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**UNIVERSITY OF SOUTHAMPTON**

FACULTY OF SOCIAL AND HUMAN SCIENCES

**The Discursive Production of Homosexual Regulation**

by

**Graham Neil Baxendale**

Thesis for the degree of Doctor of Philosophy

October 2013



UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF SOCIAL AND HUMAN SCIENCES

Doctor of Philosophy

THE DISCURSIVE PRODUCTION OF HOMOSEXUAL REGULATION

By Graham Neil Baxendale

This thesis explores the pivotal place of the 1885 Labouchère Amendment and the 1967 Sexual Offences Act in the discourse of homosexual regulation presented by 20th century homophile histories. These twin events of ‘criminalisation’ and ‘decriminalisation’ are revisited to explore how and why they occurred and how they came to assume such a central position in both academic and popular understanding. The thesis draws on two streams of evidence. The literature on homosexual regulation is examined to establish the claims that are made about Labouchère Amendment and the Sexual Offences Act and the place that they are accorded, and the relationship that is established between them, within widely accepted homophile histories of the UK. Alongside this, primary sources – in the form of parliamentary debates, government papers, newspaper archives, and biographies – are interrogated to unpick the motivations and intentions of those involved in these pieces of legislation and to position them within a wider historical context.

The thesis argues that this literature on homosexual regulation contributed to and institutionalised a homophile discourse geared especially towards establishing a history of what specific events might mean for political imperatives of the time and future prospects of homosexual communities. I will suggest that this led to uncritical acceptance of particular interpretations of the Labouchère Amendment and the Sexual Offences Act, which were reproduced over time and thus established as ‘truths’ within academia, the gay community and the wider public. Whilst some authors have recently subsequently questioned the importance of the Labouchère Amendment in the process of criminalisation (e.g. Cocks, 2003:17) these accounts have by-passed this event altogether, rather than offering an alternative account for its passage. Consequently, they have not supplanted earlier public, academic and political understandings of Labouchère. Specifically they have not explored how earlier understandings informed the debate about decriminalisation which, as this thesis will show, was premised on these historical interpretations. More broadly, the thesis argues that the over-concentration and mistaken interpretation of the Labouchère Amendment, which has misinformed understandings of the SOA (1967), has prevented the development of a more thorough, genealogical analysis of simultaneous sexual regulation more generally. In turn, developing a combined analysis of heterosexual as well as homosexual regulation contributes to the critique of existing interpretations which uncritically present certain events as homophobic rather than part of a more encompassing punitive heteronormativity.

Part One critiques homosexual regulation’s historiography, before exploring theoretical and methodological issues raised in my thesis. Part Two then questions the Labouchère Amendment’s status as a fundamental adjustment in homosexual regulation making private homosexual acts short of sodomy illegal for the first time (Weeks, 1977). I provide an alternative history showing all homosexual acts were previously punishable and show that Labouchère’s Amendment was not homophobic but a measure for the protection of male youths from sexual exploitation and as such part in keeping with the wider punitive heteronormativity. I achieve this through analysing the primary sources on Labouchère’s Amendment from that period alongside the genealogical contextualization provided by contemporaneous heterosexual regulation. This establishes the foundations for Part 3 to repeat this methodology in analysing the decriminalisation process, this questions the centrality ascribed to the 1957 Wolfenden Report. I establish that this concentration ignores that decriminalisation was a highly politicised and negotiated process reliant upon the same social and political transformations that also re-ordered heterosexual regulation. This radically changes the interpretation of the how and why decriminalisation occurred and what had been possible.



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## **Academic Thesis: Declaration Of Authorship**

I, Graham Neil Baxendale declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

The Discursive Production of Homosexual Regulation.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission.

Signed:

Date: 23.10.12



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## **Part One**



## **Chapter One**

### **The Problematisation of Homosexual Regulation**



## 1.1 Introduction

This thesis examines why the two events identified as pivotal in discourses on the history of homosexual regulation, the 1885 Labouchère Amendment and the Sexual Offences Act (1967), occurred, how they were discursively (re)produced and the relationship between the two.

Over the last three decades sexuality has moved from the margins of sociological concern to become an accepted sub-discipline for research. Homosexuality particularly interested a new breed of scholars who became determined to identify the roots of homosexual existence and regulation. The focus of early British works was the emergence of homosexuality as a category and the (supposed) criminalisation of male homosexual acts in the 19<sup>th</sup> century (see for example: McIntosh, 1968; Smith, 1976; Weeks, 1977; West, 1968 & 1977).

The way in which homosexual history was constructed had a profound effect on how the “present tasks and future prospects” (White, 1999: 486) for homosexual communities were defined and limited during the process of decriminalisation. The uncritical acceptance of these histories by subsequent authors effectively established new homophile ‘truths’ supplanting previously accepted discourses of homosexuality and sexual regulation within academia, the gay community and the wider public. These discourses have proved resistant to revision; although some have questioned Labouchère’s innovativeness they have failed to significantly supplant homophile interpretations. Additionally, having discounted it as historically significant in changing the regulation of homosexuality, this heterodoxy bypasses it without accounting for it. This doesn’t explain why it was passed or explain its social and historical impact which must also be addressed, particularly in relation to how these historical understandings informed decriminalisation. Therefore, these truths should now be examined when they are less invested in for current understandings of

homosexuals', radically improved, legal position. This allows a more critical and less invested examination and interpretation of this history.

Homophile historiography identifies a particular historical period from the late 19th to mid-20th century as key and focusses on the particular events of the Labouchère Amendment to the Criminal Law Amendment Act (1885), which criminalised gross indecency, and the Wolfenden enquiry into homosexual offences in 1954. This thesis challenges the explanations for Labouchère's Amendment and its legal changes, that informed decriminalisation, and questions the concentration on the Wolfenden enquiry rather than the political processes that resulted in the partial decriminalisation of homosexual sex by the Sexual Offences Act (SOA) in 1967.

Through a critical engagement with key sociological and historical texts, government records and parliamentary debates, this thesis challenges the homophile and heterodox histories and provides alternative explanations for these events.

The importance of the homophile historical explanation is that it contributed to a new 'homosexual' being discursively produced. Specifically, for decriminalisation to occur, the discursively produced homosexual as deviant predator and threat to children had to be transformed into a different 'homosexual'.

Through a Nietzschean treatment of the uses of history, developed with the methodological tools of Foucault and allied to critical discourse analysis, I analyse the historical narrative of homosexual regulation and examine its role in the wider discourse on homosexuality in Britain during decriminalisation. In doing so this thesis transforms the binary relationship between criminalisation and decriminalisation into a triangular one; with the present, the near past and the nineteenth century as its points, revealing tensions between each and an area of

knowledge created within. This will allow an analysis of how understandings of the past fed into the political struggles of homosexual decriminalisation.

The following diagrams illustrate how this relationship between these historical points has constructed knowledge. In figure 1 the homophile, or orthodox, approach is largely unidirectional and took as its three points a presentist gaze at decriminalization and an uncritical acceptance of that period's interpretation of the criminalization period. Figure 2 demonstrates that although the heterodox approach largely corrects the erroneous assumptions on the Labouchère Amendment, in discounting it as historically significant in changing the regulation of homosexuality, this discourse bypasses it without accounting for it. Heterodox authors seemingly analysed the Labouchère Amendment till the point of establishing that it didn't make sense and then have not sought to make sense of it. Rather, having established that it wasn't as legally innovative as previously thought, in specifically targeting homosexual activity for the first time, authors have seemingly gone in search of another "great becoming" (Foucault 1981a:68) when homosexuality was defined as a "species". Having found this in the 1861 Offences Against the Person Act their examination of the Labouchère Amendment has ended. This concentrates on the legal situation and ignores the fact that the Labouchère Amendment was not only the primary source of legal intervention but the primary source of public and political understandings of homosexuals and homosexual sex for the next century.

Figure 3 illustrates how this thesis examines the discursive space created through the interaction of the near and distant pasts. It examines how the understanding of the Labouchère Amendment's interpretation influenced the decriminalisation process, the histories that were created in this and the following period and critiques their interpretations. However, unlike the heterodoxy, I consequently analyse *why* Labouchère introduced his Amendment and the understandings of it in that period and shortly afterwards. An understanding of Labouchère's Amendment remains essential to comprehending a century of homosexual regulation and the deregulation

of the SOA. Additionally, the homophile concentration on the supposed iniquities of the 1885 Act has deflected attention away from why decriminalisation took ten years after Wolfenden's publication. My thesis will examine this and the discourses deployed within it, explaining decriminalisation as the result of a complex party political process.

Fig.1 Homophile/Orthodox

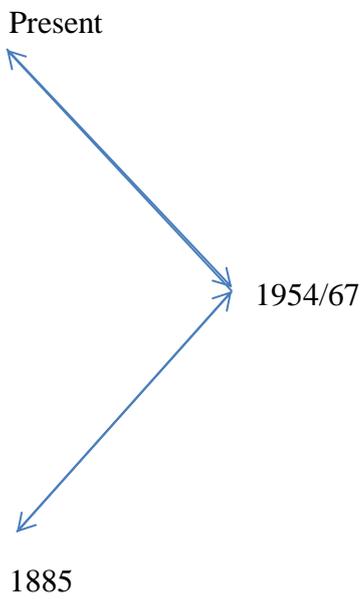


Fig.2 Heterodox

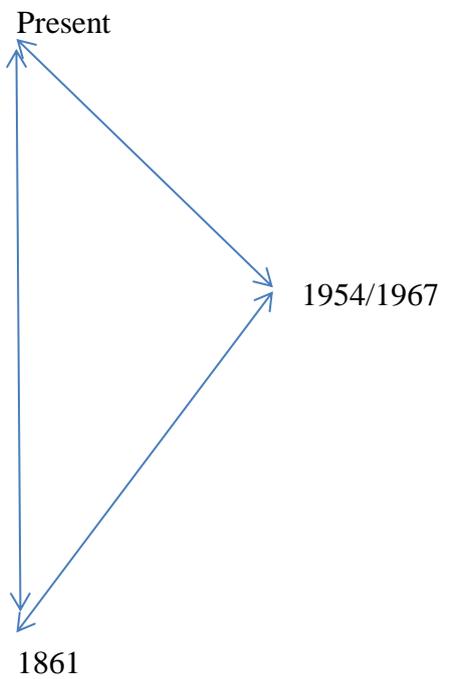
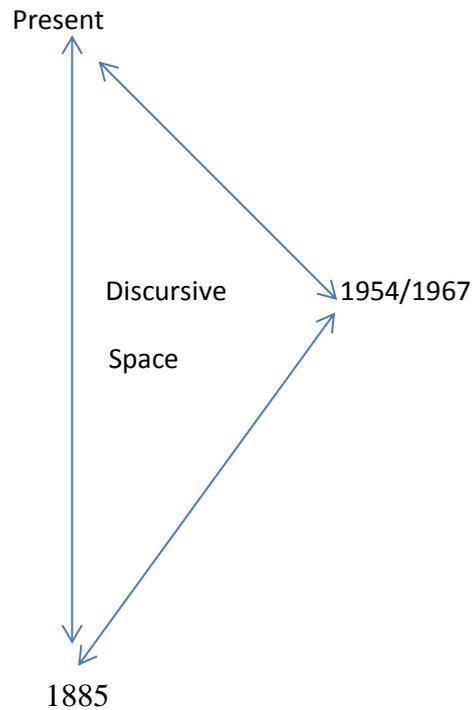


Fig.3 Thesis



It is important at the outset to state that I refer to discourse as “historically situated material practice that produces power relations” (Spargo, 1999: 73); to appreciate discourses their historical context must be understood. Thus I first analyse nineteenth-century homosexual regulation showing how the homophile history has misrepresented changes. I then examine sources from that period to show how and why the Labouchère Amendment occurred and its intent was not homophobic before examining its socio-political context, the genealogy, to better understand this archaeological event. Homosexual regulations were not isolated events but part of wider developments and disjunctions in sexual regulation. Only through an examination of contemporary changes in heterosexual regulation can this relative position of homosexuality be understood and thus the changes in homosexual regulation be understood more fully. By providing this genealogical analysis of the period I further show that Labouchère’s amendment in that era and that the treatment of heterosexuality shared significant similarities with the supposedly aberrant

regulation of homosexuality. Although there were substantial differences between heterosexual and homosexual regulation, there were significant similarities which provide insight into the punitive heteronormative framework and the relative place of homosexual regulation within this.

Part 3 will then provide a similar analysis of changing heterosexual regulation in the mid-twentieth century that will provide the genealogy for the following analysis of the decriminalisation of homosexuality in 1967. My examination of this process will show how the homophobic history of homosexual regulation was pivotal to political understandings of the change they were debating. Additionally I will show homosexual decriminalisation was a highly politically contingent process. This relied upon similar party political calculations for its reform to homosexual regulation reforms of that period. In most analyses there is an over-concentration on the Wolfenden Report to the near exclusion of political analysis. This relegates the decriminalisation process to the enactment of the Wolfenden proposals rather than a hard-fought political process.

## 1.2 Challenging the Discipline of Homosexual History

As previously argued, the homophile history of homosexual regulation has been resistant to falsification despite its obvious flaws. Those authors that acknowledge that Labouchère's Amendment did not innovatively criminalise all homosexual acts short of sodomy still do not critique the Amendment in the light of this. Additionally there has been insufficient exploration of the political process of decriminalisation which can explain how and why homosexuality was decriminalised. The potential knowledge of homosexual regulation has been discursively disciplined by an over-acceptance of what is known and unknown. Homosexuality now had a history that was established by Foucault in particular and others who came after him; but in producing it much of the history of homosexuality has been ossified in direct contradiction to Foucault's injunction to disrupt fixed or singular histories. This section will explore how I will challenge this disciplined knowledge. It outlines a critical approach to historical narrative and its effects before applying this to historical discourses on homosexual regulation. In these accounts, a historical narrative unproblematically links the Labouchère Amendment with the Wolfenden Committee and the SOA. The way in which this understanding became central to group identities and political campaigning can be explained as a presentist history but it lacks the rigour of historical investigation.

Foucault is relevant to this work as both the author of one of the most significant works on sexuality, particular concentrating on homosexuality, and the source of several methodological and theoretical constructions influential on research in the disciplines of gay and lesbian studies and the law. The relationship between Foucault and these academic disciplines is problematic however. Foucault was "seeking to uncover the deepest strata of Western culture" thereby "restoring to our silent and apparently immobile soil its rifts, its instability, its flaws" (Foucault, 1972: xxiv). Conversely the acceptance of Foucault's history of sexuality rather than producing a dynamic instability replaced one stable history with another.

Whatever research the academic may undertake “it is the protocols and procedures of the [academic] institution which will shape how the history will be written, and how the different historical events will be fitted together to form a coherent vision” (Danaher, 2000: 101). In this instance the disciplines of academic institutions and the institutions of the sexual minority groups have confined and directed the historical research undertaken. As Garland has argued: “The telling and retelling of the standard historical tale is a most effective way of persuading the discipline’s recruits that whatever else may be contested, this much at least can be taken for granted” (Garland, 2002: 9). For studies on homosexuality the narrative of ‘homosexual’ regulation, demonising Labouchère’s Amendment as an unprecedented extension of state intrusion and decriminalisation as a response to public pressure, became just such an unquestioned truth. Even when the facts were rejected the interpretation remained. Historical research in gay and lesbian studies thus contributed to a disciplining of potential knowledge and action by delineating what is known and unknown and therefore directions of legitimate or required research.

Through reviewing how historical narratives were constructed, and acknowledging them as “politically charged sites” (Bravmann, 1997: 30) for homosexual identities, this thesis advances alternative political and social understandings of homosexuality and sexual regulation. This is done by opening up the narrow grid of specification that homosexuality is primarily considered within. By examining the complex and multi-faceted systems that regulated heterosexuality in the nineteenth and twentieth centuries I show how these were side-lined in works on homosexuality. Discourses on deviant (hetero)sexualities in part 2 illustrate how the regulatory processes identified formed part of a punitive heteronormativity that punished sex not conforming to a married, monogamous procreative model. Once we take this into account then alternative interpretations of homosexual history are enabled.

Heteronormativity (Warner, 1991) identifies a normatively prescribed dominant form of acceptable gender and sexuality roles and performances. Thus it privileges

certain sexualities as ‘natural’, coherent and morally superior to others. Its privileges can take many forms:

“unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment. It consists less of norms that could be summarized as a body of doctrine than of a sense of rightness produced in contradictory manifestations-often unconscious, immanent to practice or to institutions” (Berlant & Warner, 1998:548).

I examine this primarily through its enactment through institutions and the power/knowledge they produce. This thesis will demonstrate that the nineteenth-century British state developed a punitive heteronormativity through rationalising, codifying and advancing previous religious and common-law regulations that framed the right and proper role and form of a coherent (hetero)sexuality. This preferred a particular conception of acceptable sexuality and punished transgressors of this normative code. Subsequently in the mid-twentieth-century this heteronormative system came under pressure from evolving social imperatives.

Thus this research re-evaluates the distinction of homosexual regulation’s history from that of heterosexual regulation, and positions homosexuality’s regulation within a history of the regulation of sexual deviancy. This parallel analysis of homosexual/heterosexual regulations provides a genealogical context for homosexual regulation challenging the archaeological concentration on the twin events of criminalisation (Labouchère) and decriminalisation (and especially the Wolfenden Report<sup>1</sup>). This more contextualised examination of homosexual regulation liberates it from the singular meaning and distinctive treatment, which in turn destabilises subsequent narratives of the history of homosexual regulation.

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<sup>1</sup> The 1954 Departmental Commission on Homosexual Offences and Prostitution will be referred to as the Wolfenden Committee

This homophile discourse on homosexual regulation was largely formulated in Britain during the decriminalisation process. This historical accounting is dominated by assertions that the ‘homophobic’ Labouchère Amendment (1885) extended prohibited same-sex acts and intruded upon a previously sacrosanct private realm. The Wolfenden recommendations are viewed as changing this by advocating re-creating this private homosexual realm and decriminalising certain homosexual acts. This thesis shows that no such private realm existed and that all homosexual acts were previously covered by the criminal law. Furthermore, the establishment of this committee is explained as a response to public pressure and the law’s disrepute in this area. However it is essential that the motivation behind this challenge to homosexual regulation be re-examined. Many contentions are unsupported by available historical documentation and there has been a distinct lack of scrutiny on the political aspects of the decriminalisation process. The Wolfenden committee’s establishment, delays in its partial implementation and the eventual passing of the SOA (1967) were all determined by political factors. Thus the arguments utilised and developed during this parliamentary process are utilised to critically assess the historical narrative of decriminalisation. I challenge the primacy of Wolfenden’s role in enabling decriminalisation through providing its rationale. I argue that Wolfenden was itself a product of pre-existing decriminalisation rationales, Wolfenden’s most important contribution was in further legitimising those discourses rather than any novel recommendations.

This will facilitate subsequent explorations of explanations for Wolfenden’s recommendations not being enacted, until partially done so through the SOA (1967).<sup>2</sup> This ten-year delay is insufficiently explained: If the Wolfenden Committee was established because of growing popular opposition linked to the law being brought into disrepute by its prosecution, why were successive governments

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<sup>2</sup> McGhee (2001:135) details how the “Wolfenden Committee’s probation-treatment aim, especially those relating to adolescents, had been excluded from the Sexual Offences Bill which would eventually pass into law”.

unwilling to acquiesce to popular opinion and restore the law's legitimacy? I will question the homophile history of deregulation as a political response driven by changes in popular opinion. Instead I proffer an alternative narrative of decriminalisation as a highly negotiated outcome driven by changing elite concerns, ideological priorities and moral impulses.

Homophile understandings of nineteenth-century homosexual regulation and the political imperatives towards twentieth-century de-regulation informed political strategies adopted by reformers seeking homosexual decriminalisation. However, there are significant political differences between seeking new rights and attempting to restore a previous status quo. In the homophile discourse established from the 1950s onwards the latter conception became dominant. This thesis shows that the perceived failures to pass the Wolfenden recommendations before 1967 misunderstood the possibilities of the political environment. Ignoring the politics of decriminalisation approaches a teleological belief of progress towards a liberal conception of freedom and rights. The process wasn't inevitable or inexorable but the result of complex political processes.

Through this examination of historical processes and the discourses challenged by, and constructed in response to them, I demonstrate that these historical narratives were potent features and tools of gay politics and (self) representation during decriminalisation. This thesis examines the theoretical, political and historical implications of the rise to pre-eminence of the homophile discourse, demonstrating that their claims of knowledge about the homosexual past were a critical element of claims for a homosexual future free from the repressive regime of Victorian regulations.

### 1.3 Re-examining the Exemplary History of Homosexual Regulation

*“For close on a hundred years the male homosexual consciousness has been dominated by the legal situation”* (Weeks, 1977:11).

David Garland’s investigation of the development of British criminology identified and confronted similar problems to those I found in the academic treatment of homosexuality in Britain (Garland, 2002: 8). Garland’s concern was with the history of his discipline rather than a history accounted by it, however in my research I have found the two to be inextricably linked. The problem is nonetheless the same: “A discipline’s practitioners work with a sense of where their subject has come from and where it is going, which issues are settled and which are still live” (Garland, 2002: 10). Whereas Garland states that criminologists learn from their history “who are the exemplars to emulate and who are the anathemas to be avoided” (Garland, 2002: 10) what is learned with homosexual regulation is an exemplary history. I will illustrate how this largely uncritical use of the established history entered the academic and public discourse on homosexuality and necessarily limits and influences that which is ‘known’ and that requiring further research.

Lesbian and gay studies in the UK have been predominantly concerned with existing homosexual regulation and societal acceptance, and through such research advancing social and political transformations of homosexuality. History as distant as the nineteenth century has not been an area deemed of particularly relevance to the present and therefore only of interest in so far as it informed current events.<sup>3</sup> This

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<sup>3</sup> Similar concerns and imperatives can be seen in other nations. For instance, in the USA D’Emilio argued that the gay liberation movement in the 1960s lacked a “history that we could use to fashion our goals and strategy” and dismissed that which was created as an ‘invented mythology’ that has “limited our political perspective” (1993: 467-8).

history of homosexuality's treatment by the state is similar to that found by Garland in criminology: "Criminology's history is most often presented in the form of a preface... usually in a few compressed and standardized pages... introducing the reader to the subject and placing the author's text within a longer tradition" (Garland, 2002: 9).

Garland found the history of criminology "broadly accurate" and reasoned that it would be surprising if it were not. However, "the broad sweep of its narrative and the resounding simplicity of its generic terms can be profoundly misleading if they are taken as real history, rather than as a kind of foundational myth, developed not for historical purposes, but for heuristic ones" (Garland, 2002: 9). The dominant historical account of homosexual regulation is more problematic than this. Rather than a myth outlining the creation of the object of the criminal, homophile homosexual history created a foundation stone in the narrative of homosexual existence in Britain. It not only charts the medical/legal construction of the homosexual as object, or a species in Foucault's term (1976: 43), but the creation of the homosexual as a subject, and as such is fundamental to discourses on homosexuality. It was not constructed for heuristic reasons but to account for the then legal and social position of homosexuality. But it cannot be separated from either that historical period or the existing political and ideological rationales that also motivated them.

Foucault questioned the "historical rupture between the age of repression and the critical analysis of repression" (Foucault, 1976: 10). This thesis shows that the alternative homophile discourse on homosexual regulation and the previous moral, legal and medical discourses on homosexuality all relied upon the same historical knowledge, and are "part of the same historical network" (1976: 10) and thus were part of the same power/knowledge. Whereas there was a discursive explosion on the history of homosexual regulation after decriminalisation it was constrained by the power/knowledge that created it. Key to this constraint was the historical knowledge

of the creation of the homosexual object that was thus central to the creation of the homosexual subject also. Foucault claims that the ranges of nineteenth century discourses on homosexuality allowed for a “reverse” discourse (1976: 101). However, this downplays the power differentials that existed to establish truths. Those revising homosexual regulation’s history did so in terms of interpretation rather than usurpation. Thus understanding the relationships between both sets of discourses becomes important; the objectifying legal discourse and the subjectifying homophile one.

This homophile discourse did not consciously distort a ‘true’ history, rather early academic works were too readily accepted and not subjected to the rigorous critical evaluation expected from academia. The incestuous relationship between academia and activism played a pivotal role in this uncritical acceptance and disciplining of knowledge. The twin roles of academic and gay activist shared by many key authors in the area meant that academic concerns were legitimately directed by contemporaneous political concerns; that is histories of the present. However, as Carole Vance has claimed “early work in lesbian and gay history... was history against the grain, against the heterosexist narrative: in short activist history and history as political work” (1989:164) and thus was vulnerable to becoming presentist histories.

Garland identified that criminology’s history was “often simplified into a tale of icons and demons” (2002, 10). In the field of homosexuality the foremost demon is Henry Labouchère, the paucity of evidence supporting this characterisation provided a barrier to my understanding homosexual regulation’s history. The next section examines the accepted knowledge of Labouchère’s Amendment. This highlights the hegemony that this homophile discourse of homosexual regulation has attained and discusses the questions it raises but does not answer regarding Labouchère’s intent, the changes he actually produced and the impact of their historical interpretations.

## 1.4 The Accepted Knowledge of Homosexuality and the Law

The dominant public, political and academic understanding of Labouchère's Amendment remains that "Between 1885 and 1967 all male homosexual acts, whether committed in public or private, were illegal" (Weeks, 1977: 11).

Despite its legacy, there is a dearth of original sources on the passing of the Labouchère Amendment. In parliament Labouchère stated that his Amendment would mean that:

"Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and... shall be liable... to be imprisoned for any term not exceeding one year with or without hard labour" (Commons, 06.08.1885; vol.300col.1397).

Hansard's account of Labouchère's summary of its meaning reads that:

"at present any person on whom an assault of the kind here dealt with was committed must be under the age of 13, and the object with which he had brought forward this clause was to make the law applicable to any person, whether under the age of 13 or over that age" (Commons, 06.08.1885; vol.300col.1397).

For over a century Labouchère's Amendment was the most notorious judicial tool used to regulate sexual activity and became central to understandings of homosexual sex and the primary means by which it was made apparent to the public. This 'notorious' Amendment was increasingly condemned as an unwarranted and unprecedented intrusion into private conduct and from the 1950s it became the focus

of parliamentary campaigns for decriminalising private homosexual activities. More recently it has even been labelled in explicitly modern terms; “institutionalised homophobia<sup>4</sup> gained its most salient expression with the passage of the Labouchere Amendment in 1885” (Engel, 2001: 150).

Paradoxically, given these vociferous accusations and its centrality to the discursive history of homosexual regulation, Labouchère’s Amendment has not been exhaustively researched. Its clearly understood motivations and facets should form the basis for research on subsequent developments in homosexual regulation. Such expectations are predominantly confounded, with the categorical assertion that the Amendment represented a radical alteration of homosexual regulation predominating.

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<sup>4</sup> Homophobia was coined in the late 1960s by George Weinberg an American psychologist, author, and heterosexual homophile activist. He first used it in print in a magazine article in 1971 and in *Society and the Healthy Homosexual* (1972) to denote a “phobia about homosexuals... a fear of homosexuals which seemed to be associated with a fear of contagion, a fear of reducing the things one fought for—home and family. It was a religious fear” (Weinberg in Herek, 2004:6). Whilst conceptions of anti-homosexual prejudice were not new, the term was radically placed the psychiatric problem with the heterosexual not the homosexual at a time when the American Psychiatric Association still listed homosexuality as a mental disorder and homosexual sex illegal in most US states (Herek, 2004:8). The term is now commonly applied beyond the individual to characterise institutions, policies and laws. Thus homophobia is not just an individual failing but a social problem of sexual stigma that “exists in the form of shared knowledge that is embodied in cultural ideologies that define sexuality, demarcate social groupings based on it, and assign value to those groups and their members” (Herek, 2004:14).

### 1.4.1 Early accounts of Labouchère's Amendment

The week that Labouchère's Amendment was passed, newspapers were more concerned with his questioning of the Egyptian policy (e.g. *Reynold's Weekly Newspaper*, 9.8.1885; *The Bury and Norwich Post*; *Suffolk Herald*, 11.08.1885). However some reported his interventions on the Criminal Law Amendment Act; *Reynold's Weekly Newspaper* recorded his failed "important amendment" to withdraw parental control "from parents who facilitated the ruin of their children" who would be given into the charge of reformatory schools. *The Times* (7.8.1885) also reported this alongside newspapers as diverse as the *Hull Packet and East Riding Times* (7.8.1885) to the *Sheffield & Rotherham Independent* (7.8.1885) which recorded Labouchère's failed amendment and not his successful one. The *Pall Mall Gazette* (7.8.1885) did detail all the clauses moved including the previous successful amendment by Labouchère<sup>5</sup>; the clause outlawing gross indecency. The *Glasgow Herald* (7.8.1885) also included both of Labouchère's clauses and the addition of *The Leeds Mercury* (7.8.1885) concludes all the newspapers in the British Library's British Newspaper Archive which covered Labouchère's amendments. It was a year before *The Times* reported a gross indecency trial; a clergyman tried for offences against two boys, but "the circumstances were of a painful and repulsive nature, the details being unfit for publication" (5.8.1886).

Early biographies of Oscar Wilde might also be thought as a rich source on Labouchère's Amendment but are almost as disappointing. Vyvyan Holland<sup>6</sup> identified Sherard's *Oscar Wilde: The Story of an Unhappy Friendship* (1909) as the basis of all other biographies of Wilde (1960: 39). However, it only alluded to Wilde's crimes and doesn't mention Labouchère or his Amendment. This is also true of *The Trial of Oscar Wilde from the Shorthand Reports* (Anonymous, 1906,

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<sup>5</sup> The *Pall Mall Gazette* (25.8.1885) called Labouchère the "leader of forlorn hopes" when accounting for members votes in 1885.

<sup>6</sup> Oscar Wilde's son.

alternatively published as *The Shame of Oscar Wilde* (1906) which Moran (2008: 236) identifies as the first source on the trials. Perhaps revealingly, this book was privately printed in Paris as was Christopher Millard's *Oscar Wilde: Three times Tried* (1911: 135-7) which was a source for Montgomery Hyde<sup>7</sup> (1948). This book does reproduce Hansard's transcript of the Labouchère Amendment but without any commentary.

However, Frank Harris's biography of his friend Oscar Wilde, that Holland called "the so-called biography... which is nothing else but... self-glorification" (1960: 39) did assert that Wilde was "arrested and tried for an offence which was not punishable by law ten years before" (1916:143) which may have confused some into believing that the acts were previously legal. Harris also attacked the wider Act as being prompted by Stead's "shameful and sentimental stories (evidently for the most part manufactured)" (1916:143). But Harris's most remarkable accusation is that Labouchère:

"inflamed, it is said, with a desire to make the law ridiculous, gravely proposed that the section be extended, so as to apply to people of the same sex who indulged in familiarities or indecencies... and it became the law of the land... which is without a model and without a copy in the law of any other civilised country" (1916:144).

The notion that Labouchère's intent was to ridicule the Bill probably stems from Mr Hopwood's comment, when the Bill was in Committee, that Labouchère "was anxious... to show the Committee the absurdity of the whole of the Bill" (Commons, 30.7.1885, vol.300 col.786, also cited in Smith, 1976:169). However, in accepting Hopwood's claim, these authors ignored Labouchère's response that Hopwood "did not understand the Bill... [and] was so indignant with [it] that he opposed every clause in it, whether right or wrong" (Commons, 30.7.1885, vol.300 col.787). Hopwood's contention also begs the question of why Labouchère would choose that

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<sup>7</sup> Montgomery Hyde was an author and Ulster Unionist MP who was an advocate for reform in the 1950s (Commons, 28.4.1954; vol.526 col.1745-56).

particular Amendment given that many considered it so divergent from the object of his derision.

Grosskurth's (1964) biography of John Addington Symonds, the poet and contemporary of Wilde, also provided a source for Smith (1976), yet it is distinctly confused. Grosskurth asserts that Labouchère's Amendment was passed "with the memory of the Cleveland Street Scandal... still lurid in the memories of the shocked, an extra clause was slipped in, by which indecencies between males, even if practiced in private, were made a criminal offence" (1964: 283). However, Labouchère's Amendment was passed four years *before* the Cleveland Street scandal and was actually used in its prosecution.

The most influential source for much of the misunderstanding as to what the Amendment actually did was Sir Travers Humphreys' preface to Montgomery Hyde's *The Trials of Oscar Wilde* (1948:5-6). He stated that:

"until [section 11 of the Criminal Law Amendment] Act came into force... the criminal law was not concerned with alleged indecencies between grown-up men in private... the law only punished acts against public decency or conduct tending to the corruption of youth... The clause... creating the new offence of indecency between male persons in public or private. Such conduct in public was, and always had been, punishable at common law... It is doubtful whether the House fully appreciated that the words "in public or private" had completely altered the law".

This was certainly influential in cementing the belief that a previously unmolested private realm of legal homosexual acts existed before 1885 and was extensively referred to in decriminalisation debates.

Montgomery Hyde later asserted that mutual masturbation, full body and oral-genital contact “were not regarded as criminal” before 1885 (1970:7-8). Despite this assertion, Montgomery Hyde recounts the first reported trial for homosexual offences when, in 1621, even though Earl Castlehaven ““emitted between the thighs’”. This was held to be sodomy within the meaning of the statute even though penetration had not taken place” (1970:47). Thus intercrural sex was known by the author to have been previously punishable by law despite his contrary assertions.

Thus, biographies and accounts of Wilde’s trials are misleading sources for information on Labouchère’s Amendment.

However, their influence was such that after the Wolfenden report’s publication, the Wolfenden Committee Secretary, W C Roberts, wrote in a Home Office memo (26.9.57, HO/291/123) that “It is, indeed, “Labby’s Law” (the Criminal Law Amendment Act, 1885, which first made illegal acts of gross indecency other than buggery committed between males in private)”.

#### **1.4.2 Post-decriminalisation interpretations of Labouchère's Amendment**

Immediately after decriminalisation West (1967:80) wrote that "Short of buggery, homosexual activities appear to have been permissible in the nineteenth century... This gap was filled in 1885... From then on all sexual acts between males of any age became offences of 'gross indecency'". West later maintained that the "Criminal Law Amendment Act of 1885... permitted the prosecution of homosexual acts other than buggery" (West, 1977: 130).

The works of Jeffrey Weeks have been particularly influential on understandings of the transformation that Labouchère's Amendment represented: "Between 1885 and 1967 all male homosexual acts, whether committed in public or private were illegal... Before 1885 the only legislation which directly affected homosexual acts was that referring to sodomy or buggery" (Weeks 1977:11). Over the next two decades Weeks repeatedly asserted that the Labouchère Amendment's innovations were in bringing "within the scope of the law all forms of homosexual activity [...and] extended the scope of the legal prohibition of sodomy" (Weeks, 1996: 48 & 51).

The influence of these statements constitutes a discursive event; determining how homosexual history was considered, what was sayable about it, and established the 'truth'. Weeks was not the first to state these historical 'truths' but his explicitly homophile interpretation of them was novel and influential coming from a gay liberation activist.

However, in recent years some authors have recognised the misunderstandings of Labouchère's Amendment. Cocks writes that "it is now clear that [Labouchère's] efforts did not change the laws in a dramatic fashion... It was possible to prosecute all kinds of homosexual behaviour, consenting or otherwise, in public as well as private, long before 1885" (2003:17). However, this acknowledgement of

misunderstanding is not explained or directed at any specific sources, instead he praises them. Cocks (2003:6) identifies Montgomery Hyde's *The Other Love* (1970) work as "pioneering" and "the first reference point for the study of homosexuality and law in British history... [which] still retain their authority". Thus Cocks' first reference point contradicts his thesis and he likewise lauds "Similarly ground breaking work by Jeffrey Weeks" (2003:6) without any reservations.

Weeks' semantic and intellectual legacy is apparent in subsequent authors' works. Looking at google scholar's record of citations; Weeks (1977) is cited 109 times and its 1990 edition 970 times, West (1977) 120 times, Montgomery Hyde's 1970 book is cited 53 times, whereas only 29 citations are identified for Smith's (1976) earlier article. Weeks' influence was cemented in his extensive subsequent scholarship in the subject area which maintained his influence over the discourse; his 1985 book, *Sexuality and its discontents: meanings, myths, & modern sexualities* has been cited 1221 times (accessed 12.03.13).

The broad contention in these three early works was accepted and became the dominant truth; that Labouchère "for the first time made all other forms of male homosexual behaviour ('gross indecency') criminal" (Grey<sup>8</sup>, 1992: 16). Mort (1987: 129) identifies it as "the catch-all clause... outlawing all forms of male homosexual contact" and references Montgomery Hyde (1972) and Weeks (1977) to support this assertion. More recent scholarship bringing this assertion into doubt did not change Mort's position in his revised edition deigned to "correct minor errors" (2000: x & 101). Most authors have thereby accepted that Labouchère's Amendment was "the most devastating blow struck against male homosexuals in modern times" (Bennion, 1991: 207) and promulgated this characterisation. This promoted the view that Labouchère had single-handedly "rendered criminal a type of conduct that had never previously been punishable by the criminal law" (Bennion, 1991: 207).

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<sup>8</sup> Grey is the pseudonym for AEG Wright who was secretary of the Homosexual Law Reform Society (Higgins, 1996: 126)

Readers are informed that through this Amendment previously legal ‘homosexual’ acts became offences, thereby “extending the scope of the criminal law to cover, for the first time, all forms of sexual activity between men” (Jeffrey-Poulter, 1991: 9). The confusion these assertions created caused one American author to imagine previous periods of restricted and unrestricted homosexuality before the Labouchère Amendment “re-criminalized male homosexuality” (Adam, 1985: 116). The French historian Florence Tamagne goes further, writing that “For the first time, the sodomite was no longer just a sinner, but a criminal” (2006: 306). Burke and Selfe (2001: 11) state that Labouchère “widened the criminal law’s overt control of homosexuality by covering all aspects of male homosexual behaviour, not just the act of buggery... specific private consensual acts were now criminalised”. What specific acts is a mystery as Labouchère’s Amendment names none.

Even mentions of Labouchère’s Amendment in journals this decade do not clarify it. In 2003 the editor of the Queensland Bar Review maintained that the Labouchère Amendment had “for the first time in English legal history, made it an offence for consenting adult males to commit acts of indecency in private” (Morris, 2003: 16). Daudaa writes that “the 1885 legislation... criminalized all sex between men, replacing a more generalized crime of buggery” (2010: 240). Pugh asserted that “through the Labouchere [amendment]... all forms of same-sex sexual contact between men became illegal”. Friedman (2010: 1077–1088) also states that “the Labouchere Amendment... criminalized sex between men in public and in private”. Opitz writes about “The criminalization of homosexual acts under British law, particularly the Labouchere Amendment” (2012: 256). Finally Appleman claims that “the Labouchere Amendment... made male homosexual acts criminal.” (2011: 988). This demonstrates how durable this discursive formulation is.

Although Weeks stated later that “Other homosexual acts generally were subsumed under the heading of conspiracy to commit the major offence” (1980:199), this qualification is much less repeated than his earlier unequivocal assertions. This confirms the discursive effect of the earlier event, which meant that even Weeks could not challenge this truth’s hegemonic effects. However, some have detailed this contradictory caveat more prominently. Higgins states that gross indecency “was similar to the crime of attempted buggery in covering every homosexual act except buggery” (Higgins, 1996: 155-6).

Deacon acknowledges that sodomy prosecutions included instances where no sexual act had occurred: “The mere solicitation also to the commission of [sodomy] is, in itself, an indictable offence, without any overt act indicative of the attempt to commit it” (1999: 28). Cocks also recognises that “It was possible to prosecute all kinds of homosexual behaviour, consenting or otherwise, in public as well as private, long before 1885” (2003:17). However, he also states that “still... confusion abounds as to what exactly was an offence and when” (2003:6-7), but does not identify any homosexual sex which was found by a court to be legal. Cocks also does not critique this confusion, and the knowledge production entailed, by identifying and critiquing its sources but directs his gaze towards earlier legal changes. This sheds light on the law, but not on understandings of the law that developed in the late nineteenth century and persisted and developed in the twentieth century and continue to frame discourses on the topic.

Thus homophile authors have accepted the importance of the 1885 Act uncritically. Whilst some recent authors have established a heterodoxy having recognized that it did not change the law in previously understood ways, they do not explain it; what it did, why it did it and why it mattered legally and discursively.

Montgomery Hyde (1948) and Weeks stressed that Labouchère's Amendment extended the law's reach into all spaces; "whether in *public* or *private*" (1989: 199). This implies that a private realm had previously existed unregulated by the state: "This infamous measure brought police officers into the bedrooms even of the most respectable, discreet and faithful male lovers of males" (Bennion, 1991: 198). This claim that Labouchère extended the law's reach irrespective of "whether committed in public or private" (Jeffrey-Poulter, 1991: 9) was even more important in the decriminalisation process than that it extended the range of prohibited behaviours.

This conception of the Amendment is also challenged: "To suggest that this Amendment criminalized acts in private which had not been previously criminal is incorrect" (Moran, 1998: 20). However, this perception persists in public and academic discourse and it had important political ramifications. Since 1967 legal challenges to homosexuality's differentiated status frequently centred on the conceptual divide between public and private spaces. The Sexual Offences (Amendment) Act 2000's section on sex in public lavatories (Bainham & Brooks-Gordon, 2004: 267) caused widespread debate and accusations of 'homophobia'. These debates occurred within an historical understanding that intrusion into private homosexual activity was a nineteenth-century invention.

I will show how this perceived divide between public and private sexual activity was based upon an unconvincing interpretation of Labouchère's Amendment and the pre-existing legal situation. The idea that he destroyed this private realm of legal sex will be shown to be unsupported by historical records but became almost universally accepted and influential in the decriminalisation process. The predominant academic view on Labouchère's amendment remains that it wholly transformed the legality of homosexual acts extending the law's powers and was intentionally homophobic. However, this interpretation is rarely subjected to analysis rather than a recounting of an 'accepted' history.

New generations are accessing these ‘truths’ through major LGBT organisations’ websites, such as Stonewall, Knitting Circle and GLBTQ, and more general information websites. The following extracts from these sites evidence the continued acceptance and dissemination of these ‘truths’. GLBTQ, the encyclopaedia of LGBT and queer culture, is the first Google result to detail the Amendment and states that it was “more insidious, for it extended punishment to any homosexual act between men” ([gltq.com/social-sciences/labouchere\\_amendment](http://gltq.com/social-sciences/labouchere_amendment)).

The foremost British LGBT pressure group, Stonewall, provides information for the public, media and politicians and provides the dominant interpretations thereby contributing to the Labouchère Amendment’s centrality in LGBT consciousness: “the offence of gross indecency... made all sexual acts between men illegal. The criminal law was now focused on the punishment of homosexuality” (Stonewall).

More general information sites also present the homophile interpretation of the Amendment’s legal changes; “what constituted gross indecency was left up to juries to decide... this included, for the first time in British history, any sexual touching between men” ([everything2.com](http://everything2.com)).

Many websites also claim that the offence of gross indecency was repealed in 1967 rather than only limiting the circumstances under which it could be prosecuted: “[it] cast a shadow of criminality over British homosexual life until its repeal 82 years later” ([knittingcircle.org](http://knittingcircle.org)). This view that “the law was not overturned until 1967” appears widespread on internet sites (e.g. [media.clickclickexpose.com](http://media.clickclickexpose.com)). However the primary ‘truth’ provided by these sites is that “the Labouchère Amendment went further [than previous sodomy Acts] because it criminalized all sex acts between men for the first time in English history” ([gayhistory.com](http://gayhistory.com)).

All these sites imply that sex between men was freer before 1885. However, academic works propagating this view provide no evidence of such freedoms existing before Labouchère's Amendment. Chapter 4 will show through contemporary court records and press coverage that the state interfered in private homosexual behaviour and acts short of sodomy. I will show that these cases were known to academics asserting that there was not any "comprehensive law relating to male homosexuality before 1885" with only sodomy previously being outlawed. That other "male homosexual acts generally were subsumed under the heading of conspiracy to commit the major offence" (Weeks 1980:199) insufficiently qualifies the previous statement.



### **1.4.3 The Homosexual Species and group identity**

If one accepts Foucault's (1976: 43) assertion that there was no conception of a distinct class of men who desired only sex with men before the late 1800s then the sodomite was an aberration and only with the identification of the homosexual was there a conception of something beyond the act. At that time sex was predominantly defined and understood as penetrative, thus homosexual sex was also assumed to be concentrated on sodomy. However, the law did not distinguish between the temporary aberrant and the homosexual, so the law's centrality to discourses on the creation of the homosexual object through its regulation is questionable. However, once identified the criminal was targeted.

These problematisations of the existing research and historical narrative provided led me to question if their major assertions can be substantiated. Chapter 4 shows that Labouchère's Amendment was not the first comprehensive measure outlawing homosexual activity, citing examples from before 1885 and examining how the legal status of homosexual acts was then understood and prosecuted by the legal establishment. I thereby question Labouchère's reputation as the scourge of homosexuals and why his Amendment became considered such a departure from the previous legal situation, why this misapprehension became so prevalent, and its impact on discourses on homosexuality.

This research contends that the homophile historical accounting for Labouchère's Amendment was a mid-twentieth century presentist history. Those writing these histories were concerned with their current social and political struggles and influenced by the Wolfenden discourse, even if they railed against it. These factors influenced how they interpreted the past and the importance of nineteenth-century legal transformations. To understand homosexual history it becomes necessary to understand the historical circumstances that shaped how and why these historical

‘facts’ were found. Thus the discourse on homosexual regulation becomes an *object* of academic concern not just a *subject* within it.

Significantly, the Labouchère Amendment is taken to have treated homosexuals as a distinct group in a way that the previous all-encompassing sodomy laws did not. Chapter 4 shows this was not as novel as assumed by homophile authors, but it was particularly relevant in the identity politics of gay rights groups. Homosexuals attempting to have their distinctiveness recognised and further claims of rights and protections from and through the law, utilised this idea that the Labouchère Amendment had constituted a homosexual ‘species’. This importantly shaped the homosexuality’s political and legal transformations. In the aftermath of the SOA (1967) homosexual activism was directed towards what was considered its double edged sword of creating a private freedom “provisional on their circumspection” which facilitated a greater public control (Weeks 1989: 243; McGhee 2005: 143-144). Within this environment writers looked not to an ancient sodomy law based on archaic religious justifications for the root of their oppression but rather a modern law that remained the primary source of judicial interference in gay men’s lives and which had seemingly first interfered in private conduct and institutionalised this misinterpretation.

This thesis does not suggest there was a conscious attempt to distort history for strategic use by LGBT groups, rather that history was viewed according to contemporary concerns and highlighted elements that seemingly mirrored them. The lack of critical re-examinations of these periods, or at least the limited general acceptance of the partial re-examinations that have occurred, points to a decrease in the centrality of these issues to current group struggles. However these issues periodically come to the fore in debates on changing sexual regulation. Perhaps the reason for the lack of systematic revision lies more in the political sensitivities of critically re-examining the ‘foundational myths’ of a political minority group’s ‘origins’.

The archive of sources in this thesis reflects and acknowledges the wide variety of interests on homosexual regulation, encompassing the disciplines of history, sociology, cultural, queer and legal studies, and biographical and lay authors with personal interests in these areas. Additionally official government and parliamentary archives will be analysed to test the academic narratives and better understand the political processes involved.

A second aspect of the concentration on the Labouchère Amendment is that its placement of the regulation of homosexuality in the modern era frames the discourse in terms of rights lost. This led many in the decriminalisation process to talk of rights taken from them by Labouchère not of gaining new rights; e.g. the rights to privacy and to engage in acts short of sodomy. There is a major difference between the two positions, legally, morally and psychologically. According to this homophile discourse, the SOA (1967) essentially restored the pre-1885 legal status of homosexuality. Further claims by LGBT pressure groups were made on the basis that having reformed the homophobic regulations of a retrogressive ninety-year period *real* progress was required.

The alleged homophobic nature of the Labouchère Amendment needs to be re-evaluated. This thesis argues that it may better be understood as part of wider heteronormative regulations enacted in the nineteenth century and as such was not a particular targeting of homosexuals and secondly it was designed to protect youths against exploitation and so was this cannot be considered a homophobic Amendment. This entailed state control of a more tightly delineated legitimate heterosexuality, largely defining as illegitimate sexual relations inconsistent with monogamous, married, procreative relationships.

Heteronormativity (Warner, 1991), denotes a normatively prescribed dominant form of acceptable gender and sexuality roles and performances, privileging as ‘natural’, coherent and morally superior these heterosexualities over other sexualities. This is enacted through institutions and the power/knowledge they produce. Through a parallel analysis of heterosexual and homosexual regulation this thesis will demonstrate how in the nineteenth century a punitive heteronormativity was statutorily developed upon by the state. The state rationalised and advanced previous religious and common law regulations, preferencing particular conceptions of acceptable sexuality whilst punishing transgressors of these normative codes. In the mid-twentieth century this punitive heteronormativity was under pressure and changing according to different social imperatives. To support this contention part two examines how the law changed in the nineteenth-century to more tightly regulate heterosexual relations and shows how Labouchère’s Amendment was consistent with such changes. Part three will replicate this methodology in examining twentieth-century heterosexual and homosexual deregulation in the post-war period.



## 1.5 Conclusions

Current understandings of homosexual regulation are confused and contradictory, do not explain why these key events occurred, and were significantly shaped by the concerns of the period they were written in. I will re-examine homosexuals' regulation providing a clearer understanding of the radical transformation between 1885 and 1967. This explains *why* Labouchère put forward his amendment, the then understanding of existing laws, how it changed homosexual regulation and how it became synonymous with increased repression of homosexuality. The role of this historical knowledge regarding the origin of existing regulation is then examined during the homosexuality decriminalisation process. Like the Labouchère Amendment, the SOA must be analysed to examine *why* it was eventually passed after numerous failures. The political dimensions of this have been insufficiently researched with the importance of the Wolfenden Report over-emphasised which does not explain the decade delay.

Part two challenges this exemplary history and shows it has been institutionalised in academic and activist works. I also show the relevance to this event of contemporaneous regulation of heterosexuality which shared many concerns and imperatives. Part 3 then analyses how the homophile history was utilised politically in the decriminalisation process before again showing the importance of understanding changing contemporary heterosexual regulation. This destabilises 'disciplined' and institutionalised knowledge of the pivotal events in homosexual history: the Labouchère Amendment (Part 2) and the SOA (1967) (Part 3). The homophobic portrayal of these events that has become institutionalised within homophile histories will be challenged, contextualising these events within wider heteronormative sexual regulation.

The next chapter elaborates on the theoretical and methodological framework of this research, examining the role and nature of historical research and discourse and the methodological tools employed to analyse these.



## **Chapter Two**

### **Theory, History and Discourse**



## 2.1 Introduction

Understanding the roles and uses of history is essential to my analysis of how homophile historical explanations of homosexuals' regulation have been so unquestioningly accepted and the failure of the heterodox thesis to rectify this. These philosophical conceptions on the use of history are important in explaining how a paradigm shift in the understanding of homosexual regulation was not realised through new historical information but through changed socio-political imperatives. What will be argued is that a new history didn't change people; new people, and most specifically with the election of young, educated Labour members shaped by social and political changes of the time, changed the historical interpretations.

This thesis is concerned with institutionalised historical knowledge performing central functions in political action and sexual group (self) identification during decriminalisation. Thus it is essential to critically examine theoretical positions on the use and practice of historical research with particular reference to Foucault, whose works are so influential in gay and lesbian studies. This chapter argues that Foucault had negative and positive impacts on research and knowledge in this area. Examining the role of discourse in historical research this chapter outlines the wider theoretical relevance of my research and highlights the theoretical issues that prompt and inform it. In establishing these theoretical foundations this chapter provides an introduction to the methodological issues examined in chapter 3.



## 2.2 The Importance of History

The nature of historical research, its motivations, purpose, and practice are critical components of my historical analysis of homosexual regulation. For Foucault historical research should discern and specify how processes occur and how they generate “particular ways of understanding, controlling and specifying sexuality” (in, Cocks & Houlbrook, 2006: 9). The history of sexual regulation is intrinsic to how homosexuals became recognised as objects and subjects. Assmann and Czaplicka identify history’s contribution to “a cultural identity pseudo-species [that] is a function of the cultural memory” (1995: 125-6). After decriminalisation homosexuals were freed to construct “their unity and peculiarity through a common image of their past” (Assmann & Czaplicka, 1995: 127). This was established according to a fixed point in history which “are fateful events of the past, whose memory is maintained through cultural formation (texts, rites, monuments) and institutional communication” (Assmann & Czaplicka, 1995: 128-9). This “concretion of identity” allowed homosexuals to satisfy needs for identity by reconstructing knowledge relative to “actual and contemporary situation[s]” (Assmann & Czaplicka, 1995: 130). It is this process that this thesis is concerned with; how homosexual history was first constructed and then reconstructed in a homophile discourse that established and served contemporary homophile needs.

I am concerned with two inter-dependent histories: firstly nineteenth century homosexual regulation and the context within which it occurred. Secondly, a questioning of the historical analysis of discourses established in the 1970s surrounding the partial decriminalisation of homosexual acts which was partly founded upon historical understandings of nineteenth century regulation.

Conceptualisations of the historical treatment of homosexual regulation remained largely unchanged within these histories; both relied upon the same historical data

and agreed that Labouchère widened the range of punishable homosexual acts. What changed in the decriminalisation period were judgements on this change; from celebrating its protection of ‘normality’ to a homophile condemnation of homosexuals’ persecution. Part 3 explores the changed political and social environment within which historical judgements were made, examining how a more permissive social, sexual and intellectual context allowed for different moral imperatives.

