came to be involved in prosecutions,[88] and Emsley suggests that prosecution counsel were widespread by the 1840s.[89] Defence counsel were rarer, and not legally permitted to sum up the defence case (although they could examine witnesses) until the Prisoner's Counsel Act 1836.[90] They remained less common than prosecution counsel throughout the nineteenth century. This may reflect the relative means of the parties:[91] legal assistance for those who could not afford to pay counsel themselves would not be available outside murder cases until the Poor Prisoner's Defence Act 1903.[92]

There were also changing attitudes to the criminal law among those who made it, particularly parliament. The "bloody code" of the eighteenth century consisted of a large number of statutes creating offences (many capital), but these were specific and their application could be as localised as the offence of damaging Westminster Bridge. However, in the nineteenth century, legislation was wider in scope and increasingly related to the national context, notably in the 1820s with Peel's reorganisation of the criminal law.[93]

Finally, approaches to punishment were changing significantly. Most important was the development of imprisonment as the major sanction available to the courts. Intellectual credibility gained from publications such as Jeremy Bentham's *Panopticon*

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[86] Emsley, *Crime and Society*, p 13.
[87] The Quarter Sessions and Assizes, where trial was by jury.
[88] Langbein, *Origins*, Chapter 3.
[89] Emsley, *Crime and Society*, pp 193-194.
[90] Langbein, *Origins*, p 111; Clive Emsley, *Crime and Society*, p 195.
[91] David Philips, *Crime and Authority in Victorian England*, London: Croom Helm, 1977 pp 104-105, cited in Emsley, *Crime and Society*, p 195.
[92] It should be noted that despite all these changes which collectively serve to bring the Victorian criminal justice system closer to our own than that of the eighteenth century, there were nonetheless important differences. In particular, the principal safeguards for the nineteenth-century defendant were pre-trial scrutiny, the accused's rights to peremptory challenge of jurors, the requirement for a unanimous jury verdict and the rules of criminal evidence; today, only the latter is significant, along with the right to free legal representation and the right of appeal (see David Bentley, 'Acquitting the Innocent. Convicting the Guilty. Delivering Justice?' in Judith Rowbotham and Kim Stevenson (eds), *Behaving Badly: Social Panic and Moral Outrage – Victorian and Modern Parallels*, Aldershot: Ashgate, 2003, pp 15-30 at pp 16-17).
[93] Emsley, *Crime and Society*, p 13.

plan of 1791,[94] as well as increasing political support, allowed construction of a penitentiary at Millbank, London between 1812 and 1816.[95] Following its completion, legislation aimed at producing a more uniform and rational approach nationally followed.[96] Imprisonment became central as the primary punishment for most crimes, both petty and serious.[97] Emsley notes that this was also part of a general move away from public punishment to private.[98]

As law reports grew, and the system and its personnel became more professional, the relatively casual eighteenth-century approach of finding a category within which to fit behaviour apparently outside the criminal law's scope[99] was perhaps less easy to sustain. Again, Mary Chapman's case is a good example of this: unable to find a suitable offence, the magistrate felt he had no option but to discharge the prisoner. Indeed, there then came a near-disappearance of female husband cases (or other cases based upon lesbian sexual activity). After Chapman's in 1835, the next known trial was in 1864 and seems more concerned with robbery than sexual misconduct:

> Tuesday, 19 November. . Went out to the Westminster Police Court, to the examination of Mary Newell, the maid of all work who robbed her master last week, went off in man's clothes, travelled down to Yarmouth, took lodgings there, smoked cigars, & made love to her landlady. Assuming that she had as I was told done it only for a lark, I admired her pluck skill and humour, and wished to observe her person & character. But the inspector who helped to catch her showed me that she was probably a practised thief and a dissolute girl ... At noon the court opened, with a great rush of people to see the prisoner. As a barrister, I had a reserved seat in front of her. She was led in and placed on high in the dock: a sullen but fairly good looking girl, of moderate height, and not unfeminine. Drest in shabby finery: her hair, which she had cut short, hanging over her forehead. Her hat, coat, trousers, and the rest of her male clothing were exhibited on a table... After she had been committed for trial at the Sessions, I walked away with her master—a surveyor—and his pupil, the young man whose name & garments she assumed. She was a dirty and untidy servant,

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[94] Jeremy Bentham, *Panopticon; or, the Inspection-House*, London: T Payne, 1791.
[95] Emsley, *Crime and Society*, p 267.
[96] For example, the Gaol Act 1823, an amending Act in 1824; the establishment of a prison inspectorate in 1835; but note that financial considerations limited the spread of penitentiaries beyond London: Emsley, *Crime and Society*, pp 270, 274.
[97] Emsley, *Crime and Society*, p 284.
[98] For example, public whippings and executions, as well as fundamentally public punishments such as the stocks, were all abolished in the mid-nineteenth century: Emsley, *Crime and Society*, esp p 279.
[99] See for example the comments of Edward Christian cited in Chapter 4.

> they said; was in the habit (they now found) of stealing out to low theatres alone, hiring cabs to go in and smoking cigars with the cabmen...[100]

Similarly, a case the following year involved a woman, Sarah Geals, who lived as "William Smith" with her partner Caroline until her employer James Giles discovered her true sex. An agreement was reached whereby Caroline lived with Giles but saw Geals on Sundays, and Geals lost her job but received some financial support. The arrangement broke down, and Geals found herself in court not because of her relationship with Caroline but for the attempted murder of Giles. Although he was in fact unharmed by Geals' attempt to shoot him, she was convicted of attempted grievous bodily harm for which she received a severe sentence of five years' penal servitude.[101]

Despite several more such cases involving cross-dressing women prosecuted for offences unrelated to their sexuality,[102] the long gap in prosecutions based upon the relationship itself continued until the twentieth century, when the rise of sexology had increased awareness of motivations beyond the financial or mere delinquency. In 1930, what was probably a commentary on the Barker case appeared in a discussion of *Law Relating to Women*. It is notable that in contrast to sources in previous centuries, this discussion openly acknowledges the possibility of a sexual motive for female cross-dressing:

> A recent case has drawn attention to the question of masquerading. *Per se* this is not a crime at law. To masquerade as a seaman (Admiralty Powers, etc., Act, 1865, Sect. 8), soldier (44 & 45 Vict., Ch. 58 (Army Act), Sect. 142), policeman (Police Pensions Act, 1921, Sect. 16) or for the purpose of obtaining property (False Personation Act, 1874, Sect. 1) is an offence. There is no enactment against such conduct if induced by sexual motives only. For a male to dress as a female is not an offence in itself. He is usually proceeded against under the Vagrancy Acts as inciting

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[100] Arthur Munby, *Diary*, 1861, quoted in Jackson, *The Victorian Dictionary*, and in Oram and Turnbull, *The Lesbian History Sourcebook*, pp 28-29.

[101] Camilla Townsend, '"I Am the Woman for Spirit": A Working Woman's Gender Transgression in Victorian London' in Andrew H Miller and James Eli Adams (eds), *Sexualities in Victorian Britain*, Bloomington: Indiana University Press, 1996, pp 214-234.

[102] For example, Margaret Honeywell aka William Seymour, a cab-driver with a "wife", convicted of stealing two pieces of meat, who was questioned about her cross-dressing – but not her marriage - in court, although the magistrate was at pains to say he would not treat her differently from any other prisoner (*Liverpool Mercury*, 13 February 1875, quoted in Oram and Turnbull, *The Lesbian History Sourcebook*, pp 31-33); Elsie Carter, a 16-year-old servant charged with stealing a man's suit and bicycle (*Daily Herald*, 25 April 1929, p 1, quoted in Oram and Turnbull, *The Lesbian History Sourcebook*, p 43).

> others to prostitution and for conspiracy to commit the offence of sodomy (*R. v. Boulton & Park*, 12 Cox 87). It would doubtless be the same in the case of a Woman – though there do not seem to be any reported cases, and there could not be a charge of conspiracy, as two women together cannot commit sodomy.[103]

A year later, former CID officer Cecil Bishop would show a similar awareness of lesbian sexuality, devoting a chapter of his book *Women and Crime* to it.[104] In a complete inversion of Victorian sexual orthodoxy, he argued that "many women are more highly sexed than men", turning to each other because "the average man, whose vitality has perhaps been reduced by long hours of uncongenial work, is sometimes physically incapable of meeting their demands."[105] Given such an excess of female sexual agency, "[v]eiled truths may do more harm than lies ... until these facts are known there is no certain safety for any woman."[106] In December 1954 a magistrate castigated two women for their "unnatural passions" despite the explanation of the "husband" that she felt she was really male and had attempted to obtain medical treatment.[107]

To understand this almost complete reversal in approaches to female sexuality and its legal regulation, one must turn to the ways in which women's sexuality was understood, both through the ideological lens of female sexual passivity and through the later "scientific" lens of the sexologist (often closely linked to the criminologist). They would redefine notions of women's sexual and criminal agency.

Female sexual passivity

Chapman's trial was separated from those of her predecessors by the revolutionary disquiet of the later eighteenth century, when liberalism brought not only actual revolution in neighbouring France but also disquiet to domestic politics. In particular, liberalism carried the threat of women being included among the persons entitled to

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[103] E Ling-Mallison, *Law Relating to Women*, London: The Solicitors' Law Stationery Society Ltd, 1930, p 50.
[104] Cecil Bishop (Late of the CID), *Women and Crime*, London: Chatto and Windus, 1931, Chapter 8.
[105] *Ibid*, p 162.
[106] *Ibid*, p 163. His twentieth-century approach nonetheless has strong hints of the eighteenth century when he argues that "self-abuse ... leads naturally to the greater perversion", and that "[f]or both purposes special instruments are actually manufactured" (p 163); the consequences of their use include loss of "robust appearance" (p 164).
[107] *News of the World*, 19 December 1954, p 2, cited in Oram, 'Cross-dressing and Transgender', p 256.

universal rights, and encouraged the reinvigoration of feminism marked by the publication of Mary Wollestonecraft's *A Vindication of the Rights of Woman*.[108] Although the revolutionary threat had largely subsided by 1835, feminists as well as liberals and Chartists continued to campaign actively.[109] Thus, even if England would go on to share little of the upheaval of the 1848 revolutions in mainland Europe, gender relations based upon a supposed natural order of society had lost credibility and new ideologies now emerged. As silence became the preferred approach to all matters of female sexuality, already-silenced lesbianism was unmentioned to a greater extent than before.

The publicising of "female husband" cases, so characteristic of the previous century, did not continue into the nineteenth century. Instead, there was a period in which the silencing of lesbianism within the criminal justice system seems to have been considerably more effective. Nonetheless, by the end of the nineteenth century cracks were beginning to appear once more. This chapter analyses that move into silence and out again.

There were differences in the nineteenth century which affected not only the nature but also the choice of prosecutions. First, prevailing models of sexual difference had been substantially restructured. Within the upper reaches at least of the medical profession, the two-sex model was largely accepted and the Galenic approach to sexual difference discredited.[110] Scientific theories such as evolution were also used to further the argument that men and women were fundamentally biologically different: Darwin's own book *Descent of Man* supported the notion of fundamental sex difference.[111] Not only women's reproductive organs but their whole bodies, skeletons and nervous systems were now perceived as fundamentally different to men's: of course her reproductive biology affected a woman's entire being since "she exists only through her ovaries".[112] Marriage became not only a way of keeping her under male control, but also a moral

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[108] London, 1792.
[109] For example, the campaign of Caroline Norton which led to married women obtaining some rights to custody of and access to their children under the Infant Custody Act 1839.
[110] See discussion in Chapter 4 above.
[111] Angelique Richardson, *Love and Eugenics in the Late Nineteenth Century: Rational Reproduction and the New Woman* Oxford: Oxford University Press, 2003, p 40.
[112] Thomas Laqueur, *Making Sex: body and gender from the Greeks to Freud*, Cambridge, Massachusetts: Harvard University Press, 1990, p 149, and quoting Victor Jozé, 1895.

duty: since men and women were by nature so different, each was required to supply the defects of the other.[113]

Socially, attitudes to women had crystallized and the transition required by the Industrial Revolution from the family as economic unit to a middle- and upper-class model of male economic activity and female domestic activity had largely been successfully achieved.[114] One should be careful of overstating this as a practical rather than ideological change: in 1851, "nearly one half of adult women in Britain had no spouse to support them", while one in four wives were in employment, and by 1891, "4.5 million (out of 13 million) women were in the workforce".[115] In 1862, Frances Power Cobbe claimed that 25 per cent of women would never marry (and that 25 per cent of men were bachelors, although they were not seen as "redundant" or problematic).[116]

Nonetheless, the image and function of the middle-class home and family had undergone substantial change; Catherine Hall argues that the Evangelicals "were able to play a mediating role in this transition".[117] These members of the Church of England who sought to reform not only the Church but also, more ambitiously, national morality placed particular "emphasis on women as domestic beings, as primarily wives and

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[113] Anthony Fletcher, *Gender, Sex & Subordination in England 1500-1800*, New Haven: Yale University Press, 1995, pp 396-397.

[114] This is not to say that there was no criticism of this model, or female rebellion from it. Indeed, it is notable how little time the apparent consensus lasted before the rise of significant feminist activism (particularly in the latter half of the century: by the 1860s, the suffrage movement had become significant, notably with the suffrage petition of 1866 signed by 1,499 women; the campaign for married women's property rights was about to achieve its first major success with the Married Women's Property Act 1870; there was an active and ultimately successful campaign against the Contagious Diseases Act; and such activism would continue unabated until the First World War). However, it was accepted as the dominant ideological model to which the middle and upper classes should aspire (see for example Lord Neaves in *Jex-Blake v Senatus of Edinburgh University* (1873) 11 M 784: "the special acquirements and accomplishments at which women must aim, but from which men may easily remain exempt ... [m]uch time must or ought to be given by women to the acquisition of a knowledge and household affairs and family duties, as well as to those ornamental parts of education which tend so much to social refinement and domestic happiness"), and a majority appear to have done so. Of course, the ideology did not prevent the employment of working-class women in their homes, factories, shops, mills and mines, thus bringing working-class women a small way into the public sphere while effectively depriving them of the opportunity to carry out many private-sphere functions such as much child care, let alone "ornamental" functions.

[115] Richardson, *Love and Eugenics*, pp 35-37; Catherine Hall, *White, Male and Middle-Class: Explorations in Feminism and History*, Cambridge: Polity Press, 1992, p 176.

[116] 'Celibacy vs. Marriage', *Fraser's Magazine*, LXV, pp 228-235, cited in Margaret Jackson, *The Real Facts of Life: Feminism and the Politics of Sexuality c1850-1940*, London: Taylor & Francis, 1994, p 15.

[117] Hall, *White, Male and Middle-Class*, p 79. See also Lucy Bland *Banishing the Beast: English Feminism and Sexual Morality 1885-1914*, London: Penguin, 1995, pp 49-50.

mothers".[118] Foremost among those propounding such views was Hannah More who, horrified by Wollstonecraft's *Vindication of the Rights of Woman*, argued for very different roles for men and women within their separate spheres; however, while women ought to be dependent and domestic, their superior moral qualities were to give them a vital role as improvers of male morality and, in Hall's phrase, "moral regenerators of the nation".[119]

With an increased emphasis upon the division between public and private, the private being defined as the (feminine) domestic sphere, sexual attitudes also changed. Female virtue became synonymous with sexual virtue, while the feminine ideal now firmly located women's role within the family and home.[120] While early proponents of separate spheres, such as the Evangelicals, had opposed the double standard and instead placed emphasis upon the importance of marriage,[121] the ideology came to support a new formulation of sexuality which naturalised male promiscuity and female chastity, thus entrenching sexual double standards.[122] Women were to be sexually submissive, and without an autonomous sexuality.[123] Rather than the passive but voraciously "open" creature feared in previous centuries, who must struggle to preserve chastity despite "fierce and unruly desire",[124] the Victorian woman was to be without desire. Her passivity now took the form of submission, accepting an act of penetration which she could (or should) not actively solicit. In the infamous words of the urologist and anti-

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[118] Hall, *White, Male and Middle-Class*, p 75; Bland, *Banishing the Beast*, p 50.
[119] Hall, *White, Male and Middle-Class*, pp 82-86.
[120] See Hall, *White, Male and Middle-Class*; Bland, *Banishing the Beast*; and Lucia Zedner, *Women, Crime and Custody in Victorian England*, Oxford: Clarendon Press, 1991, pp 12-15. Lynda Nead discusses the ways in which women were discouraged from negotiating London's streets alone (and the pleasures they nonetheless achieved in doing so) in *Victorian Babylon: People, Streets and Images in Nineteenth-Century London*, New Haven: Yale University Press, 2000. Note that of the 4.5 million women working in 1891, almost half were in domestic service and thus still firmly in the domestic sphere (Richardson, *Love and Eugenics*, p 37).
[121] Catherine Hall, *White, Male and Middle-Class*, p 83.
[122] Lucy Bland draws upon Davidoff and Hall to argue that "by the 1840s this ideology of separate spheres which had originally been linked to evangelicalism had become increasingly secularized – become in fact 'the common-sense of the English middle class'" (*Banishing the Beast*, p 50).
[123] Indeed, Richardson argues that in the later part of the century, the social purity campaigns also adopted such an approach, seeking to give women a moral authority based upon their "natural instinct ... to virtue", in contrast to the "challenge to the sexual double standard that the [Contagious Diseases Act] repealers had mounted" previously (*Love and Eugenics*, pp 48 – 49) Earlier Evangelical women such as More had of course put forward similar arguments, as had the French feminist Necker de Saussure at the time of the French Revolution (Laqueur, *Making Sex*, p 195).
[124] R Steele, *The Ladies Library*, London, 1714, vol I, p 155, cited in Fletcher, *Gender, Sex &*

masturbation campaigner William Acton, "the majority of women (happily for society) are not very much troubled with sexual feeling of any kind",[125] a sentiment shared to varying extents by many (although by no means all) Victorian doctors and much of wider Victorian society.[126] It is unsurprising, then, that mentions of the clitoris in popular handbooks "underwent expurgation" in the nineteenth century;[127] as late as 1918, knowledge of the word's meaning was put forward as evidence of lesbianism in the Maud Allen libel case.[128] After all, if female pleasure were to be found in the marital embrace, it was "a displaced sexuality ... taking vicarious pleasure from the giving of pleasure to her husband".[129] Importantly, even those who accepted the possibility of autonomous female desire tended to emphasise the importance of its control by women's natural modesty, "an *unconscious* quality" all too easily lost through "bad habits" including "masturbation, the reading of 'licentious novels', or mixing with 'lewd' companions".[130]

The consequences for women of this emphasis upon virtue and modesty as essentially sexual qualities were threefold. First, "[a]lmost any expression of sexual desire by a woman could be interpreted as pathological and clinically described as nymphomania."[131] Second, a refusal to submit to sexual intercourse was linked to a wider insubordination: "since the rights of women have been so much insisted upon ...

Subordination, p 392.

[125] William Acton, *The Functions and Disorders of the Reproductive Organs, in Childhood, Youth, Adult Age, and Advanced Life, Considered in the Physiological, Social, and Moral Relations*, London, 1865, p 112.

[126] For a discussion of those on either side of the debate, see Bland, *Banishing the Beast*, p 55. There is little consensus on Acton's professional status amongst his peers: to Lesley A Hall, "Acton's reputation among his fellows was high" ('Acton, William John', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/39445, accessed 11 October 2006) while Janet Oppenheim argues that "Acton was not ... a highly regarded member of the Victorian medical profession" (*"Shattered Nerves": Doctors, Patients and Depression in Victorian England*, Oxford: Oxford University Press, 1991, p 201). Michael Mason highlights the risks of assuming that there had been a universal change from the eighteenth-century model of female sexuality, particularly among GPs who "were not alert, or did not choose to be alert, to the latest laboratory or dissecting-room discoveries" and who, dependent upon patients who would readily change practitioner, had "little reason to dole out unfamiliar sexual ideas" (*The Making of Victorian Sexuality*, Oxford: Oxford University Press, 1994, pp 180-181).

[127] Lesley A Hall, 'Clitoris', in Colin Blakemore and Sheila Jennett (eds), The Oxford Companion to the Body, Oxford: OUP, 2001, and reproduced at http://www.lesleyahall.net/ocbclit.htm (accessed 4 October 2006). Oppenheim points out that the notion of female sexual passivity was "implicit in much nineteenth-century literature on the home, on womanhood, and on marriage" (*Shattered Nerves*, p 202).

[128] Cross-examination of Maud Allen, 29 May 1918, quoted in Kettle, *Salome's Last Veil*, p 68.

[129] Alan Hunt, *Governing Morals: A Social History of Moral Regulation*, Cambridge: Cambridge University Press, 1999, p 92.

[130] Bland, *Banishing the Beast*, p 56 (emphasis in original).

numerous husbands have complained to me of the hardships under which they suffer by being married to women who regard themselves as martyrs when called upon to fulfil the duties of wives".[132] Third, in the criminal justice sphere, the consequence of this elision of women's morality and sexuality was that female criminality became synonymous with prostitution.[133]

Women's presumed asexuality, when combined with social endorsement of "romantic friendship" between people of the same sex, provided a powerful ideological reason for ignoring lesbianism. Although never universal, and increasingly under public attack as the century reached its end, this myth and the legal discourse based upon it persisted well into the twentieth century[134] and linger even now.[135] However, it must be borne in mind that the myth of female sexual passivity, although dominant in legal discourse, was used strategically: in other words, it served particular ideological aims and purposes but was not universally believed, even by those putting it forward.

First, the myth was never truly applied to all women but was profoundly raced and classed. The assumption, sometimes articulated and usually implicit, was that certain women fell outside its terms: those who were working class and/or were not white British women. Female sexual vice could come to Britain as an exotic eastern or Continental disease (the association of female masturbation with convent life, for example, necessarily connected it to foreign, Catholic countries).[136] It could be found amongst the

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[131] Zedner, *Women, Crime and Custody*, p 88.

[132] William Acton, *The Functions and Disorders of the Reproductive Organs*, 5th edition, 1871, p 196.

[133] Famously, Lombroso equated the two, eliding female criminality with prostitution and thereby disappearing the difference between male and female rates of offending (although he then to some extent undermined his own argument by considering prostitutes and other female criminals as two different, albeit related, groups and arguing for the existence of a female "born criminal" (Cesare Lombroso and Giuglielmo Ferrero, *The Female Offender*, London, 1895)); see also David G Horn 'This Norm Which Is Not One: Reading the Female Body in Lombroso's Anthropology' in Jennifer Terry and Jacqueline Urla (eds), *Deviant Bodies*, Bloomington: Indiana University Press, 1995, pp 109-128). Martin J Wiener suggests that the explanation is a fear of women`s independence, seen as loosing women from male control into unregulated sexuality: "Most female criminality was seen as rooted in prostitution, the most common form of independent economic activity by women" (*Reconstructing the criminal: Culture, law and policy in England, 1830-1914*, Cambridge: Cambridge University Press, 1990, p 17).

[134] Thomas Laqueur cites Havelock Ellis who listed "scores of studies that purport, on the basis of almost no evidence, to speak to this novel issue" of women`s congenital incapability for feeling sexual satisfaction, and liability to sexual anaesthesia (Havelock Ellis, *Studies in the Psychology of Sex*, vol 3, Philadelphia: F A Davis, 1920, pp 193-194, cited in Laqueur, *Making Sex*, pp 189-190).

[135] See Chapter 8 for further discussion of contemporary legal attitudes.

[136] See for example R D Owen`s speculation that female masturbation originated in the convents of Europe (*Moral Physiology*, pp 34-35, cited in Laqueur, *Making Sex*, p 228).

working classes, and particularly among those involved in prostitution.[137] But it had no natural home amongst those women who shared their race and class with the country's law-makers.

Many feminists therefore saw one crucial area of challenge to the myth, and the sexual double standard it supported,[138] as the unity of interest of working and middle class women (and men). Thus, said Josephine Butler,

> [A] large section of female society has to be told off – set aside, so to speak, to minister to the irregularities of the excusable man. That section is doomed to death, hurled to despair; while another section of womanhood is kept strictly and almost forcibly guarded in domestic purity.[139]

Similarly, Edwardian suffragette Flora Drummond linked the exploitation of women in sweatshops and prostitution to the campaign for the vote.[140] Such feminists[141] offered a radical critique of male and female sexuality, attacking the sexual double standard which criminalised prostitutes while tacitly endorsing their male clients.[142]

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[137] Zedner notes the increasing concern in the mid-nineteenth century with crimes of morality such as prostitution, drunkenness, gambling and dancing, to which women were seen as peculiarly vulnerable (*Women, Crime and Custody*, p 31).

[138] The sexual double standard was of course nothing new: eighteenth-century women were also expected to be chaste while men had much greater sexual licence. However, the form of the mythology had changed significantly: previously, women were believed to have an excess of sexual appetite (for intercourse in particular) whose potential satisfaction outside marriage formed a justification for male control of women. Thus women's sexual appetites posed a challenge to patriarchal power, and had to be suppressed, while men's could be satisfied outside marriage with less threatening consequences. Now, women were passionless and so did not need extra-marital intercourse: any women who sought it out must therefore be immoral, bad and "fallen" or else mentally disordered. (For further discussion of the sexual double standard in the eighteenth century, see Fletcher, *Gender, Sex & Subordination*, pp 17 *et seq*).

[139] Josephine Butler, 'The Double Standard of Morality', *The Philanthropist*, October 1886. Butler was also invited to address the Trades Union Congress and talked in terms of a struggle between "aristocratic privilege" and "the people" (M J D Roberts, *Making English Morals: Voluntary Association and Moral Reform in England, 1787-1886*, Cambridge: Cambridge University Press, 2004, p 233). Attacking the sexual double standard was a crucial part of Butler's campaigns against the Contagious Diseases Acts.

[140] *The Suffragette*, 29 November 1912, quoted in Margaret Jackson, *The Real Facts of Life*, p 42.

[141] It would be a mistake to think that there was a single "feminist" position on any issue in the nineteenth century, any more than there is in the twenty-first. However, a significant number of Victorian feminists were concerned with attacking the sexual double standard. The issue would become more controversial at the end of that century and beginning of the next when some feminists moved from problematising men's sexual behaviour to arguing that women's sexual liberation was the answer. Most famous among these is Marie Stopes, author of the marriage manual *Married Love* (Marie C Stopes, *Married Love: A New Contribution to the Solution of Sex Difficulties*, London: A C Fifield, 1918); see also the work of Stella Browne, who specifically warned of the danger of "pseudo-homosexuality" and linked militant feminism to "unconscious inversion".

[142] This shift of "the focus of moral discourse away from the immorality of wayward women ... on to men of the upper and middle classes" was "a quite remarkable feature of the Victorian purity campaigns [-] that

However, concerns over prostitution could be and were interpreted by some (particularly non-feminist and religiously inspired) campaigners in a way which conformed to prevailing notions of female sexual passivity and purity. It was therefore unpolitic to discuss lesbianism, and the silence of activists on that issue is reflected even now in discussions of the period. Contemporary historian Judith Walkowitz discusses women achieving gains through "the social purity doctrine of female passionlessness" which "helped the New Women of the late-nineteenth century to mark out a 'passionless' sexual identity independent of men" [143] without addressing the actual or probable lesbianism of a number of those women.[144] Equally, Lynda Nead, in her book-length discussion of representations of Victorian women's sexuality, does not mention lesbianism at all.[145] These omissions are a tribute to the effectiveness of silence on the issue of lesbianism.

Again, this silence was race- and class-specific so that the general denial often broke down under scrutiny to a denial that white British higher-class women could engage in such sexual activity.[146] Wheelwright notes that a similar type of double-think was employed in relation to cross-dressing women: while Menié Muriel Dowie argued in 1881 that female soldiers' "day is done .. and they have left us no genuine descendants", A J Munby had written an article a dozen years earlier citing "scores" of working-class women working in male clothing and occupations, while other authors cited female warriors in "primitive" cultures.[147] It would follow then that neither those making the law

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they were directed at the middle and upper classes themselves" (Hunt, *Governing Morals*, p 98).

[143] Judith R Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London*, London: Virago, 1992, pp 132-3.

[144] On this omission, see for example Rosemary Auchmuty, 'By Their Friends We Shall Know Them: The lives and networks of some women in North Lambeth, 1880-1940' in Lesbian History Group, *Not a Passing Phase: Reclaiming Lesbians in History 1840-1985*, London: The Women's Press, 1989, pp 77-98; Jackson, *The Real Facts of Life*, pp 16-17. Just a few more examples of writings on Victorian sexuality which manage to make no reference to lesbianism include Wendell Stacy Johnson, *Living in Sin: The Victorian Sexual Revolution*, Chicago: Nelson-Hall, 1979; Lynda Nead, *Myths of Sexuality: Representations of Women in Victorian Britain*, Oxford: Basil Blackwell, 1988; Walkowitz, *City of Dreadful Delight*.

[145] Nead, *Myths of Sexuality*.

[146] See for example the discussions in the 1921 parliamentary debates and in *Woods and Pirie v Dame Helen Cumming-Gordon* (Chapter 3).

[147] Menié Muriel Dowie (ed), *Women Adventurers: The Adventure Series*, Vol 15, London: Unwin Brothers, 1893, p x; A J Munby, 'Female Soldiers and Sailors', *Notes and Queries*, 19 Feb 1881, Vol III, p 228; 'What Can Women Do?', *Chambers's Journal*, 5 October 1872, p 635; and Anna Harriette Leonowens, *The English Governess at the Siamese Court: Being Recollections of Six Years in the Royal Palace at Bangkok*, London: Truber, 1970, p 94; all cited in Wheelwright, *Amazons and Military Maids*, p

nor women themselves were necessarily as ignorant of the reality of women's sexual capabilities as their public discourse suggested.

Indeed, women's enforced and artificial ignorance regarding sexuality was one of the cornerstones in maintaining the myth of the passive female. Thus while men were expected to gain experience and "sow wild oats", women were kept in deliberate ignorance of issues even as fundamental as menstruation and pregnancy. Sexual knowledge was itself interpreted as a sign of female sexual impropriety – Josephine Butler, for example, was vilified for speaking out publicly about prostitution.[148] Maud Allen's understanding of the word "clitoris" was itself argued by the defence to her libel case to be evidence of her lesbianism.[149] Knowledge, and denial of knowledge, were thus vital tools in seeking to prevent women from asserting an active sexuality of their own. (Conveniently, pointed out Dr Louisa Martindale, they also made innocent and submissive young women easier to seduce).[150]

However, silence could not be absolute and middle- and upper-class women either accessed forbidden sources of information or discovered their sexuality for themselves. I have mentioned the lesbianism of some feminists at that time; and it was not only amongst politicised feminists that lesbian relationships occurred. We have some evidence of lesbianism being known of, and occurring, at girls' boarding schools during the nineteenth century. Perhaps the most notorious example is the Scottish boarding school run by Mariann Woods and Jane Pirie at the beginning of that century, which closed following allegations of lesbianism made by one of the pupils against her teachers. The result was a court case which reached the House of Lords, who discussed lesbianism in some detail and were firm in locating it as racially and sexually other, an activity indulged in (if at all) by women who were not of the white, British middle class, while at the same time defining it as a subject of educated upper-class male knowledge.[151]

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[148] See Lesley Hall, *Hauling Down the Double Standard*, (2001) 16(4) *Gender & History* 36-65; Hunt, *Governing Morals*, p 145.

[149] For a more detailed discussion of this 1918 case see Chapter 1.

[150] *Under the Surface*, Brighton: The Southern Publishing Company, 1910, quoted in Margaret Jackson, *The Real Facts of Life*, p 45.

[151] *Miss Mariann Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon*, New York: Arno Press, 1975; see also Lillian Faderman, *Scotch Verdict: Miss Pirie and Miss Woods v Dame Cumming Gordon*, New York: William Morrow, 1983, and discussion in Chapter 3.

The construction of higher-class men as knowing and higher-class women as unknowable was not unique to lesbianism. As Sullivan comments in relation to the Madeleine Smith murder trial of 1855,

> [An] association between energy and mystery was, it must be stressed, true almost entirely for the middle-class woman. Incessantly photographed, measured and read from the 1850s on, poor women were generally presented as either essentially knowable, because their sexuality and their character were visibly inscribed in their bodies, or as a cultural problem.[152]

That their lordships were utterly wrong in dismissing the possibility of sexual knowledge among white women of the middle classes (a dismissal probably motivated by preserving the ideology of Empire as much as by genuine belief) is also suggested by the memoirs of Mary Betham-Edwards. She recalled in 1898 that at a boarding school earlier that century, "[v]ices with which [the girls] ought to have been absolutely unfamiliar, were openly discussed, and in language that savoured of the gutter"[153] (although she was at pains to emphasise that despite being "well-to-do middle class", "daughters of wealthy hotel-keepers", they were "a very low type" whose language was "new to my own ears").[154] Notorious surgeon Isaac Baker Brown would also refer in one of his case-notes to a woman having been introduced to masturbation by a school-fellow.[155]

The myth of female sexual passivity, and its corresponding requirement of female sexual ignorance, was therefore deployed in relation to middle- and upper-class white women, while acknowledging the existence of lesbianism among those outside the ruling classes. A further aspect of strategic use of the myth was the high degree of consensus amongst those making the law – the almost entirely white, upper-middle and upper-class body of men who made up the judiciary and legislature – that the law should operate

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[152] '"What is the Matter with Mary Jane?" Madeleine Smith, Legal Ambiguity, and the Gendered Aesthetic of Victorian Criminality' (2002) 35 *Genders* www.genders.org, para 37, accessed 25 August 2004.

[153] M Betham-Edwards, *Reminiscences*, London: George Redway, 1898, p 114, and cited in Ronald Pearsall, *Public Purity, Private Shame: Victorian sexual hypocrisy exposed*, London: Weidenfeld and Nicolson, 1976, p170. Although he interprets the comment as referring to the specific "vice" of lesbianism, its exact meaning is much more ambiguous in the original context.

[154] M Betham Edwards, *Reminiscences*, pp 114-115. Note that in this instance, the servants, "eminently staid", were not to blame (p 115).

[155] Dr Isaac Baker Brown, FRCS (Exam), *On the Curability of Certain Forms of Insanity, Epilepsy, Catalepsy, and Hysteria in Females*, London: Robert Hardwicke, 1866, Case XXXI, and see discussion below.

upon the basis that these myths were true. As a result, they have been enshrined in both case law and legislation.

Thus, the Contagious Diseases Acts of the 1860s[156] assumed that men had uncontrollable sexual urges which financially-motivated women catered to: therefore women's role was to police or make safe men's active sexuality, not to share it. Hence the 1870 Royal Commission on the Contagious Diseases Acts felt able to state that

> There is no comparison to be made between prostitutes and the men who consort with them. With the one the offence is committed as a matter of gain; with the other it is the irregular indulgence of a natural impulse.[157]

These Acts aimed to address the high rates of venereal disease among the armed forces, and targeted prostitution as the source of infection. Their solution was not to restrict men's access to prostitutes, but rather to attempt to ensure a supply of uninfected prostitutes whom men could safely use. Women living in specified garrison towns who were suspected of prostitution could be forcibly examined for sexually transmitted diseases and then forced to undergo treatment in secure "lock hospitals". Contemporary campaigners, notably Josephine Butler, highlighted the sexual double standard thereby invoked.[158] However, the enactment of similar provisions during both world wars[159] suggests that that double standard has been very slow to die.

Not only the criminal justice system but also women themselves could use the mythology of female sexual innocence and passivity strategically. Originally, it gave Evangelical women an active and important role as moral educators. Throughout the nineteenth century, some feminists used it to claim a similar moral basis for their campaigns. By the turn of the twentieth century, feminists were able to identify the power of refusing heterosexual relations in more radical terms:

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[156] A series of Acts of the same name were passed in 1864, 1866 and 1869 (the latter two increasing the areas covered). The Acts were suspended in 1883 and repealed in 1886.

[157] *Royal Commission upon the Administration and Operation of the Contagious Diseases Acts: Volume 1: The Report*, C. 408, London: HMSO, 1871, para 60, cited in Hall, *Hauling Down the Double Standard*, p 39.

[158] See for example Jackson, *The Real Facts of Life*, pp 24-26.

[159] Defence of the Realm Act 1918, Regulation 40d; and Ministry of Health Regulation 33b of 1942 (although the latter theoretically applied to both men and women, it was again aimed at professional prostitutes rather than their clients).

> In the hearts of many women today is rising a cry somewhat like this: ... I will know no man, and bear no child until this apathy [of men to women's suffering] is broken through – these wrongs be righted.[160]

Such rejection of marriage might seem in some sense a continuation of the idea that women did not have overwhelming sexual needs and could thus live without (hetero)sexual relationships. However, it took that idea a long way from its origins in the idea of separate spheres, and deliberately posed an overt threat to marriage as then constructed: if spinsterhood were a viable alternative then women need not choose marriage at all and would certainly only do so when its conditions had improved.[161] Further, to assume that an advocacy of celibacy meant abstinence is to understand the term in its narrow contemporary sense: its original meaning of being unmarried allowed for sexual activity outside marriage with either men or women (albeit such potential was not publicly articulated).[162]

Individual women, too, negotiated the mythology for their own survival. This was apparent in the Colonel Barker case. A vital part of Elfrida Haward's self-construction as innocent party in the police investigation was her self-portrayal as sexual innocent:

> Miss Hayward [*sic*] explained that she had been brought up very strictly by her parents, was not strongly sexed and had little knowledge of physiology.[163]

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[160] Lucy Re-Bartlett, 1912, cited in Sheila Jeffreys, '"Free from all uninvited touch of man": Women's campaigns around sexuality, 1880-1914' in L Coveney, M Jackson, S Jeffreys, L Kaye, P Mahony, *The Sexuality Papers: Male Sexuality and the Social Control of Women*, London: Hutchinson, 1984, pp 22-44 at p 41. See also Cicely Hamilton, *Marriage as a Trade*, London, 1909 for arguments in favour of spinsterhood as a political necessity.

[161] Hamilton, *Marriage as a Trade*, London, 1909, discussed in Jeffreys, 'Free from all uninvited touch of man', p 41; Margaret Jackson, 'Sexology and the Social Construction of Male Sexuality' in L Coveney, M Jackson, S Jeffreys, L Kaye, P Mahony, *The Sexuality Papers: Male Sexuality and the Social Control of Women*, London: Hutchinson, 1984, pp 45-66 at p 52; Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present*, London: The Women's Press, 1985, p 237.

[162] The *Oxford English Dictionary* defines celibacy as "The state of living unmarried", citing sources dated between 1663 and 1855, while "celibate" is "Unmarried, single; bound not to marry" with sources from 1829 to 1882 (*Oxford English Dictionary*, second edition (2004) http://0-dictionary.oed.com.emu.londonmet.ac.uk/cgi/entry/50035339 and 50035343, accessed 21 October 2006).

[163] Inspector Walter Burmby, *Central Officer's Special Report*, 22 April 1929, PRO MEPO 3/439.

Thus firmly placed in the role of sexually passive innocent, Haward did not face prosecution. She could even address (albeit euphemistically) the unspoken suspicion of lesbianism, stating that "she had not been engaged in any objectionable practices with Colonel Barker."[164] Barker's attempt to place herself in a similarly idealised female role, that of the self-sacrificing mother, appears to have been less successful: although she argued in the press that "[w]hat I have done has been for my boy, the only person in the whole world for whom I have any affection, and it is in the light of a mother's love ... that I ask to be judged"[165] she was seen in no such light by the courts or public. They were all too aware of the "deviant" so recently created by sexology.[166]

The rise of the sexologists

By the end of the nineteenth century there was growing discussion of women's sexuality among those professional men who could participate with some degree of respectability. In particular, both evolutionary and eugenic ideas moved women's role as mothers (and hence their sexual conduct) from an individual issue to one of vital importance to the development of the race. Given this context, respectable, heterosexual, white, middle-class women were both norm and ideal. Those who deviated from it posed a risk to the future of the race, hardly a positive starting point for any discussion of lesbianism. Indeed, the stereotype of the lesbian was far from favourable, and these discussions overtly linked lesbianism with criminality, especially violent criminality.

A somewhat parallel trend was apparent in the United States of America, where there were a series of well-publicised lesbian murder cases in the period from the 1880s to the 1930s.[167] However, there were significant contrasts. Most notable is the overtly racialised element to the lesbian stereotype deployed in England during the late nineteenth century, in contrast to the relationships between white women discussed by

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[164] Inspector Walter Burmby, *Central Officer's Special Report*, 22 April 1929, PRO MEPO 3/439.
[165] "Colonel Barker", *Sunday Dispatch*, 10 March 1929, pp 1 and 5 at p 1.
[166] Vernon suggests that Barker used her identity as a mother more effectively in a 1934 trial for theft of a purse, which ended in her acquittal following her claim that she had not returned the purse through fear it would lead to discovery of her female identity and shame for her son ('For Some Queer Reason', p 43). It is notable that in that trial, no question of her sexuality was raised.
[167] Lisa Duggan *Sapphic Slashers: Sex, Violence, and American Modernity*, Durham, North Carolina: Duke University Press, 2000.

Lisa Duggan in her analysis of such discourses in the United States. She notes that two separate discourses were at play in the USA: "[t]he black beast rapist and the homicidal lesbian".[168] By contrast, without such a large and highly visible black minority,[169] the former discourse did not develop to such an extent in Britain at this time. Only after the First World War would a growing, and largely male, ethnic minority population lead to race riots in Britain's main ports; Lucy Bland identifies fears around miscegenation as one cause, with an accompanying discourse of people of colour being innately "sexually predatory and immoral".[170] Although one can see that Havelock Ellis's examples would come to play directly into popular anxieties about race and sexual immorality, there is no suggestion that in the different pre-war context in which he wrote, such tensions were significant in British society. Nonetheless, racial and sexual otherness were linked in the single location of the lesbian.

The new discipline of psychiatry had already concerned itself with women's role and linked it to the health of society: Henry Maudsley and T S Clouston "expressed concerns about the future of the nation if women were increasingly to deny their 'nature'."[171] Such concerns were shared by those interested specifically in female criminality. As early as 1849, lawyer J C Symons suggested that an apparent rise in female offending was "indicative of the 'increasing demoralisation' of the country as a whole."[172] The new experts in criminology and sexology would expand upon these concerns.

In the late nineteenth century, an influential group of men including Cesare Lombroso and Havelock Ellis published scientific studies of social "deviants", a term

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[168] *Ibid*, p 3.

[169] There was indeed a significant black population in Britain, but not comparable in size to that of the United States. Neither were there similar levels of racial tension: Jeffrey Green comments upon the lack of a colour line or overt racial antagonism in nineteenth-century Britain, in contrast to the United States ('Reexamining the Early Years of Samuel Coleridge-Taylor, Composer', in Gretchen Holbrook Gerzina (ed), *Black Victorians / Black Victoriana*, New Brunswick: Rutgers University Press, 2003, pp 39-50 at pp 47-48). The most visible members of Britain's ethnic minorities at this time were those who formed part of Queen Victoria's court, and at the other extreme, foreign sailors such as the residents of Chinatown in Limehouse, popularly seen as a mysterious and dangerous place of opium dens and exoticism. Nonetheless, black people in fact lived in every part of Britain in the nineteenth century (David Killingray, 'Tracing Peoples of African Origin and Descent in Victorian Kent', in Gerzina (ed), *Black Victorians / Black Victoriana*, pp 51-67 at p 51).

[170] Lucy Bland, 'White Women and Men of Colour: Miscegenation Fears in Britain after the Great War' (2005) 17 *Gender & History* 29-61 at p 33.

[171] Emsley, *Crime and Society*, p 152.

applied to (amongst others) lesbians and criminals. Their work gave credibility and an aura of intellectual respectability to a number of stereotypes of both lesbians and female criminals. Because they did not challenge many of the hostile popular attitudes toward women who were not conventionally feminine,[173] but rather endorsed them and gave them "scientific" support, their work (although initially radical and controversial) eventually achieved a measure of public prominence. That prominence, in turn, both reinforced and further disseminated those popular images.

The importance given to the sexological literature in particular has survived the period in which most of it was written, with Havelock Ellis and his fellow sexologists being cited even today as key figures in the birth of modern gay and lesbian identities.[174] However, while gay men have generally seen their work as positive in creating an identity and hence a political community, for lesbians the stereotypes created have been highly problematic, while the emphasis upon congenital inversion is antithetical to lesbian feminism which does not accept heterosexuality as natural. I shall argue that when combined with their and Lombroso's publications on criminality, the effect has been particularly damaging for lesbians who are criminal defendants.

Further, the treatment of lesbianism as purely sexual deviancy, and criminality as purely "moral" deviancy, divorces the lesbian and the criminal from her social or political context. While she is by no means divorced from her race and class status, these are both defined and attributed to her in essentialist terms which deny her subjectivity. She is studied as someone who is abnormal in one area of her life and behaviour (albeit this

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[172] Zedner, *Women, Crime and Custody*, p 31.

[173] Indeed, in his study of criminal women, Havelock Ellis specifically cites popular sayings to the effect that masculine women are untrustworthy and undesirable (Henry Havelock Ellis, *The Criminal*, The Contemporary Science Series, 1890, p 63, and see below). The pseudo- male deceiver has been a persistent stereotype, featuring strongly in popular accounts of the 18th and 19th century female husbands discussed above. Lombroso similarly relied upon popular prejudices against criminals: in his view, "honest men and (especially) women were innately repulsed by the ugliness of the [male or female] criminal type, and the conclusions of "instinctive observers" had found expression in proverbs, folk songs, and jokes" (Horn 'This Norm Which Is Not One', p 113).

[174] For example, Jeffrey Weeks refers to "the highly influential work of Havelock Ellis, especially his majestic *Studies in the Psychology of Sex*. This is a vast and still very valuable chronicle of sexual behaviour and beliefs, essentially descriptive in form ... Most works since ... have taken for granted the merits of such an approach, and the result had [*sic*] been an extremely important garnering of sexual knowledge" (*Sex, Politics and Society: The regulation of sexuality since 1800*, Longman, 1981, p 2).

affliction may manifest itself in other, particularly physical, anomalies).[175] Her life is depoliticised and, if she is a "congenital invert", reduced to an innate deformity, thus undermining any challenge it might otherwise pose to the heteropatriarchal system. Indeed, the subtext of these creations at just the time when a feminist movement was gaining strength[176] seems to have been to distort the challenge to heteropatriarchy posed by women who defied social convention from a political to a medical problem.[177] Any woman who did not conform to stereotypes of femininity could be argued to demonstrate that "virility" which was the hallmark of both the true lesbian and the true criminal. Feminists were thus reduced from activists posing a threat to the heteropatriarchal order, to deviants who were unable to take their proper place in society because of congenital abnormality.

The stereotypes of the lesbian and of the female criminal created by Lombroso and Havelock Ellis[178] are remarkably similar to each other (a similarity all the more remarkable since Lombroso's research subjects were working-class criminal and prostitute women, while Havelock Ellis's were middle-class, including his own wife

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[175] The search for physical anomalies has by no means been abandoned. For example, in an article published in 1998, AF Bogaert examined the relations between sexual orientation and weight, height, and age of puberty in women. The women, described as "nondelinquent", were classified as lesbian or heterosexual; lesbians were taller and heavier than heterosexual women but no difference in age of puberty was found ('Physical development and sexual orientation in women: Height, weight, and age of puberty comparisons'' *Personality and Individual Differences*, 1998, Vol. 24, No. 1, pp 115-121). For a recent and accessible survey of current theories, including explanations based on genetics and events *in utero* (and which incidentally shows the highly normative views of gender upon which much of this research is based), see Neil Swidey, 'What Makes People Gay?', *The Boston Globe*, 14 August 2005, http://www.boston.com/news/globe/magazine/articles/2005/08/14/what_makes_people_gay/?page=full, accessed 25 September 2005.

