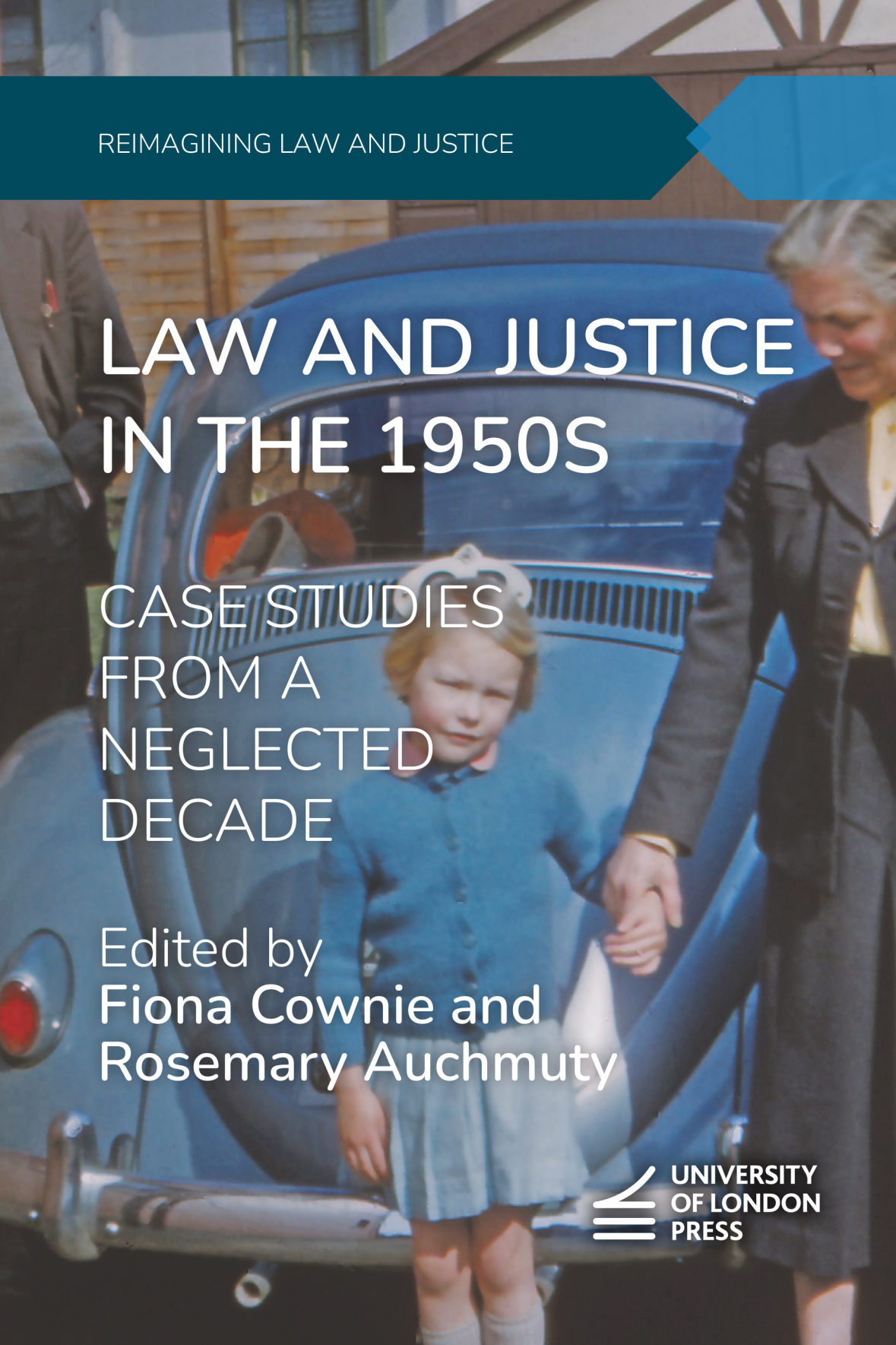




REIMAGINING LAW AND JUSTICE

LAW AND JUSTICE IN THE 1950S

CASE STUDIES
FROM A
NEGLECTED
DECADE

Edited by
Fiona Cownie and
Rosemary Auchmuty



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Law and Justice in the 1950s

Reimagining Law and Justice

Today, societies face urgent questions about the meaning of justice, whether that takes the form of racial, sexual, economic, environmental, reparative, intergenerational, interspecies or social justice. The *Reimagining Law and Justice* series, published in association with The Institute of Advanced Legal Studies, is an exciting interdisciplinary and open access intervention in these key issues, challenges and debates in legal studies. The books in the series focus squarely on reimagining that age-old search for an understanding of the relationship between law and justice through interrogating the crucial challenges of our times.

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(January, 2023)

ISSN 3049-5113 (Print)

ISSN 3049-5121 (Online)



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Available to purchase in print or download for
free at <https://uolpress.co.uk>



First published 2026 by
University of London Press
Senate House, Malet St, London WC1E 7HU

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A CIP catalogue record for this book is
available from The British Library.

ISBN 978-1-911507-53-6 (hardback)
ISBN 978-1-911507-54-3 (paperback)
ISBN 978-1-911507-57-4 (.epub)
ISBN 978-1-911507-56-7 (.pdf)
ISBN 978-1-911507-55-0 (.html)

DOI <https://doi.org/10.63674/yqyj7969>

Cover photo shows Fiona Cownie and family friend Florence
Terrett outside the Cownie family home in Ripon, Yorkshire, 1959.
Photo credit: Joseph Terrett.

Cover designed by Hayley Warnham for University of London Press.
Book design by Nigel French.
Text set by Westchester Publishing Services UK
in Meta Serif and Meta, designed by Erik Spiekermann.

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Introduction

Rosemary Auchmuty and Fiona Cownie

The 1950s have a poor reputation in the legal history of England and Wales. They are remembered as a restrictive and conservative era, with little legal development and no real progress. In the 1950s Britain was still recovering from the Second World War – rationing did not end until 1954 – and social policy was to return the country to pre-war ‘normality’, which meant men in paid employment and women back in the home.¹ Reforms expected from the Royal Commission on Marriage and Divorce² and the Wolfenden Committee on Homosexual Offences and Prostitution³ did not materialise in that decade. In contrast to the 1960s, with its ‘sexual revolution’ (the pill, decriminalisation of homosexuality and abortion law reform) as well as, finally, divorce law reform, and the 1970s with the Women’s Liberation Movement, the 1950s seem tame, even regressive. Certainly that is how they appeared to those of us born in the 1950s, who as teenagers and young adults enjoyed the exciting times that followed.

Yet as legal historians we both knew there must be more to the 1950s than this. Hindsight casts the past in a new light, as we see it through the eyes of the present (whenever that is), but for people at the time it probably felt very different. The war had ended, the National Health Service and the welfare state had arrived, there was almost full employment; wages were rising and family allowances had been introduced.⁴ Perhaps women, repeatedly assured that they were ‘equal now’, actually felt more equal, or at least more appreciated and less exploited than previously. Life seemed to be getting better across the board: education, health, standards of living, access to new media like radio and television, exciting popular culture from the US and at home, the end of rationing and the introduction of new foods and cuisines.⁵

Many of these improvements and reforms were, of course, implemented through legislation, much of it well documented.⁶ But we were

interested in discovering stories of 1950s life that had not already been recorded in the standard legal histories. So in 2022 we put out an open call for contributions to a one-day online conference on ‘The Neglected Decade: Legal Issues of the 1950s’. With no fixed idea of what we would get, we were delighted to be offered a wide range of papers.

The collection

This collection is drawn from that conference. It does not claim to be a comprehensive or even representative survey of the legal history of the decade. From the presentations at that conference we selected for this publication nine that presented a variety of topic, law and approach. They draw on a range of legal specialisms: legal education, company law, public law, family law, environmental law, criminal law and property law.