My research was prompted by an inability to similarly interpret evidence used in previous works on homosexual (de)regulation. Not only have pre and post-Wolfenden historiographies relied upon largely the same evidence but the most pertinent questions have not changed. The origins of modern regulation of homosexual sex remain relevant to understanding the development of current regulations. However, the centrality of this history to the LGBT community has changed, the struggles of the LGBT movement since the passing of the SOA (1967) have largely been successful and the discriminatory regulation of homosexual sex largely dismantled. It is thus long overdue that this historical accounting be re-visited, not only to provide clarity on the nineteenth-century but how discourses on the history of homosexual regulation framed struggles of the recent past. However, in doing this research I have analysed sources misrepresented in existing scholarship, and new sources that have provided new evidence on the Amendment, e.g. Labouchère’s *Truth*.

Homosexuals’ regulation was intrinsic to how homosexuals were objectified and came to understand themselves as subjects. In the nineteenth-century homosexuals were primarily objectified within a moral/legal regulatory discourse. This discourse only became seriously challenged through the decriminalisation process and subsequent liberalisation allowing research, by pioneers such as Weeks, into homosexual history and existence. This did not challenge pre-existing historical ‘facts’ but merely their attendant narrative. The ‘homophile community’ was freed to

write and campaign thereby constituting homosexuals as subjects highlighting their historical maltreatment.

Partly this was achieved by creating an alternative discourse on gay history; of persecution. Other minorities' struggles showed how pride in group history was a powerful weapon in agitation and consciousness raising. Specifically the LGBT movement borrowed from the USA civil rights movement translating black and proud into gay pride (Mason, 1994: 99), with history becoming a tool in gay liberation. The history of homosexual regulation was transformed into a source of pride; criminals like Wilde became celebrated martyrs.

This new historical narrative was highly reliant on, and functional to, the nascent gay liberation movement. This history of homosexual regulation is predominantly structuralist-functionalist in nature. Rather than a causal explanation being posited for the Labouchère Amendment's supposed increased repression of homosexual acts, repression is retrospectively taken as its *raison d'être*; thus effect becomes cause. My alternative explanation is that Labouchère's Amendment was what he claimed it to be, a measure for protecting young men in keeping with the Bill. Likewise the Wolfenden Committee's exploration of homosexual regulation is taken as being teleologically functional, as a necessary step towards the amendment of iniquitous laws and homosexual emancipation.

In neither case is the question addressed, in anything but the vaguest terms, of how and why homosexuals came to be differentially "constituted out of particular systems of subjugation by tracing the tortuous paths by which this constitution occurred" (Fay, 1996: 120). The contexts of these changes have been insufficiently examined. Despite this, both legal innovations are assumed to be in one sense phenomenal mutations but in another representing a continuity as they stemmed from conscious teleological intent. Firstly, towards more repressive control of homosexuality

responding to fears of the increasingly corrupting effects of ‘deviant’ sexualities: Foucault’s repressive hypothesis (1972). Secondly, in loosening those controls towards emancipating homosexuals within a more permissive social/sexual order, with the liberation of subjugated minorities being part of wider liberalisations of social norms and values.

Through questioning these assumptions, that now take the form and role of self-evidences, this research sheds light on these historical periods that were so important to group identification and political action. It contributes to knowledge and understanding of homosexual history and deconstructs the foundations of socio-legal studies regarding homosexual regulation. Foucault (1972) questioned the repressive hypothesis by identifying a discursive explosion on sexuality resulting from nineteenth-century socio-legal repression. I firstly question if Labouchère’s law was actually more repressive and if that was his intent. Secondly I contradict its portrayal as homophobic and instead place it within a wider punitive heteronormative framework. Thirdly in examining the decriminalisation process I again suggest that this was part of a heteronormative re-structuring. This deregulation did not result in new truths on historical regulation of homosexuality but relied on homophile interpretations of old truths.

## 2.3 A History of the Present

In *Discipline and Punish* Foucault asks why he should write such a history: “Simply because I am interested in the past? No, if one means by that writing a history in terms of the present. Yes, if one means writing the history of the present” (1977: 31). Accordingly, my research proceeded from a problematisation of present conditions and a desire to understand their history. To understand homosexuality in British society, an understanding of the derivation of its current legal and social conditions is necessary. Inherent in this is the belief that “the ‘past’ has this living active existence in the present that it matters so much politically” (Popular Memory Group, 1982: 211).

This thesis shows that the decriminalisation process preceding the SOA (1967) opened up new vistas on that present and its past. A binary opposition between decriminalisation and criminalisation drew the historical gaze to the criminalisation process of a previous era. For parliament to review the law relating to homosexual offences it was necessary to comprehend and conceptualise homosexuals and the laws regulating them. By doing so, this questioned existing discourses on homosexuality with their elements of medical, religious and legal conceptions of homosexuality as sickness, sin, and a threat to vulnerable individuals and the social order. To understand these elements, as well as the nature and scope of the legal changes in 1967, academics and homophile groups looked to the nineteenth-century. Thus the historians of the 1960s and 1970s were centrally concerned with a history of the present in examining nineteenth-century changes to laws regulating homosexuality.

In constructing the past the present was also constructed, defined and limited. Part 3 will show how these ‘truths’ took on an existence and reality during decriminalisation debates that defined that present as a period of emancipatory

struggle against Victorian regulation. Homophile groups and politicians seeking to achieve reform relied heavily upon historical interpretations to justify their claims. When political motivations are so intrinsic to historical investigations the inherent danger is that those interests dictate it. They will become “a projection of today’s preoccupations onto the past... sticking onto the past a concern that holds true only, or principally, for our time” (Baker, 1994: 239).

The relative lack of current identity investment in historical homosexual regulation permits a more dispassionate enquiry into it. I argue that the power/knowledge of these historical truths limited academic investigations that were anyway disinclined to question. Thus they have proved so durable, being tacitly accepted without any sustained critical analysis. At this historical juncture, when legal parity for homosexuality is much closer, a clearer understanding of this historical period is possible.

## 2.4 The Use of History

*“The growth of gay history and the shaping of its concerns cannot be separated from the evolution of the gay movement” (D’Emilio, 1992: 98).*

Having argued that the history of homosexual regulation performed functional roles in the creation of the homosexual as a political and social object and subject I will now examine the functions and uses of history.

Foucault’s most acknowledged influence on his historicism is Nietzsche who stated that “We wish to use history only insofar as it serves living” (Nietzsche, 1873: 7). Nietzsche identified three fundamental uses of history: “the monumental, venerating great events and deeds; the antiquarian, preserving the past as the continuity of identity in tradition; and the critical, judging and condemning parts of the past in the name of present truths” (Dean, 1994: 18)

It is in relation to these Nietzschean uses of history that historical knowledge, and the power structure produced through and complicit with it, came under attack from the 1950s. Homosexuals and other oppressed peoples sought to articulate their history and subvert historical discourses marginalising their experiences and precluding them from using this powerful tool of self-expression and group identification.

However for Foucault academic history was suspect as a discipline both as “highly structured institutions for the production of particular bodies of knowledge, and instances of the typically insidious exercise of power in modern society” (Goldstein 1994a: 3). Foucault stressed that no-one should seek to replace one power/knowledge with another. Foucault’s histories intended to shed light upon

present systems without “invoking the themes of memory, tradition, and foundations, and making history the haven in which the constitutive subject finds reconciliation” (Dean, 1994: 20). Thus Foucault challenged the idea that the histories produced in this profusion of alternative viewpoints and subjectivities produced any more of a transcendental truth than those they usurped.

The homophile history of homosexuality comports with Nietzschean uses of history and their inherent dangers Foucault identified. Although, the monumental use is displayed in the condemnation of those perceived as infamous rather than to the “veneration of great deeds”. Homosexual history has centred on the Labouchère Amendment’s immense damage to homosexuals and more ambiguously on the Wolfenden Report and the consequent Sexual Offences Act (1967). The latter is welcomed for the progress made but both are condemned for their conception of privacy and homophobic fears of homosexual spread.

Secondly history preserves the present as the continuity of identity in tradition, it creates the subject male homosexual in modern terms but one with a significant history and pre-history. In this it relies heavily upon Foucault’s ‘History of Sexuality: An Introduction’ which identified the homosexual as a distinct species originating from the nineteenth-century (1976: 42-3). However, this work started with a concentration on the eighteenth-century and Foucault later reverted to that position (Trumbach, 2003: 19-20).

Thirdly history judges and condemns these events, and the truths and opinions that shaped them, on the basis of truths of the era the research was conducted in. This use of history is evident in works condemning the regulation of homosexual sex as ‘homophobic’ and in specific reaction to the post-1967 retention of elements of Labouchère’s Amendment’s regulation and its perceived rationale.

Foucault recognised that “memory is actually a very important factor in struggle... if one controls people’s memory, one controls their dynamism” (1975: 25). Subsequent writers on homosexuality sought to replace the history of homosexuals as the “objects of the expert knowledge of moralists and physicians” with one in which subjects actively re-claimed their past and laid claims to their future (Goldstein 1994a:4). The power and role of history in the political struggles of the gay liberation movement was a conscious motivating factor in the conduct of research into homosexual history. D’Emilio argues that the “growth of gay history and the shaping of its concerns cannot be separated from the evolution of the gay movement” (1992: 98). Many academics undertaking research were involved in gay liberation movements, some in leadership roles, and the interests of one sphere of their lives cannot be clearly separated from the other. In “the first [British] historical monograph on homosexuality”; *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (1977), Weeks provided “both an analysis and a critique of the sexual liberalism that had dominated homosexual politics in Britain.” Weeks identifies himself within it as a radical gay liberationist. Such a symbiotic relationship between academia and activism is not unique, or necessarily problematic, but it does require readers to make informed evaluations of the impact one role might have on the other.

Inherent in Nietzsche’s uses of history is a rejection of history as a search for a discernible absolute truth. Foucault also rejected such positivist historicism concerned “with showing how it really was” in favour of a “sophisticated and rarefied form that insists on the irreducibility of the discursive order and the contents that appear within it” (Dean; 1994: 17). Accordingly I will not assert definitive truths but show how alternative explanations are more convincing and thus demonstrate the subjective and contextual imperative in historical analysis. These interpretations will be informed by and tested against historical sources and the academic literature on these events and show that the evidence better complies with my historical explanations.



## 2.5 Conclusions

This thesis aims to avoid producing a presentist history whilst examining the extent to which others have done likewise. In analysing the discourse on homosexual regulation I construct a place for that regulation within wider discourses on sexual regulation providing alternative contextualised explanations for transformations of the nineteenth and twentieth centuries.

The central 'event' I examine is the discursive eruption during the 1950-60s decriminalisation process. This examination begins from a critical examination of homophile interpretations, explanations and justifications of homosexual criminalisation and decriminalisation. It assesses the use of historical data, grid of specification, and characterization of these historical events which provided the foundations of the homophile discourse that supplanted 'dominant' religious-legal discourses on homosexual regulation. In the following chapter the specific tools and methods I employed are examined in detail.



## **Chapter Three**

### **Research Methodology**



### **3.1 Introduction**

This chapter outlines the research methods and approaches that I employ to examine the changing discourses on homosexual regulation from the nineteenth-century until partial decriminalisation in 1967 and the discourses interpreting this process.

Properly selected and executed research methods enable researchers to obtain sufficient quality data to utilise and facilitate the development of their thesis. Transparency in their selection and how they are operationalised enriches readers' understanding and verification of arguments and conclusions deriving from that data.

Trow (in, Bryman, 2001: 331-2) asserts; “the problem under investigation properly dictates the methods of investigation”. Thus this chapter illustrates how my research questions dictated my choice of research methods and how these enabled them to be answered. This chapter begins by discussing Foucault's methodological contributions to studying history developing the theoretical issues raised in Chapter 2. The specific issues of operationalising these theoretical research methodologies are then addressed, highlighting particularly relevant and/or problematic elements of a discourse approach to socio-historical analysis.



### 3.2 Archaeology and Genealogy

Foucault's historical research used two distinct "methodological strands"; archaeology and genealogy. Archaeology is "the process of working through the historical archives... to bring to light the discursive formations and events that have produced the fields of knowledge and discursive formations of different historical periods" (Danaher, 2000: ix). Through this archival research Foucault believed he could "bring to light the discursive formations and events that have created the fields of knowledge and games of truth by which that society has governed itself" (Danaher, 2000: 36).

Archaeology is "a basically "vertical" conception of successive cultural forms, or geological layers, stacked one upon the other so as to emphasise their self-containment and radical difference from one another (Goldstein, 1994a: 14-15)". Its purpose is to uncover:

"relations between discursive formations and non-discursive domains (institutions, political events, economic practices and processes). These *rapprochements* are not intended to uncover great cultural continuities, nor to isolate mechanisms of causality. Before a set of enunciative facts, archaeology does not ask what could have motivated them... nor does it seek to rediscover what is expressed in them... it tries to determine how the rules of formation that govern it... may be linked to non-discursive systems: it seeks to define specific forms of articulation." (Chartier, 1994: 174)

This methodology helps this research in addressing changing forms of articulation governing homosexual regulation and connections between discourses on homosexuality and non-discursive legal and political changes related to them.

However, inherent in this archaeological approach is that historians are "outside the social practices being analysed" (Hoy, 1986: 7). More applicable here is genealogy,

which “admits the polemical interests motivating the investigation and critique of the emergence of modern social power” and examines the “horizontal dimension” of historical periods (Hoy, 1986: 7). This is relevant in relation to the motivations for this research and in analysing the historical research that attained such a pivotal position in homosexual discourses.

Genealogy is concerned with providing “eventuality” and narratives that are “resolutely non-teleological”. It portrays events as “eruptions” whose “outcomes are local and radically contingent, never adhering to a global necessity” not as necessarily connected and comprising a coherent larger history. Genealogy therefore suits my critique of accepted and unquestioned knowledge: “it debunks the most cherished values and institutions of present day liberal culture by demonstrating that they originated in “mere” historical contingency and in petty or ignoble practices”(Goldstein; 1994b: 114). Such criticism allows the limits of “supposedly timeless, metaphysical structures that stake out the limits of the human subject” to be questioned and ultimately violated (Goldstein; 1994a: 14-15).

Genealogy is not a matter of “digging down to a buried stratum of continuity” but, as Foucault stated, “identifying the transformation which made this hurried transition possible” (1991: 75). Such historical discontinuities and disjunctures are the concern of genealogy “which tries to trace out the multiple beginnings, sudden lurches forwards, pauses and gaps, which, for [Foucault], comprise historical events” (Danaher, 2000: 100).

Succinctly put, “genealogy is a process of analysing and uncovering the historical relationship between truth, knowledge and power... knowledge and truth are produced by struggles between and within institutions, fields and disciplines and then presented as if they are eternal and universal” (Danaher, 2000: xi). Thus it is particularly relevant to this research.

This relationship between power and knowledge and their use in social control was a central focus of Foucault's later work. 'Truth' was less interesting than the interplay between power and knowledge which produces truth. "Knowledge linked to power, not only assumes the authority of 'the truth' but has the power to *make itself true*. All knowledge, once applied has real effects, and in that sense at least, 'becomes true'" (Hall, 2001a: 75-76).

Most importantly genealogy attempts to "reveal discourse at the moment it appears in history as a system of constraint" (Horrocks, 1999: 97). Thus it is appropriate to this research's central concern of the limiting of knowledge that the historical discourse represents. McConnell-Ginet observed that "what gets naturalised in discourse tends to be the common-sense beliefs of dominant groups" and Ehrlich "that the beliefs in question may be *presupposed* in discourse rather than stated openly" (Cameron, 2001: 126). This power to establish truths includes those accepted in a common sense fashion despite, or because of, a lack of evidence. The truth becomes dictated by the surrounding discourse rather than the specific evidence of that truth.

This thesis questions the accepted history of homosexuality that largely ignores the possibilities of multiple disjunctures by contextualising those events and establishing their position in wider events. Usually the only 'events' detailed are the Labouchère Amendment and its sudden reversal by the Wolfenden Report and the alternative discourse it represented. This history may not have been accurate but the weakening of the state supported discourse and the laws accompanying it allowed a discursive space enabling a new discourse to attain pre-eminence in the production of knowledge and interpretations on homosexual history.

I will critically analyse this alternative homophile discourse when it first emerged during the decriminalisation process predominantly using a genealogical approach. This discourse needs to be destabilized on its own grounds and I will demonstrate how these events are open to a very different interpretation. In analysing different historical periods it will produce a genealogy of the archaeological points in

homosexual regulation, contextualising these landmark moments. Thus Part 2 deals with sexual regulations in the nineteenth century before Part 3 builds upon this archaeology by producing a genealogy of the 1967 decriminalisation of homosexuality.

### **3.3 Discourse Analysis**

#### **3.3.1 The efficacy of a discourse approach**

Academic interest in language has grown until it is “increasingly being understood as the most important phenomenon, accessible for empirical investigation” and thus there has been increased interest in discourse approaches (Alvesson & Karreman, 2000: 1126). However the heterogeneous nature of discourse analysis means that a unitary understanding of its principles and practices is elusive: “The word discourse has... no agreed upon definition, and confusingly many uses” and consequently for many “Discourse sometimes comes close to standing for everything, and thus nothing” (Alvesson & Karreman, 2000: 1126-1128).

However this doesn't mean, “‘anything goes’ in discourse work,” just that no “single set of evaluative criteria will prove sufficient.” But discourse analysts have attempted to “advocate or legislate their own ‘gold standard’” (Wetherell, 1998: 387). In keeping with previous discussions of Foucault, this thesis is essentially interested in discourse as an articulation and legitimisation of power/knowledge.

I will now explore the parts and levels of discourse analysis most pertinent to this research.



### **3.3.2 Level of analysis: discourse or Discourse?**

I use discourse to refer to “language in use” so any reference to discourse includes verbal and non-verbal, including written, broadcast or spoken data, and its analysis should be taken to include meaning, implied meaning and subtext (Joworski & Coupland, 1999:3).

If the level and focus of this research was the specific active use of language on homosexual regulation, this would be what Alvesson and Karreman labelled as discourse with a little ‘d’; a “micro discourse approach” where a “detailed study of language use in a specific micro-context” is undertaken. Discourse would be studied as a “linguistic performance” but would “refrain from drawing any conclusions on, or making assumptions about the relationship to what is more strictly seen as other phenomena” (Alvesson & Karreman, 2000: 1132). However, I am specifically interested in relationships between discourse and those “other phenomena”.

Alvesson and Karreman refer to ‘Discourse’ as the Grand Discourse and Mega-discourse approaches; “an assembly of discourses, ordered and presented in an integrated frame” and is most appropriate to this research. It applies when there is a “more or less universal connection of discourse material” and “standardised ways of referring to/constituting a certain type of phenomenon”. My analysis will identify this Discourse on homosexual regulation and chart its evolution (Alvesson & Karreman, 2000: 1132).

However, this shift between discourse and Discourse should not mean losing “linguistic rigor for the sake of sociopolitical claims” (Wilson, 2001: 411). The “decision to view utterances as potential Discourse material” does not mean that micro discourse be abandoned (Alvesson & Karreman, 2000: 1146-7). Texts must first be analysed “in terms of situated meaning versus meaning that is stable enough to allow... comparison” (Alvesson & Karreman, 2000: 1146-7). I will analyse data as though they have the potential to provide understandings of “broader more generalised vocabularies/ways of structuring the social world” whilst retaining

methodological rigour in the micro-discourse analysis of individual texts (Alvesson & Karreman, 2000: 1146-7).

This approach was seen in Chapter 1 where the pre-eminent text on British homosexual regulation (Weeks, 1977) was first examined as a single text, then in conjunction with other texts by Weeks, identifying common discursive language, themes, assumptions and parameters. The wider academic discourse on homosexual regulation was then analysed to establish whether these identified discursive rules established and reproduced within that academic field. The level of scrutiny was then widened to identify if this discourse had successfully limited discourse in more generalised forums. LGBT and other groups' publications were surveyed for conformity to this power/knowledge.

This approach is replicated in Chapter 5's examinations of historical narratives on Labouchère's Amendment; critically examining individual texts before placing them within wider frameworks of 'truth' production. Revealing weaknesses in evidence and argument I show how these discursive elements contributed to the 'Discourse' on homosexual regulation and delimited alternative truths. The chapters on decriminalising homosexuality replicate these methods of comparing and critiquing academic texts and destabilising the homophile Discourse they contribute to. However, it also examines parliamentary and government discussions of homosexuality using these discursive contributions to question this Discourse on historical accounts of decriminalisation. This dataset was established by keyword searches for homosexual, homosexuality and gross indecency in Hansard and National Archive collections. This ensured that the records analysed were representative of the political discourse on homosexual regulation and my research's reliability and validity in not 'cherry-picking' records. The strength of this approach is that in each chapter a different array of data is utilised building upon or challenging each other; these are drawn from a wide range of sources including these political records, contemporaneous accounts as well as academic and activist histories. Moving between current historical works to contemporary sources I use each to destabilise accepted knowledge and narratives to postulate alternative

explanations. This is additionally enabled by expanding the genealogical contexts and archaeological inheritances of each period inviting alternative connections to be made; specifically to heterosexual regulation.

In summary, this thesis' concentration is at the level of Mega or Grand Discourse but this is only revealed through individual texts. So my initial research was conducted according to a micro-discourse approach before utilising that data to identify and analyse the larger Discourses. Thus, in divergence to a micro-discourse approach I draw conclusions about the relationship of texts to other phenomena.



### 3.3.3 Critical Discourse Analysis

Given the various levels of discourse studied in this thesis, Critical Discourse Analysis (CDA) is the most appropriate model. It “primarily studies the way social power abuse, dominance, and inequality are enacted, reproduced and resisted by text and talk in the social and political context”(van Dijk, 2001a: 352). Consequently it is “probably the most common position among [sociological] discourse analysts” (Wetherell, 2001b: 385).

Importantly it:

“provides a way of moving between close analysis of texts and interactions, and social analysis of various types... to show how language figures in social processes. It is critical in the sense that it aims to show non-obvious ways in which language is involved in social relations of power and domination” (Fairclough, 2001: 229).

Thus it is suitable for this study of changing discourses on homosexual regulation. CDA studies tend to focus on “social problems and political issues, rather than on current paradigms and fashions... Rather than merely describe discourse structures, it tries to explain them in terms of properties of social interaction and especially social structure” (van Dijk T, 2001a: 353). The view taken within this approach, and in the development of this research, is that studying ways in “which people communicate during a period of major social change is one way of studying change itself” (Cameron D, 2001: 129-30). Specifically discourses produced in periods of major social and legal changes in homosexuality are crucial signifiers of those changes and a determinant of subsequent developments.

CDA’s use is also recommended by the way it “focuses on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of power and dominance in society” (van Dijk, 2001a: 353). However, this is a value-laden position as dominance is defined as the abuse of power, as opposed to its legitimate use (van Dijk, 2001b: 302).

This is a major criticism of CDA; that its “openly ‘committed’ agenda... challenges the orthodox academic belief in objective and neutral description” (Cameron, 2001: 140). Advocates argue that this commitment ‘enriches’ analysis and the inherent risks are “reduced, by going beyond the single text to examine their related texts and to explore the actual interpretations that recipients make of them” (Cameron, 2001: 140). This was demonstrated in chapter one; how a single discursive text/event influenced wider discourses affecting academic and group conceptions of homosexual history. Thus it is necessary to understand texts in their original forms and their impact through others’ understandings of their meanings; thus situated and transported meanings are analysed.

CDA is also academically honest in acknowledging values’ and opinions’ effects on research, making them explicit, rather than leaving readers to decipher their implicit impact. Objectivity should be strived for but rigorous subjectivity is the most that is achievable. This is especially true on problems involving sexuality and prejudice that rely on value judgements from which academic detachment is problematic or impossible. Indeed on such contentious issues as homosexual rights authors’ values and opinions on the issue are likely to be the motivation for conducting research.<sup>9</sup>

This means that in analysing a text it is beneficial to understand its context to the utmost extent possible, this includes any biographical information for the author that may provide insight. This can be seen in authors treating “Foucault’s sexual life as a matter of serious philosophical interest” (Halperin, 1995: 9). His texts are considered in relation to the sum of his work and to gain more understanding they are analysed as products of a specific biography.

This section showed that CDA provides a useful methodological model for my data analysis. However, it requires a reflexivity in operationalisation equal to the critical analysis directed towards the texts examined.

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<sup>9</sup> Thus I should state that I am wholeheartedly of the view that homosexual relations should be on an equal par with heterosexual ones.

### 3.3.4 Competing and Elite Discourses

Foucault argues that “we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one” (1976: 100). However, I heuristically term discourses as dominant in relation to their degree of public, academic and official acceptance not to suggest that they are “subservient to power” or that oppositional discourses are uniformly “raised up against it”. Indeed I argue that the discourse on homosexual regulation was destabilised from within by the political and legal elites, rather than replaced from without by an alternative historicisation. I illustrate in the decriminalisation process and its historical accounting a “complex and unstable process” where discourse was “both an instrument and an effect of power but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy” (Foucault 1976: 100-101). The use of history in this process exemplifies this facet of discourse as it “transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it” (Foucault 1976: 101). It thus should not be conceptualised that there is “a discourse of power, and opposite it, another discourse that runs counter to it” (Foucault, 1976: 101).

When discourses are characterised as dominant they are frequently seen as imposed and controlled by social, scientific, or political elites. However, as has been shown in chapter one the existence of dominant discourses does not preclude “smaller, oppositional” “elite groups” playing prominent roles in the production of alternative discourses (van Dijk, 1999: 542). Indeed the existence of discourses may only become apparent through such opposition, before which universal acceptance renders them invisible.

A major effect of discourses is to “precisely to manufacture... consensus, acceptance and legitimacy of dominance” thereby limiting possibilities of competing discourses and the effectiveness of those that are established (Van Dijk, 2001b: 302). This hegemony denotes the power of dominant groups to establish and sustain “class

domination, sexism, and racism” through “laws, rules, norms, habits and even a quite general consensus” (Van Dijk, 2001a: 355). This power needn’t be maintained through overt or “abusive acts of dominant group members” because its values are established as common sense conceptions beyond discursive alteration (Van Dijk, 2001a: 355). Such discursive control denotes that which is possible to be said but also that which is beyond saying. Hegemonic influence is often such that oppressed groups frequently accept their socially given position.

However, this over simplifies power relations in modern western civil societies as uni-directionally hierarchical; residing solely with the state, ruling classes, economic and media elites, etc., and acting upon those below. However for Foucault:

“power does not ‘function in the form of a chain’ – it circulates. It is never monopolised by one centre. It is deployed and exercised through a net-like organisation... we are all caught up in its circulation – oppressors and oppressed” (Hall, 2001: 71).

This doesn’t deny dominance in the use of power but rather asserts that a linear conception of its possession, use and direction obscures power exercised by others.

Accordingly power isn’t something simply possessed by elites and felt by others. The twentieth century provides a plethora of examples of oppressed groups overthrowing relations of subjugation. To these could be added the homosexual rights movement. Frequently these political, social and cultural transformations were achieved not through violence but the establishment of alternative discourses and means to persuade those in power to relinquish elements of their control.

Thus, it is possible for discourses to run counter to a dominant discourse and for these to interact to change societal relations. Mehan suggests that ‘the relations between voices in public political discourse take the form of a conversation’ (1990: 135), in which discourse strategies or moves on the part of one organisation (government, churches, other governments, etc.) provoke responses from others”

(Fairclough, 1999: 197). My research concerns this type of discursive relationship; between the 'dominant' discourse on homosexuality, backed by state regulation, and alternative discourses established by reformers. This was subsequently cemented by academic activists and homosexual rights campaigners through the selective use of arguments for further emancipation.

These sought change in homosexuality's socio-legal position through challenging the common sense ideas the public and successive governments held. This dual target is relevant to the study as the "the intertextual constitution of texts is connected with audience... the question of audience anticipation is always relevant to intertextuality" (Fairclough, 1999: 200). Just as politicians speaking on decriminalisation were concerned for public reaction, historians writing on homosexuality after the 1960s were acutely aware of the dangers and possibilities inherent to readers' reception of their research. For example, Weeks agrees with Ken Plummer that writing about sex in that period made you "morally dubious" and "did not help" his career (in, Seidman et al, 2006: 14-15).

Although a single source of power was rejected above and there is never merely one elite, this does not mean that such conceptions are not understood and enacted in society. However, rather than the discourse on homosexual decriminalisation being a top-down discourse of the state being countered by a bottom-up discourse from reformist politicians, LGBT activists and academics each viewed themselves as the political and intellectual leadership of their constituents and drew power from that. Seeing their position in moral terms gave them a sense of superiority over their opponents and mitigated against feelings of inferiority which a top-down discourse would suggest.

Discourses existed alongside and in competition with each other, not in a strict hierarchy. A hierarchical conception obscures discourses' common ground; disputes existed on particular elements or the way accepted 'facts' or events were interpreted rather than totally rejecting other discourses. This will be explored in chapter 9 which will show that religious, political, legal and academic elites all interacted and

competed in the discursive space opened in the 1950s. With each claiming knowledge and experiences allowing them to authoritatively speak on the issues involved.

I will “assume a more reciprocal and less mono-causal and unidirectional top-down relationship of influence between “the elite” and other social groups and strata within a specific society” (Wodak & Reisigl, 2001: 380). However, I won’t ignore important power differentials that must be recognised to understand the homophile discourses, the place that the history of homosexual regulation held within them, and how they came to supplant the ‘dominant’ discourse.

### 3.3.5 Discourse and Social Problems

Throughout the periods under examination homosexuality has been a social problem, either in itself, as part of problems of declining moral and family values, or concerning minority rights. In the twentieth century this became more explicitly contested as a social problem which culminated in the decriminalisation process. Its relative acceptance or denial as a social problem was constructed by competing discourses on homosexuality.

For a social problem to become apparent three basic conditions need apply; that a verifiable objective social condition exists, that it “be amenable to removal or at least attenuation or solution” (Jamrozik & Nocella, 1998: 2) and that it is subjectively defined as a problem, being “recognised by a considerable number of persons as a deviation from some norm which they cherish” (Becker, 1966: 1-2).

This last subjective element most concerns this research; it recognises that identifying social problems is a social process, over which some groups have greater influence than others. This has been considerably researched within constructionist approaches to social problems, “that focuses not on social conditions themselves, but on the full range of definitional activities that facilitate such conditions coming to be understood and reacted to as problematic” (Jenness & Broad, 1997: 3).

For Foucault the “constructionist theory of meaning and representation” means “Subjects like ‘madness’, ‘punishment and ‘sexuality’ only exist meaningfully within the discourses about them” (Hall, 2001a: 74). Hence discourse analysis contributes to studying social problems by investigating their production, representation, legitimisation and negotiated intervention mediated through discourse.

Hall, discussing applying Foucault’s theories to studying discourses on homosexuality, listed what needed to be included: Statements about homosexuality that “give us a certain kind of knowledge about it” and an understanding of “the

rules which prescribe certain ways of talking about [homosexuality] and exclude other ways – which govern what is ‘sayable’ or ‘thinkable’ about [homo]sexuality, at a particular historical moment” (Hall, 2001a: 74). It would produce homosexuals as ‘subjects’ personifying the discourse “with the attributes we would expect these subjects to have, given the way knowledge about the topic was constructed at that time” (Hall, 2001a: 74). In this study this predominantly means homosexuals as sexual criminals but reformers repositioned them as innocent victims of their sexuality and the law.

The discourse would also present “how this knowledge about the topic acquires authority, a sense of embodying the ‘truth’ about it; constituting the ‘truth of the matter’. At any historical moment;” “the practices within institutions for dealing with the subjects ... whose conduct is being regulated and organised according to these ideas” including “punishment” and “moral discipline”. With homosexuality these truths were produced through religious, legal and medical establishments, this thesis will show how new religious imperatives, legal philosophies and sociological sources of knowledge came to challenge these truths. There would also be “acknowledgement that a different discourse or *episteme* will arise at a later historical moment, supplanting the existing one, opening up a new *discursive formation*, and producing, in its turn, new conceptions... [of homo] ‘sexuality’, new discourses with the power and authority, the ‘truth’, to regulate social practices in new ways” (Hall, 2001a: 74).

The aim of this thesis is to critique discursive formations on homosexual regulation and to provide new interpretations, supported by existing and new sources, and provide a greater contextualisation of changes in homosexual regulations. This has been inextricably linked to the transformation of homosexuals’ place, and space, in society including its changing recognitions as a social problem.

Evident in Hall’s summary of Foucault’s’ position is the inextricable link between discourse and particular moments in time. It is in this light that the next section will explore the concept of the event.

### 3.3.6 The Event

For Foucault a discourse could be understood as a series of events (Danaher, 2000: 34). These are not events such as Acts, trials, or Committees but utterances and statements that entail “the reversal of a relationship of forces, the usurpation of power, the appropriation of a vocabulary turned against those who had once used it, a feeble domination that poisons itself as it grows lax” (Foucault 2003: 247). Thus events such as Wolfenden and the Labouchère Amendment only constitute Foucauldian events if they transform discursive relations.

This was illustrated in Chapter 1, where I argued that Weeks’ characterisation of the Labouchère Amendment constituted a major event in homosexual history and discourse. Weeks’ work exemplifies Foucault’s claim that statements are “essentially rare because, while a discourse can potentially take in an indefinite number of statements, usually only a limited number actually constitute any discourse, and these are referred to again and again.” (Danaher, 2000: 35). Alternative accounts have failed to supplant those statements that achieved a central position in discourses on homosexual regulation. This suggests either their manifest truth or that they are necessary in some way and therefore resistant to refutation.

The history of homosexuality is centred on a small number of happenings. This becomes problematic when they are perceived to form a coherent and distinct series, and thus a whole; when events are understood “by the action of causes and effects in the formless unity of a great becoming” (Foucault 1981a: 68). Rather than this limited, and limiting, history I open the context of these events to show the ‘heterogeneity of elements’ framing them and invite alternative emphasis and interpretations. This allows a perception of discontinuity, reversal and arbitrariness and rejecting the conception of continuity and acceleration of the oppression of homosexuality as a systematic and coherent consequence of homophobia. This supposed continuation was apparently suddenly reversed when the homophobic system collapsed due to its inherent contradictions bringing the law into disrepute.

Foucault stressed the idea of a sudden single break “dividing all discursive formations, interrupting them in a single moment and reconstituting them in accordance with the same rules... cannot be sustained” (2002: 175). Thus when events are argued to form such a sudden break this must be rigorously tested. I do this by analysing the supposed radical transformations of Labouchère and Wolfenden through examining their genealogical context and archaeological heritage. Thus the history of homosexual regulation before Labouchère will be examined through records of the time and academic treatments of it, before providing the genealogy of heterosexual regulation, in turn, these form a new archaeology for my subsequent genealogical examination of homosexual decriminalisation in Part 3.

Paradoxically Foucault provided such an epistemological break by asserting that the “psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterised” in Westphal’s *Archiv Für Neurologie* (1870). Consequently arguing “The sodomite had been a temporary aberration; the homosexual was now a species” (1976: 43). The invention of the homosexual, relatively, contemporaneously with new laws governing homosexual acts, confirmed for many a discursive rupture governing the medical, social and legal realms just as the Wolfenden process’ culmination in the SOA (1967) is also understood. Legal innovations are constructed and framed through these discourses, thus homosexual regulation was produced through this post-hoc discourse of homosexual regulation. This thesis questions whether Labouchère’s Amendment and Wolfenden represented such discursive ruptures.

As noted before, in discussing his work on punishment Foucault stated he “took this discontinuity, this in a sense ‘phenomenal’ set of mutations, as his starting point and tried, without eradicating it, to account for it. It was a matter of not digging down to a buried stratum of continuity, but of identifying the transformation which made this hurried transition possible” (1991: 75). Nevertheless, in his identifying the homosexual ‘species’ this did not occur; Foucault, and others following him, took the event of medical classification as representing such a singular break in discursive formations. To some extent this was taken even further; Westphal’s characterisation,

or Foucault's identification of it, was taken to represent an origin of the homosexual, and thus the history relevant to the homosexual must stem from this period.

The advantage of Foucault's eventuality is also its disadvantage in "that it frees the historian to look anywhere for the conditions of possibility of the phenomenon under consideration" (Baker, 1994: 194). This freedom allows tremendous latitude in subjectively identifying what is pertinent to study but historians of homosexuality have rejected this. Instead they have narrowly defined the context within which homosexual regulation is examined.

Rather than eventualisation removing self-evidencies and singularities "where there is a temptation to invoke a historical constant... or an obviousness which imposes itself uniformly on all" the historicisation of homosexual regulation has sought out such major disjunctures. Instead of "rediscovering the connections, encounters, supports, blockages, play of forces, strategies, and so on which at a given moment establish what subsequently count as self-evident" (Foucault, 1991: 76) analysis of the Labouchère Amendment created a singularity in the event where my archaeological research shows none existed. Equally narratives surrounding the Wolfenden Committee and the SOA (1967) identify a radical discursive transformation. However, my genealogical research into the period shows an evolution, not a revolution, in discursive formations of this time which are not adequately integrated into the period's historicisation which provides a rather one-dimensional context with a tacit assumption of the inevitability of 'progress'.

The importance of context is seen in Foucault's contention that discourses are potential sites of resistance, indeed there can be no power without such resistance. That which is resisted against must surely define that requiring historical investigation. The 'queer' "critique of heterosexuality is a political response to oppression and exclusion, fuelled by a belief in the possibility of resistance and the hope... of radical change (Jackson, 2006: 71)." But resistance to heteronormativity and homophobia cannot be properly formulated if understandings of their natures are so problematic. Understanding homosexual regulation and resistance requires a

proper awareness of how, and through what, it was constituted. This cannot be done by understanding only where heterosexuality regulated homosexuality but also through ways heterosexuality produced and regulated itself.

This can especially be seen in that heterosexuality was only named after homosexuality. Fuss used Derrida's concept of the 'supplement' to look at the oppositional dynamic between heterosexual and homosexual. Rather than the presumed relationship that homosexuality was an addition dependent on the original (heterosexuality), it is the reverse; "heterosexuality could be seen as a product of homosexuality" (Spargo, 1999: 46). Thus the academic separation of the two histories is hard to justify theoretically.

Just as Saussure asserted that words only have meaning in relation to others (Danaher, 2000: 7-8), events are similarly reliant upon other events for meaning and sense. It follows they may make different sense if related to alternative events. Homosexuality is predominantly historicised in terms of its regulation, but is rarely analysed in conjunction with heterosexual regulation. If analysed according to the former grid of specification then a homophobic targeting of homosexual activity becomes apparent. However when parameters are widened to include heterosexuality then a societal preoccupation with diverse transgressions of a more encompassing heteronormative sexual code becomes evident.

Only through comparing and contrasting heterosexual and homosexual regulation can the latter be truly understood. It should become possible to incorporate the two into a discourse on sexuality that delineates between the socially constructed illegitimate and legitimate and not simply between heterosexual and homosexual. This was more noticeable, of course, after homosexuality's partial decriminalisation. Chapters five and seven will provide such genealogical contextualisations of homosexual regulation and deregulation by examining heterosexual regulation.

To understand events in homosexual regulation they must also be related to other events of their eras. Only through doing both these analyses can one test whether the

dominant grid of specification is indeed the relevant focus. In expanding the horizons of what is considered relevant to homosexual history this research opens it up to contingency and plurality rather than the inevitability of the homophile history.

In some respects the isolationist analysis of homosexuality is what Foucault would identify as “an analytical space” produced through and “populated by the dispersion and entwinement of discursive, governmental and ethical practices” (Dean, 1994: 204). However, the identifying of this is a subjective exercise. As I will demonstrate, homosexuality was often linked in these “practices” with prostitution up to and beyond these twin concerns of the Wolfenden Committee. If homosexual regulation has been discursively isolated from heterosexuality then it has not necessarily been done so by legal or ethical discourses but through the homophile discourse of homosexual liberation that largely supplanted them.



### 3.4 Victims and Social problems

For some “a social problem is not fully constituted until its victims are made apparent” (Jenness & Broad, 1997: 6). For most of the period in this study the victims were those that ‘innocently’ come into contact, or under the influence, of homosexuals. Chapter 4 posits that the Labouchère Amendment was not homophobic but intended to protect young men from sexual exploitation by adult men through a removal of the age restriction which placed those above thirteen in peril as an accomplice to any act. This blurring of distinctions between what would now be labelled paedophilia and homosexuality was debated before the Wolfenden Committee and parliament during decriminalisation (see chapter 9).

It is evidently problematic if victims of a social problem are also considered to be social problems in other respects, for one societal image must be paramount, victim or ‘cause’. For a social group to be able to make claims for social intervention in their situation they must usually be predominantly considered its victims rather than its cause.

Moran and Skeggs claim that “All recognition claims are a claims for justice, an appeal to be heard and seen and not misrecognised... One of the demands made by lesbians and gay men is that they become visible before the law and therefore can access protection” (Moran & Skeggs, 2004: 5). However, previously homosexuals’ problem was that they were *too* visible to the law. For homosexuals to escape legal persecution, they must have first become ‘dis-recognised’ as a social problem before a new homosexual victim of a social problem could be recognised. It is through the transformation of homosexuality’s regulation and deregulation that this shift in the status of homosexuality was first publicly discussed. This will be outlined in Chapter nine’s examination of the discursive distinction between paedophiles and homosexuals during decriminalisation.

In analysing and accounting for changes in regulating homosexuality, I will analyse ways that claims for protection from the law were framed by discourses reliant on certain historical visions, through which homosexuals were positioned as victims.

### 3.5 Positioning

Positioning is an issue in all discourse analysis but of particular relevance here, both in terms of positioning of subjects in discourse and in reflexive positioning:

“One key claim of discourse researchers... is that language positions people – discourse creates subject positions... To speak at all is to speak from a position ... the positions or slots in culturally recognised patterns of talk ... give us a psychology. In other words, they provide us with a way of making sense of ourselves, our motives, experiences and reactions” (Wetherell, 2001b: 23-24).

This is relevant firstly in accepting the concept of ‘the homosexual’ as a discursively, rather than biologically or psychologically, produced subject. This is not taking a position on the nature versus nurture debate, but on the social production of the term’s meaning. The essence of my research is how homosexual regulation has been used to transform the public and political perception of homosexuality. This necessitates the discursive creation of homosexuality and homosexuals by society, politicians and homosexuals themselves and this is of crucial theoretical and practical interest. At the start of the research period, the homosexual was discursively produced as sexually deviant, predatory and a threat to children, their legal and social transformation relied on a different ‘homosexual’ being created.

Secondly, positioning is of methodological concern when interpreting texts, in order to be aware of the ‘position’ from which authors are speaking (Wetherell, 2001c: 23-24). Since many academics writing on homosexuality were also LGBT activists these dual positions must be considered when interpreting their texts.

In this respect another aspect of positioning is relevant. Hollway outlines how:

“conflict, suffering and threats to self operate on the psyche in ways that affect people’s positioning and investment in certain discourses rather than others... The idea of a defended subject shows how subjects invest in

discourses when these offer positions which provide protection against anxiety and therefore supports to identity” (2004: 19 & 23).

These defensive activities “affect and are affected by discourse” and “real events in the external, social world ... are discursively and defensively appropriated” (Hollway, 2004: 24). Thus, oppression and inequality homosexuals experience may mean they “are invested in particular positions in discourses to protect vulnerable aspects of self”; they may therefore frame their discursive contributions relative to this defended subject position (Hollway, 2004: 26). As already outlined, Weeks and Plummer considered that their research had damaged their careers (Weeks in, Seidman et al, 2006: 14-15) and their contributions should be understood in this context.

Less obviously, opponents to reform may also be considered as defended subjects. A major reformer, Leo Abse (1973:153), adapted his tactics on the perception that some opponents were heavily invested in concepts of masculinity and sexuality that underpinned their psycho-social viewpoints. So Abse presented arguments which posed less psychological threat to opponents and the undecided, withholding his true beliefs.

### 3.6 Conclusions

This chapter has outlined the reasoning behind my adoption of a CDA approach; exploring reasons for analysing discourse, what it can reveal, levels of discourse examination, how discourses are identified relative to power, the role discourse plays in identifying and framing social problems, and how people and groups are positioned by it.

Discourse analysis methodologies are fundamentally about regulating the interpretation of texts; injecting discipline and reflexivity into the reading process and relating texts to other discourse material and phenomena. Taking all references to homosexuality in Parliament and government as my dataset ensures reliability and validity (Plummer, 1983: 101). The choice of non-parliamentary sources was more selective and they were identified by a wide reading of the subject area and bibliographical searches identifying influential and widely referenced texts (e.g. google scholar). Each chapter's sources varied according to the subject matter, for those providing a genealogy of a period a wide net was cast to question self-evidencies, seek new connections and a broader grid of specification. These genealogies were then analysed according to established archaeological narratives and explanations of changing homosexual regulation.

However their analysis is a cerebral exercise reliant upon intellectual honesty in not finding only what one is seeking. Consistent reference to the methods outlined sought to ensure I avoided the same pitfalls in interpreting texts and evidence this thesis addresses. I am not asserting my findings are the absolute truths but the interpretations most fitting to the evidence found.



## **Part Two**



## **Chapter Four**

### **In Defence of Labouchère**



## 4.1 Introduction

Chapter 1 showed how Labouchère's Amendment is portrayed in academic and public discourses as a significant event changing state regulation of homosexuality. It became the most renowned legal tool for prosecuting homosexual sex for a century and the major statute that Wolfenden examined. Thus it has commanded a primary position in discourses on homosexual regulation's history.

This chapter critically examines this historicisation; providing an archaeology of homosexual regulation up to the twentieth century before chapter 5 provides its genealogical context of heterosexual regulation. By analysing historical works and primary sources I question the legal centrality of Labouchère's Amendment to the history of homosexual regulation, demonstrate how laws were previously administered to punish homosexuality and provide a new interpretation of how and why this change occurred which rejects the homophobic portrayal of Labouchère.

In analysing twentieth century homophile literature that discursively produced Labouchère's Amendment as a radical transformation, I concentrate predominantly on the primary sources and evidence they used to support their claims. However I draw on other primary sources and later works to elaborate on details of the evidence and to construct a wider understanding. This also shows how these 'facts' remain largely unchallenged. The chapter outlines how specific changes to the law and its enforcement occurred up to 1900 and shows how public attention to homosexuality was intermittent and usually connected to wider concerns over sexual morality. This shows that claims made against Labouchère and his Amendment are tenuous and open to significantly different interpretations.

Historical sources used by authors who dominate discourses on homosexual regulation will provide examples of state interference in private homosexual behaviour short of sodomy. This is despite those authors asserting that there was no “comprehensive law relating to male homosexuality before 1885” and that only sodomy was previously outlawed (Weeks, 1980: 199). Using *their* evidence I will show that Labouchère’s Amendment was not the first comprehensive statute outlawing homosexual activity. This will open up the period to alternative interpretations through additional primary sources and destabilise the homophile discourse and established ‘truths’.

To do this, I explore the statutory status of homosexual sex before 1885 and how this was understood and prosecuted by the state. I will establish that Labouchère doesn’t deserve his reputation and question why his Amendment became considered such a regulatory departure and how this impacted upon homosexual regulation discourses.

## 4.2 A History of Homosexual Offences Prior to 1885

Chapter one showed that the overwhelming concentration by academics and LGBT groups is on the Labouchère Amendment as the primary source of homosexual regulation. Therefore it is important to examine those laws regarding homosexual sex that this Amendment supplanted to provide context, frame this intervention and test such claims.

The first modern judicial intervention into same sex activity was under ecclesiastical authority. Church courts had jurisdiction over crimes such as adultery, fornication, incest, bigamy, and sodomy. Upon conviction a sodomite could be “handed over to the civil power to be burnt” although they “rarely, if ever suffered this penalty” (Richards, 1970: 63).

In his Commentaries on the Laws of England (1769) William Blackstone wrote of that horrible sin not to be named among Christians. Relating ancient treatment of “the infamous crime against nature, committed either with man or beast” he wrote that “our ancient law in some degree imitated [God’s punishment against Sodom and Gomorrah], by commanding such miscreants to be burnt to death”. Importantly Blackstone also noted that “if both are arrived at years of discretion... the perpetrator and consenting party are punished the same” (Blasius, 1997: 13). This reflects the biblical judgment that “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death” (Leviticus 20:13).

In the changing relationship between state and church after Henry VIII’s split with Rome, several Acts were passed in the Reformation Parliament bringing offences into the purview of the civil courts offences. The earliest of these, in 1533, was the

first statute addressing that “There is not yet sufficient and condign punishment... for the detestable and abominable Vice of Buggery” (Crompton, 2003: 361). This extension of statutory law into a previously ecclesiastical province cannot be separated from its political context. The assertion that there was not sufficient punishment was a rebuke and allegation of complicity against the Catholic Church. When Henry’s agents entered monasteries to ascertain their assets they also recorded their sexual misconducts; over 180 monks were recorded as sodomites (Crompton, 2003: 363).

Emulating the ecclesiastical offence, all sodomitical acts were punishable by execution whether “between man and woman, man and beast, or man and man” (Weeks, 1977: 12). The target of this statute was not the ‘homosexual’, for such a conception did not yet exist, it was “directed against a series of sexual acts, not a particular type of person” (Weeks, 1977: 12).

These sexual acts contributed to those considered ‘crimes against nature’; sex for pleasure without the possibility of conception (Weeks, 1977: 12). The terms sodomy and buggery were often undefined with their precise meaning ambiguous to many. There was some clarification and a reduction in the ability to convict on sodomy charges in 1781 when a court ruled the offence required both anal penetration and emission (Weeks, 1977: 12). Proving the charge became much more difficult, however if proved punishment tended to be the most extreme available. More people were executed in England for buggery than for murder in 1806 (Weeks, 1981: 100-102).

The horror and repugnance towards this ‘most horrible of crimes’ resulted in a reluctance to discuss sodomy; a will to silence establishing what was unsayable and sayable about homosexuality. This silence explains the paucity of information about pre-Labouchère regulation and misunderstandings of what acts were prohibited.

Understanding of sodomy's meaning was vague even amongst those charged with prosecuting it. The most common misconception was that other acts between men also constituted sodomy. In 1817 a man was convicted, but later pardoned, for sodomy and sentenced to death, despite performing fellatio (Weeks 1977: 13-14).

In 1826 Sir Robert Peel's major reforms of the English criminal law removed the need to prove emission, reversing the 1781 precedent. Although the death penalty was removed for over a hundred offences it remained for sodomy and abortion. This reinforces the impression that "unnatural crimes" were regarded as the most serious that could be committed" (Cocks, 2003: 23). It was finally removed by section 61 of the Offences Against the Person Act (1861) which replaced it with life imprisonment. Section 62 provided for ten years' imprisonment for attempted buggery but importantly included the same sentence for *any* indecent assault upon any male person (legislation.gov.uk/ukpga/Vict/24-25/100/enacted; Weeks, 1977: 13-14; Moran, 1996: 83). Importantly this Act distinguished between buggery and bestiality for the first time and specifically defined attempted buggery and indecent assault with another male. Thus *this* Act not Labouchère's Amendment first explicitly targeted homosexual sex.

However, a variety of charges had previously been used to prosecute especially in order to circumvent the need for third party corroboration in cases of sodomy where both participants were guilty. These possible alternative charges included indecent assault where parties could be convicted of assaulting each other (Cocks 2003: 28) In 1843 Richard Simpson and George Stacey were jointly convicted of "an assault with sodomitical intent" (OBP: t18430227-1044). Or convicted alone, for example, Thomas Fenner was indicted in 1839 for indecent assault on James Horn and sentenced to two years' confinement (OBP: t18391021-2929).

Just as no term was yet coined for homosexuals there was no widespread conception of men who *only* desired sex with men. Those acting upon such desires were likely to be condemned as libertines seeking transgressive sex or men whose ‘natural’ sexual desire was forestalled by the absence of women resulting in an ‘unnatural’ expression rather than as a distinct group/species. Thus, measures taken against such activities can *only* be seen in terms of wider concerns over perceived sexual immorality and ‘perversions’, as part of a wider punitive heteronormativity rather than homophobic. Nineteenth century homosexual regulations must be contextualised by contemporaneous heterosexual regulation. However, works on homosexual regulation frequently omit any discussion of controls on heterosexuality (excepting prostitution). Without this context, characterising Labouchère’s Amendments as homophobic” (Engel, 2001: 150) tacitly compares a tightly controlled ‘homosexual’ space to a privileged and unfettered heterosexual arena. That heterosexuality was also tightly regulated is demonstrated in chapter 5.

The next section examines how homosexuality was prosecuted by the state in the nineteenth century. It will show how this is interpreted in the homophile literature yet the implications of homosexual acts short of buggery being prosecuted were ignored by the early homophile authors.

### 4.3 Cases and Scandals

In illustrating the history of homosexual regulation, homophile literature is replete with scandalous instances of same-sex activity. These are related here to illustrate the laws' use before 1885 and the knowledge of that use available to those who established the homophile discourse on Labouchère. All the scandals in this section are referred to in Weeks' seminal work *Coming Out* (1977). However other subsequent works will be extensively referenced to demonstrate Weeks' discursive influence on research and how these failed to sufficiently critique these scandals' meaning to the historical regulation of homosexuality.

It should first be noted that the enforcement of the 1533 sodomy law varied over time, with spates of prosecutions usually occurring alongside wider societal concerns about morality and (hetero)sexual conduct. These concerns did not always emanate from the state; power, morality and social control underwent significant transformations after the end of puritan domination.

Around the turn of the eighteenth century many transgressors of moral codes were brought to the attention of the authorities by “agents of the Societies for the Reformation of Manners, an organisation... formed to rid London of sodomites, prostitutes, and breakers of the Sabbath” ([gltq.com/social-sciences/molly\\_houses](http://gltq.com/social-sciences/molly_houses)). This society was established in London in 1690, and is notable for its tactics of “exploiting the criminal justice system for suppressing immorality... their members gathered information which they gave to Justices of the Peace, and provided funds to people to pay for prosecutions, or brought prosecutions on their own” (Norton, 2002). This was a particularly modern reaction and strategy to counter immorality. At that time in London morality could apparently no longer be ‘policed’ through church or informal community censure. In this urban landscape deviants were

simultaneously more apparent and anonymous than ever before and the developing tools of modernity were more efficacious.