[176] The late nineteenth century saw the rise of the first wave of feminism, which led to a rise in single, independent women; to attacks upon the sexual double standard; and to the explicit challenging of men to take responsibility for their own sexuality (see Sheila Jeffreys, *The Spinster and Her Enemies: Feminism and Sexuality 1880-1930*, Melbourne: Spinifex, 1985; Jackson, *The Real Facts of Life*; Jackson, 'Sexology and the Social Construction of Male Sexuality'. See Jackson in particular for a full discussion of the impact of Havelock Ellis' work in normalising male domination and female submission as "natural").

[177] See Sheila Jeffreys, *The Spinster and her Enemies*.

[178] I concentrate upon Havelock Ellis amongst the sexologists of the period firstly because of his particular influence in Britain (unlike other pioneers of the field such as Magnus Hirschfeld and Richard von Krafft-Ebing, he was himself British; his public profile was only increased, particularly in relation to lesbianism, by his authoring of a foreword to *The Well of Loneliness*; indeed, Jeffrey Weeks refers to him as "the most influential of the late Victorian pioneers of sexual frankness" (*Making Sexual History*, Cambridge: Polity Press, 2000, p 17); and secondly, because he was the first to include first-person case histories of lesbians (Duggan, *Sapphic Slashers*, p 162). This is not to suggest that he is somehow representative of sexology as a whole; there were major differences between the various sexologists. To take one, fundamental example, Krafft-Ebing saw homosexuality as a "nauseous disease" while Havelock Ellis argued that it was natural.

Edith Lees). In essence, both the born female criminal and the born lesbian are portrayed as half-male, with all the bad points and none of the charms of conventional femininity. If they thereby coincide with the popular image of the feminist, that fact only confirms that feminists are defective women, half-men who do not have the proper feminine and maternal instincts.

It is illuminating to make a detailed comparison of the main characteristics of these two types of "deviant". Both Lombroso and Havelock Ellis pay careful attention to the physical characteristics of deviant women. Their interest stems from the idea of deviancy being in some cases congenital: if this affliction is present from birth, it ought to manifest itself in some identifiable way in the body. The characteristics they describe are reflections as well as reinforcements of their belief that both lesbians and female criminals are not fully women, but part-male. Such attitudes had a long history; the notion of the lesbian as half-man – in the terms of the age, a hermaphrodite – had already enjoyed currency in the eighteenth century.[179]

The characteristics thus assigned are, first of all, a masculine appearance:

> virility of aspect is … characteristic of the criminal-woman[180]
>
> numerous precepts are in harmony with the results of modern research: … "Salute from afar the beardless man and the bearded woman"[181]
>
> In male inverts there is a frequent tendency to approximate the feminine type, and in female inverts to the masculine type; this occurs … in physical … respects[182]

The female deviant's "virility of aspect" is liable to be enhanced by her choice of clothing: "even her dress, increase[s the criminal woman's] resemblance to the sterner sex".[183] Likewise, "There is … a very pronounced tendency among sexually inverted women to adopt male attire when practicable. … And when they still retain female

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[179] See for example Julie Peakman, *Lascivious Bodies: A Sexual History of the Eighteenth Century*, London: Atlantic Books, 2004, pp 174-178.
[180] Lombroso and Ferrero, *The Female Offender*, p 99.
[181] Havelock Ellis, *The Criminal*, p 63.
[182] Havelock Ellis, *Psychology of Sex: A Manual for Students*, Heinemann, 1933, p 199.
[183] Lombroso and Ferrero, *The Female Offender*, p187.

garments these usually show some traits of masculine simplicity."[184] Under that masculine dress, "Among criminal women remarkable abundance of hair is frequently noted, and it has sometimes formed their most characteristic physical feature",[185] just as female inverts may show "some degree of hypertrichosis".[186]

This masculinity is not only skin-deep: "a comparison of the criminal skull with the skulls of normal women reveals the fact that female criminals approximate more to males ... than to normal women".[187] Deeper still, Havelock Ellis assures us of the truth of that saying, "Distrust the woman with a man's voice"[188] as she may be a criminal, although the female invert may equally have "a somewhat masculine development of the larynx".[189]

The physical manifestations of deviancy extend to bodily movement: the "love of violent exercise"[190] and "the singular agility and force displayed by a very few extraordinary criminals"[191], are matched by the "brusque, energetic movements",[192] "muscles ... everywhere firm" and "capacity for athletics"[193] of the inverted woman.

Turning to the behaviour of these deviant women, both Lombroso and Havelock Ellis agree that they are physically and sexually precocious. So much does Lombroso consider it typical of the criminal that he announces that

> Precocity and virility of aspect is the double characteristic of the criminal-woman, and serves more than any other feature to destroy and mask her type.[194]

Havelock Ellis agrees, particularly in terms of sexual precocity:

> To all forms of sexual excitement, natural and unnatural, criminals of both sexes resort, often from a very early age.[195]

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[184] Havelock Ellis, *Studies in the Psychology of Sex Vol. 1: Sexual Inversion*, The University Press, 1897, p95.
[185] Havelock Ellis, *The Criminal*, p 73.
[186] Havelock Ellis, *Manual for Students*, p 200.
[187] Lombroso and Ferrero, *The Female Offender*, p 28.
[188] Havelock Ellis, *The Criminal*, p 63.
[189] Havelock Ellis, *Manual for Students*, p 200.
[190] Lombroso and Ferrero, *The Female Offender*, p 194.
[191] *Ibid*, pp 130 – 131.
[192] Havelock Ellis, *Sexual Inversion*, p 96.
[193] *Ibid*, p 97.

Yet again, the lesbian's characteristics match those of the female criminal: "Sexual precocity appears to be marked in a high proportion".[196] Further, both act in a remarkably similar way: Havelock Ellis tells us that "Venturi found tobacco used by ... 1.5 [per cent] of normal women; ... 15.9 [per cent] of criminal women."[197] Predictably, lesbians have "frequently a pronounced taste for smoking".[198] Such a characteristic was significant because of the effects claimed for prolonged tobacco use by other authors: according to Talbot, amongst a variety of other alarming symptoms (many of which even the most determined anti-smoking campaigners would not claim today), "[m]enstrual disturbance occurs in women"[199] and there are vague allusions to sexual delinquencies.[200]

Both Lombroso and Havelock Ellis are openly disapproving of the attitude of these deviant women towards men. Lombroso is disgusted that "the need of protection and the confidence in the other sex, which we have described as characteristic of the normal woman ... are entirely wanting in the born criminal, who, semi-masculine, tyrannical, and selfish, demands not help or protection from anybody, but the simple satisfaction of her own passions."[201] Clearly he is determined not to see confidence in other women as an option. The woman who is not emotionally dependent upon a man must be a selfish monster. Havelock Ellis is scarcely more impressed by the lesbian's independence:

> She shows ... nothing of that sexual shyness and engaging air of weakness and dependence which are an invitation to men. The man who is passionately attracted to an inverted woman is usually of rather a feminine type.[202]

Once again, then, the deviant woman does not appeal, in either sense of the term, to men. Her lack of dependence upon men is again portrayed as unattractive:

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[194] *Ibid*, p 99.
[195] Havelock Ellis, *The Criminal*, p 144.
[196] Havelock Ellis, *Manual for Students*, p 199.
[197] Havelock Ellis, *The Criminal*, p 120.
[198] Havelock Ellis, *Sexual Inversion*, p 97.
[199] Eugene S Talbot, *Degeneracy: Its causes, signs, and results*, London: Walter Scott Ltd, 1898, p 112.
[200] *Ibid*, p 114.
[201] Havelock Ellis, *Manual for Students*, p 195.
[202] Havelock Ellis, *Sexual Inversion*, p 98.

> As a rule the inverted woman feels absolute indifference towards men, and not seldom repulsion. And this feeling, as a rule, is instinctively reciprocated by them.[203]

The elision of female independence from men with female deviance was not new. In 1876, historian of crime Luke Owen Pike posited similar views (although treating independence as cause and deviancy as effect), stating that

> in proportion as [women] have rendered themselves independent of men for their subsistence, they have thrown off the protection against competition and temptation which dependence on men implies. It follows that, so far as crime is determined by external circumstances, every step made by woman towards her independence is a step towards that precipice at the bottom of which lies a prison.[204]

Given the alarming independence of the female deviant, it was no doubt a great reassurance to Lombroso, Havelock Ellis and their male readers to learn that the born deviant is a rarity. Lombroso refers to "the comparative rarity of the criminal type in women",[205] while Havelock Ellis proclaims that "pronounced cases [of inversion] are, indeed, perhaps less frequently met with than among men".[206] The majority of deviant women, then, are not born to that state and hence beyond male rescue (indeed, if a man wants to reform a woman then by definition she is too attractive to be a congenital case):

> [A] class in which homosexuality, while fairly distinct, is only slightly marked, is formed by the women to whom the actively inverted woman is most attracted ... they are not repelled or disgusted by lover-like advances from persons of their own sex ... Their sexual impulses are seldom well marked, but they are of strongly affectionate nature ... they seem to possess a genuine though not precisely sexual preference for women over men.[207]

These women, then, are not truly independent of men and do not reject them; their attachment to other women is not sexual but merely affectionate. They are not beyond all

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[203] *Ibid*, p 88.
[204] L O Pike, *A History of Crime in England*, Vol II, London, 1876, p 527.
[205] Lombroso and Ferrero, *The Female Offender*, p 110.
[206] Havelock Ellis, *Manual for Students*, p 190.

hope of redemption. The message here is that even the majority of deviant women are in need only of male guidance to be reformed. There is but a small minority of congenital cases who are beyond male control.

Allied to this, however, is another message equally designed to undermine women's independence. This second group of women, with their weakness for the true lesbian's advances, are most likely to develop into homosexuals in single-sex institutions such as colleges, women's clubs and societies, and settlement houses (all those most associated with the New Woman of the time).[208] Ellis also quotes Thomas Laycock's argument that inversion was especially common among women working outside the domestic setting, in hotels, shops and so on.[209]

Given the striking similarities between the pseudo-scientific definitions of the true lesbian and of the criminal woman, it is unsurprising that Havelock Ellis himself links these two genres of female deviancy. Thus while he is eager to emphasise the high number of male inverts who have artistic talent or high intellect, among women it is prostitutes who "have an undue tendency to homosexuality, just as we have it among criminals, and, to a much less extent, among persons of genius and intellect."[210] Indeed, lesbianism has increased, he informs us, as a result of the movement for female emancipation:

> It has involved an increase in feminine criminality and in feminine insanity, which are being elevated towards the masculine standard. In connection with these we can scarcely be surprised to find an increase in homosexuality which has always been regarded as belonging to an allied, if not the same, group of phenomena.[211]

The linking of lesbianism and criminality in women is made even more explicit in a lengthy footnote which states that "a considerable proportion of the number of cases in

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[207] Havelock Ellis, *Sexual Inversion*, p 87.
[208] Caroll Smith-Rosenberg, 'The New Woman as Androgyne: Social Disorder and Gender Crisis, 1870-1936' in *Disorderly Conduct: Visions of Gender in Victorian America*, Oxford: Oxford University Press, 1986, pp 245-296 at pp 266-267.
[209] Margaret Gibson, 'Clitoral Corruption: Bodily Metaphors and American Doctors: Constructions of Female Homosexuality, 1870-1900' in Vernon A Rosario (ed), *Science and Homosexualities*, London: Routledge, 1997, pp 108-132 at p 120.
[210] Havelock Ellis, *Sexual Inversion*, p 102.
[211] *Ibid*, p 100.

which inversion has led to crimes of violence, or otherwise acquired medico-legal importance, has been among women".[212] Havelock Ellis seeks to substantiate this statement by citing selected details of two American cases, taking pains to emphasise that in neither case was a plea of insanity justified. Hence he underlines the point that while insanity in women may be in the same group of phenomena as criminality and inversion, it is the latter two which are really connected. This point was taken up in the English courts in Maud Allen's 1918 libel case: defendant Noel Pemberton Billing argued that she and her brother, who had been executed for two sexual murders, shared "hereditary vice".[213]

Lombroso and, more explicitly, Havelock Ellis further link sexual and social deviancy with race. Thus Lombroso, discussing "virility of aspect" as the hallmark of the born criminal, also argues (with unconvincing photographic illustrations) that the beauty admired by "savages" is masculine in type. Havelock Ellis devotes a passage in *Sexual Inversion* to discussing inter-racial lesbian relationships, specifically relationships between black and white women, concluding that these are a result of "the imperative need for a certain sexual opposition".[214] This notion that a mixed-race relationship creates "sexual opposition" serves to construct black lesbians as "other", explicitly placed in opposition to white lesbians. His example of the prevalence of such relationships is a telling one:

> I am told that in American prisons for women Lesbian relationships are specially frequent between white and black women. A Dr. Kiernan informs me that "of the three murders from perverted sexual jealousy by women in the United States in two decades, one was a negress's; and of four similar attempts to kill, four were [?by] negresses".[215]

The link is explicitly made between lesbianism, female violence and race. The citing of one victim, as against four attempted murderers, being black further links

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[212] *Ibid*, note 2, pp 78-79.
[213] See Oram and Turnbull, *The Lesbian History Sourcebook*, p 163.
[214] Havelock Ellis, *Sexual Inversion*, p 120
[215] *Ibid*, note 2, pp 78-79. Dr Kiernan, Ellis's informant, was "[t]he most prolific and influential U.S. sexologist, James G. Kiernan" who had "a particular interest in female sexual inverts". He published accounts of the 1878 killing of Ella Hearn by Lily Duer (both white) and the 1892 killing of Freda Ward by Alice Mitchell (both white), which are presumably the two cases of murder not involving a "negress"

violence with racial otherness. Ironically, Havelock Ellis was writing only a few years after the murder of Freda Ward by her lover Alice Mitchell in Memphis, Tennessee in 1892; both were white, middle-class women. Since the case attracted national attention and involved a number of psychologists as expert witnesses,[216] it would be unlikely that Havelock Ellis was ignorant of it (Dr Kiernan certainly was not), making the emphasis upon inter-racial relationships all the more significant.

In a 1915 edition of *Sexual Inversion*, Havelock Ellis extended his discussion of American cases,[217] not only giving fuller details of the Alice Mitchell case (and asserting that "[t]here is no reason to suppose that she was insane at the time of the murder" although the opposite had been found at her trial), but also discussing at some length "the 'Tiller Sisters', two quintroons". Again, he contradicts the court finding of insanity. Of two further American murder cases, one concerns two Russian "girls". In the cases involving white women, maternal insanity is carefully documented; in three of the four cases it is made clear that the violent woman is the "congenital invert" in the partnership. The careful detailing of racial background in two out of five cases, even to the fastidious description of the Tiller Sisters as quintroons, once more links lesbian violence with racial otherness[218] just as the identification of the violent partner as a "congenital invert" ties together lesbianism, masculinity and violence.

Such a racialised stereotype was not unrelated to the science of race, another nineteenth-century invention. Just as men and women were now seen as fundamentally biologically different, so there was a shift from "monogenism" which saw all people as fundamentally the same to "polygenism" which suggested that different races amounted to different species.[219] Those outside the white norm thus faced similar scientific disparagement to those outside the heterosexual male norm. As Judith Raiskin explains,

> Once science had constructed an elaborate model of racial hierarchies positing "Causasian" [*sic*] as the superior and "Negro" as the inferior races, nineteenth-century studies of sexual and gender

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(Duggan, *Sapphic Slashers*, pp 172-3).

[216] Duggan, *Sapphic Slashers*; for press coverage, see Chapter 2 in particular and for medical evidence, Chapter 4.

[217] Quoted in Duggan, *Sapphic Slashers*, pp 174-5.

[218] And of course, since all his violent cases come from the USA, he carefully situates such violence "abroad" too.

[219] Nancy Stepan, *The Idea of Race in Science*, London: The Macmillan Press, 1982, p 1.

differences found this template of racial inequalities ... remarkably helpful in explaining, or rather asserting, gender and class inequalities as well. Categories of sexual behavior and identity created by nineteenth- and twentieth-century sexologists were also influenced by the classification systems of race, whereby people of color, particularly "mixed race" people, and homosexuals were conflated through the ideas of evolution and degeneration prevalent in the late nineteenth century.[220]

Such concerns were linked with the growth of eugenicism and ideas of degeneracy as a hereditary condition.[221] These theories attached importance not only to hereditary mental disorders and so on, but also to class and race. (Indeed, it should not be forgotten that in the British context, class was if anything more important than race as a focus for eugenic concerns, although anti-Semitism was also a significant feature).[222] While not advocating racial purity,[223] Talbot emphasised the importance of care in mixing and of each race staying in its proper place:

> Whether the results of race intermixture prove degenerate or not will turn largely on the environment. The mulatto is certainly better adapted to the white environment than the pure negro, albeit less so than the white. That race intermixture may however, determine degeneration, is

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[220] Judith Raiskin, 'Inverts and Hybrids: Lesbian Rewritings of Sexual and Racial Identities' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 156-172 at p 157

[221] Such theories were adopted by Havelock Ellis, were implicit in Lombroso's theories of atavism, and were expounded by authors such as Eugene S Talbot, himself associated with Havelock Ellis (Talbot's *Degeneracy* was part of the Contemporary Science Series which Havelock Ellis edited and in which he published his own *The Criminal*).

[222] To Angelique Richardson, "eugenics was a biologistic discourse on *class*: a class-based application of ... evolutionary discourse" (*Love and Eugenics*, p 3). Margaret Gibson emphasises that since the lower classes were "more degenerate", "it was ... anticipated that sexual inversion would also be more readily discovered in the working classes" ('Clitoral Corruption: Bodily Metaphors and American Doctors: Constructions of Female Homosexuality, 1870-1900' in Vernon A Rosario (ed), *Science and Homosexualities*, London: Routledge, 1997, pp 108-132 at p 120). Such a concern with class over race was by no means new: Louise A Jackson discusses the 1835 case of a Native American man charged with attempting to rape a ten-year-old girl. As his class status (a Chief, landowner, and person who had had extensive dealings with the British government) became apparent, his image in both the media and the criminal justice system shifted from criminal "savage" to member of the landed gentry. He was acquitted of the charge (Louise A Jackson, *Child Sexual Abuse in Victorian England*, London: Routledge, 2000, pp 128-129). However, we should bear in mind Nancy Stepan's reminder that "the 'class' eugenics of Britain was nonetheless easily translated into racial terms" (*The Idea of Race in Science*, p 126): in particular, anti-Semitism and eugenics were linked by such writers as Houston Stewart Chamberlain, Arnold White and Anthony Ludovici (see Martin Pugh, *Hurrah for the Blackshirts*, pp 13-14).

[223] Indeed, he gives a great deal of attention in Chapter 5 to the mixed racial background of the English and the potential benefits of racial mixtures.

> shown by the relapse into voodooism and cannibalism of the Haiti and Louisana [*sic*] French hybrids ...[224]

Unsurprisingly, Talbot was certain that the white race held the highest evolutionary position:

> On the whole, race intermixture will not tend to elevate the race where there is a decided difference in the state of evolution of the two races, and moreover especially where, as is usually the case, the mother is of the inferior race. It must be obvious that, given a negro pelvis and the head of a white, results damaging to the offspring cannot but occur. And these results are of a nature likely to be transmitted by heredity.[225]

In the complex hierarchy of races which he develops, white races appear to be at the top and "negroes" at the bottom. Such ideas made the mixture of white women with black women particularly shocking, mingling as it did sexual degeneracy, the most undesirable of racial mixtures, and the highly visible rejection by white women of their proper (breeding) role in perpetuating the superior English race.

Siobhan B Somerville agrees that sexual and racial anxieties were intimately linked in the sexologists' invention of "the homosexual".[226] She focuses in particular upon Havelock Ellis's *Sexual Inversion*, whose focus upon "somatic differences ... drew upon and participated in a history of the scientific investigation of race."[227] She notes as suggestive that even where, in his chapter "The Nature of Sexual Inversion", Ellis dismissed race as a significant category, he nonetheless made it the first topic of the chapter.[228] I would add that his discussion of cases of mixed-race relationships supports this point, since all the cases were not only outside his own first-hand knowledge but were American: he had therefore made a concerted effort to seek them out.

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[224] Talbot, *Degeneracy*, p 99. Later writers would follow such concerns about the dangers of racial mixing, combining them with anti-Semitism in particular and leading to the close association of eugenics with fascism: for example, Houston Stewart Chamberlain claimed that "a mongrel is frequently very clever, but never reliable; morally he is always a weed" (*The Foundations of the Nineteenth Century*, 1899, p 261, quoted in Martin Pugh, *Hurrah for the Blackshirts*, 2005, p 13).

[225] Talbot, *Degeneracy*, pp 101-102.

[226] Siobhan B Somerville, 'Scientific Racism and the Invention of the Homosexual Body' in Lucy Bland and Laura Doan (eds), *Sexology in Culture: Labelling Bodies and Desires*, 1998, Cambridge: Polity Press, p 60-76.

[227] *Ibid*, p 63.

Somerville notes that scholars dealing with race through "comparative anatomy" focused upon the African female body, using the same methodologies as the sexologists. Indeed, just as women's bodies and genitalia were focused upon in a search for the boundaries of race, "women's genitalia and reproductive anatomy held a valuable and presumably visual key to ranking bodies according to norms of sexuality."[229]

Popular literature (albeit with some pretence to professional knowledge) could make the same linkage between race and sexuality. In his chapter on women's "perversion", which he identifies wholly with lesbianism,[230] former CID officer Cecil Bishop connects foreign travel and black women with lesbianism by including the following in his discussion of the topic:

> The sights to be seen on the Continent have spoiled the minds and ruined the lives of many girl visitors from this country. For instance, I recently learned that two young girls, travelling together to Paris last Easter, were conducted round Montmartre by a designing scoundrel who took them to a place where they saw persons of different colour indecently performing for public show. The girls paid two hundred francs to witness this spectacle. I was given this information by a Frenchman who added that English and American girls frequently go to see sights of the kind mentioned. [231]

His work, however, reflected the newly-developing concern with lesbianism amongst the middle and upper classes which followed the *Well of Loneliness* trials and to some extent the "Colonel Barker" trial (Bishop wrote in 1930, only a short time after those events). Although Bishop makes no reference to these cases, he does focus upon the greater opportunities given to wealthier women who have the financial means to set up flats or pay for hotels for themselves and their younger lovers. Clearly the publicity around Radclyffe Hall, with her wealth and social status, made the assignment of lesbianism to

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[228] *Ibid*, pp 63-64.
[229] *Ibid*, p 66.
[230] "Perversions [of women] ... take several forms, but the basis of them all is lesbianism" (Bishop, *Women and Crime*, p 162).
[231] *Ibid*, p 169. Tellingly, this passage links the discussion of lesbianism to a discussion of inter-racial (but apparently heterosexual) performances in London which itself leads into a discussion of male homosexuality. Thus although the performances in Paris may have been heterosexual in nature – the author leaves this extremely unclear – they intimately connect lesbianism, the Continent, and "persons of different colour".

the working classes alone no longer tenable; it is notable that it is at this point that public and legal concern began to be openly expressed.

The effect of the turn-of-the-century writings on deviant women, then, is to identify the true lesbian and the born criminal woman as at least similar, and very often the same. The linkage works on two levels. First, we are explicitly told that the lesbian is likely to be a criminal. Second, the stereotypes created are so similar that the one can be superimposed upon the other. The effect upon lesbian criminal defendants is not difficult to imagine: the defendant is identified as lesbian; a certain stereotype is projected on to her as a result; that stereotype also matches the stereotype of the criminal woman; the defendant is therefore perceived as innately criminal. If she is black and/or working class, the juxtaposition of the two is even easier to make: the "invert", argues Lynda Hart, "displaced the threat of women's sexual 'deviance' onto women of color and working-class women".[232] In consequence, "as lesbianism became a clearer concept during the twentieth century, it was also increasingly associated with a semi-criminal underworld of violence, murder and sexual depravity generally".[233]

Again, the underlying message of this stereotyping seems to be that respectable middle-class white women are by definition not true lesbians. However, those who are independent are at risk of pseudo-lesbianism (often led astray by the single-sex institutions of New Woman-hood) – but, happily, are redeemable and thus not beyond male control. For once a woman steps irrevocably beyond the bounds of patriarchal control, she is, in the eyes of the turn-of-the-century "scientist", a savage, a criminal and above all, unsexed: a "malignant semi-masculine creature".[234] Readers need not worry about their own wives: the female deviant is unattractive to men, half a man herself, outside their norms of race, sex and class.

While it may seem easy to dismiss this concern as being based upon outdated, discredited authors, in fact these two men had great contemporary impact, writing as they were on the fashionable subjects of the day. Havelock Ellis' notions received particular public attention in the course of the prosecution in 1928 of Radclyffe Hall's novel *The*

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[232] Lynda Hart, *Fatal Women: Lesbian Sexuality and the Mark of Aggression*, London: Routledge, 1994, p 4.
[233] Oram and Turnbull, *The Lesbian History Sourcebook*, p 158.
[234] Lombroso and Ferrero, *The Female Offender*, p 204.

Well of Loneliness, which was based upon sexological theories about female inversion and for which Ellis had written a foreword, for obscenity.[235] Her eagerness to use sexological concepts was by no means unique among lesbians; in particular, the notion of congenital lesbianism could be seen by some as offering the possibility of greater toleration and a route to equal rights.

The influence of these authors' approaches has also continued to the present day, even where specific theories have been rejected. Alison Morris reminds us that this imagery of the criminally deviant woman is not just a historical curiosity: "idealized and simplified sterotypes of appropriate behaviour for men and women persist and continue to influence criminological theory" so that eighty years after Lombroso and Havelock Ellis first published their theories, Freda Adler was arguing that women were increasingly criminal and violent because they were "virilized".[236] Similarly, biological approaches to sexuality and gender – including an emphasis on their evolutionary roles - have become newly fashionable in recent years.[237]

Further, Ellis and his contemporaries have been credited with having made a lesbian and gay community and movement possible, through defining lesbian and gay identities (rather than activities) for the first time.[238] More broadly, "Ellis ... wrote a large part of the script for twentieth-century concepts and attitudes".[239] Margaret Jackson highlights how Ellis's "influence on modern conceptions of sexuality has been enormous

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[235] The sexologists' work was not generally available since most bookshops would sell them only to doctors. lawyers and scientists (Margaret Jackson, *The Real Facts of Life*, p 129) but was popularised not only by this trial but by other books and articles strongly influenced by sexology. Lucy Bland points out that earlier publicity around the banning of Havelock Ellis' book as obscene may have prevented access to it, but nonetheless resulted in his receiving hundreds of letters from "inverts" (*Banishing the Beast*, p 263). (Note that her interpretation of the legal aspect is a little faulty).

[236] Alison Morris, *Women, Crime and Criminal Justice*, London: Basil Blackwell Ltd, 1987, p 13.

[237] See for example the discussions in Stevi Jackson, 'Heterosexuality, Sexuality and Gender: Rethinking the Intersections' in Diane Richardson, Janice McLaughlin and Mark E Casey, *Intersections Between Feminist and Queer Theory*, Basingstoke: Palgrave Macmillan, 2006, pp 38-58 at p 38; Neil Swidey, 'What Makes People Gay?', *op cit.*

[238] This argument is, however, a controversial one. The notion that lesbian identity was impossible prior to the turn of the century is fallacious; indeed there were a number of terms current in the eighteenth century, for example, such as Tommy, tribade, Sapphic, etc (see Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668 – 1801*, London: Scarlet Press, 1993). That is not, of course, to say that the nature of lesbian identity was unchanging during those centuries.

[239] Jeffrey Weeks, *Making Sexual History*, p 49.

– as great, in some respects, as Freud's",[240] a view shared by post-war sexologist and author of *The Joy of Sex*, Alex Comfort.[241]

One of the most far-reaching consequences of the sexologists' growing influence was the way in which lesbianism now became visible, but only through the lens of congenital inversion. First, lesbianism gained a newly sexualised image: no longer hidden among romantic friends or passing women, lesbians now took their place among the other categories of "perversion" bequeathed us by the sexologists, including sadists, masochists and paedophiles.[242] Second, while the "scientific" literature seemed initially to be yet another domain of privileged knowledge, open to the educated professional and upper classes (initially only if they read languages other than English),[243] its impact soon proved very different. The literature was rich with case studies, many sent in by "uranians" or "inverts" themselves in response to earlier publications.[244]

Further expansion saw professionals such as the police officer Cecil Bishop or the lawyers who participated in the 1921 parliamentary debates contributing their own (albeit not necessarily reliable) accounts of encounters with lesbian women. These cases were not confined to the working classes but were often from the very levels of society where the English law had dedicated so much effort to denying that lesbianism existed. Indeed, Havelock Ellis imported general suspicion of lesbianism into middle-class women's relationships for the first time:

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[240] Jackson, 'Sexology and the Social Construction of Male Sexuality', p 47.

[241] In a review of Phyllis Grosskurth's *Havelock Ellis: A Biography*, New York: Alfred A Knopf, 1980, (cited in her article 'Reviewing the Reviews' (1981) *History Today* 54-55).

[242] These terms were all coined in 1890. See Chris Waters, 'Sexology', in HG Cocks and Matt Houlbrook (eds), *The Modern History of Sexuality*, London: Palgrave Macmillan, 2006, pp 41-63, at p 45.

[243] The earliest works included the publications of German lawyer Karl Heinrich Ulrichs (*Forschungen über das Rätsel der mannmännlichen Liebe*, Frankfurt, 1864-1865) and Austrian neurologist Baron Richard von Krafft-Ebing (*Psychopathia Sexualis: Eine Klinische-Forensische Studie*, Stuttgart, 1886 and twelve later editions).

[244] In particular, publicity around the prosecution of George Bedborough for selling the book, "a certain lewd, wicked, bawdy, scandalous libel", prompted hundreds of letters to Ellis. Note that as Bedborough pleaded guilty, there was no finding as to whether the book was obscene; the book itself was not on trial. Indeed, the purpose of the trial seems to have been primarily to destroy the Legitimation League, an organisation whose meetings provided a platform for anarchists (See Jeffrey Weeks, *Making Sexual History*, pp 27-28; Anne Humpherys, 'The Journals That Did: Writing about Sex in the late 1890s' (2006) 3 *19: Interdisciplinary Studies in the Long Nineteenth Century*, http://www.19.bbk.ac.uk/images/HumphresyFinalPaper.pdf, accessed 7 December 2006, pp 1-2).

> Before Havelock Ellis no one had questioned the "naturalness" of the New Women's genteel passions. Ellis did not write to defend the New Women from criminal prosecution and allegations of moral and physical degeneracy [as he had for male homosexuals]. He initiated those allegations. Even more significantly, Ellis phrased them as an attack upon political feminism.[245]

In this context, the prosecution of a middle-class "female husband" such as Valerie Arkell-Smith makes sense. While earlier cases had been taken exclusively from the working classes, sexology had transformed the problem into one also liable to strike their social betters. Thus one consequence of sexology was to be that lesbianism's visibility increased dramatically, and the law would have to change its approach correspondingly.

We have seen that originally, the concept of female sexual passivity carried with it that of female moral superiority. Problematic as such an essentialist notion might be, it gave women a valued and valuable role in the moral education of their families and even of society. Many feminists were able to build upon that role to gain a voice in the public domain.[246] Ultimately, the notion that women were not subject to overwhelming sexual desires helped lead to spinsterhood as a radical political choice. At the same time, feminist critiques of sexuality denied the naturalness of existing sexual behaviour and, rejecting the myth that men had a stronger and less controllable sexual instinct, demanded that male behaviour should change.[247]

However, the sexologists' work renaturalised sex roles and undermined women's moral claims: women had no special claim to morality when females of all classes could have unconventional sexual desires, while a refusal of heterosexuality might be no more than a front for or an inducement to less acceptable forms of sexual conduct.[248] Lesbianism was particularly important here since, Havelock Ellis asserted, it "appears to be scarcely less common than among men, in this respect unlike nearly all other aberrations".[249] Thus robbed of their moral standing, and suspect in their friendships,

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[245] Smith-Rosenberg, 'The New Woman as Androgyne', p 277.
[246] In a radical twist on this approach, the militant suffrage movement of the early twentieth century made explicit the link between the need to attack the sexual double standard and the need for women to be represented in parliament (Margaret Jackson, *The Real Facts of Life*, p 35).
[247] See in particular the work of the doctor Elizabeth Blackwell, discussed in Margaret Jackson, *The Real Facts of Life*, pp 28-29 and Chapter 3.
[248] For a full discussion of the ways in which sexology made love between women a 'morbid' condition, see Lillian Faderman, *Surpassing the Love of Men*, p 237.
[249] Ellis, *A Manual for Students*, p 190.

women not only lost an important role but also appared dependent upon men for their own moral guidance. Hence Sheila Jeffreys describes the sexologists' ideas being "used to launch a savage propaganda battle against the 'spinster'" before the First World War.[250] By 1914, Hargrave L Adam was writing of woman's "lack of moral responsibility", an inevitable consequence of her dependent role "[i]n the well-ordered scheme of natural things", which resulted in "nuisance" or outright criminality when women "encroach upon or intrude into the sphere of man's natural industries".[251]

For lesbians, and especially the lesbian criminal defendant, then, the work of the sexologists was very much more hindrance than help. She was now seen through the lens of two forms of deviancy: sexual and criminal. Nonetheless, so far has Havelock Ellis entered the minds of many women as someone whose work was favourable to lesbians that Sheila Rowbotham feels able to refer, in her recent book *A Century of Women: The History of Women in Britain and the United States*, to "Ellis's non-judgemental case histories" without further comment.[252] Unfortunately, any benefits offered by the sexologists' dissemination of lesbian case histories came at a price. Thanks to the criminal and sexual anthropologists of the late nineteenth century, the lesbian is criminal.

However, one should be cautious of overestimating the extent to which sexology provoked a dramatic change in approaches to female sexuality. First, it often added a scientific gloss to existing attitudes, as when Havelock Ellis stated that "in a very large number of women the sexual impulse remains latent until aroused by a lover's caresses",[253] hardly a challenge to the myth of female sexual passivity.[254] Second, the sexologists themselves did not necessarily oppose a policy of silencing. Havelock Ellis, who saw his work as addressed to that (essentially male, higher-class) professional audience considered entitled to privileged knowledge, argued that homosexuality should be decriminalised because "it at once puts a stop to the movement of agitation, and the tendency to the glorification of homosexuality – which is undesirable and even in many

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[250] Jeffreys, 'Free from all uninvited touch of man', p 42.
[251] Hargrave L Adam, *Woman and Crime*, London: T Werner Laurie, 1914, p 17.
[252] London: Viking, 1997, pp 32-33.
[253] *The Sexual Impulse in Women*, St Louis, Missouri, 1902, p 9.
[254] He further argued for the naturalness and inevitability of male sexual domination and female submission, the importance of female modesty, and the need for the male to take the initiative to overcome her sexual inhibition - which may appear as fear or reluctance! (Jackson, 'Sexology and the Social Construction of Male Sexuality', pp 53-55).

respects harmful".[255] Third, it is vital not to assume that sexology alone set the terms of discussion in the 1920s. In fact, older attitudes also persisted. In the previous chapter I discussed the popular tendency to mock lesbian marriages even as they were condemned. Such an approach was still strong in 1920s Surrey: "the woman's masquerade at Hampton is now the cause of great amusement to those who knew her when she resided there and one has only to mention her name to raise a laugh."[256] Fourth, the Barker trial was in some ways anomalous, coming as it did so soon after the *Well of Loneliness* case and being heard by a judge already familiar with the debates around lesbianism. Oram has identified a number of later stories of cross-dressing women, which were treated as light entertainment in the pre-sexological style. Indeed, she suggests that in subsequent media accounts of female cross-dressing, "it was not until the late 1940s that any reference to lesbian sexual motives ('unnatural passion') began to creep [in]".[257]

Lesbianism as mental illness

Although lesbian visibility was increasing by the late 1920s, and there were two high-profile trials in as many years, we should not be misled by the Colonel Barker and *Well of Loneliness* cases into imagining that the courts were now thronged with lesbian defendants. On the contrary, the criminal law was not the only or main mechanism for policing lesbianism. Social, financial, religious and familial pressures all had their roles to play, and it was in part to escape these that some women disguised themselves as men. However, in the nineteenth century a new form of regulation also developed: the sciences of psychology and psychiatry. They were not entirely separate from the legal system but shared links with it, both overt and practical on the one hand, and more subtly in the aims and attitudes demonstrated on the other.

Insanity was not a new concept either within or outside the criminal justice system; as a criminal defence it dates back to the middle ages.[258] In the eighteenth

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[255] Ellis, *A Manual for Students*, p 201.
[256] *Surrey Comet*, March 1929, quoted in Simon Brody, 'Perfect Gentleman was a Wily Woman', *Kingston Guardian*, 12 March 2004, http://www.kingstonguardian.co.uk/news/features/display.var.469340.0.perfect_gentleman_was_a_wily_woman.php, accessed 19 June 2006.
[257] Oram, 'Cross-dressing and Transgender', p 275.
[258] Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England*, Basingstoke: Palgrave Macmillan, 2004, p 24.

century, insanity defences were not uncommon,[259] and the later disincentive of incarceration as a consequence of success did not yet apply. A connection between gender and insanity was also being made: Rabin suggests that

> [w]hile insanity had been gendered as both masculine and feminine, different features of the diseased mind were thought typical of men or women. Melancholia, with its symptoms of withdrawn, quiet, impenetrable depression, and violent dangerousness, had traditionally been ascribed to men, while women's lunacy was associated with dazzling outbursts of singing and dancing as well as uncontrolled talking.[260]

However, as the eighteenth century progressed, so the concept of the lunatic was changing. Showalter defines the late eighteenth century as the historical moment when "lunatics [who] had formerly been regarded as unfeeling brutes, ferocious animals that needed to be kept in check ... were now seen instead as sick human beings, objects of pity whose sanity might be restored by kindly care."[261] With this fundamental change, though, came another important shift: "the appealing madwoman gradually displaced the repulsive madman, both as the prototype of the confined lunatic and as a cultural icon."[262] Such feminising of insanity was apparent within the legal system. Rabin posits that in the eighteenth-century courts, "elite men attempted to reclaim and reinvigorate traditional masculinity and reassert the distinction between male and female, popular and elite, by alleging their superior self-control and pathologizing the mental states described in court as the domain of weak men and all women."[263]

As ideas about madness changed, so did the legal response to insanity. It was immediately following the acquittal of James Hadfield, who had attempted to murder George III, on the basis of insanity that the Act for the Safe Custody of Insane Persons Charged with Offences 1800 was passed, providing that persons acquitted of any felony

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[259] The number of pleas of insanity rose significantly between 1740 and 1800 (Nigel Walker, *Crime and Insanity in England Volume One: The Historical Perspective*, Edinburgh: Edinburgh University Press, 1968, pp 68-72).
[260] Rabin, *Identity, Crime, and Legal Responsibility*, p 4.
[261] Elaine Showalter, *The Female Malady: Women, Madness and English Culture, 1830-1980*, London: Virago, 1987, p 8. Henry de Bracton, for example, had described the mad as "not far removed from brutes" (*On the Laws and Customs of England*, vol 2, p 424, cited in Rabin, *Identity, Crime and Legal Responsibility*, p 41).
[262] Showalter, *The Female Malady*, p 8.

by reason of insanity be incarcerated.[264] Just over a quarter of a century later, the Madhouse Act 1828 would require a certificate or order for the committal of private patients to an asylum, thus extending legal regulation to the non-criminal insane.

The close connection between the criminal justice system and the mental health field was highlighted once more in 1843 with the enunciation of the *M'Naghten Rules* governing the defence of insanity.[265] These rules provided (and continue to provide) the test for the point at which a person's insanity excuses them legally from responsibility for their actions. M'Naghten had attempted to assassinate Robert Peel, firing at him but killing his secretary instead; the consequence of the finding of insanity, that he should be confined in an asylum rather than hanged, led to public concern about the dangerously insane and the need for asylums.[266]

In fact, facilities for the confinement of the insane were expanding dramatically. The Lunatics Act 1845 required all counties in England and Wales to make provision for the care of lunatics; such provision generally took the form of lunatic asylums.[267] By the mid-1850s, the majority of their inhabitants were women; by the 1870s they were overcrowded, underfunded and understaffed.[268] Approaches based upon psychoanalysis rather than confinement would not be widely used until they were adopted for treating shell-shocked men after the First World War.[269]

Victorian psychiatry did not have a single approach, as can be seen in the divergence of expert opinions upon whether insanity's causes were moral or physical.[270]

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[263] Rabin, *Identity, Crime and Legal Responsibility*, p 4.
[264] *Ibid*, p 142.
[265] *M'Naghten's Case* (1843) 10 Cl and Fin 200: "it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." For a detailed discussion of M'Naghten's case, see Chapter 5 of Walker, *Crime and Insanity in England Volume One*.
[266] Andrew Roberts, 'The National Lunacy Inquiry and Its Circumstances', *The Lunacy Commission, A Study Of Its Origin, Emergence And Character*, Middlesex University, 1981, http://www.mdx.ac.uk/WWW/STUDY/4_05.htm#MoralInsanity, accessed 7 May 2006.
[267] By 1847, 36 out of 52 counties had built public asylums (Showalter, *The Female Malady*, p 17).
[268] Showalter, *The Female Malady*, pp 17-18.
[269] *Ibid*, p 19.
[270] *Ibid*, pp 29-30. Even the two terms over-simplify the range of potential causes identified: the Bethlem Hospital statistics identified 27 causes of female insanity including heredity, anxiety, disappointment, excessive study, religious excitement, jealousy, death of relatives, bodily illness, over-lactation, uterine disturbance, opium eating and onanism (W Charles Hood, *Statistics of Insanity; Embracing a Report of Bethlem Hospital, from 1846 to 1860, Inclusive*, London: David Batten, 1862, p 55).

However, Showalter suggests that there was far greater unanimity on the treatment to be preferred: cure through "moral management", a regime of moderation and the encouragement of willpower.[271] The asylum was to have an atmosphere of domesticity: the idea of management without the use of restraints won wide acceptance,[272] and its leading proponent John Conolly was feted and honoured as amongst the "greatest and most noble benefactors ... that our profession and our country have ever produced" for his pioneering work on this issue.[273] Physical restraints were replaced, however, by a paternalistic system of "benign control" centred upon supervision rather than shackles. Critics point out that this was in some ways a greater restriction since it required the insane to conform fully to the standards set by their keepers: according to Foucault, this marked an internalisation of restraint, and "substituted for the free terror of madness the stifling anguish of responsibility; fear no longer reigned on the other side of the prison gates, it now raged under the seals of conscience."[274]

As asylums grew in size, so this system of control became "increasingly like the family, ruled by the father, and subject to his value and his law."[275] Such a connection was made explicit by Florence Nightingale:

> It is not only against those esteemed physically insane that commissions of lunacy are taken out. Others have been kept unjustly in confinement by their well-intentioned relations, as unfit to be trusted with liberty. In fact, in almost every family, one sees a keeper, or two or three keepers, and a lunatic.[276]

Given the replication of family structures, it is no surprise that women's diagnosis and treatment was profoundly affected by the gender stereotypes and concerns of Victorian society. As the asylum aimed to resemble the home, so it became an increasingly feminised space: in the space of a decade, the proportions of males to females reversed,

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[271] Showalter, *The Female Malady*, p 30.
[272] *Ibid*, p 31.
[273] *Ibid*, p 44. That is not to say that his methods did not meet with initial resistance (see p 46).
[274] *Madness and Civilization: A History of Insanity in the Age of Reason* (1961), London: Routledge, 2001, p 234.
[275] Showalter, *The Female Malady*, p 50. She notes that in Bethlem, "the old manacles had been converted into stands for flatirons, an ironically efficient transformation of restraint into domestic work" (pp 82-3).
[276] Florence Nightingale, *Suggestions for Thought to Searchers After Religious Truth*, London: Eyre & Spottiswoode, 1860, vol 2, p 220.

so that by the 1850s most inhabitants were women.[277] At the same time, the professionalisation of the asylum meant that the number of women in all but secondary roles decreased drastically.[278]

With the feminisation of the asylum, however, came the psychiatrisation of women,[279] and particularly women criminals. The latter development was logical given that "mad" became a label for disorderly or disobedient women.[280] Emsley notes that as the Victorian period wore on, there was increasing emphasis upon female offenders as "feeble-minded" through diagnoses such as kleptomania, "linking ... the offence/disease with female sexuality and using this to re-emphasise woman's secondary position in nature."[281]

The growth in female asylum inmates was not unnoticed at the time. On the contrary, it was debated fiercely with proposed explanations including women outliving men;[282] the greater numbers of poor women; and the presence of non-insane women including the epileptic and physically or mentally handicapped; but above all, that the instability of women's reproductive systems made them more vulnerable to insanity:[283] "[t]o the crises and periodicities of her reproductive organs could be traced all the

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[277] Showalter, *The Female Malady*, p 58, cites figures to show that while in 1845, male patients outnumbered females by 30% (John Thurnam, medical superintendent of York Retreat), by the 1850s women outnumbered men. However, the question of whether women actually significantly outnumbered men rather than moving from a minority to equal representation or a little more among patients, is controversial (see for example Jonathan Andrews and Anne Digby (eds), *Sex and Seclusion, Class and Custody: Perspectives of Gender and Class in the History of British and Irish Psychiatry*, Amsterdam, New York: Rodopi, 2004, where this point is a theme common to many of the contributors). The proportions of men and women certainly may not have been uniform across the country. Nonetheless, contemporary perceptions were that women accounted for an increasing and disproportionate number of patients.

[278] Showalter, *The Female Malady*, p 53.

[279] Pamela Michael, in her study of North Wales, points out that when patients being cared for in workhouses or by friends or family, as well as those in asylums, are included then there is "a pronounced excess of female over male patients" ('Class, Gender and Insanity in Nineteenth-Century Wales' in Andrews and Digby, *Sex and Seclusion*, pp 95-122 at p 100).

[280] Michael, 'Class, Gender and Insanity', p 112. She points out that such an assertion does not deny the possibility these women suffered mental or physical illness: "it is simply a claim that the evidence adduced for their insanity related to their expressive behaviour in defiance of social norms specific to their gender, and in defiance of male authority."

[281] Emsley, *Crime and Society in England*, p 153.

[282] W Charles Hood argued in *Statistics of Insanity* that the statistics were misleading given that women outnumbered men in the population generally, by a greater extent than women outnumbered men in asylums.

[283] Showalter, *The Female Malady*, pp 54-55 (citing, respectively, Edgar Sheppard, *Lectures on Madness in Its Medical, Legal, and Social Aspects*, London: John Churchill, 1873, pp 3-5; Andrew T Scull, *Museums of Madness*, pp 241-5; and Hunter and Macalpine, *Psychiatry for the Poor*, pp 63-64; Horatio R Storer, *The Causation, Course and Treatment of Reflex Insanity in Women* (1871), New York: Arno Press, 1972, p 78).

peculiarities of her nature".[284] In the words of George Man Burrows, "The functions of the brain are so intimately connected with the uterine system, that the interruption of any one process which the latter has to perform in the human economy may implicate the former."[285]

By the 1870s, "moral management" was declining in both popularity and practicality as the number of asylum inmates grew. What Showalter identifies as "psychiatric Darwinism" now came to the fore,[286] led by figures such as Henry Maudsley. Their emphasis was upon heredity and physical causes; the field of psychiatry was thus extended far beyond the asylum and into realms such as sexuality, leading to the growth of the field of sexology discussed above. Lunacy was now another form of degeneracy, with all the likelihood of incurability which that implied.