In terms of topic, we have a hotel takeover battle, London smog (truly emblematic of this decade) and railway modernisation plans leading up to the Beeching railway cuts (another powerful association). We have different aspects of legal education – radio programmes on law, the definition of a university, a modernising critique of the undergraduate curriculum by a famous scholar. And we have a novel approach in the discussions of what were effectively non-landmarks: the divorce law reform that never happened, the aspects of the Wolfenden Report that no one remembers, and a woman’s successful battle to keep her home, using law that was later changed to stop this happening again.

We did not prescribe a particular methodological approach, so contributors chose their own. Some selected a legal issue or event from the 1950s and, having examined it, brought developments up to the present, or compared the 1950s with the current legal situation. This is the most traditional approach, the tale of ‘then and now’ or ‘then to now’, focused mainly on legal change. Other chapters are socio-legal in character. Their authors locate their legal topic in the social history of the period, drawing on a range of historical as well as legal sources to fill out the picture of ‘how it was then’.

Themes

While some chapters are self-contained, dealing with the legal aspects of events and processes that have gone down in history – or not (Farran on the London smog, Jones on railways modernisation, Wheeler on the

attempted takeover of the Savoy) – others reveal common themes in their concern with education, women and the home.

Education

It is appropriate in a book written by law teachers that three chapters (Cownie, Lee, Parry) deal with education. The Education Act 1944 reorganised secondary education in England and Wales, raising the leaving age to fifteen and creating a tripartite system of schools intended to suit different types of students. Though a Tory measure, it was implemented by the Labour Government's first woman Education Minister, Ellen Wilkinson. It was especially significant for girls, whose education had always been seen as less important than boys'.⁷ The fact that secondary education was free enabled girls to stay on at grammar schools – indeed, the Act made it unlawful for parents to make their daughters leave school early – and thus to go to university, opening the professions to working-class girls for the first time. The Act also abolished the 'marriage bar' that had allowed education authorities to dismiss women teachers on marriage. Equal pay, however, though recommended and much discussed in the 1940s and 1950s, was not offered to teachers until 1961.

In contrast, the higher education sector remained tiny. It is hard for us to imagine today how few institutions of higher education existed and how few people went to university. With only one university created between the wars (Reading, 1926), post-war concerns about increasing social justice and widening educational opportunity contributed to pressures for expansion and, as the horrors of Nazi domestic policy became clear in 1945, arguments that 'the universities had a duty to inoculate future political leaders against the dangers of unbridled scientism' gathered support.⁸

During the war, British university scientists had made significant contributions to the war effort, and academics had also occupied senior positions in Whitehall. This meant that by the end of the war 'The academic community commanded both respect and deference'.⁹ There was a positive attitude towards experts, and a belief that intellectual endeavour could overcome the problems of industry.¹⁰ A series of official reports published in the 1940s put pressure on the government to expand higher education. These included the Percy Report on Higher Technological Education, the Barlow Report on Scientific Manpower, the Goodenough Report on Medical Education, the Scarborough Report on Oriental, Slavonic, East European and African Studies, and the Clapham Report on Social and Economic Research.¹¹ In consequence, five further former university colleges were upgraded to full university status before 1960: Nottingham (1948), Southampton (1952), Hull (1954), Exeter (1955) and

Leicester (1957), bringing the total to twenty-two at the end of the decade. The 1960s saw a much greater expansion and the number of universities more than doubled.¹²

Likewise, the number of people entering university grew rapidly in the post-war years. After an inevitable drop during the war,¹³ by 1950 there were 64,000 full-time students, of whom almost half were studying arts or social sciences.¹⁴ This growth in numbers was fuelled by a number of factors. The government introduced the Further Education and Training Scheme to allow demobilised members of the armed forces to go to university, paying their fees and providing a grant for living expenses. Between 1945 and 1950, 83,000 awards were made, of which 43,000 were actually taken up at universities.¹⁵ Eighteen-year-olds who qualified for a university place could apply for a grant from their Local Education Authority (LEA). By 1950, LEAs were awarding 10,000 grants annually, but this overall figure disguises the fact that there were differing practices around the country, with some LEAs refusing to pay the maximum annual grant.¹⁶

Only a tiny fraction of awards made under the Further Education and Training Scheme were given to women. At the same time, formal and informal quotas operated in many institutions to restrict the number of women admitted to the university or to certain courses. Oxford, for example, did not remove its quota until 1957.¹⁷ There was also considerable employer resistance to the appointment of women in business and industry, so that the vast majority of the 5 per cent of female graduates in relevant fields were deflected into other occupations. The Civil Service was a career route chosen by many scientifically minded women, for whom equal pay was phased in between 1955 and 1961; other options were limited. Overall, women remained outnumbered in a ratio of three to one at English universities in the immediate post-war years.¹⁸

The post-war growth in student numbers experienced by the higher education sector as a whole was reflected in university law schools: Wilson, in the survey he undertook for the Society of Public Teachers of Law (SPTL) (now the Society of Legal Scholars), reported that in 1938 there were 1,515 full-time undergraduate law students in England and Wales, and a further 490 in Scotland; by 1953 there were 2,440 in England and Wales and a further 556 in Scotland.¹⁹ Law remained, however, a minority choice for undergraduates, strikingly so in comparison to its current popularity, and teaching was mostly delivered by practising lawyers rather than professional academics, taking a practical rather than critical approach to the subject. Aspiring solicitors and barristers did not have to have a university degree and many lawyers (and even judges) did not. Fewer than half of all solicitors had degrees in the 1950s,²⁰ though three-quarters

of barristers had, though by no means always in law, and usually from Oxford, Cambridge or London.²¹

This would perhaps explain why Wilson noted no comparable increase in postgraduate student numbers. In the same period, they rose from 100 in England and Wales and only one in Scotland, to 256 in England and Wales and a further 12 in Scotland.²² The increase in postgraduate numbers was concentrated in a small number of universities, and the students mainly came from overseas.²³

Significantly, the SPTL survey of legal education did not mention anything about the position of women in law schools, either as students or as staff. There were very few female law students in the 1950s and the number of female law teachers could be counted on the fingers of one hand. The culture of law schools in the post-war years remained stubbornly masculine, reflected in the reluctance of the SPTL to extend membership to women (they could not join the Society until 1950).²⁴ Even in the 1969–70 academic year, twenty-five years after the end of the War, women constituted only 9.5 per cent of all full-time legal academics in UK law schools, and ten out of the thirty-one law schools in the UK had no female members on the academic staff.²⁵

Women and home

Two chapters (Auchmuty, Tribe) in this collection deal with women and the home, an almost inseparable conjunction of words in this decade. For women, the 1950s were a paradoxical era. Marriage and family were considered to be the primary goal and indeed *raison d'être* of every woman's life, whatever else she did with it, though actually the UK marriage rate started declining in that decade and has been declining ever since.²⁶ Yet women's participation in paid employment, expected to drop after the war ended, did not in fact do so. An expanding economy required a larger workforce than English men alone could supply. Governments turned first to the former colonies, recruiting the 'Windrush generation' of West Indian men to work on the railways and women in the hospitals and schools from 1948 onwards.²⁷ But still more workers were needed, and who better than married women who could be allocated part-time and low-status roles in jobs that did not compete directly with men? As long as women also carried out their designated duties as homemakers and carers, husbands could not really object to their wives undertaking paid work (though many did, fearing loss of status and control). In many families it was the wife's income that paid, in an era of increasing consumerism, for the luxuries that were fast becoming necessities, like the washing machine or holidays, or even facilitated

the purchase of the home itself. Through both ideological pressure (for example, in the advertisements for homes and consumer goods) and the practical reality (they did all the homemaking work), home was central to women's lives in the 1950s.²⁸

But home life was represented, in that decade, by extremes of comfort. The vision of the post-war homemaker presented in the literature and case law is irredeemably middle class and aspirational, and the chapters in this collection dealing with women's property issues on divorce and desertion reflect that sector in society where property was owned. But unimaginable poverty remained: in 1951, a survey found, 6 per cent of homes had no running water, 15 per cent no toilet, and half no vacuum cleaner.²⁹ Former Home Secretary Alan Johnson, born in 1950, grew up in a London slum with no electricity, no bathroom, no toilet, no heating, no blankets, not even a front door.³⁰ Less deprived, but still unfortunate, were the many young couples forced to live with their parents or in-laws as they could not afford to rent, and others who could not marry at all because they had nowhere to live.