The earliest scandal typically recounted in homophile histories concern a result of morality campaigns in the early 18<sup>th</sup> century; the raid upon Margaret Clap's molly house in 1726. The consequences for those seized were dire but varied; three men were hanged, two men and two women pilloried, one man died in prison, one was reprieved, and several were forced into hiding (Kaplan, 2005: 20). 'Mother Clap's' was one of more than twenty molly houses identified in London and the raid one of a series breaking them up. Evidence of Molly Houses was used by Mary McIntosh in '*The Homosexual Role*' (1968), one of the first sociological works on homosexual history and construction of identity.

Although outrage at Molly houses should be seen within wider disquiet over morality they may have been considered particularly threatening; representing a relatively public development of a new subculture rather than individual and isolated transgressions. Such concerns led to particular worries within sections of society over same-sex activity within all male establishments which is also highlighted within the homophile literature. The armed forces were alarmed by possible effects of sodomy on order and discipline. It was specifically mentioned in the naval Articles of War from the seventeenth century and was more often punished by execution than mutiny or desertion. Sentences of a thousand lashes were not uncommon; a death sentence of exceptional brutality in itself (Weeks, 1977: 13). The notoriety of such cases is demonstrated by the "vast concourse of spectators", including royalty, who attended the 1811 execution of an Ensign and drummer boy, who frequented the Vere Street brothel, and the execution of four crewmembers of the *Africaine* in 1816 (Weeks, 1977: 13).

The scandal surrounding the Vere Street Coterie was the last high profile scandal surrounding Molly houses. The White Swan was established for financial gain as a male brothel and Molly house in 1810. It was raided within six months and twenty three to twenty six people were arrested, seven men were convicted, pilloried, and sentenced to between one and three years in prison ([rictornorton.co.uk/vere.htm](http://rictornorton.co.uk/vere.htm)).

This case was a sensation in the newspapers and pamphlets, most notably in the lawyer Robert Holloway's (1813) *The Phoenix of Sodom, or The Vere Street Coterie* (Norton, 1999). The notoriety the case and its coverage created culminated in thousands flocking to abuse the pilloried prisoners. Perhaps significant in creating such vilification, was its class dimension. The influence and interest of the press in such sex scandals and the added attraction of seeing the mighty fall would find echoes in later scandals.

Those convicted from Vere Street were from a "broad social mix" but were the lowest believed involved, others supposedly having bribed their way out of trouble. Thus the vices of sexual depravity and corruption were alleged at those of high social standing. The presence of the Duke of Cumberland at the executions of Drummer White and Ensign Hepburn (OBP: t18101205-1, 05.12.1810) was taken by many as indicative of his sympathy not disgust for them. Not only was Cumberland alleged to have visited the White Swan but in June 1810 he was allegedly found "in an improper and unnatural situation with [his valet] by the other servant Sellis, and exposure was expected." Sellis was subsequently discovered in bed with his throat cut and the coroner's jury found that he had "committed suicide after trying to assassinate the Duke in a fit of madness" (Norton, 1999). In 1813 a journalist who published the rumour that Sellis had been murdered by the Duke was sentenced to fifteen months in prison (*The Times*, 06.3.1813).

The linkage of this most reviled sexual impropriety to impugn a particular social group had been used before, against the monks. Nineteenth-century Radicals later used allegations against the nobility to agitate the mob and twentieth-century communists would also be ‘tainted’ by associations with ‘homosexuality’. This confirms that homosexual regulation cannot be considered separately from its genealogical context, repression was explicitly linked to other social concerns.

The next scandal to capture public attention recounted in the homophile narrative is that of “the transvestites<sup>10</sup> Boulton and Park” (Weeks, 1977: 37). These sons of a judge and a stockbroker, respectively, were arrested and tried in 1870-71 for the offence of “having personated women with felonious intent, and conspired with others to commit an abominable crime” (*Reynold’s Weekly Newspaper*, 5.6.1870). Although this case highlights that the sodomy law was not the only measure utilised against suspected homosexuals this is not highlighted in homophile works detailing it.

The ensuing furore stemmed as much from consternation and confusion as disgust, all the more so because the accused were ‘gentlemen’. Indeed Boulton was alleged to have lived as the ‘wife’ of Lord Arthur Clinton a Conservative MP who died before he could stand trial (*Reynold’s Weekly Newspaper*, 26.6.1870). The most curious element to the press was the sexual ambiguity of the accused. The authorities were apparently equally confused and curious; surveilling Park and Boulton for over a year before their arrests. After arrest a police surgeon intimately examined them for evidence of sodomy, the conspiracy to commit which they were also accused of (Norton, 1999; Weeks, 1977: 14).

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<sup>10</sup> Transvestite was only coined in 1910 by Magnus Hirschfeld and is thus a modern post-hoc labelling.

Their appearances in court were standing room only with the court “literally besieged” by an “immense” crowd (*The Times*, 7.5.1870). *The Times* dwelled on sensational details; “Boulton wore a cherry-coloured evening silk dress trimmed with white lace... a wig and plaited chignon. Park’s costume consisted of a dark green satin dress, low-necked, trimmed in black lace... His hair was flaxened and in curls” (*The Times*, 30.4.1870). *The Times* discerned “disappointment” and “chagrin” in the crowds when the defendants later appeared in “male apparel” (*The Times*, 7.5.1870). This affair illuminated for a new generation the subculture of men cross-dressing and their soirées. However, unlike in previous cases, there was apparently public support for them. Those allowed into court often “manifested their sentiments, and especially their sympathy with, any revelations that appeared to tell in favour of the defendants” (Kaplan, 2005: 41). Much of this evidence comes from *Reynold’s Weekly Newspaper’s* detailed reportage; it reports applause when defence counsel “hoped that it was not suggested that [sharing a bed] was any proof of the horrible crime imputed to the prisoners” (15.5.1870). However no homophile authors have suggested this represented a wider changing of public opinion as many have about similar sympathetic displays in the 1950s.

The press coverage was often detailed and “most papers portrayed the case as dramatizing the conflict between traditional morality and urban life” (Kaplan, 2005: 63). A theme particularly considered by *The Times* was whether the public good was served by such prosecutions or if the attendant notoriety did more harm; “for society will not fail to visit such breaches of decency with a reprobation which is in itself a sufficient punishment.” However, the publicity promoted “a strong appetite for the morbid, and the sensational a credulity beyond bounds concerning the malpractices of the classes above them” (*The Times*, 7.5.1870). Such concerns would re-surface in 1950’s governmental reaction to the problem of high profile homosexual prosecutions. However, *The Times* judged that “in this case there is certainly enough to justify the strictest inquiry” especially considering that the “extraordinary rumours

which arise... and become the belief of millions, render it highly inexpedient that any scandal so serious and so public should seem to be hushed up” (7.5.1870).

The scandal again posed almost as much of a challenge to the social as to the sexual order, with class and immorality linked by the public and press. *The Times* asserted that:

“The charges... are such as are seldom advanced in this country, except against the lowest, the most ignorant, and the most degraded... this androgynous clique... have committed the worst possible social outrage, and will fully deserve any social excommunication with which they may be visited” (*The Times*, 31.5.1870).

The radical republican *Reynold's Weekly Newspaper* had a distinctly different viewpoint; quoting the poet William Cowper it blamed urban life for creating an environment where “rank abundance breeds, in gross and pampered cities, sloth, and lust, and wantonness, and gluttonous excess, in cities vice is hidden with most ease” (5.6.1870)”. These excesses came from “the glaring infamies and the grave ‘freaks’ perpetrated by the aristocratic orders” (*Reynold's Weekly Newspaper*, 5.6.1870). In its desire to remove that social class *Reynold's Weekly Newspaper* differed from *The Times* and such organisations as the Society for the Suppression of Vice in publicising such trials in detail (Kaplan, 2005: 67). Such a difference is exemplified by its front page article “Men in Petticoats - Horrible and Disgusting Disclosures” on May 22<sup>nd</sup>; detailing Park’s medical examinations revealing “two syphilitic sores in the anus... which had been created by an unnatural intercourse with another person”

and that the “other private parts of Boulton were... of an abnormal size, which was often occasioned by improper connexion.”<sup>11</sup>

It is worth noting that Weeks researched the *Reynold's Weekly Newspaper* for Park and Boulton's case when he wrote *Coming Out* (Weeks, 1977: 258n6). However, Weeks makes no comment on the case that refutes his assertions about the novelty of the Labouchère Amendment's provisions against acts short of sodomy.

The Boulton and Park case was treated very seriously by the authorities, with the Attorney and Solicitor Generals both appearing to prosecute it. In his opening statement the AG highlighted the difficulty in prosecuting sexual offences, with them being “likely to be committed in private and the participants to be equally guilty”, additionally witnesses were likely to be reluctant to come forward fearing guilt by association (Kaplan, 2005: 75). Thus this case demonstrates that the highest prosecutors in Britain knew their reach extended into private spheres and that this information was available to homophile authors constructing the discourse asserting the opposite. In the end the accused were acquitted, but the case resulted in the licensing of medical examinations for signs of sodomy in the investigation after Park and Boulton's examinations were deemed to have been done without such authority (Kaplan, 2005:75).

In July 1884 newspapers were filled with another homosexual scandal: the Dublin Castle affair. Providing a template for a Wilde's scandal, it centred on libel trials against William O'Brien MP the editor of *United Ireland*. He had printed an article

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<sup>11</sup> Of passing interest is that during the trial Park's older brother was convicted of indecently assaulting a police officer eight years previously before fleeing bail, he was sentenced to twelve months' imprisonment (*Reynold's Weekly Newspaper*, 31.7.1870).

attacking the characters and adventures of various Crown employees including Inspector French the head of the CID at Dublin Castle (Kaplan, 2005: 176).

When served for libel O'Brien employed Sir George Lewis who recommended hiring a private detective to seek evidence to support the claims. This was the same course of action Lewis later recommended to Marquess Queensbury against Wilde. The investigation found "a criminal conspiracy which for its extent and atrocity almost staggered belief. It included men of all ranks... from aristocrats to outcasts of the lowest dens" (Kaplan, 2005: 176).

O'Brien printed these charges and received three further libel writs. The first case was lost by the Secretary of the GPO in Ireland, Gustavus Cornwall, after three men testified of sexual misconduct with him. With French withdrawing because of financial difficulties the only other case tried was of Crown Solicitor Bolton, who allegedly protected his subordinate. This case was also lost and police consequently arrested Cornwall, French and seven others for sodomy and 'conspiracy to commit buggery' (Kaplan, 2005: 176-8).

Perhaps mindful of the uproar created by press treatment of previous cases, the grand jury appealed to the judge to prevent publication of its details "in the interest of public morality". The judge rejected this but did presume upon the "discretion and Christian forbearance of the Press", this was heeded and no details were published (Kaplan, 2005: 176-8). Combined with all records being lost in the civil war its proceedings were lost to history. However, after a hung trial Cornwall and Kirwan were acquitted on conspiracy charges. However, French was tried three times after juries failed to reach verdicts until he was convicted and sentenced to two years' imprisonment. Worse befell one unfortunate who pled guilty and was given twenty years (Kaplan, 2005: 176-8).

These cases illustrate that authorities of the time were fully aware of alternative means of prosecuting 'homosexual' conduct where behaviour or evidence did not prove sodomy. Equally they prove that prosecutions did not acknowledge any private boundary to the law's reach. It should again be noted that all these scandals were known and cited by Montgomery Hyde, Weeks and his contemporaries when establishing the homophile history of homosexual regulation which claimed such legal boundaries had existed before 1885. Thus this knowledge production needs to be explored.



#### 4.4 Blackmail

A central aspect of the Labouchère Amendment's alleged innovations is its role in enabling blackmail. It was frequently labelled as the 'Blackmailers' charter' in decriminalisation debates and afterwards in the academic literature. Real or fabricated allegations of homosexual activity or importuning were used for blackmail under the threat of exposure. In 1954 the Attorney General, Earl Jowitt, stated that "at least 95 per cent of the cases of blackmail which came to my knowledge arose out of homosexuality, either between adult males or between adult males and boys" (Lords, 19.05.54, vol.187col.745).

Weeks argues that the Amendment greatly facilitated blackmail but acknowledges occurrences before 1885 without detailing any incidences (1977: 21-2). The sobriquet had been firmly established before by Sir Travers Humphreys, a judge who had been a junior counsel for Wilde who wrote that "A learned Recorder dubbed it "The Blackmailer's Charter" and an eminent Q.C. prophesied that juries would refuse to convict where the alleged acts were in private" (1948: 6). This was followed in Parliamentary debates in the 1950/60s which portrayed blackmail as being particular to the Amendment itself, as if before 1885 it did not, or could not, occur. Chapter 9 will show Humphreys was pivotal to historical understandings of Labouchère.

Moran (1996: 51) cites two eighteenth century cases where gentlemen were maliciously accused of sodomy, or importuning for sodomy, to gain money. These victims paid but after subsequent demands informed on their blackmailers who were convicted of highway robbery and sentenced to death. In one a special court of twelve judges ruled "a threat to accuse a man of having committed the greatest of all crimes, is... a sufficient force to constitute the crime of robbery by putting into fear" (Moran, 1996: 42). Other cases are readily found in Old Bailey records: In 1794

Thomas Steward was indicted for “falsely accusing Charles Butts of Sodomy” and imprisoned for two years (OBP: t17940604-27). In 1792 Robert Jones was convicted and transported for seven years for “threatening to accuse... Thomas Horne of the crime of sodomy” (OBP: t17921215-123). For assaulting Mark Harrison and “falsely charging him with an attempt to commit the crime of sodomy” James Watts and Francis Hardy were sentenced to death in 1786 (OBP: t17861213-2). William Jones was convicted of highway robbery in 1800 and transported for seven years (OBP: t18000528-128) and five men were convicted of extortion in 1850 and sentenced to transportation for life (OBP: t18500408-803).

In 1833 another victim was blackmailed but when a further extortion was attempted the victim was accompanied by a policeman. William Attrell was convicted of highway robbery accompanied by extortion through the “threat of preferring an infamous charge” (White, 1999: 35-36). Attrell’s justification of his blackmail, presumably by asserting the truth of his accusation, was judged an “aggravation of his crime” and he was hanged (White, 1999: 35-36).

Thus the potential damage of blackmailing attempts was evidently not reliant on innovations by Labouchère. James Adair<sup>12</sup>, the only dissenting Wolfenden Committee member, further argued that “blackmailing thrived not because of the law but as a consequence of social fears” and thus not reliant on illegality (Higgins, 1996: 111). Although this may be true the threat of exposure that a criminal prosecution entails cannot be divorced from such fears. However, it is evident that the, harsher, threat from sodomy laws was sufficient to extort money before Labouchère. The higher incidence of prosecutions post-Labouchère may have increased awareness and consequently blackmail, but similar assumptions could be made about high profile cases in the nineteenth century likewise prompting an

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<sup>12</sup> Adair was a Scottish solicitor and former Procurator Fiscal for Glasgow (McGhee, 2001: 178).

increase. It is hard to equate a decreased legal punishment to an increased threat of blackmail. That Weeks and others before and after him did not detail cases of blackmail before 1885 suggests they 'knew' the cause and did not look beyond Labouchère. That contrary evidence has not significantly weakened this power/knowledge shows that those constructing the homophile discourse did not sufficiently critique the preceding historiography but utilised it for their own ends.



#### 4.5 Criminal Law Amendment Act 1885

The preceding sections have shown how homosexual conduct was regulated and prosecuted before 1885, demonstrating that the supposed innovations to the legal situation of Labouchère's Amendment require more critical examination. The widely accepted assertion that only after 1885 was all homosexual sex, committed in public or private, outlawed has been shown to be incorrect through prosecutions utilising conspiracy to commit sodomy and other lesser offences. I now examine the specific context the Labouchère Amendment was passed within to further critique the homophile narrative to examine the understanding that it innovatively identified homosexuality as something distinct and beyond other stigmatised sexual conduct.

The Criminal Law Amendment Bill's first readings contained no reference to same-sex activity. It reflected concerns over declining morality attending urbanisation and was specifically intended for "the protection of women and young girls, [and] the suppression of brothels" (Richards, 1970: 64). It was responding to the public outcry over a graphic series of articles in the *Pall Mall Gazette* entitled "The Maiden Tribute of Modern Babylon" exposing the scandal of a 'white slave trade' in young poor girls sold into prostitution: "This very night in London, and every night, year in and year out... will be offered up as the Maiden Tribute of Modern Babylon... within the portals of the maze of London brotheldom" (6.7.1885). To publicise their plight the editor, W.T. Stead, purchased a girl of thirteen from Ireland for £5. Stead proved his case too well and was imprisoned for three months for child abduction. The outrage the articles provoked prompted 250,000 people to rally in Hyde Park calling for the protection of girls from male predators. Even more than previous scandals mentioned, the 'Maiden Tribute's' coverage was explicitly framed in terms of class exploitation; with "wealthy men driven by lust to abuse innocent girls vulnerable to exploitation because of their age and poverty" (Kaplan, 2005: 172-3). Surprisingly sexual immorality was less of an issue, with Stead stressing the difference between vice and crime:

“I do not ask for any police interference with the liberty of vice I ask only for the repression of crime. Sexual immorality, however evil it may be in itself or in its consequences, must be dealt with not by the policeman but by the teacher, so long as the persons contracting are of full age are perfectly free agents, and in their sin are guilty of no outrage of public morals.... that is an affair for the moralist, not the legislator” (*Pall Mall Gazette*, 6.7.1885).

It can thus be seen how many have seen Labouchère’s Amendment as deviating from the Bill’s intent in apparently targeting private sins between adults.

Before the *Pall Mall Gazette*’s intervention reform to counter child prostitution had been subject to a protracted reform effort. An 1881 Lords Select Committee had recommended raising the age of consent to sixteen and increasing penalties for various sexual offences. When the Bill was introduced in 1883 it passed easily in the Lords but failed in the Commons. It was reintroduced in 1884 under pressure from “women’s purity organisations” (Mort, 2000:100) but dropped during the struggle over Parliamentary reform. In May 1885 the Bill passed for a third time in the Lords but seemed destined to fail again when Parliament recessed on May 22<sup>nd</sup>. At this point Gladstone’s government resigned over the budget and Lord Salisbury took office until a general election could be called, with this Bill considered an almost certain casualty.

However, the *Pall Mall Gazette* inflamed the public to such an extent that debate was resumed on July 9<sup>th</sup> 1885. Many MPs remained opposed to the Bill because its increased police powers were seen as curtailing civil liberties, and it was defeated by three votes. Negotiation on its provisions ensued and it was again debated in August. During its second Commons’ reading in the early hours of August 6th a new clause was proposed to Section II by a prominent Radical backbencher; Labouchère. This Amendment introduced the offence of gross indecency covering all homosexual sex short of buggery, it was not debated with the only intervention made by Sir Henry

James, the AG, who moved the maximum punishment be two years hard labour not one (Commons, 03.08.1885 vol.300col.897). There is no evidence to suppose that James acted other than as a private member in this regard.

The lack of debate has been taken as indicative of how homosexuality was viewed (Weeks, 1977: 14-16). No-one wished to address such matters and didn't want to take a position perceived as condoning it. An alternative interpretation, which takes into account the Bill's history, is that the few Members present wanted to see the back of this troublesome Bill and not extend its saga over a 'minor' Amendment.

Whichever the case, the Labouchère Amendment's notoriety is based on a miscomprehension of the scope of pre-existing laws. The iconic status it holds in the history of homosexuality is premised upon the idea presented by most authors that pre-1885 private homosexual acts short of sodomy were legal. However, the most notorious scandals of the age demonstrate this was not true. Charges of attempted sodomy and conspiracy to commit sodomy were already used to prosecute acts short of sodomy.

Park and Boulton's case demonstrates that even where evidence didn't support these charges 'outraging public decency' was used to prosecute sexually suspect men. This common law offence covered "all open lewdness, grossly scandalous behaviour and whatever outrages public decency, or is offensive or disgusting" and may "destroy the law of decency, morality and good order" and was suitably vague to apply to homosexual behaviours short of sodomy (McGhee, 2005: 202). Evidence to Wolfenden also stated that "men were convicted of buggery that had not actually committed the act, but performed another homosexual act".

Allied to the perceived extension of prohibited acts Labouchère allegedly widened them into a previously unmolested private realm. Burke and Selfe (2001: 11) claimed that “specific private consensual acts were now criminalised” despite no such specifics being detailed.

Sir Travers Humphreys’ (1948:5-6) doubted that parliament “fully appreciated that the words “in public or private” had completely altered the law”. Weeks correspondingly stressed that gross indecency applied “whether in *public* or *private*” and was echoed by Jeffrey-Poulter (1989: 199; 1991: 9). Bennion elaborated that “This infamous measure brought police officers into the bedrooms even of the most respectable, discreet and faithful male lovers of males” (1991: 198). West (1977: 282) attributed the “gross violations of privacy” in 1950s’ prosecutions as having begun to “alienate public opinion”. Many contributors to the decriminalisation debates shared these conceptions; notably Boothby followed Travers Humphreys in claiming that Parliament didn’t realise that the Amendment’s words “in private” would “completely” alter the law (Commons., 28.04.54, vol.526col.1750; Travers Humphreys, 1948: 6). Walkowitz’s influential *City of Dreadful Delight* (1992: 82) also states that “the act made indecent acts between consulting [sic] male audits [sic] illegal, thus forming the basis of legal proceedings against male homosexuals until 1967”. There is almost nothing in this sentence that is correct; it misunderstands the situation before 1885, overestimates the impact until 1967 and ignores gross indecency’s survival after 1967.

Press understanding of the laws governing homosexual relations could also be rather simplistic and certain yet including intimations of doubt. *The Times* (14.1.1958, Homosexual Laws in History: 9) was cited by Smith (1976) and detailed that through “the “gross indecency clause”... Labouchère... probably intended precisely what the clause states. If so his differing explanations of it were highly misleading”.

Higgins study of assizes prosecutions from 1861-86 refutes assertions that Labouchère radically altered prosecutions, finding that “that neither the prosecutor nor the court drew any distinction between public and private” (1996: 157).<sup>13</sup> That no distinction was previously made between offences in public or private was also shown through the cases previously highlighted. In Park and Boulton’s prosecution their landlady’s evidence alleging they shared a bed was central to the Crown’s case. Likewise charges against Ensign Hepburn and Drummer White related to their conduct in a private room. In fact no notorious case involved overt sexual activity in public, so the 1885 Act also did not extend the law in this regard.

Despite claims that parliament did not realize what it was doing in extending the law into private realms (Travers Humphreys, 1948: 5-6) Labouchère was quite explicit in his regard of the limits to privacy relating to such offences. In discussing the Cleveland Street scandal he stated that “there are offences that put those who commit them beyond the pale that protects privacy. Not only are they illegal offences, but they are revolting to every man with a vestige of manly feeling” (28.11.1889: 982-3). Thus Labouchère was unequivocal that homosexual activity had no legitimate space.

The reduction of the punishment from ten to two years under the 1885 Act may have meant juries were more willing to convict (Higgins, 1996: 157). However, Travers Humphreys relates that “an eminent Q.C. prophesied that juries would refuse to convict where the alleged acts were in private” and another “legal friend” thought that Wilde’s trial would show “which the jury dislike most – section 11 or Oscar Wilde” (1948: 6-7). Nevertheless, the irony remains that a law significantly reducing the punishment of same-sex acts became the most notorious statutory intervention

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<sup>13</sup> Old Bailey records also suggest confusion as to what had changed. In only the Old Bailey’s eighth prosecution for gross indecency a 56 year old Pierre Frouger was the first person to be sentenced to the maximum of two years’ hard labour as he “had been several times convicted of the same offence”. His nineteen year old co-defendant was “discharged on his father’s recognisance” despite also pleading guilty (OBP: t18870110-177, 10.01.1887)

into homosexuals' lives and central to discourses on the history of homosexual oppression.

#### 4.6 Labouchère Re-interpreted

The accepted view of Labouchère's Amendment implies that it was a discordant note in a law designed to protect young girls from sexual exploitation and assault. Thus it is portrayed as a homophobic intervention with Labouchère demonised in discourses on homosexual regulation. However, Hansard reported at the time that:

“the meaning of [the Labouchère Amendment] was that at present any person on whom an assault of the kind here dealt with was committed must be under the age of 13, and the object with which he had brought forward this clause was to make the law applicable to any person, whether under the age of thirteen or over that age” (Commons, 06.08.1885, vol.300col.1397).

Waites concludes this meant that Labouchère and others were confused and believed that the age of consent for homosexual acts was 13 (2005: 82 & 68).

Although Waites' explanation fits the scarce evidence available it seems unlikely given that it wasn't six months since the Dublin Castle affair convictions. Although these convictions were for conspiracy to commit sodomy it would be hard to escape the conclusion that this was the accepted method for ensuring convictions when the ability to prove sodomy was in doubt. It seems inconceivable that Labouchère as the editor of a weekly publication often concerned with the excesses of the powerful wouldn't have been fully aware of this scandal. The durable notoriety of this scandal is demonstrated by *The Albany Times'* (USA) front page reaction to the Cleveland street scandal fourteen years later; “if half the stories afloat are true London is to have a trial that will develop details as disgusting as those of the Dublin scandal” (21.11.1889). The *Pall Mall Gazette* (20.11.1889) also compared the offences to the former scandal, stating that those arrested “were accused of offences similar to those which led to the Cornwall-French trials in Dublin”. Obviously these newspapers expected their readers to be familiar with the Dublin affair.

Given Hansard's summary of this Amendment an alternative rationale is required. This is perhaps found in the Consent of Young Persons Act (1880), which deprived adults of the defence of consent when charged with indecently assaulting children under the age of 13 (Kaplan, 2005: 176). Given that sodomy, attempted or actual, made both parties equally guilty this means that only children of 13 or under would be considered the victim of an assault if sodomised and not charged. Even amongst those who were confused about whether homosexual acts were already criminalized there was acknowledgement of the importance of the age of 13, Mr Hopwood, commented in the debate passing Labouchère's Amendment that "at the present moment the kind of offence indicated could not be an offence in the case of any person above the age of 13, and in the case of any person under the age of 13 there could be no consent" (Commons, 06.8.1885, vol.300col.1398).

This demarcation at 14 between who could be considered a conspirator or a victim can be traced back even further. In 1772 the *Public Ledger* received letters regarding the case of Captain Jones for sodomising a boy, one alleged the boy was "a most lying, dirty, pilfering scoundrel that ever existed... and Captain Jones is remarkable for a good character" (13.8. 1772). The same day, a front page letter contained arguments against the Captain which explicitly understood the age of the victim as vitally important. If his victim had been fourteen not thirteen he would have also been tried as complicit. The correspondent argued that; "Every indecent familiarity between persons of the same sex [was] encouraged by the fostering hand of power, and our great men, in quest of amusement, set nature at defiance. What a set of Italianized wretches out Ministry be!" He referred to Jones as a "reptile", and condemned his "filthy mode of Maccaroni entertainment" but argued the point of law that:

"A boy at *thirteen*, in affairs of this kind, is deemed a COMPETENT EVIDENCE, because, not being arrived at the age of puberty, he is not supposed capable to assent, and so become an ACCOMPLICE... The law has laid down a general rule, and supposed them at FOURTEEN capable of

voluntary assent or dissent, consequently accomplices to guilt... The inference is; that the Captain should not be hung upon the evidence of an accomplice; but this is an IMPUDENT FALLACCY... the letter of the Law... fixes the time of age so as to constitute an accomplice at FOURTEEN”.

The profile of this case is demonstrated by the author referring to the Privy Council having “examined the Boy”.

The legal arguments for Jones’s pardon were that his victim had consented to sex on several occasions, that he was only a year off being prosecuted as an accomplice (“the age of consent for males was fourteen”) and that he was the only witness. Whilst the evidence for masturbation was clear, this was identified as only convicting “on the misdemeanour of ‘assault with intent to commit sodomy’”. Three newspapers extensively covered these arguments in the trial. In the correspondence the British legal restrictions on sodomy were compared to other countries and times, and reform claims publicly made for the first time (Norton, 2000). This view perpetuated; in 1846 medico-legal expert Alfred Swaine Taylor wrote that sodomy involving a boy under fourteen was a ‘felony in the agent only’ and thus similar to statutory rape of a girl under twelve (in Jackson, 2006: 237).

It is more plausible that Labouchère sought to extend this protection to older youths (freed from the threat of complicity) than him being ignorant of prosecutions for homosexual activity short of sodomy. The law becoming applicable to all persons can thus be interpreted as extending the protection from assault to those over 13 and removing their assumed complicity. This would generally be considered a provision for those less able to protect themselves from ‘assault’; the poor young. Given this was the group the 1885 Act sought to protect, this alternate light shows Labouchère’s Amendment added to protections the Act provided to young targets of male lust rather than a homophobic aberration.

This interpretation's acknowledgment of the Amendment's protection of boys from sexual exploitation makes entirely consistent with the Act's protection of girls. Weeks before Labouchère proposed his Amendment, he wrote about Stead's campaign which led to the Bill arguing that:

“Law... should only punish crime; and experience shows that if it goes beyond this it defeats its own object. I regard it, though, as the basest and vilest of crimes to maltreat children and I would have anyone who does so, either directly or indirectly... be subjected for a lengthened period to prison discipline. To such scoundrels I would show no mercy.” (*Truth*, 16.7.1885: 91).

Although Smith (1976: 166) grudgingly accepts that “Labouchère ended by agreeing coldly that the laws protecting infant females from molestation needed strengthening” this is incorrect. Labouchère did not follow Stead in calling for the protection of *girls* but refers to children generally, indicating Labouchère's wider concerns and signalling his Amendment's intent.

In two further statements, five and ten years later, Labouchère stated he had intended to “facilitate proof” on the extent of male prostitution. He claimed he was alerted to this problem by Stead who had sent him a report (in Weeks 1989: 102). This assertion also tallies with the enduring association between the regulation of homosexuality and the protection of the young, and also the political and legal connection with prostitution that would reach its apogee in the Wolfenden Committee and prove influential in criminalisation debates (see chapter 9). Smith refers to “contemporary speculation recalled by Frank Harris” in 1916 that Labouchère's motivation for his Amendment was to ridicule the law and thinks that this “may be right” (1976:166-7). However Smith ignored Labouchère's explicit defence of the Bill in Parliament despite referencing the debate (Commons, 30.7.1885, vol.300 col.787). Additionally in *Truth* (6.8.1885: 213) Labouchère wrote

that “The Act itself is in many respects a good and useful one. It was, however, very badly drawn up”. Again later, when agreeing with Stead’s imprisonment, Labouchère wrote that “Stead meant well, and I am inclined to think that, had it not been for his “disclosures” the Criminal Law Amendment Act would not have been passed” (*Truth*, 12.11.1885: 749). This contradicts allegations that Labouchère sought to wreck the Bill.

Additionally, this “contemporary speculation” evaded Stead; three months after the Act was passed he specifically publicly thanked Labouchère and only one other MP, stating that Labouchère:

“had given him better help in passing the Criminal Law Amendment Act and had done more good in that way, than half the members of the House of Commons... He had once said to Mr Labouchère, ‘you are no saint, I know, but for these little children you have done more service than half the saints of the House of Commons’” (*Pall Mall Gazette*, 21.10.1885).

Furthermore, Stead intended to call Labouchère as a witness at his abduction trial but the judge ruled his witnesses as irrelevant (*The Times*, 4.11.1885). Neither are reactions expected of Stead towards a man who had intended to sabotage his Bill.

Smith further argued that “Labouchère, far from embracing the purity campaign as most later writers infer, rebuked Stead for discussing openly in a family paper that which ought to be ‘alluded to in veiled terms’” (1976: 166). However, Labouchère criticised Stead’s methods not his intent, writing in *Truth* that:

“There are subjects which are rarely touched upon by the press, or if touched upon at all, they are alluded to in veiled terms. The rule is, I think, a sound one... The editor of the Pall Mall Gazette broke through this rule last week, and his having done so has caused a great sensation” (16.7.1885: 90).

However, Labouchère acknowledged that Stead “wished to awaken public opinion to the horrors which, according to him, are daily taking place...and in this he has succeeded... [but] as a consequence of the mode adopted to make them public, many much have read what probably would have been better that they should not have read” (6.7.1885: 90).

In this Labouchère was hardly alone. The day after the second in the *Pall Mall Gazette* articles a large number of regional newspapers from Aberdeen to Southampton voiced similar discomfort. *The Hampshire Advertiser* (8.7.1885) reported that the *Pall Mall Gazette* “has acquired unenviable notoriety by the insertion of filthy details” and might be prosecuted under Lord Campbell’s Obscene Publications Act (1857, see Chapter 5 regarding this Act). The *Pall Mall Gazette* nevertheless ran an article glorying in the reactions of “The Press on the Crimes of Modern Babylon” (14.7.1885) and celebrating the provincial press’s contribution to “the conspiracy of silence breaking down” and derided the silence of London dailies. It also stated that “As to the talk of a prosecution for publishing obscenity, that is somewhat too ridiculous in view of the enthusiastic support which is extended to us by all the best men and women of the time” (14.7.1885).

Additionally, in the *Law Quarterly Review* (Vol.1, 1885: 482) a Justice of the Peace wrote about the “grievous mischief already wrought by the *Pall Mall Gazette*... that the open sale of such garbage should be permitted in crowded streets is a disgrace to a civilized country”. Interestingly this article doesn’t discuss Labouchère’s Amendment even though it sought to rectify “considerable misapprehension as to remedies which already existed under English law” (471).<sup>14</sup> It should also be noted that although Labouchère’s *Truth* might cover controversial issues it did not detail them explicitly; its coverage of the Cleveland scandal in 1889 only identified the

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<sup>14</sup> Phillips’ article was cited by Schultz’ *Crusader in Babylon* (1972), neither of these sources gave any information on Labouchère’s contribution but were nevertheless a source for Smith (1976).

offences by stating that they were “indicted under a clause in the Criminal Law Amendment Act that I moved and carried” (5.12. 1889, 1039).

Furthermore, Smith accepts that Labouchère was criticising the Bill when he wrote that Stead’s campaign contained “a certain amount of truth in it, but that habitual practices have been somewhat loosely assumed from isolated cases” (Smith, 1976: 166; *Truth*, 16.7.1885: 90). However, this again supports Labouchère’s contention that his intent had been to garner evidence on the issue of male prostitution. Smith also attributes to Labouchère a jealous “pique” at having been “scooped” but doesn’t quote the rest of Labouchère’s article which states: “That the law for the protection of children against scoundrels should be strengthened I have always thought, and the necessity of this is proved if only one-hundredth part of the Pall Mall revelations be true.”

Smith notes that Hesketh Pearson, a later Wilde biographer, refuted Harris’ explanation, by stating that the Amendment “was not, as Harris thinks, with the object of reducing the Act to absurdity, but with the intention of increasing its gravity”, but Pearson agreed that the Amendment “did not exist in any other civilized country” (Pearson, 1946: 302). Smith concludes that, despite Harris’s confusion as to the specifics of the Amendment, “there is enough circumstantial evidence to suggest that the standard explanation is open to question” (Smith. 1976:166). Smith’s conclusion being that Labouchère “intended the clause to mean what it said and have the results that it had” (1976:166). Thus Smith chose the narrative he preferred with no other sources than Harris and Hopwood despite having cited Labouchère’s 1885 contributions to *Truth* and the parliamentary debate directly refuting them.

Montgomery Hyde (1970: 135) also criticises Labouchère for claiming he based his Amendment on the French penal code, assuming “he must have had in mind the corruption of youth, since the French code did not penalise homosexual acts between

consenting adults in private, and in fact had not done so since the Revolution”. Smith (1976:167) suggests that Labouchère was confusing this clause with his other, failed, Amendment removing parental responsibility “from parents who facilitated the ruin of their children” (*Reynold’s Weekly Newspaper*, 9.8.1885) which was allowed in French law.

However, the impression that France allowed homosexual freedom is misleading. Although, the French penal code of 1791’s sole sexual crime was rape, the law of 19<sup>th</sup>-22<sup>nd</sup> July 1791 intriguingly referred to acts of *gross indecency* and obliquely to same sex acts:

“Chapter II, Article 8 declared,

Those accused of having committed a gross indecency, by a public offence against the decency of women, by unseemly actions, by displaying or selling obscene images, of having encouraged debauchery, or having corrupted young people of either sex, will be immediately arrested” (Sibalis, 1996: 83).

The punishment for these offences was a maximum six months’ prison term, this was doubled in cases concerning youths (Sibalis, 1996: 83). Thus an offence of gross indecency existed punishing the corruption of boys by a year’s imprisonment.

Labouchère’s terminology of ‘gross indecency’ and the replicated punishment, before it was doubled through an intervention, strongly suggest this was the law to which he referred. It therefore bolsters my argument that Labouchère’s Amendment was intended as a protection for male youths against corruption. Montgomery Hyde points out that Labouchère’s Amendment included no age limit but neither did the French law. He wrongly asserts that Labouchère took his Amendment from the provisions on indecent assault. Stating that “If Labby had stuck to the term ‘indecent assault’ in preference to the vague and undefined ‘act of gross indecency’, a vast

amount of unnecessary trouble and suffering... might have been avoided”  
(Montgomery Hyde, 1970: 136).<sup>15</sup> The problem was not that gross indecency was undefined; rather that no one apparently knew where to look for its elaboration. It is worth asking what other wording might have sufficiently encompassed all sexual acts short of sodomy and how acceptable these might have been in an Amendment of the time.

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<sup>15</sup> John Addington Symonds also condemned Labouchère’s Amendment as “a disgrace to legislation by its vagueness of diction & the obvious incitement to false accusation” (Grosskurth, 1964:283).



## 4.7 Gross Indecency

My alternative interpretation to the historical discourses on the Labouchère Amendment will now be considered in relation to its earliest prosecutions. The first major prosecution was the 1889 Cleveland Street Affair concerning telegraph delivery boys becoming prostitutes for high-ranking personages at a brothel. Two related trials concerned a libel against an Earl accused of complicity and of a solicitor accused of conspiring to fund the emigration of a witness.

The gross indecency trial was held in “virtual secrecy and was abetted by complete silence in the press” until Labouchère’s *Truth* broke this silence (Schmidgall, 1994:218) and used it to press the case “vigorously” (Kaplan, 2005:182). However, the *Truth*’s vanguardism has been exaggerated with other papers previously having raised the case’s issues of abuse of power. The *Pall Mall Gazette* (12.9.1889) reported the Solicitor to the Treasury’s presence at Marlborough-street police-court for Veck and Newlove’s commitment for trial; “but the question which Sir Augustus Stephenson will have to answer is whether the two noble lords and other notable persons... are to be allowed to escape scot free”. *Reynold’s Weekly Newspaper* (29.9.1889) also wrote that Hammond, one of the suspects, “scented danger – how, one wonders – and levanted... Week after week the wretched youth Newlove, and the more infamous Veck, were remanded...to give the rich and influential patrons... time to secure their immunity by flight”. Whether this was true or not, the Prime Minister, the Marquess of Salisbury, did not consider that “any official application could justifiably be made of the French Government for assistance in surrendering the fugitive” (24.7.1889, HO/144/477/X24427).

*The Times*, by contrast, only mentioned the scandal on 19<sup>th</sup> December and only in relation to the solicitor’s prosecution. This was the subject of considerable correspondence by the DPP who collated an extensive collection of newspaper

cuttings regarding the scandal (DPP/1/95/3). Confusingly early reports in *Truth* (21.10.1889: 932) gave a different address as the locus of this affair; “Anent the Cavendish-street scandal... Why are the minnows to be convicted, and the sharks to be allowed to go scot-free?”<sup>16</sup> Ernest Parke, editor of the *North London Press*, also attacked the powerful frequenters of Cleveland Street; alleging that Lord Euston had done so and “was convicted of libel and sentenced to a year in prison” (*Pall Mall Gazette*, 23.11.1889). The conviction left the attorney general in a difficult position and he was asked whether John Saul<sup>17</sup>, a witness who had admitted to indecencies with Euston, should be charged with them or with perjury, the AG preferred neither charge (DPP/1/95/1 & 4). *Truth*, perhaps ironically, demanded why, given that he had committed “One of the most horrible perjuries on record” (*Truth*, 30.01.1890). On December 26th 1889 Labouchère’s *Truth* (1199) printed details of how to donate to the “Park Defence Fund”, the legal team this enabled included the future P.M. Asquith (*Pall Mall Gazette*, 25.11.1889).

The scandal resulted from enquiries into petty thefts from the general post office which revealed a clerk, Henry Newlove aged 18, was spending more than he earned. The case was handed over to Scotland Yard after Newlove revealed that he and “several of his fellow messengers were in the habit of going to this house [in Cleveland Street] and receiving money” (*Truth*, 28.10.1889: 982-3). Newlove and George Veck, aged 40, were tried quickly at the Old Bailey “when the court was almost empty, and, having pleaded guilty, one was sentenced by the Recorder to nine

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<sup>16</sup> In the same edition of *Truth* (931) an article revealed “a direful scandal on board the Victoria and Albert, owing to a trusted and highly-favoured petty officer being detected in an indiscretion of a peculiarly heinous description, for which the Queen would consider keel-hauling a light punishment”.

<sup>17</sup> A handwritten note on John Saul’s original statement of 10.8.1889 identifies him as having the pseudonym of ‘Dublin Jack’ and that he “was in the “Dublin Scandals” (French and others)” (DPP/1/95/4).

months' imprisonment, and the other to four months'" (*Truth*, 28.10.1889: 982-3; Transcript of trial, DPP/95/1/3).<sup>18</sup>

The case interested Labouchère for a number of reasons. Firstly it concerned the excess and corruption of the aristocracy whilst the lowly were punished:

“whilst these two persons were smuggled into prison, one offender – a nobleman connected with the court – was called upon to explain his conduct by a Court official... The nobleman fled, and when he had got well out of British jurisdiction a warrant was issued against him... If this is not one law for the obscure, and another for those highly-placed, what is?” (*Truth*, 28.10.1889)

This was a particular obsession for Labouchère and he used *Truth* to berate those in power; “Whether the government will grant an investigation into the Cleveland – street scandal, I know not... If they decline an investigation, they will stand self-condemned” (12.12.1889). Labouchère addressed a public meeting in November alleging that “There was no meanness, no subterfuge, no bribery to which the government would not descend... the Government of the classes must not suppose that they would be allowed to send poor men to prison and to step in to protect men of the classes” (*Pall Mall Gazette*, 30.11.1889). In March 1890 Labouchère was excluded from Parliament for saying he disbelieved Lord Salisbury over the matter (*The Times*, 01.03.1890). The content of Labouchère’s speech was the subject of an internal investigation as to how he had obtained “the particulars as to dates and incidents to which he referred” (DPP/1/95/6).

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<sup>18</sup> Old Bailey records consist of a bare five lines and less than fifty words relating to the convictions on “certain obscene acts, and also to conspiracy” (OBP: t18890916-696, 16.9.1889). However a more complete transcript is held in DPP archives (DPP/1/95/1).

That Labouchère was correct is demonstrated by the lengths the governments and its legal officers went in seeking to obscure the identity of those allegedly involved. Even in internal letters Lord Arthur Somerset was either identified by a blank space<sup>19</sup>, as L.A.S., by paper pasted over the name when used, or by the pseudonym he had used; Brown. A letter from the DPP to the AG encapsulates the government's concerns, whilst "the statements of the witnesses must be fully taken they should not be asked...the names of individuals ... If the name of "Brown" comes out (I mean his real name)... let me see the deposition as soon as possible" (DPP/1/95/1). Furthermore, when prosecuting "every precaution will be taken to prevent any name being mentioned" (2.8.89, DPP/1/95/1).

The disagreements in the government are revealed in letters from the DPP, firstly to the AG: "I feel sure that you will understand & the Sec of State will understand that in trying to express my own views I do so with the greatest deference to his & your own and in the confident assurance that however we may differ in opinion – we have the same object" (DPP/1/95/1). Further revealing to the Home Secretary that the "Attorney General directed me to take proceeding against Veck only... The responsibility of the case hitherto adopted is not with me" (19.10.1889, DPP/1/95/1). His exasperation at this is evident in his later letter to the Metropolitan Police Commissioner that the case "has been for some time past and is still entirely out of my hands" (22.10.1889, HO/144/477/X24427). The relevancy of Labouchère to the case was made plain in the DPP case summary which identifies him as "the Government's foremost critic", indeed the series of DPP documents on the Cleveland Street case is entitled "Labouchere Papers" (DPP/1/95/1).

Secondly the case was of personal importance to Labouchère "What business is it of yours? It will be asked...it is my particular business. Newlove and Veck were

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<sup>19</sup> "I am not satisfied with the evidence of identification of "\_\_\_\_\_." (17/8/89, letter from Treasury department (Sir Augustus Stephenson) regarding Reg. v. Newlove).

indicted under a clause in the Criminal Law Amendment Act that I moved... It is a clause that was specially designed to arm the police with powers to act in cases like this, and I am determined that my clause shall run against all, and not only against the obscure” (*Truth*, 5.12.1889: 1039). Labouchère also stated that “in 1885, Parliament armed the guardians of public morality with full powers to deal with this offence. In doing so, they recognised that the offence was on the increase, and they expressed their desire that it should be stamped out” (Commons, 28.02.1890, vol.341 col.1535). In this Labouchère was echoing the Recorder at the trial: “Prisoners at the bar you have pleaded guilty to these offences... created by a recent statute making such acts misdemeanors [sic]” (DPP/95/1/3).

Notably, Wright, a seventeen year-old messenger who went to Cleveland Street, gave sworn information admitting that he went willingly to the WC where: “Newlove put his person into me, this is to say behind only a little way and something came from him”. However, the indictment against Newlove was that he did “make an assault on him [Wright]... did then beat wound, & illtreat with intent that detestable & abominable crime not to be named among Christians”. Thus, the violence and incomplete nature of the act having been transformed, Wright was released from his admitted complicity in buggery. Yet again we can see how an alternative, lesser, and more easily proved charge was used to enable selective prosecution of the ‘guiltier’ party.

Thirdly, Smith (1979: 168) asserts that Labouchère “enthusiastically endorsed the savage sentences given to two of the small fry. This is a gross misrepresentation of Labouchère’s statements and the sentences which were noteworthy for their leniency; it was this and the covert nature of their trial which inflamed journalistic sentiments. Lord Halsbury wrote that “The punishments already inflicted seem to me very inadequate and more likely to do harm than good” and newspapers of the time uniformly agreed (DPP/1/95/2-3). The scandal was more about the perceived abuse of the criminal justice system to allow the “sharks” to go free whilst the “minnows”

suffered. Smith's copying of Labouchère's piscine analogy and his extensive referencing of *Truth* suggests that he knew of this. Indeed Labouchère notably reserved his ire for the older Veck and ignored the lesser sentence for Newlove: "what are we to think of the almost nominal sentence on Veck when he pleaded guilty?... I assert that a grosser miscarriage of "justice" never took place in a court of law than this sentence" (*Truth*, 19.12.1895: 1141-2). This again suggests that Labouchère was most concerned that older, privileged, men who took advantage of poorer youths were the target of his Amendment in keeping with the wider Act.

Kaplan acknowledges that throughout the scandal the press cast the telegraph boys as victims "capitaliz[ing] on the fervour that had animated Stead's 'Maiden Tribute' and led to the passage of the [Labouchère Amendment] in the first place. Even the DPP characterised them as having been "made the victims of the unnatural lusts of full-grown men" (DPP/1/95/1; Kaplan, 2005: 192-193). Weeks also recognizes that Labouchère described the young men as being "more sinned against than sinning" (Weeks, 1991: 59). Hardly the sentiment of a notorious homophobe, if he was indeed such then it seems in this case it was trumped by his radical sensibilities.

The scandal became a vehicle "for the aggressive assertion of a middle-class morality seeking to define the national character." It possessed all the attributes common in most of its precursors; an aggressive press, a brothel, noble malefactors and their relatively lowborn objects of lust. The scandal was made even more outrageous to the radically minded by rumours that Prince Albert Victor frequented the brothel and an alleged cover up by his father the Prince of Wales (Kaplan, 2005: 182). It is more likely that the Prince's intervention resulted from the indictment of his equerry Lord Somerset than to aid his son. Somerset was never brought to trial, having fled to France on October 17/18<sup>th</sup> before the warrant was finally issued for his arrest on November 12<sup>th</sup> (DPP//95/5). However, his solicitor, Newton, was imprisoned for six weeks for offering to facilitate the emigration of Algernon Allies, one of the telegraph boys to prevent him from testifying (DPP/1/95/1; *The Times*,

21.05.1890). *Truth* provocatively suggested that Newton should have argued that he was “aiding, and not impeding, the actions of the guardians of the law by getting witnesses out of the way” (30.01.90). This conspiracy occurred before Somerset fled, indeed the Commissioner of Police informed the Attorney General on October 5<sup>th</sup> that Somerset was “in town” to attend his grandmother’s funeral but that after the “failure of the attempt to remove Allies” he would be leaving the country (DPP/1/95/1). The rumour of even higher-born malefactors may have started by Somerset: “At Constantinople... [Somerset] explained that he had left England to screen a highly-placed person – a falsehood of the basest and most baneful description, as there is not the shadow of the shade of a suspicion against the person in question” (*Truth*, 19.12.1889: 1141-2).

It is not necessary to provide detailed commentary or analysis of the infamous use of the gross indecency law in Oscar Wilde’s prosecution. By this time the law’s use was established and whilst it contains many of the familiar elements of nineteenth century ‘homosexual’ scandals it possessed little novel. Suffice to say that a misguided libel suit against the Marquess of Queensbury after he had accused Wilde of ‘posing as a sodomite [sic]’ precipitated Wilde’s 1895 downfall. Even the suggestion of such activities compelled Wilde to respond and after his libel case failed he was eventually convicted “under a single indictment containing twenty-five counts and alleging: (a) the commission of acts of gross indecency by both men contrary to the Criminal Law Amendment Act, 1885, section 11; and, (b) conspiracy to procure the commission of such acts by Wilde” (Montgomery Hyde, 1948: 179). It is worth noting that the evidence against Wilde was graphic and alleged sodomy: “Wilde invariably began his “campaign” – before arriving at the final nameless act – with indecencies... “tossing him off”, explained Parker quite unabashed, “He suggested two or three times that I should permit him to insert “it” in my mouth but I never allowed that” (Anonymous, 1906: 97).

Ironically Wilde once described Labouchère as his hero and one of “the best writers in Europe, a most remarkable gentleman” (Ellmann, 1987: 215-6). The Wilde case highlights the damage such allegations could do and the level of public and societal distaste of homosexual activity. Such matters were not to be aired in public and the punishment for indiscretion was severe. This extended to those writing on the subject. The first book published on homosexuality, Havelock Ellis’s *Sexual Inversion*, was prosecuted two years later as a lewd, bawdy, scandalous and obscene libel” (Haste, 1992: 29). Thus, if there was a discursive explosion created regarding homosexuality, it was one which the state sought to muffle.

The last notable nineteenth-century law impacting upon homosexuality was the 1898 Vagrancy Act, despite the fact that it was passed with no mention of homosexuality. Parliamentary debates made it clear that it intended to “prevent males soliciting in a public place for an immoral purpose”; meaning men trying to obtain clients for prostitutes. However, the law was widely used to arrest and prosecute men soliciting for other men. This use, and the harsher light that such activity was viewed in, was acknowledged when it was amended in 1912 (McGhee, 2005: 64-67).

Like the 1885 Act, this Act did not uniquely target same-sex activity for prohibition. The primary concern of lawmakers in both Acts was prostitution. The 1898 Act made no mention of homosexuality. It was only through their use by the police and courts that these Acts came to have such a devastating impact on generations of homosexuals.

Weeks states that “in 1898 the laws on importuning were tightened up and effectively applied to male homosexuals” which again represented a “significant [extension] of the legal controls on male homosexuality” (1991: 19). However, the charge of incitement to commit an unnatural offence would appear to be applicable to such behaviour and such a conviction was achieved in 1874. In *R v. Ransford* this

incitement had been in correspondence, but the offence did not stipulate the form such incitement must take (White, 1999: 46-49).

Thus in the latter half of the nineteenth-century homosexuality had been firmly outlawed and placed beyond the realm of that considered decent and acceptable in civilised society, with each succeeding decade after 1861 seeing increased prosecutions. Whilst this was the effect of Labouchère's Amendment its intent is far more debateable, given the scarce and contradictory nature of the available evidence, and it represents a rationalisation of previous laws rather than an innovation.



## 4.8 Conclusions

This chapter has critiqued significant happenings discursively produced as Foucauldian ‘events’ in discourses on homosexual regulation and shown that existing explanations for them are inadequate, incomplete and unsupported by the evidence.

By elaborating upon and deconstructing these ‘events’ I have problematised the foundations of discourses on homosexual regulation portraying Labouchère’s Amendment as representing a “reversal of a relationship of forces” (Foucault 2003: 247). This rejects the established narrative of homosexual regulation shared by reformers, opponents and academics alike, expanding the moral, legal and social context within which this should be seen. I illustrated the surfaces of emergence of homosexuality, the foundations of these discourses on homosexual regulation, and those “social and cultural areas through which discourse appears” (Horrocks & Jevtic, 1997: 87), principally in this study the courts, press, and the political process.

I contend that Foucauldian “grids of specification” were adapted and developed through discourses on illegitimate sexuality in the nineteenth-century which changed how homosexual acts were related to other sexual acts. Rather than simply grouped in with bestiality and other non-procreative forms of sexual behaviour, homosexuality was becoming distinct in the minds of legislators. Labouchère’s Amendment wasn’t the first to specifically target homosexual acts short of sodomy, although its use significantly entrenched and raised the profile of this distinction first made in the Offences Against the Person Act (1861). It is for this and not for other alleged attributes that the Amendment deserves to be remembered.

The manner in which homosexuality came to prominence in this period intrinsically linked it to the 'vice of prostitution'. This defined it in moral terms and the ways its control and regulation was perceived and enacted. This grid of specification continued until Wolfenden was asked to examine the laws relating to both. Therefore a fuller understanding of Labouchère's Amendment and the history of homosexual regulation can only be achieved by analysing the connections between regulating homosexual and heterosexual sex. These changes were being made in the same era, often by the same politicians, within the same society and on the same subject of sexual immorality.