At the same time, the "New Woman" also became a public figure, seeking opportunities for education and employment hitherto denied to women. The identification of female biology with mental ill health was emphasised by their opponents, and women's vulnerability in cases of mental over-exertion was presented as a reason to thwart their ambitions: "evolutionary theory seemed to furnish undeniable reasons why the status quo should not be radically altered in response to these [feminist] demands".[287] Sexual differentiation was seen as a sign of high civilisation, and any move away from feminine norms was thus a step towards degeneracy. To Henry Maudsley, "there is sex in mind as distinctly as there is sex in body".[288] Indeed, the sexual differentiation of the mind had quite literal form: James Crichton-Brown, the Lord Chancellor's Medical Visitor in Lunacy, claimed that the average female brain weighed significantly less than the male; it also had fewer convolutions in the frontal cerebral lobes and shallower grey matter.[289] With any move out of traditional female roles seen as a cause or manifestation of insanity, women who sought independence from men were highly vulnerable to

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[284] Andrew Scull and Diane Favreau, 'The Clitoridectomy Craze' (1986) 53(2) *Social Research* 243-260, p 243.
[285] *Commentaries on the Causes, Forms, Symptoms, and Treatment, Moral and Medical, of Insanity*, London: Underwood, 1828, p 146, cited in Scull and Favreau, 'The Clitoridectomy Craze', p 244.
[286] *The Female Malady*, p 104.
[287] Oppenheim, *"Shattered Nerves"*, p 182.
[288] 'Sex in Mind and in Education' (1874) 15 *Fortnightly Review* 468, cited in Showalter, *The Female Malady*, p 122.
[289] Oppenheim, *Shattered Nerves*, pp 185-186.

psychiatric intervention. Combined with the emphasis upon excessive or extra-marital sexuality as a form of female insanity, it can be seen that lesbian women were at risk of (the threat of) incarceration.[290]

Such arguments were, however, actively challenged by women, notably Louisa Lowe who published a critique of psychiatry, *The Bastilles of England*. She not only described the laws which made incarceration of another easy and obtaining their release difficult, but highlighted the disproportionate impact upon women:

> It is naturally more frequent for women in general and wives in particular to be "put away", as it is called, without due cause than for men.[291]

Women were vulnerable to more than incarceration, however. Outside asylums, the belief in physical causes of insanity saw a new interest in physical cures.[292] Those for female insanity tended to focus upon the reproductive system: from Dr Edward Tilt advocating the retardation of menstruation, to W Tyler Smith recommending injections of ice water into the rectum, ice in the vagina, or leeching of the labia and cervix to treat nervous symptoms of menopause, to the extreme of Dr Isaac Baker Brown's use of clitoridectomy as a cure for female insanity.[293]

Baker Brown discussed this highly experimental surgical procedure in terms which utterly denied the subjectivity – practically the existence - of the patient:

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[290] One example of female incarceration for rejecting matrimony was that of Edith Lanchester, committed by her family to a private asylum with the co-operation of Dr G Fielding Blandford because she was living with a man to whom she was not married. Blandford "believed that her opposition to conventional matrimony made her unfit to take care of herself"; he gave the cause of her insanity as "over-education" (Showalter, *The Female Malady*, pp 146-147).

[291] Louisa Lowe, *The Bastilles of England; or, The Lunacy Laws at Work*, London: Crookenden & Co, 1883, p 46.

[292] Scull and Favreau highlight in particular "the newly emerging specialism of neurology ... [and] another new group of specialists, gynecologists" ('The Clitoridectomy Craze', p 246).

[293] Baker Brown, *On the Curability*. See further Judith M Roy, 'Brown, Isaac Baker (1811–1873)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/50268, accessed 14 Oct 2005; Scull and Favreau, 'The Clitoridectomy Craze'; Ornella Moscucci, 'Clitoridectomy, Circumcision, and the Politics of Sexual Pleasure in Mid-Victorian Britain', in Andrew H Miller and James Eli Adams (eds), *Sexualities in Victorian Britain*, Bloomington: Indiana University Press, 1996, pp 60-78; Elizabeth A Sheehan, 'Victorian Clitoridectomy: Issac Baker Brown and His Harmless Operative Procedure' in Roger N Lancaster and Micaela di Leonardo, *The Gender Sexuality Reader*, London: Routledge, 1997, pp 325-334.

> I was led to the conclusion that the cases which had puzzled me ... depended on peripheral excitement of the pudic nerve. I at once subjected this deduction to a surgical test, by removing the cause of excitement.[294]

However, of less interest here than his dubious physiology[295] and more dubious research ethics[296] are the ways in which his attitudes and those of his detractors not only reflected the dominant ideologies of the time but also prefigured the 1921 parliamentary debates in both substance and language.

The disorders susceptible to treatment by clitoridectomy were those Baker Brown believed to be caused by a "loss of nerve power" due to masturbation.[297] First apparent at puberty and leading eventually to death, they were characterised by a series of physical symptoms as well as moral characteristics including being "indifferent to the social influences of domestic life",[298] "distaste for marital intercourse".[299] and having

> a great disposition for novelties ... the patient desiring to escape from home, fond of becoming a nurse in hospitals, "soeur de charité," or other pursuits of the like nature, according to station and opportunities.[300]

To the critical reader, then, his concern is with limiting female autonomy and above all, autonomous sexuality. The root of all these problems, the most dangerous behaviour of all, is therefore masturbation.[301] Indeed, there was a moral as well as surgical element to

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[294] Baker Brown, *On the Curability*, p vi.

[295] Baker Brown would later describe clitoridectomy as "neither more nor less than circumcision of the female" ('Replies to Remarks of the Council', numbers 12 and 13, quoted in footnote (a) to 'Editorial: Clitoridectomy and Medical Ethics', *Medical Times and Gazette*, 13 April 1867.

[296] He showed a similar attitude to his patients when he began performing ovariotomies: his first three patients all died, but he nonetheless performed a fourth procedure, on his own sister, who did survive (Judith M Roy, 'Brown, Isaac Baker (1811–1873)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/50268, accessed 14 Oct 2005).

[297] Baker Brown, *On the Curability*, p 7.

[298] *Ibid*, p 15.

[299] *Ibid*, p 16.

[300] *Ibid*, p 15.

[301] Imputing such consequences to masturbation was of course by no means unique: from the anti-masturbation tracts of the eighteenth century to the medical publications of his nineteenth-century colleagues, there was a large (pseudo-)medical literature on the harmful and even fatal consequences of masturbation. What was different in the nineteenth century was the move from physical to mental consequences, from illness to insanity (see further Roy Porter, 'Love, Sex and Madness in the Eighteenth Century' (1986) 53:2 *Social Research* 211-242 at pp 222-227; Anonymous, *Onania or the heinous sin of self pollution*, London, 1710; Anonymous, *Satan's Harvest Home*, London, 1749; Samuel Tissot, *Onanism,*

the treatment: "improvement can only be made permanent, in many cases, by careful watching and moral training".[302]

That improvement, to Baker Brown, is explicitly characterised as the resumption of a proper feminine role and behaviour. The bulk of his book is composed of case studies, of whom Case XXXI, who suffered "as many as four or five [cataleptic] fits a day", is presented as a paradigmatic example of the condition. It is perhaps not coincidental that there is a suggestion of past lesbianism.[303] She

> had long indulged in self-excitation of the clitoris, *having first been taught by a school-fellow*. The commencement of her illness corresponded exactly with the origin of its cause; in fact, cause and effect were here so perfectly manifested, that it hardly wanted anything more than the history to enable one to form a correct diagnosis. [Emphasis mine]

Other symptoms include Case IX's "distaste for the society of her husband" and case XIX's being "disobedient to her mother's wishes ... a monomania that every gentleman she admired was in love with her ... much time in serious reading." Similarly, case XLI was treated for epilepsy but "is very eccentric in her manners and conversation; is frequently observed, both day and night, by the nurses to practise injurious habits, to which she acknowledges for the last thirty years." Following the operation, she "became cheerful, rational, tractable, and much more sensible in her conversation" as well as being cured of the fits.

The book does little to conceal Baker Brown's ideological agenda, offering clear evidence that the happiness of the husband took priority over the interests of the wife. Her legal and social independence were apparently removed as efficaciously as the clitoris itself: Case XLVI, a married woman of 57, "complained to [Baker Brown's] son, Mr. Boyer Brown, that [he] had unsexed her." Nonetheless, her husband expressed "his gratitude ... for ... his home was now one of comfort and happiness both night and day."

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or, A Treatise upon the Disorders Produced by Masturbation, London, 1776).

[302] Baker Brown, *On the Curability*, pp 17-18.

[303] Nor was such a suggestion unique: Akihito Suzuki quotes a letter from one Dr Fraser to Middlesex County Asylum in 1859, explaining that the patient had undergone a clitoridectomy-type operation due to "vicious habits of self-indulgence" contracted under "the evil influence of the worthless maid servant" ('Framing Psychiatric Subjectivity: Doctor, patient and record-keeping at Bethlem in the nineteenth century' in Joseph Melling and Bill Forsythe (eds), *Insanity, Institutions and Society, 1800-1914: A social*

Case XLVIII had "a great distaste for her husband; so much so, that he and his friends were induced seriously to contemplate a separation ... she had long been separated *à mensa* from her husband, on account of her great distaste for him and cohabitation with him." Following treatment, she not only returned to her husband but bore him a child; Baker Brown "feels compelled to say, may not it be typical of many others where there is a judicial separation of husband and wife, with all the attendant domestic miseries, and where, if medical and surgical treatment were brought to bear, all such unhappy measures would be obviated?"

The cure for married women is thus defined in terms of successful resumption of sexual intercourse, frequently evidenced by the birth of children (case XIX's cure was so successful that, single when operated upon, she got married and became pregnant within a little over a year thereafter). Baker Brown's approach is completely centred upon limiting women's sexual activity to accepting penile penetration. Thus he is able to advise Case XV that "the objection that, in the event of marriage, my operation might interfere with marital happiness" is "physiologically ... untenable". Only in the context of the twin norms of first, female desirelessness and second, vaginal penetration as "real sex" could such an assertion be made, at the same time as he claimed that "in no case am I so certain of a permanent cure as in acute nymphomania".[304] The lack of autonomous sexual desire was seen as positive; it would be replaced by a passionless submission manifested in a new willingness to undergo marital sexual intercourse, as for Case XIII who "became in every respect a good wife."

However, Baker Brown's concerns extended beyond the happiness of husbands. A majority of his patients appear to have been single women, old enough that marriage was not likely. Nonetheless, he was concerned that they too become properly feminine, their behaviour characterised by epithets such as "modest", "cheerful" and "tractable". His aim, then, extended beyond marital comfort to the policing of all women's behaviour. Sexuality was crucial here, but primarily as a manifestation of independence from patriarchal authority.

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history of madness in comparative perspective, London: Routledge, 1999, pp 115-137 at p 115).

[304] Baker Brown, *On the Curability*, p 70.

It should be borne in mind that Baker Brown was a conventionally-qualified doctor, among the founders of St Mary's Hospital,[305] who enjoyed sufficient respect from his peers to be elected President of the Medical Society in London in 1865,[306] at a time when he was already performing clitoridectomies but had not yet published this account of them. In addition to himself possessing a range of medical qualifications, he was able to situate himself within a body of expert opinion. The book is dedicated with permission to Dr Brown-Séquard[307] and draws extensively on the work of Dr Handfield Jones, by whom he was "pleased to be supported";[308] and he was able to cite by name no less than sixteen doctors "who have been led to adopt my views and treatment".[309] Nor was he the first doctor to recommend clitoridectomy: for example, Samuel Ashwell had done so in 1848, although in a rather narrower range of cases.[310]

That his methods fell into disfavour was due to his being discredited not for his method of treatment but for dubious practices in two areas. First, he used publicity in the form of speeches and newspaper articles aimed at laypeople. Second, there were reports that his patients did not always give informed, or any, consent.[311] Arguably these,

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[305] Scull and Favreau, 'The Clitoridectomy Craze', p 248.

[306] Judith M Roy, 'Brown, Isaac Baker (1811–1873)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/50268, accessed 15 Oct 2005. Only with hindsight would he be assessed as "a skilful operator, but ... rash and impetuous, being deficient in reflection and jumping too hastily to conclusions" (*Plarr's Lives of the Fellows of the Royal College of Surgeons of England*, revised by Sir D'Arcy Power, London: Royal College of Surgeons, 1930, Vol 1, p 152.

[307] Brown-Séquard was a distinguished physician who did important work on sensory pathways in the spinal cord (the area of his research which connected to Baker Brown's work); as well as doing work which led to his being considered the father of endocrinology. He practised in Paris, the USA, and Switzerland as well as at the National Hospital for the Paralysed and Epileptic in London, and enjoyed many distinctions including election to the FRS and FRCP, and an honorary LLD awarded by Cambridge University. Unfortunately for his reputation, outside medical circles his best-known experiment was when, aged 72, he injected himself with extracts from animal testes and claimed to feel rejuvenated in consequence (Roger G. Gosden, 'Séquard, Charles Édouard Brown- (1817–1894)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/3720, accessed 15 Oct 2005).

[308] Baker Brown, *On the Curability*, p 4. Jones was a histologist but also published clinical observations on paralysis, anaesthesia and neuralgia. In 1888 he became a vice-president of the Royal College of Surgeons (Norman Moore, 'Jones, Charles Handfield (1819–1890)', rev. Michael Bevan, *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/14985, accessed 15 Oct 2005).

[309] Baker Brown, *On the Curability*, p 13.

[310] Moscucci, 'Clitoridectomy, Circumcision', p 61.

[311] Judith M Roy, 'Brown, Isaac Baker (1811–1873)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, http://www.oxforddnb.com/view/article/50268, accessed 14 Oct 2005; Lesley A Hall, 'The Other in the Mirror: Sex, Victorians and Historians' (1998), http://homepages.primex.co.uk/~lesleyah/sexvict.htm#THE%20OTHER%20IN%20THE%20MIRROR, accessed 14 October 2005.

combined with the implied insult upon women's morality (given his implication that large numbers of women engaged in masturbation), were the main factors leading to his downfall.[312]

Indeed, the crisis which brought about his downfall began with an article in *The Times*, 'The London Surgical Home', which promoted his work,[313] and was exacerbated by the publication of his book, "the presentation of subject matter fit only for the eyes of fellow medical men in a binding more suited 'to a class of works which lie upon drawing room tables.'"[314] It is notable that there had been no such controversy following his earlier reports of this procedure in a professional publication, the *British Medical Journal*.[315] It was the wider publicity he gave to the matter which put him in the wrong: a Dr West, who had himself recommended clitoridectomy to a patient suffering from hysterical symptoms, nonetheless criticised Baker Brown because "public attempts to excite the attention of non-medical persons, and especially of women, to the subject of self-abuse in the female sex are likely to injure society".[316] Thus the concern was not only with protecting the women themselves but also – or especially - with protecting myths of female sexual ignorance and disinterest.

As for the second concern, the lack of informed consent to the operation, this related not only to consent from the woman herself but also from her male relatives. Indeed, the surgeon Mr Haden suggested that the procedure was a type of blackmail, where the husband or father could not complain because that would involve revealing his wife's or daughter's "disgraceful practices". The "victim", to him, was not the woman who had "undergone a dreadful mutilation" but the man who then had to "write a cheque for 100 or 200 guineas".[317]

On 3 April 1867, a hearing was held by the Obstetrical Society of London which concluded with Baker Brown's expulsion from the society.[318] Ten days later, an editorial

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[312] Judith M Roy, 'Brown, Isaac Baker'.
[313] 'The London Surgical Home', *The Times*, 15 December 1866, cited in Peter Stothard, 'Women at our mercy', *The Times*, 27 March 1999
[314] *British Medical Journal*, 28 April 1866, p 440, quoted in Scull and Favreau, 'The Clitoridectomy Craze', p 253.
[315] Sheehan, 'Victorian Clitoridectomy', p 330.
[316] Quoted in Sheehan, 'Victorian Clitoridectomy', p 330.
[317] *British Medical Journal*, 6 April 1867, quoted in Sheehan, 'Victorian Clitoridectomy', p 331.
[318] Judith M Roy, 'Brown, Isaac Baker'.

in the *Medical Times and Gazette*[319] attacked Baker Brown's use of clitoridectomies as "an offence against Medical science and Medical ethics", spelling out point by point the objections. Among the most serious was that in "set[ting] himself to consider whether or not the patient is guilty of immoral practices" and asking questions which might see women "tainted with filthy inquiries", the doctor would impugn and even threaten her morality.[320] The code of silence around women's sexuality was thus invoked, and in terms closely reflecting those of the 1921 parliamentary debates on criminalising lesbianism: matters "almost too beastly to tell of'; the wrong of "bringing a knowledge of evil to minds from which it had been absent." *The Lancet* used similarly evocative terms, regretting the "repulsive" duty of examining a subject better never mentioned.[321]

Again, the woman's sexuality and wider role were firmly reiterated as being in the domestic sphere. The lack of consent complained of was that not just of the patient herself but also of "the persons on whom she is dependent, as wife or daughter", since "the woman's character affects theirs".[322] Thus consent was not framed in contemporary terms of individual autonomy, but in patriarchal terms of men's control over women's sexuality. A woman's character was reduced to her sexual character, and located as the concern of her closest male relations.

Both Baker Brown's practise and the nature of the objections to it which finally ended his medical career highlight the patriarchal functions of treatments for women's "insanity". Such treatments, whether aimed at treating physical causes or involving incarceration in clinics, asylums or private homes, formed a significant means of disciplining those women who failed to conform to patriarchal expectations. Despite significant changes following the First World War, such as the more widespread use of psychotherapy, the use of incarceration in asylums for the "morally insane" would continue for a good part of the twentieth century.[323] In the 1960s, Walker and McCabe

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[319] 'Editorial: Clitoridectomy and Medical Ethics', *Medical Times and Gazette*, 13 April 1867.

[320] In support of this argument, a case is described in which another surgeon told a girl's parents that she was not a virgin. In consequence, a case of rape appears to have been discovered and prosecuted; a consequence viewed in the editorial as wholly negative.

[321] Editorial, *The Lancet*, 22 December 1866, discussed in Peter Stothard, 'Women at our mercy', *The Times*, 27 March 1999.

[322] Editorial, *The Lancet*, 22 December 1866.

[323] Although "moral insanity" as defined by James Cowles Prichard in his *Treatise on Insanity* of 1835 was in part a precursor of psychopathy, his definition was much wider and included "moral perversion connected with hysterical or sexual excitement". Although not uncontroversial, it attracted a great deal of

still found girls being held for "care and protection" due to sexual misconduct;[324] indeed, in 1960, 64 per cent of girls committed to penal institutions had not been convicted of any criminal offence (compared to only 5 per cent of boys).[325] The power to detain girls for their sexual conduct was given statutory endorsement by the Children and Young Persons Act 1933, which allowed care orders to be made for girls (and boys) in "moral danger".

The designation of the lesbian as mentally ill persisted even longer: it was only in 1973 that the American Psychiatric Association removed homosexuality (including lesbianism) from its list of disorders, and not until 1980 did the third edition of the authoritative *Diagnostic and Statistical Manual of Mental Disorders* appear, reflecting that change.[326] By that time the psychiatric professions had already established sexuality as within their remit: thus moves to take homosexuality out of the law's province were at the expense of it being placed in the medical domain. Such an approach, including a belief in the curability of many homosexuals, underlay the recommendations of the Wolfenden Report on the partial decriminalisation of male homosexual acts.[327] In 1984, Gayle Rubin argued that "[s]exual variation *per se* is more specifically policed by the mental-health professions, popular ideology, and extra-legal social practice [than by the criminal law]".[328]

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support from prominent practitioners including Henry Maudsley throughout the nineteenth century, and persisted into the twentieth. (See for example Andrew Roberts, 'The National Lunacy Inquiry'; His Honour Peter Fallon QC, Professor Robert Bluglass CBE, Professor Brian Edwards CBE and Mr Granville Daniels, *Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital*, London: The Stationery Office, 1999, 6.13-6.14).

[324] Nigel Walker and Sarah McCabe, *Crime and Insanity in England*, Vol 2, Edinburgh: Edinburgh University Press, 1973, p 147.

[325] Carol Smart, 'Criminological Theory: Its Ideology and Implications concerning Women' (1977) in *Law, Crime and Sexuality*, p 29.

[326] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd edition, Washington DC: American Psychiatric Association, 1980. Despite being a US publication, the influence of this manual extends internationally: it is widely used in the United Kingdom, for example, where in addition to its clinical use it is regularly cited before the courts on issues of mental illness.

[327] See Peter Bartlett, 'Silence and Sodomy: The Creation of Homosexual Identity in Law' (1998) 61(1) *Modern Law Review* 102 at pp 109-110.

[328] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory on the Politics of Sexuality' (1984) in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality*, London: Pandora, 1989, pp 267-319 at p 288.

Conclusion

We have seen that the policy of silencing, and tactical breaches of it in certain female husband cases, continued through the nineteenth and early twentieth centuries. Initially, the prevailing ideology of female sexual passivity firmly supported such an approach. Combined with an increasing professionalisation and formalisation of the criminal justice system, the result for Chapman was that her conviction became impossible and her case attracted little attention.

However, by the end of this period, cracks in the policy were becoming apparent: the new sciences of psychiatry, criminology and sexology posed a threat to assumptions of universal female sexual innocence and passivity. We can look to the debates of 1921 to see how much effort was now having to be expended upon maintaining the mythology around women's sexual innocence. The Barker case illustrates the situation well: it not only brought wide publicity, and a prison sentence, but also kept something of a veil over the sexual elements of the case (although referred to by Haward in the press, for example, euphemisms were employed and very little detail given). The concerns of the trial judge Sir Ernest Wild both to find out about the sexual behaviour of "Colonel Barker" and to keep it secret from the public and press in the courtroom are a graphic illustration of those contradictory pressures.

We have seen that despite significant changes, there were also common threads between both these cases and the prosecutions of previous centuries. However, given the extent of those changes, it might be tempting to conclude that a rupture was imminent: that growing general and scientific knowledge of lesbianism, combined with greater reliance upon psychiatry as a primary means of policing of women's sexuality, would mean clear changes by the latter part of the twentieth century. We will see in the next chapter that the changes have been surprisingly gradual, and that as late as 2004 a "female husband" case could still emerge.

Chapter 6

Kelly Trueman and Jennifer Saunders: contemporary "female husbands"

In the previous two chapters I have examined cases of "female husbands" from the seventeenth to the early twentieth centuries. Although they were situated in specific historical contexts, such prosecutions are more than a historical curiosity, a point which I develop here in considering similar recent cases. Those of Kelly Trueman and Jennifer Saunders were prosecuted in 2004 and 1991 respectively. Again, they involved relationships between females, one of whom was disguised as a man; a significant difference is that although there was no actual marriage, conviction was nonetheless possible in both cases.

One advantage of examining cases which have considerable factual similarities is that the legal and social changes accompanying them are thrown into relief. A notable feature of both cases when compared to those of earlier centuries is that the defendants were charged with an explicitly sexual offence, indecent assault, an important change which I will discuss in some detail here. However, equally interesting are the similarities between such cases which persist across the centuries. In particular, increased lesbian visibility within society appears to have had a surprisingly limited effect upon the courts, which may indicate first, the persistence of myths about female sexuality and second, the slowness of the criminal justice system in responding to social change.

Kelly Trueman

Kelly Trueman was a 22-year-old woman who disguised herself as Jake, a 16-year-old boy. Press reports gave elaborate detail of how she achieved her deception:

> She:
>
> **WRAPPED** bandages around her chest to flatten her bust,
>
> **ALWAYS** wore baggy sports clothes to hide her feminine figure, and
>
> **DABBED** her face with flecks of foam every morning to make it look like she had been shaving.

> It all added up to a cunning disguise.[1]

She befriended a 12-year-old girl and became her "boyfriend". They kissed, and Trueman gave the girl lovebites on her neck and stomach. She also asked the girl to allow oral sex to be performed upon her (or as the News of the World put it, "a lewd sexual act"),[2] but the girl refused. The press accounts made clear that there was no attempt at penetrative sex.

During this period,[3] Trueman told the girl's family that she had been thrown out by her father. In consequence, she was allowed by the girl's mother to stay at their home. However, Trueman's father heard about this and informed a neighbour of her true identity. The neighbour then told the family, who confronted Trueman. The girl's mother gave some description of this scene:

> I can't believe that at the end of it all I was stood in my kitchen saying to my little daughter's sweetheart, 'Jake, are you a boy? Or are you a woman?'[4]

Trueman was arrested, and told the police that she was a lesbian and had done this as a joke. Following a three-day trial, she was convicted of eight counts of indecent assault.[5] On 8 March 2004, after Stoke on Trent Crown Court heard that she had a history of anorexia and mental illness, and was "grossly immature", feeling happier in the company of children, she was sentenced to two years' imprisonment.[6] Given the respective ages of the participants, it is perhaps surprising that the element of disguise was treated in media reports of the case as more significant than that of paedophilia, a point which I discuss further below.

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[1] 'Lesbian, 22 posed as boy of 16 to seduce girl of 12', *News of the World*, 29 February 2004, pp 12-13 at p 12.
[2] *Ibid*, p 13.
[3] The length of the relationship is not specified in the accounts but appears to have been several months (it began in the August before the trial).
[4] *News of the World*, 29 February 2004, p 13.
[5] 'Lesbian Pervert Guilty of Abusing Girl', *Derby Evening Telegraph*, 10 February 2004, p 3; 'Woman posed as teenage boy to assault child', *Ripley and Heanor News*, 12 February 2004. The press reports give no details of her defence, although the latter report states that she "denied getting any sexual gratification from her encounters", "felt horrible" about the deception and had been "pushed into it".
[6] 'Victim of lesbian predator "taunted" at school', *Derby Evening Telegraph*, 9 March 2004, p 5.

Jennifer Saunders

Although many discussions of female husbands assume that such masquerades were easier in the past and have effectively vanished today, in fact Trueman's case is not unique even in our own era. A similar incident, more straightforwardly comparable to the female husband cases of the past, had taken place in the previous decade. Jennifer Saunders allegedly disguised herself as a man in order not to marry but to have a sexual relationship with two young women. She was tried for indecent assault in September 1991, and convicted by the jury. She was then sentenced to six years' imprisonment, which would later be reduced by the Court of Appeal to two years' probation.

The Saunders case is complex in that the factual basis of her sentencing was heavily contested. The trial was extensively reported in *The Sun*;[7] the prosecution case as set out in that newspaper's reports was that the first complainant, seventeen-year-old Rebecca Andrews, met Saunders at a family party and thought she was a boy called 'Jimmy'. She entered into a relationship with her, which lasted five months with daily meetings. After two months, the couple had "sex" - *The Sun* appears to mean (simulated) sexual intercourse - for the first time. Andrews's account was that

> "He then went to the bathroom then undressed me and lay on top of me. The light was off and we kissed.
>
> "He was touching me intimately, then began to make love to me.
>
> "It hurt so much I pushed him away. It was sharp and I asked him if he'd got a banana.
>
> "He said I had embarrassed him because when he was 14 he couldn't ejaculate, so he'd had a tube put down his penis and it was sharp.
>
> "I didn't have any reason not to believe him. I asked him why he held it all the time.
>
> "He said it was dangerous because of the tube. We gave up but tried on other occasions and succeeded."[8]

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[7] *The Sun*, Thursday 19 September 1991, pages 1, 4 and 5; Friday 20 September 1991, pages 4 and 5; Saturday 21 September 1991, page 3.

Despite this horrible first experience, the couple allegedly went on to have sex in this way six times a week for the remaining three months of their relationship, always in the dark. Andrews went on to give an account of never being allowed to touch "Jimmy's" private parts, of "him" never removing his T-shirt, and always keeping his clothes on while they made love. She also said that the only birth control used was when "he" put a condom on himself on several occasions.

Andrews's friend Helen Edwards, also aged seventeen, allegedly had sex with Saunders on one occasion. She was at the flat with Saunders and Andrews; when Andrews left, they "ended upstairs with Jimmy on top of Helen... He wanted sex and she agreed. At the time she was a virgin. It hurt her, and she asked him to stop. But he didn't. He laughed."[9] *The Sun* goes on to report that Edwards said "she would not have consented to sexual contact if she had known Saunders was female."[10]

Jennifer Saunders allegedly kept her female identity secret by wearing baggy clothes, and by claiming that her breasts were a boil and/or the result of cancer. She was discovered when Andrews's uncle moved into the flat and became suspicious at a number of callers asking for "Jennifer". Andrews's parents then questioned Saunders all night, although she would not admit to being female.

Saunders's defence was that she only pretended to be a boy at Andrews's request. Andrews was aware throughout their relationship that Saunders was a woman, but did not want her parents to know. Saunders had apparently initially attended a birthday party for Andrews's mother dressed as a man, but told Andrews that she was in fact female although Andrews was reluctant to believe this initially. Saunders said that after three weeks, she showed Andrews her breasts and vagina. Andrews then accepted that Saunders was a woman, and the relationship continued for five months until Saunders ended it. Saunders also claimed in court that there had been no sexual contact between them, "I never kissed her, cuddled her or hugged her."[11]

It is impossible for us to know the truth of what happened. The jury at Doncaster Crown Court, having heard all the witnesses, found Jennifer Saunders guilty of the charges of indecent assault, thereby accepting the accounts of Andrews and Edwards. One may well have reservations about accepting that verdict, and I

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[8] *The Sun*, 19 September 1991, page 4.
[9] Peter Kelson, prosecuting counsel, quoted in *The Sun*, Thursday 19 September 1991, p 4.
[10] *The Sun*, Thursday 19 September 1991, p 4.

certainly do not assume that it is correct. However, there is much we can learn from this case without making any assumptions as to the true facts.

Following her conviction, Jennifer Saunders was sentenced on the basis that she had had relationships with two seventeen-year-old women while posing as a man. Because the women had consented only in the belief that they were engaging in sexual activity with a man, there was legally no valid consent. In the same proceedings, Saunders pleaded guilty to offences of residential burglary, burglary of a school, handling stolen goods, theft of a vehicle and assault. Anna Marie Smith argues that those offences are relevant because

> [f]or the courts, Saunders was a juvenile delinquent whose correction depended upon the gathering of detailed information about that aspect of her life which - in the case of a law-abiding, middle-class, heterosexual man – would have been regarded as private conduct.[12]

Saunders pleaded not guilty to the charges of indecent assault, stating that the complainants knew she was a woman and only their families and friends were deceived. She denied ever having used a dildo, and expressly raised class as an issue in her case. In a letter to Outrage!, she wrote that

> She [Rebecca] knew I was a bird and that she was a lesbian. But her mom and dad were middle-class and snotty, so she told her family I was a man to make herself clear, if you know what I mean. ... I couldn't believe it when I was arrested. I went along with all the stupid things she was saying as I loved her more than anything in the world. I couldn't hurt her. So I promised to say nothing.[13]

In his sentencing remarks, Judge Crabtree emphasised his views as to the unusual seriousness of the offence, and passed what he explained was a deterrent sentence of six years' imprisonment:

> Apart from the possible risk to the public I take the view these offences are far and away too serious to be dealt with in any other way than by a long custodial sentence. ... Also, in these days of sexual openness about lesbianism and bisexual behaviour, I think I have to ensure that

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[11] *The Sun*, Friday, 20 September 1991, p 4.
[12] Anna Marie Smith, 'The Case of Jennifer Saunders', in Karla Jay (ed), *Dyke Erotics*, 1995, New York University Press, pp 164-179, at p 170.
[13] Quoted in Cherry Smyth, "Out News," *City Limits*, 21-28 November 1991, p 52.

> anybody else who is tempted to try and copy what [Saunders] did will, first of all. count the cost of it.[14]

The Court of Appeal reduced Saunders' sentence on two grounds. First, they held that the sentence was too long in view of her age at the time of the offences (sixteen and seventeen). Second, they questioned the effectiveness of a deterrent sentence. Thus they did not in their reasoning directly challenge the seriousness of the offences themselves, although the reduction to a non-custodial sentence does suggest that, in reality, they took a somewhat different view to the lower court.

To put these cases in their contemporary context, I will highlight two particularly significant themes: the identification of lesbianism with social embarrassment, and the levels of abusive heterosexual male behaviour which are implicitly accepted by the courts. I will then explore the principal continuities and changes in such cases from the seventeenth to the twenty-first centuries. In particular, the importance of the development of an offence of indecent assault will be analysed. The question of why lesbian visibility appears to have had relatively limited impact will also be addressed. Finally, I will ask a question common to all these cases of impersonation: what does an analysis of such masquerades contribute to a critique of queer theory, and in particular of Judith Butler's theory of gender performativity and subversion?

Lesbianism and social embarrassment

In both the Trueman and Saunders cases, we can identify several important common themes. The first of these is the identification of lesbian relationships as socially embarrassing, and the further identification of such social embarrassment as a particularly serious form of damage to a young woman. This attitude has a long history in the courts, and was spelled out in *Kerr v Kennedy*, where an accusation of lesbianism was held to be an imputation of unchastity under the Slander of Women Act 1891 since it "is calculated both to bring her into social disfavour and, as the phrase runs, to damage her prospects in the marriage market and thereby her finances".[15] More recently, a similar argument was deployed in child custody cases where the stigma and embarrassment the mother's lesbianism would allegedly cause

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[14] Judge Crabtree, Sentence, *Regina v Jennifer Lynne Saunders*, Crown Court at Doncaster (20 September 1991), p2, quoted in Smith, 'The Case of Jennifer Saunders', pp 164-179.

the child was used as a reason to oppose granting residence.[16] Such arguments that non-lesbians are, by association, affected by "stigma" superseded earlier arguments based upon "harm" but, in the family law context, have themselves now been discredited.[17] It is therefore all the more unfortunate to see that argument continuing to hold sway in the criminal courts at the very time it was being rejected elsewhere in the legal system.

In Saunders' case, such themes of social embarrassment coalesced around Crabtree's sentencing remarks. The aspect of his comments which gained particular attention from lesbian activists and press was his comparison of the girls' experiences to that of rape:

> You have called into question their whole sexual identity and I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did. At least that way, given time and counselling, those girls might have been able to forget it more easily than I suspect they will forget the obvious disgust they now feel at what has happened to them.[18]

Both the extremely serious nature of rape itself, and the risks including pregnancy and serious sexually transmitted diseases, are glossed over in these remarks and viewed as trivial next to exposure to sexual "deviancy". There is also, of course, an arrogance in the assumption that a male judge is able to accurately predict the "preference" of a young woman in these circumstances.

In response to reporting of the comments, and resulting criticism in some of the lesbian and gay media, as well as a demonstration by LABIA (a lesbian group affiliated to OutRage!),[19] Crabtree issued an explanation that

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[15] *Kerr v Kennedy* [1942] 1 KB 409 at p 411.

[16] See for example *S v S (custody of children)* [1978] 1 FLR 143 and *E v E*, 27 November 1980, unreported.

[17] For a detailed account of the law's development in this area, see Lynne Harne and Rights of Women, *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997. The argument that children of lesbian parents would suffer tormenting or ostracism was rejected by the court in *B v B (minors)* [1991] 1 FLR 402, following the expert evidence of Professor Derek Russell-Davis. More recently, the courts have gone further and recognised rights of non-biological lesbian parents: for an analysis of their current approach see Leanne Smith, 'Principle or Pragmatism? Lesbian parenting, shared residence and parental responsibility after *Re G (Residence: Same Sex Partner)* (2006) 18(1) *Child and Family Law Quarterly* 125.

[18] Judge Crabtree, Sentence, *Regina v Jennifer Lynne Saunders*, Crown Court at Doncaster (20 September 1991): 1-2, quoted in Smith, 'The Case of Jennifer Saunders', pp 164-179.

[19] See '6 years for "5,000 times a lady" lesbian', *The Pink Paper*, 12 October 1991, p4; 'Off with his wig', *The Pink Paper*, 26 October 1991, p1.

> in the case of a male rape[20] he would have been able to order that the girls should not be named. But in the Jennifer Saunders case, the girls had had sex with Saunders after being deceived into thinking Saunders was a man. Because Saunders was in fact a woman the judge could not protect the girls by ordering their anonymity and the press was free to print personal information about them.[21]

Again, embarrassment is placed above the harm of the offence itself. Moreover, this explanation seems to be an attempt to rewrite his remarks, which do not bear out his gloss on them. He in fact seemed most alarmed at the girls apparently being forced to question their sexuality.

Crabtree's anxiety on this point is of particular interest, and concern, to lesbian feminists as we would argue that questioning of one's sexuality can be a positive process for women (albeit not in the circumstances alleged by the prosecution in this case). One cannot be clear from Crabtree's remark whether he assumes that the girls will suffer from questioning something he believes to be already fixed, and therefore disgusted at acting against something innate in themselves, or alternatively from questioning something which he believes is open to change so that they are disgusted at the real possibility of their being or becoming lesbian. Either way, it seems to be assumed that public embarrassment will be internalised as private self-disgust.

As for the public response, there was a strong assumption by the courts in both cases that one's lesbian relationships (actual, contemplated or effectively accidental) are a source of embarrassment. Sentencing Saunders, Crabtree asserted that "[f]or a long time, vicious and unthinking people are likely to jeer at these unhappy girls as a result of the misery you have caused them by your evil behaviour."[22] This emphasis upon negative public comment about the girls seems to be a reversion to the idea of sexual assault as damaging primarily to a woman's reputation (and hence her position in the marriage market). His later comments, discussed above, upon the lack of anonymity orders again seem to reflect a concern with the effect of these events upon the girls' sexual reputations. In Crabtree's formulation, the greatest harm they have suffered is not any physical or mental distress occasioned by the acts themselves but

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[20] In this context, rape of a woman by a man is clearly meant, although the term 'male rape' is more commonly used to describe a situation with a male victim.
[21] 'Judge Crabtree', *Capital Gay*, 22 November 1991, p9.
[22] '6 years for "5,000 times a lady" lesbian', *The Pink Paper*, 12 November 1991, p 4.

the damage to the girls' value in the eyes of the public. They will suffer most not because of Jennifer's actions but because of the mockery which these will engender.

Media reports similarly emphasised the naivety and humiliation of Kelly Trueman's victim: "the gullible youngster ... puppy love ... taken in ... 'We know how stupid we were'".[23] This echoes the emphasis upon the naivety of eighteenth-century women such as Mary Price, "wife" of Mary Hamilton. In reports of Trueman's sentencing, this theme of social embarrassment was made more explicit through comments by the victim's mother:

> It bothers [my daughter] because she gets a lot of questions and stick at school about it.
>
> I told her to hold her head up high as it's not her fault but it's difficult when hundreds of kids are taunting you.[24]

From Quarter Sessions to Crown Courts, from Henry Fielding's pamphlets to today's newspapers, throughout the centuries the expected (even required) response of audiences to lesbian relationships has been derision and contempt; that of the protagonists, embarrassment and shame.

Heterosexuality and abuse

However, to fully understand the prejudice underlying this characterisation of lesbianism as a source both of humiliation and of unwanted and damaging self-examination, one must contrast it to the approaches to heterosexuality implicit in the cases. Trueman's prosecution passed over as unproblematic the (illegal) relationship between a twelve-year-old girl and a sixteen-year-old boy; while when one considers what passed without comment in Saunders' case, and then remembers that the courts found the fact that "Jimmy" was a woman the only aspect worth of comment and condemnation, that case becomes very disturbing.

According to the prosecution case, in their first sexual encounter "Jimmy" had to stop penetrative sex after it became too painful for Andrews. Nonetheless, and given that on the version of facts accepted by the jury, matters could hardly have improved significantly thereafter (insofar as the problems were caused by the "fake

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[23] *News of the World*, 29 February 2004, pp 12-13.
[24] Derby Evening Telegraph, 9 Mar 2004, p 5.

penis"), they allegedly went on to have sexual relations six times a week for several months. Throughout that time, "Jimmy" set the terms and behaved in a way which would almost certainly humiliate "his" partner: "he" would not let her touch him, and remained mostly dressed at all times. However, this account of a "heterosexual" relationship was clearly credible to the jury and passed without real comment from the courts.

Edwards's alleged experience is even more disturbing. She found penetration by "Jimmy" so painful that she asked "him" to stop. "He" not only continued, but laughed. Those facts would clearly have amounted to rape had "Jimmy" been a man.[25] Nonetheless, that was not commented upon by the courts (indeed, Judge Crabtree suggested that Helen would have preferred to be raped rather than noting that she effectively had been) and appears to have attracted little comment elsewhere. Such complacency, like the idea that a woman could prefer rape on the basis that it is somehow less embarrassing, is extraordinary but consistent with the failure of the judiciary to take that offence seriously.

The cases therefore throw a disturbing light upon the level of abuse which is both credible and acceptable to judge and jury within a "consensual" heterosexual relationship. That is not in itself a new insight. However, what is revealed by the Saunders case in particular is not only that such relationships are nonetheless viewed as "normal" and non-traumatic for the young women involved, but that a lesbian relationship is *per se* supposed to be much worse. Despite the significant progress made by feminists in gaining legal recognition of rape within relationships, in particular the recognition of marital rape as a criminal offence,[26] the analyses offered by these campaigns have clearly passed many of the judiciary by. Judge Crabtree in particular failed to notice, understand or analyse the nature of the abuse alleged within the relationships and could see criminality only in the deception as to Jennifer's sex.

Comparison with earlier "female husband" cases

To consider the similarities between contemporary and historical prosecutions is not to assume these simply reflect some common feature of lesbian identity. On the

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[25] In law, sexual intercourse is a continuing act which although complete upon penetration ends only with withdrawal, so that to continue sexual intercourse after consent is withdrawn amounts to rape (*Kaitamaki v R* [1985] AC 147 (PC)).

[26] This was finally achieved with the House of Lords judgement in *R v R (Rape: Marital Exemption)* [1991] 4 All ER 481, which made explicit reference to changing social attitudes.

contrary, they are worthy of note precisely because so much of their surrounding context has changed. In any event, such elaborate disguises and deceptions are not the most common forms of lesbian relationship today, and almost certainly were not in previous centuries either. Instead, what is reflected is the limited number and nature of cases reaching the courts, given the policy of silencing lesbianism which has operated within the criminal justice system.

We do not need to call upon essentialist or ahistorical concepts of lesbianism or of attitudes towards it to understand the persistence of these prosecutions' common features. In fact, there have been enormous shifts in the way in which gender has been understood during these periods, including fundamental changes to the medical or biological model of sex difference as well as social and political changes – not least the various waves of feminism.[27] Instead, there is a better explanation for the similarities between cases which were actually prosecuted.

Particularly significant is the close mimicry of the most traditional and patriarchal of heterosexual relationships. The reports of these cases emphasise not only the use of such a model for the relationship, but also the inadequacy of the imitation. Obviously the narrative of the sexual activity (or its absence) between the couple, and of the discovery of the deception, highlight this inadequacy. However, the interpretations imposed by both courts and press accounts serve to further highlight the theme. Thus the relationships are portrayed as not just inferior, but as downright ridiculous versions of the "real" heterosexual thing. They are bizarre, surprising, strange; what they are not is serious. The emotions involved are reduced to the callousness of the deceiver and the public shame of the deceived: there is no discussion of the feelings of attachment, betrayal and so on which must surely have been involved in any such close, intimate relationship.

Central to many such accounts is an emphasis upon the most literal form of imitation: that of the fake penis. While this did not feature in Trueman's case, it is central to Saunders' prosecution and offers a striking similarity to the cases of the eighteenth century. It is interesting that the actual dildo (should it have ever existed) has undergone a similar disappearance to that which occurred in some earlier cases, where the device was alluded to but never seems to have reached the courtroom.[28]

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[27] See Chapters 5 and 6.

[28] See for example the case of Mary Hamilton, where the "device" is referred to in published reports and Fielding's pamphlet but remains obstinately absent from the case papers.

Although it is referred to as a "strap-on plastic penis" throughout the *Sun* reports, there is no mention in the newspaper accounts of its having been found or even seen by anyone involved. This point is intriguing given that details are provided of how Jennifer Saunders' room was searched by Andrews's uncle and various other items including a box of tampons were found.

If there was no dildo involved in the offences, why would one have been invented? Jennifer Saunders herself gave the most probable explanation in a short interview with *Capital Gay*:

> And where pray in Yorkshire did she get the strap on we all read about. She laughed. "There never was no dildo. They thought there had to be a penis involved, so they said that about the dildo."[29]

This issue is more than one of prurient curiosity. The inability to imagine sexual activity without the penis may have been a contributory factor in Jennifer Saunders' conviction (and those of many of her predecessors). This is not to argue that the complainants were necessarily lying and Jennifer Saunders speaking the truth: we do not know that. We do know that juries make their decisions based not only upon the demeanour of witnesses but also upon surrounding circumstances affecting the credibility of their evidence. To a jury member unfamiliar with (and even threatened by) the idea of sexual activity which does not involve the penis, a version of events relying upon just such activity may well seem inherently less credible than one which does involve at least a facsimile penis. Thus whatever the truth of the case, we can be fairly sure that the heterosexist insistence upon sexual activity involving penile penetration as the only "real" sex would be at least an unspoken factor making conviction more likely.

Despite such continuities, there are important differences between the cases too, and the most crucial of these relate to the growing visibility of lesbianism. One is a simple change of emphasis occasioned both by changing standards of sexual expression and by a change in the law. Since the offence is now not financial but sexual, and since sexual matters are raised openly and explicitly both in the courtroom

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[29] 'Judge Frees Jailed Lesbian', *Capital Gay*, 19 June 1992, p 1. To a reader today, the comment also shows the enormous impact of queer politics and commercialisation in just one decade: now, when every lesbian publication except those which are avowedly radical feminist carries advertisements for dildos and similar items, it is hard to imagine that an interviewer would ask that question in that way.

and in the general media, recent reports have much more explicit detail of the sexual activity involved. Nonetheless, we should remember that euphemism and allusion were generally sufficient to inform eighteenth-century observers of these matters too.

Another difference is related, but above all reflects enormous social changes, and that is the overt identification of these relationships as lesbian in the modern trials and reports. The eighteenth-century press described the facts without ascribing motivation – or where it did so, this was given as financial rather than emotional or sexual. That approach reflected a more straightforward context in which to silence lesbian possibility. Today, such official silence is no longer viable in that form, since both the growth of fields of "expertise",[30] and the openness of lesbians themselves in speaking publicly and demanding visibility, have ensured that lesbianism cannot be satisfactorily rendered as "secret". However, its association with the bizarre and the emotionally shallow, with deceit and inadequacy, serve effectively to portray it as an unattractive option; and there are only a limited range of alternative representations of lesbians in the media, particularly in crime reporting.

Indeed, in the Trueman case we have a clear example of how categorisation as "lesbian" can serve to both reinforce and create negative stereotypes. The facts of the case seemingly put it into the category of paedophilia: while the defendant was an adult, the victim was only twelve years old. The emphasis upon the case as "lesbian" with the word "paedophile" only secondary thus suggests that lesbianism is somehow itself connected with paedophilia. The BBC News report of the case emphasised the connection through quoting terms such as "predatory" and ending with a contrast between the "teenage boy" the girl thought she was with and the "22-year-old woman" Trueman really was;[31] while *The Mirror* titled its story 'Boy Ploy Gay Jailed'.[32] That association between lesbianism and paedophilia has not generally been made in the past, but as lesbian visibility is increasingly closely tied to that of gay men (an issue I discuss further below and in Chapter 8), so negative stereotypes and myths of gay male sexuality can be projected upon lesbianism to render it unappealing.[33]

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[30] See the discussions of the expansion of sexology and psychology in Chapters 3 and 5.

[31] BBC News, 'Lesbian jailed for attacking girl', 8 March 2004, http://news.bbc.co.uk/1/hi/england/derbyshire/3543323.stm, accessed 27 October 2006. This report made no mention of factors such as Trueman's immaturity and anorexia emphasised by the judge and reported by the News of the World.

[32] *The Mirror*, 9 March 2004, p 13.