The post-war Labour government, faced with, among other problems, a severe housing shortage, set itself the goal of providing every family with a home. By the end of its time in office (1951), it had built a million homes, 89 per cent of which were provided to local authorities with government grants.³¹ From 1948, however, 20 per cent of the government's housing budget was given to private developers to build homes for sale.³² Even so, there remained a significant shortage, especially given that with increased divorce rates homes were needed for two households where one had served before. Following the New Towns Act 1946, new towns such as Welwyn Garden City grew up with housing initially directed mainly at the rental market but increasingly, as demand for home ownership increased, for sale.

The focus shifted under the Tories, who were in power from 1951 onwards. They made cuts to funds for public housing, relaxed building regulations, and diverted budgets to slum clearance and the construction of homes for sale.³³ In the New Towns, Corporations were required to provide 50 per cent rental properties and 50 per cent for owner-occupation.³⁴ By the end of the 1950s the amount of building for public housing had been overtaken by that of private developments, mostly of freehold houses.³⁵ At the same time, developers and even building societies were buying up rent-controlled blocks of flats and selling them on to tenants who could afford them.³⁶ In the absence of anti-discrimination legislation, Black immigrants often found it impossible to rent accommodation so banded together to buy properties in less desirable (and therefore cheaper) districts – if they could find a white vendor to sell to them.³⁷

Throughout the 1950s, then, home ownership was encouraged and advertising particularly targeted the women whose domain the home would be, with an emphasis on kitchens and ‘labour-saving’ devices.

The contradiction between the ideology of women’s place and the reality, that it was men who owned the property, reflected a wider contradiction between society and law that is also played out in the third chapter concerned with women, Derry’s exploration of the aspects of the Wolfenden Report dealing with women. Just as there were slums, as well as fought-over owner-occupied houses, so there were lesbians and prostitutes who did not conform to the ideal of married, domestic womanhood, and their existence is also revealing of the struggles of law (not to speak of the individuals themselves) to deal with contradictory aspects of society.

Doing legal history

For those who wish to pursue legal history in the 1950s, or indeed any period, there are two ways to proceed. The first, the one that comes most naturally to the legal scholar, is to note a legal development of interest – perhaps a case or statute, or an article you come across in a legal journal – and explore its background and context through wider reading not simply in legal sources but also in historical ones. Your research would include primary sources (those written at the time) but you must not forget the secondary histories, a common omission among many legal scholars who have little idea of the breadth of scholarship that exists outside their own area of law. These secondary sources (see the Literature Review section for suggestions) will give you an overview of what was going on and help you to set your topic in context. Researchers into a legal development that took place in the past must understand the features of the period in order to understand the legal context and avoid anachronism and misunderstanding.

A second approach is to start with those very secondary sources and see what emerges as of legal significance in them. Social historians may have written about the events and features covered by the chapters in our book but their accounts may take a different perspective or lack the knowledge of law and legal method our legally trained authors bring to the exercise. You may notice that the historian has not quite got the law right, or skates over an aspect you think is important. This means that the legal aspect may be new to social history as well as the social history aspect being new to legal history.

Literature review

There are several general social histories of 1950s Britain. The older books look back from a shorter perspective, so may highlight different things from those detailed in a contemporary study. Useful older surveys include John Montgomery, *The Fifties* (London: George Allen & Unwin, 1965); Christopher Booker, *The Neophiliacs: A Study of the Revolution in English Life of the Fifties and Sixties* (London: Collins, 1969); and Peter Lewis, *The Fifties: Portrait of a Period* (London: Heinemann, 1978). There are also many photographic surveys – for example, Nigel Perryman, *Fifties Britain: Post-war Life* (London: Frances Frith Collection, 2002) – and these are also useful: is there anything quite so evocative as the photographs of a given period? The definitive modern study is that of David Kynaston in *Austerity Britain 1945–51*, *Family Britain 1951–57*, and *Modernity Britain 1957–62* (London: Bloomsbury, 2007–14), books that really tell it as it was, almost day by day, as riveting as any novel, and whose titles aptly summarise the dominant tone of each period.

It is worth noting, however, that *women* are often inadequately treated in the general histories: in a review of Peter Vansittart's *In the Fifties* (London: John Murray, 1985), Elizabeth Young wrote that 'his coupling of women with children in this brave new world is revealing. . . . [O]ne could assume from this book that women at the time were on a par with cats – attractive, silent, unsuited to public life.'³⁸ Better to read Elizabeth Wilson, *Only Halfway to Paradise: Women in Postwar Britain, 1945–68* (London: Tavistock, 1980) and Virginia Nicholson, *Perfect Wives and Ideal Homes: The Story of Women in the 1950s* (London: Viking, 2015) for the missing information about half the population.

Biographies and autobiographies of people who lived in the period are an excellent source not simply for the personnel in the story being researched but to give a picture of what it was like then. A good example is Jean Mann's *Women in Parliament* (London: Odhams, 1962), basically the story of her own Parliamentary career and very revealing of the challenges that women MPs faced in an overtly sexist and discriminatory age. Lord Denning's many volumes of critique and autobiography give a (naturally biased) view of the judiciary and courts of the time and legal developments in which he took part.³⁹

Conclusion

Successive generations tend to reject the actions of their immediate predecessors, and then they are often forgotten, until historians resurrect

and reinterpret them. But with *legal* history, that resurrection may never take place, since legal history is traditionally told as a tale of progress with each reform erasing the work that went into making it. Legal history also tends to prioritise what current lawmakers think is important over what might have mattered in the past and to judge the past unfavourably in contrast to the present. This collection aims to bring the neglected 1950s into legal history, at the same time demonstrating the different ways in which its legal developments (and indeed non-developments) might be revealed and examined. The editors hope that all these features make this collection truly fascinating as well as ground-breaking: a collection of different topics, using different law and different approaches, all presented by legal scholars who write out of interest in and love for their idiosyncratic research interests.

Notes

1. Dominic Sandbrook, *Never Had It So Good: A History of Britain from Suez to the Beatles* (London: Abacus, 2006), 47–8; Sheila Rowbotham, *A Century of Women: The History of Women in Britain and the United States* (London: Penguin Books, 1999) 292–3.
2. Discussed in [Chapter 7](#). A few minor changes were incorporated into the Matrimonial Causes Act 1958 but nothing major on divorce itself.
3. Discussed in [Chapter 9](#).
4. David Egerton, *The Rise and Fall of the British Nation: A Twentieth-Century History* (London: Penguin Books, 2019), chapter 9.
5. Sandbrook, *Never Had It So Good*, 144–6.
6. For example, Michael Barber, *The Making of the 1944 Education Act* (London: Cassell, 1994); John E. Pater, *The Making of the National Health Service* (London: King Edward's Hospital Fund for England, 1981); Elizabeth Wilson, *Women and the Welfare State* (London: Tavistock, 1977).
7. Harriet Samuels, 'Education Act 1944', in Erika Rackley and Rosemary Auchmuty (eds) *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Oxford: Hart, 2019), 219–25.
8. Roy Lowe, *Education in the Post-War Years: A Social History* (London: Routledge, 1988), 57.
9. W.A.C. Stewart, *Higher Education in Post War Britain* (Basingstoke: Macmillan, 1989), 9.
10. Michael Sanderson, 'Higher Education in the Post-War Years', *Contemporary Record* 5, no. 3 (Winter 1991): 417.
11. Michael Shattock, *Making Policy in British Higher Education 1945–2011* (Maidenhead: Open University Press, 2012), 12.
12. There are 165 universities and institutions of higher education in the UK at the time of writing.
13. Peter Hennessy, *Having It So Good: Britain in the Fifties* (London: Penguin Books, 2007), 77.