By recognising themes apparent in the discussion and prosecution of scandals this chapter provided something approaching a continuum. Many treatments of the subject have treated the different scandals as merely illustrations of the law's history of violence whilst not identifying themes, commonalities or elements demonstrating that homosexual activities, no matter their degree, were acted against.

One theme often ignored in discussions of homosexuality is class. Throughout the period class was linked through the scandals to conceptions of propriety and the legitimacy, or otherwise, of the ruling classes. Earlier in the period it was considered shocking that persons of good standing should conduct themselves in a base manner more associated with their social inferiors. Later middle class radicals attributed homosexual activity to the debauched aristocracy. This is particularly relevant in understanding Labouchère's reasons for his amendment.

Especially interesting is Park and Boulton's case where the authorities and press seemed unsure how to deal with them or exactly what they constituted. This ambiguity was best illustrated in the pamphlet "The Hermaphrodite Clique" that showed the press lacked the vocabulary to describe them. Most revealing is their offence's very public nature and the support they seemingly enjoyed in court and

outside. The instant and uniform vilification one might expect towards them was not apparent. For men accused of conspiracy to commit sodomy to be met with cheers and amusement is discordant with much of what is recorded before and after. It suggests more complex reactions to manifestations of ‘deviant’ sexuality than is usually assumed. Equally casting doubts upon the presentist 1970s homophile histories portrayal of similar sympathetic 1950s manifestations as being unprecedented developments.

It is also apparent that the evidence suggests a developing distinction between sexual morality and the right and proper realm of the law’s jurisdiction, with the added complication that the law was seen to highlight what was best left hidden, even at the expense of allowing such practices to continue. Indeed in 1889 the DPP, Lord Halsbury, stated that “the expediency of not giving unnecessary publicity” was worth allowing “private persons – being full grown men to indulge their unnatural tastes - in private” (circa 7.10.1889, DPP/1/95/3; also cited in Weeks, 1996: 49). This sentiment, when expressed in the 1950s, was also characterised as being unprecedented within elite discourses. Halsbury was concerned with the Cleveland street scandal giving “very wide publicity and consequently will spread very extensively matter of the most revolting and mischievous kind, the spread of which I am satisfied will produce an enormous evil”. However, in portraying this as opposition to such prosecutions Weeks doesn’t mention that Halsbury further wrote that:

“The punishments already inflicted seem to me very inadequate and more likely to do harm than good... if the sentence could be penal servitude for life, or something by its terrible severity would strike terror into such wretches... I should take a different view. But... the only offence alleged is the new misdemeanour” (7.10.1889, DPP/1/95/3).

Thus Halsbury was wishing that Labouchère’s Amendment didn’t exist so the previously more severe punishments could be applied. This directly contradicts the

existing interpretation of Halsbury and the establishment's position on Labouchère's Amendment.

## **Chapter Five**

### **Nineteenth Century Heterosexual Regulation**



## 5.1 Introduction

Chapter 4 showed that nineteenth-century changes to homosexual regulation were not as punitive, novel, or homophobic as portrayed. Labouchère's Amendment should instead be seen as extending protection from homosexual assault to youths and others. This chapter shows that Labouchère's Amendment must also be contextualised as part of wider political, social and moral movements largely rationalising and formalising pre-existing ecclesiastical or common law regulations on sexual activity, but also including previous statutory interventions. I characterise this as adapting the nineteenth-century punitive heteronormativity that firmly organised and privileged a certain conception of heterosexuality. This chapter explores laws favouring married heterosexuals and punishing transgressors of this code conducting extramarital sexual activity.

For Foucault the 'invention' of homosexuality significantly gave the state and medical institutions powers to establish truths and regulate desires by specifying normality and abnormality. But the claim that "the homosexual and the 'pervert' were merely the first and most obvious candidates for this kind of treatment" (Cocks & Houlbrook, 2006: 8) is unfounded. Indeed Foucault recognised that the "marriage relation was the most intense focus of constraints... stricter, perhaps but quieter" (1976: 37-8). This chapter questions whether the state was indeed quieter on these matters.

Famously Foucault rejected the "hypothesis that modern industrial societies ushered in an age of increased sexual repression" (1976: 49) seeing instead a multiplication of discourses on sexuality solidifying and implanting "an entire sexual mosaic" (1976: 53). However, this concentrates overly on outcomes: I contend these were irrational consequences of rational actions (Ritzer, 1993) intended to limit sexual deviance. Throughout the periods under consideration the political/legal elites also

sought ways to prevent public discussion of these matters. Foucault asked why there was this seeking of truth, power and knowledge of sex, the answer is simple: to control it. In rejecting the most obvious answer of the repressive hypothesis Foucault ignores that society and the law's *intent* was to repress. He may have wished to "break free... of the theoretical privilege of law and sovereignty" but the people couldn't and the elite did not want to (1976: 90).

To fully understand 'deviant' sexualities of the Victorian era one must do so in relation to the dominant sexuality, because they are mutually constructed through binary oppositions of normal and abnormal. The dominant sexuality constantly reproduces itself socially and culturally, but when significant changes in protecting or entrenching elements of it within statutory law are undertaken then one must examine what perceived threats prompted this. Therefore this chapter examines diverse elements of Victorian sexualities and their legal reforms. By providing this context it will be possible to judge my contention that Labouchère's Amendment was part of a punitively heteronormative social structure that constructed the right and proper accepted sexual forms.

This chapter shows that discourses on sexuality are rarely, if ever, just about sex. This is never truer than when sex enters public discourses; sex is produced though and produces other societal tensions and conflicts. Whether these tensions are between sexualities, genders, classes, or ideological positions they must be understood in their societal and historical context. Thus this chapter produces a genealogy of the archaeology of heterosexual regulation, creating the context for the landmark moments of that history, thereby contextualising homosexual regulation. In attempting to avoid the mistakes I identify in others' research this chapter provides an exhaustive examination of nineteenth-century state regulation of heterosexuality. This provides the archaeological foundation for part 3's genealogy of decriminalisation.

## 5.2 Bastardy and pre-marital sex

This section exploring the issue of bastardy shows how various discourses intersected to produce a particularly punitive patriarchal approach which punished the mother and child but rarely the father. Discourses on respectability, morality, class, heteronormativity and poverty combined in producing an illegitimacy that was increasingly cemented through state power.

Illegitimacy rates appear to be a useful quantitative measure of illicit pre-marital heterosexual conduct and an obvious issue to look for social responses to physical proof of fornication. However they must be considered cautiously as they may reflect changes not only in sexual but also in social behaviours; in the willingness of couples to marry in the event of pregnancy. The illegitimacy rate in 1846-50 was 67.1 per 1000 live births, this declined until 1900 before gradually increasing but was only firmly surpassed in 1961 (Cook, 2004: 102).

As with other early 'moral' crimes, such as described regarding homosexuality, "official displeasure at fornication or extra-marital sex and at the birth of bastard children was expressed through the public penance that could be imposed by church courts" (Jackson, 1996: 30). However, Elizabeth I and James I introduced laws regulating signs of disorder and immorality, including statutes to combat drinking, gaming, Sabbath solemnity, swearing, dress, alehouse-keeping, and bastardy (Hoffer & Hull, 1981: 13).

The state first intervened directly in illegitimacy in the 1576 and 1610 Poor Law Acts, which allowed:

“justices of the peace to commit ‘every lewd Woman’ bearing a chargeable bastard to a House of Correction for one year. If a woman re-offended, she was to be committed until she could provide sureties for her good behaviour... Significantly, by providing only for the punishment of women, this statute reinforced existing prejudices against unmarried mothers” (Jackson, 1996: 30).

In this discourse on poverty the mothers of bastards were considered “undeserving burdens on this system of parochial poor relief” (Jackson, 1996: 31). Economic and moral judgements were intertwined, with parents of bastard children accused of “defraud[ing] the parish of its capacity to relieve the ‘true poor’ by thrusting destitute infants upon local charity and “bastardy was singled out in this law [1609] as a “great dishonour” and “great charge” to the nation”.

This shows that the state was jointly interested in the moral issues and the financial burdens bastards presented. The Poor Laws, and others allied to them, attempted to deter working class women from having illegitimate babies on both grounds. The Settlement and Removal Act (1662) added to the punitive treatment of unmarried mothers by determining a bastard to be settled where it was born. Parishes were consequently eager for chargeable bastards to be born elsewhere and unmarried pregnant women were often forced from the parish by “bribes or threats”. Sometimes women known to be pregnant by a ‘stranger’ were forcibly married with “the bridegroom having to be brought to church in chains”. Perversely this law discouraged marriage for the poorest members of society, as non-parishioners would often find themselves moved on immediately after marriage (Marshall, 1937: 41). Thus the interplay of law and morality could be contradictory and irrational in consequence.

In 1733 with 'An Act for the Relief of Parishes' somewhat redressed the Poor Laws' gender bias by allowing for imprisoning fathers of bastard children unless they undertook to recompense the parish for his child's costs. This law concentrated solely on the financial aspects of illegitimacy and no longer characterised it "as being against God's laws and the mothers were no longer referred to as 'lewd'. In the eighteenth century, the legislature's sole expressed concern was the financial burden of bastards on the parish" (Jackson, 1996: 37).

When the Bastardy Clauses of the New Poor Law (1834) abolished the "possibility of the unmarried mother receiving a pension from the father of her child" riots erupted in northern England. This prompted the Commissioners to re-establish the "possibility of getting an Affiliation Order, but the procedure was so complicated, and for such paltry results, that it was hardly ever used" (Spensky, 1992: 104). Thus "for most unmarried urban women their vulnerability in the event of pregnancy had greatly increased by the 1830s and 1840s" (Cook, 2004: 64).

Despite state efforts to discourage and penalise bastardy, illegitimacy rose in England from "about one birth in a hundred... in 1650 [to] about seven in a hundred in 1845" (Mason, 1994a: 66). These figures suggest the reason for increasing concern over illegitimacy and the Poor Law's ineffectiveness in reversing the trend. Indeed "the rise in bastardy levels contributed to a rapid and disturbing rise in the poor rates" and local resentments towards the bearers of chargeable bastards (Jackson, 1996: 37). However, official rates of bastardy were not even half of the story of pre-marital pregnancy. Examinations of eighteenth-century marriage and Christening registries suggest between a third and a half of all brides were pregnant. Pre-marital sex was therefore extremely prevalent amongst 'courting couples' and Mason concludes that a significant proportion of illegitimate births resulted from "a disruption of marriage intentions" (1994a: 67).

Class and location were key elements in this. Unsurprisingly brides from lower social classes were more likely to be pregnant because marriage plans were more easily frustrated for the economically vulnerable. Servants were most vulnerable to illegitimacy, accounting for “About two-thirds of unmarried mothers applying to the London Foundling Hospital”. Whereas other factors were involved, such as the need to be sexually respectable and the inability to keep a baby whilst in employment, it accords to increasing concerns over the conduct of female servants in the eighteenth and nineteenth centuries (Mason, 1994a: 70). Expanding middle class employment of servants changed “the context and forms of domestic service” to being more contractual than familial.

With this came a “widespread perception that the criminal underworld of theft, prostitution and infanticide was largely populated by domestic servants” (Masciola, 2002: 62). Concurrently servants were eroticised in this period; *My Secret life by Walter* (1888) details the authors’ ‘seductions’ of household maids by force and guile, similar themes of ‘gentlemen’ seducing servants are prominent in the *Romance of Lust* (Vols. 1-4; 1873–1876) and *The Pearl* (1879-1880).

Notably pauper illegitimacy in London was the “outstanding example of low urban illegitimacy, with the lowest levels in the nation around mid-century – all areas, rich and poor alike, obey the law of low metropolitan bastardy” (Mason, 1994a: 71). Despite rising concerns over the moral effects of urbanisation, particularly among factory workers, illegitimacy was distinctly higher in rural areas.

The nineteenth-century saw dramatic swings in illegitimacy rates; a downturn at the beginning of the century lasted until 1831 before a dramatic leap of between 50 and 100% by 1840. However, they fell in the 1850s and by 1861 their “fall was sharp and universal”. Unprecedentedly, this pre-dated declining legitimate birth rates by ten years; previously illegitimacy had tended “to be in step with changes in general fertility, as well as with changes in rate and age of marriage, and in pre-nuptial

pregnancy” (Mason, 1994a: 65-6). Theories behind the decline in both birth rates will be examined in the next section on birth control.

This section shows how moral and financial considerations combined to increase social concerns over illegitimacy and, like with homosexuality, inextricably linked this social problem to class in punitive heteronormative structures. This theme will be developed further in the next sections.



### 5.3 Birth control

Issues of population, and through this birth control, were of increasing intellectual concern from 1800. This discourse's development is firstly covered in detail as those involved in these debates were influential in this era's general moral discourses. This is especially important as it was not innovations in birth control methods that caused changes in fertility but a greater willingness to utilise them, whether as cause or/and effect this discursive expansion requires examination.

Birth control most notably came to public attention in the 1877 criminal libel trial of Annie Besant and Charles Bradlaugh after reprinting and circulating *Fruits of Philosophy*, an American birth control pamphlet by Dr Knowlton. This was a deliberate provocation after Charles Watts and Henry Cook's prosecution for printing and publishing this pamphlet in 1876 despite it having been sold without judicial interference for over forty years (Banks, 1954: 23-4). Besant and Bradlaugh's trial was widely publicised, achieving their aim of challenging "the informal censorship... of this kind of knowledge". In their defence they articulated arguments on "sexuality, marriage and contraceptive practices" (Smart, 1992: 20). Despite, or perhaps because of, this they were sentenced to six months' imprisonment, but on appeal they were dismissed on a technicality (Cook, 2004: 61). The trial prompted the immediate formation of "the Malthusian League to which Professor Glass traces the promotion of the modern birth control movement with its system of clinics." Of more immediate effect was that Besant claimed publicity for the pamphlet meant circulation rose from 700 copies annually to 120,000 between March and June, illustrating the public demand for this information (McGregor, 1992: 82).

Besant and Bradlaugh self-published an account of their trial “as a contribution to the discussion of the Population Question” (1877:1). Writing that Knowlton’s pamphlet was not “of itself, of vital importance; its importance lies in the fact that it is condemned... because it advocates prudential restraint to population, while also advocating early marriage” (1877:1). They acknowledged that scientific knowledge had since improved but “no better book can be published, for doctors will not write and publishers will not sell a work which may bring them within the walls of a gaol” (1877:1). Therefore they had taken their stand to “make the way possible for others dealing with the same topic” believing that “it was never dreamed that Lord Campbell’s Act might be strained to include medical and scientific works; its author scouted the possibility of such misuse, and himself limited its object to the seizure of the foul literature of passion and sensuality” (1887: 1-2)

This prosecution suggests a more proactive approach to the regulation of heterosexuality by political and judicial elites. However, the Lord Chief Justice considered the prosecution ill-advised because of the attention given to matters better left unspoken of. Indeed Bradlaugh and Besant wrote that “Once more a new truth has been spread everywhere by its persecutors and gained a hearing from the dock that it could never have won from the platform” (1887:2). This argument against giving publicity was a consistent objection to regulation that was made by Lord Halsbury regarding the Cleveland scandal and will also be seen in the pornography section. It will again be shown being deployed to forestall calls for homosexual reform in the 1950s.

Although *Fruits of Philosophy* was American, by a circuitous route its origins were largely the work of the Briton Francis Place. He converted Richard Carlile to the merits of contraception whose “*Every Woman’s Book*” stimulated Robert Dale Owen in America to write *Moral Physiology*. This prompted Knowlton’s works “which

were pre-eminent in the conventionally published literature of contraception throughout the first forty years of Victoria's reign" (Mason, 1996: 179).

Influential in concerns over population was Reverend Thomas Malthus; his 1798 *Essay on the Principle of Population* argued that "excessive procreation of the lower classes" caused pauperism. However, Malthus opposed any "artificial" means of reducing fertility, advocating "moral restraint" instead (Langer, 1975: 671). Although James Mill wrote an encyclopaedia entry seemingly advocating birth control, the first to take Malthusian principles forthrightly in this direction was Place, a friend of Bentham and Mill.

Place was a seasoned campaigner who drafted the Chartist movement's 1838 People's Charter. Pertinently, Place was married at the age of nineteen and his wife bore him fifteen children, "eight of whom were dead by 1830" (Mason, 1994a: 22). Although a Malthusian, he knew from his own experience and humble origins the suffering of poverty and regarded moral restraint as "utterly illusory" (Langer, 1975: 673). In 1822 Place published *Illustrations and Proofs of Population*, arguing that "those who really understood the cause of a redundant, unhappy, miserable and considerably vicious population, and the means of preventing this redundancy, should clearly, freely, openly and fearlessly point out the means" (Langer, 1975: 674).

Like bastardy, population concerns were economic, political and moral. Poor relief's costs rose precipitously from £600000 in 1750 to £2 million in the 1780s and £8 million by 1812. This caused fiscal concerns and fears of the working class revolt widespread in Europe. Such fears were exemplified by the repression in the 1819 'Peterloo Massacre' and the introduction of the 'Six Acts' which "extended earlier

repressive measures” against political activity and radical publications through a stamp duty on periodicals (Priestly, 1969: 240).

Birth control was illustrative of the widespread belief in declining English morality and growing irreligiousness. Whilst many looked to the Prince Regent for evidence of this, the ruling classes were most concerned with perceived working class excesses. For Place this moral discourse was being used to justify “legislation hostile to the working classes” such as the Combination Laws (Mason, 1994a: 29). Place testified to Select Committees on the Combination Laws (1824), Drunkenness (1834), and Education (1835) consistently arguing against received wisdom. These were published in the pamphlet *Improvement of the Working Class* (1829), which argued that there had been “a massive shift towards greater moral respectability” amongst the lower middle and working classes (Mason, 1994a: 23 & 29). Thus, in the discourse on political rights, morality was a key issue, and class weapon, used to advocate the limitation or extension of rights.

Place’s *Illustrations* was overwhelmingly concerned with Malthusian doctrine but his handbills contained more practical advice. But contraception methods available to Victorians were not new and would have been already known to many of those who read Place’s 1823 handbills. Carlile read Place’s writings whilst imprisoned for defying press laws, but he saw the birth control problem from a libertarian not Malthusian position. His ‘*Every Woman’s Book*’ or ‘*What is Love?*’ (1826) sold 5000 copies in six months and sales doubled in two years. Whilst Place had carefully addressed his advice to the married, Carlile was not so constrained. This transgression against the heteronormative code was condemned by the radical politician Cobbett for being “so filthy, so disgusting, so beastly, as to shock the minds of even the lowliest of men and women” (Langer, 1975: 676-7). Cobbett contradicted Place on England’s moral trend, believing that there was “modesty in

the word and grossness in the thought” (Mason, 1994a: 39), presaging the prevalent twentieth-century view of Victorian moral hypocrisy.

Owen was sufficiently impressed with the English birth control movement to publish in America. The backlash this caused prompted him to write fully on the subject in his pamphlet *Moral Physiology* (1830), which was re-printed five times within a year and published in England to similar popularity. Whilst a Malthusian, Owen firmly believed sex beyond was “one of the most beautiful of human relations and should, if possible, be relieved of the fear of too many children” (Langer, 1975: 679).

A New England doctor, Knowlton, was impressed by Owen’s thoughts but not his recommendation of coitus interruptus, preferring the syringe or douche and anonymously published *The Fruits of Philosophy* which, as opposed to the more philosophical previous works, was the “first study of contraceptive techniques since the writings of Soranos in the second century A.D.”. This accomplishment earned him three months in jail for obscenity (Langer, 1975: 679). It was this pamphlet that Besant and Bradlaugh were tried for publishing in 1877.

After the furore surrounding *The Fruits of Philosophy* there was a decrease in publications concerning birth control. There was however a working class backlash against what some considered an elite plot to limit the working class. There was even a pamphlet written under the pseudonym ‘Malthus’ entitled *Essay on Populousness* (1838) advocating infanticide which further inflamed sentiments (Langer, 1975: 684).

However Dr Drysdale’s *The Elements of Social Science, or Physical, Sexual and Natural Religion* (1854) was so popular that by 1892 it had reached its twenty-ninth

edition and sold 77,000 copies (Langer, 1975: 685). Despite it containing “only three pages on actual birth control techniques” (Mason, 1996: 193). Drysdale advocated the use of the sponge, believing that “Any preventive means... must be used by the *woman*, as it spoils the passion and impulsiveness of the venereal act if the man have to think of them” (Cook, 2004: 60).

Thus antipathy towards birth control came from those opposed on religious grounds and those perceiving it as an attack on the working classes. As with other areas of sexual regulation, class was a crucial element in discourses on population and birth control. A stricter moral code might have explained the dramatic fall in illegitimacy by 1861 if it hadn't anticipated a similar fall in legitimate births. Suggesting it resulted from greater control exerted over procreation not reduced fornication, the “controversy” being “how it got under way, and what physical means were being used” (Mason, 1994a: 53). Given the widespread availability of the literature discussed, wider knowledge of birth control techniques was partially responsible. It has been argued that the middle-classes were pioneers in the extensive use of birth control, motivated by material ambitions, attempting to limit their dependants within more stringent economic conditions. Supporting evidence outlines that couples only used birth control “once some desired total of offspring had been reached... Indeed... births in the first years of marriage... tended to be *more* frequent... than for couples in earlier decades” (Mason, 1994a: 54 & 61). Thus it was the respectable middle classes, of moderate finances, which sought to protect their status through contraception. For the professional classes marrying from 1851-1861 changes in family size were small but by 1881-86 “such difference had become significantly clearer” with family size falling from 86% of the average to 72% (McGregor, 1957: 83).

So if it was not new birth control techniques or essentially new information about them, responsible for this increased control over procreation then the likeliest cause

is a moral re-evaluation of them. This, combined with other changes, increasingly delineated between moral and legitimate and immoral and illegitimate sexual expression. This places the propaganda and changes in fertility within a wider moral re-evaluation, acknowledging a more gradual and complex causal relationship. A cause noted by one observer of the fertility decline was a “decay of religious sentiment and the decline of the idea that the prevention of conception is an immoral act”. Furthermore commercial rather than ideological propaganda on birth control came to predominate the late Victorian period. Again supporting the view that “families employed traditional means of restricting fertility in a new scale once the idea of family limitation had made its impact” (Mason, 1994a: 60 &63).

One means of birth control not discussed already is abortion. Abortion and birth control were frequently discursively linked and “there are frequent allegations that abortion was routinely practiced by the working class, and even the upper class” with some suggesting that up to 7% of working-class pregnancies were aborted (Mason, 1994a: 62). In the moral/legal discourse of the time infanticide and abortion were considered murderous means by which “poor working-class women... regulate reproduction” (Smart, 1992: 19).

A statutory prohibition of abortion was introduced as part of Lord Ellenborough’s 1803 Act. It allowed for the death penalty for using any “deadly poison, or other noxious and destructive substance or thing with intent... thereby to cause and procure the miscarriage of any woman” after the ‘quickening’. This distinction originated in 13<sup>th</sup> century ecclesiastical law, which claimed the quickening was when the soul entered the foetus, therefore creating a person whose destruction was murderous. In 1837 this distinction was removed and in 1861 the maximum punishment was reduced to life imprisonment. This same statute removed the death penalty for sodomy (Jackson, 2002: 170 & Hoffer & Hull, 1981: 87) although no

executions for homosexual offences had occurred since 1836 (Montgomery-Hyde, 1970: 92).

These severe laws were not as effective as hoped or as influential as the birth control propaganda. A 1914 survey of late nineteenth-century working-class birth control behaviour, showed that “in several areas abortifacients are reported to be widely promoted and responsible for considerable mortality...an increased market for these substances may also have come in on the back of the campaign for contraceptive devices” (Mason, 1994a: 64).

It can thus be seen that from the late eighteenth-century there was an intense, though periodic, discourse on fertility. This moved from concentrating on demographics and the efficacy of moral restraint to involving more subversive moralities. Although some elements were distinctly contrary to the prevailing moral codes, in the mid-nineteenth-century more moderate elements were incorporated into genteel society to restrict family size.

Birth control use ran contrary to the official moral strictures of the time, as is demonstrated by the restrictions on publications discussing it. However, its adoption enabled the growing middle-classes to maintain their position and thereby helped create the stable, modest and moderately sized family that came to represent genteel Victorian society. This suggests an ambiguity and contradiction between public and private moral discourses of the time. The adoption of birth control suggests that these birth control discourses influenced many that otherwise maintained decorous behaviour in adherence to public morality and its restraints. In fact the desire to be included in genteel society inspired the petit bourgeois to moderate family size to facilitate their financial capacity to achieve respectability (Mason, 1994).

The bastardy section outlined the discourse on working class morality which the philosophical debate on birth control also originally shared, with Malthus calling for moral restraint. However, this section demonstrates the discourse moved on, driven by the middle classes who produced the literature, the demand for it, and pioneered birth control usage. Falling illegitimacy rates reveal a revised sexual morality that, in private at least, allowed for birth control whilst maintaining outward respectability.



## 5.4 Infanticide

Allied to bastardy, abortion and birth control is infanticide. This periodically came to social prominence involving many of the issues and tensions affecting interventions on homosexuality. By its very nature infanticide was highly gendered, secret and fundamentally produced by societal conceptions of legitimate and illegitimate sexuality. More than any other law of the time, infanticide was explicitly prejudiced against single women and their sexuality.

The law on infanticide conforms to my characterisation of nineteenth-century British society as punitively heteronormative in disadvantaging women purely on their marital status. Unmarried mothers endured a presumption of guilt if their child was found dead. However, as with homosexuality, the situation was more complicated than this and in some respects the law was changed to be less punitive in the nineteenth-century.

In 1624 an act was passed to:

“prevent the Destroying and Murthering of Bastard Children... whether it were born alive or not, but be concealed: In every such Case the said Mother so offending shall suffer Death as in Case of Murther, except such Mother can make proof by one Witness at the least, that the Child...was born dead.”

Thus concealment of pregnancy outside of marriage became a capital crime if that child was later found dead without being witnessed alive post-partum. The inherent presumption was that these “lewd” women had cause to murder their babies because of their illegitimacy.

Hoffer & Hull found that infanticide was so prevalent that it accounted for “Over 25 percent of all murders heard in the early modern English courts”. The crime was a highly gendered one with 90 percent of “murderous assaults by women... directed at infants”, almost the reverse for overall murders (1981: xviii & 98).

Central to this legal change were growing concerns over “Concealment of sexual transgression among poor women” (Hoffer & Hull, 1981: 11). That women were having sex and bearing children in sin made them suspect for the greater sin of murdering their children. The horror at such killing was exacerbated because perpetrators were seen as “The harlot who... was the antithesis of the submissive Christian wife and mother” (Hoffer & Hull, 1981: 11).

Like Labouchère’s Amendment, the 1624 statute’s provisions were not as radical or unprecedented as often presumed. “They entailed a return to an earlier definition of... murder. Concealment of death was a crime in itself as early as Saxon times... The relationship between concealment and murder was antiquated in common law, but not dead” (Hoffer & Hull, 1981: 26). It also didn’t create a new offence, but allowed for the easier prosecution of a crime that was difficult to convict.

As previously outlined, moral antipathy towards women bearing illegitimate children was exacerbated by the financial burden they represented to parishes. This incentivised single women to conceal pregnancies and commit infanticide, incidences reportedly increased after the 1576 Poor Law. The 1624 law greatly facilitated prosecuting such women; being successful in 72.7% of cases compared to 33.3% where it did not apply (Hoffer & Hull, 1981: 17 & 23-24).

A new defence of benefit-of-linen was created through precedent to counter prosecutions alleging concealment; after 1700 if a woman had prepared linen for her child this was almost always accepted as non-concealment if there were no signs of violence. The exceptional 1734 case of Mercy Hamby shows the spread of this knowledge; attempting to save herself she borrowed linen from a neighbour but was convicted when the deception was proved (Hoffer & Hull, 1981: 69). However benefit-of-linen is not the only explanation proffered for falling convictions in the 1700s. There was a greater reluctance by juries to accept the certainty of medical evidence on causes of death but a greater willingness to listen to medical evidence on the mother's state of mind. More importantly it is argued there was increasing public sympathy with "reappraisals of the character of the accused women" (Jackson, 2002: 6).

They were increasingly portrayed not as barbaric women but victims of male lusts and "as modest and virtuous victims of circumstances beyond their control". In this changed portrayal the reason for concealment was women being too modest to publicly acknowledge their lost virtue, with less moral women being unconcerned by public shaming. This sentiment was instrumental in the creation of the Foundling Hospital where "virtuous victims who would respond to being relieved of their burden rather than exposed to further shame and punishment." It was also expressed in the 1772 debate to have the Act repealed; with MPs arguing that concealment "might proceed from the best causes, from real modesty and virtue" (Jackson, 2002: 110 & 114-5).

This repeal attempt was prorogued after passing in the Commons and its first Lords' reading, but the tide had turned with no convictions after 1774 (Rabin, 2002: 7; Jackson, 1996: 159-60). Crucially important to this was the absence, unlike murder, of alternative verdicts. Either women charged with concealment were guilty and liable to execution, or they were not guilty. In numerous debates on the Act until

1803 the “overwhelming fear expressed by the legislature, was that the sovereignty of the law was being undermined” (Jackson, 2002: 6), this argument was used in favour of homosexual decriminalisation in the 1950s. This was linked to more general concerns over capital punishment in the late 1700s. A Commons Committee established in 1770 examined capital offences over concerns it disincentivised juries to convict. It recommended removing capital punishment from the 1624 statute and seven other crimes but parliament rejected its repeal (Jackson, 2002: 159).

A further reform attempt was made in Lord Ellenborough’s Act (1803), this introduced a separate punishment of two years imprisonment for concealment if a woman was cleared on a charge of murder (Jackson, 2002: 169). Ellenborough intended to remove difficulties meaning that “judges were obliged to strain the law for the sake of lenity and to admit the slightest suggestion that the child was still-born as evidence of the fact”.

Removing the presumption of guilt on illegitimate mothers loosened the heteronormative favouring of married mothers, however it still punished concealment. This reflects the situation with Labouchère’s Amendment and the introduction of gross indecency as a lesser offence to sodomy and the 1861 Act also. Similarly one must examine the motivations behind the change and consider if the law’s purpose was to alleviate an injustice or rather to better enable transgressors’ punishment. In replacing the death penalty for concealment with two years’ imprisonment the primary concern was to bolster the law and prevent its disrepute through failed prosecutions and a perception of the law being overly punitive. The intent in lowering the penalty was to enable more successful prosecutions, albeit for the lesser offence of murder.

## 5.5 Marriage and divorce

This section discusses the creation and dissolution of that most heteronormative institution, marriage. Church teachings on marriage in the eighteenth-century hadn't changed significantly since medieval times; with it still regarded as the only means people could "escape the sinful consequences of their incontinence". However, the Church believed marriage was "a formidable barrier to the attainment of spiritual purity because it exposed husbands and wives to the risks of sexual pleasure" (McGregor, 1957: 1).

This prohibition on women's sexual pleasure seems to have taken hold by the nineteenth-century before which "it was assumed that women had passionate sexual feelings. By the early twentieth century there is evidence that many, if not most, women repudiated physical sexual desire." (Cook, 2004: 62). The Church considered sex within marriage as acceptable solely for procreation and if "conducted without anticipated or actual enjoyment" and even then "no one could hope to escape some defilement." Sex for pleasure or outside of marriage were the sins of fornication and adultery.

The archaic laws on marriage were informal and irregular; only marriages conducted under Church regulations were considered regular but all were absolute until the mid-sixteenth century (McGregor, 1957: 2). In addition to marriages performed in Church after the publication of banns, there could also be a marriage contracted "if a couple prefaced their copulation with a verbal declaration of their intention to be man and wife; or... if a couple simply announced "we are now man and wife"" (McGregor, 1957: 2). When taking into account the age of consent to marriage without parental consent was seven, one can see that marriage was a problematic construct.

This was exacerbated by Fleet marriages performed without question or license, frequently in public houses and even brothels, originally conducted by clergy imprisoned in Fleet prison. The Church required parental consent for those under 21, which these unregulated ministers didn't.

The situation scandalised opinion, especially concerning marrying for profit because there was no real possibility of dissolving marriages, however irregular; "tho' one be the son of a hog driver, and the other a Duke's daughter" (Hill, 1984: 97). Indeed class discrepancies could be the motive behind clandestine marriages. Sir Dudley Ryder argued in the Hardwicke's Marriage Act (1753) debate that "when a young gentleman or lady is entitled to a large estate, the advantage... from marrying them is great, and consequently the temptation so strong, that our laws have never as yet been able to prevent the evil" (Lemmings, 1996: 339).

The Lord Chancellor, Hardwicke, made legitimate only daylight marriages held in a chapel after posting banns (Lemmings, 1996: 345). The situation's perceived seriousness was reflected in the penalty for officiating at unlicensed weddings being fourteen years transportation. Hardwicke's Act alleviated the excesses of the previously under-regulated system, strengthening marriage through increased legitimacy. This was improved upon by the Marriage Act (1836) which "established a wholly civil procedure for contracting marriage", removing the necessity of Church involvement (McGregor, 1957: 14). This established the state's ascendancy in marriage regulation and extending its heteronormative framework.

The Church had abolished absolute divorce, "by elevating marriage to the status of a sacrament." However, divorce *a mensa et thoro* (from bed and board), could be granted by ecclesiastical courts if a spouse was found "guilty of adultery, cruelty, or heresy and apostasy... which had the effect of a modern judicial separation"

(McGregor, 1957: 1-3). Thus Britain largely recognised Church jurisdiction in matters relating the indissolubility of marriage. However, the practical reality of divorce differed significantly from ecclesiastical principles. If an impediment could be found to the original marriage then it was considered to have never existed (McGregor, 1957: 3-4). Marriages were held invalid to the fourth degree of consanguinity and as sex made participants one flesh this extended such affinity. Accordingly Henry VIII's marriage to Anne Boleyn was "annulled by the ecclesiastical court on the double grounds of her earlier pre-contract to Northumberland and the affinity created by Henry's sexual intercourse with her sister" (McGregor, 1957: 3-4). Thus if an end to a marriage was desired a genealogist not a lawyer was required.

However the Reformation abolished the "very evasions, fictions and loopholes which had made the medieval system tolerable in practice." The only authority left able to grant divorces was Parliament through private member's Bills. But Parliament still recognised the authority of the Church, only allowing a Bill if a divorce *a mensa et thoro* was granted. Additionally a suit for criminal conversation must have been successful against the wife's lover. The nature of this process limited it to the wealthy and influential; only five such Acts passed before 1715 and thereafter, on average, one a year until 1775. Only five were granted to wives, with all having adultery aggravated by other factors such as bigamy or incest. Despite the Church's position on divorce no bishop voted against divorce Bills in the Lords and divorce did not preclude re-marriages (McGregor, 1957: 11; 1956: 176).

The Matrimonial Causes Act (1857) introduced divorce without Acts of Parliament. The limitations on divorce were no longer considered sustainable; the minimum cost of £700 was beyond the means even of most enfranchised males. The change allowed for divorce on the grounds of a single act of adultery by wives but husbands must have committed adultery aggravated by incest, bigamy, cruelty or desertion, the

latter two being new grounds for divorce (McGregor, 1957: 10). The 1857 Act created a new Court for Divorce and Matrimonial Causes and reduced costs. The next decade saw 148 divorces, increasing to 582 in the 1890s. This was a massive increase but still a very small amount, reflecting the social and moral, as distinct from legal and financial, impediments to divorce remained in full force.

Matrimonial law further changed through Lord Penzance's private member's Matrimonial Causes Act (1878). This gave magistrates powers to grant separations and maintenance to wives "whose husband had been convicted of aggravated assault upon her" (McGregor, 1957: 24). This had been provoked by "a 'moral panic' around Wifebeating" which also prompted the Aggravated Assault on Women and Children Act (1853). Wifebeating was portrayed as symptomatic of working class degradation and excess "which could only be alleviated through top-down measures such as severe punishments, or, conversely, education" (Clark, 1992: 200-1). This again reflects growing legislation on the proper form of sexual relationships and a middle-class conception of marriages based upon affection.

Interestingly the limited changes in the Matrimonial Causes Act (1857) have been "consistently misrepresented" (McGregor, 1957: 19). In 1953 Lord Justice Denning wrote: "the principle of indissolubility was the binding force which cemented [marriage]. During the last ninety-six years the State has abandoned the principle" (1953: 121). A barrister informed the Morton Commission on Marriage and Divorce (1956) that divorce was first introduced in 1857 (McGregor, 1957: 19n). This mirrors assumptions made about Labouchère's Amendment; mid-twentieth-century opinion was again overly eager to see nineteenth-century rationalisations as innovations.

From the mid-eighteenth century the state became increasingly involved in regulating marriage to bolster its legitimacy. Whilst measures facilitating divorce may seem contrary to this, the limited causes complied to more modern conceptions of marital relations. Though by no means equal, the grounds for divorce represented an increasing concept of marriage based on affection rather than property and alliance.



## 5.6 Prostitution

Prostitution in Victorian England is interesting for contemporaneous and modern interpretations of its nature, scale, and ways the state laid claim over women's bodies. It is especially relevant here due to the enduring state linkage with another illegitimate sexual activity, homosexuality, which lasted until Wolfenden's dual investigation. This section outlines increasing nineteenth-century public and state concern over this transgressive heterosexual activity which extended punitively heteronormative state powers.

The most notorious Victorian laws regarding prostitution were the Contagious Diseases Acts (CDA). These were concerned with the threat prostitution posed to the military by spreading venereal disease. The threat of syphilis remained considerable well into the twentieth-century, in 1924 syphilis killed 60,335 (Davenport-Hines, 1990: 246). The first CDA was passed in 1864 without debate, like the Labouchère Amendment. It is difficult to extricate the threat of physical disease from the, perhaps greater, threat of moral disease. Police and doctors in selected ports and towns were empowered to detain and examine women suspected of being 'common prostitutes'. If such women were infected with venereal disease they were subject to incarceration in a 'lock hospital' for up to nine months and continued monitoring after release. Even if uninfected they could be registered for periodical examinations (Kaplan, 2005: 22; Walkowitz, 1973: 74).

Effectively the Acts created a system of state regulated prostitution (McGregor, 1957: 88). They were criticised by radicals for their intrusive and disproportionate effect on working class women and by moral reformers for implicitly condoning male sexual license. The 1866 Act extended the jurisdiction from diseased prostitutes to those suspected of promiscuous behaviour (Kaplan, 2005: 22; Walkowitz, 1973:

75). The Acts were repealed in 1886 after a sustained campaign and a Royal Commission investigation to which Mill and Place testified. However, the CDA's were still enforced outside of Britain where they were known as the Cantonments Acts (Enloe, 1989: 82).

Apart from the CDAs, prostitutes were mainly dealt with under Vagrancy Acts, which grouped them with beggars, thieves and all others unable to account for themselves and their livelihood (Walkowitz, 1973: 75). The 1898 Vagrancy Act was designed to prevent men soliciting in public places to obtain clients for prostitutes. However, it was widely used to arrest men soliciting for other men (McGhee, 2005: 64-67). Brothel prostitution was previously legislated against by the 1751 Disorderly Houses Act (Luker, 1998: 603).

Some attempts to control prostitution were apparently less punitive; Magdalene societies believed in redeeming prostitutes blaming them less than "the leading role of men involved in prostitution, either as clients or organisers" (Mathers, 2001: 302). However Magdalene houses became increasingly punitive and used to constrain sexually active single women.

There were consistent concerns during the nineteenth-century that prostitution was increasing. Estimates of prostitute numbers varied massively, however lower assessments based on court and police data were remarkably consistent. Given the massive population increase and extensions in official power to label women as prostitutes this represented a significant drop in prostitute numbers (Mason, 1994a: 76-78). Patrick Colquhoun, a London magistrate, published the first calculation of prostitute numbers in 1796. He estimated there were 50,000 prostitutes in London, but only 20,000 of these were 'common prostitutes' as he also included "part-time prostitutes and working-class concubines". Colquhoun's figures were self-

acknowledged estimates but had the merit of a magistrate's professional understanding. More sensational estimates differed from police figures "by a factor of ten" but cited no supporting evidence.

Nineteenth-century prostitution again demonstrates increased public and state concern with illegitimate heterosexual activity. Whereas this can be considered utilitarian, it cannot be understood without its moral undertone censorious of promiscuous women. Significantly, later concerns concentrated on male immorality, with these sentiments expressed in Committee hearings on the CDA. Men's role was also recognised in the, misused, Vagrancy Act's prohibition of soliciting and living off immoral earnings.

As discussed in chapter 4, the Criminal Law Amendment Act (1885) was primarily concerned with preventing exploitation of women and girls through prostitution. Thus the Act most associated with outlawing homosexual acts was an Act regulating heterosexuality and bolstering moral restrictions on extra-marital sex. Likewise the focus significantly shifted from punishing all parties to protecting 'victims' of male lust, as I argued in the previous chapter's alternative understanding of Labouchère's Amendment.



## 5.7 Pornography and Censorship

Pornography is an interesting example of transgressive sexuality for this research because concerns over its regulation centred on public/private tensions that were prominent concerning homosexuality. As such many of those later positions were established in the discourse examined here, where the law favoured the private realm's protection from interference (Lewis, 2003: 144).

In 1860 Mr Platener was prosecuted for selling slides of nude statues (Lewis, 2003: 151). Central to this prosecution were issues of public propriety, the intersection of public and private vice, and resurgent interests in legislating morality in the face of newly perceived challenges. Platener was prosecuted under the first statutory prohibition of obscene publications, passed three years previously. Lord Campbell's private member's Bill (1857) largely replaced King George III's 1787 Royal Proclamation 'for the Preventing and Punishing of Vice, Profaneness and Immorality'. This had suppressed all "loose and licentious Prints, Books, and Publications" (Trudgill, 1976: 138; [www.bbc.co.uk/dna/h2g2/A679016](http://www.bbc.co.uk/dna/h2g2/A679016)).

It was one thing to view art *in situ* but quite another to reproduce them through new technologies for private enjoyment which was presumed to be less interested in aesthetics than lasciviousness. The legal nebulous definition of obscenity in 1857 was given form in *R v Hicklin* (1868). The 'Hicklin test' was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (Leigh, 1964: 669-681). This test allowed judges to determine obscenity by looking at specific words or passages without taking into account the whole work or its artistic, literary, or scientific value.

Paternalistic Victorian concerns over whose hands pornography may fall into extended from minors to the lower classes and especially women as “those whose minds are open to such immoral influences”. Of particular concern were cheaper and improved printing and photography (Leigh, 1964: 669-681). The censorship of pornography presumes an inherent harm and therefore supposes its attendant victims. The process of identifying those susceptible to the effects of pornography created categories of vulnerable readers for whom restrictions were deemed necessary. Whereas adult cultured men considered themselves impervious to the harmful consequences of pornography, they had no difficulty identifying those less immune to its ‘depraving and corrupting’ effects (Leckie, 1999: 8).

The new law meant that it “was not the existence or consumption of obscene materials *per se*” that required state intervention but the potential extension of consumption (Lewis, 2003: 153). Thus the primary concern was not what was being read but who was reading it; “obscenity had been democratised” (Rowbotham; 2003: 153). Various changes brought reading materials within the grasp of those previously excluded through literacy or finances. The lower publishing costs through improved printing technologies and the abolition of stamp (1855) and paper (1861) taxes extended profitability and prices reduced to include those perceived to have baser interests; those lower, but increasingly literate, classes lacking aesthetic feelings and education (Lewis, 2003: 144). The invention of photography meant literacy was not even necessary. The public hawking of this material also brought it directly into the view of women and children leaving them at risk of its ‘poisonous’ effects.

This paternalistic and patriarchal concern demonstrably endured until the *Lady Chatterley’s Lover* obscenity trial in 1960. The lead prosecution counsel referenced those groups identified in the nineteenth-century discourse on obscenity by asking: “Would you approve of your young sons, young daughters - because girls can read

as well as boys - reading this book? ... Is it a book that you would even wish your wife or your servants to read?" (Rolph, 1961: 6).

The nature of pornography's harm was left vague but its potential for damage was much elaborated upon. The recurring metaphors were "those of poison, pollution and infestation", Campbell compared pornography to a "poison more deadly than prussic acid, strychnine or arsenic" (Lewis, 2003: 145). Pornography was considered both symptom and cause of national ills, with *The Times* reporting from a trial for obscene libel that the "sure preliminary to the downfall of the nation was the general indulgence of lust and sensuality on the part of the people" (10.02.1872). These exact sentiments were used to describe the dangers of homosexual tolerance in the 1950s (see chapter 8). Thus it was not solely obscene literature and prints that supporters of the 1857 Act were concerned with but the dangers of an increase in lusts that obscenity posed.

The danger inherent to obscenity was that its discussion might arouse prurient interest in those not previously exposed to it. One former Lord Chancellor, Lord Lyndhurst, considered that the Bill: "will wholly fail in its object... it is unwise and impudent to poke into these question and agitate the public mind in respect of them" (Lords, 25.06.1857 vol.146col.330). Yet again this presaged the DPP's comments on the Labouchère Amendment in 1889 and by those seeking to avoid decriminalisation debates in the 1950s. However, in all cases, the perceived damage to society these social problems posed overrode misgivings on the dangers of giving them notoriety through Parliament and the courts.

In 1896 the Lord Chancellor, Lord Halsbury, introduced the Publication of Indecent Evidence Bill proposing that Judges could prevent the reporting of evidence of "an indecent character... likely to be prejudicial to public morality" (Lords, 20.03.1896 vol.38col.1442). This occurred after Oscar Wilde's trials and reflects the standing of

such offences as gross indecency. This remedy to the problem of highlighting homosexual vice through prosecutions was again advocated in 1953 by Churchill. Remarkably Lord Halsbury's began its second reading by stating that "although the evil with which the Bill seemed to deal was very great and urgently required a remedy, it was one he could not pretend to illustrate by any facts" (Lords, 20.03.1896, vol.38col.1434). However, Lord Herschell argued that "their Lordships should act, not upon hypothesis, but upon evidence" (HL, 20.03.1896, vol.38col.144).

Importantly, unlike the perceived innovations of the Labouchère Amendment, the 1857 Obscene Publications Act (OPA) did not restrict "the freedom to consume obscenity in private" (Lewis, 2003: 147). However, the move to restrict the spread of obscene material was not done without arousing "great concern to respect the sanctity of the private domain" (Lewis, 2003: 155). Debates on obscenity heralded those on the law's role in the private realm between Mill and Stephen Fitzjames Stephen which informed the 1960s Hart/Devlin debate, inspired by the Wolfenden Committee.

Mill declared in *On Liberty* "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others" (Mill, 1991: 14). This position's heritage can be seen in the first English treatise on the law's role in same-sex relations *Offences against one's self* (1785) by the jurist, philosopher and social reformer Jeremy Bentham. This remarkable exploration of 'pederasty' argued it was not the law's concern to proscribe activities with no discernible harm and mocked such regulation (Bentham, 1978).

In response to Mill, Stephen saw the criminal law as “the organ of the moral indignation of mankind” (Collini, 1991: 284-5). Laws were essential in “promoting virtue” and should restrain vice “on the ground that vice is a bad thing” (Stephen, 1993: 147-8). This opinion matched those supporting the OPA and other Bills seeking to legislate morality and prevent vice even if, like Mill, they sought to stop at the front door. Given that many of these Bills sought to replace ecclesiastical law or convention it is pertinent that Stephen saw the changing role of the criminal law as “exercis[ing] an influence over the minds of the people in many ways comparable to that of a new religion” (Collini, 1991: 284-5). In this the state assumed the Church’s powers. Mill’s legacy may be more renowned but Stephen’s perhaps affected more people, his attempted codification of English law failed to pass Parliament in 1878, 1879 and 1880, but his draft was influential in the colonies. It was adopted in Canada and formed the basis for the Queensland code of 1899, which became a template adopted in many African colonies (Sander, 2009: 10; Moore, 2007: 44; Morris, 2007: 138).

As with the Labouchère Amendment the “the *legal* response to obscenity was deeply equivocal”. In the case of pornography the “ambivalence was largely due to anxieties and tensions which centred on the public/private dichotomy” (Lewis, 2003: 144). In contrast to homosexuality, the law favoured protecting the private realm from interference. However this should not obscure that in obscenity the state was again increasingly involved in regulating deviant sexuality.



## 5.8 Conclusions

This chapter showed heterosexual relations and freedoms were consistently legislated against in the nineteenth-century in adapting a patriarchal and punitive heteronormative system. This was established through a discursively produced power/knowledge on transgressive sexuality, frequently through amending or codifying previous regulations, representing the state's desire to assert control over sexuality even if this was frequently requested by private Members' Bills. Thus it is of direct relevance to homosexual history and must inform it, which seldom happens.

The literature on homosexual regulation largely omits this heterosexual history and suffers without this comparison, whilst the literature on heterosexuality often misinforms about the changes to homosexual regulation (e.g. Mort, 2000). Heterosexuality's regulation was often concerned with similar issues, obstacles and objections. This is important genealogical context for homosexual regulation which suggests wider heteronormative, not homophobic, intent. Equally homosexual regulation is largely ignored by chroniclers of heterosexuality; Michael Mason's *The Making of Victorian Sexuality* only mentions homosexuality four times in passing or to state the paucity of evidence on it. Likewise Mort's *Dangerous Sexualities* only deals with heterosexuality in its epilogue. However, whereas it might be argued that a relatively clear picture of heterosexuality can be gained without including homosexuality, the reverse is not true. The heteronormativity of state regulation was intrinsic to ways it viewed and intervened in homosexuality, thus its nature must be clearly understood.

The state intervened in sexual matters beyond that required for merely maintaining order. A primary motivation was the promotion of a sexual regime that clearly delineated the acceptable and unacceptable in moral terms rather than resting upon

Mill's harm condition. A recurring theme in this chapter, as with homosexuality, was the consideration given to the balance between the advantages of action as opposed to the harm caused by publicising 'problems'.

Class and gender were intrinsic to debates concerning sexuality just as sexuality was an important facet of discussions on class and gender, with sexuality being central to many of the core philosophical debates of the period. The legal and moral heteronormative constraints existing in this period were subject to intense and sustained debate, which makes their strengthening more remarkable and noteworthy.

It is important to understand the crimes and moral transgressions discussed in this chapter within a wider context of legal change from the eighteenth to nineteenth centuries. This saw a distinct shift towards punishing personal injuries, from a position whereby the pettiest property crime could result in death or transportation but manslaughter's maximum penalty was one year's imprisonment (Wiener, 1998: 202). Male violence in particular became an increasing legislative, judicial and public concern. This harsher stance on male violence included sexual offences, with the law on rape changed to make convictions easier, as with sodomy emission need not be proved after 1828 (Wiener, 1998: 204 & 206). Thus the changes within this chapter must be considered within a growing emphasis and reliance on the law. This can be seen in the total prosecutions at assizes from 1805-1842 rising fourfold for women and eightfold for men (Wiener, 1998: 209).

Having established the importance of heterosexuality to a genealogical understanding of homosexual regulation in the nineteenth-century, the next chapter examines how and why heterosexuality was re-regulated after WWII. This provides the context for analysing the homosexual decriminalisation process in that period. Many of the statutes discussed here were amended to change the state's control over heterosexuality. This re-ordered heteronormativity must be clearly understood to

appreciate how and why homosexual regulation was also reformed, which the rest of Part 3 will examine. Firstly Part 3 will briefly examine the Wolfenden Committee and problematise its role within decriminalisation.



## **Part Three**



The following chapters problematise the links between Wolfenden and decriminalisation. By analysing the parliamentary decriminalisation process I deconstruct the discursive links with the Wolfenden report, showing the accepted relationship overly centralises Wolfenden. Just as previous chapters destabilised Labouchère's historical position the following chapters reveal wider discursive spaces of decriminalisation. I re-examine this parliamentary process critically assessing discourses of that period and socio-historical discourses explaining and interpreting decriminalisation. I challenge the post-hoc assumed inevitability of decriminalisation through examining the developing discourses and challenging portrayals of decriminalisation as the culmination of a 'Wolfenden process'.

Weeks states it was “essentially prejudice and ignorance and timidity that held back the immediate application of the [Wolfenden] proposals” (1977: 167), implying that decriminalisation was a direct consequence of Wolfenden only delayed by homophobic politicians. However, the Wolfenden committee was the product of pre-dating parliamentary pressures; a process of increasing visibility and questioning of regulations produced by and reproducing a heteronormative system. Wolfenden informed and was a motor for decriminalisation but its content didn't dictate it and wasn't as significant as its solidification of a discursive freedom for these existing discussions of homosexuality to flourish within. Additionally, concentrating on Wolfenden disguises that decriminalisation resulted from a negotiated Parliamentary process of developing, contested, and contradictory attempts at truth production. This was not a linear progression to an inevitable decriminalisation or a one-dimensional attempt to enact Wolfenden.

In 1954 John Wolfenden CBE<sup>20</sup> was asked by the Home Secretary, Sir David Maxwell-Fyffe, to chair a committee investigating “the law and practice relating to homosexuality and prostitution” (Moran, 1996: 1). It met in September and 60 further occasions before publishing its report in September 1957. The members of the committee included three lawyers, doctors, and academics, two MPs, a peer and a Catholic layman and included three women, four Scots and a Welshman (Higgins, 1996: 9-10). The committee received over 100 memoranda from “interested parties” and cross-examined their representatives in 32 sessions. Through this it elicited a “tremendous amount of discussion” about homosexuality, but this was intra-elite and didn’t extend into public forums before its publication. No submission advocated anything beyond the decriminalisation of consenting private adult homosexual sex and all sought to minimise the ‘threat’ of homosexuality through greater effectiveness of existing controls or through decriminalisation.