[33] For a discussion of the popular association of male homosexuality with paedophilia, see David Selfe

The development of indecent assault

The most striking difference between the prosecutions of Saunders and Trueman and those of their predecessors is that the contemporary women were charged with sexual offences. One of the most significant legal developments of the nineteenth and early twentieth centuries was the change in women's legal status which saw them remain full legal persons even after marriage.[34] This change from being the possession of a father or husband to being a legal person in one's own right, and with some right to sexual autonomy, saw a corresponding change in the charge against "female husbands" from financial fraud to indecent assault.

The changes to the law on sexual offences represent not only the creation and reformulation of the offences themselves, but also changes in the rationale of this area of law. Originally centred upon the protection of male property rights, it has moved (albeit very imperfectly) towards conceptualising its purpose as, initially, the protection of female sexual innocence, and latterly, the protection of female sexual autonomy. Feminist critiques highlight the extent to which the latter aim is neither universally shared nor effectively achieved among those responsible for the law's implementation; nonetheless, it has been a factor in the most recent changes to the law on sexual offences.[35]

Historically, the main sexual offences had been sodomy[36] and rape; the latter was in practice the offence of primary relevance to women. It was initially conceived of as an offence not against the woman herself but against her husband or father.[37] The concern to protect the safe transmission of property (in the senses both of real and personal property and of woman as property) was also apparent in related offences

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and Vincent Burke, *Perspectives on Sex, Crime and Society*, London: Cavendish, 1998, pp 6-7, and the 'worst' comments of politicians quoted in Martin Bowley, 'The Worst and the Best' (2000) 150 *New Law Journal* 1882.

[34] This was not an overnight transformation in women's legal status, but the gradual outcome of a long series of legislative (and, to a much lesser extent, judicial) reforms. The demise of the doctrine of coverture began with reforms such as the Married Women's Property Act 1870, a process largely completed in 1991 by the abolition of the marital rape exemption in *R v R*. Women gained rights in the public sphere through statutes such as the Representation of the People Act 1918 and the Sex Disqualification (Removal) Act 1919.

[35] See the discussion of the Sexual Offences Act 2003 in Chapter 8.

[36] See Chapter 3.

[37] See for example William Blackstone, *Commentaries on the Laws of England*, Volume 4, 1769 at 210; Sir Matthew Hale, *The History of the Pleas of the Crown*, Volume 1, London, 1736; Anna Clark, *Women's Silence Men's Violence: Sexual Assault in England 1770-1845*, London: Pandora, 1987, p 47; Nazife Bashar, 'Rape in England Between 1550 and 1700' in London Feminist History Group, *The Sexual Dynamics of History: Men's power, women's resistance*, London: Pluto Press, 1983, pp 28-42.

concerned with the procuration of girls under 21 by false pretences[38] and the abduction of heiresses.[39] However, sexual assaults which did not involve marriage or sexual intercourse, or upon women who had already engaged in extra-marital sexual activity, did not pose the same threats to the transmission of property to legitimate and suitable heirs, and thus had little legal status.

When offences against persons were consolidated in one statute, the Offences Against the Person Act 1861, indecent assault was distinguished legally for the first time.[40] Prior to this Act, there was no specific offence for sexual assaults which did not involve penile penetration (those which did could be charged as either rape or sodomy). Instead, legal textbooks might include a little discussion of assault and battery as including two instances which would now be characterised as sexual offences:

> So, if a master take indecent liberties with a female scholar, though she does not resist, it is an assault; *Rex* v. *Nichol,* R. & R. 130. If a medical man unnecessarily strip a female patient naked, pretending that he cannot otherwise judge of her illness, it is an assault if he himself take off her clothes; *Rex* v. *Rosinski,* R. & M. 19.[41]

The 1861 Act created two separate offences of indecent assault, defined by the victim's gender: indecent assault on a female (section 52) and indecent assault on a male (section 62). The difference was significant largely because of the penalties: the maximum sentence for indecent assault on a female was two years' imprisonment,

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[38] Protection of Females Act 1849.

[39] Sections 53 and 54 of the Offences Against the Person Act 1861 (respectively, abducting a woman against her will or a girl under 21 against the will of her parent; and forcible abduction of a woman with intent to marry or carnally know her). Note that civil remedies were also available: husbands suing for criminal conversation and fathers for seduction of their daughters were awarded heavy damages by eighteenth-century juries (Clark, *Women's Silence Men's Violence,* p 48).

[40] This was one of a series of consolidating acts passed by Parliament in that year, in an attempt to rationalise the more than 20,000 Acts then on the statute books (Kim Stevenson, 'Observations on the Law Relating to Sexual Offences: the Historic Scandal of Women's Silence' [1999] 4 *Web JCLI,* http://webjcli.ncl.ac.uk/1999/issue4/stevenson4.html, accessed 25 November 2006).

[41] Richard Matthews, *A Digest of the Law Relating to Offences Punishable by Indictment,* London: William Crofts, 1833, p 20. Likewise Edward E Deacon, *A Digest of the Criminal Law of England; as altered by the recent statutes and the consolidation and improvement of it,* London: Saunders and Benning, 1831, pp 62 – 63:

> Where a medical man made a female patient strip naked,(a proceeding which was wholly *unnecessary*) under the *pretence* that he could not otherwise judge of her case – and he himself took off her clothes, though without any resistance on her part – this was held to be in law an assault. *R.* v. *Rossinski,* 1 *Ry. & M.* 19.10. And so if a master take indecent liberties with a female scholar without her consent, though she does not actually resist, he may be punished for a common assault. *R.* v. *Nichol, Russ & Ry.* 130.

compared to the much higher ten-year maximum for indecent assault on a male.[42] Here was evidence of the assumption that women were essentially asexual: a male perpetrator was assumed, so the disparity in penalty was appropriate given the difference between supposedly natural (albeit non-consensual) sexual activity between a male and a female, and unnatural and thus more blameworthy sexual conduct between two males.[43]

Nonetheless, the terms of the offences were apparently gender-neutral as to perpetrator: "*whosoever* shall be convicted of any indecent Assault upon any Female ..." and "*Whosoever* ... shall be guilty ... of any indecent Assault upon any Male Person". Only apparently, because the line of cases concerning women's right to vote,[44] be admitted to universities,[45] or practise a profession[46] made explicit that women were not necessarily included in such gender-neutral terms. An additional complication was that the offence against male victims was in a section which also addressed behaviour specific to male offenders such as attempted sodomy, and which appeared under the sub-heading 'Unnatural Offences'. The issue of female culpability would not be resolved for some time, as I discuss below.

- **Indecency**

Although the primary difference between indecent assault and other forms of assault was the element of indecency, its meaning was not defined in the Act. The courts were therefore left to formulate vague tests such as "what all right-minded men, men of sound and wholesome feelings would say was indecent".[47] Such vagueness served an important function, ensuring that the interpretation of what constituted indecent assault was carried out on masculine terms: those right-minded men were the twelve who composed the jury, which would remain male-only until 1919.[48]

There was little change on this point in the following century or so. The leading modern case of *Court* repeated the definition of indecency as "an assault

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[42] The same Act reduced the maximum sentence for buggery from the death penalty to life imprisonment. The maximum sentence for indecent assault upon a female was eventually increased to ten years' imprisonment by the Sexual Offences Act 1985.
[43] It was also, of course, evidence of the value placed upon a woman's virginity (life imprisonment) as compared to her sexual modesty or autonomy (two years' imprisonment).
[44] *Chorlton v Lings* (1886) LR 4 CP 374.
[45] *Jex-Blake v Senatus of Edinburgh University* (1873) 11 M 784.
[46] *Bebb v Law Society* [1914] 1 Ch 286; *Jex-Blake v Edinburgh University*.
[47] Justice Brett, 1875, quoted in Stevenson, 'Observations on the Law Relating to Sexual Offences'.
[48] *Ibid.*

which right-minded persons would think was indecent".[49] It did expand upon that definition a little by setting out two types of scenario: assaults which were "inherently indecent" and those which were "only *capable* of being an indecent assault", depending on the circumstances and the defendant's state of mind.[50] *Court*'s own facts fell into the latter category: a shop assistant spanked a girl on her bottom. Although the activity was not necessarily sexual by nature, he said that he had acted because of a "buttock fetish" and thus his purpose made it indecent.

Lord Griffiths, in his concurring judgement, gave an alternative definition of indecency as "conduct that right-thinking people will consider an affront to the sexual modesty of a woman."[51] While this offers little in the way of clarity as to the behaviour included, it does throw light upon the underlying approach of the law. First, "right-thinking" introduces a moralistic tone which "might encourage a more unyielding judgmental standard than the collective sexual mores possessed by a particular (hopefully gender balanced) jury".[52] Such appeals to an assumed shared moralism tend to introduce considerations such as the complainant's conduct, or the perceived immorality of same-sex relations, which disadvantage women generally and lesbians in particular. Second, emphasis upon "sexual modesty" as demanding protection does not only mark the survival of Victorian myths around female sexuality into the late twentieth century. It also highlights the continuing importance of the protection of female innocence and virtue, rather than the safeguarding of women's sexual autonomy, as the perceived function of this offence as recently as 1989.[53]

- **Age of consent to indecent assault**

As the law moved from protecting male property alone towards protecting female innocence, so the possibility of an age of consent for indecent assault slowly gained ground. In 1861, the Offences Against the Person Act had defined the age of consent for sexual intercourse through the offence of unlawful sexual intercourse with a girl

[49] *R v Court* [1989] AC 28 HL at p 42 (Lord Ackner).
[50] *Ibid*, pp 42–43 (Lord Ackner; emphasis in original). This structure is basically maintained by the definition of "sexual" in section 78 of the Sexual Offences Act 2003, although the "right-minded person" has become a "reasonable person" and the conduct must be sexual rather than indecent.
[51] *Court*, p 34. Lord Goff of Chieveley, in his dissenting opinion, agreed that "the gravamen of the offence ... is to be found in the affront to modesty" (p 50).
[52]

under the age of 12.[54] However, low as that age of consent may have been, there was no age of consent at all for indecent assault (and consequently, none for any sexual act not involving penile penetration). The factual consent of the complainant was thus a complete defence regardless of her age (although Louise Jackson suggests that the age limit of twelve had hitherto been assumed to apply to both attempted carnal knowledge and indecent assault of girls).[55]

The inadequacy of this provision in safeguarding children became apparent when a defendant was acquitted of indecently assaulting a child of six on the basis that the child consented.[56] An age of consent for indecent assault (against both boys and girls) was subsequently created by the Criminal Law Amendment Act 1880, section 2, which read:

> It shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency.

The age of consent was eventually raised to 16 by section 1 of the Criminal Law Amendment Act 1922.

The Offences Against the Person Act 1861 as amended therefore possibly created an age of consent for lesbians, apparently by accident. The question of whether such an age of consent did in fact exist tends to be viewed as remaining controversial until the mid-twentieth century, since there was a question as to whether a woman could commit an indecent assault. However, the issue was actually raised and decided at first instance in 1885. The decision arose out of rather unusual circumstances with no lesbian overtones: the "purchase" by journalist W T Stead of thirteen-year-old Eliza Armstrong. Stead, a campaigning journalist who sought to highlight the traffic in young girls for prostitution, published his account of obtaining

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[54] Section 51. In fact, carnal knowledge of a girl under twelve had been a misdemeanour since the middle ages, although there had been confusion following an Elizabethan statute which defined carnal knowledge of a girl under 10 as a felony without benefit of clergy; however, the doubt as to whether carnal knowledge of a girl between 10 and 12 was an offence appears to have been cleared up by the early nineteenth century, and this statute simply confirmed the position (Louise A Jackson, *Child Sexual Abuse in Victorian England*, London: Routledge, 2000, pp 13-14). The age of consent was later raised to 13 by the Offences Against the Person Act 1875, section 4 (which also raised to twelve the age below which carnal knowledge would be a felony). The age of consent did not rise to 16 (the current age) until the Criminal Law Amendment Act 1885, section 5.

[55] Jackson, *Child Sexual Abuse in Victorian England*, p 14. She explains that since a male's consent to sexual activity with another male was itself an offence, the age of criminal responsibility (fourteen) effectively functioned as an age of consent for boys indecently assaulted by men.

[56] As discussed by Lord Bingham of Cornhill, *R v K* [2001] UKHL 41.

Eliza in the *Pall Mall Gazette* under the title 'The Maiden Tribute of Modern Babylon',[57] and was subsequently charged with offences including abduction. His trials also involved five other defendants in what was referred to as the *Armstrong Abduction Case*. The co-defendants had taken part with him in the purchase, apparently for the purpose of prostitution although in fact with the intention of exposing child prostitution. Unfortunately for Stead, although he had the mother's consent to the "purchase" he did not have her husband's. The father of a legitimate child – not its mother - was its legal guardian, and so without his consent an offence was committed. Stead and those who assisted him were tried and convicted of various offences.

Among the co-defendants was the French midwife Louise Mourez,[58] who had examined the girl to ensure she was a virgin (a service which she apparently performed often for brothels).[59] That examination resulted in a charge of indecent assault against her. *Justice of the Peace* reported:

> There is one point which was decided by Lopes, J., in the recent Armstrong abduction case which deserves to be remembered. The counsel for one of the defendants contended that there could not be an indecent assault by one woman upon another. The contention was a bold one but was evidently untenable. – Lopes, J., explained that the striking or touching of another without his or her consent was an assault, and if accompanied by indecent circumstances was an indecent assault. – Mr. Overend said his client was a midwife (*diplômee*) [*sic*] and an examination such as she might make in the practice of her profession, might, though accompanied by circumstances which would be indecent in other persons, he contended be allowable in her. – Lopes, J., said if the examination were made at the request of the girl's father or parents for proper purposes that would be so: but the consent could not be given by the child alone. The case was one which must go to the jury.[60]

Annabel Faraday wrote the first contemporary analysis of the Mourez case, although as a non-lawyer she did overestimate its potential significance in suggesting it was "an isolated attempt to equalise the law by criminalising lesbian as well as male

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[57] 6-8 July 1885.
[58] Also sometimes referred to as Louise Saurez.
[59] Alison Plowden, *The Case of Eliza Armstrong: A Child of 13 Bought for £5*, London: BBC Publishing, 1974, p 20.
[60] (1885) 49 *Justice of the Peace* 745. Interestingly, although Lopes appears to have assumed that the child could not give legally valid consent, reports give her age as thirteen and thus above the age of consent (although this would not have mattered on the facts, since the child did not give factual consent).

homosexual acts".[61] In fact the consequence of *Armstrong* was less drastic: it meant that only *non-consensual* sexual activity between women was illegal (whether the lack of consent was factual, or was legal due to the complainant's young age). Legal writers have followed Faraday in emphasising the seeming isolation of the decision: Matthew Waites, who has published the first sustained analysis of the lesbian age of consent,[62] follows Susan Edwards in dismissing the case as "apparently isolated".[63] His comment that it "assumed a non-consensual context" takes us little further since in age of consent cases, there is no legal consent regardless of factual consent (indeed, Lopes seems to have assumed that the girl's age alone prevented her from giving valid consent here).[64] I would suggest that the judgement's apparent isolation has less to do with legal reality than with the surrounding myths in which the law was often shrouded.

Certainly the facts of Mourez's case were unusual since the assault, though indecent by nature, was not carried out for any sexual motive of the defendant's own. However, there appears to have been little doubt in the minds of either Lopes or the commentator in *Justice of the Peace* that this interpretation of the law was obvious and relatively uncontroversial. Lopes seems to have dismissed the defence argument fairly briskly, while the *Justice of the Peace* calls it "bold". Indeed, the report goes further in saying that the point "deserves to be remembered": in other words, that it should have status as a precedent (albeit persuasive only, since it is a first instance decision).

I would therefore suggest that the case was unusual only factually: prosecutions of women for indecent assault were extremely rare, and indeed it would be almost half a century before the next reported case. There were good reasons to keep such cases quiet, since they generally posed a direct challenge to myths around female sexuality. Obviously a passive and desireless woman would have no means or

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[61] Annabel Faraday, 'Lesbian Outlaws: past attempts to legislate against lesbians', (1988) 13 *Trouble and Strife* 9-16, p 12.

[62] Matthew Waites, 'Inventing a "Lesbian Age of Consent"? The History of the Minimum Age for Sex Between Women in the UK' (2002) 11(3) Social & Legal Studies 323-342; see also Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship*, Basingstoke: Palgrave Macmillan, 2005, pp 88-96.

[63] Susan Edwards, *Female Sexuality and the Law: A study of constructs of female sexuality as they inform statute and legal procedure*, Oxford: Martin Robertson, 1981, p 43; Waites, 'Inventing A "Lesbian Age of Consent"?', p 327. Note that Waites refers to the case as *R v Armstrong*, which is incorrect: Eliza Armstrong was the victim (hence references to the *Armstrong Abduction Case*), but in the conventional format it would be *R v Saurez and others*. He adopts the same analysis (and nomenclature) in his recent book, *The Age of Consent*, pp 89-90.

reason to commit an indecent assault. Indeed, it was probably no coincidence that this first reported prosecution involved first, no actual sexual activity on the part of the defendant (she was assisting others to cater to male sexual desires), and second, crucially, a defendant who was far outside the British, middle-class norm of virtuous femininity. Here was a French, lower class, criminal woman involved in the fringes of prostitution (and, it was rumoured, abortion).[65]

However, the decision that a woman could commit indecent assault, and do so upon another woman, was apparently neither legally surprising nor controversial. Factors such as prosecutorial discretion and lack of reporting were at work here, rather than legal impossibility: where a case did come before the courts there was no doctrinal difficulty in interpreting the law to permit a conviction, nor controversy over such interpretation. In other words, among those whose professional knowledge and experience entitled them to know "truths" about female sexuality, there was little hesitation in accepting that such indecent assaults both could occur and should be punished.

In 1922, section 2 of the Criminal Law Amendment Act raised the age of consent for indecent assault from thirteen to sixteen.[66] It did so through a gender-neutral provision that the consent of a young person (of unspecified sex) under sixteen was no defence (for persons of unspecified sex) to a charge of indecent assault. Matthew Waites notes that this gender-neutral approach was a significant change from the wording of a government bill (which did not progress into law) in 1917:

> 1. (1) Any male person of the age of sixteen years or over who commits an act of indecency with a girl under the age of sixteen years shall be liable on conviction on indictment to imprisonment …[67]

Waites argues that given the 1921 debates, and some comments of the Home Secretary Edward Shortt (quoted below), the issue of women indecently assaulting girls must have been in Parliament's mind. Thus the wording which encompassed

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[64] Waites, *Age of Consent*, p 89.
[65] See the judgement of Lopes quoted in Plowden, *The Case of Eliza Armstrong*, p 135; the allegation that she was an abortionist came from her co-defendants.
[66] Note that this was some 37 years after the same age of consent had been established for sexual intercourse.
[67] Waites, 'Inventing a 'Lesbian Age of Consent'?', p 330.

such a situation was deliberate. Although the evidence is not entirely unambiguous, I would agree with his interpretation.

However, I would take it further and suggest that the failure to discuss sexual conduct between women openly despite Parliament's inevitable awareness of the issue was no accident. The approach of direct prohibition had been rejected and that of silencing and repression was therefore maintained. The ambiguous and allusive nature of the Home Secretary's comments in Standing Committee make more sense in that context:

> Take the case of an older man or woman who has got hold of a girl, who has polluted her mind and committed an indecent assault upon her. If that girl is going to be prosecuted, she will never give any information against that man, nor will a boy give any information against that woman. Hon. members talk about equality of the sexes. I see nothing in this which distinguishes one sex from another. So far as the provisions go, they treat both sexes exactly alike. An accusation could be brought under this clause against a woman as well as against a man.[68]

Parliament was not to discuss the issue directly again, and so the emphasis was to be upon heterosexual conduct. Yet these comments, whether deliberate or simply muddled, show that lesbianism was present as an undercurrent, something below the surface but carefully left unspoken.

- ***R v Hare*: *Mourez* confirmed?**

After 1922, there would be no major changes to the law around indecent assault and the age of consent until the end of the twentieth century. This period of legislative stability in part reflects changes in feminist campaigning between the wars, which tended to follow the sexological lead in seeking sexual fulfilment for women, rather than continuing its hitherto sustained attack upon the sexual double standard and the abuses of women and children thereby permitted. (Campaigns around sexual offences law would become prominent again from the 1970s, and play a significant role in some of the changes made by the Sexual Offences Act 2003). Thus in the early twentieth century, new information for women began to appear, most famously Marie

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[68] Home Secretary, House of Commons Standing Committees, May – July 1922, 12.7.1922, col 9, cited in Waites, 'Inventing a 'Lesbian Age of Consent'?', p 332. The Home Secretary's comments refer to an

Stopes' *Married Love*, although she was careful to emphasise the importance of women's sexual satisfaction *within marriage*.[69] Lesbianism remained silenced and disapproved of and men were still assumed to be the initiators of sexual activity; it was the exercise of men's sexual dominance, not its existence, which was challenged.

Among potentially worrying fractures in the official policy of silencing were those which suggested that heterosexual women could have full sexual agency. Once that was conceded, lesbianism also became a logical possibility. In this context came the case of Maggie Hare, a woman who was prosecuted in 1933 for engaging in sexual activity with a 12-year-old boy, namely three incidents of sexual intercourse which left him infected with a venereal disease.[70] The court's judgement not only accepted some degree of female sexual agency but also raised and recognised the spectre of lesbianism, albeit *obiter*.

The defence argument was that section 62 of the Offences Against the Person Act referred only to "sodomitical offences", and appeared under the sub-heading "unnatural offences". Thus indecent assault upon a boy could only be committed by a man and not by a woman. The argument appears to have had some academic support, since the 1930 publication *Law Relating to Women* asserted:

> It is certain that a woman cannot be convicted of an indecent assault on a male under section 62 of the Offences Against the Person Act 1861, although the section says: "whosoever ... shall be guilty ... of any indecent assault upon any male person." The point does not seem to have been decided. By its language, the section obviously refers to attempted sodomy.[71]

However, the Court of Appeal in *Hare* had little patience with this argument and did not even call upon counsel for the Crown to oppose it. They pointed out that the sub-heading was added after the passing of the Act and "forms no part of the enactment". There was no ambiguity in the wording of the section, since "whosoever" admittedly

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amendment which proposed making consenting 15-year-olds criminally responsible. The amendment, which he opposed, was rejected.

[69] Marie Stopes *Married Love: A New Contribution to the Solution of Sex Difficulties*, London: A C Fifield, 1918; George Robb, 'Marriage and Reproduction', in HG Cocks and Matt Houlbrook (eds), *The Modern History of Sexuality*, London: Palgrave Macmillan, 2006, pp 87-108 at p 101.

[70] *R v Hare*, [1933] All ER Rep 550; also reported at [1934] 1 KB 354; 103 LJKB 96; 150 LT 279; 98 JP 49; 50 TLR 103; 24 Cr App Rep 108; 32 LGR 14; 30 Cox CC 64.

[71] E Ling-Mallison, *Law Relating to Women*, London: The Solicitors' Law Stationery Society Ltd, 1930, p 50.

included a woman,[72] and a woman could therefore be guilty of indecent assault upon a male.

Having conceded some sexual agency to women, *Hare* went further, confronting the spectre of lesbianism in the following *obiter dictum*:

> Reference has been made to many other sections in the Act of 1861, in which the word "whosoever" is used. There is no doubt, in our opinion, that in s. 52 of the Act the word "Whosoever" includes a woman, and there is no reason for saying that a woman cannot be guilty of an indecent assault on another female.

The fact that an *obiter* remark has been accepted by modern commentators as setting out the law[73] where the earlier Armstrong case has not perhaps suggests more about our willingness to take Victorian pronouncements on female sexuality at face value than about legal realities. Only in understanding the complicated relationship between public pronouncements and actual beliefs can we assess the legal history of sex between women accurately.

In 1956, the Sexual Offences Act re-enacted the two indecent assault offences as sections 14 and 15, relating to indecent assaults on females and males respectively; each could be committed by a "person". This Act consolidated rather than reformed the law,[74] although the 1861 Act's placing of indecent assault against a boy under the heading of "Unnatural Offences" was corrected, with both indecent assault offences now under the heading "Assaults". The issue has now been further simplified by the Sexual Offences Act 2003's consciously gender-neutral approach: both men and women can now be perpetrators and victims of a single offence, sexual assault.

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[72] Note that the earlier line of "person" cases, which held that such gender-neutral terms excluded women in a variety of contexts, had been overturned by legislation, notably the Sex Disqualification (Removal) Act 1919.

[73] See for example The Report of a Howard League Working Party, *Unlawful Sex*, London: Waterlow Publishers Ltd, 1985, p 185 which cited *Hare* alone as authority; Edwards' statement that "it has generally been the rule that woman cannot commit ... an indecent assault ... This remained the case until the 1930s when the statute relating to indecent assault was interpreted in a significantly new way" (Edwards, *Female Sexuality and the Law*, p 37); and the slightly more cautious approach of Waites discussed above. Interestingly, a rather earlier account of *Hare* explicitly referred and gave equal weight to the *Armstrong* case (I Mackesy, 'The Criminal Law and the Woman Seducer' [1956] Crim LR 446-456 at p 448).

[74] C Bruce Orr, *The Sexual Offences Act, 1956 With Introduction and Annotations*, London: Butterworth & Co, 1957, p iii.

- **Fraud and consent**

The law on the age of consent was the basis of Trueman's conviction for indecent assault. However, the complainants in the Saunders case were both over sixteen. Since they had given apparent consent, and since indecent assault must be non-consensual, how had an offence been committed? The answer is that the criminal law allows fraud to vitiate consent in certain circumstances. For sexual offences these have been defined narrowly, being effectively limited to fraud as to identity or fraud as to the nature of the act. Counter-intuitively perhaps, it is the second ground which applies here: fraud as to identity was limited to impersonation by another of an actual husband or boyfriend[75] (since extended by section 76 of the Sexual Offences Act 2003 to impersonation of any person known personally to the complainant, a definition which would continue to exclude the Saunders situation).

Fraud as to the purpose of the act has also been narrowly defined. In cases such as *Flattery*[76]and *Williams*[77] it was held that fraud would vitiate consent where the complainant believed that she was consenting to something other than sexual intercourse (in both cases, the defendant claimed to be carrying out surgical treatment). Although both are rape cases, *Williams* accepted that the deception also vitiated consent for indecent assault. *Flattery* makes an interesting distinction: according to Kelly CB's leading judgement, "even if she had such knowledge [that the 'operation' involved sexual connection], she might suppose that penetration was being effected with the hand or with an instrument." Thus he regarded the difference between penetration with a penis and penetration with anything else as sufficiently fundamental that there was no valid consent.

Such a distinction becomes the more significant when the extreme narrowness of the frauds recognised is understood. The "nature" of the act has been narrowly defined so as to limit it to situations where the *sexual* nature of the act was not comprehended by the complainant. Indeed, according to Morland J in *Linekar*, the basis of *Williams* and *Flattery* was that "non-consent to sexual intercourse rather than the fraud of the doctor or choir master ... makes the offence rape."[78] Thus the fact that the defendant knows he is infected with a serious sexually transmitted illness but

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[75] *Elbekkay* [1995] Crim LR 163.
[76] (1876-77) LR 2 QBD 410.
[77] [1923] 1 KB 340.
[78] [1995] QB 250 at p 255.

encourages the complainant to believe that he is not will not vitiate consent.[79] The nature of the act is assumed to be the same (sexual intercourse) despite the reality that – from the woman's perspective at least – it is surely fundamentally different (an act involving both a high risk of serious illness and a deception by a person whom one believes one can trust). Again, consent to sexual intercourse consummating marriage has been held to be valid even though the "marriage" was fake.[80]

The approach to fraudulent consent, then, is centred firmly upon the importance of the penis.[81] Thus penetration by a diseased or disease-bearing penis is assumed to have more in common with penetration by a healthy penis than does penetration with any other body part or object. Once one looks from the perspective of the penetrated woman, the view is utterly different: penile penetration without high risk of disease potentially has more in common with penetration by fingers, for example (being an act of intimacy) than penetration with a high and hidden risk (being an act of danger, possible infection, and betrayal of trust). In this legal context, female sexual autonomy is diminished while lesbian sexuality is always aberrant, and less desirable than even risky heterosex. This is not to argue that fundamental frauds such as that alleged in Saunders should not be criminal; they should. However, it says very little for the status of lesbianism in the eyes of the criminal law that they are sexual offences where the conduct of Clarence or Dica was not.

It is also significant that what is being protected by the rules upon fraud and consent is very literally women's sexual ignorance. Only unawareness that the act is one of sexual intercourse (or, in Saunders' case, is *not* sexual intercourse) will suffice: it is not that women's sexual autonomy is being safeguarded, since frauds as to marriage or health have no legal effect here. Instead, the naivety which enabled the victims in *Flattery* and *Williams* to mistake sexual intercourse for surgical treatment is seen as the only proper circumstance for the law's protection to be invoked. Thus the criminal law's approach to consent is consistent with the policy of silencing: if women are to be kept unaware of their own sexuality, then men should be punished

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[79] *Clarence* (1889) LR 22 QBD 23 and *Dica* [2004] EWCA Crim 1103; note that *Dica* partially overruled *Clarence* to say that there will be a lack of consent to *non-sexual* offences against the person (see Janet Loveless and Caroline Derry, '*R v Dica*' (2004) 38(3) *Law Teacher* 387-394).

[80] *Papadimitropoulos* [1957] 98 CLR 249, [1958] ALR 21.

[81] It should be noted that although the common law has been replaced by section 75 of the Sexual Offences Act 2003, that section is in very similar terms. Future caselaw will clarify what if any difference in approach to fraudulent consent the new Act requires, but such changes are unlikely to be major in respect to the issues raised here.

for taking advantage of that socially-beneficial ignorance.

Also interesting is that fraud has remained a vital component of the offences of female husbands. However, there has been a reversal: where in the past, the fraud constituted the substantive offence with any sexual conduct simply part of its *actus reus*, the sexual conduct has now become the crux of the matter with the fraud relegated to the means of carrying it out. The offence has therefore become more straightforwardly sexual, although still retaining that mechanism which enables the presumption of the "female" partner's ignorance and innocence to be preserved.

Social visibility, legal invisibility?

The survival of the myth of female sexual innocence and passivity is not the only sign that the courts have failed to keep pace with social developments, particularly those arising from feminism, in this area. The previous chapter ended at a moment when lesbian visibility appeared to be increasing inexorably: the late 1920s, characterized by the popularisation of sexological discourse and the high-profile cases of the *Well of Loneliness* and "Colonel" Barker. However, lesbianism appears to have somehow retreated in the intervening years so that the Crown Court judge in *Saunders* could continue to talk as if lesbianism was a possibility outside the contemplation of most women. Why is this the case?

The first answer is that the criminal courts never really abandoned the policy of silencing and attempted even in the late 1920s to keep the details of what lesbianism means quiet. Thus the aim of the *Well of Loneliness* case was to prevent the book falling into women's hands, even if the tactic of a public trial did rather backfire. Similarly, although the Barker case attracted huge public attention, the details of the alleged sexual activity between the parties was kept literally silent in court. The apparent leap into visibility was therefore never as great as it might appear, leaving the courts able to continue to attempt to silence lesbianism to some extent.

This explanation is correct as far as it goes. However, it does not account for how the courts have been able to persist in their denial when lesbians have fought for and won a growing degree of visibility in the world outside the criminal courtroom. The second answer therefore needs to look a little deeper, and highlight the ways in which the courts attempt to resist lesbian visibility. In particular, criminal legal discourse has moved from a denial of lesbian possibility to what one might loosely term containment. Saunders' case saw a crude and confused version of this: Anna

Marie Smith notes that the judge's comments

> associated [Saunders's] behaviour with the dangerously subversive advance of the feminist and sexual liberation movements. ... Like many other British officials. Judge Crabtree viewed these gains as dangerous steps on a `slippery slope' toward the destruction of heterosexual and patriarchal norms.[82]

She views his attack upon predatory lesbian sexuality as an exception to a usual sanitised version of lesbianism. In fact, as I have argued in my discussion of the 1921 parliamentary debates,[83] the notion of a predatory lesbian sexuality threatening the wives and daughters of the powerful has not been rejected, but rather accepted and then deliberately silenced as a means of defusing the threat. Crabtree's remarks are thus in this sense not exceptional but rather part of a longer tradition.

A particularly curious feature of Crabtree's remarks on deterrence is their internal contradiction. He seems to blame sexual openness about lesbianism for creating the risk of these offences, by placing his comments upon deterrence in the context of that openness. However, on either version of the events in this case, it was precisely a lack of openness about lesbian sexuality which motivated the deception of either the girls' parents or the girls themselves. Crabtree's comments make sense only when placed in the context of the judiciary's use of silencing as a strategy for controlling lesbianism. The problem was not that awareness of lesbianism made repetition of this specific crime more likely, but that this crime (because of the openness that both allowed it to be reported and allowed that lesbianism is not impossible) made awareness of lesbianism more likely. Crabtree therefore did what he could to counteract this by equally publicly imposing a very harsh sentence; his approach, though, failed both legally (when the Court of Appeal substantially reduced the sentence) and socially (when lesbians responded with very public protests).

To compensate for the increasing ineffectiveness of straightforward silencing, new ways of discussing lesbianism have developed which do not deny its existence but do conceal its realities and occlude its implications.[84] From its high point of legal

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[82] Smith, 'The Case of Jennifer Saunders', p 166.

[83] See Chapter 3.

[84] In particular, the elision of lesbianism with male homosexuality which I discuss in Chapter 8. One could also look at, for example, the media portrayal of "lesbian chic" in the 1990s, which aimed at presenting lesbianism as consistent with heteropatriarchal norms of femininity, not least through being compatible with heterosexual activity (for further discussion of this phenomenon, see Karman Kregloe

visibility in the late 1920s, lesbianism was very quickly co-opted into other discourses which also, albeit more subtly, silence its existence and significance. Arguably the most potent such method is the hiding of lesbianism behind male homosexuality: Sheila Jeffreys characterises this approach as one where "lesbians are simply gay men of smaller growth, less glamorous cultural forms and with inadequately developed libidos."[85] Thus, in the 1950s, the Wolfenden Report considered lesbians as a sub-group of homosexuals who lacked either the public order problems or the "libidinous" nature of gay men and therefore needed no legal attention;[86] an approach which has effectively continued to the present day, when lesbians are submerged within the category "lesbian and gay" which quickly collapses into visible gay men and invisible lesbians.[87]

From the 1970s, lesbianism has become increasingly visible on its own terms, as radical and lesbian feminists developed a lesbian politics and culture whose roots were in feminism rather than the classifications of the sexologists.[88] However, such a distinct identity was always resisted by the mainstream, and recent years have seen a movement of many lesbians themselves towards identification and alliance with gay men. In consequence, lesbians are increasingly subsumed within "lesbian and gay" or "queer" identities. Given this wider cultural context, it is unsurprising that the criminal courts are following suit. Almost as soon as the Saunders trial acknowledged the existence of lesbianism, the Trueman trial showed signs of an attempt to obscure such cases within another identity once more: not that of economic fraud, but of paedophilia, and hence by implication into male homosexuality which itself has long struggled with such fallacious links being made in popular discourses.

The Trueman case is something of a turning point in that a language of sex offending which is not overtly gendered but is covertly (gay) male – "predatory",

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and Jane Caputi, 'Supermodels of Lesbian Chic: Camille Paglia Revamps Lesbian/Feminism (while Susie Bright retools)' in Dana Heller (ed), *Cross-Purposes: Lesbians, Feminists, and the Limits of Alliance*, Bloomington: Indiana University Press, 1997, pp 136-156).

[85] Sheila Jeffreys, *The Lesbian Heresy: A feminist perspective on the lesbian sexual revolution*, London: The Women's Press, 1994, p 142.

[86] See Chapter 3.

[87] See the detailed discussion in Chapter 8.

[88] See for example Sheila Jeffreys, *Unpacking Queer Politics: A Lesbian Feminist Perspective*, Cambridge: Polity Press, 2002, pp 18-22; Jeffreys, *The Lesbian Heresy*, p 143. "An end to discrimination against lesbians" was one of the Seven Demands established by Women's Liberation Movement conferences (the demand was added at the 1975 Manchester conference and the Seven Demands finalised at the 1978 Birmingham conference: Zoë Fairbairns, 'Saying What We Want: Women's Liberation and the Seven Demands' in Helen Graham, Ann Kaloski, Ali Neilson and Emma Robertson (eds), *The Feminist Seventies*, York: Raw Nerve Books, 2003, pp 93-104).

"paedophile" - is starting to displace that of lesbian deviance. Such a change is, however, only beginning: it is particularly notable that despite the respective ages of the woman and girl involved, and despite the recent press approach to stories involving paedophilia, it was the label "lesbian" rather than that of "paedophile" which really pervaded these accounts. Nonetheless, the change is an important one and (for reasons which I discuss in more detail in Chapter 8), one that is likely to become more apparent in the future. The move into a generalised discourse of predatory paedophilia mirrors a move from the invisibility of the lesbian behind other women to the invisibility of the lesbian behind gay men. When she does now appear it is in the light of the most damaging of stereotypes of gay male sexuality.

Masquerade and the queer subversion of gender

How, though, should lesbians ourselves interpret the facts of these cases? In Chapter 4, I referred to the differences between historians as to whether the female husbands of earlier centuries could be interpreted as proto-feminist heroines challenging patriarchal limitations. This debate reflects contemporary differences over lesbianism and the ways in which our actions can best challenge heterosexist norms and discrimination. Such issues surfaced in relation to the case of Jennifer Saunders, where the most vocal champions of her case were LABIA, a lesbian group affiliated to OutRage! and espousing a queer politics of direct action. They championed her to an extent which extended to personal support, for example by visiting and writing to her in prison and taking her for a drink after her successful appeal.[89] Although the links between such queer activism and academic queer theory are informal and even frequently uncomfortable, nonetheless this does raise the questions of why Saunders' case seemed to fit so comfortably within queer campaigning and what queer theory offers in terms of interpreting the "female husband" type of case.

The context in which the case of a male impersonator finds a home within queer theory is through the notion of gender as performative, and its corollary that gender can best be subverted by performing gender differently. Queer theory proposes that the adoption or parodic performance of butch personae can expose the constructed

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[89] 'Remember Jennifer Saunders', *City Limits*, 21-28 November 1991, p 52; 'Judge Frees Jailed Lesbian', *Capital Gay*, 19 June 1992, p 1.

nature of heteropatriarchal gender relations themselves and thereby upset them.[90] In order to consider what light these female husband cases may throw upon the strengths and weaknesses of this aspect of queer theory, I will begin by considering the notion of performativity and its political consequences.

- **Performativity**

The theory of performativity in the context of gender is largely centred upon the work of Judith Butler.[91] She describes the performative as "not a singular act, but a repetition and a ritual, which achieves its effects through its naturalization in the context of a body, understood, in part, as a culturally sustained temporal duration";[92] "the reiterative and citational practice by which discourse produces the effects that it names."[93] In other words, masculine and feminine behaviour – indeed masculine and feminine subjects - are produced by repetition and imitation, not by any single act or gesture, and above all not by any natural, innate gender essence. It is such repetition (the ongoing conduct of living in ways seen by society as "masculine" or "feminine", the long-term performance of what is understood by these) and its citational nature (its status as "a reiteration of a norm or set of norms")[94] which creates and reinforces gendered norms by making them appear natural. Gender, then, remains a performance (albeit not usually a conscious one) rather than something preordained and inevitable.

However, says Butler, the existence of the "abject" is also necessary:

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[90] See, for example, Judith Butler, 'Imitation and Gender Insubordination' in Sara Salih (ed), *The Judith Butler Reader*, Oxford: Blackwell Publishing, 2004, chapter 4.

[91] Note that "performativity" is a term used in very different ways by different theorists (see for example Andrew Parker and Eve Kosofsky Sedgwick, 'Introduction' in Andrew Parker and Eve Kosofsky Sedgwick (eds), *Performance and Performativity*, London: Routledge, 1995, pp 1-18 at p 2). Here, I will be discussing its use in the sense adopted by Butler and those following her work: see Judith Butler, *Bodies That Matter: On the discursive limits of "sex"*, New York: Routledge, 1993; Judith Butler, *Gender Trouble* (1990), London: Routledge, 1999; Judith Butler, *The Psychic Life of Power*, California: Stanford University Press, 1997; Sara Salih (ed), *The Judith Butler Reader*, Oxford: Blackwell Publishing, 2004; Nikki Sullivan, *A Critical Introduction to Queer Theory*, Edinburgh: Edinburgh University Press, 2003. For critical accounts of Butler's approach see Elizabeth Wilson, 'Is Transgression Transgressive?' in Joseph Bristow and Angelia R Wilson (eds), *Activating Theory: Lesbian, gay, bisexual politics*, London: Lawrence & Wishart, 1993, pp 107-117; Seyla Benhabib, 'Feminism and Postmodernism', in Seyla Benhabib, Judith Butler, Drucilla Cornell and Nancy Fraser, *Feminist Contentions: a Philosophical Exchange*, London: Routledge, 1995, pp 17-34; Jeffreys, *Unpacking Queer Politics*, esp pp 39-40; Martha Nussbaum, 'The Professor of Parody' (1999) *The New Republic Online*, reproduced at http://www.md.ucl.ac.be/ebim/scientif/Recherche/GenreBioethique/Nussbaum_NRO.htm, accessed 14 January 2007; and see generally Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994; Margaret Sönser Breen and Warren J Blumenfeld (eds), *Butler Matters: Judith Butler's impact on feminist and queer studies*, Aldershot: Ashgate, 2005.

[92] Judith Butler, *Gender Trouble*, London: Routledge, 1999, 'Preface (1999)', p xv.

[93] Judith Butler, *Bodies That Matter*, p 2.

> the subject is constituted through the force of exclusion and abjection, one which produces a constitutive outside to the subject, an abjected outside, which is, after all, "inside" the subject as its own founding reputation.[95]

We are not all subjects, and the existence of the lesbian, for example, is crucial for the existence of heterosexuality. It is only by defining lesbianism and identifying lesbians as abject that heterosexuality comes to exist and to be a precondition of full subjecthood.

Butler develops her notion of the abject in 'Imitation and Gender Subordination', so that abjection becomes a notion similar to silencing:

> [I]t becomes important to recognize that oppression works not merely through acts of overt prohibition, but covertly, through the constitution of viable subjects and through the corollary constitution of a domain of unviable (un)subjects – *abjects*, we might call them – who are neither named nor prohibited within the economy of the law. Here oppression works through the production of a domain of unthinkability and unnameability. Lesbianism is not explicitly prohibited in part because it has not even made its way into the thinkable, the imaginable, that grid of cultural intelligibility that regulates the real and the nameable. How, then, to "be" a lesbian in a political context in which the lesbian does not exist? That is, in a political discourse that wages its violence against lesbianism in part by excluding lesbianism from discourse itself? To be prohibited explicitly is to occupy a discursive site from which something like a reverse-discourse can be articulated; to be implicitly proscribed is not even to qualify as an object of prohibition.[96]

- **Parody**

The abjection of lesbianism is presented as both problem and potential solution: "this disavowed abjection will threaten to expose the self-grounding presumptions of the sexed subject"[97] and thus Butler suggests that the "abject" lesbian can reveal the constructed and performative nature of gender and of heterosexuality. Butler's preferred means of revelation is to perform gender differently: she argues that for a

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[94] *Ibid*, p 12.
[95] *Ibid*, p 3.
[96] Butler, 'Imitation and Gender Insubordination', pp 126-127. Note that "law" here has a wider sense than the one in which I use it in this thesis.
[97] Butler, *Bodies That Matter*, p 3. For a short but clear criticism of the usefulness of mainstream psychoanalytic theory in the understanding of lesbian desire at all, see Elizabeth Grosz, 'Refiguring Lesbian Desire', in Doan (ed), *The Lesbian Postmodern*, pp 70-74.

person designated "female" to perform gender in a way which does not match that designation can highlight the obscured basis of the whole system. We can therefore destabilise the categories of gender by performing our gender in ways which highlight those categories as constructed rather than (as they pretend) natural and unchanging.[98] Such notions of conscious performance and subversion are fundamental to much queer theory and activism.

Indeed, the Foucauldian formulation of power which Butler uses may seem to leave little other option for action. Hartsock points out that "systematically unequal relations of power ultimately vanish from Foucault's account of power".[99] Instead, discourses are described as if they themselves contain power; very little is said about who has the power to create or authorise those discourses. In consequence, it appears that there is nothing beyond the discourses which are argued to create us as subjects. For those trapped within them, "passivity or refusal represent the only possible choices".[100] The option of positive action, of the development of an alternative discourse, is not considered viable. In consequence, we are limited to purely oppositional attempts at transgression, subversion or resistance which, "since they are cast in the terms set by that which is being rebelled against, ... are the politics, ultimately, of weakness."[101]

Butler, in following Foucault, concurs that we cannot argue for any self existing outside the terms of existing discourses:

> Subjection consists precisely in [a] fundamental dependency on a discourse we never chose but that, paradoxically, initiates and sustains our agency.[102]

It is largely for that reason that the forms of political activism she proposes focus upon subverting existing discourses rather than trying to establish new ones. To her, since our very identities and senses of ourselves as subjects come from existing discourses, we are constrained to arguing within and against those discourses as there is no "I" outside of them to do the arguing. Our opportunity for resistance therefore

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[98] Although I say "we", Nussbaum points out in 'The Professor of Parody' that such performances involve personal acts rather than "mass movements of resistance or campaigns for political reform".
[99] Nancy Hartsock, 'Foucault on Power: A Theory for Women?' in Linda J Nicholson (ed), *Feminism/Postmodernism*, New York: Routledge, 1990, pp 157-175 at p 165.
[100] *Ibid*, p 167.
[101] Wilson, 'Is Transgression Transgressive?', p 109.
[102] Judith Butler, *The Psychic Life of Power*, California: Stanford University Press, 1997.

comes when power is assumed: while that power compels reiteration, nonetheless "the act of appropriation may involve an alteration of power such that the power assumed or appropriated works against the power that made that assumption possible",[103] thereby creating resistance and subordination in the same moment. Resistance must be to a specific manifestation of power, constrained to respond to its terms and thus to either accept, deny or parody them. What is not seen as viable is a transformative politics which moves outside existing discourses to positively create rather than negatively oppose.[104]

In particular, Butler advocates the use of parody, for which she gives the example of (gay male) drag. The example is a telling one, since she seems to make no distinction between the silencing of lesbianism and the explicit prohibition of gay male sexuality in terms of the tactics to be adopted in response, and the particular technique suggested is one largely specific to gay men. The use of drag is also to some extent surprising because historically it has not been part of lesbian culture. (Although "drag kings" now perform for lesbian audiences, they do not have anything like the profile among lesbians which drag queens have among gay men). While this chapter highlights the lesbian use of cross-dressing throughout several centuries, unlike drag it was a very serious attempt (termed a masquerade by Butler) to persuade society that the woman concerned was a man.

Butler argues that drag "implies that all gendering is a kind of impersonation and approximation" so that lesbianism can no longer be viewed as "a copy, an imitation, a derivative example, a shadow of the real" since "*gender is a kind of imitation for which there is no original*".[105] Likewise, she states in *Gender Trouble* that

> The notion of an original or primary gender identity is often parodied within the cultural practices of drag, cross-dressing,[106] and the sexual stylization of butch-femme identities. … *In imitating gender, drag implicitly reveals the imitative structure of gender itself – as well as its contingency.*[107]

It does so, claims Butler, because

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[103] *Ibid*, p 13.
[104] For further criticism of Butler's arguments on this point, see Nussbaum, 'The Professor of Parody'.
[105] Butler, 'Imitation and Gender Insubordination', p 127; emphasis hers.
[106] By this, she appears to mean transvestism.