14. Lowe, n5, 61.
15. Lowe, 62.
16. Lowe, 61. It was the Education Act 1962 which made it compulsory for LEAs to give full-time students maintenance grants (the amount being means-tested).
17. www.history.ox.ac.uk/article/a-short-history-of-womens-education-at-the-university-of-oxford, accessed 13 April 2025.
18. Lowe, 64.
19. John F. Wilson, 'A Survey of Legal Education in the United Kingdom', *Journal of the Society of Public Teachers of Law* New Series IX, no. 1 (1966): 13.
20. Richard L. Abel, *The Legal Profession in England and Wales* (Oxford: Basil Blackwell, 1988), 143.
21. Abel, 47.
22. Wilson, n16, 21.
23. Wilson, 22.
24. Fiona Cownie and Raymond Cocks, 'A Great and Noble Occupation!': *The History of The Society of Legal Scholars* (Oxford: Hart, 2009), 161.
25. Fiona Cownie, 'The United Kingdom's First Woman Law Professor: An Archerian Analysis', *Journal of Law and Society* 42, no. 1 (March 2015): 146.
26. Harry Benson, UK Marriage Statistics, <https://www.2-in-2-1.co.uk/ukstats.html>, accessed 10 April 2025.
27. Peter Fryer, *Staying Power: The History of Black People in Britain* (London: Pluto Press, 1984), chapter 11.
28. Alva Myrdal and Viola Klein, *Women's Two Roles: Home and Work* (London: Routledge & Kegan Paul, 1956).
29. Brittain, *Lady into Woman* (London: Andrew Dakers, 1953), 171.
30. Alan Johnson, *This Boy* (London: Bantam Press, 2013).
31. Graham Crow, 'The Post-War Development of the Modern Domestic Ideal', in Graham Allan and Graham Crow (eds), *Home and Family: Creating the Domestic Sphere* (London: Macmillan, 1989), 17.
32. Martin Pawley, *Home Ownership* (London: Architectural Press, 1979), 82.
33. E.J. Cleary, *The Building Society Movement* (London: Elek Books, 1965), 244.
34. *The New Towns of Britain* (London: HMSO, 1972), 11–12.
35. John Montgomery, *The Fifties* (London: George Allen & Unwin, 1965), 53.
36. Pawley, n29, 85.
37. <https://www.nationalarchives.gov.uk/education/resources/commonwealth-migration-since-1945/housing-for-migrants-1960s/>, accessed 12 April 2025.
38. 'Dullest Decade of all?' *Guardian*, 25 April 1995.
39. For example, *The Changing Law* (London: Stevens, 1953); *The Road to Justice* (London: Stevens, 1955); *The Family Story* (London: Butterworths, 1981).

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Chapter 1

Shaking up the Savoy¹

Sally Wheeler

The 1950s saw the rise of the corporate takeover. Although there had been corporate mergers and amalgamations in the pre-Second World War decades, they were of a different character. They were most often as a result of agreed action between the boards of directors of the respective companies. In the first full decade after the Second World War, hostile takeovers began to occur. A hostile takeover is a takeover in circumstances where the board of directors of the target company do not recommend that the target company's shareholders accept the offer that is being made for their shares. The offer is then made directly to those shareholders who decide by vote whether to accept the offer or not. The rejection of the offer by the directors of the target company results in a 'battle' – for control of the target company – the more shares the bidders can acquire on the open market means the fewer shares they have to purchase by making a direct above-market price offer to existing shareholders for their shares. If they have to make that offer it has to be attractive and more compelling than any offer of increased dividends, new share issues or above-market-price share purchase made by the incumbent directors – hence the use of combative language like 'struggle' and 'battle'. The focus of this chapter is on one particular hostile takeover attempt in 1953 – the battle for ownership of the Savoy Hotel Ltd, a company listed on the London Stock Exchange. This was indeed the company that owned the London hotel of the same name, but as the second section, 'The battle story', explains, Savoy Hotel Ltd had more extensive property holdings than simply the Savoy Hotel itself.

At the level of corporate organisation and governance the battle for the Savoy was not the first hostile takeover bid of the 1950s. That honour fell

to the takeover by Charles Clore of J. Sears & Co.² Sears was the parent company of a shoe shop chain, Freeman, Hardy and Willis, which those of us of a certain age might remember as the shop where we bought our first pair of 'going out' shoes in the late 1970s and early 1980s. Clore conducted his pursuit of Sears largely in secret – he built up his shares through carefully judged acquisitions in the market and reportedly the first that the management of Sears knew about his bid was when its Chairman received Clore's offer shortly after the Stock Exchange was informed.³ A short struggle ensued but ultimately Clore took control of J. Sears & Co.⁴ The shoe shops he acquired just as clothes rationing ended did not have quite the glamour of one of the best known and most loved hotels in London.⁵ However the takeover attempt on the Savoy is of particular interest as it became a battle of cultures between the old (pre-war) London and the ideal of a new (post-war London). These unique features and the secrecy and speed of Clore's successful bid for J. Sears & Co meant that the events that surrounded the Savoy occasioned much contemporary comment and have remained in popular consciousness.

The attempted takeover of the Savoy raged from late summer 1953 to December of that year. There was media commentary in print and on the radio and questions and statements in Parliament. The chronological story of the machinations of the takeover bid and its *dramatis personae* is set out in the second section, 'The battle story'. Charles Clore has a supporting role. However as the first and third sections, 'Changing corporate practices' and 'The aftermath', make clear, the interest in this story does not begin and end with the events of the bid itself. For sure, the story is exciting enough being about landmark London hotels and people wheeling and dealing, first secretly and then openly, very large amounts of money, but it also sits in a much larger frame of new corporate practices and relatively new (1948) corporate legislation. However, the story is not just about the operation of corporate law. Whilst better known and documented features of the immediate post-war years in social and economic terms are the establishment of the NHS, the nationalisation of infrastructure and key heavy industries⁶ and the stirrings of discontent around the lot of 'the worker', there was also the huge task of reconstructing towns and cities in terms of planning and building new retail and office spaces and residential properties.⁷ The proposed takeover of the Savoy was part of this project too. As the first section, 'Changing corporate practices', explains, what ties together hostile takeover bids like the one for the Savoy, which were rarely seen before the Second World War but were more frequent in the years following it, and corporate governance practices are, in part, rising asset, including property, values. The third section, 'The aftermath', considers the long-term significance of hostile takeover bids and

the ways of doing business that came with it for British capitalism and company law.

Changing corporate practices

It would be erroneous to think that hostile takeovers became the norm in the 1950s. They did not. The amalgamation of industrial firms and the absorption of one commercial concern by another in largely co-operative circumstances, to create the ‘scale’⁸ that Hannah⁹ in his discussions of rationalisation and others identified as a trend in the 1920s and 1930s, continued.¹⁰ At the same time the move away from close control of companies by families and their associates through share ownership and management to dispersed share ownership and professional management began to infuse companies in the UK as it had done in the US.¹¹ The timing and extent of this move is the subject of an intense debate between the American economic historian Alfred Chandler¹² and many British business historians, the most prominent of whom is Leslie Hannah.¹³ The contours of the debate fall largely outside the boundaries of this contribution. Its significance here lies not so much in the subject matter detail of the debate itself but in what it tells us as socio-legal scholars about the difficulties of comparative work, the dangers of assuming path dependency and the importance of the context of soft law rules (for example the listing rules of the London Stock Exchange required that 66 per cent of shares were offered to the public (a ‘free’ float) on any public issue of shares.