The report was unanimous (apart than Adair, who submitted a dissenting report) and asserted that the law’s function was “to preserve public order and decency, and to protect the weak from exploitation” (Weeks, 1977: 165) not to regulate private immorality. The recommendations therefore sought to more strictly control and limit public homosexual expression. Thus it advocated the creation of a decriminalised private homosexual realm similar to prostitution. This would enable a juridical eradication of homosexuality and allow homosexuals to seek treatment helped by a major programme of research into homosexuality (Moran, 1996: 115).

The committee refused to classify homosexuality as a mental illness and accepted Dr Kinsey’s research that denied a clear-cut homosexual/heterosexual division. This

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<sup>20</sup> Wolfenden was the Vice-Chancellor of the University of Reading, a former public school headmaster and a respected authority on education and youth issues who had chaired various government committees on these issues. He was knighted in 1956 and became Baron Wolfenden in 1974.

enabled a distinction between homosexuals and homosexual acts (McGhee, 2001: 118-9). The exclusive homosexual would be encouraged to lead a discreet sexual life through legal toleration. The more indiscriminate offenders, particularly youths, could be adapted to a heterosexual life of greater self-control through therapy and/or punishment. However, these medical recommendations were omitted from the SOA (1967) (McGhee, 2001: 125). Chapter 8 will show the medical discourse within decriminalisation debates declined in importance as anticipated advances failed.

Although Weeks characterises Wolfenden's recommendations as "limited and conservative" (1977: 166) I have shown that, given that there was no previous era of toleration, they actually advocated homosexual sex be legal for the first time in recorded history.<sup>21</sup> However, Weeks does identify the Wolfenden Report as "a crucial moment in the evolution of liberal moral attitudes", this challenge to the assumptions of homosexual regulation was "in terms of logic... irrefutable" (1977: 164). Allied to his accusation of prejudice, ignorance and timidity in not enacting Wolfenden immediately (1977: 167), this comes close to an assumption of decriminalisation's inevitability with only irrational and emotional objections needing to be defeated for enlightened progress to be achieved. This teleology marginalises the political process and discourses of decriminalisation as subject to an historical imperative.

It is argued that "As long as a dominant ideology remains invisible within a regulating structure such as law there is no opportunity to question it". Once questioned this "dominant ideology" is "located and 'objectified'" making it "possible to contest it and thus to challenge the assumptions that form the basis of that regulation" (Henderson, 1995: 1023-4). Wolfenden helped legitimise this

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<sup>21</sup> Given that prior to the Labouchère Amendment and the 1861 Offences Against the Persons Act, homosexual activity could be, and was, prosecuted under an array of other offences.

contestation but decriminalisation was achieved through parliament not Wolfenden and decriminalisation discourses were predominantly constructed within these debates. The political elite utilised external sources other elites had formulated, such as the Wolfenden Report, Adair's minority report, and the Church of England's report on homosexuality, but were not dictated or constrained by them. These were interpreted and developed as discursive tools in support or critique of parliamentarians' arguments. Indeed these were not extensively quoted after initial debates; being largely distilled to their essence.

The importance of the analysis in Part Two will be shown through demonstrating that parliamentarians in the 1950-60s believed an unregulated private sphere of homosexual acts existed before Labouchère's Amendment. This ignorance of the revolutionary nature of homosexual decriminalisation through constructing a relatively free private sphere reduces the importance of Parliament's actions; they knew not what they did. Many imagined that they were returning the legal situation to essentially that existing before 1885 (e.g. Commons, 11.02.66, vol.724cols.804-5). However, it makes understanding discourses created surrounding decriminalisation more important. The arguments for and against reform reveal what was 'known' about homosexuality and what was contested.

Part three questions whether arguments convinced people, or if people changed the arguments. I argue that the acceptance of certain discourses on homosexuality relied less on certain truths becoming more persuasive than with parliamentarians' changing social and political mind-sets becoming more accepting of new 'truths'. Decriminalisation was not historically inevitable or driven by its innate merits. This thesis shows that, as a political process, decriminalisation relied upon the costs and benefits of reform being favourable to a changing political elite and according with their wider beliefs.

Replicating Part 2, I provide a heterosexual genealogy, examining how these changes contributed to a new heteronormative code less reliant on the law's violence. This demonstrates the continuing influence of the Church on moral issues and this will be subsequently specifically examined alongside legal scholars' competing attempts to establish the 'proper' divide between sin and crime; morality and the law. I identify other discursive themes in parliamentary decriminalisation debates and critically assess homophile interpretations of causality before finally examining the role of public opinion and party politics in decriminalisation.



## **Chapter Six**

### **Changing Attitudes to Sex in Britain**



## 6.1 Introduction

This chapter examines post-war developments in sexual morality, exploring predominantly heterosexual facets of changing legal restrictions up to 1969. This demonstrates how sexual morality regulations were changing separate from Wolfenden, except regarding prostitution, yet dealing with similar themes. This examines how far the nineteenth-century punitive heteronormativity was reconfigured through the changing social and legal structures of this period. This allowed a broader range of sexual manifestations to be understood with this, sometimes contradictory, heteronormativity. This provides a genealogical context for the partial homosexual decriminalisation examined subsequently. I again argue that heterosexual sphere changes accorded with homosexual (de)regulation.

I firstly examine popular mediums within which sexual matters were discussed and portrayed; the changing role and attitudes in the media outlines a greater freedom and willingness to address sexual matters. Although concentrating on heterosexuality, homosexual themes within these predominantly heterosexual forums are detailed when appropriate to demonstrate the specific, rather than general contextual, relevancy of this genealogy. I then analyse the legal reforms of heterosexual issues, including abortion, prostitution and divorce, detailed in chapter 5.



## 6.2 Sex and the Media

The limits on public representations of issues provide an obvious means of judging societies' attitudes towards contentious topics. Discursive limits and freedoms indicate changing attitudes towards sex and influence changing legal and social sexual regulations. The following sections are mainly concerned with artistic portrayals of sexual topics which identify such transformations. This contextualises and tests the common assertion that Britain underwent significant changes in attitudes towards sexual topics in this period. I begin with an overview of the press which played a crucial role in highlighting issues of sexual morality. This is especially relevant as Hall has contended that "[The] Wolfenden Committee was formed in direct response... to a growing moral panic about the rise of prostitution and street-walking and the spread of prostitution" (1980: 8).



### 6.2.1 The Press

The popular press was particularly influential in post-war Britain through creating moral panics concerning prostitution, obscenity, and homosexuality. The perceived problems in the press were the subject of a Royal Commission (1947-49) concluding they were out of step with public opinion and at the behest of a few press barons (Seaton, 2003: 26-31; Viscount Camrose, 1947: 1) and recommended the Press Council's establishment.

Newspapers were a truly mass media; in 1947 national dailies sold 15,760,000 daily, *The Express* and *Mirror* each sold nearly four million (Monopolies Commission: 3), and Sunday newspapers sold 25,239,000 copies. The Royal Commission found the press guilty of "lapses of taste" and "sensationalism" (1948-9 Cmd. 7700 xx, 1). In this the first picture Sunday newspaper, the *Sunday Pictorial*, excelled, running inflammatory articles on prostitution and homosexuality (Camrose, 1947: 61). In 1947 it was the third highest circulation Sunday paper selling 4,006,000 copies (Monopolies Commission: 3).

Such popular newspapers were extending the boundaries of acceptable reportage and discussion. Previously taboo sexual themes were now reported in graphically sensationalised manners whilst purporting censoriousness. Whilst frequently deplored by MPs, this paradoxically contributed to the Wolfenden Committee's establishment; directly through publicising the social problems of homosexuality and prostitution and indirectly by extending the parameters of what was 'sayable'. Ironically it was more influential in this than newspapers favourable to reform. Thus an irrational consequence of the anti-reformists press' sensationalist attack on homosexuality was that it pushed back discursive boundaries on homosexuality. The

next section shows that newspapers played a significant role in what was 'sayable' in book form.

## 6.2.2 Obscene Publications

In 1960 Penguin Books intended to publish D. H. Lawrence's *Lady Chatterley's Lover* (1928). The book contained extensive use of 'four letter words' "hitherto taboo in print" and graphic depictions of adultery crossing class boundaries (McLeod, 2007: 68). Penguin believed publication was permissible under the 1959 reform of the previously discussed OPA (1857). This allowed publications containing "literary or scientific merit" that might otherwise be deemed obscene (McLeod, 2007: 68). The Conservative government had initially opposed the legislation as an unsuitable basis for amending the law although the Home Secretary acknowledged that "it was generally recognised that the existing law was defective" (28.3.1957, CAB/128/31: 0025). In December 1958 the Cabinet had recognised the pitfall that a "defence of literary merit would make the law virtually unenforceable since no jury could be expected to decide so essentially subjective an issue" (CAB/128/32: 0085). They later unsuccessfully submitted an amendment at the Report Stage to remove this part of the sub-section (23.4.59, CAB/128/33: 0025). This Act was sponsored by Roy Jenkins and as Home Secretary he would prove pivotal in many other reforms (McLeod, 2007: 334).

The suggestion that artistic merit could outweigh any obscenity was not new, it had been attempted in defending the publishers of Radclyffe Hall's *Well of Loneliness* in 1928 (CUST/49/1057). This had been published with extensive publicity, with advertisements in seven daily newspapers; review copies sent to the "quality dailies and periodicals" received many positive reviews (Cline, 1997: 240). The *TLS* considered it "sincere, courageous, high-minded", the *Telegraph* deemed it "truly remarkable... work of art" and the *Evening Standard* agreed with Havelock Ellis' view of its "complete lack of offence" (Cline, 1997: 241-242).

However, the *Sunday Express* ran an article, 'A Book That Must be Suppressed', calling homosexuality a 'pestilence', a 'plague' and a 'leprosy' which must be destroyed by Christianity lest it destroy Christianity (Cline, 1997: 243). The author stated he "would rather give a healthy boy or healthy girl a phial of prussic acid than this novel. Poison kills the body, but moral poison kills the soul" (Cline, 1997: 243). Predictably the first printing sold out and a second was ordered by the publisher, Jonathan Cape. However, without the author's knowledge, Cape sent a copy to the Home Secretary with its best reviews soliciting his opinion and offering to withdraw the book on his say so (Cline, 1997: 246-247). The Home Secretary responded considering it an "indecent work" (CUST/49/1057) and it was withdrawn.

However, Cape published the book in France, soliciting orders from British booksellers, and in October 1928 copies were seized at Dover (CUST/49/1057). Subsequently the publishers were summoned to show evidence against their destruction (Cline, 1997: 253). The trial in November 1928 found against Cape and the books were destroyed with the magistrate saying that he had "no hesitation whatever in saying that it is... an offence against public decency" (CUST/49/1057).

The magistrate considered attempts to offer a defence of artistic merit accurate but irrelevant, "because otherwise we would be in this preposterous position, that because it is well written the most obscene book would be free from such proceedings" (CUST/49/1057). Reflecting the *Sunday Express's* analogy he stated that "The more palatable the poison the more insidious". Interestingly, the magistrate said that the mere inclusion of "unnatural offences" did not constitute an obscene libel. He conjectured that a book on homosexuality could be written as a "tragedy" in which those "afflicted... try their best to fight against this horrible vice". However the tragedy portrayed in this book is that "people who indulge in these vices... are ostracised by decent people... this book is [...an] almost hysterical plea for the toleration and recognition of these people" (CUST/49/1057).

The defence counsel remarked later upon the “rapid change in which we live and of the vagaries of taste” after the second world war when “*The Well of Loneliness* is now on sale in every bookshop without the slightest interference... The phials of prussic acid can be taken freely without any apparent injury to the citizen or the State” (Montgomery-Hyde, 1970:187).

Thirty two years later the five day trial of Penguin for obscenity proved sensational (McLeod, 2007: 68). Although now it is best remembered for the classic question to the jury by Mervyn Griffiths-Jones the prosecuting counsel:

“Would you approve of your young sons, young daughters - because girls can read as well as boys - reading this book? Is it a book that you would have lying around in your own house? Is it a book that you would even wish your wife or your servants to read?” (Todd, 1990:146)

However, Griffiths-Jones was in agreement with Lawrence who considered his book “far too good for the ... gross public” (Green, 1998: 336).

This harking back to nineteenth-century conceptions of propriety and protecting the vulnerable from corruption, with its paternalistic relations between the sexes and classes was enshrined in the new OPA (1959). A work was considered obscene if tended “to deprave and corrupt persons who are likely... to read, see or hear the matter contained or embodied in it” (Hall-Williams, 1960: 285). Although the book had been available from an Italian publisher in hardback, some saw the real issue being the reduced cost bringing it to the “grubby hands of the great unwashed” (Green, 1998: 337). The verdict in Penguin’s favour allowed them to sell two million copies the next year. Subsequent failed prosecutions allowed publication of such sexually controversial books as *Fanny Hill* (1963), *The Naked Lunch* (1966/8) and *My Secret Life* (1969) (Green, 1998: 337-8).

The two major trials discussed here concerned very different books. *Lady Chatterley's Lover* is explicit in language and content whilst *The Well of Loneliness* was only 'deviant' in its positive depiction of homosexuality. Hall's book had been published again without prosecution in 1949, showing that by the 1950s content had become more important than theme.

The government was embarrassed by the Lady Chatterley trial's verdict. Having passed the Act allowing juries to decide these matters MPs now consistently criticised the government for juries' verdicts and the prosecution for opening the floodgates (Commons, 24.11.1960, vol.630col.1289-90). However, despite the parliamentary fallout the government only received 30 letters from the public concerning it (LO/2/148). Harold Macmillan, the Prime Minister, had expressed party political arguments favouring the Bill in Cabinet stating there was a "Feeling that Tories are Philistines" and that this "should not be allowed to revive" (23.4.59, CAB/195/18: 0017).

The issue of obscene publications highlights tensions created by demands of a literate population to make their own choices confronted by a legal and political elite still wedded to the patriarchal, classist, and paternalistic attitudes of the nineteenth-century. However the 1959 legislation was an early sign of shifting moralities and the intra-elite tensions that would challenge other sexual regulations reliant on such ideologies. Thus it is evidence of the social and moral changes and a revised heteronormativity.

### 6.2.3 Theatre, Cinema and Television

#### Theatre

Theatre regulation was often dominated by concerns over homosexual themes. State censorship of the theatre in England, like sodomy, originated from Henry VIII's reign, operating after 1688 under the Lord Chamberlain without restraint from, or appeal to, either courts or parliament (Green, 1998: 339). These powers were codified in the Stage Licensing Act (1737) and Theatre Regulation Act (1843). The only means of avoiding censorship was by presenting plays as private performances at theatre clubs. Opposition to these powers was longstanding; in 1909 a Joint Select Committee recommended that licences be optional. The choice to forego an application risking prosecution for indecency, however the proposals were rejected and the issue faded away (Green, 1998: 340).

By the 1950s the theatre was undergoing a transformation from escapism into the grim realism of controversial issues. In 1958 Jenkins established the Theatre Censorship Reform Committee advocating reform of the Lord Chamberlain's powers (Green, 1998: 339-340). The Lord Chamberlain had a list of forbidden themes for plays; between 1945 and 1954 forty-two plays were refused a licence, eighteen for "sexual impropriety", and fourteen for mentioning homosexuality, which according to the censor was 'the forbidden subject' (McLeod, 2007: 42).

In 1951 the Lord Chamberlain asked the Lord Chancellor for advice on the continued prohibition of homosexual depictions because he was under "heavy pressure from some shades of public opinion to lift the ban" and a play concerning lesbianism was under consideration (LCO2/4705). The Lord Chamberlain had received arguments that the public was "much more outspoken and broadminded than it was and that to ventilate vice and its tragedies would be to the general social

advantage”. Others had argued for the ban’s continuation because “the subject will be very distasteful and embarrassing in mixed company” and might corrupt “the previously innocent”.

The Lord Chancellor advised a pragmatic response; banning a play if the treatment was in a “crude and indecent fashion” not “merely because it mentioned these matters” (LCO 2/4705). He acknowledged difficulties in administering a discretionary position rather than a “hard and fast line” but cautioned that “censorship frequently defeats its own object and that under modern conditions there is much to be said for free and open discussion.” However, the Lord Chamberlain kept the blanket ban in place until 1957 (McLeod, 2007: 42). Subsequently homosexual depictions were allowed if the treatment was “sincere and serious” (Jeffrey-Poulter, 1991: 63).

In 1965 a performance of *Saved* at a theatre club was raided and the directors of the Royal Court Theatre, which the ‘club’ used for the performance, were fined (Green, 1998: 341). Lord Annan of the TCRC, who was an ally to homosexual reform, was urged by the now Home Secretary, Jenkins, to call for a Joint Committee examining theatre censorship. Its 1968 report concluded that the Lord Chamberlain’s powers “were incompatible with the modern world” (Green, 1998: 342).

The Act abolishing the centuries old powers of the Lord Chamberlain was passed without serious opposition in 1968. It accepted the same obscenity test as the OPA (1959) and prosecutions were to be initiated by the Attorney-General (Green, 1998: 342-3). Cabinet discussions of the impending change show that depictions of sex or homosexuality were no longer a concern (CAB/128/42).

Theatre reform was explicitly linked to changing attitudes to homosexuality and is a prime example of how heterosexual forums were affected by this and thus the interconnectedness of homosexual reform and a recalibrated heteronormativity. The swift and uncontested passage of reform stands in stark contrast to homosexual deregulation. However, similarly reform relied upon a change in government and its support.

## Cinema

Control over the cinema was much stricter than the theatre, but it was not by the state but the industry itself, through the British Board of Film Censors. This was established in 1912 to forestall possible ramifications of the 1909 Cinematograph Act, which was originally intended to give local authorities the power to license cinemas and impose safety restrictions to primarily prevent fires. However, the powers provided allowed for an expansion to concerns over the moral threats films posed and were used to ban screenings.

To prevent this haphazard local censorship and forestall a council request to the government for its extension, industry self-censorship “was deemed necessary” (Richards, 1981: 95). Film manufacturers and exhibitors proposed a self-governing censorship system headed by a Home Office Appointee (Smith, 2005: 25). This became the BBFC, which operated from 1913. The BBFC only had two blanket bans, on nudity and depictions of Christ, and would reject films outright or give a Universal (U) or Public (A) certification (Smith, 2005: 25). To promote uniformity in 1923 the Home Office issued a set of model conditions to local councils, which included banning unaccompanied under 16s from ‘A’ films (Smith, 2005: 32). In the 1930s a spate of horror films prompted a new ‘A’ category with an ‘Horrific’ suffix, signifying unsuitability for children but not banning them (Smith, 2005: 71; Hunning, 1967: 141-3).

As early as 1938 there were calls for a certificate banning children from a wider variety of films (Smith, 2005: 73; Hunning, 1967: 142-3). A 1950 Departmental Committee under Professor Wheare recommended a new 'X' certificate as well as a 'C' certificate for children's films (Robertson, 1989: 102). Only the 'X' category was introduced in 1951, initially being mainly applied to foreign films of a sexual nature previously rejected for a licence (Hunning, 1967: 144-5).

For Smith (2005) the central theme of British film censorship was the protection of children from harmful themes and images. However, for Richards the level of censorship was a response to cinema's mass working-class appeal (the average weekly 1939 audience was 20-23 million) with the establishment particularly wary of cinema's power to influence and inflame public sentiment (1981: 95). This was demonstrated by *Battleship Potemkin's* rejection for certification in 1926, and only being granted the new 'X' certificate in 1954 (Robertson, 1989: 30-31).

In the 1930s censors' control was extended beyond finished films to script-vetting of prospective projects, thus eliminating unacceptable material before filming began (Richards, 1981: 99). This happened to the proposed adaptation of the novel *Stir* in 1936, which included a homosexual theme between prisoners (Richards, 1981: 95). Although voluntary it saved producers from having to delete offending scenes or having the film banned (Richards, 1981: 107).

The most notable cinematic portrayal of homosexuality was film *Victim* (1961) starring Dirk Bogarde<sup>22</sup> as a barrister with a homosexual past who takes on a blackmail ring that caused a homosexual friend's suicide. The portrayal of homosexuals as victims was ground-breaking and considered a major factor in

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<sup>22</sup> This was a dangerous move for the matinee idol and life-long 'bachelor'

keeping homosexual regulation in the public eye (Moran, 1996: 54-55). Audience sympathy was not endangered by camp portrayals with the blackmail victims all being otherwise 'respectable' (Higgins, 1996: 97)

Like the theatre, 1960s films increasingly dealt with controversial issues, attracting popular and critical acclaim. *Alfie* (1966) was nominated for six Oscars and featured promiscuous adulterous sex and an illegal back-street abortion. In more light hearted tones, the James Bond series started in 1962 with *Dr No* featuring Ursula Andress' iconic bikini scene. Thus sex was becoming a more prevalent and acceptable feature of popular films whether the treatment was serious or frivolous.

#### Television

Television viewership expanded exponentially from 350,000 TV licences in 1950 to over three million in 1954, by 1964 there were approximately 13 million (History of the BBC: 1; Hand, 2002: 32). Television also included portrayals of homosexuals as victims not criminals; a 1963 episode of BBC's *Z Cars* showed homosexuals being blackmailed (Jeffrey-Poulter, 1991: 63). Homosexuality's treatment reflected wider realistic depictions of controversial issues, typified by *Cathy Come Home* (1966) dealing with homelessness and *Up the Junction* (1965) portraying sexual encounters and a back-street abortion.

Television did not operate under any special specific legal restrictions, being primarily constrained by prevailing social conditions and expectations. The BBC operated internal censorship with its 'Green Book' listing topics to be avoided, including immorality, crudities and any reference to a man being effeminate (Green, 1998: 64). Concerns over potential consumers of questionable material, related in previous sections, were even more pertinent to television programmes beamed into people's living rooms. The state funded BBC, with its public service remit, was especially vulnerable to criticism.

In 1963 Mary Whitehouse established the Clean Up TV<sup>23</sup> group to campaign against indecency and ‘declining’ broadcasting morality, in response to Dr. Alex Comfort’s appearance on the BBC defending premarital sex (Cook, 1980: 286). Whitehouse claimed viewers risked “serious damage to their morals, their patriotism their discipline and their family life”. Members were provided a list of “objectionable” subjects to monitor; included violence, blasphemy, suggestive clothing and behaviour, abortion and homosexuality (Green, 1998: 63).<sup>24</sup>

The BBC Director-General, Sir Hugh Greene, resisted this organised pressure, even discarding the ‘Green Book’. Greene believed the BBC’s “duty” was “to take account of the changes in society, to be ahead of public opinion rather than always to wait upon it” (Greene, 1998: 61). Like many politicians agitating for reform on social and sexual issues, Greene recognised that public opinion was shifting, but not necessarily in advance of societal changes. Whitehouse’s reaction was to label Greens as “the one man who more than anybody else had been responsible for the moral collapse in this country” (*Guardian* 24.11.2001).

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<sup>23</sup> The National Viewers and Listeners’ Association from 1965

<sup>24</sup> Whitehouse particularly opposed homosexual depictions and in 1977 brought the first prosecution for blasphemous libel in living memory against *Gay Times* (*Guardian* 24.11.01).

#### 6.2.4 Conclusions:

The preceding sections show that artistic portrayals of sexual matters were transformed in the 1950s-1960s. In all but television the form and/or extent of regulation was significantly altered, with the permissibility to address sexual topics significantly enhanced. Writers had long had books and plays on these themes banned and films had followed on from this. What had changed were the political will and social tolerance to allow such portrayals. In theatre reform prominent MPs influenced the Lord Chamberlain's rules relaxation permitting homosexual themes. Labour's election bringing Jenkins into government was crucial to the eventual legal change in theatre censorship. It is also worth noting that there were previously committees to investigate theatre and film censorship and a Royal Commission on the press as would happen with homosexuality. Such freedoms contributed to how the issue of homosexuality was able to be discussed in this reform period.

Evident in the reform and transformation of artistic treatments of sexual themes is that these were entirely elite driven phenomena. The public entered these discourses as the vulnerable audience for questionable materials or for polemical attacks on those. This public was differentiated between those deemed suitable to consume such material without prurient interest and those needing protection from material pandering to base desires. The only grassroots campaign on censorship was Mary Whitehouse's wanting *greater* control. There is no evidence of wider mass liberalisation as the homophile histories suggest. Certainly there were no mass demonstrations in support of legal changes as had occurred in 1885 in favour of greater controls over sexual offences. However, by the mid-1960s those moral guardians bolstering a punitive heteronormativity had consistently been losing elite support. This conforms to my analysis of homosexual reform also being an elite driven process in which the public primarily appeared as the object of reform and regarding the wider public's possible reaction to reform.



## 6.3 Heterosexual Regulation

### 6.3.1 Abortion and Birth Control

Birth control had sparked significant controversy in the nineteenth-century and it also massively impacted upon sex and society in post-war Britain. By the 1950s contraception had been transformed with an estimated 90% of couples using contraception even before the pill's introduction (Pugh 1994: 265). This occurred without controversy or legal intervention, despite the OPA (1857) still applying and used earlier in the century.

The 'pill' was introduced in 1961 and was largely responsible for the state moving from non-involvement in contraception to providing it free and on demand by 1975 (Cook, 2004: 1, 272 & 296). Previously birth control was a private matter with the twentieth-century state loathe to intervene in its production, provision and knowledge; no restrictions existed on the use or production of contraceptive materials (Leathard, 1980: 21). Consequently contraceptive's quality was inconsistent; only in 1964 was a British standard for condoms introduced (Cook, 2004: 123-4).

However, contraceptive knowledge had progressed; the inter-war years had seen a discursive explosion on birth control and heterosexual sex. Crucially important to this discourse was the Church of England's changing position, which significantly altered what was sayable about sex and birth control. In the inter war years the established Church shifted its attitude to non-procreative sex. The 1920 Lambeth Conference urged "all high-principled men and women" to campaign against the "open or secret sale of contraceptives, and the continued existence of brothels"

(Resolution 70). Its explicit linkage between birth control and ‘loose women’ was not unique to the Church, in 1923 the radical journal *Black Dwarf* argued that birth control risked “encourage[ing] the most extended scale of prostitution” (Cook, 2004: 72).

In 1930, the bishops began to relax their position. The begetting of children was still maintained as the primary purpose of marriage, and couples who did not want a large family were urged to exercise “deliberate and thoughtful self-control... in intercourse”. However, “other methods” were allowed when there was a “morally sound reason for avoiding complete abstinence” as long as this did not stem from “motives of selfishness, luxury, or mere convenience” (Lambeth Conference, 1930, Resolution 15). This proper motive for non-procreative sex within marriage was recognised as having “a value of its own... married love is enhanced and its character strengthened” (Lambeth Conference, 1930, Resolution 13). Thus sex was recognised as having a non-biological role in cementing loving relationships and encouraged in moderation. The 1958 Lambeth Conference further accepted that using artificial means of contraception in family planning could be “right and Christian” in certain conditions (McManners, 2002: 390).

Responding to the Anglican relaxation, the Catholic Church declared that contraception was “offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin” (*Casti Connubii*, par.56). Despite the rhetoric, three paragraphs later the Pope allowed for sex when on “account of natural reasons either of time or of certain defects” pregnancy could not follow. In justifying this he, like the Church of England, allowed that intercourse was permissible to cement love and affection (*Casti Connubii*, par.59).

Thus both major British congregations changed their positions on sex, acknowledging a role within married relationships beyond reproduction. The difference lay in Catholics not being permitted to ‘unnaturally’ frustrate conception. The Churches’ more open attitudes to sex and contraception permitted more open debates. The Church of England engagement particularly widened the discursive scope, undercutting moral arguments opponents might use to restrict debates.

Foremost amongst producers of this knowledge was Marie Stopes. Cook contends that it is “difficult to overestimate the innovativeness and importance of Marie Stopes’ first two books, *Married Love*<sup>25</sup> (1918) and *Wise Parenthood* (1918)” in shaping discourses on marital sexuality and contraception (Cook, 2004: 124-5). Interestingly *Married Love* provided no information on reproduction and only the briefest mention of contraception, thus rejecting the reduction of sexual intimacy to reproduction. Stopes’ lasting legacy was in establishing Britain’s first birth control clinic in 1921 (Leathard, 1980: 12).

Increasingly these inter-war sex manuals advised men to alter their practices to ensure physical pleasure for their wives, explicitly accepting that women could enjoy penetrative sex (Cook, 2004: 202-3). However, not until the 1960s was this intellectual and emotional separation of intercourse from procreation made practical. The late 1950s saw the cheap, thin and lubricated condom become available and in the 1960s the pill first gave women direct and reliable control over conception (Cook, 2004:139). However, these developments built upon an increasing acceptance of contraception that saw usage rise from the 1890s when surveys began measuring the phenomenon (Cook, 2004: 4). This undoubtedly effected fertility; gross reproduction rates sharply declined until the 1930s saw a slow rise until the 1960s when there was another steep decline (Cook, 2004: 14-16).

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<sup>25</sup> *Married Love* sold 820,000 copies worldwide by 1937 (Cook, 2004: 192-4; Leathard, 1980: 11).

The medical establishment was largely outraged by increasing birth control literature and clinics, particularly regarding the 'unqualified' Stopes. In 1922 a Dr Sutherland wrote against her "experimenting on the poor" with a "monstrous campaign of birth control" (Leathard, 1980: 25). Stopes sued for libel but, the judge ruled in Sutherland's favour. Stopes successfully appealed this decision but Sutherland appealed to the Lords and won (Leathard, 1980: 25-6). 1923 saw the last important successful birth control prosecution against Guy Aldred and Rose Witcop for selling a pamphlet by Margaret Sanger on *Family Limitation*, with the pamphlet being ruled obscene and ordered destroyed (Leathard, 1980: 26). However, the changing attitudes are demonstrated by Dr Chesser's unsuccessful obscenity prosecution in 1942 for his book *Love Without Fear: A Plain Guide to Sex Technique for Every Married Adult*. The judge commented that "it is ridiculous and absurd to suggest that the discussion of sex and sex relationships in a book is obscene" (Robb, 2006: 102).

The state had reinforced its policy of non-intervention under the 1924 Labour government. The Ministry of Health's Circular 517 on Maternal Mortality "prevented welfare centres from giving any contraceptive information to any mother in any circumstances" (Leathard, 1980: 26). This galvanised support for reform; an attempt in the Commons in 1926 to allow local authorities to spend money providing birth control information was defeated but a Lords' resolution to withdraw the effects of the 1924 circular was passed (Leathard, 1980: 34-5). However, not until 1930 were local authorities allowed to provide birth control instruction when women's health was endangered by further pregnancies (Leathard, 1980: 43).

However, some of the medical establishment began to engage in the discourse. In 1927 the Birth Control Investigation Committee was established to "promote the scientific investigation of birth control" which had "hitherto not formed part of medical education". The announcement of the committee's formation acknowledged the contentious nature of their investigation: "members of the committee differ

widely in their opinions as to the desirability of birth control, but are united in the realisation that the practice is widespread, and that the scientific problems which it raises can no longer be ignored” (British Medical Journal, 29.10.27). It produced an ‘Approved List of Contraceptives’ including barrier methods and chemical contraceptives (Cook, 2004: 123). The BCIC became the Scientific Advisory Committee of the Family Planning Association (FPA) in 1939 (Cook, 2004: 123).

The FPA had been renamed from the National Birth Control Council which had been formed in 1930 “so that married people may space out/limit their families and thus mitigate the evils of ill health and poverty” (FPA). It established 20 family planning clinics, to provide information on contraception and sexual health.<sup>26</sup> By the time of the Royal Commission on Population report in 1949 official views on family planning and the FPA were changing. It praised the FPA’s work despite the effect it might have on population, the feared decline of which had motivated the Commission’s establishment (Holden, 2004: 40).

In this period there was a significant change in the technologies of contraception being recommended. Authors continued advocating the sponge during the inter-war years, however by the end of the period it was no longer mentioned (Cook, 2004: 126-7). Diaphragms and cervical caps became more available and commonly used but, in presaging arguments used against those taking the pill, the required premeditation and the woman taking the initiative was seen by some as “wanton” (Cook, 2004: 133-4). Dr Kenneth Walker wrote in 1940 that it was not new methods but improved cost and reliability that had brought them “within reach of the masses. This... has allowed... sexual relationships being treated quite differently from how it was treated two or three generations ago” (Cook, 2004: 193). Whichever was the case, public attitudes and behaviour had shifted and state intervention had adapted in

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<sup>26</sup> It was alone in this until 1961 when the NHS also began providing it (FPA).

response moving from punitive attempts at limiting discourse to actively encouraging it.

Of course many doctors were involved in the most extreme form of birth control by providing abortions. In 1929 the Infant Life (Preservation) Act relaxed laws; allowing abortions before 28 weeks to preserve the lives of women on physical grounds (Leathard, 1980: 63). Although establishing the extent of abortions is hard, a Birmingham General Hospital survey from 1924-8 found women admitted to one abortion for every 5.5 live births (Leathard, 1980: 34-5).

The legal situation was altered by the case of Aleck Bourne, a gynaecologist who performed an abortion on a 14 year old rape victim in 1938, he was a member of the Abortion Law Reform Association established in 1936 (Leathard, 1980: 63; Hordern, 1971: 8). Bourne informed the police of his actions and was prosecuted under the 1861 OPA, pleading not guilty. His counsel argued that a doctor was justified in performing an abortion if not doing so might “make the woman a physical wreck or a mental wreck” (Hordern, 1971: 8-9). Bourne was acquitted with the judge establishing the precedent that doctors had the duty to perform an abortion in certain circumstances.

A reform attempt was made in 1952 by a Private Member’s Bill supported by Lord Boothby, who would be a prime homosexual decriminalisation campaigner, but failed through inadequate time. Similar attempts failed in the Lords in 1954 and in 1961 by the future Labour Health Minister Kenneth Robinson. The latter attempt sought to codify established precedents which, without the protection of statute, did not provide sufficient perceived legal protection for practitioners (Commons, 10.02.1961, vol.634cols.856-7). Thus after the Labour government’s election in 1964 abortion was a social issue ripe for reformed. Jenkins considered the law governing

abortion to be “harsh and archaic” (Jenkins, 1991: 181). However Harold Wilson was cautious because of the Catholic vote and was not very interested in social issues that concerned Jenkins, apart from race relations (Pimlott, 1992: 487).

In 1966 another Bill was moved by David Steel (Liberal), which included social conditions as a reason for performing an abortion (Hordern, 1971: 10-11). In the intervening years public and political attitudes were affected by the Thalidomide tragedy.<sup>27</sup> The Catholic dominated opposition to abortion reform was weakened by their equal condemnation of contraception reaffirmed by Pope Pius XII in 1951 and 1968 (Hordern, 1971: 40-41).

The Bill passed its second reading on a free vote by 196 votes thanks partly to the Labour government’s “benevolent neutrality” and Jenkins’ “strongly favourable speech” (Hordern, 1971:11; Jenkins, 1991: 196). However, cabinet was not unanimous; this was one reason that it, like the SOA (1967), was a private Bill. Support constituted majorities on both issues but personnel differed. Jenkins records that “Frank Longford...was as strongly in favour of homosexual reform as he was opposed to abortion” (Jenkins, 1991: 208-9). Similarly minded were Leo Abse and Norman St John-Stevas, Longford (previously Lord Pakenham) and St John-Stevas were Catholic whilst Abse was Jewish (Holden, 2004: 135).

In 1966 the Society for the Protection of the Unborn Child ([www.spuc.org.uk/about/history](http://www.spuc.org.uk/about/history)) was established to oppose reform (Holden, 2004: 134). Dr. Bourne was a notable founding member after becoming opposed to further reforms (Francome, 2004: 63). According to the Shadow Chancellor the activities of

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<sup>27</sup> A Daily Mail NOP survey found that 80% favoured allowing women abortions rather than having to have a seriously deformed baby (Hindell & Simms, 1971: 87)

the SPUC were counterproductive and alienating, making waverers more likely to support the Bill (Holden, 2004: 134).

Party political considerations were used by both sides in Cabinet; reformers warned the issue would haunt the government unless it was dealt with, whilst opponents warned of electoral consequences of supporting it. In February 1966 the Cabinet discussed the private members' Bills on abortion and homosexual reform and decided that the "Government as a whole should adopt an attitude of neutrality in both instances [of abortion and homosexuality]" (CAB/128/41: 0005). In Cabinet only Longford opposed providing government time for abortion (01.06.1967, CAB/129/130: 0010), expressing concerns this would suggest government support which "might do harm to the Government's reputation with considerable sections of public opinion... as was illustrated by the collection of 500,000 signatures to a petition... organised by [the SPUC]" (01.06.1967, CAB/128/42: 0035). This was not the position he had taken regarding homosexual reform. However, Cabinet decided that "Parliament should not be prevented from reaching a conclusion on... an important issue on which public opinion was much concerned" due to a private member not having the necessary time (CAB/128/42: 0035). Despite a committed and organised opposition including a 14 hour filibuster, the Bill was passed by 84 votes (Hordern, 1971: 12).

Developments in contraception and the knowledge to effectively use them meant sex no longer necessarily held a significant risk of pregnancy. This did not happen instantly or uniformly, it was part of processes begun in the nineteenth-century which accelerated rapidly from the 1950s. Knowledge and technologies developed and changed heterosexual culture enabling freer sexual expression. These developments were created through, and consequently facilitated, reduced social and moral restrictions on sex.

The enduring perception that sexuality was dangerous needing restriction and control (Cook, 2004: 207) was consistently challenged by discourses celebrating sexuality as life enhancing. Sex was often still portrayed as the cause of shame, disease, sin, social and moral decline, and pregnancy. But by the mid-1960s, it was possible for heterosexuals to have sex without significant fear of pregnancy and this happened less discreetly than previously.

However, if the technologies of contraception reduced fears of pregnancy they had the opposite effect regarding venereal disease. The development of antibiotics which could cure venereal diseases advanced significantly in the 1950s raising hopes of eradication (Holden, 2004: 80). The threat of syphilis that had so worried the Victorians remained a considerable peril, in 1924 syphilis killed 60,335, more than cancer and tuberculosis combined (Davenport-Hines, 1990: 246). Whilst there was success in controlling syphilis gonorrhoea sharply increased. There was a 1946 epidemic and cases again increased by 1968 (Hordern, 1971: 39). Patients seeking treatment at VD centres almost doubled from 1955 to 1967, the gap also narrowed between men and women and they were increasingly under 20 (Hordern, 1971: 39; Leathard, 1980: 150).

The FPA avoided issues of VD because they did not wish to link the “even more unspeakable ‘VD’ with birth control” (Leathard, 1980: 71-2). Government intervention was also very limited but in 1964 a Home Office minister, Lord Stoneham, opened a BMA conference on VD amongst the young (Holden, 2004: 145). That same year the Church of England again showed progressive instincts in urging schools to “accept some responsibility for sex education” (Leathard, 1980: 149).

Such interventions were limited, showing that concern for the issue was very different to the nineteenth-century fears behind the CDA's. However, social restrictions on sexual expression were not removed to the same extent as physical ones and although these still constrained heterosexuality. Sex was now more freely connected with pleasure but remained a cause for social control and shaming. Information on birth control was strictly limited for most of the 1950s and 1960s and illegitimate pregnancy was still stigmatised.

Only in 1968 were FPA clinics permitted to provide services to un-affianced women and 1970 before they were required to make such provision (Cook, 2004: 290). Local authority clinics were even more constrained, serving only married women needing contraception on "medical grounds" (Cook, 2004: 272). However, in 1966 the Labour Minister for Health allowed and encouraged local authorities to support family planning. This capacity was extended by a 1967 Act which allowed provision on social grounds unrestricted by age or marital status (Cook, 2004: 302-3). However, the BMC was able to negotiate a special dispensation from the Health Ministry allowing GPs to charge for contraceptive prescriptions for non-medical reasons; making the pill the only drug NHS patients had to pay for (Cook, 2004: 280-1).

Some have suggested the state's resistance to involvement in birth control was not undermined by enlightened social attitudes acknowledging women's rights to fertility control. Weeks argues it resulted from fears of a "disproportionate birth-rate among the lower orders" (Weeks, 1989: 259). Others noted that in the aftermath of the 1960s many saw the Pill as part of the state's desire to control women's sexuality (Wilson, 1977: 69-70; Lewis, 1992:94-95). This was typified by the 1974 Finer Report on One-Parent Families statement that family planning should be directed at those "most likely to produce illegitimate children" (Wilson, 1977: 69-70).

Likewise they point to surveys of sexual behaviour in the 1960s and early 1970s showing that hetero-sexual behaviour remained conservative, and that greater premarital sex was an urban and college educated phenomenon (Weeks, 1989: 259; Lewis, 1992: 48). Cook also argues that class based sexual differences were the opposite of those which prompted the supposed nineteenth-century moral resurgence. By the 1960s the middle classes were again pioneers of a new morality but it was now one of freer sexual expression led by the young and with reduced gaps between the sexes (Cook, 2004: 185-6).

However, regarding my thesis what is interesting is that seemingly liberal developments governing sexuality were subsequently criticised as differently constituted forms of control and repression; a reconfigured heteronormativity. In these discourses the Pill didn't liberate from the tyranny of biology but was a eugenics policy, it didn't free women to say yes to and enjoy sex; it removed their opportunity to say no. Heterosexual regulation may have been in advance of changing sexual behaviours but it accorded with their trends and facilitated their acceleration. This critique of legal relaxation as apparently reconfigured repression can be seen in the representation of the Labouchère Amendment and the S.O.A. (1967). The former provided for a lesser sentence than the previous punishment of ten years' imprisonment (Weeks, 1977: 13-14; Moran, 1996: 83) while the latter is criticised for introducing a tightly controlled private sphere of tolerated homosexuality despite allowing homosexual acts for the first time in recorded history (Davidson & Davies, 2004: 175-6). These new discourses were overly sensitive to identifying supposed homophobic and heteronormative *intent* no matter the seemingly contrary *effect* of the changes.



### 6.3.2 Prostitution

Whereas extra-marital sex was becoming more acceptable and legitimised by state action prostitution remained an intermittent concern. The Wolfenden Inquiry into prostitution and homosexuality became “the main reference point for post-war legislation on prostitution and related offences in Britain” (Matthews; 1986: 188). However, the first major investigation into prostitution since the CDA inquiry was the McMillan Departmental Report (1928) recommended reducing police powers and removing the category of ‘common prostitute’ (Matthews; 1986: 188; Smart, 1981: 49 Weeks, 1989: 218). This demonstrates 1920s concerns over the (mis)treatment and labelling of prostitutes and police powers facilitating this.

By the 1950s such concerns were less apparent; prostitutes’ treatment was considered a separate issue unrepresentative of a more general threat to civil liberties (Smart, 1981:49). Rather the 1950s moral panic centred on the extent of prostitution and has been recognised as directly leading to the Wolfenden Committee’s establishment (Weeks, 1989: 238; Smart, 1981: 49).

However, the first action on prostitution in the 1950s was sympathetic to prostitutes. Introduced by Barbara Castle under the Attlee Labour government, this Criminal Law Amendment Act (1951) removed prostitutes’ exclusion from protection from procurement in the 1885 Act and was supported by all parties and well received by the press (*The Times*, 14.12.50; Self, 2003: 70). However, some newspapers helped to create a moral panic on London becoming known as the vice capital of the western world during the 1951 Festival of Britain (Weeks, 1989: 240; Smart, 1981: 50). A complicating racial factor was that many of those accused of living off prostitutes were foreign (Smart, 1981: 50). In 1949 the *Sunday Pictorial* ran articles looking at “foreign gangs ‘sucking rich fortunes from the moral sewers of the west

end” (Self, 2003: 71 & 78n). Most importantly the increased visibility of prostitution gave the impression it was increasing, this ‘fact’ was supported by higher arrest and conviction rates after a police crackdown.

Indeed Maxwell-Fyffe stated in a 1954 memo that it was unclear to what extent the increase was “real” or explained by “increased [police] activity”. However, he claimed that “there can be no dispute that conditions in the streets in certain parts of London are now deplorable” (CAB/129/66). Prosecutions in England and Wales had leapt from 3192 in 1938 to 10,291 in 1952 but cases outside London had only doubled from a paltry 226 cases to 535 (CAB/129/66). Such an increase more likely stemmed from policing priorities than increased offending. This is especially true considering the Secretary of State for Scotland detailed that offences were less than half the 1933-1938 average (CAB/129/66).

Whilst Maxwell-Fyffe acknowledged the need for an enquiry into prostitution he was unconvinced one was needed for homosexuality, which is discussed in Chapter 7, but he concluded that on balance a joint inquiry was best. The reasons that prostitution was deemed suitable for an inquiry were: in response to calls from the Church, the press and parliamentarians, the ineffectiveness of laws against solicitation requiring it to caused annoyance (the flouting of which brought the law into disrepute), and to remove public prostitution (CAB/129/66). Maxwell-Fyffe had already taken some initiatives by sending a delegation to the United States to ascertain the law and practice regarding prostitution and importuning by men (Commons, 12.11.1953, vol.520cols.73-4).

The Cabinet’s response was divided; Churchill particularly opposed an inquiry on homosexuality preferring a backbencher to introduce a Bill restricting the reporting of homosexual offences, as with divorce, or if an enquiry was unavoidable to do it

without publicity. Maxwell-Fyffe pointed out that this would not deal with prostitution and re-iterated his position that this problem was the more pressing issue and there was no prospect of legislation without a preceding inquiry (CAB/128/27).

Interestingly, during cabinet discussions in February 1954, Churchill's first reason against acting was party political; "the Tory party won't want to accept responsibility for making law on homosexuality more lenient or for *maison tolérées*"<sup>28</sup>, additionally noting that "we can't expect to put the whole world right with a majority of 18" (CAB/195/11). Whereas the reasons for the Cabinet's establishment of an inquiry into prostitution are accurately reflected in the literature, this research has found that these party political concerns are not. Rather, Weeks accuses those who refrained from enacting Wolfenden as being 'prejudiced', 'ignorant' and 'timid' (1977: 167) for not doing something they were morally against and incapable of carrying politically. Concerns over losing public support are mentioned in the literature but not that it might be divisive within the Conservative party. Labour and Liberal parties' concerns are discussed in the section on party politics and public opinion.

The central concern was for prostitution and an inquiry was deemed essential by a Cabinet majority before significant legislation was possible, with the critical problem of prostitution being its visibility. Whilst there was significant opposition to appointing another Royal Commission, the Home Secretary's offer of taking the responsibility with a departmental enquiry was one the PM and Cabinet couldn't object to (CAB/128/27). Thus the Wolfenden Committee was established in August 1954 to look at "the law and practices relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes" ('The Wolfenden Report' HO/345/1: 21).

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<sup>28</sup> The system of state controlled legal brothels in France from 1804 until 1960.

In 1957 Wolfenden reported that “the criminal law... is not concerned with private morals or with ethical sanctions” but that society cannot be “indifferent to these matters” (Wolfenden: 80). Any cure could only be achieved through changing community attitudes not through the law alone, as it only dealt with those manifestations of the problem that caused the “ordinary citizen” “injury” through its public nature (Wolfenden, 1957: 80). Wolfenden’s ethos regarding prostitution fundamentally represented a continuation from MacMillan; however, its recommendations differed significantly.

Firstly it recommended removing the requirement to prove annoyance which was recognised as being routinely circumvented, thereby bringing the law into disrepute. Additionally the system of formally cautioning prostitutes used in Scotland should be extended, allowing police more discretionary powers. This meant women eventually arriving in court already be labelled as ‘common prostitutes’, ensuring easier conviction on police officer testimony (Wolfenden, 1957: 116; Hutter & Williams, 1981: 26; Matthews, 1986: 189). Furthermore sentences would be stiffened and measures recommended against tenants using premises for immoral purposes, landlords knowingly allowing premises to be used for prostitution would furthermore be considered as “living on the earnings of prostitution” (Wolfenden, 1957: 117).

To some extent the work of the Wolfenden Committee had already been done. Despite Cabinet reservations in 1954 Cabinet, legislation had proved possible on the less contentious problem of prostitution. The 1956 SOA consolidated existing disparate laws on prostitution, and represented “‘sameness’ and continuity” (Smart, 1981: 54). The Street Offences Act 1959 was pushed through Parliament under a government whip less than two years after Wolfenden’s Report. Although it faced significant opposition regarding labelling women as common prostitutes, it passed by 147 votes (Commons, 29.01.59, vol.598cols.1267-386). The Act’s use prompted

three private member's Bills in the Lords between 1967-9 seeking to remove the label of 'common prostitute' and advocating greater concentration on prostitutes' clients (Matthews; 1986: 190).

Thus, regarding prostitution Wolfenden represented a retreat from more the earlier, more liberal, McMillan Report. This was in stark contrast to the radical change homosexual reform would represent, the Conservative government easily legislated on prostitution but would have struggled to do the same on homosexuality even if it had been so inclined. Regulation remained highly punitively heteronormative but repeated attempts at reform originated from the, feminist, left.



### 6.3.3 Divorce Reform

Divorce also holds specific pertinence for this study; like homosexual reform, it involved changing moral conceptions and concerns that divorce damaged the law's reputation through its function. Despite continual pressure for divorce reform it took eighty years after the Matrimonial Causes Act (1857) for the law to be substantially amended (Lee, 1974: 16). This despite the Gorell Royal Commission (1909) having recommended equality between the sexes and six grounds for divorce (Lee, 1974: 15) the Matrimonial Causes Act (1923) only granted women equal rights to divorce for adultery (Herring, 2007: 99).

Three of Gorell's causes formed the basis of the Herbert (Matrimonial Causes) Act 1937; wilful desertion of more than three years, cruelty and incurable insanity after five years of confinement. The law was perceived as being regularly "mocked not only in words but in deeds" (Commons, 20.11.36, vol.317col.2082). This was not novel however; in 1912 the King's Proctor stated that despite the law "75 per cent of divorces were obtained by consent" (Lee, 1974: 125). This legal concern was intrinsically linked to a moral one, as adultery was the only grounds for divorce petitioners "were forced to take one of two alternatives—either one must commit adultery or one must commit perjury" (Commons, 20.11.36, vol.317col.2082). It was this, rather than divorce, that was "disastrously prejudicial to public morality" (Commons, 20.11.36, vol.317col.2082). Surprisingly these observations quoted the Archdeacon of Coventry. Thus relationships between morality, religion and the law were never clear cut.

Reformers were most exercised by the law discriminating between classes and sexes. Divorce law was being pulled in the direction of wider social and political changes after WWI. The franchise had been equalised with men in 1928, in 1925 women

gained equal appeal over custodial issues, in 1926 women of any marital status received the right to own and dispose of property as they wanted and the Sex Disqualification (Removal) Act (1919) also allowed women's entry into the professions and public office.

After WWII a Committee on Procedure in Matrimonial Causes (1947) under Justice Denning recommended various procedural changes to rectify the existing system including recommending separation with no prospect of reconciliation as grounds for divorce (Lee, 1974: 25; Morris, 1971: 148). Three 1949 Acts changed the divorce system (Lee, 1974: 25) and the various divorce statutes were consolidated in the Matrimonial Causes Act (1950). Another attempt to significantly reform the divorce laws was introduced by Mrs White which would have introduced the concept of 'no fault' divorces by adding seven year's separation as grounds for divorce (Lee, 1974: 25).

In 1949 the Labour cabinet had recognised there was a "fair measure of support for the appointment of a Royal Commission" but foresaw controversy over its membership, no guarantee of unanimous conclusions, and it proving an embarrassment when presented. Furthermore the last year of a parliament was an unsuitable time for its establishment (CAB/128/16). When again raised in Cabinet in 1950, it concluded that although there was "intense feeling in a limited circle... there was no widespread public concern" and it would raise religious issues which was "surely unwise" given Labour's slender majority another election looming (CAB/128/17) and the PM decided to "continue to stall" (CAB/195/7).

The government's position was that it couldn't support piecemeal reform before a wholesale inquiry. However, it had consistently thwarted a Royal Commission which was recognised as an unsustainable position (CAB/128/19). It was hoped to

avoid a second reading of Mrs White's Bill by informing its sponsors of the decision to appoint a Royal Commission but it went ahead and passed. However, the pressure on Mrs White succeeded and it was withdrawn. Lady White later stated the Bill had no prospect of becoming law with the government determined to prevent it (Lee, 1974: 25). The Morton Commission was appointed in September 1951.

As with sensitivity over abortion and birth control, religious considerations figured significantly in opposition to divorce reform, however, on this issue the Catholic and Anglican Churches agreed, as will also be shown with homosexuality. Especially abhorrent to opponents was that the 'guilty' party could have divorced their spouse against their will (Lee, 1974: 26). However, press treatment of the Bill was largely sympathetic.

The Morton Commission Report (1956) has been disparaged as "the most impressive collections of unsupported cliché ever subsidised by the tax payer", and failing to contribute anything to current knowledge (McGregor, 1957: 176). McGregor considered it "a device for obfuscating a socially urgent but politically inconvenient issue" (McGregor, 1957: 193), a purpose, if not always the result, often assigned to commissions. Most unhelpful to reform was the Commission's equal split on the addition of a new 'doctrine of breakdown of marriage' to the existing 'doctrine of matrimonial offence' (Lee, 1974: 28-30).

Despite the shortcomings of the Morton Commission, there were eight separate Acts dealing with divorce between 1957 and 1960 without fundamentally changing the permissible grounds (Lee, 1974: 32). In 1963 Leo Abse introduced a Bill containing the substance of Mrs White's failed legislation. Again reflecting the moral complexities of the issue, Abse pointed out that one third of illegitimacy resulted from cohabiting parents' inability to divorce and re-marry (Lee, 1974: 33). However,

Sir Jocelyn Simon, the President of the Probate, Divorce and Admiralty Division of the High Court, saw permitting divorce by consent as tantamount to society renouncing any interest in the maintenance of stable and enduring marriages (Lee, 1974: 33). The Bill was passed as the Matrimonial Causes Act 1963 only after the divorce by consent clauses had been removed (Lee, 1974: 34).