The performance of drag plays upon the distinction between the anatomy of the performer and the gender that is being performed. But we are actually in the presence of three contingent dimensions of significant corporeality: anatomical sex, gender identity, and gender performance. If the anatomy of the performer is already distinct from the gender of the performer, and both of these are distinct from the gender of the performance, then the performance suggests a dissonance not only between sex and performance, but sex and gender, and gender and performance.[108]

On this basis, the *discovered* female husband, whose masquerade has ended, would surely offer the same dimensions and dissonances. Why, then, would such cases have seemed safe to publicise? I would suggest that it was because few viewers would have drawn the subversive conclusions suggested by Butler: to read a performance as subverting gender norms in this way, one would require a familiarity with Butler's work, following which one would anyway be aware of those norms' performative nature without actually having to see the subversive performance. Far simpler would be the readings actually made by the courts, media and many observers: that the fact something is recognised as a copy suggests its inferiority to the original. The superiority and genuine nature of the original is thereby reaffirmed rather than challenged. Thus while Butler suggests that "the more that 'act' [heterosexuality] is expropriated, the more the heterosexual claim to originality is exposed as illusory",[109] the female husband cases suggest that a parody may well fail to highlight the constructed status of the "original".

In consequence, performing gender differently faces serious limitations if used as our primary political strategy. There are also practical problems to be overcome. The first difficulty, if all gender is parody, lies in determining which parodies are destabilising. In the specifically lesbian context, Colleen Lamos acknowledges that rather than being uniformly read as destabilising parody, "even within [non-heterosexual] frames ... the significance of dildos and of butch/femme sexual styles are matters of intense interpretive debate".[110] Butler also recognises such difficulty,

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[107] Butler, *Gender Trouble*, pp 174-175; emphasis hers.
[108] *Ibid*, p 175.
[109] Butler, 'Imitation and Gender Insubordination', p 130.
[110] Colleen Lamos, 'The Postmodern Lesbian Position: *On Our Backs*' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 85-103 at p 95. For a critique of Butler's suggestion that lesbian femmes are parodic, see Carole-Ann Tyler, 'Boys Will Be Girls: The Politics of

acknowledging that drag, for example, does not always challenge heterosexuality. *Bodies That Matter* returns to the topic in a discussion of the film *Paris is Burning*, which she states "call[s] into question whether parodying the dominant norms is enough to displace them ... [or might be] the very vehicle for a reconsolidation of hegemonic norms".[111] This is hardly news: feminist critiques of drag have highlighted such reconsolidation as actually central to its performance. For Marilyn Frye, drag is "a serious sport in which men may exercise their power and control over the feminine ... [a mastery which] is not feminine. It is masculine."[112] The assumption of masculine identity, contrarily, involves an assumption of male power which idealises rather than challenges it: the foregoing chapters have described just how effectively the prosecution of female husbands operated as vehicles for reconsolidating such norms. Can parodic performance ever, then, be the answer?

Butler's work produces no test for determining which forms of performance may or may not destabilise gender binaries. One answer may be the distinction between parody, in the sense of "a hyperbolic and excessive form of mimicry that illuminates the unnaturalness, the theatricality of identity generally" and masquerade, "a performance in and through which one 'passes', and which therefore does not call into question hegemonic notions of identity."[113] However, as Moya Lloyd has pointed out, the distinction is not always clear: one must ask "what makes a parody a parody, and whether or not a parody is a parody if it is not read as such."[114] One could dismiss our female husbands as masqueraders, and thus argue that queer theory never claimed them as subversive. However, is that tenable? Surely Mary Hamilton's reported behaviour after her masquerade had been discovered - her fourteen wives, bold impudence and "Perriwig, Ruffles and Breeches", as portrayed by the *Newgate Calendar* - falls firmly within the definition of parody? Nonetheless, it was precisely

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Gay Drag' in Diana Fuss (ed), *Inside/Out: Lesbian Theories, Gay Theories*, New York: Routledge, 1991, pp 32-70 at p 56.

[111] Butler, *Bodies That Matter*, p 125. For a rather different critique of this film, which highlights in particular the racial issues it raises (the idealisation of white femininity with its implicit evocation of the white male patriarch; the problems posed by the white female gaze of the film), see bell hooks' essay 'is paris burning?' in bell hooks, *reel to real: race, sex and class at the movies*, London: Routledge, 1996, pp 214-226.

[112] Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory*, New York: The Crossing Press, 1983, p 30; note that she does accept the possibility of a drag which challenges rather than reinforces patriarchal norms, but certainly does not suggest that it could or should be a primary locus of political activism.

[113] Sullivan, *Critical Introduction*, p 90.

[114] *Ibid*, p 90, summarising Moya Lloyd 'Performativity, Parody, Politics' (1999) 16(2) *Theory Culture and Society* 195-213.

at this stage that the various print media rushed to produce detailed reports of the case, emphasising the excesses of her pretence against a measure of *natural* masculinity. The distinction between parody and masquerade does not, then, provide a solution.

Another answer, proposed by Lloyd, is to accept that our actions will bring about incalculable effects, but politics is possible because "this does not mean that we need to concede that there are *no* calculable effects";[115] in fact, we can make calculations (albeit necessarily inaccurately) based upon an analysis of their effects in similar past situations. Again, this formulation does little to provide guidance as to what will amount to destabilising parody. Until there has been a similar successful action, there is no guide for predicting any effects of this action. How do we even know that a particular parodic performance has had a destabilising effect? Whose reactions do we measure? Which contextual features of that previous parodic performance were critical, and how do we establish whether they once more exist?

Dhairyam makes the troubling criticism that the answer may be that it "is in the hands of discerning critic-philosophers who may evaluate and analyze performances of identity even as they decide which ones work most subversively."[116] In other words, this form of queer politics places the analysis and safeguarding of the political firmly within the academy. I consider criticisms of the academic nature of queer theory more fully in Chapter 8. For the moment, I would note that this and previous chapters have highlighted the extent to which the burden of legal retaliation falls upon working-class women who share few of the privileges of the critic-philosophers.

More fundamentally, even if an act is clearly read as parody, does that mean that it subverts notions of gender? Sara Salih formulates the issue thus:

> Does [the notion of parodic gender] really reveal the lack of an original that is being imitated, or does it merely draw attention to the factitiousness of the drag artists?[117]

Indeed, the possibility of attempts to subvert gender being read differently (and non-subversively) is inherent in Butler's theories. She argues, following Jacques

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[115] Quoted in Sullivan, *Critical Introduction*, p 92.
[116] Sagri Dhairyam, 'Racing the Lesbian, Dodging White Critics' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 25-46 at p 30.
[117] Salih, *Judith Butler*, p 68.

Derrida,[118] that all linguistic signs can be cited in unexpected ways, which do not conform to the author's original intentions. That this expropriation will happen, including to her own work, is acknowledged explicitly in *Bodies That Matter*:

> It is one of the ambivalent implications of the decentering of the subject to have one's writing be the site of a necessary and inevitable expropriation.[119]

The consequence would appear to be that attempts to undermine the gender system are as vulnerable to re-citations and appropriations as the very gender performances they seek to challenge. Indeed, I would suggest that one can go further and argue that they are considerably more vulnerable. However multiple a performance's meanings may be, the dominant reading will be that preferred (or enforced) by the dominant culture. A reading that is consistent with dominant gender norms will therefore be the one resorted to by most people, whatever the intentions of the author. It is here that "queer" activism is weak: what may to the actors be a challenging performance which highlights the constructed, artificial nature of gender is liable to be appropriated by most (non-queer) viewers as a demonstration of how lesbians are "like men", of how relationships require one person "to be the man" whatever the gender of the participants.[120] Those viewers, should they not reflect further upon the logical fallacies in their reasoning (and most people do not) will have their perceptions of a binary gender system reinforced rather than challenged.

In other words, what is lacking from attempts to perform gender differently as a political method is an awareness of the extent to which viewers who are not already invested in challenging gender structures can interpret such performances according

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[118] 'Signature Event Context', 1972.
[119] Butler, *Bodies That Matter*, p 241.
[120] Similarly, Carl F Stychin argues that gay male pornography offers "repetition and representation of heterosexual male values in an unauthorised cultural setting [which] demonstrates their purely constructed character", and that "the dominance and submission of some gay male pornography, including sadomasochism, may operate to parody the hierarchy of social arrangements and categories of dominant culture" (*Law's Desire: Sexuality and the Limits of Justice*, London: Routledge, 1995, pp 67-68). Again, however, it is susceptible to being read as showing that gay men need to mimic heterosexual models, thereby reinforcing their apparent naturalness; it also continues to eroticise the very relations of dominance and submission which form the basis of patriarchal social structures. Indeed, Stychin himself cites Leo Bersani's version of the former argument. Stychin joins Bersani, however, in rejecting the notion of sex without dominance and submission in favour of valuing "loss of the coherent self in sex", argued to be subversive because it may "undermine existing definitions of maleness" and highlights an "oscillation between dominance and submission" which challenges the valuation of the former alone (Stychin, *Law's Desire*, pp 69-71). For a critique of this notion of gay male pornography as liberatory, see Sheila Jeffreys, *Unpacking Queer Theory*, Chapter 4, as well as my

to dominant gender norms, and thereby confirm their existing views. That appears to be at least part of what happened with the female husband cases I have considered here: the majority of those who saw and reported upon these cases took them as proof that the only meaningful exclusive relationships were those between a man and a woman, and that other such relationships had to reproduce that model slavishly but inadequately.

One may criticise Butler's arguments on performativity as flawed; there is also a question as to whether the consequences of those theories are desirable. They pose particular issues for the disadvantaged women who have been the main targets of prosecutions for their lesbianism. Indeed, the notion of gender as performative and the denial of a pre-existing self may be particularly problematic for women generally. In Seyla Benhabib's words,

> Given how fragile and tenuous women's sense of selfhood is in many cases, how much of a hit and miss affair their struggles for autonomy are, this reduction of female agency to "a doing without the doer" at best appears to me to be making a virtue out of necessity.[121]

For Nancy Hartsock, we must ask the question,

> Why is it that just at the moment when so many of us who have been silenced begin to demand the right to name ourselves, to act as subjects rather than objects of history, that just then the concept of subjecthood becomes problematic?[122]

Butler's response to such criticisms is that "to deconstruct the subject is not to negate or throw away the concept ... it seems as if there is some political necessity to speak as and for *women*, and I would not contest that necessity."[123] However, "any effort to give universal or specific content to the category of women ... will necessarily produce factionalization"; her solution is that "feminism presupposes that 'women' designates an undesignatable field of differences, one that cannot be totalized or summarized by a descriptive identity category".[124] One might question,

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discussion of the dismantling of subjectivity below.

[121] Benhabib, 'Feminism and Postmodernism', p 22.

[122] Hartsock, 'Foucault on Power'.

[123] Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism"', in Seyla Benhabib, Judith Butler, Drucilla Cornell and Nancy Fraser, *Feminist Contentions: a Philosophical Exchange*, London: Routledge, 1995, pp 35-57 at p 49.

[124] *Ibid*, p 50.

then, what feminism comes to mean when its very constituency is so incapable of definition: is using the term "woman" with no idea of or limits to its meaning necessarily more helpful than abandoning the term altogether? While a narrow definition of "woman" is problematic and there must always be some openness to the term, such an emphasis upon differences beyond definition goes to the other extreme and renders feminism effectively meaningless. Nancy Fraser identifies a sort of surrender in the approach, a failure to ask "whether there are real conflicts of interest among women of different classes, ethnicities, nationalities, and sexual orientations, conflicts so intractable as not to be harmonizable, or even finessable, within feminist movements." Conflicts of course exist, but we should consider whether they can be resolved or worked around: "in the face of this sort of conflict, uncritical, celebratory talk about women's 'differences' is a mystification."[125]

This emphasis of queer theory upon "a politics of difference" rather than one of identity has been criticised for particularly disadvantaging already marginalised groups. For Gloria Anzaldùa,

> Queer is used as a false unifying umbrella which all 'queers' of all races, ethnicities and classes are shoved under. At times we need this umbrella to solidify our ranks against outsiders. But even when we seek shelter under it we must not forget that it homogenizes, erases our differences.[126]

Emma Pérez, a Chicana lesbian who identifies herself as a "strategic essentialist", goes further:

> My essentializing positions are often attacked by a sophisticated carload of postmodern, post-Enlightenment, Eurocentric men and women who ride in the back seat, who scream epithets at those of us who have no choice but to essentialize ourselves strategically and politically against dominant ideoloiges that serve only to disempower and depoliticize marginalized minorities.[127] Postmodernists accuse essentialists of being exclusionary and totalizing because

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[125] Nancy Fraser, 'False Antitheses: A Response to Seyla Benhabib and Judith Butler', in 'Contingent Foundations: Feminism and the Question of "Postmodernism", in Seyla Benhabib, Judith Butler, Drucilla Cornell and Nancy Fraser, *Feminist Contentions: a Philosophical Exchange*, London: Routledge, 1995, pp 59-74 at p 70.

[126] Gloria Anzaldua, 'To(o) queer the writer: loca, escrita y chicana' in Warland (ed), *InVersions: Writing by Dykes, Queers and Lesbians*, Vancouver: Press Gang, pp 249-263 at p 250, cited in Sullivan, *Critical Introduction*, p 44.

[127] Her analogy here is to the carloads of men who would shout abuse at her as a Chicana lesbian.

> we claim identities without regard for others. But as "marginalized others," essentializing ourselves within countersites thwarts cultural and political suicide.[128]

Given our long history of being silenced, punctuated by occasional ridicule and prosecution, lesbians should be wary of risking such cultural and political suicide. The treatment of "female husbands" serves as a potent warning of the limits of a politics of parody. As for undertaking our politics under the "queer" umbrella, in Trueman's case and in the following chapters of this thesis, the ways in which such merging of lesbian and gay identities have led to further marginalisation of lesbians become apparent.

Conclusion

In earlier chapters, the prosecution of "female husbands" was examined as the most obvious (or least invisible) form of criminal regulation of lesbian sexuality or relationships. This chapter has brought us to the end of that aspect of lesbian criminal history. In doing so, it has also illustrated how neither that form of relationship nor the criminal justice system's attention to it have disappeared in recent decades. The changes one might have thought betokened by the growing visibility (legal and otherwise) of lesbianism in the 1920s have therefore not come to pass. Instead, the criminal law has been tenacious in its insistence upon the primacy of penile penetration and its devaluation of lesbian sexuality. In particular, approaches to consent operate on the premise that what matters is whether penile penetration was both expected and provided: it is here that Saunders fell foul of the law.

However, the legal treatment of lesbianism has responded in other ways to social change and growing visibility. The need for a new approach both informed and undermined the sentencing remarks which concluded Saunders' trial, while Trueman's case demonstrates the increasing influence of discourses around gay male sexuality upon the legal treatment of lesbians. More concretely, the very offences charged have changed as assumptions of female sexual passivity came under attack from the late nineteenth century onwards, meaning that the contemporary proceedings are focused directly upon sexual offences.

What lessons can be drawn from these continuities and changes? Particularly important is the warning which these prosecutions give in relation to queer politics

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[128] Emma Pérez, 'Irigaray's Female Symbolic in the Making of Chicana Lesbian *Sitios y Lenguas (Sites and Discourses)*' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press,

with their tactics of parody and subversion. The normative interpretations imposed by the courts (and indeed the tabloid media) upon Trueman's and Hamilton's cases suggest that poking fun at patriarchy and heteronormativity may be a rather less effective strategy than engaging in a visionary, transformative politics which dares to consider alternatives rather than simple resistance.

Finally, Trueman's case showed a new paralleling of lesbian and gay male sexuality by the criminal law. In the next chapter, another aspect of that – the growth in the late twentieth century of lesbian age of consent prosecutions – is considered; while the final chapter will look at the recent culmination of such approaches, the Sexual Offences Act 2003.

1994, pp 104-117, at p 105.

Chapter 7

R v Allen: the limitations of formal equality

While *Trueman* and *Saunders* formed part of a continuum of "female husband" prosecutions, we have already seen another significant development. Since 1880, there has been an age of consent for lesbians, created by the legal inability of a girl under a certain age to consent to indecent assault. Although prosecutions of females for indecent assaults upon girls have had a very low profile, both legally and in the wider media, the prosecution of Donna Allen for just such an offence was reported and forms the entry point for this chapter. Through it, we will see the significance of the recent growth in such cases.

Hitherto, this thesis has concentrated upon cases of male impersonation. However, the majority of lesbian sexual activity and relationships are likely to have occurred, and certainly now occur, between women who do not conceal their sex. In the previous chapter, I considered why such women were unlikely to face prosecution in the past; I now examine the development of such prosecutions from the 1990s to the present. Since the age of consent is the same for lesbians as for heterosexual women, this poses the question of whether such formal equality in law is reflected in substantive equality before the courts: a question which I address through analysis of sentencing approaches. Such evaluation of the impact of formal equality is of particular significance given that it is a central feature of the Sexual Offences Act 2003.

Donna Allen

The case of *R –v- Allen*[1] received little media attention, in contrast to *Saunders* and *Trueman* which were both prominently featured in the tabloid press, but was reported briefly in the *Criminal Law Review* and more fully in the *Criminal Appeal Reports*. The defendant, Donna Allen, was a 20-year-old woman of good character who pleaded guilty in May 1995 to one count of indecent assault on a female and one of gross indecency with a child,[2] one of assault occasioning actual bodily harm and two of common assault.

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[1] [1996] Crim LR 208; [1996] 2 Cr App R (S) 36.

[2] Although the *Criminal Appeal Reports* headnote states there were two counts (and the *Criminal Law Review* report repeats this), the judgement specifies one.

The charges of indecent assault and gross indecency related to her sexual relationship, when she was aged 17 and 18, with a girl, Rachel, aged about 13, which lasted for about a year and ended in June 1994. Rachel was described by the Court of Appeal as a willing participant in the relationship and sexual activities. One assault charge related to an occasion upon which the defendant assaulted Rachel, "not very badly".[3] The other related to assaults on police officers when she was arrested.

At Leicester Crown Court, Judge Benson passed a sentence of two years' detention for the indecent assault with one year concurrent for gross indecency and four months concurrent for the assault on the girl, plus a consecutive six months' detention for the two assaults on police officers. Allen's total sentence was therefore two and a half years' detention; the two years' detention for the sexual offences were the main focus of the appeal.[4] The Court of Appeal held that the sentence for the sexual offences was too severe given the appellant's age, her plea of guilty, and the lack of force or coercion to overbear the will of the girl. The sentence for indecent assault was reduced to 15 months' detention and that for gross indecency with a child to eight months. The sentences for the other assaults were unchanged.

Allen's case brings a number of issues into focus. First, how has the age of consent been applied to lesbians under the pre-2003 law? Second, how did Allen's treatment compare to that of others charged with similar offences? Third, what does this tell us about the limits of formal equality for lesbians? Finally, how does the treatment of Allen compare to that of her near-contemporary Jennifer Saunders?

The lesbian age of consent

The development of the offence of indecent assault, under which a lesbian age of consent was created, was discussed fully in the previous chapter. To recap briefly, until the coming into force of the Sexual Offences Act 2003, section 14 of the Sexual Offences Act 1956 defined the offence of indecent assault upon a woman, and established the age of consent as sixteen:

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[3] *R v Allen*, p 37.

[4] Because she was under 21, Allen was sentenced to detention in a young offenders' institution rather than to imprisonment in an adult prison.

> (1) It is an offence ... for a person to make an indecent assault on a woman.
> (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.[5]

Indecent assault was any touching with an "indecent" (usually sexual) purpose to which the complainant did not consent. The perpetrator was referred to as "a person": hence the Act was gender-neutral as to the offender, rather than explicitly including lesbians. It is interesting, given the policy of silencing, that the cases which decided that women as well as men could commit indecent assault concerned, first, an examination by a midwife[6] and second, a woman committing indecent assault upon a boy.[7] The latter decision finally laid to rest the assumption that the gender-neutral language of the offence nonetheless limited it to male perpetrators.[8]

The possibility of prosecution for indecent assault upon a girl was by no means theoretical. Home Office statistics for 1994 show that

> Twelve women - seven aged 10-13 and five aged 14-17 - were cautioned for 'indecent assault on a female' in 1994. An additional 27 women were prosecuted (four aged 14-17), and three ended up in jail.[9]

In 2003, 17 women were convicted of the same offence.[10] The statistics do not indicate whether each indecent assault was coercive or with factual consent.

This can be contrasted with the figure for 1973: Home Office research found that only six women had been convicted of indecent assault on a female.[11] Moving further back to the nineteenth century, Louise A Jackson found that of her sample of 1,590

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[5] A parallel clause, section 15, governed indecent assault upon a male.
[6] The *Armstrong Abduction Case* (see Chapter 5).
[7] *R v Hare* [1934] 1 KB 354, decided upon the Offences Against the Person Act 1861, s 62, which then defined the offence.
[8] The cases were decided upon the definitions in the Offences Against the Person Act 1861, which used similarly gender-neutral language ("whosoever").
[9] Figures cited by Peter Tatchell, 'Consent at sixteen: Protection or persecution?', www.petertatchell.net/age20%of %20consent/consent%20at%2016.htm, accessed 23 September 2004.
[10] Home Office figures cited by Annie Bartlett, *Sex offenders: Madnesss, myth and modern monsters*, lecture, Dana Centre, 29 June 2005.
[11] Roy Walmesley and Karen White, *Sexual Offences, Consent and Sentencing*, Home Office Research Unity Study no. 54, London: HMSO, 1979, p 31. Although this figure is given at the beginning of a discussion of indecent assault, most of the statistics which follow concern male offenders only and none of the discussion refers back to those six women.

people prosecuted for sexual offences in Yorkshire, Middlesex and London between 1830 and 1910, only 14 were woman (an average of one conviction every six years), and of those only one had committed the offence for her own sexual satisfaction rather than in conjunction with a man (she had indecently assaulted a boy).[12]

We cannot tell from the figures how many indecent assaults were prosecuted on the basis that the sexual activity was factually consensual, but it seems reasonable to assume that at least some were (after all, we know from *Allen* that such prosecutions occur). One particularly notable feature of the statistics is the very young age of some of the girls cautioned or prosecuted for committing this offence. Again, without knowing how many of these offences were factually consensual, it is difficult to comment further but if any of the cautions and prosecutions of women under eighteen were for factually consensual sexual activity, then that is a matter of particular concern.

What does emerge clearly is that although the prosecution of women for indecent assault has remained rare, it increased significantly over the last century and a half.[13] The increasing importance of the offence was not confined to the courtroom: Matthew Waites posits that

> The 1990s can ... be described as a period in which the concept of a 'lesbian age of consent' was being 'invented', emerging in popular culture, official political discourse and legal practice as a way in which to describe and conceptualize the law.[14]

In particular, the debates on the age of consent for sexual acts between males brought the existence of a lesbian age of consent to greater attention.[15] Once one establishes that such an age of consent exists and is enforced, though, the next question must be *how* it is enforced.

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[12] Louise A Jackson, *Child Sexual Abuse in Victorian England*, London: Routledge, 2000, pp 108-112.
[13] To provide a little context for these figures, in 1994 the total recorded indecent assaults upon a woman exceeded 17,000 while by 2003, the total recorded exceeded 25,000 (Home Office, "Sexual assault on a female' - Long-term national recorded crime trend' (2006), http://www.crimestatistics.org.uk/output/Page28.asp, accessed 6 December 2006).
[14] Matthew Waites, 'Inventing a Lesbian Age of Consent: The History of the Minimum Age for Sex Between Women in the UK' (2002) 11(3) *Social and Legal Studies* 323-342 at p 337.
[15] Waites refers to Stonewall's materials ('Inventing a Lesbian Age of Consent', pp 336-7). See also Chapter 8.

How does the treatment of lesbians compare with that of other offenders?

To make sense of the sentencing in Allen's case, we must compare it with that of other offenders. One might take, for example, Anthony Keegan who also had a relationship with a thirteen-year-old girl; he was significantly older than Allen at the time (29 years old). That relationship included sexual intercourse, and the couple later agreed to run away together, actually doing so although they were discovered the next morning. The prosecution appealed against a sentence of 100 hours' community service. The Court of Appeal indicated that a sentence of twelve months' imprisonment would have been appropriate.[16] Thus the presence of what might appear to be aggravating factors such as the greater age gap, the attempt to run away with the girl, and the risk of pregnancy nonetheless did not lead to a higher, or even equivalent, sentence to Allen's.

If one feels that a comparison with a woman offender, rather than a woman victim, might be more apt then there is the case of *R v Sant*.[17] The defendant was a woman of 28 who had a sexual relationship, at her instigation, with a boy of ten lasting about three weeks. A sentence of nine months' imprisonment was upheld by the Court of Appeal. Here, the result seems inconsistent with both *Allen* and Keegan's case, since a greater age gap and a very young complainant led to a lower recommended sentence.

At first sight, the outcomes of the cases, differing primarily in the gender of defendant and complainant, appear almost random in their discrepancies. However, closer analysis of both the substantive law and the legal approach to each situation provides a great deal of insight into judicial approaches to sentencing age of consent offences.

- **Heterosexual men**

A sensible starting point for comparison would appear to be the treatment of that much larger group who commit age of consent offences against girls: heterosexual men. First, however, one must note that the legal position of men before the passing of the Sexual Offences Act 2003 was not strictly analogous to that of women. Although any sexual activity with a girl under the age of consent was legally an indecent assault, regardless of

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[16] *Attorney-General's Reference No. 80 of 2000 (Anthony Keegan)* [2001] 2 Cr App R (S) 72.
[17] (1989) 11 Cr.App.R.(S.) 441.

the perpetrator's gender, there was additionally a discrete offence of unlawful sexual intercourse (USI)[18] which applied to men who had sexual intercourse with girls under sixteen years old. USI carried a maximum sentence of two years' imprisonment, drastically lower than the maximum ten years for indecent assault, and also had a twelve-month time limit for the bringing of prosecutions. The limitations of this offence reflected parliamentary indifference or even opposition to the criminalisation of male exploitation of teenage girls:[19] nineteenth-century feminists campaigned for such behaviour to be an offence, but the resulting provision was substantially weakened by its relatively low penalty and the strict time limit for prosecutions (originally three months). It is notable that the time limit persisted until the offence ceased to exist following the Sexual Offences Act 2003, although such limitation periods are very rare in English criminal law and little justification was put forward for its retention.[20]

Lesbian sexual activity has not been treated as equivalent to heterosexual intercourse by the courts, or even as less serious than heterosexual intercourse in the way that assumptions about lesbian impunity might suggest. Rather, sentences for lesbian sexual activity with under-age girls have been noticeably higher than those received by men who were convicted of unlawful sexual intercourse. As a lesbian, Allen was not in a position to be charged with the offence of unlawful sexual intercourse; while cases of sexual assault which could have been charged as USI are sentenced accordingly,[21] no similar approach was taken by the Court of Appeal in her case. Indeed, the point does not seem to have been considered.[22]

Had the comparison with sentencing for USI been made and accepted, Allen's sentence would probably have been very different. The guideline sentencing case for unlawful sexual intercourse between a man and a girl under 16, *Taylor*[23], stated that

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[18] Sexual Offences Act 1956, section 6: "It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl ... under the age of 16". For the history of this offence, which effectively dates back to the middle ages, see the previous chapter.

[19] See Chapter 5.

[20] For example the Criminal Law Revision Committee, *Fifteenth Report* (Cmnd 9213), London: HMSO, 1984, para 5.22, offered only one reason: "In our opinion a period of limitation for this offence – which is only exceptionally found in the case of indictable offences – is of value in that it ensures that a prosecution may not be brought in respect of events that have become stale."

[21] See for example *R v Quayle* (1993) 14 Cr App R (S) 726; *R v Reeves* [2001] Crim LR 584; *R. v. Hinton* (1995) 16 Cr.App.R.(S.) 523; *R. v. Brough* [1997] 2 Cr.App.R.(S.) 202.

[22] See the *Criminal Law Review*'s commentary on the case at [1996] Crim LR 208.

[23] (1977) 64 Cr App R 182.

where a youth aged 16, 17 or 18 had a "virtuous friendship" with a girl under 16 which ended in sexual intercourse, the appropriate response was not "to pass a punitive sentence" but "a warning to the youth to mend his ways" (ie a caution or conditional discharge). Even in cases where "virtuous friendship" was absent, a fine could be appropriate and prison sentences were generally lower. *Taylor* advised a custodial sentence near the two year maximum only for cases where a person in a position of authority deliberately set out to seduce a girl under 16 for his own sexual gratification. There was no suggestion that such aggravating features were present in *Allen*.

Although in *Allen* the court commented that "the serious aspect of this case is how young Rachel was",[24] we have already seen that the older Anthony Keegan was sentenced significantly more leniently for his relationship with a thirteen-year-old girl; this despite *Taylor* identifying a larger age gap as a significant aggravating factor. Similarly, *R v Hancocks*[25] also concerned a 13-year-old girl but took a very different approach. The appellant in that case met the girl, who asked him for some money for a bus fare, on the street. He took her by taxi to his flat, gave her some lager, and then indecently assaulted her, had sexual intercourse with her, and was masturbated by her at his request. Clearly there were few of the mitigating factors identified in *Taylor* and present in *Allen*, yet the Court of Appeal reduced his sentence of 18 month's imprisonment to one of nine months on the basis that the original sentence "in the circumstances of this case, involving one consensual episode not involving a breach of trust, was too long."[26]

The contrast in both these cases to the sentence of fifteen months for the sexual offences in *Allen* is striking. This is all the more so as the facts set out in the *Allen* judgement are those of *Taylor's* virtuous friendship, although the tone used is very different:

> When Rachel was 13 in 1993, or according to this appellant, in interview, at the end of 1992, she formed an association with this appellant. Within months it proceeded to "kissing and cuddling" and then to repeated acts of sexual familiarity. ... It is clear to this Court that Rachel was a willing part of what transpired between her and this appellant, but how much of her attitude and behaviour

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[24] *R v Allen*, p 37.
[25] [2000] 1 Cr App R (S) 82.

was due to the malign influence of this appellant is unclear.[27]

The language of this passage is extremely revealing of the judge's attitude to lesbianism. First, the appellant and complainant did not form a friendship but an "association", although there is nothing in the reported facts to suggest that the word "friendship" would not have been a more appropriate term. Perhaps its avoidance helped the court to shut its mind to any parallels with the scenarios in the *Taylor* guidelines. As described, the friendship contained no sexual element at all for months, a period of time longer than that in many heterosexual "virtuous friendships", but again the emphasis is reversed in this judgement: kissing and cuddling occurred "within months", as if that were unusually precipitate rather than the reverse.

Second, the term "malign influence" is a significant one. It may be tempting to dismiss it as simply reflecting judicial distaste for young girls being encouraged into sexual activity while well below the age of consent. However, this interpretation is entirely unsupported by the caselaw, and in particular by the *Taylor* guidelines. Generally, the introduction of a young girl to sexual activity by a young man is not seen as "malign" but as natural, if not ideal: hence nothing more than a warning is required.[28] The malignity, then, must come not just from the sexuality but from the lack of *hetero*sexuality. In other words, the "malign influence" is specifically that of the lesbian, rather than that of the older, more sexually experienced person *per se*. Heterosexual activity is viewed as a natural development, so that the law is more concerned that a girl is not unduly rushed into it than that she does not do it at all. By contrast, lesbianism is by its nature deemed unnatural and corrupting, something to which a girl of thirteen should not be exposed. This view has obvious implications for a defendant such as Donna Allen: it not only encourages but requires a judge to punish a lesbian defendant more harshly

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[26] pp 84-85.

[27] *Allen*, p 37.

[28] A similar view was expressed by Lord Longford in the House of Lords debate on the Sexual Offences Bill 1999: "If someone seduced my daughter it would be damaging and horrifying, but not fatal. She would recover, marry and have lots of children. If some elderly schoolmaster seduced one of my sons and taught him to be homosexual, he would ruin him for life" (quoted in Stonewall, 'Six Myths About Homosexuality' (1999), http://www.stonewall.org.uk/documents/Scan23a.pdf, accessed 12 December 2006). Lady Young made a virtually identical argument in the same debates, that "if a 16-year-old girl has heterosexual relations the worst that can happen to her is to have a baby. ... What is so tragic for the 16 year old boy is that if he becomes entangled with homosexuality he denies himself the opportunity of marriage, children

than a male defendant charged with the same offence in similar circumstances.

Third, the term "acts of sexual familiarity" is also interesting. First, kissing and cuddling are apparently not included, a conclusion which may seem surprising to many women but is very much consistent with the heteropatriarchal emphasis upon genital contact, and above all upon penile penetration, which informs the legal approach to sexual offences.[29] Second, it is rather ambiguous when taken in the context of the passage as a whole:

> ... [I]t proceeded to "kissing and cuddling" and then to repeated acts of sexual familiarity. The appellant then, on many occasions, indecently assaulted her by digitally penetrating her vagina and also using her tongue in order to do the same. She then proceeded to get the child, digitally, to penetrate herself and fondle her own vagina.[30]

"Sexual familiarity" appears in this context to be used to refer to all non-penetrative sexual activity, although on its face it ought to refer to the penetrative activities as well. There is no attempt to enumerate the acts included, as there is for the penetrative acts. That vagueness is interesting, suggesting as it does the failure of judicial comprehension of or interest in sexual activity which does not include penetration. The word "familiarity" harks back to a kind of cosiness which places such non-penetrative activity in the realm of "kissing and cuddling" as something not really fully sexual. This impression is strengthened by the (legally incorrect) exclusion of "sexual familiarity" from the list of acts by which the complainant was "indecently assaulted".

Also of interest is the very linear process described by the court: the listing of each activity, linked by "then... then", suggests a discrete series of events each happening in turn. The implication is that there was an increasing descent into perversion, rather than an ongoing relationship involving varied sexual activities. Further, the only activities considered significant during this process are the various methods of vaginal penetration. It is almost inconceivable that no other forms of sexual activity took place simultaneously with these, but nothing else is given legal significance even though indecent assault is very much concerned with sexual touching of all types, including the rather maligned

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and a normal life (quoted in Martin Bowley, 'The Worst and the Best' (2000) 150 *New Law Journal* 1882).
[29] See the discussion of sodomy in Chapter 4.

"kissing and cuddling". The emphasis upon penetration is therefore at the court's (and possibly prosecution's) own election, rather than in any way dictated by the legal framework of the offences.

A final remark upon the hierarchy of activity which the court imposes is that the girl's active role in touching and penetrating her own vagina is seen as the ultimate stage. Indeed, this activity may well have formed the basis of the charge of "gross indecency": under the Indecency with Children Act 1960, section 1, an offence was committed when a person "commits an act of gross indecency with a child under 14, or ... incites a child under that age to such an act with him or another". The latter component was the primary rationale of the offence, which aimed to fill the loophole where the child rather than the adult did the touching, so that the adult instigated the behaviour but technically did not commit an assault.

More corrupting, more serious than the passive acceptance of penetration by another woman is the girl's act of taking on the "active", "male" sexual role for herself. Not only is her seducer of the wrong sex, but the girl's own actions are themselves outside the norm of acceptable female sexuality. She has passed from the expected female role of penetrated to the privileged male role of penetrator. Indeed, masturbation and particularly self-penetration are arguably the ultimate autonomous sexual activities within this framework: as both penetrator and penetrated, she makes for herself a self-sufficient form of sexual activity which not only denies female passivity but leaves no space for penile involvement at all.

- **Homosexual men**

If Allen was disadvantaged by comparison to heterosexual men on grounds which amount to a rejection of all but penetrative heterosex as "natural", then on the logic of the court's approach, the appropriate comparator would arguably not be a man committing the same offence against a girl, but rather a man committing the same offence against a boy. However, such a comparison is difficult, not least because of the lack of reported cases with similar facts. For example, those reported in Current Sentencing Practice[31] did

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[30] *Allen*, p 37.
[31] *Current Sentencing Practice*, Sweet and Maxwell, June 2002, Part B4 - Sexual Offences.

not include any where there was a friendship developing into a consensual relationship: even those where the sexual activity occurred over a period of time appeared either to lack consent or to be on a different basis, for example one of financial or other inducements from a much older man. Many of the cases involved breach of trust.[32] In so far as any comparison can be made, it appears that sentencing was generally no less severe than in cases of indecent assault by men upon boys.[33]

Buggery cases again offered little guidance, in particular because the aspect of penile penetration was one to which the courts attached great importance. However, the guideline case of *R. v. Willis*[34] does offer useful insight into the courts' thinking on sexual offences. A number of aggravating factors were listed; in addition to those specific to buggery and inapplicable to sexual activity such as that described in *Allen*, such as risk of injury, there were others which the courts also appear to have had in mind in *Allen*.

In particular, the courts were concerned with the issue of corruption (the "malign influence" alluded to in *Allen*), not only in encouraging the young person to take part in sexual activity but also in thereby risking that they would thereby become homosexual. Thus Lord Lawton listed (amongst others) the following aggravating factors:

> (2) Emotional and psychological damage. Judges should not assume that either of these forms of damage is a probable result for a boy who has been the victim of buggery or that being buggered when young causes homosexuality to develop later in life ... these are possible results depending on the make-up of the boy rather than on the physical act itself. ...
>
> (3) Moral corruption. Although the act of buggery itself probably does not pre-dispose a boy towards homosexuality, that which leads up to the act may do so as, for example, by gifts of money and clothes and the provision of attractive outings and material comforts. In our experience enticements of this kind can be very corrupting indeed when the boys are young adolescents.

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[32] This is not to suggest that all prosecutions of homosexual men for age of consent offences, still less all such offences, involved breach of trust, absence of consent or inducements. Rather, it suggests a particular approach to the selection of "significant" cases which is worthy of further comment, albeit that such comment is outside the scope of this chapter.

[33] See for example *R v Smith* (1987) 9 Cr.App.R.(S.) 228; *R v Roe* (1988) 10 Cr.App.R.(S.) 435; *R v Lee* [1998] 2 Cr.App.R.(S.) 272.

[34] (1974) 60 Cr.App.R. 146. Note that despite its age, this remained the leading guideline case for buggery as late as 2002 (see *Current Sentencing Practice*), but relates to offences under the old statutory regime only.

There was no question in Lord Lawton's mind that to "develop" homosexuality was both "emotional and psychological damage" and "moral corruption". Given the emphasis upon surrounding circumstances rather than the act of buggery itself, and the language of "malign influence" in *Allen*, it appears that similar concerns operated in relation to lesbianism. The comments in *Saunders* about the victims' questioning of their sexual identity[35] would appear to confirm this view. What has changed to some extent is the language: it is difficult to imagine a contemporary judgement referring without irony to a "wicked seducer" (of a mentally competent adult male) in the way that Lord Lawton does in *Willis*.

Willis concludes with guidance on sentencing cases of indecent assault by men upon boys, some of which would presumably apply in cases involving lesbian sexual activity, and thus provides a precedent for the approach taken in *Allen*:

> Much the same approach is appropriate in cases of indecent assault on boys; but it must be remembered that in these cases it is not the label of indecent assault which is important but the nature of the act. ... Sentences should reflect the seriousness of the act constituting the indecent assault

However, it is difficult to interpret the gloss that "the assault may take the form of a revolting act of fellatio, which is as bad as buggery, maybe more so." Is this interpretation equally applicable to cunnilingus, or is it the presence of the penis and of ejaculation which is significant in making this "as bad as buggery"? One suspects that the latter interpretation is the correct one, given the general significance attached by the law to the penis. Reference to *Allen* confirms this: the court did not mention cunnilingus specifically but a good way along the rising scale of sexual activities is mentioned "using her tongue in order to [penetrate the vagina]". It is the penetration (interpreted as pseudo-phallic activity) which is important, rather than the oral nature of the act.

The contemporary courts, particularly since the Sexual Offences Act 2003, would be unlikely to take such an openly hostile approach to homosexuality *per se*. The gender-neutral provisions of that Act, and its underlying rationale of non-discrimination, make such an overt approach untenable. However, I consider below the impact of the Act upon

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[35] See Chapter 6.

sentencing for sexual assaults, and draw some tentative conclusions as to whether the attitudes revealed here are now consigned to history.

- **Heterosexual women**

Our final option for a comparator is that of a woman who engages in sexual activity with a boy of a similar age. It should by now come as no surprise to find that the approach of the court differs yet again, and that any attempt at comparison here shows serious discrepancies. Thus in *R v Sant*[36] (summarised above), the defendant, a woman of 28, instigated a sexual relationship with a boy of ten. Aside from the duration of the relationship, which lasted only about three weeks, the case is no less serious than that of *Allen*, and both the age of the boy and the greater discrepancy in ages suggest that the courts would view it as somewhat more serious. However, a considerably lower sentence of nine months' imprisonment was in fact upheld by the Court of Appeal.

The rather less harsh sentence is again explicable by the particular approach to sexuality taken by the courts. Since it is natural for men to want to take an active sexual role, some persuasion into that by an older woman is perceived as essentially not corrupting. Rather, the boy is simply doing earlier what he would soon do in any event. His active role is preserved, and thus there is no threat to patriarchal power structures.

This complacent attitude towards the sexual abuse of boys by older women is taken to an extreme in the extraordinary case of *R v S*.[37] The defendant sexually abused one of her sons when he was five years old, and the other on repeated occasions when he was between the ages of five and twelve years old. It was accepted that the abuse had had a "deleterious effect" upon the boys. Nonetheless, her sentence was reduced from four to two years' imprisonment. It appears that the courts have struggled to take seriously the idea that a boy can be damaged by childhood sexual abuse in the context of activities where the other person, by virtue of being a woman, was assumed to have had a passive and subordinate role. Even when the activity was the same, its construction by the court was utterly different. Thus although fellatio took place here, the court is not reported to have described it as "revolting", and the sentence demonstrates very forcefully that the

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[36] (1989) 11 Cr.App.R.(S.) 441.
[37] (1993) 14 Cr.App.R.(S.) 788.

court did not consider it "as bad as buggery".

Indeed, the courts seem determined to see heterosexual women accused of these offences through a highly ideological lens. Not only are they thus viewed as sexually passive, but they are also allocated to another role which the lesbian defendant can rarely claim to play: that of the good mother.[38] Thus in *R v Angela C*,[39] the 43-year-old's sentence for sexual intercourse with a 14-year-old boy to whom she was *in loco parentis* on the night in question and to whom she had supplied alcohol was reduced from 26 months' imprisonment to nine months. For the Court of Appeal, "the most important [mitigating factors included] the position of the appellant's own children ... [w]e would particularly emphasise the position of her children for whom she is the sole carer".[40] The court referred in its judgement to *R v Susan S*[41] whose sentence for sexual intercourse with a 13-year-old boy at her school was reduced to five months "on account of her personal mitigation, in particular relating to the position of her children".[42] For the heterosexual woman, then, the role of mother is particularly effective in countering the suggestion she is a corrupter; the result has been significantly lower sentences than those received by childless lesbian defendants.

- **The Sexual Offences Act 2003**

Although finalised sentencing guidelines under the Sexual Offences Act 2003 have not yet been produced, the Sentencing Guidelines Council published draft guidelines for consultation in June 2006.[43] According to these, the primary factor is the "culpability of the offender", with "the nature of the sexual activity" providing a guide to the seriousness of harm to the victim. Also to be taken into account are the age and vulnerability of the

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[38] While many lesbians are of course mothers, they would have difficulty being regarded by the criminal courts as *good* mothers. (For a stark illustration of the way in which the criminal courts divide women into good and bad mothers and punish the latter far more harshly, see the magistrates' and Scottish sheriffs' interviews in Pat Carlen, *Women's Imprisonment: a Study in Social Control*, London: Routledge, 1993. Another example, the conviction of "bad" mothers for murder and "good" mothers for infanticide, is discussed by A Morris and A Wilczynski, 'Rocking the Cradle: Mothers who kill their children' in H Birch (ed), *Moving Targets: Women, Murder and Representation*, London: Virago, 1993, pp 212-214).

[39] [2003] WL 23841623.

[40] Para 25.

[41] [2004] 1 Cr App R (S) 51.

[42] Para 22.

[43] Sentencing Guidelines Council, *Sexual Offences Act 2003: Consultation Guidelines*, London: Sentencing Guidelines Council, 2006.

victim, age gap between victim and offender, youth and immaturity of the offender, and any breach of trust.[44] For offences involving vaginal penetration (with a penis or otherwise), the starting point is four years' imprisonment; if there is contact between the naked genitalia of the offender and a naked part of the victim's body, particularly genitalia, face or mouth then the starting point is two to three years; and for contact with the victim's naked genitalia using a part of the body other than genitalia or an object, 26 weeks to 18 months. Where genital contact is not involved, the starting point is a community order.

We can see that in *Allen*'s case, the starting point would have been four years' imprisonment since she penetrated the victim's vagina with her fingers; had she touched her genitalia but not penetrated her vagina, then the starting point could have been as low as 26 weeks. The enormous significance given here to penetration is striking, making her offence eight times more serious. There is a sense that sexual activity between women was not at the forefront of the Council's mind (see for example the way it lists "additional aggravating factors" as ejaculation, threats to prevent the victim reporting, and the offender being aware they suffer a sexually transmitted infection, in that order).[45] The consequences of the guidelines for female offenders, however, are potentially extremely harsh.

There is no mention in this section of the (lack of) significance of either party's sex. Given the pre-2003 sentencing approach discussed in this chapter, we can see that an unspoken assumption of non-discrimination is risky. It would therefore seem desirable that the finalised guidelines state that the gender of either party, even where the sex of offender and victim is the same, is neither an aggravating nor a mitigating factor. Without such a clear statement, the opportunity for discrimination to make its appearance covertly is very real. The emphasis in the general principles upon "humiliation", "shame" and "embarrassment"[46] are all too reminiscent of the conceptualisation of lesbianism as a source of social humiliation and embarrassment discussed in the previous chapter.

One should also be wary of treating the guidelines as necessarily reflecting actual sentencing practice. To do so is to underestimate the ingenuity of the courts in sentencing

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[44] *Ibid*, p 49.
[45] *Ibid*, p 51.
[46] *Ibid*, p 9.

according to stereotypes even while claiming to apply the principles of gender neutrality and non-discrimination. We have already seen that the courts in *Allen* covertly sentenced on the basis that lesbianism added to the seriousness of the offence, without quite admitting so overtly.

Another illustration of the ways in which the courts can achieve such effects without admitting that they are departing from principle is provided by *R v Caroline Bromiley*.[47] The defendant, a senior care assistant at a residential home for boys with learning difficulties, had had sexual intercourse with five boys aged between 12 and 14. Her sentence of five years' imprisonment was stated by the trial judge to be "nothing like as severe as it would have been had the defendant been a man."[48] She appealed on the basis that that sentence was manifestly excessive, with counsel arguing that "the risk of pregnancy, for a girl victim of male attentions, differentiates the position where there are male victims of female attentions".[49] The Court of Appeal upheld the sentence but appeared to accept that proposition, so that although they commented that "[s]exual abuse of the young, in residential homes, is currently a matter of serious and acute public concern", and a "man of the appellant's age, having sexual intercourse in such circumstances with girls of such an age, would have faced a very long sentence indeed", they found the sentence "appropriate".[50] Such a gendered approach to sentencing does not seem to have been ended by the change to an apparently gender-neutral statutory regime: in a post-2003 Act case on broadly similar facts, *Bromiley* was considered "the decision which offers best help".[51]

The implementation of the Sexual Offences Act 2003 is still in its relatively early days, and there have as yet been no reported cases of sexual assault by a female upon a female. However, sentencing under the new Act was considered and some guidelines offered by the Court of Appeal in *Attorney General's Reference (No 104 of 2004)*,[52] including in relation to assault by penetration where there is no factual consent. This

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[47] [2001] 1 Cr App R (S) 255.
[48] *Bromiley*, p 257.
[49] *Bromiley*, pp 257-258.
[50] *Bromiley*, p 258.
[51] *R v Elvira Catrina Fairhurst*, 2007 WL 2896 (CA). No reference was made to the gender-specific aspects of *Bromiley*, or to the gender-neutral approach of the 2003 Act.
[52] [2005] 1 Cr App R (S) 117.

offence is to be treated as more closely equivalent to rape than to sexual assault.[53] In consequence, the Court of Appeal has ruled that the starting point for sentencing has increased correspondingly, with a starting point of four years' imprisonment: lower than that for rape because there is not the "risk of pregnancy or infection inherent in rape" (the exception being where the object itself creates a "significant risk of physical injury").[54] The sentences for young offenders, should, however, be "significantly shorter".[55] As a result, offences of this type are now attracting higher sentences; in cases such as *Saunders* where there was no factual consent, the sentence might now be closer to that given to her at first instance than the reduced sentence handed down on appeal. The parallel with rape has resurfaced, but on a rather different (and much more appropriate) basis than that put forward by Judge Crabtree.