What is interesting about the 1950s is that these previously largely amicable business arrangements for mergers were supplemented by a sudden wave of what we might term unwelcome takeover approaches to target companies. Charles Clore is credited with pioneering this movement and, by some, with being a fearless entrepreneur who had the courage to take on the establishment.¹⁴ Certainly in the years immediately following his takeover of Sears Clore acquired three more chains of shoe shops (Dolcis, Phillips Bros and Curtis) and a haulage and motor distribution firm in Scotland (Scottish Motor Traction). By the end of the 1950s he also had acquired jewellery businesses, Mappin and Webb and Garrards, and had tried and failed to acquire the Watney brewing and pub chain.¹⁵ Whilst Clore was clearly both a clever and successful businessman¹⁶ who surrounded himself with skilled advisors, there are rather more prosaic reasons for the surge in takeover activity beyond Clore’s genius.¹⁷

The most significant of these was the change in the accounting requirements for companies introduced initially by the Companies Act 1947 and then consolidated into the 1948 legislation.¹⁸ The theme of the

1947 legislation was enhanced disclosure.¹⁹ The legislation required consolidated profit and loss accounts and a consolidated balance sheet to be prepared and disclosed.²⁰ This practice had previously been voluntary. Within this balance sheet, cost and valuation had to be separated from accumulated depreciation, investments (other than those in subsidiaries) had to be disclosed and stated separately, the dividend recommended was to be accrued and stated, contingent liabilities and their estimated amount were to be disclosed as were the value of contracts for capital expenditure.²¹ Secret reserves, often held as a hedge against possible inflation in uncertain times, could no longer be used to disguise what would otherwise have been seen as potential profits for distribution as transfers between accounts were to be disclosed.²² The effect of these legislative changes was to end the information asymmetry between company directors on the one hand and shareholders and to a greater extent potential bidders, on the other hand.²³ Directors could no longer rely on their control of financial information to keep bidders at bay and potential bidders could now assess the financial position of a target company without its alerting directors with requests for information.

The 1947 legislation had followed closely the recommendations of the Cohen Committee Report which was published in 1945.²⁴ The Committee was at pains to point out in its report that greater accounting disclosure was required to create 'confidence in the financial management of industry' and end suggestions that profits were being accumulated to the detriment of consumers and employees.²⁵ This sentiment is in sharp contrast to those expressed by the Greene Committee, the recommendations of which had underpinned the Companies Act 1928 (like the 1947 Companies Act, the 1928 legislation became part of consolidated legislation in the form of the 1929 Companies Act).²⁶ The Greene Report rejected any suggestion that legislation should dictate the form of company accounts. For them this was an area where a company needed a free hand²⁷ unless shareholders intervened to ask for information to be presented in a particular way.²⁸ It was not just the form of accounts that shareholders influenced. The whole premise of the 1929 legislation was that accounting practice was a matter between director and shareholder. Publication and disclosure was not needed for shareholders as they were considered to be close enough to directors to simply ask for more information. Rather publication and disclosure gave information to competitors and in any event a mandatory form of disclosure would not work because of the diversity of companies that existed.²⁹

What sparked this legislative *volte face* between 1929 and 1948? One might see it as a response of the post-war Labour government to the

financial scandals of the 1930s³⁰ in terms that the state should regulate economic activity more closely on behalf of the public interest.³¹ However a more plausible explanation is found in the text of the Cohen Report. It contains express acknowledgment that the separation of ownership and control was now the norm in listed companies in the UK; shareholders' control of directors was now illusory as the typical corporate investment base was no longer a few wealthy shareholders but many small shareholders with little financial experience requiring a satisfactory dividend and too dispersed to organise themselves to obtain information from the directors.³² The provision of more publicly available information in a standardised form could only assist these shareholders.³³ Post the 1948 companies legislation there was a new information democracy in which both existing shareholders and potential bidders could assess the financial health and potential of any listed company.

Aside from changes in the Companies Act 1948, there were also other Government policies running concurrently that made takeovers attractive. High inflation in the post-war period was countered by a policy of dividend restraint, even though this was something that many economists considered to be an ineffective brake on inflation, as retained profits could be spent on corporate asset maintenance and replacement.³⁴ If the now often-professionalised corporate management did decide to retain profits to combat rising costs of materials and labour, dispersed shareholders were unlikely to be able to co-ordinate action to push for an increased dividend. Unlocking retained profits to enhance the acquired business or using them for other acquisitions was attractive to takeover bidders.³⁵ Distributed profits as dividends were taxed much more heavily than retained profits.³⁶ This policy setting continued for much of the decade. By 1956 retained corporate earnings were taxed at 3 per cent and distributed profits at 30 per cent.³⁷ Both shareholders and bidders could gain from a takeover. For the shareholder low dividend return was replaced by cash from selling shares, the price of which was depressed by low dividend return. For the bidder the depressed share price made their acquisition more affordable. Dispersed share ownership meant that a bidder did not need to acquire the whole share capital of a target company; only sufficient shares to guarantee control were required making the costs of acquisition lower. In addition to accessing retained profits, on acquisition the new company owners could raise dividends which would push up the share price and allow them to sell their shares at a profit (the classic market for corporate control situation) or they could sell fixed property assets, investing the proceeds for a higher return and leasing back the asset if it was still required by the business.³⁸

The battle story

The 'property' context

Savoy Ltd had over 4,000 individual shareholders and in 1953 owned, in addition to the Savoy Hotel, the Savoy Theatre, Claridge's, the Berkeley Hotel, Simpsons on the Strand, property in Stukeley Street Holborn, Cornwall Road, Panton Street, Whitcomb Street, Oxendon Street and hotel premises in Rome and Paris.³⁹ According to the near-contemporary account of journalists Bull⁴⁰ and Vice, this extensive ownership profile in the hospitality and entertainment sector was not commonly known, although one assumes that the more 'business literate' shareholders must have had some awareness of the extent of the company's business just as they apparently had of the low level of dividend they were receiving.⁴¹ Increased trading in the shares of Savoy Ltd began in mid-September 1953. By November 1953 the price of ordinary shares had doubled from just over 25 shillings (s.) to just over 50s. This rise coupled with large purchases being made by overt nominees led the Savoy directors to recognise that this was a genuine attempt to take control of the company. However, the identity of the would-be raider was unknown at this point, making it a real-life whodunit. Once the directors knew who the bidder was, there was the possibility of negotiating with them for involvement with Savoy Ltd that stopped short of their acquiring control. This was impossible if their identity was unknown.

It became apparent (although it is difficult to determine the 'how' as all accounts of the takeover battle from the nearly contemporaneous ones to much later retelling in the biographies of individuals simply assert this, with later accounts clearly being derivative of earlier ones) that the takeover bidder had no intention of running the Savoy Hotel and every intention of redeveloping the site of the Berkeley Hotel as an office block. In 1953 the Berkeley Hotel stood on the corner of Berkeley Street and Piccadilly (not as it does today in Knightsbridge).⁴² Interestingly only one of the commentators on the takeover from the contemporary to the present day refers to it as the Battle for the Berkeley.⁴³ The reason for this we would suggest is that a Battle for the Savoy was a battle about nostalgia and how the upper echelons of British Society lived their lives, whereas a Battle for the Berkeley could only ever be a battle about mere money. The Savoy was the hotel where novels were set,⁴⁴ where wartime Government business was conducted,⁴⁵ where displaced European royalty stayed⁴⁶ and where famous Western star Gene Autry led his horse Champion up the steps and into the Lancaster Room having failed to ride it up there.⁴⁷ Even retired Savoy Hotel staff wrote books about their time there.⁴⁸ The Berkeley had never enjoyed the *cachet* of the Savoy but it had been a popular and

profitable hotel before the Second World War. Unfortunately it did not recover either of those attributes in post-war London. By 1953 its profits were a fraction of their 1945 level.⁴⁹