Although the Church of England opposed divorce reform in 1951 and 1963, in 1964 it established a review of divorce law. Its 1966 report, *Putting Asunder: A divorce Law for Contemporary Society* remarkably advocated the concept of “irretrievable breakdown of marriage” as the sole basis for divorce (McLeod, 2007: 225; Lee, 1974: 43-5). Although reaction within the Church was mixed, it was generally well received by the press and public (Lee, 1974: 57). The next month Lord Balfour, the Vice President of the Divorce Law Reform Union (1909), introduced a ‘Strengthening of Marriage Bill’, allowing divorce after five years separation but withdrew it in June 1967 to enable consensus to be established (Lee, 1974: 35-6). On October 25<sup>th</sup> 1966 Leo Abse also introduced a Matrimonial Causes Bill under the Ten Minute Rule.

The government responded to *Putting Asunder* by requesting that the Law Commission examine it and make recommendations, these were published as *The Field of Choice* (1966) (CAB/129/133). After consultations between the two groups mutually acceptable proposals were established. What is apparent in the Cabinet memorandum by the Lord Chancellor was the need to attain the support of the Archbishops and a desire not to be too closely associated with the measure (CAB/129/133 & CAB/128/42). Instead the Cabinet decided to have Parliamentary Counsel draw up legislation to be proposed by a backbencher with overt government “neutrality”, with government time only being allocated if it garnered sufficient support in its second reading (CAB/129/133 & CAB/128/42).

Mr Wilson proposed this Divorce Reform Bill in December. Opinion polls in early 1968 showed public opinion in the previous decade had significantly shifted in favour of making divorce easier (Lee, 1974: 96-7). The press were also largely supportive; the *Daily Mail* stated that “it is not often a Bill to alter the law so accurately reflects a change in public opinion” (Lee, 1974: 101). However, parliamentary opponents managed to prevent it from passing its final stage through lack of time, with the government unable or unwilling to provide more (Lee, 1974: 106).

Despite parliamentary support, a largely sympathetic press and favourable public opinion, few MPs were willing to introduce a new Bill demonstrating the enduring reluctance to be too closely connected to measures reforming the heteronormative code. Whilst many wanted reform few were willing to take the political risk of being too closely associated to any perceived moral loosening. However, Mr Jones, a new Labour MP, approached Abse and Wilson to use his private members ballot win for divorce reform (Lee, 1974: 114). It was not significantly different from Wilson’s and passed its third reading in June 1969 (Lee, 1974: 131).

The Cabinet had agreed that Jones’ Bill should be provided time for the Commons to reach a conclusion but recognized that this “was likely to be unpopular with the public” (CAB/129/133: 0014; CAB/128/44: 0023). However, positive party political implications seem to have outweighed these concerns: “it would be a valuable demonstration of the influence of back-benchers if Government intervention enabled a measure supported by the majority of the PLP to complete its passage” (CAB/128/44: 0023). The Lord Chancellor’s memo to Cabinet of 13.5.59 (CAB/129/142: 0001) also acknowledged that although the Bill enjoyed “all-party backing, the great majority of those who favour it are Government supporters”.

Thus the law on divorce was fundamentally reformed after a lengthy process of piecemeal change, failed attempts and commissions. It was in keeping with other changing moral and legal liberalization. However, this was an issue long acknowledged to need reform, which required the political will and this rested on explicitly party political calculations by the Cabinet. Reform relied upon a core of committed and hardworking backbenchers but was only possible through Labour government support in providing time, counsel and votes; Conservative members voted against reform. The Church of England's role in discursive developments over this area of sexual morality must also be acknowledged. It removed one of the primary weapons opponents of reform could deploy, largely reflecting homosexual reform.

## 6.4 Conclusions

This chapter shows that this period saw significant reforms on sexual morality issues that shared significant commonalities with homosexual reform. The accepted historical narrative is of a progressive era dismantling the punitive Victorian morality laws. The passing of so many reforms suggests some that there was a particular distinctiveness to the era, linked to wide social transformations notably the social dislocation of WWII.

Most notably, unlike 1885 and the 250,000 people rallying in Hyde Park calling for the protection of girls from male predators, these changes were elite driven, not the products of mass agitation. The discursive explosion was intra and inter-elite. These issues were not stagnant since the nineteenth-century; divorce, prostitution, and theatre regulation were all subjects of commissions before WWII. Abortion and birth control were subjects of active inter-war discourses and legislation and in 1944 were investigated by the Royal Commission on Population. Cabinet records show that governments were cautious of legitimising issues and Royal Commissions in particular were not established lightly.

Successive governments were wary of directly implementing reforms on these issues and successfully delayed legislation on most, the only exceptions were prostitution and obscenity. These were conclusively dealt with in the 1950s, the former had a liberalizing measure under Castle's Bill during the 1950-51 Labour Government before being legislated upon by the Conservatives along more punitive lines. Regarding contraception, Parliament never debated the introduction of the Pill that so revolutionised this area (Holden, 2004: 8).

It should then be understood that if commissions are sometimes rightly considered methods of delaying government action, or private members' Bills (such as White's divorce bill), they are frequently an almost essential part of the reform process. Only after a commission's report can problems largely be freed from arguments that greater knowledge is needed before action. However, it will be seen from the discussion of homosexual reform that even this can continue if the government still seeks to forestall action. Commissions also serve the crucial function of significantly distancing issues from party politics. Cabinet papers on divorce, prostitution and homosexuality show that party political considerations weighed heavily in decisions. Whilst commission reports did not necessarily lead to action they partially removed responsibility from the government. Governments could justifiably claim that legislation followed the advice of an independent inquiry, and further distance themselves from reform by aiding a private member's Bill.

That so many reforms were private members Bills disguises the importance of party politics. These reforms relied upon the actions of cadres of committed reformers but were mostly only effective within a sympathetic environment created by Labour's election. Even then, only after Labour gained a significant majority in 1966 were contentious reforms achieved. Direct government intervention, or facilitation of reform, still only occurred after accounting for popular opinion and party political considerations, but, as divorce shows, party considerations were of primary concern. Religious divides were identified as electoral dangers and the Churches' influence ran throughout this chapter. These issues are examined regarding homosexual reform in the next chapters examining religious influence and put the (party) politics back into the historical accounting of homosexual deregulation.

A consistent theme in reform discourses discussed here was the law's repute. In the theatre the law was being circumvented by theatre clubs, divorce by collusion between couples, abortion regulated through vague common law precedent, and

prostitution prosecutions obtained by the ‘legal fiction’ of officers testifying to annoyance caused. Thus reforms were designed to uphold the law and prevent it being flouted but also to bring it into line with actual behaviour, indicating that behaviour itself had changed, or at least that people were less willing to accept the hypocrisies they entailed. This reflects similar imperatives to homosexual reform outlined in Chapter 1 and examined in the next chapters.

Weeks criticises the delays to homosexual reform after Wolfenden reported as initially being the result of a “crushing unwillingness on the part of the [Conservative] government to act” (1977: 168) despite their substantial majority. He blames this on most of their MPs being “backwoodsmen interested in nothing more than the moral *status quo*” (1977:168). Thereby Weeks condemns the Conservatives for “complacency and hypocrisy” in failing to enact ‘inevitable’ legislation to which they fundamentally ideologically and morally objected (1977:168). The Conservative majority of 60 in 1958 would never have been able to reform these issues. This chapter shows that no reform was a quick fix, only prostitution took less than a decade from its re-emergence to resolution and this was the only issue that actually tightened up legislation rather than liberalized it.

These changes radically changed the punitive heteronormative legal structures of previous eras. The 1960s was a time of significant sexual liberation from the law. Homosexual sex, divorce, explicit material and abortion were all legalized to some extent; however it would take significant time until their accompanying social stigmas would reduce to achieve public acceptance. During the Conservative period after 1979, issues of ‘family values’ and the damage done to traditional morality by the permissive 1960s were a significant political discourse utilized to attack the Labour party it held responsible for them. Homosexual regulation was not alone in being discursively re-invented; therefore the genealogical analysis of deregulation

must incorporate understandings of heterosexual deregulation. It is in this light that homosexual decriminalisation process will be analysed in the next chapters.

## **Chapter Seven**

### **Religion and the Law**



## 7.1 Introduction

Within the discourses for and against reform, the legal and religious debates are components ascribed very different significances in the historical accounting of decriminalisation. Understanding the role these discourses played in changing parliament's moral stance is crucial to understanding why the SOA (1967) was passed.

Higgins regards the 'often' claimed influence of the Church on the Wolfenden Committee to be "pure propaganda" (1996: 35). However, even if one accepts this limited role, it must be distinguished from their influence on parliamentarians during decriminalisation and how reformers were able to utilise religious opinion. The philosophical legal debate between Professor Hart and Lord Devlin after Wolfenden remains highly influential in discussions on the law's moral role but, in fact, it did not figure prominently in decriminalisation debates.<sup>29</sup> This chapter examines official records showing that the religious discourse was very influential in decriminalization. Opponents frequently voiced objections in religious terms while reformers regularly stressed that advocating decriminalisation didn't mean they considered homosexual acts any less sinful. In this they were supported by the views of all Churches except the Scottish Presbyterian (Commons, 11.02.66, vol.724 col.859).

Part two showed how statutory law became the "primary means through which the state attempted to regulate 'morality' and people's supposedly private lives" (Cook, 2006: 65). Moreover, it is claimed that the 'homosexual' "was not simply regulated by the legal system but was also produced by it" (Cook, 2006: 65). However,

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<sup>29</sup> A BBC website even states that Hart and Devlin were on the committee (BBC, 2004)

despite claims that “the history of modern Western sexuality has... tended overwhelmingly to be the history of secularization” (Cocks & Houlbrook, 2006: 14), the previous chapter demonstrated the churches’ continued influence on debates on sexual and social regulation. This chapter examines how church doctrine similarly shaped homosexual reform. This extends the genealogical context of homosexual deregulation to include more surfaces of emergence of new discursive formations about (homo)sexuality; exploring two traditional discourses on regulating morality; religion, characterised as fading in significance, and the law, seen as being pre-eminent. Analysis of all relevant parliamentary debates and government records shows that the way in which the law and religion are represented in the literature cannot be sustained.

Although the Hart/Devlin debate was prompted by Wolfenden’s Report the churches’ involvement in homosexual regulation preceded and influenced both. Thus although the Wolfenden Committee contributed to discursive freedoms it was prompted and produced by pre-dating freedoms. I illustrate how parliamentarians were influenced by the changing relationship between sin and crime articulated by the Churches, but less so by legal debates. Of far more significance was Adair’s minority report dissenting from the Wolfenden Report. However, shifting morality was crucial to decriminalisation rather than shifting legal interpretations.

## 7.2 Sin or Crime? The Religious Discourse

The discursive demarcation between sin and crime was fiercely contested in decriminalisation debates. In 1957 Lord Pakenham acknowledged that Wolfenden's most controversial conclusions were on the distinction between sin and crime and that homosexuality shouldn't remain "an exception to... non-interference with isolated immorality". In the first post-Wolfenden Commons debate Sir Hugh Linstead reiterated that homosexuality should be considered a "moral and not a legal question" (Commons, 26.11.58, vol.596col.414). The first point of the Home Secretary's draft speech (14.11.58, HO/291/123) was the difference between sin and crime, the committee having looked into the latter the government must also consider the moral offense and injury to the public".

These distinctions were vigorously contested throughout debates, with Lord Kilmuir<sup>30</sup> alleging that decriminalisation was "one of the most serious blows at our moral standards that has taken place this century" (Lords, 16.06.66, vol.275cols.155-166). The importance of this issue was recognised in 1960 by the Home Secretary, Butler, when he concluded the debate calling for early action on Wolfenden's recommendations: "We need more time to discuss the very fundamental issues which arise in this matter of the relationship between law and morals and more time to weigh the possible... consequences of modifying that relationship" (HC Deb 29.06.1960 vol.625 col.1498). However, Dr Owen agreed with Wolfenden that whilst not condoning it "there must remain a realm of private morality and immorality which is... not the law's business" (Commons, 19.12.66, vol.738col.1011). That reform did not mean considering homosexuality any less sinful was so regularly expressed that in one of the final debates Mr Iremonger, an

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<sup>30</sup> The ennobled Maxwell Fyfe.

opponent, welcomed the absence of reformers “humbug” in pointing out homosexuality’s sinfulness (Commons, 19.12.66, vol.738col.1099).

This section explores the central consistent presence of religion in parliamentary debates on decriminalisation’s moral and legal implications. This analysis of the churches’ influence is essentially examining the discursive intervention and interpretation of one elite’s position by another. Although opponents made claims about congregational dissent, Church leaders made no claims of representing their parishioners’ views. Rather they sought to lead religious and moral opinion in the country and Parliament on this moral/sexual issue, as Chapter 6 showed they had on similar issues. By the culmination of the decriminalisation process “the only Church which has not given its support is the Scottish Presbyterian Church” (Mr Allen, Commons, 11.02.66, vol.724 col.859).

This thesis focuses on the *state’s* concern over (homo)sexual activities and construction of punitive heteronormativities. Whilst transferring sanctions from Church to state removed the Church’s legal authority its cultural authority remained. The state has always been directly guided by Christian doctrine and indirectly influenced through MPs Christian beliefs. Thus Church doctrine, actions and interaction with the legislative process are important in investigating post-war sexual and social morality. It might be assumed that the Churches’ relevance and influence declined in the post-war period as part of a linear decline in religiosity. However, the churches, population and Parliamentarians still unabashedly considered Britain a Christian nation. Despite a significant congregational decline during WWII they were resurgent afterwards.<sup>31</sup> Furthermore, many MPs debating social reforms were active Christians or clergy who frequently referenced Christian doctrine and Church

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<sup>31</sup> Those receiving Easter communion rose by 25% between 1947 and 1956 and confirmations reached their pre-war levels, however congregations declined from 1960 falling to their war time levels in 1968 (McLeod, 2007: 38-40).

positions. Additionally the advocated homosexual reform did not mean the Church was relinquishing its role as a moral compass. On the contrary, it was claiming these issues were their concern not the state's, as Mr Deedes summarised their position; "They have said... that this should cease to be the responsibility of the legislators and should become their responsibility as upholders of the Christian doctrine" (Commons, 29.06.60, vol.625col.1464).

In 1952 the Church of England's Moral Welfare Council took a pioneering position in establishing a committee to examine homosexuality's legal position. In 1954 it became the first major body to recommend legalising private homosexual relations, for those over 17. However, a *Times* article (25.11.1953) reported that the Archbishop of Canterbury sought to dispel any confusion on the Church's stance; "homosexual indulgence is a shameful vice and a grievous sin from which deliverance is to be sought by every means". The Church's changed position was one of concern for public morality and sin but distinguishing this from crime. Thus it was seeking more influence on this matter which it considered its province not the state's.

Mr Donnelly cited this report to legitimise his calling for an enquiry, pointing to its conclusions on this "unusual" legal interference into "what is essentially a moral issue" and juxtaposing this to legal toleration of 'sinful' heterosexual fornication. This was the first use of Church opinion in debates and presaged their influence in debates on the law's role in regulating morality (Commons, 28.04.54, vol.526cols.1754-56).

The Bishop of St. Albans, the Moral Welfare Council Chairman, later welcomed Wolfenden's recommendations on homosexuality, noting that they followed those of his Committee (Lords, 04.12.57, vol.206col.7770). The Archbishop of Canterbury concentrated on the hypocritical treatment of heterosexual sins over homosexual

ones. Arguing that decriminalisation would allow some who have fallen into “vice” to escape it without taint or pressure to resume from “former companions”. He was the first to advocate retaining the prohibition on sodomy, which would “relieve the anxieties, fears and indignation of a great number of people”. He believed this offence was “in a class by itself” and reform would “only revert to what was the law up to 1885”, re-affirming the common misconception that such reform would only re-establish lost rights.

Thus early in this nascent discourse the Church framed decriminalisation by shifting the moral boundaries, opening up what homosexual acts were morally and legally comparable to. Only three years earlier Bishop Southwell had remarked “there can hardly be any subject about which a man would more readily be excused from speaking at all... [than] this extremely distasteful and horrible subject” (Lords, 19.05.54, vol.187col.751). Bishops were now unashamedly speaking on it advocating reform.

The alleged divide between the Church elite and their congregations was used to consistently attack Church prelates. As early as 1954 Earl Winterton expressed “astonishment” at the Church’s attitude on disparities between legal treatments of homosexual and heterosexual sins, arguing that whilst “Fornication and adultery are evils... I completely contest the view that they are more evil and more harmful to the individual and the community than the filthy, disgusting, unnatural vice of homosexuality” (Lords, 19.05.54, vol.187col.739).

Whilst acknowledging the Church’s pioneering position it is easy to overlook divides within it. Bishop Rochester disagreed with Church policy alleging that “half the people in the Church” opposed reform (Lords, 04.12.57, vol.206col.738). As late as 1965 Lord Brocket expressed sorrow “that things of this kind are brought up in this

House by the Leader of my Church” (Lords, 16.07.65, vol.268col.411). He denied they represented their congregation’s opinion and pointed out that the Church Assembly’s vote endorsing the Wolfenden report was only passed by a small majority with most not voting. They had also considered “the recommendations relating to prostitution require further study” (Lords, 04.12.57, vol.206 col.734). In the final decriminalisation debate Lord Ferrier was still curious why all Bishops had voted for this “queer's charter” despite the Church being “split right up the middle” (Lords, 13.07.67, vol.284cols.1300-1).

Bishop Rochester, and others, claimed that “among the rank-and-file... a considerable majority [were] against the proposal” (Commons, 26.11.1958, vol.596col.462) and it would be surprising if congregations favoured decriminalisation more than the general public. It is far likelier that, as with the political elite, the religious elite was in advance of general opinion. Similarly in 1956 almost all Anglican Bishops had supported a failed capital punishment reform Bill and only one Bishop dissented in the early 1960s (McLeod, 2007: 222) despite public opinion favouring retaining capital punishment (CAB/195/6, 8.11.58). Interestingly this Bill followed the 1949 Royal Commission on capital punishment, established after a departmental committee investigation was ruled out “because it would not carry sufficient authority” (CAB/129/30:0022) a concern unapparent in the Wolfenden Departmental Committee’s establishment.

Those opposing reform frequently used the contrary opinion of the Church of Scotland to provide a moral counterweight to the Anglican position, despite reform not applying in Scotland. In 1965 Lord Balerno was still referencing their General Assembly’s approval of Adair’s argument that “the moral force of the law will be weakened” by reform. Lord Ferrier, a member of their Church and Nation Committee, explained that although a sub-committee had favoured Wolfenden’s

recommendations the main Committee and the Assembly “overwhelmingly” rejected this (Lords, 12.05.65, vol.266cols.146-7).

By 1966 religious opinion had been so well discussed that it was frequently referred to by reformers without detailed comment. This did not mean the Churches’ importance had lessened, but like other extensively debated issues they were summarised by speakers before moving onto more contested grounds. Leo Abse particularly prefaced his speeches with church opinions, and in 1966 introduced his Bill by asking that Parliament heed their call (Commons, 05.07.66, vol.731col.261).

The Anglican reformist policies undoubtedly influenced many waverers by undermining opponents’ claims to the moral high ground, thereby allowing reformers to claim it for themselves; taking on the mantle of Christian concern for ‘victims’ of these moral problems. This will clearly be shown later in reformers’ attempts to discursively shift homosexuals from being the cause of social and moral problems to a minority victimised by society. The Church of England was not alone in its reformism; the Roman Catholic Advisory Committee on Prostitution and Homosexual Offences produced a report arguing that; “penal sanctions are not justified for the purpose of attempting to restrain sins against sexual morality committed in private by responsible adults” (Commons, 26.11.1958, vol.596col.389). Norman St John-Stevas, a devout Catholic prominent reformer, declared in 1966:

“We are a Christian country and, therefore, it is right to pay attention to the almost unanimous view of the leaders of the churches... The evidence of the leaders of Christian opinion in this country should... be persuasive, particularly to those who have moral doubts about this matter” (Commons, 19.12.1966: vol.738col.1121).

This section has shown that religion, and the Church of England specifically, retained an influential role in homosexual reform debates which crucially bestowed reformers a moral legitimacy. The direct contributions of Lords Spiritual to Parliamentary debates were extensive and reformers, notably Abse who was Jewish, made great play of the Church's position.

Since this period the Churches' moral authority and centrality to discourses on socio-moral issues has declined. However, although arguably the Churches' role in decriminalisation contributed to this, their intent was the opposite. The Church of England intended its actions to reclaim pre-eminence as the country's moral authority, through helping the state to significantly relinquish its role as the primary moral arbiter exercised through the law. Thus what shifted was the moral compass of the Church not their perception of their role. Higgins' claim about the influence of the Church on the Wolfenden Committee to be "pure propaganda" cannot be sustained regarding the parliamentary discourse (1996: 35).



### 7.3 Legislating Morality

The previous section showed how the Churches argued that sexual morality was the proper province of the individual guided by religious leaders, not the law. This section explores how legal authorities addressed the law's moral enforcement after Wolfenden's Report and their influence on parliamentary decriminalisation debates. The 1950's use of laws against homosexual acts is/was alleged to have brought the law into disrepute. This had three facets: that these laws were commonly flouted, that they raised questions of how far the law should legitimately restrict private conduct, and that they no longer reflected public opinion (Milligan 1993: 97; West, 1977: 283; Thorp, 1998: 9; Aldrich, 2001: 454; Coppa, 1999: 89).

That the law required examination did not presume any outcome, for some, such as Maxwell-Fyffe, the law needed to be "more rigorously and evenly applied" (Weeks, 1977: 164), for others it needed wholesale reform and for Churchill the solution was increased censoring of prosecutions. Such differences largely relied on competing conceptions of the law's role. The direction of change often retrospectively assumes an inevitability (Weeks, 1996: 166-168) but regarding reform this way relegates discourses surrounding decriminalisation to irrelevancy, they were not. They manifested changing socio-moral attitudes that were more general than specific to homosexual reform.

The legal debate in the late 1950s between Lord Devlin and Professor Hart developed upon the nineteenth-century dispute between Mill and Fitzjames Stephen. However, Denning had earlier responded to Wolfenden's Report by stating "emphatically that standards and morals are the concern of the law... whether done in private or in public". Denning further contended that "without religion there can be no morality and without morality there can be no law" (Devlin, 1957: 13). Denning addressed the law's role in moral enforcement in the Lords' Wolfenden debate,

identifying other private acts the law regulated; bestiality, incest, sex with a 'defective', sadism, sterilisation, abortion and suicide. Denning considered these all distinct from 'natural' sins, such as fornication or adultery, because they "strike at the continuance and integrity of the human race" (Lords, 04.12.57, vol.206cols.806-10).

Denning dismissed the Marquess of Lothian's claim that the law was inconsistent in its leaving lesbianism unmolested as it was "not so widespread or so harmful as offences between males" (Lords, 04.12.57, vol.206col.808). Thus lesbianism was privileged because it was less harmful not less sinful. This argument that a problem must be sufficiently harmful and widespread for the law to restrict the right to indulge in consensual discreet sexual activities continued to the final debate. The Marquess of Salisbury stated that sins should only be crimes when the community considers that they were becoming "a danger... to the moral fabric of the community as a whole" as with homosexuality (Lords, 13.07.67, vol.284col.1292).

Thus the contradictions in regulating male homosexuality were justified by its purported exceptional social harm. This relied upon a moral not legal judgement, that male homosexuality and the acts it involved were fundamentally more objectionable than lesbianism and lesbian sex in this it was supported by centuries of religious and legal precedent. It also influenced a significant discursive theme with opponents seemingly more concerned with the law as a warning than actual punishment.

Denning favoured only allowing the AG or DPP to initiate prosecutions of persons over 21 so that while the law should "condemn it for the evil it is... judges should be discreet in their punishment of it" (Lords, 04.12.57, vol.206col.811). This option was recognised by the Wolfenden Committee's secretary in a Home Office memo (26.9.57, HO/291/123). However, he 'hesitated' to recommend it because chief Constables would be obligated to report cases over which they presently "exercise a certain amount of discretion".

Despite Denning's contributions, Devlin is most identified as articulating the case against Wolfenden's legal philosophy through his 1959 Maccabean lecture (Jeffrey-Poulter, 1991: 70). Devlin's thesis was that an established morality was "as necessary as good government to the welfare of society" (1957: 13). These moral judgements were a "morality of common sense", and thus immorality was what "every right-minded person is presumed to consider to be immoral" (Devlin, 1957: 78). Devlin denied that a private morality could exist as there were always public concerns about private conduct. Whilst he acknowledged that many laws balanced individual and societal rights and freedoms, individual freedoms only extended to the point they threatened societal integrity. Thus Devlin allowed that judgements must be made on whether the damage to society was sufficient to warrant statutory restriction. The disgust felt towards homosexuality was evidence for Devlin that the limit of toleration was threatened and this was sufficient to maintain prohibition. For Devlin moral standards did not shift as they derived from "divine revelation", again demonstrating the religious discourses centrality. Despite acknowledging that toleration of "departures from moral standards" varied between generations he warned that laws must not change hastily in reaction lest they be in perpetual motion (Devlin, 1957: 78). Thus he opposed reform on both moral and practical grounds.

Hart rejected Devlin's thesis as rationalising unwarranted intrusions on individual liberty, denying that society was feeble enough to be threatened by legal relaxations on moral issues and based his attack on Mill's 'harm principle'. For Hart, Devlin did not distinguish between morality and society, so changing morality became "tantamount to the destruction of a society" (Hart, 2002: 51). Hart dismissed such interpretations claiming that neither Devlin nor any reputable historian had ever proffered any evidence that deviations from accepted sexual morality caused the downfall of civilisations (Hart, 2002: 50). In rejecting that shifting morality was tantamount to changing from one society to another Hart argued moral changes could contribute to societies' advance.

My analysis of parliamentary debates shows this comparative socio-historical debate was frequently alluded to in foreign examples and historical precedents. However, the legal philosophies of Hart and Devlin played no explicit significant part in these developing discourses. Although a crude measure of content cannot quantify influence, my analysis showed that Devlin's argument was only referenced in two debates.<sup>32</sup> This concerned whether two men "living in sin" would constitute a "conspiracy to corrupt public morals". In response Baroness Wootton briefly outlined Hart's contrary position, which was only the second time he was mentioned (Lords, 23.05.66, vol.274cols.1190-208). Only in 1965 did Lord Rusholme extensively outline the legal debate, from Mills to Devlin, Rusholme maintained that morality was as much about understanding and compassion as condemnation and the law should reflect this (Lords, 12.05.65, vol.266cols.106-11). This highlights the shift in the moral debate on homosexuality from forbidden sex acts to Christian tolerance and compassion.

Devlin was not unique in alleging homosexuality contributed to the downfall of empires<sup>33</sup> despite Wolfenden finding that "we cannot find it right to frame... [laws] by reference to hypothetical explanations of the history of other peoples in ages distant in time" (Jeffery-Poulter, 1991: 29). In the Commons Black claimed that "Great nations have fallen... because corruption became widespread and socially acceptable" (Commons, 26.11.58, vol.596col.465). Mr Dance not only claimed that the oft cited downfall of the Roman Empire resulted from homosexual decadence but that "the condoning of these offences... led to the fall of Nazi Germany" (Commons, 26.11.58, vol.596col.437). In 1965 Lord Arran sought to pre-empt negative historical precedents by stating that "As a classicist, I hope that no one will tell us to-

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<sup>32</sup> However, Devlin later signed a letter to *The Times* on April 21<sup>st</sup> 1965 stating that the time for reform was overdue and hoped that the government would recognise this and "introduce the necessary legislation with the minimum of delay". This volte face was referred to three times in Parliament.

<sup>33</sup> Reformers countered these apocalyptic warnings using examples of foreign toleration

day that Athens fell because of sex perversion. It is not true” (Lords, 12.05.65, vol.266col.75).<sup>34</sup> Lord Huntingdon asserted that homosexuality wasn’t a sign of increasing decadence but had been accepted in many admirable cultures of the past (Lords, 24.05.65, vol.266cols.141-3). This debate was dominated by the new issue of homosexuality in the military, Arran asked if most NATO countries’ decriminalisation of homosexual acts had damaged discipline (Lords, 24.05.65, vol.266col.634). Lord Alamein responded that “we are not other nationals. We are British, thank God!” (Lords, 24.05.65, vol.266col.648). Lord Saltoun also later argued that the Roman Empire had fallen because it was no longer “interested in the production of Romans” (Lords, 10.05.66, vol.274col.625). In this he echoed nineteenth-century anti-Malthusian rhetoric on birth control and Denning’s argument that homosexuality struck “at the integrity of the human race” (Lords, 04.12.57, vol.206col.807).

Classical examples were not the primary source of comparison; modern alternative systems provided a richer thread within debates informed by lay comparative legal/sociological analysis. In the 1954 debate calling for an enquiry Boothby claimed that homosexuality was less prevalent in France where laws were laxer, suggesting heavier penalties increased the “sensationalism and exhibitionism by which it is so often characterised” (Commons, 28.04.54, vol.526col.1750). Responding for the government, Sir Hugh Lucas-Tooth, also noted that “such activities are no crime in many countries of the world”. In the debate on homosexual crime after the Wolfenden Committee’s announcement Earl Winterton pre-empted arguments that homosexuality was legal elsewhere: “this argument is valid only if the absence of the law in countries with a moral outlook similar to ours has reduced the number of adult homosexual offences against juveniles” (Lords, 19.05.54,

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<sup>34</sup> Sir Charles Cunningham, advised that the Home Office spokesman’s speech in the first Parliamentary discussion of the Wolfenden Report should be “sprinkled with allusion to Athens and Sparta” (3.10.57, HO/291/123).

vol.187col.740). Thus Winterton undermined international comparisons by placing doubt upon other countries' moral equivalency and linking homosexuality with paedophilia.

Winterton further declared that whilst some countries regarded homosexuality as harmless their moral climate and international prestige weren't equivalent to Britain's. He believed that "few things lower the prestige, weaken the moral fibre and injure the physique of a nation more than tolerated and widespread homosexuality" (Lords, 19.05.54, vol.187col.741). Bishop Southwell concurred that increasing "unnatural offences" was an "ominous warning" of radical problems in the social order that historically signified "a demoralised or decadent culture (Lords, 19.05.54, vol.187col.751). Lord Chorley countered this claimed linkage between state prestige and homosexual toleration by arguing that Britain had "a reputation for being completely hypocritical" which would be improved by dealing with it in a "more civilised and sympathetic manner" similar to Scandinavia and Northern Europe (Lords, 19.05.54, vol.187col.765-766). Earl Jowitt also hoped that Wolfenden would study foreign examples, particularly France where it was legal "between adults in private" but also "Scandinavian countries, where this problem is by no means so prevalent as it is here" (Lords, 19.05.54, vol.187col.745-746). Thus the comparative approach to homosexuality was introduced to the discourse early, and connected to Britain's world standing.

International comparisons were not limited to Parliament; after the Wolfenden Committee was announced the *Sunday Express* claimed that homosexuality "does not flourish in lands where men work hard and brows sweat with honest labour. It's a wicked mischief, destructive not only of men but of nations" (Wildeblood, 1955: 129). In refuting this claim Wildeblood asked "What about the Scandinavian countries, Belgium, Holland, Switzerland, and Germany, in none of which it is considered necessary to carry out periodic witch-hunts against homosexual

scapegoats?” (1955: 129). That the situation in other countries, especially Germany, was contrary to Wildeblood’s understanding demonstrates that facts weren’t allowed to interfere with rhetoric on moral or legal superiority.

The Wolfenden Report’s third appendix indeed provided a survey summarising the legal position of homosexuality in eleven European countries (Wolfenden, 1957). Only Austria, Norway and West Germany punished consensual sex between all males. Additionally only Greece didn’t have public decency laws applying to homosexual activities; however, the punishments varied widely between three months’ imprisonment to four years. Interestingly, only Italy and Norway distinguished buggery from other acts. Italy punished acts enabled by an abuse of authority by five years’ imprisonment, doubled if violence was involved. However, if buggery hadn’t occurred then the maximum punishment was one third lower. Abuse of authority was punished in all the democratic countries, either as a separate offence or an aggravating factor.

Wolfenden’s appendix on foreign regulations was never cited in Parliament, despite persistent claims regarding foreign practices. In the first Wolfenden debate Lord Pakenham asserted that bringing the law into conformity with most of Europe, apart from Germany and Austria, did not mean condoning homosexuality, rather “we condemn it as utterly wrongful”. Lord Moynihan agreed, citing the lack of moral decline in other countries enacting similar changes as evidence that no increase in homosexuality would result (Lords, 04.12.57, vol.206cols.746-7). By 1960 Jenkins was maintaining that a “move in a more civilised direction” in accordance to the “general current of civilised world opinion” was essential. This debate included frequent references to other countries and Jenkins pointed out that the inherent problems had not been “insuperable” in them (Commons, 29.06.60, vol.625col.1510).

Opponents, such as Sir Cyril Black, continued to claim that reform would harm Britain's "standing as a nation" (Commons, 11.02.66, vol.724col.780). In 1967 Abse pointed out that Sweden rarely prosecuted cases involving those between 18 and 21 unless involving a power relationship. This prompted Sir Spencer Summers to warn of a slippery slope he wanted to avoid by setting the age of consent at 25. In this debate Rees-Davies displayed a colonial (and party political) attitude in questioning what "Indians, Ghanaians and Jamaicans—people who thought that all law and order came from this country—will think of the Home Secretary if the Bill passed" (Commons, 3.7.67 vol.749col.1440). However, Earl Dundee later pointed out that of countries with a "Christian civilisation" only Germany still outlawed it (Lords, 13.07.67, vol.284col.1288).

The most enduring linkages between the legal and Parliamentary debates were references to foreign and classical comparisons. Opponents highlighted the supposed disastrous effects of homosexuality on civilisations and alleged Britain's standing would suffer through decriminalisation. Supporters ridiculed these classical interpretations but showed that homosexual regulation was not always thus. Modern examples were used to demonstrate that similar countries had looser regulations without dire consequences. Importantly these modern comparisons were in terms of morality and adherence to Christian values not of legal ethics or doctrines. Practical concerns over the administration of decriminalised homo-sex were addressed through comparisons but more importantly that there was no attendant moral decline. Thus an outward gaze accompanied the introspection prompted by perceived increases in homosexual activities. Opponents looked backwards and outwards for examples of decadence and toleration, using them to their own ends to shape the evolving discourses.

However, by far the most common example of a less punitive 'foreign' legal practice whilst maintaining the moral order was Scotland. Boothby was foremost in praising

Scotland's lower rate of prosecutions for private adult offences. This resulted from the Procurator-Fiscal's necessary determination that prosecutions were "in the public interest", that offences over six months old were referred to the Crown Office and that a higher burden of proof was required. Boothby contrasted this to the 'chaotic' situation English administered locally by Chief Constables (Lords, 24.05.65, vol.266col.668 & 16.06.66, vol.275col.1469). This starkly demonstrates that, even for a stalwart reformer, the issue was not simply decriminalisation but managing the problem. Many opponents also favoured the pragmatic solution exemplified by Scotland. However, under English law the Scottish model was unsustainable and so partial decriminalisation was the only viable alternative, however distasteful and regrettable it was to many parliamentarians.



#### 7.4 Adair's Minority Report

Despite its centrality to debates on the ethics of the law (Cane, 2006), Devlin and Hart's legal discourse only marginally influenced parliamentary decriminalisation debates. However, Devlin's position reflected Adair's minority report dissenting to the Wolfenden's recommendations. Adair, not Devlin, most influenced parliamentary debates. Adair's report showed the evidence presented to Wolfenden was insufficient to ensure unanimity and thereby legitimised opposition.

Winterton argued that Adair's arguments were "overwhelming" and Lord Mathers was equally convinced by the "most wholesome reading in the whole of the Report" (Lords, 04.12.57, vol.206col.823). Lord Rowallan also believed that Adair was "much nearer to the truth than the Wolfenden Committee" (Lords, 12.05.65, vol.266col.131). In the Commons Mrs Mann and Mr Dance were influenced by Adair's concerns that decriminalisation would allow men to "set up as lovebirds anywhere", thereby corrupting public morals through their private activities (Commons, 26.11.58, vol.596col.455). For the government, Mr Renton wondered if public opinion might have been swayed had Wolfenden agreed with Adair that sodomy should remain illegal. This option was recommended by the Wolfenden Committee Secretary to "satisfy" reformers "without unduly upsetting those who disagree with the recommendation as a whole". Remarkably, whilst preferring this option, he acknowledged that it is "admittedly quite illogical; but logic has never been one of the most conspicuous features of English criminal law... many (if not most) people have an instinctive... abhorrence of buggery" (26.9.57, HO/291/123). The DPP's views were sought and he was "against any compromise directed to retaining buggery as an offence when committed between consenting adults in private but providing that homosexual activities of other kinds in these circumstances should not be punishable" (14.11.57, HO/291/123).

The next chapters demonstrate that for a wide range of issues within decriminalisation debates Adair was a significant tool for questioning the legitimacy of separating legality and morality according to Wolfenden's recommendations. Adair was a more practical and appealing source than Hart/Devlin's discourse as he provided direct rebuttal of the Wolfenden recommendations on specific debating points.

## 7.5 Conclusions

It is appealing to see homosexual decriminalisation as the triumph of modernity and legal rationality over religious bigotry and intolerance. However the reverse is more accurate; Church opinion favoured reform more than the judicial establishment (represented by Devlin and Denning) and provided an alternative morality crucial to reformers creation of a new homosexual victimised by the law. The Church wanted primacy over this moral question rather than the law. This severely weakened opponents' moral claims founded upon Christian condemnation of homosexuality.

The discursive battle over the law's role in moral enforcement shifted between Wolfenden's report (1957) and decriminalisation (1967). Philosophical legal debates in Parliament were limited and less informed by legal sources than Wolfenden and Adair. Although some parliamentarians professed they were converted by these arguments most utilised them to justify their political and moral positions. After 1962 such philosophical arguments became largely redundant as the discursive ground shifted with the increasing inevitability of reform. Opponents argued more in favour of the message sent by the law's existence than for its application. By advocating relegating the law to a paper tiger opponents undercut arguments for the law's moral enforcement role.

The debate on the law's role was a continuation of a century old debate. Wolfenden's recommendation of a private realm for permissible homosexual acts was informed by and became integral to this discourse. This chapter shows that Wolfenden re-energised debates on the law's proper role and represented a significant rise in the influence of those considering it wasn't the law's role to legislate morality. However, the opposition of senior judges such as Devlin and Denning represented the opinions of many who still believed what was immoral

should also be illegal. In the end the argument was won by those who considered private sexuality was unjustly impinged upon by homosexual regulation.

Pivotal in the discursive shift was the Church's changing attitude legitimising empathy for homosexuals' plight. This severely weakened the central opposition plank; that homosexuality was an intolerable sin. The Church pre-emption and support for Wolfenden signalled a shift in the moral discourse, from religious concepts of sin combined uneasily with medical and psychological justifications for interference in 'deviant sexualities' towards one of personal freedoms based on concepts of toleration. This is reflected in Chapter 8's discussion of the re-positioning of the homosexual as a victimised minority. Simultaneously sexual transgressions were becoming seen less as social problems requiring action than as individual failings. Like heterosexual sins, it was increasingly believed that homosexual failings should be understood rather than compounded by legal intolerance. Thus society's morality should be judged by its compassion rather than its sexual orthodoxy. By decriminalisation Baroness Gaitskell was proclaiming it would be a progressive step in rectifying the law's savage treatment and do away with self-deceiving notions of "normal" and "unnatural", especially as society's laws ignored so many private indiscretions between heterosexuals, a point that would have been met very differently ten years previously (Lords, 13 .07.67, vol.284col.1306).

Whilst 1950s Conservative governments supported legal controls justified by social harm and moral repugnance, the twin discursive pillars of religion and law supporting them were being dismantled. An alternative religious discourse was now pre-eminent and thus the legal discourse, which fundamentally relied upon the upholding of Christian ethics, was destabilised. The rationales for homosexual regulation were collapsing and, the space replacing them was unstable and able to be shaped by opponents who contributed to and took advantage of this situation.

This theme of elite discursive transformations creating instabilities continues in the next chapters. These show how other discourses were challenged by new sources of knowledge, especially the emerging sociological discourse, and how the historical accounting of homosexual regulation remained unchallenged. Chapter nine also shows that practical legal concerns were far more influential than the marginal role of the philosophical legal discourse outlined here. Devlin's contribution could not counter the impact of Wolfenden's conception of the law's moral function and the resulting changed demarcation between what was 'sayable' and 'unsayable'.

Likewise the moral debate centred on the Churches' transformed opinions.

Wolfenden and the Churches' positions fitted in with the changing ideological, moral and political atmosphere, reflecting wider concerns of civil rights and protection from the state's unreasonable or intrusive interference. Thus the ground upon which decriminalisation would be fought had shifted.



## **Chapter Eight**

### **Discursive Themes of Parliamentary Homosexual Decriminalisation**



## 8.1 Introduction

The homophile narrative of homosexual regulation centres on a select few critical events; the Labouchère Amendment, the Wolfenden Enquiry and the Sexual Offences Act (1967). The apparently causal links between the three have subsequently been rather uncritically accepted. This chapter problematises the discursive links between Wolfenden and decriminalisation; demonstrating that the accepted relationship is overly accepting of Wolfenden's centrality. It is also important to examine the influence of politicians' understanding of Labouchère's Amendment's role in homosexual regulation in the decriminalisation process. This sets out Parliament's understanding of the current law, its origins and why they became willing to change it. These understandings were based upon early elements of the academic homophile discourse that Chapter 4 deconstructed and subsequently reinforced those understandings through their deployment in parliament.

I further analyse the relevant parliamentary debates and government records, from the 1940s to 1967, exploring the shifting and adapting themes tactically used by those attempting to advance or stymie reform. The concentration on these sources is because it was in these forums that decisions about decriminalisation were made, yet they have not been the focus of analysis. These debates were conducted by elites, drawing on other elites' arguments, but not dictated or overly constrained by them. Wolfenden contributed to parliamentary discursive freedoms but was a product of pre-dating freedoms. Themes pre-dating Wolfenden are examined here showing how they endured as major debating elements throughout decriminalisation. I trace the changing arguments on homosexuality in relation to emergent knowledge and truth production they contributed to. I examine how these themes interacted and competed but through repeated debate they were synthesised into wider and far more complex arguments addressing the 'problem of homosexuality' within which reformers showed that homosexuals were a mass of people too large to be ignored, treated or

imprisoned. This resulted in the creation of a relatively cohesive discourse with clearly understood limits and points of contestation. I illustrate how themes such as the history of homosexual regulation and Labouchère's Amendment were almost universally accepted. However, as Chapter 7 showed, most other issues were vigorously contested but this constituted an acceptance of their legitimacy as the discursively contested ground.

The first part of this chapter examines the practical legal arguments concerning reform, as opposed to the philosophical legal debate detailed in Chapter 7. In looking at prominent cases I examine how parliamentarians argued that the law was brought into disrepute by its intervention in private consensual homosexual conduct, which is identified as a major influence in decriminalisation (West, 1977: 156). I then examine the argument that the Labouchère Amendment's reputation as a blackmailers' charter (Weeks, 1977: 22) played a significant role in the political discourse. The political discussion of the extent of homosexuality and prosecutions for such sexual conduct is then analysed showing how homosexuals were increasingly portrayed as a minority. The chapter then examines how the dominant discourses within debates on homosexual deregulation changed and adapted through this political process. The medical discourse's utilisation will be analysed before exploring newly prominent sources of knowledge, such as sociological and historical sources.

## 8.2 The Law in Practice

### 8.2.1 Prominent cases and the law

The evidence most often cited for supposed changes in public opinion towards homosexuality prompting the Wolfenden Committee's establishment are instances of public support for convicted homosexuals. The two most prominent examples are the applause Montagu and Wildeblood received after their 1954 convictions and the standing ovation for Sir John Gielgud's stage return after being convicted of "persistently importuning for immoral purposes"<sup>35</sup> (Weeks, 1977:160 & 164, Jeffery-Poulter, 1991: 14). This section questions this supposed support and shows that the class concerns so evident in the 1800s still persisted, but these were increasingly augmented by security concerns, however the theme of homosexuals' vulnerability to blackmail remained constant.

Public reaction to these incidents are seen as highlighting that the law was being brought into disrepute, causing the government initiated investigation into homosexual offences. In 1954 Winterton asserted that "there was little public or Parliamentary interest in the subject until cases affecting prominent men occurred last year" (Lords, 19.05.54, vol.187col.738). Another man convicted in 1953 was even better known to Parliamentarians; William Field was a Labour MP convicted for persistently importuning who resigned his seat (Jeffery-Poulter, 1991: 14). Interestingly all these prosecutions were not for gross indecency but under the 1898 Vagrancy Act.

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<sup>35</sup> This October 1953 conviction came just four months after his knighthood.

The era's most notorious case was the Montagu affair of October 1953. Weeks contends that "The trial of Wildeblood and Montagu... proved a catalyst which revealed the inherent problems in the situation of homosexuals. Either the law had to be tightened up further, more rigorously and evenly applied, or it had to be reformed" (Weeks, 1977: 164). Lord Montagu and Kenneth Hume were charged with "serious offences" committed on two boy scouts (Jeffery-Poulter, 1991: 14). In December Montagu was prosecuted for "an unnatural offence and an indecent assault", the jury acquitted on the more serious charge and was deadlocked on the lesser count (Davenport-Hines, 1990: 303). In January 1954 Montagu was charged with two new offences of conspiracy to commit homosexual crimes with his cousin Michael Pitt-Rivers, two airmen, and Peter Wildeblood, a journalist (Jeffery-Poulter, 1991: 15). The March trial was a press sensation; the DPP attended the sentencing with Pitt-Rivers and Wildeblood receiving eighteen months imprisonment and Montagu twelve (Davenport-Hines, 1990: 303). The airmen, who received immunity, were booed as they left court but the reaction to the convicted men was even more surprising; Wildeblood recalls:

"a small group of people surrounding the car, mostly women... they were not shouting insults, but words of encouragement. They tried to pat us on the back and told us to 'keep smiling'" (Wildeblood, 1955:96-97).

This display of sympathy is often cited as evidence of shifting public opinion. However, Wildeblood states that it was a small crowd of people and even identified one as a woman who had spat at him previously (Wildeblood, 1955: 87). This support for a young aristocrat 25 miles from his estate is hardly an emphatic rejection of the status quo by a significant section of the community. Wildeblood wrote a book on his experiences and testified to the Wolfenden Committee. Like many notorious nineteenth-century cases, the offenders' class was material, the DPP believed his department should intervene when those "in authority... used their position to make victims or accomplices of those... under their influence"

(Davenport-Hines, 1990: 304). During his trial it was put to Wildeblood that “inverts... seek their love associates in a different walk of life from their own” and that the airman “McNally was infinitely... your social inferior” (Wildeblood, 1955: 80).

Another category of person gained notoriety in the 1950s; “The panic over homosexuality was partly precipitated by the various spy scandals of the early fifties” (Hall, 1980: 8). In 1951 after Guy Burgess became aware that American security services were close to exposing Donald Maclean’s espionage they both defected to the USSR. Both were known to have sex with men and the British security services were put under pressure by America to “weed out known or suspected homosexuals” (Jeffery-Poulter, 1991: 25). In a 1953 newspaper interview Colonel Lipton MP echoed Senator McCarthy in stating that “the problem of homosexuality among Government officials ... is of growing magnitude” (Jeffery-Poulter, 1991: 25). Under Parliamentary privilege Lipton named Kim Philby as the ‘third man’ in the Cambridge spy ring in 1955 (Commons, 25.10.55, vol.545cols.28-9). However, Prime Minister Macmillan stated that Philby had “carried out his duties ably and conscientiously” and not betrayed his country (Commons, 07.11.55, vol.545col.1497). However, under increasing pressure Philby defected in 1963. A fourth suspect in this spy ring was Anthony Blunt, a known homosexual, who was interviewed by SIS in 1952. Blunt admitted his spying activities in 1963 after revelations from an American he had recruited.

Unconnected with the Cambridge spy ring William Vassall was revealed as a spy in 1962. Whilst Naval Attaché in Moscow during 1955, he was photographed by the KGB with men in sexual circumstances. Whereas previously concerns had centred on how homosexuality threatened the social order, in the early Cold War the threat was additionally to the political order. As homosexuals were revealed as traitors, homosexuality was increasingly considered a threat to national security; *The*

*Scotsman* saw homosexuals as the enemy within who “owe their primary allegiance to the homosexual groups... Hence the connection between perversion and subversion, which is one of world Communism’s greatest strengths in this country” (Jeffrey-Poulter, 1991: 48-49). Only Vassall was entrapped into spying rather than doing so for political motives. However *The Daily Mail* saw homosexuals as “easy targets for blackmailers and spies” and the Vassal case as a reason for reforming the law (Jeffrey-Poulter, 1991: 61).

These spying revelations also directly impacted on the Wolfenden Committee. Goronwy Rees, Principal of the University College of Wales, was the Wolfenden Committee’s foremost advocate of reform until revelations in April 1956 about his association with Burgess forced him to resign both positions. Rees had anonymously written a book about Burgess which was serialised in the *People*, before his authorship being exposed by the *Telegraph* five weeks later (Higgins 1996: 81). Despite his reputation as a supporter of reform, the articles contained vitriolic attacks on Burgess’s “depraved lifestyle” and indulgence “in practices that repel all normal people” (Higgins 1996: 84). Rees claimed that “men like Burgess are only able to escape detection because they have friends in high places who practice the same terrible vice” (Higgins 1996: 82). Rees was perfectly placed to know; he had known Burgess since the 1930s and godfather to his child. After the 1951 defections Rees went to the SIS but ironically was discredited by Blunt whom he also knew to be a spy (Higgins 1996: 82).

Rees’ most ironic claim was that “Burgess and Maclean staged their reappearance in Moscow as a warning to those remaining traitors... that they can be exposed if they do not continue in the service of Russia” (Higgins 1996: 85-6). Rees was again well placed to know as the KGB defector Vasili Mitrokhin revealed him as a spy until the Nazi-Soviet pact (BBC, 1999).

Security concerns led Raymond Mawby to argue for the extension of the military and merchant Navy exemptions to decriminalisation to all those “who are sworn to the Official Secrets Act”. Mawby was a former Conservative Junior Minister, and was most concerned about the “security position” relating to the danger of blackmail, despite him being posthumously revealed as having spied for Czechoslovakian intelligence for financial reasons ([www.bbc.co.uk/news/uk-18617168](http://www.bbc.co.uk/news/uk-18617168) accessed 28.06.2012).

A case involving a prominent public figure marked the publication of the Wolfenden report. In November 1958, Ian Harvey, a junior Foreign Office Minister, and a Coldstream Guardsman were arrested in St. James' Park. A gross indecency charge was dropped but they were convicted of breaching park regulations and fined £5. Harvey resigned his seat the day of the Commons Wolfenden debate. Harvey's resignation had been proffered on November 21<sup>st</sup> but Macmillan gave him a week to reconsider (Jeffery-Poulter, 1991: 40-41), suggesting that at least to some a homosexual ‘taint’ was not inevitably death for a political career. Harvey's portfolio went to John Profumo.

High profile homosexual cases represent the primary means by which homosexuality came to the public's attention than as evidence for changing public opinion. It is unsurprising the population still predominantly thought homosexuality should be criminal when they only ever read about it regarding prosecutions. These cases also show the sexual other being increasingly conflated with the political other during Cold War tensions. Whereas the public might sympathise with a renowned actor or ‘playboy’ peer this did not extend to traitors whose sexuality was used to define them. Responding to these fears the Privy Council reported on security, urging departments to be internally vigilant for “serious failings such as drunkenness, addiction to drugs, homosexuality or any loose living that may affect a man's reliability” (CAB/129/80).

Interestingly Devlin's response to Wolfenden drew parallels between the "suppression of vice" and the "suppression of subversive activities" stating that "it is no more possible to define a sphere of private morality than it is to define one of private subversive activity" (Devlin, 1957: 15). Crucially, for Devlin, both private immorality and private subversion threatened societal integrity. The perceived vulnerability of homosexuals in security positions was addressed in 1965 when Arran asked "will not a change in the law reduce the risks to the security of this country?" (Lords, 12.05.65, vol.266col.76).

However, it must be noted that although homosexual scandals contributed to heightened concerns over homosexual regulation resulting in the Wolfenden Enquiry they were far less evident subsequently and were insignificant during parliamentary debates.

## 8.2.2 Blackmail

In Chapter 5 I provided analysis questioning whether the 1885 Amendment deserved its reputation as the ‘Blackmailer’s Charter’ (Weeks, 1977: 22). However, blackmail was a regularly voiced concern for all sides in Parliamentary debates. Indeed, in 1921, an attempt to extend the Labouchère Amendment to include lesbian acts failed partly because opponents thought it would “enormously increase the chance of blackmail” (Lords, 15.12.21, vol.43col.569).<sup>36</sup> References to the ‘blackmailer’s charter’ frequently quoted Sir Travers Humphreys’ preface to Montgomery Hyde’s “The Trials of Oscar Wilde” (e.g., Commons, 28.04.54, vol.5260cols.1754-56) which popularised many misconceptions of homosexual regulation.

Before the Wolfenden committee was established the Minister of Works asserted that “if a man is a homosexual he is much more easily blackmailed, owing to the law... than almost anybody else” (Commons, 29.04.54, vol.526col.1865). However, this susceptibility to blackmail rested in criminality and Winterton contended very early on that, in this, homosexuality was no special case. In principle this was true but in reply the former AG, Earl Jowitt, stated that in practice “at least 95 per cent” of blackmail cases arose out of homosexuality (Lords, 19.05.54, vol.187col.745).