A truly gender-neutral application of the sentencing guidance under the new Act would have something of a mixed impact upon lesbian defendants. First, it would benefit such women by removing their lesbianism as an (unspoken) aggravating factor. Second, it would to some extent challenge the assumption that penile penetration is enormously more significant than all other forms of sexual conduct (although penetration *simpliciter* remains a crucial factor). However, the principle of gender neutrality is somewhat simplistic and fails to take into account the wider context of such prosecutions, a point I develop further in the following chapter.

One must also bear in mind, however, that there is scope for sentencing which is not gender-neutral. I have highlighted the ways in which both the sentencing guidelines themselves and the approaches taken by the courts allow space for hostility to lesbianism and stereotypes of female sexuality to have an impact upon the sentences actually passed upon women for lesbian sexual activity. Without a fundamental change in judicial attitudes, the equality offered by the Act risks being an empty promise.

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[53] The 2003 Act replaced the offence of indecent assault with two new offences, of assault by penetration (where the vagina or anus is penetrated with an object or body part other than the penis) and sexual assault (essentially covering all other behaviour formerly categorised as indecent assault). For further discussion see Chapter 8.
[54] *A-G's Ref*, p 670.
[55] *A-G's Ref*, p 671.

The limits of formal equality

The dominance of liberal theory in the modern law of sexual offending is discussed in the following chapter. However, the implications of one crucial element of liberalism – formal equality - are clearly highlighted by the sentencing of Donna Allen, and thus deserve some attention here. Liberalism's assumption that we are all equal before the law means that we should all be subject to the same legal rights and responsibilities, and so the law should take the same form for each of us: this is formal equality. Such an approach has significant limitations, particularly for those who are structurally disadvantaged such as women and lesbians, and it is for that reason that many feminists (amongst others) emphasise the need for a substantive equality which looks at the *consequences* of laws rather than their form or wording alone.

The first question which feminists have asked about formal equality is, equality with whom? In other words, since the law takes men as the norm (and existing patriarchal structures as a given), are we to assume that equality means being treated in the same way as a man?[56] There are very obvious examples of the shortcomings of such an approach, such as pregnancy (one could treat a pregnant woman however one wanted and still claim that one was not treating her differently to a pregnant man!). In the specific context of age of consent prosecutions, such a notion of formal equality would raise particular issues. To begin with, which men would provide the norm against which our legal treatment is to be measured: gay men or heterosexual men?[57]

Neither offers a particularly attractive prospect. For lesbians to be treated in the same way as gay men poses three difficulties. First, it would mean a continuation of many of the problems identified above, notably harsh sentences based upon notions of corruption and unnaturalness. Second, it would further the legal erasure of lesbians

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[56] For analysis of the way in which the liberal subject of law remains male, see for example Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford: Oxford University Press, 1995, pp 18-39; Julia Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1 *Feminist Legal Studies* 141. For criticism of the way in which liberalism not only constructs the individual self as male but requires a "selfless" female see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, Princeton: Princeton University Press, 1995, pp 160-162.

[57] One should bear in mind that we are not discussing any heterosexual man, but specifically an affluent, white, middle-class, heterosexual man. This is the man of law who "possesses a set of values and a public role which is remarkably similar to, indeed mirrors and reflects, the moral and social priorities of those most powerful of persons", the judiciary and top echelons of the legal profession (Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Sydney: Allen & Unwin, 1990, p 100).

through their elision with gay men. Third, it is essentially an impossible comparison. Once a commitment to formal equality is made, the homosexual man must himself be compared to the heterosexual man and so the comparison effectively collapses under the logic of formal equality.[58] However, comparison to a heterosexual male norm poses its own, albeit less obvious problem: if the courts were to take such an approach seriously, sentences would be lower for the offender, but this would be achieved on the basis of accepting sexual "initiation" as a normal and positive experience, with issues of exploitation, power differentials, and so forth largely ignored. In other words, the interests of girls would be subordinated to those of older defendants.[59]

Further, we can see from Allen's case that in practice, the courts have baulked at making such a comparison. Notably, in Allen's case it was not only the judges who failed to do so: counsel did not raise the argument before the court.[60] Whether their approach will change under the explicitly gender-neutral regime of the 2003 Sexual Offences Act remains to be seen, but early indications suggest otherwise.[61] Since various sexual acts are of course qualitatively different, formal equality alone provides a weak basis for challenging the value judgements which underlie their different treatment.

Such failures to make the comparison between sexual intercourse and sexual activity between women are explicable on a number of bases. First, judges tend to sentence women more harshly than men if they have behaved in a way perceived as "unwomanly".[62] There is little that the courts view as more unwomanly than taking the initiative sexually (especially, as here, to an extent which could be characterised as predatory). The combination with offences of violence is a particularly potent one.[63]

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[58] In the same way, comparison with a heterosexual woman is not an option: the reference to a male norm means that if the courts are truly dedicated to formal equality they will in turn compare the heterosexual woman`s treatment to that of a heterosexual man.

[59] That they set up this kind of competition between different interests is precisely one of the criticisms of individualistic liberal legal rights.

[60] See the *Criminal Law Review's* commentary upon the case (1996 Crim LR 209).

[61] Early indications (notably the sentencing of women convicted of sexual activity with boys under sixteen: see *Elvira Catrina Fairhurst*) suggest that there will be an unhappy mishmash of proclaimed gender neutrality muddled with far from gender-neutral sex stereotyping.

[62] Reviewing the research on sex and sentencing, Susan Edwards notes that "[o]n this point researchers are unanimous, that differences in treatment arise in relation to the character of the crime, and the degree to which the defendant`s behaviour is at variance with the female role" ('Gender "Justice"? Defending Defendants and Mitigating Sentence' in Susan Edwards (ed), *Gender, Sex and the Law*, London: Croom Helm, 1985, pp 129-158 at p 134) .

[63] See my discussion in Chapter 5 of the long-standing association of lesbianism with violence.

Such a situation also contributes to the second issue: that the courts sentence more harshly those whom they see as deviants from a heterosexual norm. Here, Allen was sexually deviant both in her choice of lesbianism and in her choice of a much younger partner; she was further deviant by virtue being a violent woman. Thus a more fundamental problem with formal equality is highlighted: the equality it seeks is to the most privileged comparator, the white, middle-class, heterosexual male. The disadvantaged person seeks not to overturn heteropatriarchal privilege, but to obtain a share of it. In consequence, patriarchal structures are strengthened rather than threatened, as the lesbian seeking rights within them will achieve those rights only at the price of conformity. To prove that one is deserving of equal treatment, one must show that all the circumstances of the case except the relevant ground (here, lesbianism) are the same. Only then must one be treated in the same way as the similarly situated non-lesbian, failing which there has been discrimination. As Robson formulates this, "but for" her lesbianism, the defendant would have been treated in a certain way; therefore formal equality is achieved when the lesbian too is treated in that way.[64] However, to be that "but for" lesbian one has to reconstruct one's identity to fit heteropatriarchal norms in all but the choice of sexual partner. Otherwise, the denial of equal treatment can be justified upon grounds other than, or in addition to, her lesbianism. Thus the political elements of lesbianism, indeed any hint of challenge to patriarchal norms, have to be eradicated before an effective claim to equal treatment can be made.

However, even if that can be achieved, it will be difficult for our hypothetical lesbian defendant to position herself as a "but for" lesbian. She will still be far from the ideal liberal citizen, since she has just been convicted of a crime, and is therefore undeserving. Here, Allen's case shows the difficulty involved in using the "but for" lesbian as the starting point of our theorising in the area of criminal law. Donna Allen cannot realistically be portrayed as an otherwise ideal woman who but for her lesbianism would not have been prosecuted. Rather, the relationship in which she was involved should be seen as problematic whatever the gender of the parties. In particular, the power imbalance in the relationship between Allen and the complainant seems to have been

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[64] Ruthann Robson, 'Convictions: Theorizing Lesbians and Criminal Justice' in Didi Herman & Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men, and the Politics of Law*, Philadelphia: Temple University Press, 1995, pp 180-194.

pronounced and was even maintained at one point by the use of physical violence. One cannot, then, say that but for her lesbianism she would not have been prosecuted and punished; thus the law appears to have granted equal treatment. Only an analysis extending beyond the requirements of formal equality allows us to fully appreciate that it did not. An important limitation of liberalism, then, is the way in which it encourages us to consider whether a woman represents ideals of lesbianism rather than to critically engage with what her treatment shows about the courts' attitudes to lesbianism.

Liberal theory assumes that everyone is an independent individual in an equal position of strength relative to all other such individuals. This individualistic approach can function to reinforce the very differences which it ignores, entrenching rather than eradicating differences between women and men, heterosexuals, lesbians and gay men. In consequence, formal equality tends to favour the most rather than the least privileged:

> In a world in which white, male and middle-class people both have more effective access to legal forums and meet a more sympathetic response when they get there, the ascription of formally equal rights will in effect entrench the competitively asserted rights of these privileged people.[65]

For disadvantaged groups to seek to

> go beyond this 'equality' in search of 'special rights' or 'privileged treatment' ... would fracture this egalitarianism. Paradoxically, this approach invokes the egalitarian myth as if it remained operational, because the relationship of heterosexuality to homosexuality is taken to have become a neutral relationship, rather than one of domination and subordination.[66]

Thus, in the context of the campaign for an equal age of consent, Matthew Waites points out that appeals to formal equality meant that "[u]nderlying inequalities between

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[65] Nicola Lacey, 'From Individual to Group', in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of the Law*, London: Mansell, 1992, pp 99-124 at pp 106-107. (Of course, in the context of criminal law, such privileged access is to the status of victim; that of defendant is largely reserved for the least privileged). For an example of the way in which formal equality has in practice favoured the more powerful in society, see how the guarantee of equality in the Canadian *Charter of Rights and Freedoms* was initially used successfully by more men than women (Stephanie Palmer, 'Critical Perspectives on Women's Rights: the European Convention on Human Rights and Fundamental Freedoms' in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law*, London: Cavendish, 1996, pp 223-242 at pp 227-228, 237).

[66] Chris Brickell, 'Whose "special treatment"? Heterosexism and the Problems with Liberalism' (2001)

homosexuality and heterosexuality, and particularly the way these inequalities function in the lives of under-16s, remained concealed by political rhetoric"; "liberal and progressive heterosexuals [could] denounce overt discrimination while harbouring unspoken assumptions that theirs may nonetheless be a normatively superior way of life".[67]

A comparison of *Trueman, Saunders* and *Allen*

Having considered the difficulties inherent in comparisons between lesbians and others, I will end by contrasting the treatment of three lesbian defendants, Trueman, Saunders and Allen. This discussion reiterates some of the themes highlighted above, shedding further light upon the impact of discourses of corruption and upon how the treatment of lesbian defendants cannot be understood through appeals to principles of legal equal treatment alone.

The first instance decision in *Trueman* and Court of Appeal judgements in both *Saunders* and *Allen* have many common features. The latter two cases involve a focus upon acts of penetration to the exclusion of any other sexual activity; like *Trueman*, they are particularly concerned about the introduction of young women to lesbian activity, and rather more blasé about abuse within the relationships; and all resulted in sentences which appear to have been significantly higher than the general approach to such offences would warrant, effectively upon the basis of lesbianism as an aggravating factor.

However, *Saunders* and *Allen* had very different outcomes upon appeal. While Allen's sentence remained at fifteen months' imprisonment, Jennifer Saunders (originally sentenced to six years' imprisonment, more severe than many rape sentences) was released and her sentence reduced to one of two years' probation. Why was her sentence ultimately so much lower?

There are many possible reasons, including Saunders' personal mitigation (an "exceptional background and disturbed childhood, including sexual abuse");[68] we do not know Allen's background but no similar mitigation was referred to in the Court of Appeal judgement. Indeed, the *Saunders* judgement was not referred to at all in *Allen*.

4(2) *Sexualities* 211-235 at p 213.

[67] Matthew Waites, 'Equality at Last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom' (2003) 37(4) *Sociology* 637-655 at pp 644 and 651.

[68] Defence counsel Adrian Fulford, quoted in 'Judge Frees Jailed Lesbian', *Capital Gay*, 19 June 1992, p 1.

While this may reflect the dissimilarities in the cases, it is also reminiscent of the ignorance of precedent and sense of each case as virtually unique already noted in my discussion of historic prosecutions.[69] There were also significant differences between the complainants: in *Allen*, she was thirteen but gave factual consent while in *Saunders* the complainants were both seventeen years old but their apparent consent was vitiated by fraud. Finally, the Court of Appeal is not immune to political considerations, and there was considerable campaigning around Jennifer Saunders' sentence while Donna Allen's case seems to have attracted little if any public attention.

However, other factors make the difference more surprising. Allen was of good character; by contrast, Saunders was of bad character (and she pleaded guilty to a number and range of non-sexual offences at the time of her trial for indecent assault). There was also a level of abusive behaviour apparently present in her relationships, including at least one incident which would have been rape had she been male, which seems generally not to have existed in the Allen case (there was one assault; but although that is serious in itself, there was no suggestion that this was other than a unique incident). Finally, the *Allen* judgement was four years later than that in *Saunders*; during this period of the 1990s, lesbians were making significant advances in other areas of law, notably lesbian custody cases.[70] However, no such advance in judicial attitudes was apparent here.

Ultimately, the best explanation for the disparity in the two sentences appears to be the courts' fear of corruption, expressed more or less overtly in both cases. Donna Allen's sexually activity was with a young girl who consented knowingly to a lesbian relationship, and therefore raised very vividly the spectre of the corruption of a young person. By contrast, the complainants in the Saunders case were both somewhat older. Even more importantly, they publicly and vigorously rejected lesbianism in favour of heterosexuality. They presented themselves as sexually naïve but heterosexual, thus allaying any fears that they had been "corrupted" into a lesbian lifestyle and offering the certainty of their return to heterosexuality.

These two cases, then, provide a salutary reminder that we must not be complacent about the progress we have made. Even after significant advances had been

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[69] See Chapter 4.
[70] See Chapter 6, footnote 17.

achieved in the substantive law and in certain areas such as family law, the judiciary continued to discriminate against lesbian criminal defendants. In particular, the suggestion of corruption of youth has resulted in harsh sentences far in excess of those given to heterosexual offenders committing similar offences.

Conclusion

Despite its long legal history, the "lesbian age of consent" has only become of practical importance in prosecutions relatively recently. Although prosecutions remain relatively unusual – they are a tiny proportion of total prosecutions for these offences – their increasing use is nonetheless significant. First, it highlights how the formal legal equality which lesbians appear to enjoy (in the criminal law at least) has failed to ensure corresponding substantive equality. Second, it represents another part of the progression identified in the previous chapter, from the complete silencing of lesbianism to its limited exposure as a lesser form of male homosexuality. As lesbianism has become increasingly associated legally with male homosexuality, so the possibility of prosecution has been more apparent. A discourse of corruption has also been imported from the sentencing of male homosexual offences.

The new sentencing guidelines for the Sexual Offences Act 2003 suggest that the Act has advanced that association. Its benefits for gay men in reducing their potential criminalisation and in implicitly requiring a non-discriminatory approach to sentencing are manifest, but the gains for lesbians are to say the least more ambiguous. In particular, the covert discrimination which has been a defining feature of cases such as *Allen* is not explicitly challenged under the new regime. Thus, quietly and almost unnoticed, lesbians may continue to be sentenced more harshly as the courts take into account factors such as the "embarrassment" caused.

In the following chapter, the substantive content of the Sexual Offences Act 2003 and the consequences of its explicitly liberal and gender-neutral approach will be considered in depth. However, for the moment it should be noted that one price of lesbianism's slightly increased visibility within the criminal justice system is a concomitant growth in its criminalisation. This change is a double-edged one: girls are given greater protection as the age of consent now has some practical legal meaning for

them, but at the same time young women defendants are treated more harshly than their counterparts. They may not be ideal lesbians, but it is unacceptable for them to be punished twice: both for their actual offence and for their lesbianism.

Chapter 8

The Sexual Offences Act 2003: where are we now?

This chapter brings us to the most recent major legal development in this area, the Sexual Offences Act 2003. The Act aims to respond to a number of criticisms of sexual offences law and to create a coherent and consistent approach to such offences. It therefore goes beyond earlier legislation in both scope and ambition, and its changes have a direct effect upon the criminal law's regulation of sexual activity between women.

I will argue that there are two themes running through the Act which are of particular relevance here. First, in so far as it deals with conduct between adults of full capacity, the aims of the Act are explicitly liberal. This is partly expressed through the concept of gender-neutrality, whose consequences include the further silencing of lesbians under the "lesbian-and-gay" umbrella (although remnants of the older policy of silencing lesbians altogether are still traceable), and an indifference to many of the power differentials fundamental to a patriarchal society. The consequence for lesbians is that there is no recognition of the dangers to them of gender-neutrality, notably in the discriminatory ways in which apparently undifferentiating offences have been enforced in practice. I shall also argue that the policy of gender-neutrality has been only partially achieved, and has sometimes resulted in real confusion.

Implicitly however, and for all its apparent liberalism, a second effect of the Act is the conservative one of creating a hierarchy of sexual activity, with penile penetration placed at the top and non-penetrative acts at the bottom. Patriarchal ideologies of penile penetration as "real sex" are thus reaffirmed. As well as reflecting a wider ignorance of the gendered nature of cultural attitudes to sex and sexual offending, such a hierarchy also furthers lesbian invisibility and silencing by effectively placing lesbianism on the lower tiers of sexual expression while not only heterosexuality but also male homosexuality achieve higher ranking through their cultural association with penile penetration.

In criticising the approach of the current law, one inevitably raises the question of how such issues ought to be approached. Would a more consistent liberalism better serve the interests of lesbian women? If not, what alternatives are preferable: queer activism or radical feminism? I will conclude therefore by considering future directions, contrasting the approaches offered by queer and radical-feminist theories.

Sexual Offences Act 2003

The government published its consultation paper on sexual offences, *Setting the Boundaries*, in July 2000. This was followed by the command paper *Protecting the Public*, published on 19 November 2002. The following year, on 20 November, the Sexual Offences Act 2003 passed into law. It aimed to be a comprehensive reform and consolidation of sexual offences law.

There was little obvious change in the legal position of sexual activity between women under the new law. Most significant was the division of indecent assault into two new offences, assault by penetration and sexual assault. Both of these apply only to factually non-consensual assaults, while separate offences deal with sexual activity with a minor.

Assault by penetration is defined in section 2 of the Act as where a person (A)

> (a) … intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
> (b) the penetration is sexual,
> (c) B does not consent to the penetration, and
> (d) A does not reasonably believe that B consents.

The maximum sentence is life imprisonment.

Where the sexual penetration may be factually consensual but is of a child aged between thirteen and sixteen, then the separate offence of sexual activity with a child applies.[1] Sexual activity involving penetration of the child's anus or vagina with an object is indictable-only and has a maximum sentence of fourteen years' imprisonment.[2] If the child is under thirteen, the offence is assault of a child under 13 by penetration, an indictable-only offence carrying a maximum life sentence.

Other forms of sexual activity between women fall under the offence of sexual assault, defined in section 3 as where a person (A)

> (a) … intentionally touches another person (B),
> (b) the touching is sexual,
> (c) B does not consent to the touching, and

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[1] Section 9.
[2] Section 9(2). If the defendant is aged under 18 then the maximum sentence is 5 years' imprisonment

(d) A does not reasonably believe that B consents.

The offence is triable either-way with a maximum sentence of ten years' imprisonment. Again, section 9 applies where there is factual consent but the touching is of a person aged between thirteen and sixteen; the offence is then triable either way with a maximum sentence of 14 years' imprisonment. For children under thirteen, section 7 creates the offence of sexual assault of a child under 13, triable either-way and with a maximum sentence of 14 years' imprisonment.

There are also separate offences of causing or inciting a child to engage in sexual activity.[3] These are aimed at the situation where an adult induces a child to engage in sexual activity without herself committing sexual acts upon the child, but could also cover the situation where both parties engage in sexual acts with each other. While there would generally be little reason to bring separate charges under these sections in the latter situation, it would be an option where for example the child has penetrated the defendant (an indictable-only offence) but the defendant has not penetrated the child (the assault thus constituting only an either-way offence which might be tried and punished summarily).

Finally, there is a new offence of sexual activity between minors. Section 13 provides that

> (1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18.
> (2) A person guilty of an offence under this section is liable-
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
> (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.

Thus sexual activity between a person under 18 and a person under 16 is effectively a discrete offence with its own penalties. These are lower than those for sexual activity between adults and minors. However, as I discuss later, there are concerns at the

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(section 13).

[3] Section 8, causing or inciting a child under 13 to engage in sexual activity (maximum sentence: imprisonment for life if there is anal or vaginal penetration of or by the child; otherwise 14 years' imprisonment); section 10, causing or inciting a child to engage in sexual activity (indictable-only if there is anal or vaginal penetration of or by the child; otherwise either-way, but in either case with a maximum sentence of 14 years' imprisonment for an adult, 5 years' imprisonment if the accused is under 18).

extent to which consensual conduct between peers will be caught within this offence and the consequent wide discretion given to police and prosecutors in deciding whether to caution or charge.

The Act has therefore done away with the separate offences of indecent assault upon males and females, and recognised the seriousness of penetration with an object (including a body part) other than the penis. Indeed, its overall approach is gender-neutral and has made some effort to incorporate feminist perspectives. However, as I shall discuss below, problems remain with the approach taken when the particular position of sexual activity between females is considered. I will first address the liberal theoretical basis of the Act, before focusing more closely upon two particular aspects of it: the principle of gender neutrality and the emphasis upon penile penetration. I will then consider the implications of the Act's approach for the way in which the policy of silencing is now pursued. Having considered where lesbians are now, the next issue for discussion is of course the way forward, and in particular whether queer activism and theory or radical feminism offers the best future direction.

Liberal arguments

I will not deal with liberal theory and its criticisms at great length here, but will concentrate upon their implications in terms of the Sexual Offences Act 2003 and its impact upon lesbians. However, a brief outline is first given to locate the arguments in their wider theoretical context. In particular, the Act is based upon a strand of liberalism which was formulated by John Stuart Mill and has had some appeal for twentieth-century reformers of sexual offences law, notably in the Wolfenden Report.[4]

The liberal approach to criminal regulation of morality has largely developed from John Stuart Mill's *On Liberty*.[5] In this work, he argued against "moral police" and claimed that the purpose of the law is to protect the individual against tyranny, be it tyranny of government or of the majority. The limit on the individual's freedom should be governed by the harm principle: that the "sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any

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[4] It should be noted that the dominance of this form of liberalism is largely confined to sexual offences: for a discussion of the ways in which New Labour is otherwise characterised by a discourse of family and community, see Carl F Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform*, Oxford: Hart Publishing, 2003, pp 28-30.

[5] John Stuart Mill, *On Liberty*, London: Parker, 1859.

of their number, is self-protection" or "to prevent harm to others". Where no harm is caused, "over his own body and mind, the individual is sovereign."[6] Mill explicitly excluded "the sight or knowledge" of "vice or folly" from the definition of harm.[7]

Classic liberalism's emphasis upon the liberty of the individual where others are unharmed means that the division between public and private spheres proves crucial. While conduct in public will inevitably affect others, the private is conceptualised as a safe space where the state should not interfere. Sexual activity is generally regarded as private, and therefore when restricted to the private sphere should not be punished by the state: such a liberal approach was most clearly stated by the Wolfenden Report, which asserted that "it is not the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour".[8] This approach led (albeit with a decade's delay) to the Sexual Offences Act 1967, which decriminalised adult male homosexual activity provided that it took place in a narrowly-defined private place.[9]

The Wolfenden principle has continued to be an accepted basis for the law on sexual offences.[10] However, while at the time of the Wolfenden Report male homosexual activity was illegal *per se* and assumed by many to be harmful, contemporary attitudes have changed so that many people (and significantly, many politicians) would not argue that its mere visible presence causes harm. In that situation, is a liberal approach to sexuality necessarily liberating?[11] The proponents of the Sexual Offences Act 2003 seem to have largely assumed so. Discussing *Setting the Boundaries*, Nicola Lacey remarks that "a certain liberal feminist and gay rights discourse has, almost overnight, been converted into the official language of law

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[6] *Ibid*, p 9.
[7] *Ibid*, p 13.
[8] Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, London: Her Majesty's Stationery Office, 1957.
[9] Section 1(2) defined private as *not* being
(a) when more than two persons take part or are present; or
(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.
R v Reakes [1974] Crim LR 615 effectively extended this to include not only the presence of a third person but also their possible presence: "you consider ... the likelihood of a third person coming upon the scene" (at p 615).
[10] See for example Professor J C Smith (with comments by Antony Grey), *The Reform of the Law of Sexual Offences*, Leeds: University of Leeds, 1981, p 2, where Professor Smith identifies the Wolfenden principle as having been approved by the Criminal Law Revision Committee and the Policy Advisory Committee in their reviews of the law on sexual offences.
[11] The answer is of course yes to the extent that it has led to the abolition of discriminatory homosexual offences. However, the scope and ambitions of the Act extend much further than this.

reform"; "the shade of John Stuart Mill stands behind".[12] I would suggest that it is no accident that liberal strands of both feminism and gay rights have informed the government's approach, and that such a background is highly significant for the Act's impact upon lesbians.

The historical background alone does not explain the dominance of liberalism in the realm of sexual law reform. As Davina Cooper has pointed out,

> Lesbian and gay rights groups, utilising the discourses of formal equality and citizenship, are more congruent with the explicit ideologies expressed by the British (or Western) state than are campaigns based on radical or revolutionary feminism. Similarly, groups who operate within hierarchical organisational frameworks and whose politics consists of motions, letters and meetings are more compatible with state practices than ad hoc, direct action projects.[13]

It is therefore unsurprising that Stonewall was the lesbian and gay rights group with most influence upon the shaping of the Act. They are the most prominent lesbian and gay rights group campaigning from a liberal perspective, and their influence is apparent in both the consultation documents and the Sexual Offences Act itself. It should be pointed out at this stage that Stonewall's main concern with the new legislation was the legal position of gay men; relatively little attention was paid by them to lesbians.[14] From their perspective, liberal formal equality brought real gains in removing overtly discriminatory laws governing sexual activity between men. However, although the position of gay men is not the focus of this chapter, some of the disadvantages which they will continue to face are addressed.

In his foreword to the White Paper *Protecting the Public*, Home Secretary David Blunkett stated "[n]or must we intervene in the personal, private relationships of consenting adults."[15] This avowedly liberal aim is what the government claims to be pursuing in those parts of the Act dealing with adults of full capacity. Thus ideas of harm to society and the divide between public and private are central to the treatment, for example, of male homosexuality (gross indecency is no longer criminal, but

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[12] Nicola Lacey, 'Beset by Boundaries' [2000] *Crim LR* 3-11 at pp 4 and 5.

[13] Davina Cooper, 'An Engaged State: Sexuality, Governance and the Potential for Change' in Joseph Bristow and Angelia R Wilson (eds), *Activating Theory: Lesbian, gay, bisexual politics*, London: Lawrence & Wishart, 1993, pp 190-218 at p 196.

[14] See for example the group's summary of the 2003 Act which makes no references to lesbians, in 'Sexual Offences', http://www.stonewall.org.uk/information_bank/criminal_law/69.asp#Sexual_Offences_Act_2003, accessed 13 December 2006.

"cottaging" – sex in public toilets, which are considered to be in the public domain - remains so albeit under a gender-neutral offence).

Child protection in particular is very much (and rightly) an overt exception to this liberal policy, but this distinction is apparently based not upon any understanding of the limits of liberalism but rather upon an analysis of sexual abuse as harmful to society at large and thus within the realm of legitimate state interference, which implicitly characterises it as something done by strangers outside the home (ie within the public sphere).[16] David Blunkett uses terms more reminiscent of the media coverage of stranger attacks by paedophiles than of a considered analysis of sexual abuse of children in all its (predominantly intra-familial) forms:

> Public protection, particularly of children and the most vulnerable, is this Government's priority. Crime and the fear of crime has a damaging and debilitating effect on all who experience it. But sexual crime, particularly against children, can tear apart the very fabric of our society. It destroys lives and communities and challenges our most basic values.[17]

More fundamentally, there is no "development of a fully articulated concept of sexual abuse or exploitation" in *Setting the Boundaries*;[18] nor indeed in subsequent publications including the Act itself. This is one aspect of the dangers of liberalism apparent in the Act; others include the emphasis upon formal equality and the failure to recognise structural differences and inequalities between individuals and groups, the limitations of the harm principle, and the dependence upon the public/private divide, each of which I will now address.

- **Formal equality**

Liberalism's emphasis upon formal equality has already been the focus of discussion in the previous chapter, which considered criticisms of this principle as they related to sentencing issues. It is worth developing a little further here in relation to issues of consent.

The liberal assumption that all rational adults should be treated by the law in the same way credits everyone with the same autonomy and ability to withhold consent.

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[15] HMSO, 2003, p 5.
[16] For a fuller discussion of the paternalist aspects of the Act, see Lacey, 'Beset by Boundaries'.
[17] David Blunkett, 'Foreword', *Protecting the Public*, HMSO, 2003, p 5.
[18] Lacey, 'Beset by Boundaries', p 9.

The Act makes several specific exceptions, notably adults without the mental capacity to consent and children, but there is little acknowledgement of the power differences which may exist between adults of full mental capacity. There was some awareness in the development of the Act that consent is itself a problematic concept with a varied legal history, but no deep analysis was developed. *Setting the Boundaries* concluded that consent could be equated with "free agreement", and section 74 now defines consent as where a person "agrees by choice, and has the freedom and capacity to make that choice". This approach has met with a rather mixed reception, generally recognised as a step forward but perhaps not a very large one.[19]

One of the most controversial parts of the Act was the list of situations in which there is a rebuttable presumption of absence of consent;[20] those adopted are generally so obvious and extreme (eg unconsciousness, consent supposedly given via a third party) that either they will make little practical difference since juries would almost always have been highly sceptical, or else social attitudes towards consent are even worse than most feminists fear and the concept itself is utterly useless without further clear exposition which the Act does not provide.[21] Further, the situations are all individualistic: there is no discussion of the wider pressures – economic, cultural, and

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[19] See for example Lacey, 'Beset by Boundaries', p 12 where she praises it moving "in the direction which cogent feminist analyses have argued to be desirable"; contrast Philip N S Rumney, 'The review of sexual offences and rape law reform: another false dawn?' (2001) 64(6) *Modern Law Review* 890, in which he argues at pp 900-904 that while the definition seeks to further a communicative model of sexuality which would focus more attention upon what the defendant had done to obtain consent, this is unlikely to happen in reality. It is the complainant and her freedom and capacity which will continue to be the focus of judicial attention. Such reservations about judicial interpretation of the definition appear to be justified: see Sharon Cowan's discussion of the 2005 case of *R v Gardner* where a very drunk, vomiting 14-year-old girl was found to have the capacity to consent ('"Freedom and capacity to make a choice": A feminist analysis of consent in the criminal law of rape' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements*, Abingdon: Routledge-Cavendish, 2007, pp 51-71 at pp 56-58).

[20] Sexual Offences Act 2003, section 76.

[21] For criticism of the way in which these provisions also seem to establish a hierarchy of rape, with the irrebuttable presumptions in section 76 (relating to fraud) at the top, the section 75 situations in the second tier, and other situations at the bottom, see Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: intoxicated consent and drug-assisted rape revisited' [2004] *Criminal Law Review* 789 (I suspect that the appearance of a hierarchy was rather more inadvertent here than for penile penetration, but it is problematic nonetheless). There are further and fundamental criticisms of the practical working of the presumptions. The section requires that the relevant circumstance be proved beyond reasonable doubt; the presumption then comes into play unless the defendant puts forward evidence in rebuttal; if they do so then the presumption does not operate and the absence of consent and belief in consent must be proved in the usual way. Given that the jury cannot be asked whether they accept the circumstances have been proved, or whether they consider the defendant to have rebutted the presumption, the only safe way for the prosecution to proceed would presumably be to assume that the jury might not apply the presumption and thus to adduce evidence to prove lack of consent and lack of belief in consent in any event. This is particularly true as the presumption may be easily rebutted: "in many cases the burden will be discharged so that s 75 will not apply" (Judicial Studies Board, *Crown Court Bench Book*, London: Judicial Studies Board, 2004)

so on - which may prevail. While there are many difficulties for the law in fully taking on board feminist critiques of consent,[22] their near-absence from the discussion is of concern. Once again, structural discrimination and oppression has been ignored in favour of liberal individualism, with little examination of the alternatives.

Largely outside the scope of this chapter, but also significant for campaigns around lesbian rights more generally, is the terms upon which liberal formal equality is offered. As was largely implicit in much of the discussion around this Act, and explicit in earlier debates on issues such as the gay age of consent and section 28, liberal rights depend upon defining lesbianism and male homosexuality as a discrete and fixed identity, innate or acquired in early childhood.[23] It is only by thus establishing ourselves as a stable and permanent "true minority" in liberal terms that we will be entitled to claim societal tolerance and legal protection. The adoption of such an identity is, however, antithetical to radical lesbian politics whether queer or radical feminist.[24]

- **The public/private divide**

A central tenet of classic liberalism is the division between the public and private domains, and this has been incorporated into the Act. In this formulation, the state should not interfere with private activities but does have a right to do so when they intrude into the public domain.[25] Hence the Act decriminalises much behaviour which

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[22] Some feminist critiques, such as that of Catharine MacKinnon that consent and coercion are indistinguishable in a male-dominated society which eroticises dominance and submission, offer relatively little scope for incorporation into existing legal approaches (see Catharine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) *Signs* 515; 'Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence' (1983) 8(4) *Signs* 635). However, others such as Susan Brownmiller's argument for a standard of explicit consent are considerably more compatible with liberal legal theory yet were equally ignored (see the discussion of her approach to consent and its relation to liberal contract theory in Judith Vega, 'Coercion and Consent: Classic Liberal Concepts in Texts on Sexual Violence' in Ngaire Naffine (ed), *Gender, Crime and Feminism*, Aldershot: Dartmouth, 1995, pp 247-261 at pp 251-259).

[23] See for example Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality*, Toronto: University of Toronto Press, 1994, especially at pp 37-53; Matthew Waites, 'Equality at Last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom' (2003) 37(4) *Sociology* 637-655.

[24] Herman, *Rights of Passage*, offers an account of how such radical perspectives were sidelined by a liberal rights paradigm in the context of Canadian lesbian and gay rights law reform, which provides an illuminating analysis of the consequences of such an approach.

[25] Note that the terms 'public' and 'private' and their particular meanings in different spheres such as the economic are by no means straightforward: economic liberalism, for example, draws the dividing line between the (public) state and (private) free market; the public sphere can also include public discourse (for definitions of the public sphere, see Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition*, London: Routledge, 1997, pp 69-70). However, liberal theory in the field of sexual offences essentially formulates the public/private division as the distinction

is allocated to the private realm (notably discriminatory homosexual offences, since they are not now seen as *per se* threatening to public order and morality), but continues to include offences which are conceived of as essentially violating public order. Thus there is a specific offence of sex in a public toilet and, somewhat problematically, the Act has failed to abolish the common law offence of outraging public decency, which is vague and wide-ranging yet carries a maximum sentence of life imprisonment.[26] The right to private and family life under Article 8 of the European Convention on Human Rights is a further factor in perpetuating this division within the Act, and indeed the influence of the Convention upon the Act has been less than positive in some circumstances,[27] although its support for abolishing certain discriminatory offences in relation to male homosexuality is welcome.[28]

What was not articulated during the legislative process leading to the Act, however, is that liberalism's reliance upon the public/private divide is by no means unproblematic.[29] On the contrary, it poses problems both legally, in terms of defining 'private',[30] and politically. Feminist critiques have highlighted the ways in which liberal notions of the private operate ideologically. First, the idea of a private sphere

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between space to which the public have access and that to which they do not (paradigmatically, a private home, although it should be noted that even the home was not necessarily sufficiently 'private' under the pre-2003 law on sexual activity between men).

[26] See Lacey's criticism of 'Setting the Boundaries' for its relatively uncritical approach to public order offences ('Beset by Boundaries', p 9).

[27] For example, its privileging of marriage which helps to undermine protection for girls under 16 (see discussion below).

[28] See *ADT v United Kingdom* [2000] 35765/97, www.echr.coe.int. Note that in this case Article 8 was engaged because the activities (between four men) were to remain unpublicised; they were thus "genuinely 'private'", leaving only a very narrow margin of appreciation and no justification in terms of public health or morals (paras 37 and 38). In consequence, the ruling did not suggest that discriminatory laws relating to public sexual activity would necessarily breach defendants' rights. In *Sutherland v UK* [2001] 25186/94, www.echr.coe.int, the British government conceded that a discriminatory age of consent breached Article 8 read in conjunction with Article 14 (which prohibits discrimination), following an opinion to that effect from the Commission (*Sutherland v UK*, Report of the Commission, [1997], www.echr.coe.int)

[29] This is not to say that feminism would necessarily reject the notion of the private altogether (for a discussion of this point see Ruth Lister, *Citizenship: Feminist Perspectives* (2nd edition), Basingstoke: Palgrave Macmillan, 2003, pp 120-122), but that the way in which it is defined and operates in classic liberal theory furthers male dominance and women's oppression.

[30] This point has been contentious in relation to the extraordinarily narrow definition of "private" in section 1 of the Sexual Offences Act 1967 (see footnote 7 above), and during the passage of the 2003 Act posed particular difficulty in relation to the issue of sex in public toilets: the offence now includes an unwieldy definition of a public lavatory as "a lavatory to which the public or a section of the public has or is permitted to have access, whether on payment or otherwise" (section 71; who or what might constitute a section of the public is not defined). For a discussion of the shifting legal boundaries of public and private, see Katherine O'Donovan, *Sexual Divisions in Law*, London: Weidenfeld and Nicolson, 1985, pp 2-20 and Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Oxford: Hart Publishing, 1998, 72-78; for the law's nonetheless consistent "assignment of public space to men and private space to women", see Z R Eisenstein, *The Radical Future of Liberal*

which should be immune from state interference both hides the law's considerable impact upon the "private" realm of the personal or the family[31] and contributes to the legal and social failure to protect women from domestic and sexual violence perpetrated by acquaintances and intimates.[32] Second, it describes something which is not an observable phenomenon but is rather legally constructed in fundamentally hierarchical ways, valorising the public while devaluing the (traditionally female) private.[33]

For lesbians, the combination of (private) sexuality and (private) femaleness has meant that liberalism has itself played a crucial role in enforcing invisibility. From this perspective, the private sphere can function as a crucial site of lesbian oppression rather than as classic liberal theory's space for (male) self-actualisation.[34] "The silencing surrounding the lesbian subject means that her desire, her sexuality, her lifestyle, and her knowledge are deeply privatised":[35] the private is coterminous with the closet and the denial of lesbian existence. Reliance upon privacy rights therefore poses very specific problems for lesbians.

Dividing public from private can also impact disproportionately upon those lesbians who fall furthest outside mainstream expectations of women's behaviour. Anna Marie Smith argues that the effect of the liberal approach in this area of English law has been to differentiate between "good" and "bad" lesbians and gay men. She points to the Wolfenden Report and to section 28 as serving "a dual purpose: to decriminalize private activities which do not harm other people and to intensify the

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Feminism, London: Longman, 1981, p 22.

[31] Note that the personal and the domestic are not identical, so that classical liberal theorising of the personal in fact pays surprisingly little attention to the family (see Judith Squires' discussion of this point in *Gender in Political Theory*, Cambridge: Polity Press,1999, pp 26-27).

[32] See for example O'Donovan, *Sexual Divisions in Law*, especially Chapter 5; Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*, Sydney: Allen & Unwin, 1990, pp 69-71; Lister, *Citizenship*, pp 122-128; Fraser, *Justice Interruptus*, pp 88-89. Such feminist critiques also inform the slogan "the personal is political".

[33] See for example Lacey, *Unspeakable Subjects*, pp 82-85. For a discussion of the origins of the public/private divide in ancient Greek thought, and its gendered and hierarchical nature, see Margaret Thornton, 'The Cartography of Public and Private, in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates*, Oxford: Oxford University Press, 1995, pp 2-16 at pp 2-4. For an interesting analysis of who does and does not have the power to define what is "private", see Nancy Fraser's account of the Clarence Thomas confirmation hearings, 'Sex, Lies and the Public Sphere: Reflections on the Confirmation of Clarence Thomas', *Justice Interruptus*, pp 99-121. A general review of feminist challenges to the public/private divide, and reaffirmation of its potential value, is undertaken by Ruth Gavison in 'Feminism and the Public/Private Distinction' (1990) 45 *Stanford Law Review* 1-45.

[34] The private can also function as a place of respite from the pressures of heteropatriarchal society, but will not invariably do so, for example where a lesbian woman has children, lives with her family of birth, and so on.

[35] Gail Mason, '(Out)Laws: Acts of Proscription in the Social Order' in Margaret Thornton (ed), *Public*

regulation of public activities which were held to disrupt the social order".[36] Similarly, Matthew Waites points out that Wolfenden "represented a legal strategy of control and an attempt to eradicate the problem of male homosexuality from public view, rather than pure 'permissiveness'".[37] Such a policy of privatisation lives on, for example in immigration law where Jenni Millbank argues that "privacy" (secrecy) is seen as a solution to persecution of lesbians and gay men.[38] In the same way, the 2003 Act sets up an expectation of well-behaved lesbianism which does not seek to differentiate itself publicly from male homosexuality or female heterosexuality and renders itself apparent only in the private domain.

- **The harm principle**

Liberal theory balances principles such as privacy and non-interference with individual autonomy against the state's right to interfere to prevent harm. The definition of harm, however, is itself not value-free. On the contrary, it involves important and highly-disputed questions such as what counts as harm; when behaviour has an impact extending beyond the individuals directly concerned and may harm society; what or who is society; and how common social interests are discovered or defined. Such issues have not been articulated in either *Setting the Boundaries* and *Protecting the Public*, or their predecessor the Wolfenden Report. How far these unspoken issues are nonetheless crucial to the implementation of the harm principle is apparent from one example in the Wolfenden Report: the recognition that the criminal law might intervene "to protect the citizen against what is offensive".[39] This one notion raises questions of who defines what is offensive, when, where, to what degree, and to whom.

Such questions were side-stepped when the idea of the liberal approach as effectively value-free was put forward in the consultation paper, *Setting the Boundaries*:

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and Private: Feminist Legal Debates, Oxford: Oxford University Press, 1995, pp 66-88 at p 79.

[36] Anna Marie Smith, 'Resisting the Erasure of Lesbian Sexuality: A challenge for queer activism', in Sexualities' in Ken Plummer (ed), *Modern Homosexualities: Fragments of lesbian and gay experience*, London: Routledge, 1992, pp 200-213 at p 203.

[37] Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship*, Basingstoke: Palgrave Macmillan, 2005, p 107. However, see also his discussion of this notion of privacy as recognising the citizenship of the homosexual male (*Age of Consent*, pp 111-113).

[38] Jenni Millbank, 'A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003', (2005) 14 *Social and Legal Studies* 115-138.

[39] Para 13.

> The criminal law is not an arbiter of private morality but an expression of what is needed to protect society as a whole. In a tolerant and diverse society, the law should be based on a public morality that protects the individual from danger, harm, fear or distress, with additional safeguards for the younger and frailer members of the community. This would provide a structure that broadly permits consensual activity in private but is effective against force, coercion and harm. Respect for private life means that any regulation which is proposed must be limited to what is necessary in a democratic society and proportionate to the problem. Such a concept of the criminal law does not condone or advocate any particular form of sexual behaviour, but is based on principles of preventing harm and promoting public good.[40]

The consequences of this simplistic approach are apparent throughout the legislative process leading up to the 2003 Act. First, where the harm is perhaps not obvious, the justifications for offences are not based upon a clear, principled approach but instead upon sweeping statements (which may well be true, but are put forward with no discussion or supporting evidence), such as that bestiality is so "profoundly disturbed" and necrophilia "so deviant" that both should be criminalised.[41] What is particularly sad, not to say disquieting, about this is that as early as 1981, Professor J C Smith had cited the offence of bestiality as an example of "a tendency to find another reason to retain an offence which has its basis in public disgust, even though this sense of disgust may remain as the real ground for the prohibition", inadequately justified on arguments around cruelty to animals or ensuring medical treatment for the offender.[42] Yet again, it is apparent that the Sexual Offences Act has taken little account of the extensive critiques of its liberal basis.

Second, without a clear and principled basis for determining harm, there is considerable scope for exercising one's own prejudices. This was apparent in the parliamentary debates, as when the Bishop of Chester argued that sexually transmitted diseases are a relevant form of harm and by implication, sex outside marriage and in particular homosexuality is harmful and thus requires greater regulation.[43] It is perhaps

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[40] HMSO, 2000, 6.2.4.

[41] *Protecting the Public*, paras 79 and 80. For a more detailed discussion of the ways in which "moral consensus and righteousness within the community" was an underlying and largely unacknowledged ideology in the Act, see Vanessa E Munro, 'Dev'l-in Disguise? Harm, privacy and the Sexual Offences Act 2003' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements*, Abingdon: Routledge-Cavendish, 2007, pp 1-18 at pp 1-10.

[42] Smith, 'The Reform of the Law of Sexual Offences', p 3.

[43] Debate on the introduction of the White Paper to the House of Lords, *Hansard*, 19 November 2002, columns 294-5. Similar arguments had been made in the debate around section 28 of the Local Government Act 1988, where homosexuality was portrayed as harmful because of its association with

not only lesbian invisibility which prevents those putting forward such arguments from suggesting that on this basis, lesbianism should be preferred to heterosexuality! That the harm-based argument hid a different agenda is apparent from the Bishop's later comments in a media interview that

> Some people who are primarily homosexual can reorientate themselves. I would encourage them to consider that as an option, but I would not set myself up as a medical specialist on the subject... Sexual intercourse is the supreme example of body language ... Because it is precious and supreme, it should be kept to one person at a time in the deep life-long commitment we know as marriage.[44]

The breadth of possible interpretations of harm can be seen by contrasting the wide definition of harm adopted by the Bishop of Chester to the very different approach advocated by Gayle Rubin. To her, harm is done largely by regulating and restricting expressions of sexuality; she extends this argument to age of consent laws and taboos on sexual relations between adults and minors, arguing that "our culture denies and punishes erotic interest and activity by anyone under the local age of consent."[45] There is also a substantial body of feminist critique of the ways in which the law protects against "harm" as identified by male standards and excludes harms which only or primarily affect women;[46] yet again, such feminist analysis seems to have had little impact upon the makers of the Act.

It is significant within this context that the move away from seeing homosexual behaviour as harmful has come at the expense of accepting it as innate. Such arguments were most apparent in the debates over section 28 of the Local Government Act 1988,[47] but underlie the 2003 Act too. Such an understanding of sexuality as fixed poses two problems for lesbians. First, heterosexuality remains the norm and lesbianism (or male homosexuality) an inferior and unfortunate variation:

HIV/AIDS (see Martin Durham, *Moral Crusades: Family and Morality in the Thatcher Years*, New York: New York University Press, 1991, pp 121-122).