There were numerous attractions for the would-be property developer in the Berkeley site and others in Central London. Much corporate property had not been valued since before the war, so balance sheet values did not reflect current property values, which had been rising since the invasion of France in 1944. This meant that the cost of acquiring shares was dwarfed by the profits that could be made on the sale of corporate assets. One of the developers who began their career in property at this point was Harold Samuel who through his company Land Securities Investment Trust started to acquire sites in Neasden and Hatch End.⁵⁰ By 1953 his ambitions had progressed from site purchase *simpliciter* to site development and in central London, too, including the Berkeley Hotel.⁵¹ Roberts reports that Clore launched his takeover for Sears on being informed by an estate agent, one Douglas Tovey, that the Sears balance sheet undervalued the firm's 900 high street stores by £10 million.⁵² The possibility of selling undervalued property remains still today as a key rationale for the acquisition of seemingly under-performing high street retail chains.⁵³ The Capital Issues Committee⁵⁴ made it hard for companies to acquire bank finance or access the capital market, so realising cash from the sale of property assets sometimes accompanied by a lease back to an investor such as a life insurance company looking for a safe investment with a modest return was an attractive way of acquiring an injection of cash that could not be obtained through the more usual borrowing and capital raising methods.⁵⁵ It was not a risk-free arrangement – rises in rental levels might leave a company paying out more in rent for an asset it had previously owned than it had received in sale proceeds.⁵⁶

Demand for office accommodation was high. Victorian London had seen the building of offices, not by developers on a large scale for onward sale, but by owner occupiers. There had been very little additional office building between the wars in London as development had concentrated on building residential flats. Wartime bombing destroyed around 10 per cent of the available square footage in office accommodation.⁵⁷ The Town and Country Planning Act 1947 had attempted to control inflation in property prices by levying a development tax.⁵⁸ It had the effect, together with the need to acquire a building license and a shortage of raw materials, of dampening down development activity but not property prices.⁵⁹ The development tax was removed by the Town and Country Planning Act 1953 and this boosted the property development industry. Changing patterns of British industry indicated that post-war London would be a headquarters for marketing, finance and other central functions of large, amalgamated

industries and an international base for overseas industries. Investors in property, such as Cyril Black, moved their focus from residential property to commercial property where returns seemed more assured.⁶⁰ As well as providing equity finance and support through lease back arrangements, life insurance companies such as Pearl and Legal & General Assurance Society bought finished office buildings as a way of acquiring assets with a similar longevity to their own financial obligations and occasionally developed property themselves.⁶¹

The Savoy takeover manoeuvres

Charles Clore was the directors' first thought for the identity of the takeover bidder. He was sounded out in mid-October 1953 by one of the Savoy directors (often thought to be Goldsmith, as they were acquaintances) at a horse race meeting in France.⁶² Clore denied being the buyer and claimed to hold only around 500 Savoy shares. However, keen to offer his business acumen and support in the face of a possible takeover by persons as yet unknown, he suggested that the directors should recommend an offer to the Savoy shareholders from his company for their shares. He wanted only a seat on the board of Savoy Ltd and promised that no management changes would be made. The Savoy directors feared that if the Berkeley was lost to commercial office development, other sites would soon be lost as well. This offer was not without its attractions; the directors would not find themselves replaced in the short term. However Clore would not promise that he would not sell parts of the Savoy portfolio in the future and his offer was declined as a result.⁶³ Under the Companies Act 1948 the Board of Trade could be asked to investigate share ownership if requested to do so by either 200 shareholders or the holders of one tenth of the share capital.⁶⁴ The Savoy directors, together with employees who were shareholders, fulfilled these requirements and asked for an investigation. The Board of Trade appointed an Inspector who would report by early December at the latest. The announcement of the appointment had the effect of stabilising the share price. Shortly after the Inspector was appointed the City decided that the mystery bidder was Harold Samuel through his company Land Securities Investment Trust.

A defence strategy

Once the Savoy Ltd board of directors realised that it was the Berkeley Hotel and site that they needed to protect, they began to formulate a defence strategy. They needed to ensure that even if Savoy Ltd fell into the control of a takeover bidder the business of the Berkeley could not be altered. This meant that they did not need to compete to buy shares over

and above the 7 per cent they held collectively in a market that would soon start to rise again once the Board of Trade Report was published. A defence strategy was created around the formation of a new company called Worcester Building Company (London) Ltd. There seem to be two possible rationales for the choice of this name for the rescue vehicle. The first is that there had once been a mansion belonging to the Earls of Worcester, known as Worcester House, standing between the Savoy Hotel and the river.⁶⁵ The second is that a small bungalow in a Worcestershire village, Badsey, was where Harold Samuel, his wife, her sister and her husband, one Max Joseph and their respective children spent the years of the Second World War.⁶⁶ Was this a way of signalling to Samuel that they knew he was the bidder? I have not been able to discern any family, business or property connection to Worcestershire so it may simply be where the family felt safest during the war in the event of a German invasion, particularly as they were Jewish.⁶⁷

On 25 November 1953 Samuel notified the Savoy board that he was the takeover bidder and that he wanted to develop the Berkeley into offices. All other facets of Savoy Ltd including the existing management would remain the same. This offer was rejected by the board, which was worried that Samuel might not keep his promise and in any event they wanted the Berkeley to stay as a hotel. The Board of Trade report came out on 28 November. It confirmed Samuel as the takeover bidder and placed his shareholding in Savoy Ltd at 20 per cent. Charles Clore was identified as holding 9 per cent of the Savoy Ltd shares.⁶⁸ Soon thereafter Clore sold his shares to Samuel giving him *de facto* control of the company. The Savoy share price rose to 60s as a result of these revelations and dealings. At this point both the Savoy directors and Samuel stopped buying shares. For Samuel this was because presumably he thought that, even if he converted the Berkeley Hotel to offices, 60s per share was the highest price at which he could make a profit. He might also have thought that with a shareholding of 29 per cent the Savoy Board would be prepared to enter into negotiations with him. The directors of Savoy Ltd stopped buying shares because they had formulated a clear strategy of defence through the Worcester Company. The share price eased back and by 2 December it was 51s.

The Worcester Building scheme defence strategy was revealed to shareholders, including Harold Samuel, on 5 December. Taken as a whole it appears a complex strategy but it can be broken down into a series of simple steps. Worcester Building Co. Ltd was incorporated with three classes of shares: first preference, second preference and ordinary. Ordinary shareholders had limited financial rights compared to the preference shareholders but enjoyed complete voting control. The object

of Worcester Building Co. (in the company law sense of ‘object’) was the purchase and management of the Berkeley Hotel. Worcester Building Co. Ltd would acquire the Berkeley Hotel from Savoy Hotel Ltd using its preference shares as consideration. On acquiring the Berkeley Hotel, Worcester Building Co. Ltd would lease it back to the Savoy Hotel for fifty years with covenants that precluded its use as anything other than a hotel, thus reversing the sale and lease back weapon beloved of takeover bidders. Savoy Hotel Ltd would set up a staff benevolent fund with £30,000, part of which would be used by the fund’s trustees to subscribe for all the ordinary shares in Worcester Building Co. Ltd. The fund’s trustees could not be dismissed or replaced by the Savoy Board for fifty years and had voting control of Worcester Building Co. Ltd by virtue of representing the ordinary shareholders in it. Worcester Building Co. Ltd was a private company so it did not have quoted shares that could be bought nor was it required to offer a free float. Control of Savoy Ltd would not result in control of the Berkeley Hotel or its site. There was no provision either for profits to be taken out of Worcester Building Co. Ltd if the Berkeley Hotel was returned to profitability.

The response

There was both a private response, in that Harold Samuel took action as an individual shareholder, and a public response through the Board of Trade to the Worcester Building Scheme. Turning to the private response first, Samuel began buying shares again and increased his holding to around 40 per cent. He used the Companies Act 1948 to demand a Board of Trade investigation into the Worcester Building Scheme. In doing this he was presenting himself as quintessentially an ordinary shareholder of Savoy Ltd who was concerned its shareholders were losing control of some of the company’s property without any consultation or approval by them.⁶⁹ Savoy Ltd also bought shares and the share price rose to 61s before falling back to 53s. During that time Harold Samuel offered to sell his shares to the Savoy Board, an offer that was initially rejected by the Board but ultimately accepted on 10 December at a price of 62s. 6d.⁷⁰ A condition insisted upon by Samuel was that Worcester Building be liquidated. He also withdrew his application for a Board of Trade Inspector to be appointed.