Denning dismissed the threat of blackmail and supposed the case was similar for abortion “but does anyone say that that should be taken out of the calendar of criminal offences?” (Lords, 04.12.57, vol.206col.810). However, there was official recognition of this special instance of blackmail; after the Wolfenden Report Chief Constables agreed to consult the DPP before prosecuting “stale” homosexual

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<sup>36</sup> Although that Bill failed the Cabinet Home Affairs Committee pledged to proceed with it again as a government Bill with the contentious Amendments omitted (13.12.1921, CAB/24/131).

offences or those revealed through investigating blackmail. Although he had no power to enforce this, the DPP did not have “any reason for believing that they have not followed his suggestion” (Lords, 12.05.65, vol.266col.100). This was accepted, with reservations about their ability over retaining “their discretion” by the Conference of Chief Constables (Conference Minutes, 26.02.58, HO/291/123).<sup>37</sup> However, the DPP had been against any interference with “the principle of the local administration of criminal justice (04.11.58, HO/291/123). The change in the procedure for prosecuting homosexual offences was widely reported in the newspapers on the 28<sup>th</sup> November 1958 (e.g. *News Chronicle*, *Birmingham Post*, *Daily Mail*). Interestingly the only time a victim was identified through a homosexual blackmail prosecution was in 1950 when Devlin had refused to proceed unless the victim revealed himself; he refused but was ‘outed’ by the press (Higgins, 1996: 101).

The abhorrence most Parliamentarians felt towards blackmail is difficult to overestimate. Even reform opponents such as Lord Rowallan acknowledged “blackmail as a much worse evil than homosexuality”. This favoured homosexuals’ victimhood over their criminality. Towards the end of the deregulation process Lord Brocket even tried to turn blackmail to the advantage of opponents. He expressed the frequent concern for subordinates in a novel way, that “blackmailing the guilty for money” would be replaced by those in positions of influence; “blackmailing the innocent for sin” (Lords, 24.05.65, vol.266col.631-52).

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<sup>37</sup> There was also a denial that there were “wide variations in the administration of... homosexual offences. This was a specific reference to paragraphs 128-135 of the Wolfenden report (1957: 46-50). Mention was also given to “snowball cases” which wasn’t mentioned in parliament (3.7.58, HO/291/123, Minutes of Meeting of No. 7 District Chief Constables’ Conference, 10.04.58, HO/291/123).

Wolfenden's findings on blackmail were notably absent from parliamentary discussions. Not until 1965 did Viscount Dilhorne refer to the Report's conclusion that "the amount of blackmail which takes place has been considerably exaggerated in the popular mind" and their doubts "whether blackmail is due primarily to exposure or primarily to the threat of a criminal prosecution" (Lords, 24.05.65, vol.266col.689).

The former point was frequently expressed by those suggesting that decriminalisation wouldn't remove the social taint and thereby the vulnerability to blackmail. Opponents, such as Osborne, actually argued that vulnerability would increase with the expansion in homosexuality that decriminalisation would cause. However, Mr Chataway claimed this presented a contradictory supposition; that social stigma would not prevent homosexual activity but would prevent homosexuals reporting blackmail. He rather considered that newly legitimised homosexual victims "would be much more ready to report their tormentors" (Commons, 11.02.66, vol.724col.868).

In the final debate Lord Byers hoped that the change would allow more of this "oppressed minority... to get real help" and consequently reducing blackmail (Lords, 13.07.67, vol.284col.1286). The Bishop of London similarly hoped that, freed from threats of prosecution and blackmail, previously reluctant homosexuals would seek spiritual and psychiatric help. However, Dilhorne returned the argument full circle to Winterton's early speech by arguing that the blackmail issue was "grossly exaggerated" as, in his time as a Law Officer, he hadn't encountered any homosexual blackmail (Lords, 13.07.67, vol.284col.1313).

Thus blackmail remained a focus throughout the debates despite, not because, of the Wolfenden report. There was an almost universal repugnance of blackmail amongst

even opponents of reform. The temporary solution of not prosecuting acts revealed through blackmail demonstrated which offence was viewed more seriously by the legal and political establishment. This can also be seen in Abse's Amendment requiring the DPP's consent to prosecute when one of the parties was under 21, to remove "anomalies"; cases where the younger party was blackmailing the older and where there was a relationship between two young men and one turned 21 and became liable for greater penalties (Commons, 03.07.66. vol.749col.1491).

### 8.2.3 Practical legal concerns

This section explores how practical legal concerns over homosexuality were used in parliament to question the law's effectiveness in regulating a minority. Particularly using statistics provided by Michael Schofield/Gordon Westwood, reformers argued that homosexuals were too numerous to ignore, treat or imprison. The HLRS<sup>38</sup> also held as a central plank of its campaigning that "Homosexuality is the problem of a minority, but not of an insignificant minority... there are four times as many homosexuals as unemployed, and every section of society is affected" (HLRS, *Progress Report*, April 1959, quoted in Montgomery Hyde, 1970:240). Whereas giving homosexuals a legitimised sexual realm whilst protecting society from any public manifestations could effectively protect public decency. The prevalence of homosexuality that became accepted meant its legal control was impractical and so should no longer be considered as a social problem. As an 'individual failing' it was beyond the remit of the state's control if in private. The problem therefore shifted from eradicating homosexual conduct to providing and managing a private realm to lessen its public manifestations.

Schofield's contributions to debates are further explored in the sociological discourse section. His research aided arguments that the law couldn't be effectively administered and facilitated the discursive deployment of these statistics in socio-political rather than clinical or legal terms; that homosexuals constituted a persecuted social minority. Thus legislation against them acting upon their presumed nature could no longer be ignored.

The statistics most commonly cited in the decriminalisation debates were introduced by the Wolfenden member Sir Hugh Linstead. He related that the Wolfenden committee had taken the lowest estimated prevalence of 2% and accepted that half

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<sup>38</sup> Homosexual Law Reform Society was established in May 1958 after the announcement of the Wolfenden Committee's establishment.

would be “chaste”; therefore 500,000 people might be helped by reform. Linstead thereby refuted the law’s deterrent value as only “100 people [were] convicted each year” (Commons, 26.11.58, vol.596col.413). Introducing his 1966 reform Bill, Berkeley referred to the “great deal more knowledge” produced by research since 1960, especially regarding paedophilia and “proselytisation” (Commons, 11.02.66, vol.724col.786). Berkeley again cited Schofield’s estimate that 50 or 60 million homosexual acts occurred annually to contextualise the mere 100 private adult prosecutions. In 1965 a Home Office Minister, Lord Stonham, stressed the “great significance” of these “enormous” differences. This questioned whether homosexuality was a sufficient threat to warrant legal restriction and/or if reform would suggest official condoning of homosexuality thereby prompting an increase, which the Wolfenden Committee had doubted. It was increasingly accepted that the law proved no deterrent for the “unhappy” 500,000 “exclusively homosexual” men with “little or no hope of any treatment which will alter his condition” (Lords, 12.05.65, vol.266col.98).

In 1966 Abse used these statistics when claiming that homosexuals comprised the largest criminal grouping, excepting motorists. The scant convictions for private adult acts only made the law capricious and unjust meaning the law was neither reformatory nor deterrent; the law could not regulate desires and few would be sent to prisons that didn’t work anyway (Commons, 05.07.66, vol.731col.263).

Even opponents such as Hogg conceded there was little justification for regulating “conduct which cannot be prevented or to keep in being a law which cannot be enforced” but, like other opponents, he used statistics showing that reform would prevent very few cases (Commons, 03.07.66. vol.749col.1502). Abse pleaded for an alternative choice for homosexuals other than “celibacy or criminality”, which he maintained was no choice, because homosexual compulsion was no less than heterosexual. The 100 prosecutions demonstrated how unenforceable the law was

whilst significantly harming and stigmatising 500,000 otherwise law-abiding citizens (Commons, 19.12.66, vol.738col.1072).

These statistics were criticised; Dilhorne disputed the estimate of 500,000 homosexuals, pointing out that Lord Kilmuir had found that there “were only 15 cases of genuine inverts” in prison. Dilhorne argued that legal relaxation may make it harder for people to resist such urges and ridiculed the Archbishop of Canterbury’s claim it would enable treatment, comparing it to revising laws to decriminalise narcotics to facilitate treatment. The legalisation of sodomy also sent the message to the country, that he believed opposed change, that it was not “such a grave sin or wrong as to be a crime” and thus increase temptation (Lords, 13 .07.67, vol.284col.1314).

This theme was the closest most debates came to claiming that homosexual regulations brought the law into disrepute. Although this is widely accepted as a cause of reform by historians (e.g. Milligan 1993: 97; West, 1977: 283; Thorp, 1998: 9; Aldrich, 2001: 454; Coppa, 1999: 89), in parliamentary debates it was generally implied not explicit. It was developed into arguments that the law should be more liberally applied rather than changed. Both arguments were developments from the law being brought into disrepute by prosecutions, to the disrepute stemming from the *arbitrary* nature of prosecution. By 1966 Jenkins was able to defend the Government’s position by arguing that “the criminal law continued to apply to acts which Parliament no longer considered to be criminal” and the “existence of largely unenforceable legal provisions tends to bring the law into discredit” (Commons, 19.12.66, vol.738col.1141).

Reformers such as Stonham argued against liberal enforcement, stating that if homosexuality remained illegal “the criminals should be brought to justice”.

Understanding the impracticality of pursuing “the largest class of criminals... in the country” they sought to prevent a pragmatic solution. Francis Williams asserted that public and official opinion opposed enforcing the law to its fullest extent, which anyway would be “absolutely unworkable” (Lords, 24.05.65, vol.266col.765). In later debates it was never argued that the law should be rigorously applied. This had never been a significant argument; the debate was between those wanting the status quo maintained, with the law’s moral force bolstered by selective prosecutions, and those seeking to end this capricious enforcement altogether.

In the Wolfenden Commons debate Mr Rawlinson, who had been junior counsel for Wildeblood, pointed out that “Prevention of Corruption, offences under the Official Secrets Act and incest” all required the AG’s authority to prosecute (Commons, 26.11.58 vol.596col.474). This idea, of having a “deterrent law liberally administered”, requiring a decision by the DPP and AG, was put to Butler by Mr Shepherd and others. However, Butler maintained that he had discussed this with the AG who could “not see any way through”.

I have shown that this was not the case and in 1965 it was acknowledged by Stonham’s statement that after the Wolfenden Report the AG requested that Chief Constables “consult” the DPP before prosecuting offences which were “stale” or revealed through blackmail investigations (Lords, 12.05.65, vol.266col.100). In June 1964 the new DPP added adult private consensual offences to this list, thereby extending consultation to include all those Wolfenden wanted legalised.

## 8.2.4 Conclusions

The parliamentary decriminalisation 'Discourse' was significantly influenced by practical legal concerns not the philosophical legal arguments of Hart/Devlin. Quantitative sociological analysis was used to validate arguments juxtaposing the disparity between the estimated incidence of homosexuality and its ineffective and arbitrary regulation. This element of parliamentary debates came closest to articulating the oft cited disrepute that the law's treatment of homosexuality was supposedly creating (Milligan 1993: 97; West, 1977: 283; Thorp, 1998: 9; Aldrich, 2001: 454; Coppa, 1999: 89). The section on the sociological discourse will show that these statistics enabled the repositioning of homosexuals as an oppressed minority.

Prominent prosecutions were important as the primary means by which homosexuality entered the public consciousness and latterly the means through which reform opponents conflated sexual and political others. However, these cases did not figure largely during debates. Blackmail *did* remain a constant theme concerning opponents and reformers. This pre-dated the Wolfenden process and little mention was made of Wolfenden's finding that blackmail had been exaggerated in the public mind (Lords, 24.05.65, vol.266col.708).

Essentially, however, most reformers simply wanted to decriminalise homosexuality. The deployment of critiques of the law's practical consequences was important in justifying that position. Some waverers may have been convinced by compassion for the blackmailed or the desire to limit publicity that prosecutions created, whilst others may have considered the arbitrary nature of law's enforcement unsustainable. However, most ardent reformers were morally opposed to the discriminatory nature

of the law just as opponents defended the law's moral enforcement role. These arguments over the law's performance bolstered their case, but it was not *the* case.

### **8.3 Medical, Sociological and Historical Discourses**

The following sections chart challenges to existing power/knowledge and new sources utilised in Parliament, showing how the terrain upon which this decriminalisation debate was conducted was shifting. Separately and in concert these elements contributed to the homophile discourse utilised by opponents to create a multi-faceted discursive challenge to the status quo.

#### **8.3.1 Medical Discourse**

The first requests for an inquiry into homosexuality explicitly requested it look at the medical aspects of homosexuality (Commons, 03.11.49 vol.469cols.577-9). The first significant debate on the issue was entitled “Homosexuality (Treatment)” and pointed to “modern scientific knowledge and of recent discoveries in the fields of psychology... psychiatry” and “medical treatment” (Commons, 03.12.53 vol.521col.1297). The BMA favoured reform and submitted to Wolfenden that “public opinion against homosexual practice is a greater safeguard [than law]” (Weeks. 1977: 30). This led some to conclude that Wolfenden had preferred medical and psychiatric opinion over the public good (Commons, 26.11.58, vol.596col.416 & 423). However, others continued to point to the medical and psychiatric professions’ support for Wolfenden as the “sort of opinion” that should be consulted (Commons, 29.06.60, vol.625col.1458).

Both in regard to homosexuality’s causes and treatment, medical opinion was significant in early debates, but declined thereafter; the causes remained unclear and initial hopes for improved treatments dwindled. Treatment became a concurrent commitment for reformers more as a sop to opponents rather than a realistic belief it offered solutions to the ‘problem’ of homosexuality. Abse’s 1962 Bill, dubbed “Wolfenden watered down”, required first time offenders to have medical reports

before sentencing. This stemmed from the Wolfenden recommendation for compulsory pre-sentencing psychiatric reports for persons under 21. The Committee had included this recommendation at a late stage due to the intimation by Mr Mishcon that he would otherwise append a minority report (26.9.57, HO/291/123). However, reformers such as the Archbishop of Canterbury still genuinely held hopes for medical treatment and condemned the HLRS's refusal to acknowledge the "variety of states and... causes" causing homosexual activities and therefore the extent to which medical science could help (Lords, 12.05.65, vol.266cols.80-81). But Lord Francis-Williams was more typical in arguing that society should not "condemn as criminals" those whose condition society couldn't help or understand (Lords, 12.05.65, vol.266col.112).

For opponents medical treatment was originally an alternative to reforms objected to on moral and/or practical terms. Earl Dundee attacked medical experts' influence on Wolfenden, claiming that the Conservative government had taken "certain administrative steps" but went no further because of doubts over the "medical and sociological evidence" to Wolfenden. Adair influentially criticised Wolfenden's acceptance of the "manifestly indefensible" "opinions of some psychiatrists" and overestimating the "very limited" effect that medicine could have. This latter view was shared by others, but Stonham reversed it by arguing that Parliament must not avoid its responsibilities "by persuading ourselves... that the remedy lies with the doctor" (Lords, 12.05.65, vol.266col.105).

Although some argue that Wolfenden's effect "lay in its reinforcement of the medical model in interpreting and regulating homosexuality" (Bennett, 2010: 149) this was not evident in Parliament. The treatment recommendations were omitted from the SOA (1967) and the usefulness to both sides of medical opinions lessened dramatically over time. Others have identified this as a "discursive shift from probation-treatment to the punitive paradigm... that has characterised the

parliamentary debates and reform strategies” (McGhee, 2001: 135). However, even this exaggerates the influence of the treatment option in early debates. It was only utilised by a few opponents identifying treatment as the only proper response to homosexuality, reformers merely used it to claim legalisation would enable treatment. The more legislation looked inevitable the less this was needed to sway the undecided, although it was used mostly by the Lords Spiritual.



### 8.3.2 Sociological Discourse

With medical opinion unable to provide definitive answers, homosexuals were increasingly defined as a socio-political minority rather than a medical aberration. The Wolfenden Committee “ had the advantage of access to data collected by the [Cambridge and Oxford University departments of Criminology] in connection with a survey of cases” in 1947 and 1953 respectively (Wolfenden, 1957, appendix II: 120). The emergence of this power/knowledge was significantly aided by the works of Michael Schofield/Gordon Westwood’s (*Society and the Homosexual* (1952), *A Minority* (1960) and *Sociological Aspects of Homosexuality* (1964)<sup>39</sup> which both sides referenced extensively, particularly his quantitative analysis as previously described.

As early as 1954 Donnelly quoted Westwood’s assertion that Labouchère’s Amendment had long been described as the ‘blackmailer’s charter’ (Commons, 28.04.54, vol.526col.1746). In the first Wolfenden debate there were three mentions of Wildeblood’s book *Against the Law* and subsequent debates were equally influenced by Schofield’s book *A Minority*. In that debate homosexuals were twice referred to as a minority and Schofield’s influence was significant in this growing terminology.

Ironically the first identification of homosexuals as a minority was made by a reform opponent who described homosexuality as “evil”. Although Wolfenden’s report had convinced him that homosexuals deserved pity he urged MPs to direct their attention “to the average elector, not to any small select... and exclusive minority” (Commons, 26.11.58, vol.596col.416). This position was more temperately mirrored by Mr

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<sup>39</sup> The latter contained a foreword by Wolfenden

Renton for the government who stated that “to protect and absolve that genuine minority, they might foster the growth of that larger group of homosexuals which surely should not be allowed to spread” (Commons, 26.11.58, vol.596col.502).<sup>40</sup> This established opponents’ claims that reform should be prevented to protect the majority of ‘normal’ people over the minority. However, Douglas Jay suggested that legislating against something that doesn’t affect others on the grounds of distaste or considering it “morally wrong” was to start on the road that ends with “concentration camps and to the persecution of heretics”. This explicitly argued that the legal order’s moral transgressions were greater than those of homosexuals.

Butler also read *A Minority* and announced that Westwood was leading government sponsored research at Birkbeck into the causes and nature of homosexuality (Commons, 29.06.60, vol.625col.1495).<sup>41</sup> But Dr Broughton argued that the greater good must be considered, rather than concentrating “on the difficulties of a minority group... we must survey the community as a whole and legislate for the good of the majority, even if... it hurts a minority” (Commons, 29.06.60, vol.625col.1477).

Reformers began explicitly identifying homosexuals as a minority group, arguing that the criminal law “discriminates against one minority and... infringes on the essential liberty of the individual” (Commons, 29.06.60, vol.625col.1489). This claim became progressively more confident in placing homosexuals’ treatment

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<sup>40</sup> This speech omitted from the draft the statement that “If it were possible to establish them [“genuine homosexuals with unalterable impulses”] in a community of their own or enable them to lead full lives on a desert island our difficulties would be solved” (HO/291/123).

<sup>41</sup> Butler’s announcement on research ignored the essential problem as identified in a 1957 Home Office memo: “research is doubtless very important, but even if this were to result in identifying the causes of homosexuality, and even if these causes could be eliminated (both of which are very doubtful), this would in no way solve the problem of how the law should deal with homosexual behaviour when it does occur” (27.9.57, HO/291/123). Despite this five speakers welcomed the announcement (18.12.58, HO/291/123).

alongside racial minorities and thus more within developing civil rights discourses than medical or criminal ones. Abse later maintained he misled Parliament on his views of homosexuality, deciding to hide his “Freudian belief in the universality of bisexuality” believing this would alienate many MPs insecure in their own heterosexuality (1973: 153). The “anxieties” and “stifled fantasies” of MPs could be overcome by portraying homosexuals as a distinct minority deserving of “compassion” for suffering the “terrible fate” of being deprived normality (Abse 1973: 153). Therefore Abse tactically argued that the 500,000 practising homosexuals were “a substantial and unfortunate minority” who hadn’t chosen their fate (Commons, 09.03.62, vol.655col.845).

By 1965 Arran was stridently proclaiming that “we are persecuting a minority” in the same way “as others have persecuted Jews and Negroes” (Lords, 12.05.65, vol.266col.75). This minority had to be “natural” because nobody would willingly choose that plight and Wolfenden evidence showed early seduction didn’t alter sexuality. So homosexuals lived “In shame if they restrain themselves; in fear if they practise their homosexuality” (Lords, 12.05.65, vol.266col.73). The next year Strauss continued this minority discourse by likening homosexual persecution to that of “coloured people, of Jews, Catholics, Huguenots and many others”. He further claimed that homosexuals’ general behaviour and contribution to society “was as good as those of the majority” (Commons, 11.02.66, vol.724col.808). The conduct of the majority was unacceptable therefore because “tolerance of minorities is a measure of the civilised quality of a society”.

The increasing labelling of homosexuals as a minority is not a minor semantic point. It was deployed as a claims-making device for equal membership within society. A group that was criminalised for their very ‘nature’ was compared to racial minorities that suffered discrimination for theirs. In the era of civil rights this was a bold and resonant claim and relied significantly upon Westwood’s discursive contribution.

Opponents, such as Shepherd, also cited Westwood to attack the “wildly distorted” propaganda of the HLRS. He questioned why it was necessary to legalise buggery given Westwood found only 25% indulged, he also referred to Westwood’s finding that many homosexuals would consider partners below 21. The novelty of Westwood’s contributions is demonstrated by Lord Rowallan’s shocked reaction to him not finding the “slightest contrition, or even the slightest shame or guilt” from homosexuals (Lords, 10.05.66, vol.274col.628).

Westwood was not an apologist for homosexuality, but explaining it and demanding reform. Abse highlighted Westwood’s conclusion that “The present social and legal methods of dealing with the problem are irrational and tend to create more social evils than they remedy” (Commons, 11.02.66, vol.724col.823). Notably it was British research that predominated and Kinsey was rarely referenced, the exception to this being through discussions of Wolfenden’s estimates of homosexuality’s prevalence which Kinsey informed (for example: Lords, 04 .12.57, vol.206col.813). Wildeblood’s *Against the Law* was also only explicitly referenced once when Greenwood referred to Wildeblood’s experience of the lack of medical treatments in prison (Commons, 26.11.58 vol.596col.390). The increased sociological prominence in debates can also be seen in the previously discussed use of a lay sociology in comparing British to other European countries’ experiences of homosexual (de)regulation.

Thus homosexuality was becoming seen as a social problem rather than an individual, medico-psychological, failing. The discursive usefulness of sociological approaches to homosexuality was not in explaining it but in identifying the homosexual in socio-political rather than medical or legal terms. They cemented the homosexual not in modes of deviance or aetiological terms and typologies, although

they informed these, but in terms of objective and subjective existence.

Homosexuality was enumerated, and compared with foreign manifestations as well as heterosexuality; thus homosexuals could be identified in emotionally resonant terms as a minority rather than a medical aberration. The homosexual hence became a legitimate locus of claimsmaking and more difficult to attack. Such attacks continued but reformers could discursively position themselves as valiant protectors of an oppressed minority, not apologists for deviants. This utter refutation of the mainstream discourse evidently caused consternation amongst opponents who thoroughly rejected the portrayal of the homosexual as a victim but became likened to racists.



### 8.3.3 Historical Discourse

Having previously challenged the historical accounting of Labouchère's Amendment, its place in Parliamentary debates is now examined showing it was less contested than almost any other element of debates with Travers Humphreys' preface to Montgomery Hyde's "The Trials of Oscar Wilde" accepted as the definitive history.

In 1954 Donnelly detailed Humphreys' claim that before 1885 "the criminal law was not concerned with alleged indecencies between grownup men committed in private... the law only punished acts against public decency and conduct tending to the corruption of youth" (Commons, 28.04.54, vol.526col.1747). Boothby, quoting Humphreys, claimed parliament hadn't realised how the Amendment's words "in private" would "completely" alter the law. Thus Boothby perpetuated Humphreys' misconception that only "Such conduct in public was, and always has been, punishable at common law" (Commons, 28.04.54 vol.526 col.1747, Travers Humphreys, 1948: 6). These statements helped cement the homosexual threat to youth and the public/private divide as constant themes in debates. Boothby repeatedly quoted Humphreys in claiming that the Bill's intent was to remove Labouchère's Amendment (Lords, 13 .07.67, vol.284col.1302 & Lords, 24.05.65, vol.266col.639).

In the 1958 Wolfenden debate Butler outlined the history slightly more equivocally; stating that although the most "extreme form of homosexual conduct" had been outlawed for 400 years "lesser forms arise, in particular from the Amendment moved by Labouchère... these are the facts and the point from which we must start is inescapable. So much for the facts" (Commons, 26.11.58, vol.596col.368). Indeed! In 1960 Robinson repeated Boothby's phraseology when he blamed the status quo

on the “notorious Labouchère Amendment” and was joined by others (Commons, 29.06.60, vol.62col.1455). However, Butler acknowledged that the simple expediency of repeal was not possible because homosexual regulation now resulted from “a combination of the Labouchère Amendment and other statutes” (Commons, 29.06.60, vol.62col.1491).

In 1966 Sir Cyril Black claimed they were discussing the “repeal of a law which has stood for over 400 years in respect of practices which have been condemned by moralists and religious leaders from the earliest days of human history”. However, Strauss took issue with this and repeated verbatim Humphreys’ history (Commons, 11.02.66, vol.724cols.804-5). Interestingly, at this late point Viscount Dilhorne pointed out that the Bill would not legalise homosexuality for only homosexual acts were illegal and contradicted Boothby’s assertion that its “main purpose was to repeal the Labouchère Amendment” (Lords, 13.07.67, vol.284col.1310). Dilhorne supported this but not legalising sodomy, feeling that whether this “disgusting, abominable offence” should be legalised divided people most. He accepted that it was right to ask pity for the homosexual but that this did not excuse these practices (Lords, 13.07.67, vol.284col.1311).

Of all the discursive themes and trends the historical discourse alone was unthreatened by decriminalisation debates, rather being perpetuated and cemented through them. Even many opponents regretted the passing of Labouchère’s Amendment but were loath to repeal it lest it send the wrong message to the public and homosexuals.

Both sides’ agreement on homosexual regulation’s history thus represents a “reutilization of identical formulas for contrary objectives” (Foucault, 1976: 100).

Only the interpretation of the justness of Labouchère's Amendment was significantly disputed. It was a new (homophile) power not a new knowledge that was deployed.



## 8.4 Paedophilia

Relevant to the medical and sociological discourses on homosexuality and the knowledge they produced was the relationship between homosexuals and youths. As Schofield wrote in *A Minority* (1960: 159-165) “Popular opinion seems to assume that homosexuals are attracted to young boys” but he concludes that “The law... cannot be defended on the ground that it protects children”. For decriminalisation to proceed it was necessary to refute claims this posed a threat to youths and advance claims it could enhance protections. The pre-eminent concern for youth protection is often rightly highlighted in the literature on deregulation and was an ever-present theme in debates.

However, the discourse developing was more than that, becoming a nascent discourse of paedophilia. The term was first used in parliament during these debates and represented attempts by reformers to firmly differentiate between the two sexual typologies and opponents to portray all homosexuals as potential pederasts. Although Wolfenden outlined opinions that very few homosexuals “turn their attention to boys” this was not explicitly mentioned until a Lords’ debate in 1965 (Lords, 12.05.65, vol.266col.97). Reformers frequently claimed that homosexuals, denied any legal sexual partners, were more indiscriminate than if ‘adult sexual partners’ were legalised. However academics of the time were more starkly differentiating between the two groups, Schofield (1965:149) stated that “confusion” between the two was less common in the past and most would agree with “Freund and Pinkava (1959) when they report that a homosexual whose attention is focused on adults is hardly ever a danger to children”. However opponents portrayed homosexuals as indiscriminate and proselytising.

In 1954, Winterton cited “an eminent legal authority” who contended that half of offences against children were by known “adult homosexuals [sic]”. Although seeking to refute it, this was the first time that this particular formulation and distinction between youth-seeking and adult-seeking ‘homosexuals’ was made in Parliament (Lords, 19.05.54, vol.187col.740). The difference between the two was contested throughout decriminalisation debates. The Marquess of Lothian<sup>42</sup> first used the word in parliament when arguing “a more constructive attitude should be taken in regard to the homosexual offender in prison, because he is often what is called the paedophiliac—the homosexual who prefers young people” (Lords, 04.12.57, vol.206col.784). In 1958 Linstead initiated an exchange on paedophilia when discussing the age of consent proposed by Wolfenden. Hale argued that if the law was to be changed to favour the homosexual then why not the “pedophiliac [sic]” if both were congenital (Commons, 26.11.58, vol.596col.411). Linstead countered that whilst the “pedophiliac [sic]” may also suffer from the law he suffers “in the interests of the young who require protection” (Commons, 26.11.58, vol.596col.411).

Dr. Bennett had difficulty understanding why Wolfenden accepted the testimony of psychiatrists that there was rarely an overlap between “those who seek as partners other adult males, and... paedophiliacs”. He absolutely rejected that homosexuals wouldn’t seek “an adolescent male above the age of puberty, because I think they all do”, believing reform “would inevitably lead to a greater evil in proselytising” (Commons, 26.11.58, vol.596col.447). Mr Rawlinson also found it “very difficult to follow the difference” between types that other members suggested (Commons, 26.11.58, vol.596col.3474). In 1960 Robinson again distinguished between adult seeking homosexuals who were “not the same people who tend to seduce young persons. The paedophiliac is a rather special type” (Commons, 29.06.60, vol.625col.1458).

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<sup>42</sup> a member of the Wolfenden Committee

Concerns over when sexuality became fixed were behind much debate over the age of consent. Montgomery advocated an Amendment to the Bill that it be 80 not 21. Earl Huntingdon<sup>43</sup> advocated 18 and Earl Iddesleigh moved 25, pointing out that under the Children and Young Persons Act anyone up to the age of 21 in full-time education remained a “child” (Lords, 21.06.65, vol.267cols.332-334).

In moving his Bill in 1966, Berkeley cited the greater knowledge produced through research since 1960. His speech heavily references Schofield’s works, reflecting the greater emphasis in recent debates on social science knowledge. Berkeley stressed that Schofield found the vast majority of homosexuals were not so through choice, that the extent of “proselytisation... appears to have been greatly over-estimated” and that homosexuals were no more likely than heterosexuals to be “attracted to or assault juveniles” (Commons, 11.02.66, vol.724col.786).

Thus we can see that there was a significant development in the struggle for typologies and definitions of sexual desires. This included heterosexuality, the word first being used in Parliament by Maurice Edelman while debating the Obscene Publications Bill (Commons, 29.03.57, vol.567col.1516). Thus in discussing and seeking to define the homosexual politicians also began to define the paedophile and the heterosexual. Whilst some continued to deny any difference, distinguishing between paedophiles and homosexuals was crucial in the latter’s acceptance. Parliamentarians found no difficulty in distinguishing between the heterosexual and the paedophile. The struggle to likewise differentiate homosexuals was a harder process, but it started with the discursive distinction produced over decriminalisation.

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<sup>43</sup> He was an HLRS member but did not claim to be speaking for them

The permitting of homosexual acts over the age of 21 was recognised as a fudge.<sup>44</sup> However, parliamentarians were concerned to establish the age of consent high enough to dissuade the seduction of youths and protect reformers from accusations that reform threatened youths. They also set the age of consent high enough to minimise doubts that the sexualities of participants in legalised sexual acts were fixed, not youthful explorations or rebellions which might be corrected. Despite some, such as Waites, seeing that “decriminalisation was underpinned by the firm belief that an individual’s sexual condition is determined prior to the age of 16” this overly concentrates on Wolfenden’s role. Whilst this was Wolfenden’s conclusion (Wolfenden, 1957: 16) it does not reflect parliamentary debates. There were specific concerns regarding all male adult establishments including university dormitories, and service barracks over fears of seduction and experimentation. Rear-Admiral Giles stated that “It is likely to lead to experiment and, perhaps, to corruption and scandal” (Commons, 03.07.1967 vol.749 col.1517). Whilst it was accepted that there remained a core of exclusive homosexuals whose sexuality was set at an early age, many parliamentarians were concerned about a larger element open to experiment and sensation.

It was universally accepted that adult homosexual sex was one level of sin/crime whilst sex between adults and youths was a much graver deviance. The setting of 21 as the legal age was a mechanism preventing the blurring of this demarcation. The ‘good homosexual subject’ (Smith, 1994:207) was to remain private and seek partners over this age and/or wait till this age before acting upon their urges. Through the discursive distinction between homosexuals and paedophiles homosexuals were distinguished as a ‘separate species’, somewhat dis-recognised as a threat to the young, and this enabled them to be recognised as victims.

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<sup>44</sup> Although it was the then age of majority this was already under scrutiny by the Latey Committee (1965-7) which recommended the age of 18.

## 8.5 Chapter Conclusions

The decriminalisation of homosexuality was achieved through parliament's enactment of the SOA (1967). The homophile discourse was predominantly constructed within decriminalisation debates by politicians utilising sources such as the Wolfenden Report, Adair's minority report, and the Church of England's report on homosexuality. These were interpreted and utilised as discursive tools deployed in support or critique of parliamentarians' arguments. However, these reports were not extensively quoted after initial debates; being largely distilled to their essence. These homophile arguments were later accepted into the academic, LGBT and public discourses. These themes did not determine events; however they illustrated the rhetorical elements used by participants. Parliament didn't legislate because of Wolfenden's findings but decriminalisation was facilitated by Wolfenden legitimising what Parliamentarians increasingly wanted. To proceed on contentious issues frequently requires an enquiry distancing proponents from the issue, no longer are they arguing for change but adherence to an impartial reasoned enquiry.

This is not to say that the process was inevitable, which is implicitly suggested by cursory treatments of the political process in many historical analyses (e.g. Weeks, 1977). Rather reform was enabled by political and social changes transforming the makeup of Parliament and the moral and political ethos's informing and driving politicians to transform society. Homosexuality was a crucial element of these changes, but the arguments within debates cannot be judged in isolation or on their own merits. Politicians were convinced of the need for change in censorship, divorce, capital punishment, contraception, and theatre regulation. Some supported all these reforms whilst others were steadfast opponents of divorce whilst being pivotal supporters of homosexual reform, and vice versa. But most members were neither ardent reformers nor opponents, rather they were guided by their political affiliations and general ethos. Chapter nine will show that these significantly

changed in the 1950s and 1960s with the election of young, educated Labour members.

In most long drawn out legislative process such as homosexual deregulation contain many threads and themes which change over time as arguments are accepted, adapted or rejected. But the homophile historical account too often encapsulates this process in simple causes and effects; identifying the initial impetuses for homosexual reform and thus portrayed reform as their direct consequence. However, this was not the case. Concerns over homosexual scandals had largely disappeared when Wolfenden reported and replaced by the more specific threat that homosexuals posed to security. This developed concerns over homosexuals' threat to the social/political order but was a minor issue revolving around larger concerns over blackmail and so eventually turned to reformers advantage.

Arguments relying upon existing medical and psychological knowledge and hopes for advances were also rapidly side-lined as they went unfulfilled. This gap was increasingly filled by sociological knowledge which seemingly promised greater understandings of the problems surrounding homosexuality, especially concerning the problems of homosexuals themselves which began to be more understood and sympathised with. The social sciences thus largely replaced the physical sciences as the predominant relevant sources of knowledge. Although references to medical treatment and knowledge did not disappear sociological texts were far more authoritatively referenced.

In contrast to those discursive themes, the Labouchère Amendment's centrality to the history of homosexuality's regulation was largely accepted without critique. Although some parliamentarians pointed out that deregulation went beyond mere repeal and others expressed more nuanced understandings of the variety of laws

regulating homo-sex, this did not refute Labouchère's transformative role. The historical discourse remained a singular stable point within competing discourses. This relied less upon its accuracy than its utility to all sides; the history was relatively neutral and able to be interpreted in support or opposition to reform. The shift in homophile interpretation of this history corresponds with the notion that changes in political and social orders are more likely to prompt new historical directions and interpretations than new sources (Popular Memory Group; 1982: 225).

The legal discourse was multi-faceted, including points of principle and practicality and utilising all the previous discourses in support of positions. The discursive contribution of Hart/Devlin is often highlighted as representing a shift in legal discourses. However, both relied upon nineteenth-century antecedents and Hart's thesis essentially defended Wolfenden's position whilst Devlin supported Adair's. Wolfenden and Adair's positions were far more influential and were not fundamentally innovations.

Indeed the Wolfenden Report was not revolutionary in its findings or recommendations, representing a refinement and endorsement of the Church's earlier report. Consequently, although the Parliamentary discourse frequently revolved around the acceptance of Wolfenden, it did not clinically examine it. Elements of Wolfenden and Adair's reports were used to support or attack arguments but they weren't *the* arguments. These were moral arguments reliant upon rival political and religious philosophies. Wolfenden allowed a 'discursive explosion' on these issues and helped transform a previously forbidden topic allowing its extensive debate in previously unimaginable ways. This was its major contribution, rather than any ground-breaking transformation in thinking.

Essentially Wolfenden didn't change the arguments; political transformations meant the arguments were more in tune with MPs who justified their principled positions through them. Therefore people changed the arguments not the arguments people; people changed the emphasis and weight of the various discursive elements that predated the shift in momentum towards decriminalisation, although these were allied to new sources of power/knowledge. Thus new truths were produced through a new discursive ascendancy.

These truths were essentially a power/knowledge repositioning homosexuals as victims of the law. The last two chapters have shown that the crucial argument became not whether homosexuality was wrong but whether it was more wrong to persecute a minority for their private sins; morality had shifted. Homosexuals were reconstructed as objects and as a minority worthy of protection from the law's violence. This was only possible through a distinction in sexual typologies separating them from the paedophile which was constructed within this homophile discourse on homosexual deregulation.

## **Chapter Nine**

### **The Politics of Homosexual deregulation**



## 9.1 Introduction

This chapter will put the politics back into our understanding of the decriminalisation process that is a glaring omission from histories of decriminalisation. Decriminalisation is predominantly explained as a consequence of the law being brought into disrepute by high profile prosecutions, prompting public opposition, in turn forcing politicians into establishing the Wolfenden Committee (West, 1968: 85-6; McGhee, 2001: 97; Weeks, 1977: 156-67).

Wolfenden recommended partial decriminalisation, however the decade delay and why the report was only partially enacted have not been sufficiently examined. In the first book dealing with the subject after the decriminalisation process had been successful, West (1968: 82) gives no explanation for this delay merely states that “After endless Parliamentary debates and many procedural delays the new Sexual Offences Act, 1967, finally removed the legal penalties for homosexual acts in private between men over twenty-one”. Through examining the political discourse recorded in parliamentary and government records, I show that decriminalisation was not a passive political reaction to external pressure but a highly negotiated political process reliant upon a congruence of events, actors and socio-political context. It can only be understood through appreciating the crucial influences of (party) political realities, concerns, changes and manoeuvrings occurring.

This chapter does not focus on the Wolfenden Committee or Report. These enabled greater freedoms to discuss homosexuality and discourses adapted in response to Wolfenden’s findings. However, previous chapters demonstrated that the themes within parliamentary debates were mostly already established and were merely developed and legitimised by Wolfenden. That homosexual decriminalisation, like many other post-war social reforms, resulted from a Private Member’s Bill shouldn’t obscure party politics’ pivotal role.



## 9.2 The call for change and the Cabinet

Higgins asserts that before the Montagu and Gielgud arrests, “no one, in public at least, called for reform of the laws in Britain” (Higgins, 1996: 3). However, under the previous Labour government Winterton had argued that “the penalty for unnatural vice between male persons is too high. Only comparatively recently, I understand, has that been a crime under English law... introduced as a result of the obstructions on another Bill by Mr. Henry Labouchère” (Lords, 28.10.47, vol.444 col.2284). There had also been calls for an inquiry into laws on homosexuality by Winterton and Sir George Benson in 1947.

Winterton argued that “the penalty for unnatural vice between male persons is too high” (Lords, 28.11.47; vol.444col.2284), whilst Mr Benson believed that: “There is nothing more completely out of consonance with modern views on this matter than the way in which it is treated by our penal system” (Commons, 28.11.1947, vol.444col.2286). Again in 1949, Brigadier Medlicott called for “the setting up of a Committee to examine the social, medical and moral aspects of this very grave problem” and the “state of the law” (Commons, 03.11.1949, vol.469col.578). The Home Secretary, acknowledged homosexuality was a “problem” that had been concerning him and that he was “considering whether it is necessary to make any formal inquiries into the possible growth of these practices”, but he chose not to act (Commons, 03.11.1949, vol.469col.578).

High profile arrests in 1953 resulted in a more public discourse on homosexuality outside Parliament. In “a six-month period beginning in October 1953 more space was devoted to homosexuality in the British press than at any period since the trials and conviction of Oscar Wilde” (Higgins, 1996: 3). This open discussion represented a significant expansion of perceived freedoms regarding the issue.

Nevertheless homosexuality was not a subject lightly raised.<sup>45</sup> Indeed it was only in 1936 that 'homosexual' was first uttered in Parliament when Sir George Benson bemoaned the lack of treatment available to convicted homosexuals (Commons, 05.03.1936: vol.309col.1614).

It was in this context that Boothby and Mr Donnelly called for a Royal Commission on homosexuality under the new Conservative government. They highlighted the development of new knowledge available through "psychology... psychiatry" and "medical treatment" (Commons, 03.12.53, vol.521cols.1295-9). The Home Secretary, Maxwell-Fyfe, stated that he was reviewing sexual offences but unable to make a statement yet. He had announced the previous month that he had sent a fact finding mission to the US and discussed with Metropolitan magistrates ways of dealing with prostitution and male importuning (Commons, 12.11.53, vol.520cols.73-4).

It must be understood that the two people most responsible for the law at this time were unambiguously opposed to homosexual reform. The Prime Minister, Churchill, and Maxwell Fyfe opposed any relaxation of the law. Churchill's preferred method for reducing concerns over homosexuality was to curtail publicity; as done for divorce under the Judicial Proceedings (Regulation of Reports) Act 1926. However, the Cabinet acknowledged that introducing a Commons Bill limiting court reporting couldn't be done without government support and was inadvisable through the Lords given the recent Montagu case (CAB/195/12:0008). Other than allowing for medical treatment for those convicted the PM was content not to "touch the subject" and indeed "to let it get worse – in hope of a more united public pressure for some amendment" (CAB/195/11/0094:428).

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<sup>45</sup> The enduring discretion extended into the Wolfenden Committee rooms with homosexuals euphemistically referred to as Huntleys and prostitutes as Palmers.

This hoped for pressure was not for 'liberal' reform, but tighter control of the 'growing' public problem of homosexuality. For Churchill the problem was not the curtailment of sexual freedoms but the damage that publicising homosexual crimes did to the public. Churchill also acknowledged the issue was problematic for party political reasons; his first concern in Cabinet was that the "Tory party won't want to accept responsibility for making law on homosexuality more lenient" (CAB/195/11/0094: 428).

In parliament, Maxwell Fyfe stated that homosexuals were generally "exhibitionists and proselytisers" and promising no change to measures preventing them being "a danger to others, especially the young" (Commons, 03.12.53, vol.521col.1298).<sup>46</sup> However, in his response to requests for an inquiry he distinguished between male prostitutes and "sensationalists" who try "any form of excitement and indulgence" who could be "dealt with" by prison and 'true inverts' who couldn't. This notion of the 'true homosexual' would gain importance in debates amongst those who argued that decriminalisation would expand homosexuality (Commons, 03.12.53, vol.521col.1298).

In response to earlier Cabinet discussions, Maxwell Fyfe presented a memorandum to the cabinet on prostitution and homosexuality in February 1954. He noted a fivefold increase in the homosexual offences from 1938-52. Although acknowledging this didn't necessarily represent actual increases, he still claimed there had been a "substantial increase" (CAB/129/66:0010). This memo, and one from the Scottish Secretary, accepted that only a small percentage of offenders could be helped by treatments but it should continue to be provided in prisons and a "new institution for mentally abnormal offenders" (CAB/129/66:0010; CAB/129/66:011).

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<sup>46</sup> He remained steadfastly opposed to reform until his death in 1965, frequently speaking in debates using such language and themes.

Maxwell-Fyfe's memorandum noted that: "There is a considerable body of opinion which regards the existing law as antiquated and out of harmony with modern knowledge and ideas... and that the criminal law... should confine itself to the protection of the young and the preservation of public order and decency" (CAB/129/66/0010). Thus this "body of opinion" was already articulating the ethos that became synonymous with Wolfenden. Despite not believing there was cause for reform, Maxwell Fyfe acknowledged there was "a sufficient body of opinion" favouring an enquiry to bring this before the Cabinet (CAB/129/66:0010). The Cabinet's willingness to hold a Royal Commission into prostitution meant homosexuality's omission would invite "strong criticism", he hoped that this inquiry might be able to inform public opinion that was "apt to be misled by sensational articles in the press" (CAB/129/66:0010).

The precedent for holding a commission before proceeding with controversial issues was well established and extensively utilised in this period; only abortion was reformed without an official enquiry having paved the way (Richards, 1981: 200). Enquiries performed the political functions of deflecting calls for immediate action and, upon report, potentially providing support for desired actions whilst not binding the government if its recommendations were contrary to desired policies. However enquiry reports could potentially energise and provide ammunition for reformers.

The matter was again discussed on March 17<sup>th</sup>, Maxwell Fyfe resumed the PM's point in stating that "we can't legislate at present" which was a "good reason to have a Royal Commission" (CAB/195/12/008:30-31). The cabinet delegated Maxwell-Fyfe to prepare another memorandum on the merits of reporting restrictions, which concluded that detailed reporting of homosexual offences "panders to the salacious reader, may corrupt the innocent, and is in general injurious to public morals", furthermore it "may lead to their imitation by others" and give an exaggerated image "of the prevalence of homosexual vice" (CAB/129/67:0021).

However, it stated that only a compelling public interest incentive could justify the curtailment of press liberty, however only an “occasional notorious case” was sensationally covered (CAB/129/67:0021). The substantive difference between civil and criminal cases was highlighted; noting that in 1926 attempts to include criminal offences had been rejected. Positive advantages of reporting were also identified; that witnesses might come forward and that greater knowledge of acts’ illegality and punishments might deter others. The political consideration was that “it would be said that the government... were endeavouring to suppress the publication of evidence which showed the need for an enquiry”. The memo concluded that “objections to legislation on the lines suggested outweigh any possible advantage” (CAB/129/67:0021).

With Churchill losing the argument, it was agreed that the Home Secretary could establish a departmental enquiry into prostitution and homosexual offences. Whilst not having achieved any long term measure controlling the discourse on homosexual regulation, the cabinet achieved this in the medium term. The departmental enquiry served to limit public and political discussions during the next three and a half years of Wolfenden’s deliberations. In political terms the government avoided an embarrassing subject being brought before parliament whilst it had a very slim majority. The interim saw the Conservatives re-elected with an increased majority, moreover the report came past the mid-way period of that parliament, making any action impractical.



### 9.3 Reformers

The previous section showed how Churchill and Maxwell-Fyffe's opinions were crucial to how the matter was dealt with under that Conservative government. Homosexual reform was highly contingent upon the changing party political and social landscape, but it also relied upon key individuals. This section describes the key actors in parliamentary reform. With the notable exception of Crossman, these men were striving towards an end they believed in for purely individual socio-political reasons rather than personal or party political gain. Their contribution is important to understand as Weeks maintains that "contradictions in the social position of male homosexuals... exploded not so much through the work of ardent reformers, but because of their own instability" (1977:156)

The prime reform advocate in the Commons was Leo Abse, a Welsh Labour MP elected in 1955. His interest in Freudian psychology shaped his views on homosexuality believing that opposition to reform largely resulted from "the imperfectly resolved homosexual drives of some of the Members".<sup>47</sup> This differed from divorce reform resistance that resulted from extra-parliamentary pressure (Abse, 1973: 145). He highlighted the importance in Labour's election and his indebtedness to the new Home Secretary Roy Jenkins. In 1966, Jenkins had assured Abse that if a majority was secured under a Ten-Minute-Rule he would secure government time for a Bill's passage (Abse, 1973: 152).

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<sup>47</sup> Abse wrongly believed that Maxwell-Fyffe "refused to sit at any Cabinet meeting where this 'filthy subject' would be discussed" (1973: 145 & 152).

As a backbencher Jenkins had been the principal sponsor of the OPA (1959), in office and was a socially radical Home Secretary who, with an able ally in the Chief Whip John Silkin<sup>48</sup>, and a supportive Richard Crossman as Leader of the House, facilitated many backbencher reforms including divorce, theatre censorship, abortion, and homosexuality. In 1960 Jenkins argued that decriminalisation was essential and the quicker it was done the less reliant it would be upon a major public campaign attracting great attention (Commons, 29.06.60, vol.625col.1510).

Crossman became Leader of the House in August 1966 and was, with Berkeley, one of two major actors in homosexual decriminalisation known to have a homosexual past.<sup>49</sup> Crossman voted for Abse's Bill in July 1966 because he considered that only by ensuring an unequivocal majority could pressure be maintained on the government to provide time for Parliament's will. He played a pivotal role in decriminalisation by providing government time and spending the all night third reading "encouraging the troops" to ensure a majority. However, Crossman notoriously described the Bill in his diary as "extremely unpleasant" considering it "twenty years ahead of public opinion" (Crossman, 1976: 407). It was additionally a party political concern because working class northern constituents jeered their MPs over it (Crossman, 1976: 407). However, he believed it would positively impact upon the Abortion Bill which was popular with working class women, thereby allaying the damage.

Abse's counterpart in the Lords was the Liberal Lord Arran who said that his late father would have been "horrified" by his involvement (Lords, 12.05.65,

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<sup>48</sup> Silkin introduced an abortion Bill in 1965 (CAB/128/39: 0080)

<sup>49</sup> As an Oxford undergraduate he spent an Easter holiday with a poet where "his mouth was against mine and we were completely together" (Howard, 1990: 24). In the 1930s he married two older divorcées (Howard, 1990: 23-67).

vol.266col.79). Abse did not understand why Arran was so motivated, finding him “wilful and eccentric... not possessed of the usual liberal syndrome” yet inviting “opprobrium: innuendo and insults” through his endeavours, the strains of which hospitalised him more than once (Abse, 1973: 150).<sup>50</sup>

Although not as important as these prime movers and facilitators of reform Sir Robert Boothby (from 1958 Baron Boothby) is worth mentioning. It was he and Donnelly who called for a Royal Commission in 1953 (Commons, 03.12.53 vol.521col.1297). Boothby claimed that this and his public speeches made him “to some extent responsible for getting the Wolfenden Committee set up” (Lords, 24.5.65 vol.266col.667). In 1954 Donnelly gave Boothby “much of the credit” for focusing public and parliamentary attention on homosexuality and “whose courage and political integrity make this House a better place” (Commons, 28.04.54 vol.526 col.1745). However, Higgins considers Boothby’s claim as a “piece of fancy some historians have believed” (1996: 135), the middle ground is probably more accurate.

Boothby believed that although there was “a lunatic fringe of homosexuals” who perversely enjoyed being on the wrong side of the law, the vast majority were good citizens who hated it and wanted respectability (Lords, 13.07.67, vol.284col.1302). Remarkably Boothby continued to speak so brazenly after 1964 when *The Mirror* alleged that an unnamed Peer was under investigation for an affair with a notorious gangster, Boothby and Ronnie Kray were named in the foreign press (*Daily Telegraph*, 26.07.09). Boothby wrote a letter to *The Times* (01.08.1964) denying that any “homosexual relationship with a leading thug in the London underworld” and threatening libel action, *The Mirror* retracted and paid damages. It also explains his

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<sup>50</sup> The mystery was solved when Abse met a man who had been the lover of Lord Sudley, Arran’s elder brother, the family scandal saw him sent to a home where he died days after succeeding to the title (Higgins, 1996: 132-3).

overreaction when perceiving he was being accused of “advocating buggery”; inviting Viscount Dilhorne to “repeat that accusation outside the House, and he will get what he deserves”.<sup>51</sup>

Humphry Berkeley was the only Conservative politician to initiate a decriminalisation Bill, although St John Stevas was also a prominent Conservative reformer. This was a risky undertaking for a Conservative MP in a marginal constituency; Abse later stated “The House didn’t like Humphrey Berkeley. He was gay and everyone knew it” (*The Guardian*, Coming out of the Dark Ages, 24.06.07).

Berkeley’s 1966 Bill was the first to pass the Commons, despite it being identical to that which had been recently rejected by the previous Conservative dominated parliament. This suggests it was not the Bill’s content that was crucial to its progress; rather it was the party political makeup of parliament that dictated the chances of decriminalisation. The election of Labour was pivotal in this Bill’s progress. However, another general election meant it went no further and Berkeley lost his seats in the election. He came to attribute this to his Bill, although apparently only in retrospect (Abse, 1973: 151). Despite this the increased Labour majority meant a significant increase in those likely to be more sympathetic to calls for social justice. Twenty opponents also lost their seats, including its most outspoken critic Shepherd who in June 1960 had attempted to amend Kenneth Robinson’s motion to state that “This House is of the opinion that the proposed alterations would largely fail to change the status of homosexuals in society, but might well bring an unwelcome increase in their numbers, with added risks to the young” (*The Times*, 29.6.1960).

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<sup>51</sup> Boothby’s indiscretions weren’t limited to men; “Everyone at Westminster knew” of his affair with Macmillan’s wife and his fathering Lady Dorothy’s fourth child (*New Statesman*, 16.01.06).

Weeks' claims over the "work of ardent reformers" (Weeks, 1977:156) significantly underestimate reformers' influence and the nature of the political process. Without the support of the committed and the influential, homosexual reform Bills would never have been presented let alone enacted. The instability of homosexual regulation was not intrinsic but contextual; the reformers mentioned here revealed the regulatory contradictions and contributed to creating that context within which homosexual regulation was destabilised. Only through understanding this can it be understood why a regulation that had endured for eighty years was now being questioned.



## 9.4 Homosexual Law Reformed

### 9.4.1 Party politics and public opinion

I have already shown that party political considerations and public opinion were significant government concerns before Wolfenden's establishment. Party political and electoral concerns contributed to reticence over the issue and references to public opinion should be viewed accordingly. Public opinion is also identified as a key motor of decriminalisation and will be examined throughout this section.

The issue of public sentiment was one which was debated in the Cabinet, parliament and also the press. The Secretary of the Wolfenden Committee, W C Roberts, wrote a report on 26th September 1957 which highlighted "the remarkable degree of support, particularly in the more serious papers" but cautioned that legislation would not "command universal acceptance and that any Bill... would encounter vigorous opposition both inside and outside Parliament" (26.9.57, HO/291/123). The Home Secretary repeated this in his report on the Report to the Cabinet Home Affairs Committee, noting the "surprising" level of support, "especially in informed and responsible quarters, for example among leaders of the churches", however the balance opposed the recommendations in and outside of parliament (21.11.57, HO/291/123). Roberts also identified opinion polls on the Wolfenden recommendations.<sup>52</sup> He suggested that "it may well be that after the first shock of the proposal has subsided... the present substantial minority will turn into a majority".