[44] David Holmes, 'Gays can have their sexuality changed' [interview with the Bishop of Chester], *Chester Chronicle*, 7 Nov 2003.

[45] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory on the Politics of Sexuality' (1984) in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality*, London: Pandora, 1989, pp 267-319 at p 290.

[46] For a summary of this analysis and a discussion of it in the context of the 2003 Act, see Munro, 'Dev'l-in disguise?', pp 11-16.

[47] See Davina Cooper and Didi Herman, 'Getting "The Family Right": Legislating Heterosexuality in Britain, 1986-91' in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men and the Politics of Law*, Philadelphia: Temple University Press, 1995, pp 162-179 at pp 171-172.

thus, though the principle of equal treatment may be accepted, this is only on the basis of heterosexual superiority. Second, as I discussed in Chapter 6, feminists do not accept that sexuality is immutable but identify heterosexuality as a socially-constructed institution fundamental to women's oppression.

The criticisms of the harm principle, public/private divide and individualism fundamental to liberal theory are not novel: a substantial and long-standing literature is available addressing just these points. It is therefore all the more disappointing that the government seems to have been largely unaware or dismissive of them in drafting this legislation. The consequence is not only that these are problems apparent in the Act, but that no consideration seems to have been given by the government as to how to balance such difficulties with the aims of the legislation. The particular problems created by one aspect of this liberal, individualistic approach, namely gender neutrality, have an especial impact upon lesbian defendants, and deserve detailed consideration.

Gender neutrality

The liberal approach underlies an important theme throughout the legislation: that of gender neutrality. In general, offences do not differentiate between male or female perpetrators or victims. While this is desirable in terms of removing offences which discriminated against male homosexual conduct, I will argue that the overall consequence of this neutrality is a failure to recognise or respond to the fact that our legal system and society are profoundly gendered, and that there is inequality between men and women, perhaps more blatantly in the area of sexual offences than elsewhere.[48]

From the beginning, an essentially gender-neutral approach was adopted. In the same paragraph as it noted that "[t]he victims of sexual violence and coercion are mainly women", the *Setting the Boundaries* paper asserted that "the law needs to be framed on the basis that offenders and victims can be of either sex."[49] While one would not argue that men and boys should be less protected than women and girls,

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[48] For a discussion of the ways in which legal gender neutrality is founded upon male norms and can lead to substantive gender inequality, see for example Catherine MacKinnon, 'Difference and Dominance: On Sex Discrimination' in *Feminism Unmodified*, Harvard University Press, 1987, at pp 35-38. For a critique of similarly gender-neutral sexual offences laws in Australia, see Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 56 *Modern Law Review* 10-37, especially at pp 24-29.

[49] *Setting the Boundaries*, para 0.6.

one might have thought that the realities of the gender differences in sexual violence might have prompted some discussion on how this is best achieved. In particular, reflection upon the ways in which greater gender-neutrality in the law of rape, for example, have not led to greater justice would surely have been apt.[50] The review might well have concluded in any event that gender neutrality is the best approach, but would have done so on the basis of informed discussion rather than mere assertion. Instead, gender neutrality is offered as a self-evident principle.

However, the consequence of such an approach is that the realities of gender are ignored. At the general level, our society is described as one where "[w]e do not discriminate on grounds of race, disability or sex":[51] a fine aspiration but hardly something we could claim as a universally-shared one, let alone a concrete reality. In terms of the substantive proposals, although mention is made of the predominance of women as victims of sexual offences,[52] the implications of this are never faced. Instead, there has been near-silence on this issue throughout the progression from initial consultation to the passing of the Act. As Lacey points out, "the questions raised by feminist analysis about the relationship between social norms of sex/gender and the sexual abuse of women tend to drop out of the picture."[53] Thus a mechanistic approach of comparing what the rules say about women and men occludes the social and ideological structures within which we live; the ways in which being a woman in this society is a very different experience to being a man; and in particular, the extent to which being a lesbian is different socially, legally and politically to being either a heterosexual woman or a gay man.

On the contrary, the specific position of lesbians in law and society was never addressed in the debates. Instead, lesbians were present only marginally and divorced from any context: as lucky people who shared the legal position of heterosexuals rather than that of gay men, a fortunate minority whose good fortune should be shared with their male counterparts. Thus Lord Falconer stated that buggery and gross indecency were "discriminatory offences ... which criminalise consensual sexual

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[50] Since 1994, the offence of rape has applied to both male and female victims (Criminal Justice and Public Order Act 1994, section 142). In that same period, the attrition rate for rape offences has increased significantly, and substantial criticisms of the way the law deals with both female and male victims have been put forward, including as responses to this consultation. (For a detailed discussion of police and judicial responses to male rape, see Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law*, Buckingham: Open University Press, 1997, Chapter 5).

[51] *Setting the Boundaries*, para 1.1.4.

[52] *Ibid*, paras 0.6, 1.1.9.

[53] Lacey, 'Beset by Boundaries', p 8.

activity in private between men that would not be illegal between heterosexuals or between women",[54] while Baroness Noakes argued that sexual activity in public lavatories should be illegal "between homosexuals", but that "the same principles apply to heterosexual sex or to sex between two women".[55]

Furthermore, the Act departs from the principle of gender neutrality in some circumstances which legitimise the abuse of girls. The authors of *Setting the Boundaries* accepted that the gender-neutral approach would founder were marriage to remain a defence to sexual activity with a child under 16.[56] However, they felt bound by international law to retain the defence, given the special status of marriage in the European Convention of Human Rights and the special status of marriage in international law.[57] Although recognising that marriage with a girl under 16 "would effectively legalise what we think could be serious child abuse",[58] nonetheless the Home Office accepted "there [are] some safeguards in place, including the operation of the Immigration Rules in scrutinising and controlling the entry of very young spouses, that would protect children. We therefore thought that we *could not* remove the defence of marriage" although it would not apply where the spouse is under 13.[59] The fact (discussed in the report) that other countries do not have a marriage defence suggests that the hands of legislators of England and Wales were not as tightly bound as those involved in drafting the Act chose to think.

The Government Response accepted this recommendation, reiterating that "in light of the special position accorded to marriage by the ECHR and the UK's international obligations to recognise valid overseas marriages we agree that the defence should remain". This was despite responses being almost evenly split on this issue, with concern that children who cannot consent to sex should not be able to consent to marriage, and that "religious or cultural reasons should not be allowed to justify sex with children aged between 13 and 16 in this country."[60]

The failure to engage with feminist criticisms of the law, beyond the purely

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[54] Hansard House of Lords Debates, 13 February 2003, col 775, and quoted in Arabella Thorp, *The Sexual Offences Bill [HL]*, House of Commons Library Research Paper 03/63, London: House of Commons Library, 10 July 2003, p 11.
[55] Hansard House of Lords Debates, 13 February 2003, col 778, quoted in Thorp, *Sexual Offences Bill [HL]*, p 13.
[56] *Setting the Boundaries*, para 3.6.17.
[57] *Ibid*, paras 3.6.18-19.
[58] *Ibid*, para 3.6.18.
[59] *Ibid*, para 3.6.19 (emphasis mine).
[60] *Government Response*, p 28.

liberal, becomes apparent in Chapter 6 of *Setting the Boundaries*, 'Issues of Gender and Discrimination'. Not only does it pay little attention to lesbian sexual activity beyond the fairly dismissive comment that

> The law treats consensual sexual behaviour differently according to sexual orientation. It permits a wide range of heterosexual (and implicitly same-sex female) behaviour and sets out the exceptional situations where such behaviour is illegal[61]

but, in a chapter supposedly on gender, women of any sexual orientation soon fade out of the picture. Thus the section on 'Views expressed during public consultation'[62] talks only about sexual activity between men. The result is that not only sexual activity between women, but also other gender issues, are ignored. Indeed, throughout the chapter, 'gender and discrimination' is generally (though not invariably) conflated with discrimination against gay men. Section 6.6, which is the only part of the chapter to discuss specific offences in detail, is headed 'The homosexual offences', by which it means 'male homosexual'.

The equation of gender neutrality with gender-blindness and the lack of any non-liberal feminist analysis causes the White Paper in particular to struggle when dealing with offences which have traditionally been gender-specific, notably rape. Faced with a general principle that offences should be gender-neutral, but having some sense that rape should be committed by men only, the White Paper flounders desperately between arguing that rape cannot physically be committed by a woman, to perhaps it can, to technically it can but it's somehow different and thus forms another offence. The paragraph is worth quoting in full here:

> One of the principles underlying our new offences is that they should not be gender specific. However, the offence of rape is clearly understood to be non-consensual penile penetration perpetrated by a man, on a woman or a man. The anatomical differences between men and women must sensibly direct that the offence of Rape should remain an offence that can only be physically performed by a man (although women can be guilty as accessories to the crime). It will therefore not apply to circumstances where a woman compels a man to penetrate her without his consent. However, this form of sexual offending will be caught within the scope of a new offence of Causing another person to perform an indecent act without consent, which

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[61] *Setting the Boundaries*, para 6.2.2.
[62] *Ibid*, para 6.3 *et seq*.

> will, in relation to sexual penetration, carry a maximum penalty of life.[63]

A clear articulation of principle would have been far preferable to this appeal to the understanding of unspecified persons and conflicting anatomical "facts".[64] Such confusion is yet another telling example of the difficulty of attempting to reform the law in this area without any clear grasp of gender politics.

As damaging as the failure to apply the principle realistically or consistently is the danger posed by gender-neutral offences themselves. Nowhere does the White Paper deal with the discriminatory way in which gender-neutral laws, particularly around the age of consent, have been applied to lesbians.[65] Some of the offences in fact seem designed to create the same effect for as long as lesbian sexual activity may be seen by prosecutors and judges as more harmful for a child under 16 than heterosexual sexual activity. Of particular concern is the new offence of sexual activity between minors.

> While it is recognised that much sexual activity involving children under the age of consent might be consensual and experimental and that, in such cases, the intervention of the criminal law may not be appropriate, the criminal law must make provision for an unlawful sexual activity charge to be brought where the sexual activity was consensual but was also clearly manipulative.[66]

Unfortunately, adults' views (especially those of parents, police and prosecutors) of what is "manipulative" are liable to be highly subjective, and many parents will prefer to believe that a same-sex partner is manipulative than that their child voluntarily engaged in such activity. Further, this is only a prosecution guideline: there is no requirement of "manipulation" in the Act itself.

The CPS guidelines[67] do little to engage with this issue either, setting out a series of factors to consider in deciding whether to prosecute which are determinedly gender-neutral. However, in the absence of any specific guidance upon same-sex relationships, there is ample room for the prejudices of prosecutors and other parties

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[63] *Protecting the Public* p 22.

[64] For a detailed discussion of the failure of *Setting the Boundaries* to address the possibility of female perpetrators, see Rumney, 'The Review of Sexual Offences and Rape Law Reform', pp 894-896.

[65] See Chapter 7.

[66] *Protecting the Public*, p 25.

[67] 'Offences Against Children Under 16: Code for Crown Prosecutors – Adult/child defendants' in The Crown Prosecution Service, 'Legal Guidance: Sexual Offences Act 2003',

to affect such decisions.[68] In particular, although the list of factors itself refers to "exploitation, coercion, threat, deception, grooming or manipulation", the summary immediately following reduces this to "aggravating features, such as coercion or corruption." Since corruption has a long history as a code-word for same-sex activity,[69] this guidance is potentially dangerous. Again, where an offence is committed by a child against a child under 13, the guidance refers to the need to obtain the views of the victim's family "where appropriate"; the views of many families will be fundamentally affected by the same-sex nature of the offence, again allowing prejudice to influence prosecution decisions.[70]

Without a fundamental change in legal and social attitudes, gender-neutrality does little to address the deep gender inequity in this area of the law and of society. Indeed, it poses its own dangers, as Nicola Lacey explains:

> This move to non-discrimination [by removing offences applying to male homosexual activity only] is deeply welcome. In congratulating the Review on its clear stance, it is, however, worth reflecting on the limitations of formal equality. Once these reforms are implemented, as they surely will be, gay men, like women, will have to pitch their critical analysis of criminal law and their case for reform not at a crude structure of overt discrimination but at the more subtle, yet potentially equally discriminatory, images of and assumptions about sexuality which structure the implementation of the law in the prosecution, trial and penal processes.[71]

Penile penetration

An area where the Act crucially fails feminists and lesbians is in its acceptance and development of a hierarchy of sexual activity, which creates three tiers: penile penetration, non-penile penetration, and non-penetrative acts. This hierarchy is created by amending the definition of rape and creating a new offence of sexual assault by penetration, both significantly more serious than sexual assault but with

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http://www.cps.gov.uk/legal/section7/sexoffencesact2003.html#50, accessed 9 January 2006.

[68] It would be wrong to assume that a changing legal context has fundamentally altered attitudes to young women's lesbian sexuality: see for example the deportation of Ugandan lesbian Faridah Kenyini, whose asylum claim was rejected by a judge "implying that she was too young to be aware of her sexual orientation' (Eric Allison, 'Campaigners fear for lesbian facing deportation', *Guardian Unlimited*, 13 November 2006, http://www.guardian.co.uk/immigration/story/0,,1946801,00.html?gusrc=ticker-103704, accessed 3 January 2007).

[69] See Chapter 7.

[70] 'Offences Against Children Under 13: Code for Crown Prosecutors – Child defendant (under 18)' in Crown Prosecution Service, 'Legal Guidance'.

[71] Lacey, 'Beset by Boundaries', p 8.

rape assumed to be more serious than non-penile forms of penetration.[72] It also, albeit less obviously, pervades many other areas of the Act.

An example is the offences of trespass and abduction with intent to commit a serious sexual offence proposed in *Setting the Boundaries*.[73] Rape and sexual assault by penetration appeared to be the offences so defined as "serious"; although the Government Response rejected this approach, it did not engage with the question of why penetration is treated differently to any other kind of sexual activity or assault. Instead, it criticised the recommendation on the pragmatic ground that "[s]uch specific intent may be difficult to prove allowing a potential sex offender to be acquitted. We therefore propose an offence of trespass with intent to commit a sex offence."[74] Similarly, the recommendation for an offence of "administering drugs (etc.) with intent to stupefy a victim in order that they are sexually penetrated"[75] was accepted only in part. The Government Response that "there seems to be no good reason to limit the offence to penetration" seems to have been based on a general desire to widen criminal liability and an analysis of evidential difficulties rather than any challenge to the privileging of penetrative sexual activity.

Conversely, although bestiality remains an offence committed only where there is penetration of or by the animal, no such requirement for penetration was initially put forward in relation to sexual interference with human remains.[76] However, it appears to have crept into the White Paper:

> There is currently no law that covers sexual interference with human remains. Although there is no indication that such activity is anything but extremely rare, we believe that this behaviour is so deviant as to warrant the intervention of the criminal law and are proposing a new offence of Sexual interference with human remains, which will carry a maximum penalty of 2 years imprisonment. Where a defendant is suspected of killing their victim, the first priority will clearly be to charge murder or manslaughter. Where there is evidence of *sexual penetration* of the body after death, it is important that the sexual deviance of the offending behaviour is properly recognised by a separate indictment of sexual interference with human

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[72] Although the Act establishes life imprisonment as the maximum sentence for assault by penetration as well as rape, both the rationale of the former offence and the courts' guidelines on sentencing make it clear that the it is in reality viewed as less serious (*Attorney General's Reference (No 104 of 2004)* [2005] 1 Cr App R (S) 117, which gave a starting point of four years' imprisonment, or five years where there was significant risk of injury, as compared to a starting point of five years for rape, rising to eight or fifteen years where serious aggravating features are present).

[73] Para 0.12.

[74] *Government Response*, p 16.

[75] *Setting the Boundaries*, recommendation 15.

[76] *Setting the Boundaries*, Recommendation 58.

remains.[77]

It was not only within the official documents that discussion of whether penetration, and particularly penile penetration, ought to be prioritised in this was absent. Instead, the consultation was itself limited by its very terms: for example, the House of Commons Committee sought responses upon the narrow issue of whether penetration of the mouth should fall within the definition of rape. Thus although the Rape Crisis Federation had elsewhere rejected the distinction between penile penetration and penetration with an object, considering both to be rape,[78] their submission to the consultation was limited to the issue of penile penetration of the mouth:

> The law adapts to cultural changes and we have a different perception now of rape in that rape can now be rape of a male and rape of a female, it can be vaginal and it can be anal. In my view, it [can] become … penile penetration of the mouth and it will be accepted just as anal penetration has been accepted as rape.[79]

Other, non-feminist organisations were reluctant to concede even that much. Although his objection was phrased in practical terms, the concern of the Chairman of the Criminal Bar Association seemed to be based upon male understandings of rape rather than sympathy for female perspectives. He suggested that assault by penetration "would be a more natural home for" penetration of the mouth since "juries might be less inclined to convict of rape itself".[80]

The government has taken a less conservative approach than that suggested by the Criminal Bar Association,[81] instead tending to focus upon the impact of offences:

> From the perspective of victims, forced penile penetration of the mouth can be just as abhorrent, demeaning and traumatising as other forms of forced penile penetration and is

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[77] *Protecting the Public*, p 33; emphasis mine.
[78] Rape Crisis Federation Wales & England, *Some Myths and Facts About Rape*, http://www.rapecrisis.co.uk/myths_facts.htm, accessed 1 December 2003.
[79] Cathy Halloran, Rape Crisis Federation and Campaign to End Rape, in House of Commons Home Affairs Committee, *Sexual Offences Bill*, Fifth Report of Session 2002-03, p 7.
[80] Peter Rook QC, Chairman of the Criminal Bar Association, in House of Commons Home Affairs Committee, *Sexual Offences Bill*, Fifth Report of Session 2002-03, p 7.
[81] Although it should be noted that the "popular understanding" argument has been accepted elsewhere, notably in relation to the issue of women perpetrators of rape (see Rumney, 'The Review of Sex Offences', pp 896-897).

equally, if not more, psychologically harmful than vaginal and anal rape.[82]

However, the effects of forced oral sex can be understood within this framework only by conceptualising it as a form of penile penetration strictly analogous to sexual intercourse. Again, there is no analysis of why penile penetration is to be considered separately from other forms of penetration or other forms of sexual assault. Instead, there is a liberal and individualistic focus upon the psychological effects on individual victims, with no attempt to place this in a wider social or political context. Such an approach achieves its positive result, recognition of the seriousness of forced oral penetration, only through hiding the reality of sexual violence within patriarchal society and reducing it to a series of individual experiences to be discussed in therapeutic rather than political terms.

As penile penetration continues to be conceptualised as real sex, so the corresponding myth of female sexual passivity also lingers on. For example, the provisions criminalising "sex with an adult relative"[83] still construct penetrative sex as involving one party penetrating and the other consenting to penetration: although intended to get away from the Punishment of Incest Act 1908's language of "having" and "permitting", it is little more than a rewriting of it. Thus, although the offences are gender-neutral in terms of who may penetrate and who may be penetrated (excepting penetration of the mouth for which the penis must be used), the model of sexual activity used is a deeply gendered one. The penetrating person is implicated as male and active, the consenting party as female and passive. A better alternative would have been to create a single offence of, for example, engaging in penetrative sexual activity; or, better still, to consider why penetrative sex is singled out at all.

The consequences of this approach for lesbians are readily apparent. First, sexual activity between women becomes anomalous for involving full female sexual agency. For as long as sexual intercourse is constructed as an act in which women are passive and men active, the law will replicate the myth that women's sexuality generally is passive, men's active: a formulation which implicitly denies lesbianism both visibility and credibility. Second, these characterisations play into stereotypes of relationships between women in ways which are damaging. The special status of

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[82] *The Government Reply to the Fifth Report from the Home Affairs Committee Session 2002-2003*, pp 1-2

[83] Sexual Offences Act 2003, sections 64 and 65.

sexual intercourse will continue to silence lesbian sexuality as necessarily inferior, less about *real* sex, than anything involving the penis. Lesbianism is thus always "lesser" since it does not involve penile penetration; with penetration by an object as the "next best thing", and non-penetrative activity having a different status altogether, there is no respect for different definitions of the sexual, or for lesbian criticisms of the emphasis upon penetration as "real" sex and the portrayal of lesbians as a lesser imitation of the male.

A new silencing?

A theme apparent throughout the discussions leading to the Sexual Offences Act 2003 is the lack of attention to lesbians in their own right.[84] Instead, lesbians tend to be considered only by comparison to gay men. I would argue that this represents a new form of silencing: since it is no longer feasible to pretend that lesbianism does not exist, it is instead subsumed within the category "gay". Lesbians, in this way, become a less problematic, less libidinous, less persecuted version of the gay male.

The wider cultural invisibility of lesbians is nothing new. In 1981, Annabel Faraday pointed out that

> Any attentions to women have tended to be, at best, attempts to constrict them within male models, thus duplicating on a smaller scale the kinds of work done on gay men, or, at worst, footnoting or appendixing mention of women in studies concerned only with men. ... Emotional relationships between women, *whether or not they have involved overt physical expression*, have tended to remain invisible and insignificant to historians and sociologists alike...[85]

However, in the sphere of the criminal law, lesbians have tended to be altogether invisible until relatively recently. The 1920s, with the *Well of Loneliness* and "Colonel" Barker cases, saw a brief moment of struggle between straightforward invisibility and a relatively straightforward visibility, but the criminal justice system has now settled upon a third approach, a new form of invisibility. This new silencing has been reinforced by the approaches of both liberal organisations such as Stonewall

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[84] This is by no means a unique phenomenon in contemporary parliamentary debate: in his discussion of the debates on the repeal of section 28 and equalisation of the age of consent, Stychin comments that while young gay men were desexualised and young heterosexuals of either sex hypersexualised, "[y]oung lesbians, for the most part, seem not to exist at all" (*Governing Sexuality*, p 36).

[85] Annabel Faraday, 'Liberating lesbian research' in Ken Plummer (ed), *The Making of the Modern*

and, as I will discuss below, of queer theory and politics. In the last decade or so, then, the *criminal* lesbian has started to emerge from behind the class of sexually passive women, only to immediately disappear behind that of gay men.

Lesbians and gay men are not, of course, the same, and their difference of sex amounts to a fundamental difference in our society. We have seen throughout this thesis that women's sexuality is characterised very differently to that of men, and in the same way lesbians are characterised as less sexual than gay men.[86] However, the differences between men and women go far deeper than what they (are presumed to) do sexually. In a patriarchal society, men are in a position of dominance just as women are subordinated, and neither gay men nor lesbians are altogether outside this system. Indeed, Marilyn Frye has highlighted the extent to which gay and straight men's interests coincide to an extent that "it becomes something of a puzzle why straight men do not recognize their gay brothers, as they certainly do not, much to the physical and psychological expense of the latter."[87] Such commonality of interests mean that "the general direction of gay male politics is to claim maleness and male privilege for gay men and to promote the enlargement of the range of presumption of phallic access to the point where it is, in fact, absolutely unlimited".[88] That queer alliances seem to promote phallic access either *to* lesbians, through celebrating sexual activity between lesbians and gay men, or *for* lesbians, through the use of the dildo, does little to suggest that such differences of interest have yet been resolved.

In those circumstances, the liberal approach which elides lesbians and gay men often leads to the lesbian criminal defendant being neglected altogether, rather than the severity of her sentencing and the discrimination which underlies it being openly addressed and criticised. Thus, for example, Stonewall is able to dismiss the onerous sentences imposed upon lesbians convicted of relationships with girls under the age of consent, or convictions on factually questionable grounds as in *Saunders*, as effectively none of their concern:

> For lesbians the criminal law is roughly the same as for heterosexuals. It is gay men who have

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Homosexual, London: Hutchinson, 1981, pp 112-132 at p 112.

[86] Yet again, one is reminded forcefully of Wolfenden's characterisation of lesbians as less "libidinous" than gay men. While such a characterisation produced some obvious benefits, notably the failure to criminalise private and consensual sexual activity between women, it has also furthered lesbian invisibility.

[87] Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory*, New York: The Crossing Press, 1983, p 130.

had a raw deal when it comes to sexual relationships and may have been fined, prosecuted or imprisoned for having consensual, adult sex.[89]

That "roughly the same" acknowledges different treatment even as it simultaneously sweeps under the carpet all those lesbians who do not fit the "but for" pattern, in order to further the aim of formal legal equality for gay men. As recently as December 2006, Stonewall claimed on its website that prior to the 2003 Act, "there was no age of consent relating to lesbians."[90]

Such popular confusion reflects the assumption that lesbians fall outside legal consideration at all. For example Donna Allen, a lesbian whose prosecution for indecent assault I discussed in the previous chapter, maintained that she was unaware that her conduct was criminal, saying in interview, "There isn't no law for lesbians anyway".[91] Such a perception reflects the silence around this issue, rather than legal fact. Lesbian invisibility, which is not only oppressive in itself but also disguises actively unfavourable legal treatment of lesbians, is once again confused with tolerance. Its perpetuation by respected campaigning organisations such as Stonewall enables lesbians to be sidelined or even co-opted into gay male campaigns.

Women's lack of visibility within the "lesbian and gay" organisation closest to the government was unsurprisingly reflected by lesbian near-invisibility during the development of the Act. This effect was achieved largely through an emphasis upon male homosexual offences as the sole area of discrimination in the pre-Act law, and an assumption that gender neutrality equates to non-discrimination, so that lesbianism is rendered irrelevant. However, even where sexual activity between women is mentioned in the debates and discussions, it is not accorded equal status. Three examples illustrate this.

First, sexual activity between women is implicitly accorded a lower status in the wording of the discussions, as where sexual activity "between women" is impliedly treated as more transitory than between men and women, given the status of "heterosexuals". While the extract below refers to activity "between men", it is part of a discussion which refers to "homosexuals", meaning only male homosexuals.

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[88] *Ibid*, p 145.
[89] Stonewall, 'Love', http://www.stonewall.org.uk/template.asp?Level1=3&UserType=1, accessed 30 October 2002.
[90] Stonewall, 'Age of Consent", http://www.stonewall.org.uk/information_bank/criminal_law/66.asp, accessed 13 December 2006.
[91] *Allen*, p 37.

Lesbians alone are thus unnamed, invisible. It is worth repeating two quotations in this context:

> ... the same principles apply to heterosexual sex or to sex between women.[92]

> The law ... permits a wide range of heterosexual (and implicitly same-sex female) behaviour...[93]

What are "same-sex females": could opposite-sex females exist? While mixed-sex couples were given the status of "heterosexuals", it seems that the L-word remained literally unspeakable.

Women would be left even further out of the equation a few sentences later, when sexual activity was reduced to (male) homosexual (cottaging) and heterosexual:

> Concerns have been raised, encouraged by some media misrepresentation, that the replacement of these offences [criminalising consensual sexual behaviour between men] will result in the legalisation of cottaging and gay sex in public. This is not the case. There is a clear difference between private and public sexual activity. No-one wishes to be an unwilling witness to the sexual behaviour of others and everyone is entitled to be protected from it by the law. Sexual activity in public that offends, irrespective of whether the people engaging in the activity are heterosexual or homosexual, will remain criminal and will be dealt with by a new public order offence dealing with sexual behaviour in a public place.[94]

While the perception of public sexual activity by lesbians as relatively unusual is largely correct, the failure to mention it at all indicates that lesbians are both publicly and legally invisible. We are consigned entirely to the private sphere, the female domain, in a way which does not so much respect our lack of enthusiasm for cottaging as erase us from the public gaze.

The way forward: lesbian feminism or queer theory?

If the lesbian present remains one of legal erasure, what of the future? I would suggest that the liberalism underlying the Sexual Offences Act 2003 can take us little further: we must look elsewhere, and in particular to two of the major theoretical and political

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[92] Baroness Noakes, Hansard, House of Lords Debates, 13 February 2003, col 778.
[93] 'Setting the Boundaries', para 6.2.2.

strands in contemporary lesbianism - radical feminism and queer theory.

Should they be treated as two separate and irreconcilable alternatives? Several recent publications have suggested that they need not, notably Linda Garber's book *Identity Poetics* and the collection of essays *Intersections Between Feminist and Queer Theory*.[95] It is significant that both find their most urgent project to be returning a recognition of feminism's contributions to the debate: "the need to move beyond the logic ... that assumes that since queer comes after feminism it supercedes it."[96] That logic is manifest in the way that queer theory has tended to position itself as the social-constructionist alternative to an essentialist radical feminism: as Stevi Jackson comments, "it is indeed odd that a [radical feminist] perspective dedicated to challenging and changing both male and female sexuality and to radically transforming our ideas about what is erotic should be seen as biologically deterministic".[97]

Indeed, Marilyn Frye's work shows how much of the core of Butler's arguments was already central to feminism:

> [P]ersons (mainly men, of course) with the power to do so actually *construct* a world in which men are men and women are women and there is nothing in between and nothing ambiguous ... The demand that the world be a world in which there are exactly two sexes is inexorable, and we are all compelled to answer to it emphatically, unconditionally, repetitiously and unambiguously. Even being physically "normal" for one's assigned sex is not enough. One must *be* female or male, actively. Again, the costumes and performances. Pressed to acting feminine or masculine, one colludes (co-lude: play along) with the doctors and counselors in the creation of a world in which the apparent dimorphism of the sexes is so extreme that one can only think there is a great gulf between female and male, that the two are, essentially and fundamentally and naturally, utterly different. One helps to create a world in which it seems to

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[94] *Protecting the Public*, p 10.

[95] Linda Garber, *Identity Poetics: Race, Class and the Lesbian-Feminist Roots of Queer Theory*, New York: Columbia University Press, 2001; Diane Richardson, Janice McLaughlin and Mark E Casey, *Intersections Between Feminist and Queer Theory*, Basingstoke: Palgrave Macmillan, 2006.

[96] Richardson et al, *Intersections*, 'Introduction' p 4. The same point is also made elsewhere, for example by Biddy Martin ('Sexualities without Genders and Other Queer Utopias' in Mandy Merck, Naomi Segal and Elizabeth Wright, *Coming Out of Feminism?*, Oxford: Blackwell Publishers Ltd, 1998, pp 11-35 at p 11).

[97] Stevi Jackson, *Theorizing Heterosexuality: Gender, power and pleasure*, Glasgow: University of Strathclyde, 1994, pp 3-4. This issue is also discussed in Clare Hemmings and Josephine Brain, 'Imagining the Feminist Seventies' in Helen Graham, Ann Kaloski, Ali Neilson and Emma Robertson (eds), *The Feminist Seventies*, York: Raw Nerve Books, 2003, pp 11-24 at pp 13-14, and Martha Nussbaum, 'The Professor of Parody', (1999) *The New Republic Online*, reproduced at http://www.md.ucl.ac.be/ebim/scientif/Recherche/GenreBioethique/Nussbaum_NRO.htm, accessed 14 January 2007.

us that we *could* never mistake a woman for a man or a man for a woman. We need never worry.[98]

Heterosexual critics of queers' "role-playing" ought to look at themselves in the mirror on their way out for a night on the town to see who's in drag. The answer is, everybody is. Perhaps the main difference between heterosexuals and queers is that when queers go forth in drag, they know they are engaged in theatre.[99]

However, where radical feminism and queer theory diverge is in their interpretation of this insight. To Marilyn Frye, identifying the practice of "sex-marking" is not enough, it forms neither the whole explanation nor the whole solution. Instead, it is a manifestation of systematic sexual oppression with concrete results:

> [W]hen a male's sex-category is the thing about him that gets first and most repeated notice, the thing about him that is being framed and emphasized and given primacy is a feature which in general is an asset to him. When a female's sex-category is the thing about her that gets first and most repeated notice, the thing about her that is being framed and emphasized and given primacy is a feature which in general is a liability to her. Manifestations of this divergence in the meaning and consequences of sex-announcement can be very concrete.[100]

In consequence, mere parodying of appearances is not proposed as a solution; nor can the systematic subordination of one sex and domination by another be solved by gender-neutral means. Instead, Frye recognises that gender is performed by our whole being, going deeper than mere drag to "mold us as dominators and subordinates", creating a need for a specifically female separation and independence: "[t]o retrain one's body one needs physical freedom from what are, in the last analysis, physical forces misshaping it to the contours of the subordinate."[101]

A recognition of the connections – and divergences - between radical feminist and queer theories, as well as an awareness of the huge diversity of contemporary feminist legal writing (a great deal of which does not fall squarely into either approach), are salutary reminders that feminism's strength lies partly in its diversity, and that different theories and approaches can contribute to our work even where we do not wholly agree with them. In comparing particular features of two particular

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[98] Frye, *The Politics of Reality*, pp 25-26.
[99] *Ibid*, p 29.
[100] *Ibid*, p 31.

approaches, I am not suggesting that we face an either/or choice between them for our future direction, or that there are no other choices available.

However, I would argue that queer's lack of emphasis upon patriarchy as a source of oppression and its frequent assumption of lesbians' and gay men's common interests mirror precisely those mechanisms which continue to keep lesbians' experiences within the criminal justice system largely silent. The contradictory interests of lesbian feminists and many gay male activists (for example in terms of the importance accorded to penile penetration; the eroticisation of dominance and submission; and the emphasis upon formal equality) have led to the latter dominating public discourse while lesbian issues have remained relatively silent.

More fundamentally, queer theory and lesbian feminism seek different outcomes: "[i]f Butler and her followers have a utopian vision it is a world of multiple genders and sexualities, not a world without gender or heterosexuality."[102] At some point, choices need to be made between those two outcomes; the growing influence of queer theory, as well as the changing directions of the criminal law, make that choice a fairly urgent one.

Queer theory

Given the gendered assumptions which continue to underlie the Sexual Offences Act 2003, queer theory may appear to offer an attractive way out. As discussed in Chapter 6, it challenges the naturalness of sex roles and offers an oppositional politics aimed at subverting gender norms and thereby highlighting the constructed nature of gender itself. Would this type of challenge be an effective way of moving on from the normative liberalism of the Act? I suggest that it would not, with particular reference to three aspects of queer theory: its emphasis upon sexual practice, its advocacy of alliances, and the inaccessibility of queer theory itself.

- **Queer theory's emphasis upon sexual practice**

The practical outcome of the queer politics spawned by Butler's theories has been a move away from identification as lesbian to a relatively undefined grouping of what

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[101] *Ibid*, p 38.

[102] Stevi Jackson, 'Sexuality, Heterosexuality and Gender Hierarchy', 2005, in C Ingraham (ed), *Thinking Straight: The Power, the Promise, and the Paradox of Heterosexuality*, London: Routledge, 2005, p 33, quoted in Diane Richardson, 'Bordering Theory', in Richardson et al, *Intersections*, pp 19-37 at p 22.

Annamarie Jagose describes as "various forms of marginalised sexual identification".[103] It has also advocated the theoretical separation of gender and sexuality, remodelling sexuality as an area separate from (although with connections to) gender.[104] However, one must ask why challenges to existing gender and sexual identifications, or even the separation of sexuality and gender, should result in a response focused almost entirely upon sexual practice. In other words, the ideologies of biological sex, gender and sexuality reach far beyond sexual activity alone, so why is so much queer activism based upon this one narrow area?

Such a focus is a logical if not inevitable consequence of Butler's work. Butler herself formulated the questions considered by *Gender Trouble* largely in terms of sexual practices:

> [T]he text asks, how do non-normative *sexual practices* call into question the stability of gender as a category of analysis? How do certain *sexual practices* compel the question: what is a woman, what is a man? If gender is no longer to be understood as consolidated through normative *sexuality*, then is there a crisis of gender that is specific to queer contexts?[105]

However, she raised the proviso that she "[did] not mean to claim that forms of sexual practice produce certain genders, but only that under conditions of normative heterosexuality, policing gender is sometimes used as a way of securing heterosexuality."[106]

The link between gender and compulsory heterosexuality is not one which radical feminism would dispute. However, the queer movement has tended to focus upon normative heterosexuality as if it were the *sole* locus of gender normativity, and in consequence has viewed non-normative sexual practices, almost regardless of their form, as the pre-eminent site of challenge. In consequence, such practices have been

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[103] *Queer Theory*, Melbourne: Melbourne University Press, 1996, p 101.
[104] This approach largely originates from Gayle Rubin's influential essay 'Thinking Sex', in which she argues "it is essential to separate gender and sexuality analytically to more accurately reflect their separate social existence" (Rubin, 'Thinking Sex', p 308), and has been adopted (with some reservations) by numerous later theorists including Judith Butler - see for example the Introduction to *Gender Trouble* (1990), London: Routledge, 1999 – and Eve Kosofsky Sedgwick in *Epistemology of the Closet*, California: University of California Press, 1990. For a detailed critique of the connections between sexuality and gender, and of both feminist and queer interpretations of them, see Stevi Jackson, 'Heterosexuality, Sexuality and Gender: Re-thinking the Intersections' in Diane Richardson, Janice McLaughlin and Mark E Casey, *Intersections Between Feminist and Queer Theory*, Basingstoke: Palgrave Macmillan, 2006, pp 38-58.
[105] *Gender Trouble*, 'Preface (1999)', p xi. Emphasis mine.
[106] *Ibid*, p xii.

formulated as themselves defining what is "queer":

> [Q]ueer raises the possibility of locating sexual perversion as the very precondition of an identificatory category, rather than as a destabilisation or a variation of it.[107]

Thus there has been more attention given to, for example, sado-masochism as potentially queer than to other forms of challenging norms outside the realm of sexual activity.

The issues and practices prioritised and valorised by queer theory have tended to be those reflecting the pre-existing concerns and practices of gay men (indeed some histories have located queer as a movement spawned by Aids activism with its focus upon sexual practices).[108] As a consequence, they have tended to result in calls for lesbians to be more like gay men rather than for gay men to become more feminist:[109] "a giddy merger with gay men that is left relatively unproblematized".[110] Further, for lesbians to become more like gay men has been presented by some prominent queer writers as a litmus test of commitment or moral engagement: Anna Marie Smith accepts that Cherry Smyth's suggestion "that lesbians should carry banners declaring '(In)visible Lesbians', 'Lesbians Solicit and Fuck Too', and 'Grossly Indecent Lesbian'" may "appear paradoxical", but asserts that to fail to do so would be wrong on two counts. First, "the cost of invisibility is so great that this risk is more than worth taking" and second, "the representation of lesbian-ness as desexualized innocence is nothing but a retreat to the responsible homosexual position and a betrayal of the risk-takers."[111] It would appear that the "risk-takers" to be betrayed are gay men who, at the time she wrote, faced prosecution for soliciting and gross

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[107] Annamarie Jagose, *Queer Theory*, Melbourne: Melbourne University Press, 1996, p 114.

[108] For example, Susan Hayes, 'Coming Over All Queer', *New Statesman and Society*, 16 September 1994, pp 14-15 at p 14, cited in Jagose, *Queer Theory*, p 76; Suzanna Danuta Walters, 'From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace', in Iain Morland and Annabelle Willox (eds), *Queer Theory*, Basingstoke: Palgrave Macmillan, 2005, pp 6-21, at p 7.

[109] See for example Colleen Lamos, 'The Postmodern Lesbian Position: *On Our Backs*' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 85-103 at p 94: "The commercialization and aestheticization of lesbian sexuality, manifest in the proliferation of sex toys, pornography, butch/femme sexual styles, s/m sexual practices, and phone sex – *many of which have been adopted from gay men* – attest to a queer lesbian culture that blurs distinctions between masculine and feminine and between gay and straight sexuality" (emphasis mine). For detailed discussion of the ways in which lesbians are being called upon to adopt gay male models of sexuality, see Sheila Jeffreys, *The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution*, London: The Women's Press, 1993; Walters, 'From Here to Queer', pp 15-19.

[110] Walters, 'From Here to Queer', p 15.

[111] Smith, 'Resisting the Erasure of Lesbian Sexuality', p 209.

indecency; thus the onus is placed upon lesbians to imperil themselves primarily for men's benefit and in order to endorse sexual practices which hitherto have been the focus of feminist critique rather than a fundamental part of lesbian cultures. (Indeed, the apparent amnesia as to the legal meaning of "soliciting" for women suggests a more general divorce from women's interests in favour of a rather one-sided solidarity with gay men). For soliciting and fucking to be presented as paradigm practices is to assume that (one version of) gay male sexuality should be the gold standard for lesbianism: that "too" in the second slogan says it all.

In consequence, feminist criticisms of sexual practices which reproduce heterosexuality's eroticisation of inequality tend to be derided or ignored. Indeed, feminist critiques are often attacked as prescriptive, in contrast with the rebellious, anything-goes approach of queer:

> Queer is by definition *whatever* is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers*. ... 'Queer' then demarcates not a positivity but a positionality *vis-à-vis* the normative...[112]

In a similar vein, Butler gives as an example of queer activism, "performing excessive lesbian sexuality and iconography that effectively counters the desexualization of the lesbian",[113] without considering the risks of such performances. While they may challenge one stereotype, they can reinforce many others, including, critically, what counts as sexual. For a performance to be recognisable as "excessive ... sexuality", it must conform to heteropatriarchal definitions of the sexual. For that reason lesbian sexuality can in these contexts come to be represented in problematic ways, such as through the dildo or the eroticisation of dominance and submission, which replicate the more oppressive aspects of normative heterosexuality and reinforce the notion of lesbianism as an inferior copy of heterosexuality. Such a notion is vividly illustrated by "the prominence of the dildo in depictions of lesbian sexuality in *On Our Backs*", celebrated by Colleen Lamos:

> The dildo flaunts its phallicism and in so doing throws into doubt received distinctions

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[112] David Halperin, *Saint Foucault: Towards a Gay Hagiography*, Oxford: Oxford University Press, 1995, p 62, cited in Nikki Sullivan, *A Critical Introduction to Queer Theory*, Edinburgh: Edinburgh University Press, 2003, p 43. Emphasis in original.
[113] Judith Butler, *Bodies That Matter: On the discursive limits of sex*, New York: Routledge, 1993, p 233.

> between male and female as well as between hetero- and homosexuality. ... Beyond being a simple sexual option, the dildo and butch/femme pose an especially embarrassing affront to normative heterosexuality and suggest its (possibly postmodern) subversion.[114]

One might question how heterosexuality is threatened if the dominant image of lesbian sexuality is an imitation of it. Lamos' answer appears to waver between following Butler's argument that the copy will highlight the artificiality of the original, and a typically "queer" delight in anything which seems shocking: this "especially embarrassing affront" "represents dirty carnal lust"[115] (although a dildo is by its very nature, of course, not carnal). Finally, she concedes that "butch/femme always works at least two ways, to confirm and to unsettle the naturalness of gender and the heterosexual norms it subtends, because the simulacrum of gender can always be naturalized as the real."[116]

Cheshire Calhoun, although arguing for a separation of lesbianism and feminism based in part upon Butler's work, is critical of Butler's support for practices such as sadomasochism and butch/femme. She argues that they have not responded to feminist critiques of role-playing, and in consequence, although she accepts (as I do not) that they "may indeed undermine heterosexual society", she points out that "Butler's ... political program would at best simply replace heterosexuality-based patriarchy (male power) with masculinity-based patriarchy (masculine power)."[117]

- **Queer alliances**

Queer politics are not just about sexual practices but also about alliances, the presumed shared interests of a wide constituency of people who transgress gender or sexual norms. In particular, theorists such as Calhoun and Carol Smart have suggested that lesbianism is best located alongside male homosexuality and in opposition to heterosexuality, rather than alongside feminism and in opposition to patriarchy. Smart equates a movement of lesbianism out of feminism and into the queer movement as "reminiscent of other earlier strategies where feminists refused to allow the category of gender to be submerged in class, or where black feminists refused to allow 'race' to be submerged in gender", an equation which somehow positions lesbians as trailing

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[114] Lamos, 'The Postmodern Lesbian Position', p 91.
[115] *Ibid*, p 91.
[116] *Ibid*, p 99.
[117] Cheshire Calhoun, 'Separating Lesbian from Feminist Theory' (1994) 104(3) *Ethics* 558-581 at p

behind other feminists just as they are also, presumably, trailing behind gay men when it comes to "insist[ing] on a new visibility for the sexual and questions of desire".[118]

For Calhoun, a feminist analysis of heterosexuality as "the produce and essential support of patriarchy" is inadequate to describe lesbians' situation under patriarchy.[119] In particular, she suggests that feminist (including lesbian feminist) theories that posit lesbianism as "the quintessential form of feminist revolt" effectively operate from a heterosexual woman's perspective in emphasising lesbians' freedom from private heterosexual relations at the expense of ignoring their oppression in wider heterosexist society. Her analysis does not take account of the extent to which lesbian feminism in fact posits lesbianism both as a liberating refusal of heterosexuality *and* as a source of oppression in a heteropatriarchal society.

Such arguments as to where lesbians best find their place have also been expressed in terms of discrimination models. Queer theory brushes against liberal reform campaigns here as both emphasise sexual orientation discrimination at the expense of sex discrimination. While liberal equality rights for lesbians have been primarily formulated as based upon sexual orientation, theorists including Diana Majury posit that the disadvantages faced by lesbians can better be conceptualised as sex discrimination. She argues that the concept of sexual orientation discrimination fails to take into account the differences between lesbians and gay men: discrimination against lesbians is effectively subsumed within discrimination against gay men, with the result that this concept may ultimately be antithetical to lesbian interests. Sex discrimination may offer a better framework within which to understand and challenge our oppression:

> Lesbians are discriminated against because they challenge dominant understandings and meanings of gender in our society. And the more, and the more overtly, we challenge gender, the more, and the more overtly, we are discriminated against. Gender differentiation, premised on the subordination of women, is as essential to heterosexualism as it is to sexism. Lesbian inequalities are sex inequalities because they are rooted in a highly circumscribed definition of gender and gender roles, according to which women are seen only in relation to men. Women who define themselves, and who, in so doing, define themselves without any reference to men, are de-sexed; either they are seen as not women or their "sex", that is their

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[118] Carol Smart, 'Law, Feminism and Sexuality: From Essence to Ethics?' (1994) in *Law Crime and Sexuality: Essays in Feminism*, London: SAGE Publications, 1995, p 102.

[119] Calhoun, 'Separating Lesbian from Feminist Theory', p 573.

lesbianism, is denied. Either way, this is sex discrimination at its most extreme.[120]

In particular, the allegation of lesbianism is used against women to prevent their solidarity and activism. Anti-lesbian attitudes and behaviour are therefore an important means of reinforcing patriarchy.

This conceptualisation has been challenged by others including Cynthia Petersen, who argues that discrimination against lesbians cannot be reduced to sex discrimination, but rather also "functions to reinforce other systems of domination, such as racism and anti-Semitism". Sex alone cannot be regarded as the primary cause of discrimination since "at times the connections between oppressions is so profound that it may be undesirable to distinguish between them .. it is not always useful (nor possible) to identify a primary source of oppression when analyzing inequalities". She argues that the conceptualisation of anti-lesbianism as sex discrimination reflects white lesbians' experience and obscures the significance of race.[121]

This argument has some force; recognising the role of other forms of oppression such as racism and anti-Semitism is vital.[122] However, the risk of Petersen's approach is that in the name of recognising the complexity of oppression, we are so careful to recognise distinct grounds that we achieve the opposite effect to that intended: sexual discrimination becomes viewed as something experienced primarily by white women and the way that it both reinforces and relies upon racism is sidelined. I suggest that when sex discrimination is such a fundamental cause of the discrimination that lesbians suffer, a conceptualisation of our oppression which takes sexism as its starting point has the most chance of enabling us to find the common ground we need if we are to be politically effective, while taking full account of our differences. Such a balancing act is, of course, extremely difficult and one must never lose sight of its risks and dangers. It is essential that if we do use the concept of sex discrimination in this way, we nonetheless pay full and careful attention to its interaction with other forms of discrimination.

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[120] Diana Majury, 'Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context' (1994) 7 *Canadian Journal of Women and Law* 286-317 at p 311.