From Samuel’s perspective he had realised a profit – some of the shares he purchased at a price of 40s or less. If he continued to buy shares it would take him longer to make a profit. He had no idea how difficult the directors of Savoy Ltd might become if he remained a significant shareholder with whom they did not wish to do business.⁷¹ The Savoy directors for their part

had no desire to have the Worcester Building Scheme legally interrogated nor did they want existing small shareholders continually approached by Harold Samuel with promises of increasing company profitability if they sold their shares to him. A sale of Samuel's shares to Savoy Ltd suited both parties. A final mystery, which has never been resolved, was how the Savoy Ltd directors financed the purchase of Samuel's shares.⁷² The obvious answer is some sort of white knight or knights. No shareholder other than Samuel is likely to have been able to dispute the Worcester Building Scheme – those who remained independent of the Board were dispersed and almost certainly not in a position to finance action against the directors. Harold Samuel emerged a small shareholder's hero out of the Savoy affair at a time when takeover bidders were generally not liked for the share price disruption and fluctuation their activities resulted in.⁷³

There remained a concern that something akin to the Worcester Building Scheme, designed without the consent of shareholders, might be promulgated by other boards of directors trying to fend off a takeover bid. The public response was a decision by the Board of Trade under the Companies Act 1948 to appoint an Inspector in April 1954.⁷⁴ It asked Milner Holland QC to report on whether the Worcester scheme was a breach of duty to the Savoy Company or its shareholders. Milner found⁷⁵ that the directors had acted in good faith without thought of personal gain and that the transaction was not *ultra vires* their delegated powers.⁷⁶ There is a discussion to be had here in company law terms about the desirability of Milner's ultimate conclusion that the directors' action should be considered invalid as, if one had regard to the purpose for which the power was exercised, it was clearly carried out to remove from current and future shareholders control of the Berkeley Hotel.⁷⁷ However, that has been eschewed in this chapter in favour of a broader discussion of the Savoy takeover battle.

In 1955 the Savoy directors adopted what they hoped was an impregnable share structure from the perspective of thwarting a takeover. They oversaw the creation of a class of 'B' shares which carried forty times more votes per share than the existing ordinary (or 'A') shares. The 'A' shares, which accounted for 97.7 per cent of the capital, were then reduced to half of the company's voting rights. The new B shares were allotted pro rata based on the holding of A shares. The directors sold their A shares and kept B shares. The creation of a dual class share structure was a classic (and generally very successful) takeover defence,⁷⁸ now largely out of fashion because of opposition from institutional investors.⁷⁹ The Savoy Group fought off many subsequent takeover attempts, including one by Max Joseph (Harold Samuel's brother-in-law and wartime companion in Badsey). In September 1994 the Board of the Savoy finally agreed sale

terms to Forte PLC, a year after the chairman who had led the defence against Harold Samuel, Sir Hugh Wontner, former Lord Mayor of London and Clerk to the Royal Kitchens, died.

The aftermath

The Savoy takeover saga captured the popular imagination of commentators. It, and the remaining years of the 1950s, were the high-water mark of the era of individual capitalists and the contested takeover bid. The 1950s set the stage for the development of the corporate financial structure that endured for much of the rest of the twentieth century. First in terms of individualism, not always London based, the business and social activities of figures such as Isaac Wolfson, Hugh Fraser, Jack Cotton, Walter Flack in addition to Charles Clore and Harold Samuel were never far from the newspapers.⁸⁰ After them came personalities like Tiny Rowlands, Rocco Forte and James Goldsmith. They and businessmen like them were supported in their ventures by longstanding relationships with bankers, both merchant and clearing, estate agents, accountants and other professionals.⁸¹ These ties were created by schooling, clubs, marriage, religion, sporting interests – the usual paraphernalia that supports the elite in their relationships within British Society. The coverage of their activities and the judgments passed on them were not always what they wanted them to be. Whilst Harold Samuel emerged as something of a hero after the Savoy affair and remained a well-respected businessman, Charles Clore did not feel the same warmth was extended to him.⁸² Both of them were ultimately knighted; Samuel for his work in property development and Clore for his philanthropic activities.

Secondly, in terms of corporate finance structures and practices, these developed to facilitate takeovers even though the Savoy management had been successful in avoiding a takeover. Institutional investment replaced small independent shareholders.⁸³ Its long hold approach to achieving investment returns meant that it was quite comfortable with the takeover being used as a way of replacing poorly performing managers, getting asset value recognised and dividend levels increased. Consequently the market for corporate control arrived in the UK. Whilst other economies, such as the US and Japan, saw the emergence of a number of takeover defences, the UK largely rejected these, becoming and remaining the most supportive jurisdiction for takeovers whilst at the same time ensuring extensive protection for minority shareholders.⁸⁴ The attitude of Government was initially one of hostility towards contested takeovers. This hostility was manifested in the Bank of England repeatedly warning lending

institutions of the undesirability of lending for ‘speculative purposes’. However Government policy changed over the course of the decade and eventually led to the creation and adoption of the City Code on Take-Over and Mergers in 1968.⁸⁵

The idea of a personalised capitalism probably ends with the convictions of the Guinness Four in 1990.⁸⁶ The Guinness civil litigation and criminal proceedings coincided with a series of other events which changed many of the regulatory structures of the corporate world. Deregulation of the City (the ‘big bang’) enticed foreign banks and foreign investment capital to London and to British manufacturing firms.⁸⁷ The same sort of career-long relationships of mutual advantage were no longer forged as there were many more potential investment and professional services providers. Lunches, clubs and corporate functions became less important as internationalisation impacted traditional City activities. City culture changed to match.⁸⁸ Institutional investors demanded quite different relationships with corporate management in these circumstances and this was one of the factors behind the birth of the ‘comply or explain’ corporate governance reporting regime⁸⁹ which included a recommendation for exclusive communication with large shareholders.⁹⁰ That the position of institutional investors is now so different again following an era in which both financialisation and short termism dominated, that their stewardship of their corporate assets has to be actively encouraged, is not relevant here.⁹¹ This chapter is a celebration and explanation of times past, warts and all.

Notes

1. The Savoy Hotel is thought to be the first place in the UK that served mixed cocktails (hence the title of this piece). Its cocktail bar still retains its original 1893 name: The American. Its most famous cocktail making barman, Henry Craddock, did indeed learn his trade in the US. Originally from Gloucestershire, Craddock emigrated to the US and became an accomplished barman. He returned to the UK at the outset of Prohibition and found employment at the Savoy Hotel. In 1930 his book *The Savoy Cocktail Book*, containing hundreds of mixed drink recipes, was published by Constable, London. Prior to Craddock’s tenure as barman that role was held by Ada Coleman. As befits the Savoy tradition of ‘firsts’ she was the first ‘professional’ female bartender in London.

2. Charles Clore was knighted in June 1971. Throughout the events of this piece he was not yet Sir Charles Clore and so is not referred to as such. This chapter began life as part of a conference held under the auspices of the Institute of Advanced Legal Studies (IALS). The IALS is housed in Sir Charles Clore House, a building funded in 1970 by one of the many philanthropic donations made by Charles Clore to a huge range of causes.

3. Charles Gordon, *The Two Tycoons: A Personal Memoir of Jack Cotton and Charles Clore* (London: Hamish Hamilton, 1984), 51.