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<sup>52</sup> the "News Chronicle indicated that 47% disagreed with the recommendation, 38% agreed and 15% were uncertain" and this was broadly replicated in the Daily Mirror.

Antipathy towards reform in Scotland was much higher; the *Daily Record* polled the public in 1957 and found 84% were opposed (26.11.58, HO/291/123). Additionally, the confidential rationale for omitting Scotland from reform on immoral earnings revealed: “The real reason was this would “therefore raise the whole question of making other changes in the law relating to homosexual offences”. The significant fall in Scottish homosexual offences also made this a far less pressing problem (CAB/129/66). This resulted from the “high standard of proof required by the Scottish Criminal Law” and the Lord Advocate’s Department long-standing “policy of not prosecuting homosexual acts between consenting adults in private” (Davidson & Davis, 2004:182). Accordingly the Scottish evidence for the Wolfenden Committee was ‘overwhelmingly’ opposed to decriminalization (Davidson & Davis, 2004:184-5). The Scottish members of the Committee also had reservations; Adair’s were extensive but Mrs Cohen’s signed reservations on the distinction between buggery and other offences and Lord Lothian sympathised with those concerns but favoured the age of consent being 18 (Davidson & Davis, 2004:189).

Opposition to decriminalization was across party political divides: “within the Scottish Liberal Party, the issue was considered divisive and electorally damaging. Even less support was forthcoming from Scottish Labour MPs” (Davidson & Davis, 2004:198). Sir Cyril Osborne remarked that “in previous confrontations the principal opponents have been the Calvinist Scots, notably the Scottish miners” (Commons, 11.02.66, vol.724 col.833). Mawby firmly believed in the party political dimension of Scotland’s exclusion and the West Lothian question “The greatest illogicality of all is that the Act will not apply to Scotland or Northern Ireland... the sponsors realised that if they included Scotland, all Scottish Members would descend in their wrath and vote solidly against the Bill” (Commons, 3.7.67 vol.749col.1514).

After Wolfenden’s publication a Home Office memo identified “four possible courses” regarding the homosexual recommendations:

“(a) to accept the recommendations in toto ... (b) ... confining any relaxation of the law to acts of gross indecency other than buggery... (c) to reject the major recommendations outright, but to accept those subsidiary recommendations that are not dependent... on the major recommendations... (d) to take no action” (27.9.57, HO/291/123).

Regarding (a) it was assessed that there was not “a need for legislation so clamant as to justify the introduction of a Government Bill which would be directly opposed to a large section of public opinion”. It was thought (b) might assuage opponents of existing regulation without “unduly upsetting those who have an instinctive horror of “the abominable crime”. The only subsidiary recommendation that would not require legislation was identified as the need for greater research and “To take action only on... (...instituting a programme of research) would border on the ridiculous” (27.9.57, HO/291/123).

Before any decision was made, however, a debate was recommended “to test parliamentary reactions” when the Home Secretary might announce that he wasn’t prepared to accept the major recommendation, but was considering legislation to implement some subsidiary recommendations. Despite option (d) being characterised as being “quite indefensible” if the only action undertaken was research, this was essentially the option taken.

The Honorary Secretary of the HLRS, A E Dyson, wrote a letter to *The Times* (13.9.58) calling for the government to justify its claims that Wolfenden’s reforms were “very much ahead of public opinion”. He further asserted that without such evidence “many of us will continue to think that a human cause is being sacrificed to political expediency”. Four days later a reply called for a reputable organization to conduct a poll on such opinion. A response from Gallup stated it had polled the public, finding that although the public ranked “the problem of homosexuality”

below that of prostitution, 47% still thought that homosexuals should be punished as opposed to 38% against and 15% undecided (*The Times*, 19.9.1958).

#### 9.4.2 Chronology of Debates

There was a Lords' debate on Wolfenden's recommendations three months after its September 1957 publication. Eleven months later the Commons followed suit. There was another Commons debate in June 1960 calling for early action on the recommendations on homosexuality during which every Conservative speaker opposed the motion and all but one Labour speaker supported it, the motion being defeated by 114 votes (Montgomery Hyde, 1970:242). It was almost another two years until Abse moved the first homosexual reform Bill. It sought to stipulate prosecutions for private conduct between adults would require DPP authorization, to halt stale prosecutions and require courts to get a psychiatrists report before sentencing (Commons, 09.03.62, vol.655cols.844-9). Over three years passed before another attempt was made.

Lord Arran wrote to Sir Alec Douglas-Home when he took office to urge him to move on the matter given "the changed attitude of the more serious newspapers" and other indications that "the violent 'antis' are now a minority" (Montgomery-Hyde, 1970:251). Arran even suggested a party political motivation for reform given that "Many people tend to regard the Labour and Liberal parties as the parties of compassion... it would be useful... if the Tories were to give their blessing to this major piece of social legislation. But Douglas-Home stated that neither he nor his Home Secretary believed that "parliamentary and public opinion is now in favour of amending the law" (Montgomery-Hyde, 1970:251). Only six months after Arran's letter even the *Daily Telegraph* came out favouring reform, it argued for the pragmatic change given that "There can no longer be any doubt that the moral corruption which follows... is greater than that which would follow from the abolition of this law" (*The Daily Telegraph*, 20.07.64).

Arran first initiated a debate calling attention to the recommendations of the Wolfenden Committee, but after the “virtual unanimity of opinion [17 of 22 speakers] in this debate on the need to implement the main recommendations of the Wolfenden Committee” declared his intent to introduce a Bill (Lords, 12.05.65, vol.266 col.170). A fortnight later he did so and this Bill passed through its third reading five months later, all stages of its progress saw extensive debates.

Two days after Arran’s first reading Abse sought leave to introduce a Commons Bill but was narrowly defeated (159 to 178) after a very short debate. Encouraged by this Berkeley introduced his Bill seven months later which passed by 78, with 13 Cabinet ministers supporting it and none against. However, the general election intervened and this Bill died. Encouraged by successes in both Houses Arran introduced a Lords’ Bill which passed to its third stage over the next month. At this point Abse introduced his second Bill in July 1966 which became the SOA (1967). Such was the extent of these debates that some objected to reform on the grounds that continued discussion of homosexuality was bringing Parliament into disrepute.

### 9.4.3 The Debates and Bills

In requesting an enquiry in 1954, Donnelly was confident that “most of the present-day *enlightened* public opinion” favoured reform, but there was no mention of wider opinion (Commons, 28.04.54, vol.526col.1749). The tone in the Commons was temperate but the Lords’ debate to “call attention to the incidence of homosexual crime in Britain” was not (Lords, 19.05.54, vol.187col.737). Earl Winterton initiated debate on this “nauseating subject” and was convinced that “the majority of British people” were against tolerating “widespread homosexuality” (Lords, 19.05.54, vol.187col.737 & 744). Bishop Southwell also claimed the country “reacts very violently against it, because it... rightly feels, that such practices are injecting poison into the bloodstream” (Lords, 19.05.54, vol.187col.752).

The government’s first response after Wolfenden’s Report was given in October 1957 by Rab Butler, the new Home Secretary. He stated the government was considering its reaction but thought it important that public and Commons opinion was gauged before any conclusions were reached (Commons, 31.10.57, vol.575c87W). The Cabinet Home Affairs Committee discussed the matter on November 29<sup>th</sup> and agreed with Butler’s assessment that “the main recommendations... on homosexual offences were too far in advance of public opinion to justify their implementation” (HO/291/123). This was endorsed by Cabinet discussions in November agreeing that whereas legislation might be introduced on some of the prostitution recommendations “it would not be practicable... to change the law relating to homosexual offences” owing to a lack of public support. This introduced the position taken by most Parliamentary opponents that public opposition was the impediment to reform. Butler did meet with an HLRS delegation after the 1959 General Election but stated that “the public had not shown its feelings in the matter” so the government would not act (Montgomery Hyde, 1970: 241). The Cabinet decided against announcing any final decision on this point in the forthcoming debate in the Lords as it came before the Commons debate (CAB/128/31:0082).

This casts doubt upon arguments that changes in public opinion prompted the establishment of the Wolfenden Committee (West, 1977: 282, Hall, 1980, 8; Waites, 2005: 97), given the same party's reason for not enacting it was the recommendations went against public opinion. The determination not to become embroiled in homosexual reform actually caused the delay of desired reforms; the re-enactment of Section 32 of the SOA, 1956, dealing with soliciting by men, was omitted from the Bill on prostitution to avoid homosexual practices being raised and forcing the issue (CAB/128/32:0085). The Cabinet agreed that it would announce that it accepted the Wolfenden recommendations on homosexuality in the upcoming debates but planned no action. The following month Butler reassured Parliament he was "under no doubt" about the anxiety the subject caused (Commons, 14.11.57, vol.577cols.1134-5).

Reformers also demonstrated sensitivity to criticism and vulnerability to adverse public and press reaction. Lord Brabazon, who in 1921 had spoken against the extension of gross indecency to women (Montgomery Hyde, 1970: 234), expressed his disgust at the press characterising the report as "trying only to make conduct between homosexuals legal" (Lords, 04.12.57, vol.206col.761). Brabazon claimed that one MP signatory of the report "was almost hounded out of his constituency" and that MPs' fear of being accused of favouring homosexuals caused the lack of objections when Labouchère's Amendment passed (Lords, 04.12.57, vol.206cols.761-3). Accordingly, Brabazon thought the unelected Lords could consider controversial issues better given their freedom from the electoral vagaries of public opinion. Indeed homosexual deregulation was primarily driven by the Lords.

Lord Kilmuir, speaking for the government, gave the agreed Cabinet position (HO/291/123), that there was "no hope of legislation on this point", he again

expressed his pre-Wolfenden themes that reform would encourage youthful indulgence and that “society would be corrupted” (Lords, 04.12.57, vol.206col.776). He acknowledged there were cases where the government should “lead rather than to follow public opinion” by this wasn’t one. The “general sense of the community” was not “with the Committee in this recommendation”, which was particularly important when the law was so longstanding (Lords, 04.12.57, vol.206cols.77332-50). Butler acknowledged that this speech was not well received in a memo: “I am impressed by the comparatively bad reception” (10.12.57, HO/291/123). A year later Butler reiterated that public opinion was the primary government concern. He felt the moral sense of a “very large section” of the population would be “offended” by reform felt to condone what they regarded as a “great social evil” (Commons, 26.11.58, vol.596col.370). Almost all members referred to public opinion and this was noted as the first specific point in the Home Office report on the debate (HO/291/123).

Like Donnelly talking of enlightened opinion in 1953 others later called for the ‘right type of opinion’ to be heeded. Ironically, given the influence of his book, Montgomery Hyde called for reaction to be based upon “accurate information and unbiased consideration” of expert opinion rather than “popular prejudices” (Commons, 26.11.58 vol.596 col.394). However, he noted opinion polls showed the public almost equally divided, whilst the national press supported reform. He also quoted Wilde’s opinion that “It is not so much public opinion, as public officials, that need educating”.<sup>53</sup>

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<sup>53</sup> Montgomery Hyde claims that Ulster Unionist MP party officials refused to nominate him for the 1959 general election because “We cannot have as our Member one who condones unnatural vice” (Montgomery Hyde, 1970:239).

On both sides some had a more sophisticated take on the interplay between the law and public opinion and urged that reform should not rush beyond that which the public could condone. Many understood public opposition to homosexual reform; given the short time homosexuality had been in the public discourse, time and public education were needed before radical change became acceptable. Sir Hugh Linstead acknowledged that public opinion was an important sanction needed to keep moral and social standards in check. But he hoped that if public opinion shifted reform might be possible. Perhaps indicating electoral concerns, Bellenger referred to constituents, rather than the public, opposition to reform and worried it would give the public “the impression that Parliament condones this practice” (Commons, 26.11.58, vol.596col.443). Mr Cole also feared this, arguing that the law and public opinion influenced each other so it was an important role of the law to set standards “that commend themselves to right-thinking people as being correct”.

This was of particular relevance to those who considered Parliamentarians were being misled by a “high pressure [HLRS] campaign” into thinking Wolfenden represented a majority of opinion. However, other, such as Rev. Williams, continued to argue Parliamentarians should lead and change public opinion by implementing this “great social document”. Mr Renton, a government Minister, wondered if public opinion might have been more swayed if Wolfenden had agreed with Adair that sodomy should remain illegal. In later debates many would claim they would have supported reform in that case.

In 1960 Kenneth Robinson won the private member’s ballot and his Bill called for “early” action on Wolfenden’s homosexual recommendations. His tone was much more combative than previous debates and this was followed by others of both sides. Whilst acknowledging the truth of the “main argument” against reform, that public opinion was opposed, he maintained it was not sufficiently opposed to justify inaction. He again argued it was “frequently the duty of the government to lead and

not to follow public opinion, and to do what they know is right” (Commons, 29.06.60, vol.625col.1458).

Robinson pointed to the Wolfenden Report, Churches’ opinion, the medical and psychiatric professions and the majority of the national press’s support of reform as the “sort of opinion” that should be consulted. He thereby sought to place this in the arena of progressive elites rather than the more reactionary public. Butler’s attitude in representing the government was attacked by Greenwood as typical of him in promising “every assistance short of help”, pointing out that they had been undeterred by differences of opinion on prostitution (Commons, 29.06.60, vol.625col.1500). Jenkins also dismissed Butler’s speech as being unprepared “to defend the current law on its merits or to envisage an indefinite period in which it continued to exist” (Commons, 29.06.60, vol.625col.1507).

Mr Lagden suggested that Robinson was hoping for “a good haul of votes from among the seventy-four new Tory M.P.s” but rightly predicted no such “misguided help”; only seven supported the measure, notably including the newly elected Margaret Thatcher. Eighteen Conservative supporters were first elected in the 1950s as were the majority overall. The Bill was defeated 213 to 99, 73 supporters were Labour, 22 Conservative and 4 Liberals.

I have shown that in these early debates public opinion was used by opponents of reform to justify an essentially principled position. Reformers sought to call for action on the grounds of informed and specialist opinions whilst downplaying, although not denying, public opposition. In these debates there weren’t many issues discussed without reference to public opinion. However, by 1962 there was an increased sense of inevitability voiced by the reformers (e.g. Commons, 09.03.62, vol.655col.856).

However opponents such as Doughty continued hoping Parliament would “never go one inch of the way along that path”. He even objected to the Bill being entitled ‘Sexual Offences’ as the 1956 SOA had dealt with things “of a more respectable nature” (Commons, 09.03.62 vol655col.859); those ‘other things’ including rape, and incest. Doughty was typical of opponents in maintaining pejorative language and tone regarding homosexuality. In 1954 the Bishop Southwell had remarked “there can hardly be any subject about which a man would more readily be excused from speaking at all... [than] this extremely distasteful and horrible subject” (Lords, 19.05.54, vol.187col.751). Before 1962 even reformers had defensively sought to excuse and justify their position. In the first Wolfenden debate Lord Pakenham had agreed with Winterton’s 1954 description of homosexuality as “nauseating” (Lords, 04.12.57, vol.206col.733). However, by 1962 reformers’ increased confidence was reflected in them no longer prefacing speeches with such remarks. Whilst some opponents continued to use hateful language this also decreased significantly after 1962.

By 1965, with Labour now in power, Arran accused the government’s position of being “Point taken; no action” (Lords, 12.05.65, vol.266col.75). This view was shared by others, including Stonham who argued that parliament must not avoid its responsibilities (Lords, 12.05.65, vol.266col.106). There was an awareness of the importance of maintaining pressure and momentum. Earl Listowel argued that the more Lords speaking in favour of reform “the bigger will be the impact of the debate on public opinion in the country and the more chance it will have to influence the attitude of the Government” (Lords, 12.05.65, vol.266col.161). A fortnight later the Bishop of Chichester expressed the growing twofold approach of reformers to public opinion; that it had shifted to being at least less opposed and that it was up to Parliament to lead not follow this change (Lords, 24.05.65, vol.266col.660).

However, at the third reading of his Bill, Arran made great play of two recent opinion polls that showed “the people of this country no longer regard homosexual practices by consenting adults in private as criminal” (Lords, 28.10.65, vol.269col.683). Both polls almost reversed one taken two years before finding that 63% favoured decriminalisation “on the lines of the Wolfenden proposals” (*The Times* 12.2.1966). Also in 1966 Schofield found that 47% of eighteen year olds agreed that “homosexuals should be severely punished” whilst 37% disagreed, (1966:61). Arran allied popular and elite support by detailing ecclesiastical backing.

When introducing his 1966 Bill, Berkeley also cited this alleged swing in public opinion. This debate was notable for beginning an increasingly partisan element to debates; including an acerbic party political speech by Sir Cyril Black which consistently attacked the Bill’s supporters for putting “buggery in front of steel” if time were taken from re-nationalisation to enable it (Commons, 11.02.66, vol.724col.833). Frank Tomney (Labour) added a class dimension by claiming that the proposers were not “horny-handed sons of toil” and objecting to their supposed “intellectual superiority and sophistication”. He had no doubt he was speaking for the common man and used the almost defunct terminology of inverts (Commons, 11.02.66, vol.724cols.840-3).

It is important to note that demographic changes within new Labour MPs evident in 1964 were even more pronounced in 1966: 41 of 72 new MPs in 1966 were under 40, almost 20% were teachers or lecturers matching manual workers, 64% in 1966 were university-educated more than double 1959’s 31%, 24% were also Oxbridge graduates, a rise from only 5% in 1959 (Dorey, 2006: 27-8). This meant almost half of the PLP had a degree and 44% came from the professions, making it a far more middle class party. Tomney was correct; these were educated and cosmopolitan products of post-war Britain schooled in the socialism of the lecture hall not the shop

floor and more concerned with social equality than the social conservatism of the working class.

In the next Lords' debate, Stonham concentrated on the remarkable progress rather than the delays. Despite it being nine years since Wolfenden reported, he found it "difficult almost to believe now that it is only just over a year since [Arran] put down a tentative Motion calling attention to the Wolfenden Report. Now many of us expect this Bill to reach the Statute Book in a matter of months" (Lords, 10.05.66, vol.274col.649). Strauss believed homosexual persecution had lessened due to "a remarkable change in public opinion, which has become more understanding and sympathetic" and he hoped that Parliament would follow this (Commons, 19.12.66, vol.738col.1098).

When Arran's Bill was read for the third time Dilhorne introduced an Amendment to address his concern over the extent of 'privacy' despite maintaining that the "best improvement to this Bill would be to cut its throat" (Lords, 16.06.66, vol.275col.148). The willingness of Dilhorne, and other implacable opponents, to amend Bills from 1966 onwards suggests they realised the war was lost but they hoped to win a few battles. However, at this point it seemed certain that this Bill would fail with no one taking up reform in the Common's ballot. The Archbishop of Canterbury called for the government to adopt it now that the Parliament's will was beyond doubt. Arran pointed out that deregulation had been the subject of 135 speeches and had only been forestalled by the general election. Lord Ferrier withdrew somewhat from his assertion that the continued debate of the subject was bringing the House into contempt but maintained that there was a "large body of opinion" that thought it had been overdone. Remarkably, Lord Brocket argued that, as only 90 odd peers had voted in favour out of over 1000 eligible, the Lords' opinion couldn't be judged.

Over four years after his first reform attempt had been dubbed “Wolfenden watered down” (Poulter, 1991: 54), Abse’s second attempt was a more ambitious and comprehensive attempt at reforming the “unjust and unenforceable”. It relied upon the shift in opinion polls that was frequently referenced; “there is little doubt that the public understand and, by a substantial majority, approve those recommendations” (Commons, 05.07.66, vol.731col.259). However, the implacable opponent Osborne wouldn’t concede popular support and widened his objections to include party political issues. He claimed there was no mandate for the Bill as no party had included it in their manifestos because they knew “that the ordinary people of Britain... would not have stomached this proposal”. Nevertheless, the Bill passed 244 to 100; 187 (of 364) Labour MPs allied to 46 (253) Conservatives and 11 (12) Liberals (Higgins 1996: 140). This shows how this issue divided along party lines, it may have been a conscience vote but consciences were significantly dictated by political philosophies.

At the second reading Sir Stephen McAdden made a bad tempered speech questioning the extraordinary government facilitation to “alleged” private member’s Bills; on homosexual reform and capital punishment (Commons, 19.12.66, vol.738col.1132). He argued they “should have the guts” to openly admit their “wholehearted support” for the measures and not let it “sneak through under the guise of a Private Member's Bill” when the divisions would clearly show party political voting (Commons, 19.12.66, vol.738cols.1132-33). This suggests opponents sought party political gain from defeat. Jenkins defended government actions by firstly stating that similar facilitation had been provided by the Conservative government with his Obscene Publications Bill (1959). Secondly that the subject was one best suited to a free conscience vote. Thirdly it was “only right” to provide government time after the “decisive shift in Parliamentary feeling” favouring reform demonstrated by two “decisive majorities” in each House on the Bill’s principles meaning that “the criminal law continued to apply to acts which Parliament no longer considered to be criminal”. Furthermore the “existence of largely

unenforceable legal provisions tends to bring the law into discredit” (Commons, 19.12.66, vol.738col.1141).

This was a significant change from May 1965 when discussing Lord Arran’s Bill when the previous Home Secretary, Sir Frank Soskice, stated that:

“it was not clear... that a majority of either the members of the House of Commons as a whole or the Governments own supporters were in favour of amending the law... although this need not preclude reconsideration of the matter in the light of any later developments in public opinion”  
(CAB/128/39:0044).

This shows that, like the Conservatives before them, the Labour government was sensitive to both party political and public opinion regarding decriminalisation, especially given that it had a wafer thin majority that dwindled to two by the 1966 election.

The following year Arran’s Bill passed through to its third reading which demonstrated that both Houses and the Labour party in Parliament supported decriminalisation. Furthermore, the general election returned 48 more Labour MPs and a comfortable working majority of 98 and Roy Jenkins took over as Home Secretary. These three factors made the situation much more favourable to reform.

On October 24<sup>th</sup> 1966 Jenkins presented a memorandum to Cabinet for the continuation of the neutral attitude to homosexual reform. However, “in view of the recent votes in both Houses”, he asked if some time could not “be provided to enable Mr. Abse's Bill to make progress” and this was agreed upon, even though some in Cabinet correctly worried that this “might be widely interpreted as indicating Government support and that it might prove difficult to resist pressure for further Government time” (CAB/128/41:0052). Jenkins’ argument included the party political observation that failure to provide time would bring them under

“considerable criticism, mainly from our own supporters” (24.10.66, HO/129/127). The Cabinet again discussed the matter in May (CAB/128/42:0030; HO/291/128) and concluded that allowing time for private members’ Bills relied upon this not impacting upon the government’s programme. However, the Cabinet did note that the subject had “already been thoroughly considered by both Houses” (CAB/128/42:0030).

In October Crossman supported Jenkins’ position in Cabinet, arguing that it was better from a party perspective to provide time to conclude reform rather than let it “drag on until nearer the next election” when it might damage Labour (Crossman, 1976: 97). Thus, despite an apparent shift in public opinion, the perception remained in the Labour party that homosexual reform would have a negative electoral impact. Six months later the Bill was again debated on government time (Commons, 23.06.67, vol.748cols.2115-200).

Opponents knew they faced defeat and this was reflected in more vitriolic attacks, the tone in the final Commons’ debate was significantly worse than in recent years. Peter Mahon was revolted by the Bill and sure all “normal people” would be “extremely worried” about legalising a perversion “inimical to the decency, dignity and moral fibre of the nation” regarding it as “moral cowardice”. Rear-Admiral Giles agreed that the “Queers’ Charter” would “produce such evil effects” and the “opinion of decent and reasonable people in Britain” was opposed to this “obnoxious Bill... and will react very violently to it”. Farr firmly blamed Labour, pointing out there were “Labour Whips at the doors of the Lobby” on a “petty and deplorable issue” which extended “the permissive society, which is very regrettable”. However, Lyon attacked this as a “base attempt” at party politics, pointing out that there were both Labour and Conservative tellers and whips supporting the Bill.



## 9.5 Conclusions

This chapter has shown that party politics was a significant concern to all and particularly to those not fully committed to reform. In identifying the cause of reform as the inherent contradictions and instabilities in the social treatment of homosexuality, Weeks belittles the work of “ardent reformers” (Weeks, 1977:156) and significantly underestimates the influence and the nature of the political process. All governments had explicitly rejected any government reform on homosexuality (CAB/128/32; CAB/128/39; CAB/128/41; CAB/128/42). Decriminalisation was instigated and achieved by the actions of influential individuals who contributed to, and took advantage of, the changing socio-political context. Likewise the contention that “Gross violations of privacy... began to alienate public opinion” (West, 1977: 156) is not reflected in debates. Public opinion was referenced frequently but not in connection to violations of privacy. Whereas high-profile prosecutions played an early part in homosexual regulations becoming more apparent and scrutinised, by the time Wolfenden reported such scandals had largely disappeared and were rarely referenced.

More important were individual actors who, because of various moral and philosophical motivations, were committed to reform, but who needed the support of others for whom it was not a primary concern. Reformers needed to allay MPs’ fears of alienating the public and consequent electoral impacts. Reform needed to be at least a zero sum game; this was best demonstrated by Crossman’s balancing potential losses of votes amongst working class men over homosexuality with gaining women voters over abortion reform.

Thus public opinion was a critical issue when seeking to convince and dissuade others. It was also a discursive tool which shifted over time for both reformers and

opponents. Undoubtedly some were genuinely concerned, for others it was a tool utilised to stymie or bolster claims. However, it is improbable a Conservative government faced with a reformist public or a Labour government with an opposed public would have found public opinion a sufficient reason to betray their instincts. As it was, the shift of power from Conservative to Labour coincided with apparent shifts in public opinion. After Wolfenden reported polls were less conclusive and public support was claimed by both sides. After 1965 opinion polls supporting Wolfenden affected the confidence of reformers and made it rarer for Parliamentarians to oppose reform citing public objection. But in the last Commons debate Mawby persisted in claiming that while the House had changed its opinion the country had not (Commons, 03.07.67, vol.749col.1512).

In the later debates some opponents shifted their objections to focus on Labour's responsibility for reform, which was warranted. When decriminalisation is charted party politics is often neglected, perhaps because reform attempts were through Private Member's Bills with free votes. However, Labour's election in 1964 and re-election with a significantly enhanced majority in 1966<sup>54</sup> were critical. New Labour MPs were of a class and education background that, allied to their political ideology, made them far more receptive to reform. In 1965 Earl Listowel asked "whether the Government could move from a position of neutrality to a position of benevolent neutrality" which indeed happened (HL, 12.05.65, vol.266cols.71-172). Without sympathetic Ministers persuading the Cabinet to facilitate the Bills' progress by allocating government time and draftsmen the SOA (1967) would not have passed. The SOA was Abse's not Labour's, but without Labour in power and supporters in key government positions it would have remained a Bill.

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<sup>54</sup> The Labour party majority increased from 4 before the 1966 election to 96.

## **Chapter Ten**

### **Conclusions**



My thesis was prompted by the inherent contradictions in discourses on homosexual regulation and deregulation that have not been sufficiently resolved in the existing literature or public and political discourses. It examined the available sources on the passing of the Labouchère Amendment and there is much that has been absent from, especially the most influential, works on the history of homosexual regulation and the discourses they inform. This has meant that interpretations of the history of homosexual regulation have suffered. Misunderstandings of the archaeology of laws regulating same sex acts have overestimated the change Labouchère introduced and consequently underestimated the significance of partial decriminalisation in 1967. Those histories that have critiqued these understandings have not identified “its rifts, its instability, its flaws” (Foucault, 1972:xxiv) but by-passed this event without accounting for it, concentrating on its lack of legal innovation and not its social and political impact. The genealogy I have provided for these transformations has also significantly altered their interpretation by placing homosexual changes within a wider punitive heteronormativity and shown distinct common factors and concerns.

My analysis of the existing historiography of the Labouchère Amendment destabilised from within the homophile interpretations of the pioneers in this area and, in contrast to the heterodoxy, suggested new explanations of its derivation, motivations and innovations. My analysis showed that the historical ‘facts’ of homosexual regulation have come to dominate homophile histories in the late twentieth century (see Chapter1), were inherited from pre-existing histories: only their discursive deployment within new truth regimes changed. These homophile truth regimes evolved during the process of partially decriminalising homo-sex in 1967. In turn, Part 3 critically assessed the role of various discourses within the political process of decriminalisation and subsequent academic interpretations of them, questioning the assumed causal factors and centrality of the Wolfenden Committee.

My interpretation of these near and distant historical ‘events’ casts new light upon the movement towards homosexual equality since 1967. This movement has not been linear but the Labour governments after 1997 transformed the legal rights of homosexuals and homosexuality’s social position has been likewise transformed. These reforms were shaped within an interpretation of the history of homosexual regulation that was radically changed during the decriminalisation process thirty years before. This homophile history was incorporated into narratives of homosexual regulation by, predominantly homosexual, authors who constructed a reality that continues to be accepted and accounted for by others; transforming how homosexual history was considered, what was sayable about it, and established the ‘truth’.

In constructing the past these homophile histories defined and limited the present and the future. This thesis has shown that, fifty years on, this historical interpretation is no longer plausible. In Chapter 4 I showed that for some time alternative explanations have existed based upon evidence that was largely available to the original authors of this historical accounting. However, although some authors have correctly identified the limited change to the legal status of homosexual acts the Amendment represented these contributions are largely marginalised in academic, public and LGBT discourses. This heterodoxy has failed to supplant the dominant position of the homophile narrative of homosexual regulation. Partly this is due to there being a distinct lack of focus on what Labouchère intended with his Amendment. Having discounted it as the radical change that was previously presumed they have failed to analyse it sufficiently. I have rectified this omission by analysing the available sources from Labouchère and others on his Amendment to try and explain why he acted as he did and what he sought to achieve. I have concluded that Labouchère’s Amendment can most accurately be described as a measure protecting male youths against homosexual acts.

Its iconic status partly derived from its assumed innovation of distinguishing homosexual acts from others. This helped transform the sodomite which “had been a temporary aberration” into the homosexual “who was now a species” (Foucault, 1976: 43). This otherness has been perpetuated by homophile discourses that have stressed the distinctiveness of state interventions in homosexual lives. This thesis questions these presumptions, I have shown that a distinction between homosexual and heterosexual sex was previously made in the Offences Against the Person Act (1861). However, this 1861 distinction was only one aspect of an Act principally dealing with non-sexual and hetero-sexual crimes. The clause outlawing assaults on males and attempted homosexual buggery was contained within the section entitled “Unnatural offences” which also dealt with bestiality, heterosexual buggery and defining carnal knowledge ((legislation.gov.uk/ukpga/Vict/24-25/100/enacted). So although nineteenth century legal changes defined homosexual crimes they did not institute a taxonomy fundamentally separating homosexual and hetero-sexual offences.

However, this reinforces the need to analyse measures regulating homosexuality in combination with a heterosexual genealogy in addition to an archaeology of homosexual regulation. Homosexual crimes were dealt with alongside heterosexual transgressions as part of a wider punitive heteronormative code. All too often heterosexual and homosexual histories do not acknowledge each other; they are two discourses on the same broad topic of sexuality talking past each other. The synthesis of these two histories is perhaps most apt when the legal separations between treatments of heterosexuality and homosexuality have largely been dismantled. Through integration this clash of histories has provided further insights and points of destabilisation of sexuality and sexual regulation.

My re-interpretation of the Labouchère Amendment, also shows how it removed the presumption of complicity of all parties in any homosexual act. I reached this

through establishing that at the time of Labouchère making his Amendment it was believed that males over fourteen were understood to be complicit and that the wider Act was intended to protect women and girls from sexual exploitation. In the light of this knowledge, and Labouchère's explicit statements at the time and during the Cleveland Street Scandal, his Amendment is no longer anomalous; it accords with and extends the protections being enacted regarding females and contributes to a wider punitive heteronormativity.

Labouchère's Amendment provided an alternate lesser charge to sodomy than the existing attempted sodomy which had been made punishable by up to ten, but not less than three, years' imprisonment by section 62 of the OPA (1861) ([legislation.gov.uk/ukpga/Vict/24-25/100/enacted](http://legislation.gov.uk/ukpga/Vict/24-25/100/enacted)). My archaeology in Chapter 4 destabilised the homophile criticisms of the Labouchère Amendment; that it outlawed previously legal acts short of sodomy and extended the law's purview into a previously free private realm. Both accusations are contradicted by the very same criminal records that homophile authors cite. Further, my research shows that the Amendment most likely derived from the French penal code and Labouchère's own claims that it was motivated by a desire to 'arm the guardians of public morality' against such abuses of youths as the Cleveland Street Scandal (Commons, 28.02.1890, vol.341 col.1535). Whatever the effects of the law's enforcement, the Amendment did nothing to extend the law, quite the contrary. So it is all the more remarkable that this legislation which reduced the punishment for homosexual offences has, in and of itself, been portrayed as homophobic even within the heterodoxy.

Authors writing on homosexual regulation's history often display a sub-textual moral objectivism; whereby anything associated with regulating homosexuality is intolerant or homophobic and all contrary impetus is labelled as liberal and accepting. Thus, for Bennion, the Lords' rejection of the Bishop of Norwich's

proposed extension of gross indecency to cover lesbian activity in 1921 represented “an unusual triumph of liberalism” (1991: 199). Yet the only contributions to the debate Bennion recounts were unequivocally illiberal objections. A former DPP asked “How many people does one suppose really are so vile, so unbalanced, so neurotic, so decadent, as to do this?” Whilst the Lord Chancellor, influenced by limitations on male homosociality that the Labouchère Amendment’s use had created, worried innocent women sharing a bedroom would be “tainted by ‘this noxious and horrible suspicion’” (Lords, 15.08.21 vol.43c573). These interventions were clearly not inspired by liberal viewpoints, but motivation, cause, and effect in these discourses are often confused with the effect being paramount in determining all characteristics. Hence Bennion also described Labouchère’s Amendment as “the most devastating blow struck against male homosexuals in modern times” (1991: 207).

The simplest explanation for these interpretations is that they were originally simply errors which subsequent authors accepted in good faith, especially when their research was not focused or seemingly reliant upon such historical groundings. Authors more interested in 20th century developments took for granted the historical template provided, reproducing it in condensed form without dwelling on its contradictions. However, early sources on homosexual regulation were distinctly selective when using sources on homosexual regulation and predisposed to using them to demonise Labouchère. This is especially true of Smith (1976); his use of Hopwood’s assertion that Labouchère sought to show the Bill to be ridiculous is used despite Labouchère’s rejecting this in the very next paragraph. Likewise, I have shown that many of Smith’s other sources were similarly selective and misleading. Most glaringly Grosskurth’s statements on the Amendment must be considered in the light of her fundamental misunderstanding of the timeline of events: that the Amendment was a reaction to the later Cleveland Street scandal. The other early influential source of Montgomery Hyde was written by a counsel of Wilde and an avowed opponent of his Amendment, yet it has been uncritically assessed. Yet, this

work also contains evidence that he ignored the implications of: that intercrural sex previously punishable by law despite his contrary assertions. This was not picked up by the homophile authors that cited his work in their extremely influential works (e.g. Weeks, 1977) and heterodox authors have not addressed the issue directly.

None of these authors, or any subsequently, have taken as their starting point that Labouchère's avowed intent for his Bill was to protect young males in similar ways to the wider Bill's intent concerning girls. That his clause "was specially designed to arm the police with powers to act in cases like [The Cleveland Street scandal]" (*Truth*, 5.12.1889: 1039). Similarly they have sought to show Labouchère as being a lone voice with even the DPP Lord Halsbury being against his Amendment in favouring "private persons – being full grown men to indulge their unnatural tastes - in private" (DPP/1/95/3; cited in Weeks, 1996: 49). This wilfully ignores Halsbury's reasoning being that punishments were too light under Labouchère's Amendment (DPP/1/95/3). The simplest explanation for this clause is that Labouchère believed that it would protect the young and took it from his understanding of the French penal code as he stated.

A more complex explanation for the homophile histories is that they were written according to the discursive conditions under which the homophile accounts emerged. Authors adhered and contributed to discourses serving to confirm, legitimate, and perpetuate power relations and truth creation/knowing powers of those involved and excluded from this increasingly influential, though not unchallenged, discourse. In doing so they marginalised the wealth of evidence contradicting their assumptions. From the original debates, through the biographies of Wilde and onto the histories of homosexual regulation, there is no source that does not treat Labouchère as either, disingenuous, a liar, a homophobe or entirely ignorant of the state of the law or his amendment's implications. They have singularly failed to show why the apparently "immobile soil" (Foucault, 1972: xxiv) supporting homosexual regulation once again

stirred beneath Victorian feet. Unable to accept and explain Labouchère's Amendment on his own utterances they have considered them as evidence of his own confusion.

These homophile discourses fundamentally questioned Victorian morality that seemingly underpinned sexual regulation. The late-modern critical eye saw in that era the roots of modern systems of constraint and repression they sought to deconstruct and undermine. When these homophile authors were writing, the legitimacy of long established social regulations was being aggressively questioned by claims of oppression by minority groups. The homophile discourse was situated alongside other liberationist claims for the granting or restoration of denied civil rights. Thus they were connected to racial, religious, and gender claims for equal treatment and recognition before the law. Whereas these started as oppositional discourses, by the late 1960s they had achieved legitimacy for their moral positions and claimsmaking. It was no longer sufficient to conceptualise these as oppositional discourses countering those of dominant power elites. In many states, parties, and governments they had become the dominant rationales for social action. As was argued in Chapter 9 this was significant in the crucial Labour support for decriminalisation.

This discourse's alternative moral positions on social/sexual issues gained pre-eminence, firmly re-positioning homosexual regulations, typified by the Labouchère Amendment, as oppressive and unwarranted attacks on homosexuals' civil rights. This largely supplanted the officially sanctioned legal discourse underpinning such regulations as measures preventing social corruption. Homosexuality was still a contested social problem but this fundamentally re-structured the parameters of debate and discussion from protection (particularly of the innocent young) to more generalised notions of equality. This was a significant theme within decriminalisation debates and, as shown in Chapter 8, was considerably influenced

by the early sociological works of Westwood. The moral freedom to debate these issues and take a reformist position was significantly enabled by the Church advocating Christian compassion for homosexuals and decriminalisation which is marginalised in most accounts. Alternative homophile 'truths' had emerged competing with and refuting previous attitudes towards homosexuals.

It is in this context that the history of homosexual regulation was written centring on Labouchère's Amendment, which resonated with authors in ways that sodomy laws didn't. Primarily because it remained the primary judicial interference in the lives of the gay men writing this history; it was significantly taken as innovatively treating homosexuals as a distinct group which sodomy laws didn't. The act of gross indecency applied only to males having sexual relations with other males and this was taken as identifying homosexuals as a distinct 'species' not merely men performing certain acts. Although the 1861 Offences Against the Persons Act had extended the crime of indecent assault to include those upon males, indecent assault was applicable to either gender where gross indecency wasn't; it was specifically male on male sexual activity not requiring any force or coercion against the will of the other participant. This corresponded to homosexual rights campaigners' claims as to the distinctiveness of homosexuality and thereby their claims of rights and protections from and through the law.

A second important characteristic of Labouchère's Amendment is that it placed the comprehensive regulation of homosexuality in the modern era rather than explaining this through the archaic religious regulation underpinning the sodomy laws. This led many to think that rights were removed in the modern era, rather than recognising that these rights had never been previously bestowed upon homosexuals. There are major legal, moral and psychological differences between the two positions, especially when, according to this homophile discourse, the 1967 SOA essentially restored the pre-1885 legal status quo. However, the Wolfenden Committee

appreciated that “to reverse a long-standing tradition [like the Labouchère Amendment] is a serious matter and not to be suggested lightly” and “would be open to criticisms which might not be made in relation to the omission, from a code of laws being formulated de novo” (26.9.57, HO/291/123). In 1958 this was adapted in Butler’s speech as asking “If we were drawing up a code for the first colonists of the moon, should we make this kind of offence a criminal offence? I am in some doubt whether we might or might not” (Commons, 26.11.58, vol.596col.369). Boothby repeatedly claimed that the SOA’s purpose was to remove the Labouchère Amendment (e.g. Lords, 13.07.67, vol.284cols.1302-3). Whilst this oversimplification was rejected by some parliamentarians (e.g. Lords, 13.07.67, vol.284col.1311; Commons, 29.06.60, vol.625col.1491) this was mainly regarding the legalisation of sodomy and homosexual regulation having been extended since, they did not contradict Labouchère’s intrusion into private realms or extension of prohibited acts. Chapter 1 showed that this still pre-dominates in academic literature and LGBT information sites. These nuances have been marginalised amid further claims by LGBT groups made on the basis that having removed homophobic regulations of a retrogressive eighty-year period it was time to make real progress.

Through providing a detailed genealogy of the Labouchère Amendment, my thesis has also shown that it was not inherently homophobic; however much its implementation came to be. Rather it should be considered part of a nineteenth-century heteronormative regulatory process entailing state control of a tightly delineated legitimate (hetero)sexuality. This defined as illegitimate those sexualities inconsistent with monogamous married procreative relationships, including heterosexualities. Indeed, the nineteenth century saw a wide ranging raft of statutes regulating heterosexual relations. Chapter 5 demonstrated that these regulations were in response to new discourses on sexual morality, which they contributed to and institutionalised. These, largely Victorian, regulations certainly went beyond any harm principle, they contributed to and institutionalised within statutory law a punitively heteronormative system. The Labouchère Amendment’s primary

contribution to homosexual regulation was not its specific provisions. Its impact relied upon its place and time; its context transformed a minor Amendment into an influential tool of state control of 'deviant' sexuality and combined with events to radically transform discourses on homosexuality. The use of the charge of gross indecency in the extremely high profile Cleveland Street Scandal and Wilde prosecution cemented the Labouchère Amendment's place in the history of homosexuality and in the minds of police, courts and politicians as a primary tool for controlling homosexuality.

Likewise the decriminalisation of homosexual acts in 1967 must be understood within the context of legal and social changes affecting heterosexual relations. Part three of this thesis provided a genealogy of homosexual deregulation demonstrating that this period saw a radical transformation of the heteronormative structures regulating heterosexuality and the discussion of sexual topics. This thesis has shown that the history of homosexual regulation is disproportionately centred on the imagined binary opposition of criminalisation and decriminalisation as represented by the events of the Labouchère Amendment and the SOA (1967). The former has been insufficiently researched and misconstrued and the latter simplistically portrayed as resulting from the Wolfenden process. My contextualisation of decriminalisation provides an expanded grid of specification that gives greater emphasis to changes within the wider sexual realm.

This allows for a greater understanding of how the political change of decriminalisation was achieved. By encompassing heterosexual regulation my thesis takes more account of the effects of a wider re-evaluation by the political elites of the state's role in moral enforcement. The homophile interpretation of decriminalisation gives primacy to certain characteristics that are seemingly specific to the problems identified in homosexuality in the 1950s; the disrepute of the law given prominence by high profile prosecutions and sensationalist press accounts

resulting in public pressure to reform, this prompted the Wolfenden enquiry which recommended partial decriminalisation which was accepted by parliament a decade later. Given that this widely accepted narrative, subsequent reform campaigns are likely to have been influenced by members' understandings of how previous changes succeeded. Therefore my research can potentially shed new light on the subsequent successes and failures of homosexual (de)regulation.

Crucial to this re-evaluation is the centrality of party political influence on the decriminalization process. In this it shared the concerns of the political elites over the effect that other social reforms would have on their party political support. This was a consistent thread in Cabinet discussions and one that has been side-lined or entirely ignored in other studies. Decriminalisation, as I have shown with other social reforms in the 1960s, could only have occurred with the active facilitation of the 1966-1970 Labour government. They were fundamentally the result of a politically determined process reliant on a cadre of committed reformers enabled by a government largely sympathetic to their aims.

In short, this research has deconstructed the accepted homophile history and constructed an alternative history of homosexual regulation; I contend that understandings of this issue matter today. The homosexual history constructed since the 1950s partly relied upon and contributed to group self-identification and state and social recognition of homosexuality. Historical research should discern how these “particular ways of understanding, controlling and specifying sexuality” were generated (Foucault in, Cocks & Houlbrook, 2006: 9). New conceptualisations and regulations governing homosexuality have been created in the last decade, these occurred within historical understandings of the history of such regulations. The history of sexual regulation/deregulation is intrinsic to how homosexuals became recognised as objects and subjects.

Given that the recent major impetus of legal treatments of homosexuality is to remove measures disadvantaging homosexuals, what does this mean for homosexual identity? Indeed in this late/post-modern society how relevant is it to talk of a homosexual identity or identities? What relevance is self or social identification of homosexuality to the lives of new generations of men who have sex with other men? Is it still a meaningful and primary identification or in this post-feminist and post-racial discursive world do we also need to talk in terms of post-sexuality? To some extent this has already been imagined in Queer Theory and Post-Queer Theory may open up such directions even more. If sexuality has a living history (Foucault, 1976) the understanding of this is intrinsic to appreciating how sexuality is developing and the discursive creation, and perhaps destruction, of the homosexual is implicated in this.

An obvious question is why this research is being conducted now and not before? To some extent the changes of the last two decades have brought into focus the supposed criminalisation of all homosexual acts in 1885 and their partial decriminalisation in 1967. My original research interest was on the introduction of hate crime legislation to include aggravation on the grounds of sexual orientation. This seemed to open up an interesting transformation of a social problem; from statutory persecution to protection in a forty year period. This could not be understood without an understanding of the process of criminalisation and decriminalisation which was more than sufficient a task in itself, as such my thesis provides a foundation for understandings of present transformations. Why such research has not been conducted before is perhaps best answered by others. However, my contention is that, as with any other group, homosexual identity is intrinsically linked to its history. Other authors have questioned the accepted history but they have not sought or succeeded in destabilising it. If they had done so this may have undermined a key foundation of British homosexual identity, present conditions, I would argue, no longer mean that this would threaten homosexual identity or group tasks and objectives.

Despite this in British parliamentary debates and committees in the past decade the Labouchère Amendment continues to be cited as a fundamental revision. Stonewall submitted a memorandum to Select Committee on Home Affairs stating that “the Labouchere amendment... labelled sex acts between men as "gross indecency" and outlawed all such acts” (Appendix 28, February 2003). In September 2003, in discussing the Sexual Offences Bill Mr Bryant argued that “The major change that resulted in the current version of the clause happened when the Criminal Law Amendment Act 1885... because for the first time British law contained the phrase: “Any male person who, in public or private” (Lords, Standing Committee B, 18.9.2003, 293-4).

Additionally this thesis is relevant today when we consider the enduring ramifications of English homosexual regulations elsewhere in the world. The Sexual Offences Acts (1967) did not decriminalise homosexual acts in Britain; it was not until 1980 and 1982 that Scotland and Northern Ireland followed England and Wales. Even this did not end the legacy of Labouchère’s Amendment; gross indecency was not removed as an offence in the UK until the SOA (2003). A direct legacy of Labouchère’s Amendment endured in Éire until it was found to contravene the European Convention on Human Rights in 1993. Remarkably, although Senator Norris<sup>55</sup> stated in the Seanad Éireann that “The Offences Against The Person Act, 1861, was a liberalising statute that mitigated the penalty which up to that had been death by hanging” (Vol. 127 No. 1, 73), he identified Labouchère’s Amendment as “a much more serious development... This was a particularly nasty piece of legislation because what it criminalised was any form of indecency, gross indecency between males” and concluded that it was “a prudish, nasty, villainous piece of English legislation” (Seanad Éireann, Vol. 127 No. 1, 75-6). It had long been understood in Eire that it was “the unfortunate Labouchere amendment which led to the homosexual laws” (Seanad Éireann, 16.12.1976, Vol.85 No. 12, 1151). Gross

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<sup>55</sup> A founding member of Ireland’s Campaign for Homosexual Law Reform.

indecenty still remains an offence, under the Criminal Law (Sexual Offences) Act, 1993, when committed on another male who is mentally impaired; the maximum penalty remains two years imprisonment

The Labouchère Amendment's influence was not limited to the British Isles; it endures thanks to the colonial exportation of English statutory laws. Singapore rejected a 2007 attempt to repeal Section 377A of their penal code which prohibited 'gross indecenty' between men (Oswin, 2010: 128). This law also exists in other South Asian former colonies.

The exportation of the English template for homosexual regulation derives in part from the Lord Chancellor's Office requesting a criminal code be prepared by James Fitzjames Stephen, whose debate with Mill was discussed in Chapter 5. Although this failed to pass Parliament in 1878, 1879 and 1880, Stephen's draft was influential in the colonies establishing their criminal codes (Sander, 2009: 10). It was adopted in Canada and formed the basis for the Queensland code of 1899, Section 211 of this almost exactly replicated the Labouchère Amendment and this code was "the model for the criminal law of most of the British African territories" (Moore, 2007: 44; Morris, 2007: 138). The recent furore over Uganda's attempt to introduce the death penalty for homosexual acts would extend the current provision stipulating that "Any person who, whether in public or in private, commits any act of gross indecenty with another person or procures another person to commit any act of gross indecenty... whether in public or in private, commits an offence and is liable to imprisonment for seven years" (Uganda Penal Code). The Kenyan code differs only in specifying males and a maximum term of five years (Kenya Penal Code).

Of the independent former British colonies in Africa, the Caribbean and Asia only in Iraq and South Africa are male homosexual acts legal. This significantly relies upon

Labouchère's legacy. Thus although this thesis has been about British history it is also about the present situation governing homosexual relations for hundreds of millions of people.



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## Appendix 1

### Chronology

- 1533 Henry VIII enacts first statute prohibiting buggery.
- 1576 & 1610 Poor Law Acts allow incarceration of ‘every lewd Woman’ bearing a chargeable bastard’ for a year.
- 1726 Margaret Clap's molly house raided; three men were hanged, two men and two women pilloried.
- 1753 Hardwicke's Marriage Act rationalised marriage laws.
- 1781 Precedent establishes requirement to prove emission in buggery cases
- 1803 Ellenborough's Act introduced death penalty for abortion after the quickening
- 1811 Execution of an Ensign and drummer boy, patrons of the Vere Street brothel
- 1816 Execution of four crewmembers of the Africaine
- 1826 Sir Robert Peel's major reforms of the English criminal law includes removing the 1781 precedent.
- 1833 William Attrell convicted of highway robbery accompanied by extortion through the “threat of preferring an infamous charge”.
- 1834 Bastardy Clauses of the New Poor Law abolish the possibility of unmarried mothers receiving pension from the fathers.
- 1857 The Matrimonial Causes Act introduced divorce without Acts of Parliament.

- 1857 Lord Campbell's Obscene Publications Act became first statutory prohibition of obscene publications.
- 1861 Offences Against the Person Act removes death penalty for sodomy and abortion. Also it distinguished between buggery and bestiality for the first time and specifically defined attempted buggery and indecent assault with another male.
- 1864 Contagious Diseases Act introduced, extended in 1866 and 1869, authorities were empowered to detain and examine women suspected of being 'common prostitutes'. Acts were repealed in 1886.
- 1870 Boulton and Park arrested and tried for the offence of 'outraging public decency'.
- 1877 Annie Besant and Charles Bradlaugh tried for criminal libel after reprinting *Fruits of Philosophy*, an American birth control pamphlet.
- 1880 Consent of Young Persons Act deprives adults of the defence of consent on charges of indecently assaulting children under the age of 13
- 1884 Dublin Castle affair.
- 1885 Criminal Law Amendment Act includes a late amendment prohibiting 'gross indecency' between males.
- 1889 Cleveland Street Affair
- 1895 Oscar Wilde convicted of gross indecency.
- 1898 Vagrancy Act, intended to "prevent males soliciting in a public place for an immoral purpose" subsequently used against homosexual importuning
- 1921 Proposed extension of gross indecency to cover lesbian activity rejected.

- 1928 Publishers of Radclyffe Hall's *Well of Loneliness* successfully prosecuted under 1857 OPA.
- 1929 Infant Life (Preservation) Act relaxed laws to allow abortions before 28 weeks if necessary to preserve the lives of women on physical grounds. In 1938 precedent is set that a doctor had the duty to perform an abortion in certain circumstances and included psychological factors.
- 1951 Conservative party elected with a majority of 17
- 1954 Wolfenden Departmental Commission on Homosexual Offences and Prostitution establishing
- 1955 Conservatives re-elected with a majority of 60
- 1956 Sexual Offences Act consolidated existing disparate laws on prostitution.
- 1957 September, Wolfenden Report published.
- 1957 December, Lords' debate on Wolfenden's recommendations
- 1958 November, first Commons debate on Wolfenden.
- 1959 Street Offences Act enacts Wolfenden's prostitution recommendations.
- 1959 OPA reformed to allow publications containing "literary or scientific merit" that might otherwise be deemed obscene.
- 1959 Conservatives re-elected with increased majority of 100
- 1960 Penguin Books unsuccessfully prosecuted for publishing D. H. Lawrence's *Lady Chatterley's Lover*, now deemed permissible under the OPA (1959).

- 1960 June, second Commons debate on Wolfenden. 1960 Kenneth Robinson won the private member's ballot and his Bill called for "early" action on Wolfenden's homosexual recommendations.
- 1962 Abse introduces the first Homosexual reform Bill based on Wolfenden's recommendation.
- 1964 Labour party elected with a majority of 4
- 1965 Arran introduces a homosexual reform Bill which passes through to its third reading in October.
- 1965 Berkeley introduced his Bill in the Commons.
- 1966 February: Berkeley's Bill becomes the first to pass in the Commons but fails when parliament is prorogued.
- 1966 March, Labour re-elected with a majority of 98.
- 1966 July, Abse introduces his second Bill.
- 1967 Abortion Act legalises abortions up to 28 weeks gestation
- 1967 Abse's Bill becomes the Sexual Offences Act (1967) which decriminalises 'private' homosexual sex.
- 1969 Divorce Law Reform Act introduces no fault divorces.