[121] Cynthia Petersen, 'Envisioning a Lesbian Equality Jurisprudence', in Didi Herman and Carl Stychin, *Legal Inversions: Lesbians, Gay Men and the Politics of Law*, Philadelphia: Temple University Press, 1995, pp 118-137 at pp 121-122.

[122] Petersen focuses upon these in her article, but the same analysis could of course be extended to other grounds such as class.

Robson, in *Lesbian (Out)law: Survival Under the Rule of Law*,[123] approaches the subject from another angle. Rather than asking why we are discriminated against, she takes as her starting point the explicit centring of lesbian experience. From there, she considers the impact of legislation and court decisions upon our survival, including their differential impact upon lesbians who are, for example, poor, members of ethnic minorities, or "pass" as heterosexual less than others. The inclusion of this latter category emphasises how taking lesbians as the centre can highlight features of our oppression which an attempt to slot us into existing categories (in particular, those afforded some degree of formal legal protection) may fail to do.

The issue of lesbians who "pass" does, however, return us to the issue of sex discrimination. "Passing" depends largely upon the adoption of stereotypically feminine appearance and behaviour. It also has a strong race and class element, in that those who most conform to specifically white, middle class norms of female behaviour will tend to "pass" most successfully in the eyes of the court. This demonstrates that while one can conceptualise the courts' anti-lesbianism as being sex discrimination, one must also be alive to its inter-relationship with oppression on other grounds.

However, neither the centring of lesbian experience nor the conceptualisation of discrimination against lesbians as sex discrimination have an obvious place within queer theory. Instead, the emphasis is firmly upon alliances between "sexual minorities", with little acknowledgement of the risks implicit in such alliances. Suzanna Danuta Walters points out that definition of queer as "a non-normative sexuality and a disenfranchisment ... reduces queer politics to a banal (and potentially dangerous) politics of simple opposition, potentially affiliating groups, identities, and practices that are explicitly and implicitly in opposition to each other".[124] Particularly problematic are the ways in which such alliances can subsume their lesbian members: in Castle's words queer "makes it easy to enfold female homosexuality back 'into' male homosexuality and disembody the lesbian once again."[125]

A degree of separatism might, therefore, be essential for lesbians but how easily does queer politics' celebration of difference allow lesbians to refuse any particular alliance? To suggest that

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[123] Ithaca, New York: Firebrand Books, 1992.
[124] Walters, 'From Here to Queer', p 8.
[125] Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, New York:

> the open-endedness of queer neither forces coalitional alliances nor rules out negotiations with the ethical[126]

is to fail to consider the ways in which queer itself delegitimises arguments for refusal. Thus Elizabeth Grosz has warned that "'queer' is capable of accommodating, and will no doubt provide a political rationale and coverage in the near future for, many of the most blatant and extreme forms of heterosexual and patriarchal power games."[127] Alan McKee has noted that the refusal to define itself apparent in much queer writing creates particular problems: as Sullivan summarises his argument, "the refusal to define queer, or at least the ways in which the term is functioning in specific contexts, promotes a sense of inclusivity which is misleading, and worse still, enables exclusory praxis to go unchecked"; consequently, queer creates its own dichotomies of assimilation and resistance, "us and them".[128] It also renders lesbians once again invisible:

> [Queer theory] tends to effect a slippage of body into mind: the monstrously feminized body's sensual evocations of smell, fluid, and hidden vaginal spaces with which the name lesbian resonates are cleansed, desexualized into a "queerness" where they body yields to intellect, and a spectrum of sexualities again denies the lesbian center stage.[129]

- **Accessibility**

A further problem is the difficulty and relative inaccessibility of queer theory,[130] and here again Butler's writing serves as a clear example. Since many lesbians and gay men do not have the time, educationally-privileged background, or desire to engage fully with her work, it becomes open to misinterpretation and over-simplification. She herself has commented upon how one example used by her, that of drag, has become

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Columbia University Press, 1993, p 12.

[126] Jagose, *Queer Theory*, p 114.

[127] Elizabeth Grosz, *Space, time and perversion: essays on the politics of bodies*, London: Routledge, 1995, p 249.

[128] Sullivan, *Critical Introduction*, pp 47-48.

[129] Sagri Dhairyam, 'Racing the Lesbian, Dodging White Critics' in Laura Doan (ed). *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 25-46 at p 30.

[130] An interesting discussion of just such difficulty is Erica Rand's account of trying to teach using material from *On Our Backs*, in 'We Girls Can Do Anything, Right Barbie? Lesbian Consumption in Postmodern Circulation' in Laura Doan (ed). *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 189-209 at pp 189-194.See also Martha Nussbaum, 'The Professor of Parody'.

treated as "the paradigm of subversive action".[131] Such an outcome is however perhaps inevitable when the whole body of her work is not readily accessible to the non-academic, and in consequence those aspects of her approach which do get adopted are likely to be those which fit with the interests of dominant groups within the lesbian and gay movement. Since a number of factors, particularly sexism, mean that the interests of gay men will predominate, the result is a movement which appears to do little to accommodate lesbians beyond expecting and encouraging them to be more like gay men, for example by characterising such practises as anonymous, casual sex and drag as liberatory.[132]

For this reason above all, criticisms of Butler's work as inaccessible and contrary to common sense are important. Queer theorists may respond that such a critique "ignore[s] the ideological dimension of appeals to common sense"[133] or "reinforces the hypostatization [reification] of the 'natural' upon which homophobia relies and thus partakes of an ideological labor complicit with heterosexual supremacy".[134] However, they rather miss the point: what is being called for is not a resort to common sense pure and simple, since radical feminism itself has aims and critiques which fundamentally challenge common sense understandings of gender relations. Rather, it is an appeal for accessible theory, which does not disempower those outside academia.[135] A discussion which has some kind of grounding in common sense (common understanding or common experience might be a better term) is what is required, rather than resort to common sense *per se* as an ideological basis for politics. Only when some degree of common understanding of one's criticisms and aims is possible can all concerned hope to make contributions on a basis approaching equality, so that lesbian concerns are not ignored or distorted, for example.

In particular, queer theory's refusal to accept terms such as lesbian as meaningful may be valuable in encouraging us to examine exactly what we mean by

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[131] Butler, *Gender Trouble*, 'Preface (1999)', pp xxii – xxiii. She discusses drag primarily in *Gender Trouble*, pp 174-177, and returns to it in 'Imitation and Gender Insubordination' p 127.
[132] Butler's own work is not free from a sometimes uncritical celebration of gay male culture, as I discussed in Chapter 6; however, such a bias is amplified when her work is interpreted by, often male, queer activists.
[133] Jagose, *Queer Theory*, p 102.
[134] Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural Theory*, New York: Routledge, 1994, p xviii, cited in Jagose, *Queer Theory*, p 103.
[135] One recalls here Dhairyam's criticism of Butler as placing analyses of subversion in the hands of "critic philosophers", discussed in Chapter 6.

those terms, how exact we want that meaning to be, how that meaning changes in time and place, and so on (although such work is by no means new: such examination occurred long before the publication of *Gender Trouble*).[136] However, it also has less desirable consequences, and it is not enough to refer to the ideological consequences of using "lesbian" in order to demand its redundancy. Instead, one must also consider the ideological consequences of *not* using the term. A failure to talk about lesbians ultimately results in a failure to address lesbian concerns, leading to an increasing gap between academic theory and concrete problems such as economic disadvantage and violence.[137]

Indeed, Butler herself increasingly recognises the need to use such terms (strategically and with care); one of the strongest explanations of this need is when she states that

> the argument that the category of "sex" is the instrument or effect of "sexism" or its interpellating moment, that "race" is the instrument and effect of "racism" or its interpellating moment, that "gender" only exists in the service of heterosexism, does *not* entail that we ought never to make use of such terms... On the contrary, precisely because such terms have been produced and constrained within such regimes, they ought to be repeated in directions that reverse and displace their originating aims.[138]

Thus, "it remains politically necessary to lay claim to "women," "queer," "gay," and "lesbian," precisely because of the way these terms, as it were, lay their claim on us prior to our full knowing."[139] The difficulty comes in relation to how we effect their repetition in new directions. The urgent requirement of queer theory that such terms be kept open in their meaning can be problematic for lesbians since any notion of lesbian specificity is thereby undermined. Given the use of silencing as a means of control, and given the problems lesbians have had historically and currently in getting

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[136] Most famously, in the publication of and debates around Adrienne Rich's essay *Compulsory Heterosexality and Lesbian Existence*, London: Onlywomen Press, 1981 (originally published in (1980) 5(4) *Signs* 631-60): for an account of this debate, see Shane Phelan, *Identity Politics: Lesbian Feminism and the Limits of Community*, Philadelphia: Temple University Press, 1989, pp 69-76.

[137] For a criticism of the way in which concerns about woman-centred theorising risk taking academic feminist theory away from an engagement with social issues, see Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) *Journal of Law and Society* 351-385. She argues that we cannot not use the category "woman"; the challenge is to be aware of the risks of essentialism when we do so – in other words, to be aware of the complexities of women's experience without overstating our lack of commonality.

[138] Butler, *Bodies That Matter*, p 123.

[139] *Ibid*, p 229.

our concerns recognised both within wider feminism and within the wider lesbian and gay movement, a label – however imperfect – does ensure a vital measure of visibility.

In particular, it functions as a demand that the specificity of non-heterosexual women's concerns, needs and issues are taken into account. It ensures that lesbians are not submerged within a generalised gender or sexual politics which pays little attention to their specific situations. The increasing identification of queer politics with gay male politics is a salutary example of that need. As Emma Pérez explains,

> If we do not identify ourselves as Chicanas, lesbians, third world people, or simply women, then we commit social and political suicide. Without our identities, we become homogenized and censored.[140]

In the legal context, this is particularly significant. Carol Smart points out that given "the law's inability to hear feminist discourse", which makes it tactically necessary to "deploy ... accepted notions ... within the confines of the trial and in pressing for legal reforms", "work like Butler's, should it be used in the legal forum, would almost certainly be treated as incomprehensible".[141] Whatever one's reservations about engaging with the legal system as a general political strategy, the criminal law leaves defendants no option but to engage, and we must allow ourselves the ability to respond in a politically effective way to their needs.

Additionally, the criticism of lesbianism as an essentialist or essentialising term is contrary to the experiences and theories of lesbian feminism; it would perhaps be truer of male homosexuality where an accompanying discourse of being "born that way" is more common. However, lesbian feminism is a movement which explicitly recognises and lauds the fact that many of its exponents have adopted a lesbian identity deliberately, coming out of heterosexual relationships and marriages. Lesbianism has therefore been constructed, since the 1970s at least, as an explicitly political rather than essential or biological category, hence definitions such as the famous formulation by radicalesbians: "a lesbian is the rage of all women condensed

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[140] Emma Pérez, 'Irigaray's Female Symbolic in the Making of Chicana Lesbian *Sitios y Lenguas (Sites and Discourses)*' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 104-117 at p 106.
[141] Smart, *Law, Crime and Sexuality*, p 110.

to the point of explosion."[142]

One can use the term lesbian while simultaneously recognising that one of lesbian feminism's principle aims is a world where the term would lose all meaning. By doing so, one creates a discursive presence; by not doing so, one becomes invisible or (if one compromises with Butler's quotation marks) makes oneself somehow a little ironic, a little less real, a lot less distinctive and a lot easier to ignore. One might even suggest that using the label "lesbian" is no more limiting and confining than the much-celebrated multiplicity of alternative labels (ever more specific and surely tying those who choose them to ever more precise behavioural – and above all, sexual - codes) which have appeared since the 1990s.[143]

Lesbian feminism

Lesbian feminism's relegation to "the realm of the surmounted obsolete"[144] is central to much queer theory, which has claimed a sort of political supremacy largely through opposing itself to a particular image of lesbian feminism. Suzanna Danuta Walters characterises that image as follows:

> once upon a time there was this group of really boring ugly women who never had sex, walked a lot in the woods, read bad poetry about goddesses, wore flannel shirts, and hated men (even their gay brothers). They called themselves lesbians. Then, thankfully, along came these guys named Foucault, Derrida and Lacan dressed in girls' clothes, riding some very large white horses. They told these silly women that they were politically correct, rigid, frigid, sex-hating prudes who just did not GET IT – it was all a game anyway, all about words and images, all about mimicry and imitation, all a cacophony of signs leading back to nowhere. To have a politics around gender was silly, they were told, because gender was just a performance anyway, a costume one put on and, in drag performances, wore backward. And everyone knew boys were better at dressing up.[145]

So, would a radical feminist politics necessarily mean a surrender to this sexless, not to say sex-hating, existence enforced by "lesbian sex police"? Walters offers her own

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[142] 'The Woman-Identified Woman', Pittsburgh: Know, Inc, 1970.

[143] For example, "guys with pussies, dykes with dicks, queer butches, aggressive femmes, F2Ms, lesbians who like men, daddy boys, gender queens, drag kings, pomo afro homos, bulldaggers, women who fuck boys, women who fuck like boys, dyke mommies, transsexual lesbians, male lesbians" (Judith Halberstam, 'F2M: The Making of Female Masculinity' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 210-228 at p 211).

[144] Judith Roof, 'Lesbians and Lyotard: Legitimation and the Politics of the Name' in Laura Doan (ed), *The Lesbian Postmodern*, New York: Columbia University Press, 1994, pp 47-67 at p 52.

riposte to this: in late 1970s/early 1980s Northampton, Massachusetts, "no girl ever banged down my door and stymied my sexual expression. The straight gaybashers, however, did."[146]

So much for dismissing the negative; what are the positive ideas and strategies offered by radical feminism? I have already addressed the extent to which many of queer theory's claims are not in fact new and unique, but have long been central to radical feminist thought. It is crucial now to focus upon the differences, upon how radical feminists have taken those shared insights and developed them in rather different directions. In particular, one must ask just what radical feminism seeks to challenge and what strategies it offers in order to do this.

- **What is being challenged?**

Radical feminism offers a positive direction for political action. To challenge lesbian oppression, we must challenge the power structures which promote it: this begins with a recognition that power is not a diffuse, web-like thing but rather something of which too much is concentrated in the hands of certain groups: particularly middle- and upper-class, straight, white men. Without acknowledging this structural nature of power, we cannot effectively seek to transform it. To suggest that our own, smaller, hard-won power is somehow part of an ever-changing web is both to underestimate what needs to be changed and to dismiss too lightly what those of us outside the charmed circle have achieved by obtaining or holding on to any power at all.

A significant element of this is challenging heterosexuality more profoundly than queer theory has hitherto managed. The difference in radical feminist and queer approaches can be summarised thus:

> the queer version analyses heterosexuality as a problem for those who see themselves as 'queer' rather than an institution which oppresses women.[147]

However, it makes little sense to attempt to analyse or improve the position of

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[145] Walters, 'From Here to Queer', p 13.
[146] *Ibid*, p 16.
[147] Sheila Jeffreys, *Unpacking Queer Politics: A Lesbian Feminist Perspective*. Cambridge: Polity Press, 2002, p 27. The same point is made by Stevi Jackson: "while queer theorists seek to denaturalise heterosexuality ... they are relatively unconcerned about what goes on *within* heterosexual relations, with the everyday practices and institutional structures that sustain a heterosexual and gendered social order" ('Heterosexuality, Sexuality and Gender', p 39)

lesbians without considering the institutions of heterosexuality, since all women including lesbians have to exist within that institutional structure. Not only those nineteenth-century women who actually entered heterosexual marriages would have been aware of the doctrine of female sexual passivity which aimed to structure such relationships; on the contrary, women who explicitly rejected heterosexual relationships called in part upon that very doctrine to do so.[148] It is not only the heterosexual woman who is judged by male standards of sexual attractiveness in multiple areas of her daily life.[149] It is therefore difficult to understand the position of the lesbian without understanding the role of heterosexuality in shaping all women's experiences, a task for which queer theory, with its empty shell version of the institution of heterosexuality and its emphasis upon sexual activity as *per se* liberatory, is ill-equipped to address.

Only through this deeper engagement with the institution of heterosexuality can one make sense of the criminal law's approach to lesbian defendants. The "female husband" cases, past and present, were judged against an assumption of what a relationship should be: these women were punished because their relationships made sense within dominant ideologies despite (or even because of) the abuse and exploitation they were alleged to contain. Their sexual conduct, allegedly centered upon an imitation of penile penetration, could be recognised as sexual and thus potentially criminal precisely because it did emulate heterosexual intercourse. The criminal justice system identified the most potent threat to it in terms not of non-heterosexuality *per se*, but of the extent to which a relationship diverged in content from the heterosexual model: that is, relationships of equality, non-domination and a specifically female autonomy were most threatening, and thus most silenced. Such a distinction between different lesbian relationships makes little sense if we do not first consider the specific institutional structures of heterosexuality.

Radical feminism therefore rejects the notion that simply being non-heterosexual is enough to challenge patriarchal structures and ideologies. Instead, the actual content of one's sexuality is as important as its non-normativity: in the classic formulation, the personal is political. That means that a political claim for equality cannot be achieved in the context of the continuing sexualisation of inequality. In

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[148] See Chapter 5.

[149] For example, sexual harassment in the workplace; abuse in public places; exhortations to "make the most of herself" by putting on make-up and high heels from family and friends; the relative invisibility

Jeffreys' words, what is required is "a sexuality of equality".[150]

- **Strategies for change**

In making its challenge to male power and privilege, lesbian feminism also shows much greater scepticism than queer theory allows towards the forming of alliances, and above all the assumption that lesbians and gay men are natural allies. Adrienne Rich expressed her hope for a "move toward a dissociation of lesbian from male homosexual values and allegiances", emphasising lesbianism as "a profoundly *female* experience" rather than one common to "other sexually stigmatized existences".[151] Over two decades later, this difference of interests between lesbians and gay men has not disappeared: this is not to suggest that lesbians and gay men can have no shared interests or common ground, but that alliances should be entered into only selectively and with a great deal of care.[152] What the queer emphasis upon difference and sexual non-normativity has obscured is that gay men share in some patriarchal privileges just as they are denied others, and that male dominance can serve their interests even as it directly opposes those of lesbians.[153]

Indeed, women-only spaces have a particular power and significance:

> The woman-only meeting is a fundamental challenge to the structure of power. It is always the privilege of the master to enter the slave's hut. The slave who decides to exclude the master from her hut is declaring herself not a slave. The exclusion of men from the meeting not only deprives them of certain benefits ... it is a controlling of access, hence an assumption of power.[154]

What, though, is to be achieved in such women-only spaces? How can effective challenges to heteropatriarchy be made? Lesbian feminism rejects the notion that

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or vilification of women who are not considered conventionally sexually attractive in the media.

[150] Jeffreys, *Unpacking Queer Politics*, p 28.

[151] Rich, 'Compulsory Heterosexuality', p 22.

[152] For a detailed discussion of the differences and differing interests between lesbians and gay men, see Jeffreys, *Unpacking Queer Politics*.

[153] To take just a few examples: male economic power underpinned the notion of the "pink pound", which saw a proliferation of marketing to – and visibility for - gay men, while middle-class gay men's concerns over financial issues such as inheritance taxes appears to have been a significant factor in the popularity of civil partnerships - and perhaps explain the much lower rate of civil partnerships between women (see for example Lucy Ward, 'More than 15,000 civil partnerships prove popularity of legislation', *The Guardian*, 5 December 2006, http://www.guardian.co.uk/gayrights/story/0,,1964055,00.html, accessed 14 February 2007); male power underlies the apparently transgressive nature of drag, as discussed above; gay men's assertions of their right to "cruise" ignore the ways in which all women including lesbians have their night-time movements restricted by the threat of sexual violence.

performing gender differently is the (only) way forward. Discourses cannot be the only ground of challenge: we must go further and look at why certain discourses are able to produce themselves as dominant in the first place. It is not enough to say that the criminal justice system's discourses have created the female subject as sexually passive, heterosexual and submissive to male authority. The point is that those discourses took those forms because white, higher-class men were the people empowered to create the discourse of the ruling classes. The material fact that until the twentieth century judges, magistrates, juries, lawyers, police officers and politicians were all male; that in the twenty-first century, almost all those institutions remain male-dominated; tell us something essential about the discourses which they are able and liable to produce. One cannot successfully challenge patriarchal discourses without challenging patriarchy itself. "If an analysis of sexuality is going to take on board 'the distribution of wealth, resources and power' it will have to 'address more than discourse'".[155]

However, such challenges to institutions will not occur only, or necessarily primarily, in the traditional public domain of political action.

> Lesbians offer a model in their modes of sexual and emotional relating of the egalitarian intimate relations upon which transformation of the public world can be based.[156]

This sexuality of equality demonstrates a way out of the binaries of male domination and female submission which queer politics cannot. While queer requires a proliferation of genders and sexual practices, which amounts to a reprioritisation of gender as the basis for social relations rather than a move for its elimination, radical feminism recognises that gender itself relies upon domination and submission. It cannot therefore be challenged by playing with it or doing it differently, but rather by creating a new way of being which emphasises equality and rejects dominance and submission as the basis for our relations whether public or private.

Conclusion

This chapter has brought us to the current law, and to the new legal position which

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[154] Frye, *The Politics of Reality*, p 104.
[155] Janice McLaughlin, 'The Return of the Material: Cycles of Theoretical Fashion in Lesbian, Gay and Queer Studies' in Richardson et al, *Intersections*, pp 59-77 at p 65, quoting Stevi Jackson (1995).
[156] Jeffreys, *Unpacking Queer Politics*, p 156.

lesbians occupy under it. Sexual activity between women is now subject to the same laws as sex between men and, for the most part, as between women and men. The legislation which brought this about is more fundamentally influenced by feminist thought than any previous sexual offences legislation has been.

However, this is unfortunately not the happy ending which one might have hoped for. The Act's foundations are liberal, and thus it is liberal feminist and liberal lesbian and gay rights arguments which have had the greatest impact upon it. In consequence, formal equality has been largely if not entirely achieved, but will not necessarily translate into substantive equality. Of general concern is the failure to take on board the extensive feminist and other critiques of this form of liberalism; also worrying is the government's failure to coherently explain their departures from it.

A particular concern is the failure to account for structural power differences. Feminist understandings of sexual violence against women and of sexual abuse of children highlight the importance of power relations. They are also key to understanding the different positions of lesbians, gay men. and heterosexuals. However, the Act and the government papers leading up to it showed little understanding of such relations and have therefore left them largely unaddressed, not challenging the assumption that equal legal provisions will lead to equality before the criminal law.

For lesbians, the effect of such a reliance upon formal equality is that we remain invisible. The silencing this time does not take the form of denying lesbian existence altogether; after all, as the last few chapters have shown, that is no longer a realistic option. Instead, lesbians are subsumed within the formulation "lesbian and gay" which assumes that lesbian women have the same interests as gay men. In consequence, issues of fundamental importance to lesbians but not gay men, such as the formulation of penile penetration as "real sex" within the Act, are ignored.

The way forward will not be easy. It is more difficult to construct a campaign against this kind of subtle devaluation of female sexuality than against overt discrimination. In particular, it is obvious that liberal approaches have reached their natural conclusion in this area and offer little scope for significant future changes. What, then, should be the way forward? The two major alternatives currently available are radical feminism and queer theory.

However, queer theory has significant shortcomings as a way of challenging the law's treatment of female sexuality. These include the disproportionate emphasis

upon sexual activity as the main locus of challenge to heteronormativity, an approach which makes it more difficult to adequately problematise the Act's failure to locate sexual offending within wider societal power structures. The current invisibility of lesbians within the Act is also unlikely to be best challenged by a movement which rejects the very term "lesbian" and emphasises exactly those alliances with gay men and others which have led to lesbians occupying a minority position within a male-dominated movement.

I would therefore suggest that radical feminism offers a more hopeful way forward. It offers a challenge to heteronormativity which goes beyond critiquing what the law says about sexual acts and addresses the societal relations of dominance and submission which create the sex roles underscoring them. It suggests that the way forward is to reject rather than to proliferate genders: that we should seek full personhood without limitations rather than paint ourselves into ever smaller corners based upon narrower and narrower forms of sexual practice. It rejects the valuation of masculinity in favour of an eroticisation of equality in which sexual practice is not separated from but integral to a more equal society outside the bedroom.

Chapter 9

Conclusion

This thesis has used a series of entry points to examine the ways in which the criminal justice system has regulated lesbianism. The starting point was a consideration of the absence of any explicit prohibition on lesbianism in historical or contemporary English law. Chapter 3 established that this silence is not accidental, nor a sign of tolerance as is popularly assumed: rather, it is the consequence of a policy of deliberate silencing. In other words, judges and parliamentarians preferred to regulate lesbianism through keeping it a secret rather than through overt prohibition. When Parliament debated the criminalisation of "gross indecency between women" in 1921, there was no dissent from the idea that silencing had been "the method that has been adopted in England for many hundred years".[1]

Lesbianism has been constructed as legally impossible precisely because it has been frightening to the male ruling class, and thus it enjoys a ghost status in the law: a largely invisible but menacing presence. Such a menace had to be addressed, and so suspect relationships between women have been subject to sanction through other legal means: for example, the Statute of Artificers was used to break up all-female households. Extra-legal controls were even more significant, and included social, economic and religious regulation (to take just three examples, consider the vicious attacks upon spinsters in the eighteenth and early twentieth centuries; the collapse of Marianne Woods and Jane Pirie's school following rumours about their relationship; and the regulation of sexual morality by the ecclesiastical courts, respectively). Such controls were required because lesbianism was viewed as a potent menace to society and even to civilisation. It threatened some of the most cherished patriarchal notions of womanhood, in particular that women's natural place was as subordinates within the patriarchal family and that their primary function was maternal.

Breaks in the silence

Silencing in the criminal justice system, then, was not an isolated phenomenon. Nor was it absolute, and the nuances of silencing are best explored by examination of the cracks in the policy. The lesbian owes her status as a juridical phantasm not only to

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[1] Lieutenant-Colonel Moore-Brabazon, Hansard House of Commons Debates, Vol 145(8), Columns

her ambivalent invisibility but also to her occasional ghostly presence: albeit without explicit acknowledgement, she appears from time to time in the criminal courts. Analysis of prosecutions from the seventeenth to the nineteenth centuries demonstrates how some women did in fact feel the force of the criminal law because of their relationships with other women, highlighting that silencing was not absolute. In particular, we can see that while the policy focused upon ensuring the "innocence" (and hence marriageability) of middle- and upper-class Englishwomen, lesbianism was identified with the working classes from whom defendant "female husbands" were almost invariably drawn (as well as with "foreign" women such as the half-Indian accuser in the Woods and Pirie case).

The first and most obvious point as to why such women were prosecuted when middle-class women were not is that working-class people have been and are overwhelmingly the subjects of criminal regulation. However, while it has a great deal of truth, such an explanation is overly simplistic. It does not fully account for why no middle-class women were prosecuted before the twentieth century (and few thereafter) despite some notorious cases such as that of the Ladies of Llangollen who eloped together to Wales. Instead, a more sophisticated analysis is required: namely that the choice of working-class defendants was central to the casting of lesbianism as "other".

We have seen that lesbianism was constructed as a specifically working-class deviancy not only through prosecutions of "female husbands" but also through the association of lesbian knowledge and behaviour with female servants. Similar associations have been made with racially "other" women, from the imagined masturbating nuns in foreign convents to reports of foreign women with enlarged clitorises; from the half-Indian granddaughter of Lady Cumming-Gordon to the black American prisoners cited by Havelock Ellis. To allow fleeting glimpses of lesbianism, always associated with those outside white middle-class norms, was to admit its theoretical possibility while firmly denying its relevance to the world in which the makers of law lived. Silencing was thus complemented by the displacement of lesbian sexual activity onto women outside the lawmakers' immediate concern.

Consequently, the policy could be pursued in criminal prosecutions even as it appeared to be breached. Another important way of achieving this in the seventeenth

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1802-1803.

and eighteenth centuries was through the attribution of financial motives to "female husbands". Despite the apparent poverty of some of the "wives" in these cases, their "husbands" were charged with fraud, namely obtaining ownership of the wife's possessions (be they as humble as the clothes she wore) upon marriage. These cases thus became unthreatening, recast as tales of gullible women and cynical deceivers engaged in comedic courtships doomed to end in a farcical wedding night (suspicious either for its failure or for its unfeasible success). In consequence, these prosecutions complemented rather than subverted a policy of rendering lesbianism invisible, both by denigrating women's relationships and by reaffirming sexuality as something necessarily focused upon the phallus.

Consistency and change

The extent to which even an enduring policy such as the legal silencing of lesbianism could vary considerably in its implementation according to the wider legal and social context is apparent from the drastic changes which occurred over the following century. The early nineteenth century saw developments which effectively eliminated female husband prosecutions for over eighty years. Particularly important were changes in the criminal justice system, which began to take on its more structured and formalised contemporary form. The establishment of police forces meant that the power to make prosecution decisions moved increasingly from individuals to the state: thus the Chapman case was brought by a police inspector, against the victim's wishes. Such proceedings can be contrasted with eighteenth-century cases such as that of Sarah Paul: when her "wife" and prosecutor Mary Parlour refused to continue proceedings, the case collapsed in consequence. From the Chapman case onwards, the co-operation of the "wife" would no longer be required.

The ideological background had also changed: dominant interpretations of women's biology and sexuality virtually reversed themselves between the mid-eighteenth and mid-nineteenth centuries. While the eighteenth-century woman shared a man's physiology, albeit reversed and internalised due to her lesser vital heat, and also shared his lusty appetites, the nineteenth-century lady was a very different creature. She was fundamentally physiologically distinct from her male counterpart, with a complicated and delicate sexual biology closely connected to her equally delicate mental balance. Such an intellectually and morally weak creature bore little relation to her actively desiring predecessors, since her moral status depended upon

sexual innocence while her physical and emotional make-up reduced her to a sexually passive, even desireless state.

Thus the regulation of women's sexuality now focused not upon constraining a threatening female voracity but upon preserving female purity and upholding the mythology of female sexual passivity. Silencing had a new importance, because it directly preserved that all-important innocence and avoided mention of forms of female sexuality which challenged notions of passivity and submission. Helpfully, the practical logic of silencing made even more sense if women were innocent, passive and desireless: they would presumably not discover such sexual secrets for themselves, and it was as feasible as it was desirable to keep knowledge of lesbianism from them.

At the same time, medicine and in particular psychiatry became an increasingly important means of regulation, alongside the social, economic and religious constraints already identified. An examination of Isaac Baker Brown's clitoridectomy cases is instructive both in highlighting the ways in which women's mental and sexual health were seen as intimately linked, and in demonstrating how sexual activity between women became merged with that other supremely autonomous form of sexuality, masturbation. The primary similarity between the woman who masturbated in her solitary bedroom and the one who did so in the company of a maidservant was not that they were performing the same physical actions but that they were engaged in sexual activity which contravened the doctrine of female sexual passivity or disinterest and, above all, which excluded male involvement. Sexual activity between men may have needed firm, even brutal, criminal control for contravening heteropatriarchal expectations but at least it involved male sexual agency and the penis. By contrast, sexual activity between women not only disrupted heterosexual norms but also affronted cherished myths about femininity: no wonder it was deemed too dangerous to speak of in open court.

Challenges to silencing

Nonetheless, however much the criminal justice system may have wished otherwise, women have never been passive automatons who simply accepted and conformed to dominant constructions of femininity. Feminist challenges were particularly strong in the decades either side of the turn of the twentieth century, and the "new woman" was a highly visible challenge to patriarchal ideologies of passive, submissive

womanhood. At the same time, she challenged the sexual double standard which saw society turn a blind eye to men's sexual infidelities and even sexual violence. In consequence, feminists campaigned for the series of new laws providing protection from sexual violence which continue to form the basis of sexual offences law today.

While the campaigners' concern that men be responsible for, and condemned for abuse of, their sexuality was a direct challenge to the sexual double standard, the fact that men were the main perpetrators of sexual violence nonetheless fitted dominant assumptions about female desirelessness. Indeed, that ideology has so coloured our contemporary view of the Victorian that the conviction of Louise Mourez for indecent assault is assumed to be the work of a maverick judge while an *obiter* remark in a 1934 case is accepted as authoritative.[2] However, I have demonstrated that in fact, Lopes's judgement was seen by his contemporaries as legally unremarkable. Of course, it helped that Mourez was engaged in facilitating heterosexual male activity rather than seeking her own sexual gratification.

At the same time as the new woman was challenging patriarchal legal and social norms, the new science of sexology was constructing the masculine "born lesbian" whose legal visibility peaked in 1928 and 1929 with the *Well of Loneliness* and Colonel Barker cases. Radclyffe Hall's novel was publicly attacked for its lesbian theme, and court proceedings were subsequently brought alleging obscenity. The consequence was that as the trial was reported, the general public became aware both of the existence of lesbianism and of sexological theories about it, notably those of Henry Havelock Ellis. It is therefore unsurprising that undertones of "perversion" in Barker's marriage to Elfrida Haward were readily apparent to both the court and the wider public. Had lesbianism moved from its spectral shadows to the legal limelight?

Even as these cases proceeded, it became apparent that any such visibility was being firmly resisted. The whole rationale of the *Well of Loneliness* case had been to obscure lesbianism; it is unsurprising, then, that despite the new-found awareness of his audience, the judge in the Barker case was determined to keep the sexual elements of the case literally silent. Indeed, the silencing approach was fought out in his courtroom: the prosecutor, scrupulously faithful to the policy, carefully said nothing about the nature of the relationship between the couple but rather identified their misuse of a church as the aggravating feature. The judge, Sir Ernest Wild, had already

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[2] *R v Hare* [1934] 1 KB 354

shown that his loyalty was not absolute when he had argued in favour of an offence of gross indecency between women in 1921. However, he now acted firmly in accordance with its traditions as he combined his own prurient interest in the details of the relationship with firm condemnation of prurient curiosity in (non-elite) others. Only defence counsel appeared eager to seize upon the apparent opportunity for openness and sought for oral evidence to be given in open court. The way in which his apparent victory (Haward was called as a witness) was in fact a defeat (she spoke none of the disputed evidence aloud) reflects the conclusion of these moments of visibility: they did not last, but quickly ended in renewed silence in the criminal courts.

Silencing, then, proved tenacious but we can see that it was under assault from three sides. First, sexologists might have written for a traditional elite male audience, particularly lawyers and doctors, but their work was seized upon by the very lesbians and others it described: the growing numbers of case studies available to the authors is one indicator of this. Second, women themselves confronted the myths around sexuality: while assumptions about male sexual "needs" were challenged by campaigns to protect girls and women from assault and exploitation, women's sexuality was discussed in work ranging from the marriage manuals of Marie Stopes and others to the lesbian novel *The Well of Loneliness*. Third, the consensus among legislators and the criminal justice professions that silencing was the appropriate way to control lesbianism was showing signs of strain.

Nonetheless, the policy was not shattered by the events of the 1920s. Parliament and the courts rallied to it once more, and it would not be until the 1950s that a different approach would begin to emerge. There are a variety of reasons for this, not least that sexology was not inevitably inimical to silencing. Both approaches located lesbianism among the criminal classes and the racially other; both saw it as a topic able to be discussed among the educated, professional male middle classes; and many sexologists, like their criminal justice counterparts, portrayed "normal" women as heterosexual, sexually submissive and fundamentally maternal, with the congenital invert as a very rare anomaly.

The evolution of silencing

The second half of the twentieth century, however, saw the emergence of a new approach. Its seed can be seen in the Wolfenden Report, its fruition in the process of

passing the Sexual Offences Act 2003. As increasing numbers of women publicly identified themselves as lesbians, pretending that "nice" women didn't do that was no longer an option. Instead, the lesbian has been recast in the discourse of the criminal justice system as a pale version of the gay male. Such an approach is made possible by myths around women's sexuality: the ideology of female sexual passivity has not yet disappeared. While the view that women know nothing about their own bodies and lack sexual agency may seem out-dated, the development of silencing in its current form – the disappearance of lesbians behind more visible gay men – is tied firmly into notions that men have *greater* sexual knowledge and agency (for better or worse: gay men, but not heterosexual ones, are thereby assumed to need greater legal control). Such a view is apparent not only in parliamentary debates, but also among those theorists who call upon lesbians to be more like gay men in order to achieve visibility or liberation.

When the Wolfenden Report of 1957 recommended the decriminalisation of male homosexuality, it gave only one mention to lesbians, to suggest that they were less libidinous and less of a public nuisance than men who engaged in sex with each other. Evidence heard by the Committee on issues such as the extent of lesbianism and the criticisms by men of a law which criminalised their same-sex activities but not those of women was not referred to . This omission can of course be explained in part by the fact that absent a legal prohibition, there was no need for legal reform in relation to women; but one cannot disregard either the history of silencing which preceded the Report or the subtle changes in policy which succeeded it.

Sexual activity between women remained off the radar of those engaged in reforming the criminal law except as a sort of afterthought when comparing the legal position of sex between men with that of sex between men and women. Some of those making the comparison even missed the crucial point that there was an age of consent for lesbianism, thereby suggesting that it was outside the criminal realm altogether. Such confusion has persisted into the early twenty-first century.

By contrast, those administering criminal justice would continue to see occasional cases brought under the indecent assault laws which, *inter alia*, set sixteen as the age at which a woman could legally consent to sexual activity with another woman (or man). The origins of those laws in nineteenth-century feminist campaigns were almost forgotten, and the problematic use of sexual offences law to discipline women's behaviour while failing to successfully sanction men's has been well-documented by a

number of feminist critics. It is therefore unsurprising that the ways in which women have been prosecuted and punished for their sexual activity with other women has proven problematic.

The connections between judicial attitudes to rape and judicial treatment of lesbians were made apparent in the Jennifer Saunders case. On the one hand, the judge recognised the greater visibility of lesbianism (although it was clear he regarded this as a bad thing). On the other, he drew upon older discourses around rape as damaging primarily to women's sexual reputation and therefore their position in the marriage market. Thus the alleged deception in the Saunders case was argued to be as bad as rape for the embarrassment it caused to the victims.

The Saunders case really hovered on the cusp of old and new discourses. On the one hand, it contained many of the themes of the old female husband cases, including an apparent conformity to traditional norms of male sexual dominance and female submission, not least through the presence of an imitation penis; the emphasis upon the deception of the "women", thereby exonerating them from colluding in the relationship; and the reporting of the case as something bizarre and more or less unique. On the other, the sexual elements of the case were no longer alluded to but rather fully described; indeed, the offence charged was not financial but sexual (indecent assault); and the judge made explicit reference to "openness" about sex between women. The social visibility of lesbianism had therefore made itself felt in the case although neither the trial judge nor the Court of Appeal seemed comfortable in addressing this, and the trial judge in particular made it clear that he saw publicity as a very bad thing.

A decade later, however, the prosecution of Kelly Trueman, who conducted a relationship with a 12 year old girl while disguised as a teenage boy, showed clear development from the old policy of silencing lesbianism *per se* to the newer policy of obscuring it behind male homosexuality. Thus Trueman's actions were identified as paedophilic. Such an overtly ungendered approach in fact draws upon particular cultural notions of the paedophile, and in consequence links lesbians to one of the most vicious, false stereotypes of male homosexuality. A similar theme emerged from the sentencing of Donna Allen for indecent assault arising out of her relationship with a 13-year-old girl: the Court of Appeal used the language of "malign influence" – corruption – much as it did for cases of male homosexual relationships. By contrast,

the leading case of *Taylor*[3] described similar relationships between similarly aged men and young girls in terms of "virtuous friendship".

Silencing today: the Sexual Offences Act 2003

Since then, the criminal law has moved on yet again with the passing of the Sexual Offences Act 2003. Based upon similar classic liberal principles to the Wolfenden Report, this Act took as its starting point the notion that the law should not interfere in "the personal, private relationships of consenting adults."[4]. It further emphasised the principle of gender-neutrality, so that offences would not distinguish according to the sex of the parties involved. In theory, then, this ushered in a new era of equality between men and women, and between heterosexual and same-sex relationships. Unfortunately, while much of the most blatant discrimination has gone, neither the Act nor the sentencing cases to date inspire confidence that perfect equality has replaced it.

First, the Act places great importance upon penetration, and creates a hierarchy with penile penetration at the top as "real" sex, non-penile penetration next, and non-penetrative sexual activity at the bottom (indeed, for some offences such as bestiality, non-penetrative activity does not count at all). The sentencing guidelines reflect this approach, with huge divergence between the recommended sentences for penetrative and non-penetrative genital touching, based on assumptions of a male perpetrator: once again, the effects of lesbian invisibility are far from benign.

Second, while its own approach is gender-neutral, the Act gives enormous discretion to prosecution agencies, who might not invariably share those values (again, there are extensive feminist critiques of prosecuting decisions in sexual offences cases). Thus the offence of sexual activity between minors theoretically applies to any sexual activity between under-sixteens. However, it has never been the legislators' intention that every such young person be prosecuted: instead, the decision is abdicated the police and CPS.

Third, language which may appear gender-neutral but which in reality has specific discriminatory overtones appears in the guidance surrounding the Act. Crown Prosecution Service guidelines on prosecuting sexual activity between minors refer to

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[3] (1977) 64 Cr App R 182.

[4] David Blunkett, Foreword to *Protecting the Public*, HMSO, 2003, p 5.

"corruption", which has long functioned as a code-word for same-sex relationships.[5] The reference in the sentencing guidance to "humiliation", "shame" and "embarrassment"[6] as aggravating factors recalls the emphasis upon the theme of lesbianism as social embarrassment which we have seen in the Saunders and Trueman cases. Will the courts use these opportunities to import gender discrimination into their sentencing practice? In *Fairhurst*,[7] the Court of Appeal was happy to approve the pre-2003 case of *Bromiley*[8] which suggested that the sentence of a care worker who abused boys with learning disabilities could permissibly be lower because the offender was a woman, suggesting that the courts are indeed reluctant to move to a truly gender-neutral approach.

The current law, then, reflects a change in policy from the silencing of lesbians altogether to silencing them through treating them as a less sexual, less socially visible and less problematic version of gay men. The apparent gender-neutrality of the Sexual Offences Act 2003 is far from certain to provide benefits for lesbian defendants. The limitations of formal equality are thereby clearly indicated: without significant change throughout criminal justice agencies and wider society, new laws alone cannot remove discrimination. In particular, formal equality does not address the subtler forms of discrimination to which lesbian defendants are subject.

Future directions

In order to decide how to further our interests in the future, it is necessary to consider the theoretical basis of any political action. In this thesis, two particular approaches have been considered: radical feminism and the strand of queer theory based upon the work of Judith Butler. Historical prosecutions of "female husbands" have particular resonance with Butler's theorising, since they recall the performing of gender differently which she advocates as the best technique for subverting gender norms. Such performances, she argues, "*implicitly [reveal] the imitative structure of gender itself – as well as its contingency.*"[9] However, examination of the cases establishes that they were made public precisely as a way of reconfirming gender norms. Do they

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[5] 'Offences Against Children Under 16: Code for Crown Prosecutors – Adult/child defendants' in The Crown Prosecution Service, 'Legal Guidance: Sexual Offences Act 2003', http://www.cps.gov.uk/legal/section7/sexoffencesact2003.html#50, accessed 9 January 2006.

[6] *Ibid*, p 9.

[7] 2007 WL 2896 (CA).

[8] [2001] 1 Cr App R (S) 255.

[9] Butler, *Gender Trouble*, pp 174-175; emphasis hers.

then serve as a refutation of the effectiveness of such performances in undermining the binary gender system?

One possible answer is that they do not since they were not intended to subvert but to conform to gender norms: they were deadly serious masquerades rather than parodic performances. However, not all of the cases will support this interpretation. Mary Parlour and Sarah Paul reaffirmed their commitment to their relationship even after its discovery, while Mary Hamilton's behaviour after her conviction showed exactly that rebellious, challenging and subversive attitude which is now claimed as queer. Colonel Barker surely entered the realms of parody (albeit unintentionally) with her excessive masculinity: a fabricated military career complete with DSO, boxing lessons, and fights with communists. Nonetheless, their public prosecution was seen as a way of supporting the status quo rather than undermining it.

Alternatively, one can look at Butler's own uncertainties over when parodic performance will be subversive. In *Bodies That Matter*, she returned to her example of drag and recognised that such parody of gender norms could reconsolidate rather than displace them. Unfortunately, she offered no clear test of when one result rather than the other will be obtained; Moya Lloyd's best suggestion is that one can make some calculations based upon analysis of past situations, although she acknowledges that these may be inaccurate. Also troubling, however, is that such calculations appear to be placed in the hands of queer theoreticians: the inaccessibility of their work risks creating new power structures within the lesbian and queer communities, with academic "critic philosophers" at the top. Attempting such calculations in the case of female husbands, however, could only suggest that lesbian parody of heterosexuality is unlikely to result in successful subversion of gender norms within the criminal justice system. It operates with the explicit aim of enforcing dominant social norms and has the state power to impose these, making attempts at parody in this domain particularly vulnerable to a re-reading which works to reinforce rather than subvert dominant notions of gender.

Queer theory, then, faces severe difficulties in implementing its approach in the courts. However, there are other weaknesses which are also of particular importance to lesbian defendants. Above all, by placing diverse groups under a single umbrella and emphasising the importance of alliance rather than strategic separation, it reinforces the invisibility of lesbians behind gay men which is already the primary tool of the criminal justice system in policing lesbianism. Too often, queer has

emphasised gay men as more sexual, more radical, more challenging than lesbians. This approach is little different to that of Wolfenden, but the effects are arguably more damaging: lesbians are now asked to collude in their own denigration. They are asked to accept that sexual practices form the main sphere of challenge to existing gender structures, and that the greatest challenge is posed by reproducing relationships of dominance and submission, centred around the phallus (through either the dildo or sexual relations with men).

Such an approach is antithetical to radical feminism, which denies that relationships should or must be based upon the eroticisation of inequality. Instead, it argues that women's oppression is better challenged by striking at its root: power structures founded upon dominance and submission. The Foucauldian formulation of power as a web or network is rejected as inadequate to describe the ways in which power inheres within certain groups, not as a level, ever-changing thing but rather a structure. Radical feminists do not accept that we are constrained by discourses, able to do no more than accept or resist them, but instead emphasise the importance of identifying who has the power to authorise those discourses, of challenging oppressive structures, and of a transformative politics which seeks to build new structures based upon equality.

Attention is therefore paid to dominant ideologies of heterosexuality, and the way in which these oppress women both within and outside individual heterosexual relationships. Lesbian oppression is not separate from the oppression of all women; heterosexuality is a way of controlling women both by keeping them within patriarchal power structures and by punishing them for seeking to move outside. Female autonomy, then, is what must be controlled and the behaviour of the criminal justice system makes more sense when viewed in this light. The women who were punished by the courts were those who sought to escape patriarchal controls: cross-dressing women who stayed within patriarchal structures such as the military, as well as lesbian women who otherwise accepted heteropatriarchal norms, did not need direct public sanction but were better ignored. Those who were prosecuted had all sought to assume patriarchal power for themselves, albeit through a slavish recreation of heterosexuality which itself left them vulnerable to portrayal as inadequate, laughable and inferior imitations.

By contrast, the relationships which have been most silenced – and which we can therefore suspect have been most threatening – are those which have rejected

heteropatriarchal models in favour of seeking a genuine egalitarianism. Here we find a clue as to the most effective way forward: for a truly revolutionary challenge to lesbian oppression within the criminal justice system (and elsewhere) we must confront heteropatriarchy's emphasis upon dominance, submission, and an uncritical admiration of masculinity and the phallus. We must continue to do the work which feminist lawyers have always had to do, looking beyond apparent gender neutrality in the law to the real effects of its provisions upon real women. The notion of gender itself as the crucial organising principle of our society (whether the law recognises two or two hundred different genders) must be questioned. Analysis of the criminal justice system's regulation of lesbianism, then, may offer lessons not only in this area but in lesbian politics more generally.

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