4. Perhaps the most interesting thing about the Sears takeover was that Clore was able to circumvent the involvement of the Sears' Board of Directors in notifying the Sears' shareholders of his offer by contacting them directly through the post. This would have been impossible in the early years of the 1950s as paper was severely rationed during the Second World War and rationing of it, along with most commodities, did not end until June 1953. In common with most countries the UK had no domestic supply of paper and imported what it needed from Canada. Rationing saw paper supplies for newspapers restricted to 60 per cent of their pre-war consumption. Newspapers were seen as a vital part of citizen propaganda and newsprint supply to them was guaranteed. All other uses and consumers had to take what was left. See Henry Irving, 'Paper Salvage in Britain during the Second World War', *Historical Research* 89, no. 244 (2016): 373, and from a publishing and editorial perspective see Michael Sheldon, *Friends of Promise: Cyril Connolly and the World of Horizon* (New York: Harper & Row, 1989).
5. Amanda Durfee, 'Utility Futility: Why the Board of Trade's Second World War Clothing Scheme Failed to Become a Fashion Statement', *Penn History Review* 25 (2019): 89.
6. Robert Millward and John Singleton, eds. *The Political Economy of Nationalisation in Britain, 1920–1950* (Cambridge: Cambridge University Press, 1995).
7. George Goyder, *The Future of Private Enterprise: A Strategy in Responsibility* (London: Basil Blackwell, 1954).
8. For example, Cadbury's and J. S. Fry and Sons merged in 1919 and spent the next sixteen years rationalizing their brands of chocolate whilst their respective directors held cross-membership of the other company's board. ICI (Imperial Chemical Industries) was formed in 1926 from the merger and amalgamation of four companies. Unilever was formed in 1929 when a Dutch company, the Margarine Union, merged with Lever Bros Ltd. The brewery industry contracted from 4,500 breweries in the early years of the twentieth century to 600 or so by 1950, see William Mennell, *Takeover: The Growth of Monopoly in Britain 1951–61* (London: Lawrence and Wishart, 1962), 43.
9. Leslie Hannah, *The Rise of the Corporate Economy* (London: Methuen, 1976), 29–44 and Leslie Hannah, 'Managerial Innovation and the Rise of the Large-Scale Company in Interwar Britain', *The Economic History Review Second Series* 27, no. 2 (May 1974): 252.
10. Peter Edward Hart and Sigbert Jon Prais, 'The Analysis of Business Concentration: A Statistical Approach', *Journal of the Royal Statistical Society Series A (General)* 119, no. 2 (1956): 150.
11. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York, Harcourt, Brace & World, 1968. Revision of original 1932 edition). In an important refinement to the Berle and Means model, Franks and colleagues suggest that, whilst share ownership did become more dispersed, directorial appointments remained under close control for longer than they had in the US. Julian Franks, Colin Mayer and Stefano Rossi, 'Spending Less Time with the Family: The Decline of Family Ownership in the United Kingdom', in *A History of Corporate Governance around the World: Family Business Groups to Professional Managers*, ed. Randall K. Morck (Chicago: University of Chicago Press, 2005), 581–612.
12. Alfred D. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA: Harvard University Press, 1990). For Chandler the presence in UK corporate life of 'personal capitalism' long into the 1950s in comparison with the 'competitive managerial capitalism' seen in the US and the 'co-operative managerial capitalism' that characterised (West) Germany was an explanation for historic under-performance of the UK economy. Instead of investing in professional

managers who in turn would invest in marketing, production infrastructure and distribution, family firms continued with owner managers whose goal was to provide themselves with 'a steady flow of cash' (at 390). See also David J. Teece, 'The Dynamics of Industrial Capitalism: Perspectives on Alfred Chandler's Scale and Scope', *Journal of Economic Literature* 31, no. 1 (March 1993): 199. As a counter-balance to the general rejection of Chandler's narrative in UK academic circles it is important to note the contemporary comment of financial journalists George Bull and Anthony Vice that managerial inefficiency in UK companies in the post-Second World War years gave succour to takeover bidders, see G. Bull and A. Vice, *Bid for Power* (London: Elek Books, 1958), 29.

13. Leslie Hannah, 'The Divorce of Ownership from Control: Re-calibrating Imagined Global Trends', *Business History* 49, no. 4 (July 2007): 404.

14. William Davis, *Merger Mania* (London: Constable, 1970), 17–23. For comment on Davis's narrative see I. Fallon and J. Strodes, *Takeovers* (London: Hamilton, 1987), 14–16.

15. In taking over store chains, Clore looked to sell the shop freeholds, often to insurance companies, and take a long lease on the premises thus realising the market value of the property and creating working capital. This was a device created not by Clore but by Isaac Wolfson and Joseph Littman in their commercial property acquisitions towards the end of the Second World War, see E. Erdman, *People and Profit* (London: Batsford, 1982), 55. See further the text accompanying nn54–6.

16. See the account of Clore's activities in the 1950s provided by David Clutterbuck and Marion Devine, *Clore: The Man and his Millions* (London: Weidenfeld and Nicolson, 1987), 53–9, 64–78.

17. Clore's lawyer of choice was Leonard Sainer who was regarded by his contemporaries as an excellent negotiator with strong commercial as well as commercial skills, see John Cooper, *Pride versus Prejudice: Jewish Doctors and Lawyers* (Liverpool: Liverpool University Press, 2003), 305–6.

18. The acquisition of all the shares of a company as opposed to a majority was made easier by CA 1929 s.155 which allowed a purchaser whose offer had been accepted by 90 per cent of shareholders to force the remaining 10 per cent to sell their shares on the same terms. This section became Companies Act 1948 s. 209. For a fuller discussion of this provision than is possible here, see Andrew Johnston, 'Takeover Regulation: Historical and Theoretical Perspectives on the City Code', *The Cambridge Law Journal* 66, no. 2 (July 2007): 424–6 and D.D. Prentice, 'Take-Over Bids: The Compulsory Acquisition Of Dissentients' Shares', *Modern Law Review* 35, no. 1 (January 1972): 73.

19. Paul Bircher, *From the Companies Act of 1929 to the Companies Act of 1948* (London: Garland Publishing, 1991).

20. On the significance of consolidated accounts for financial transparency see John Richard Edwards, 'The Process of Accounting Innovation: The Publication of Consolidated Accounts in Britain in 1910', *Accounting Historians Journal* 18, no. 2 (December 1991): 113. Edwards (at 130) describes the publication of consolidated accounts as 'the major 20th century innovation concerning external financial reporting'.

21. Much of the detail around the required accounting form and substance is to be found in Companies Act 1948 sch 8.

22. On the prevalence of secret reserves see Anthony J. Arnold and Derek R. Matthews, 'Corporate Financial Disclosures in the UK, 1920–50: The Effects of Legislative Change and Managerial Discretion', *Accounting and Business Research* 32, no. 1 (March 2002): 3.

23. L. Hannah, 'Takeover Bids in Britain Before 1950: An Exercise in Business "Pre-History"', *Business History* 16, no. 1 (1974): 65, 69 and 75.

24. Report of the Committee on Company Law Amendment (the Cohen Report) 1945 Cmnd 6659.
25. Report of the Committee on Company Law Amendment (the Cohen Report) 1945 Cmnd 6659, para 101.
26. Report of the Company Law Amendment Committee (the Greene Report) 1926 Cmnd 2657.
27. Report of the Company Law Amendment Committee (the Greene Report) 1926 Cmnd 2657, para 69.
28. Report of the Company Law Amendment Committee (the Greene Report) 1926 Cmnd 2657, para 71.
29. Michael Chatfield, *A History of Accounting Thought* (New York: Krieger, 1977), 115.
30. The most egregious of these was the Royal Mail Group Company collapse in 1930, see Peter N. Davies and A.M. Bourn, 'Lord Kysant and the Royal Mail', *Business History* 14, no. 2 (1972): 103.
31. Bircher, *From the Companies Act of 1929*, 139, 294–5 and Ian C. Stewart, 'The Ethics of Disclosure in Company Financial Reporting in the United Kingdom 1925–1970', *Accounting Historians Journal* 18, no. 1 (1991): 35. The Cohen Report was commissioned in 1943 during the years of the National Government. The National Government only ever had eleven Labour Party members during its duration out of a total of sixty-five members. It is hard to see how those Labour members could have influenced to any real degree the report or the legislation that closely followed the Report's recommendations.
32. See the Cohen Report paras 7 and 124.
33. Josephine Maltby, 'Was the Companies Act 1947 a Response to a National Crisis', *Accounting History* 5, no. 2 (November 2000): 31.
34. See the discussion provided in Alex Rubner, 'The Irrelevancy of the British Differential Profits Tax', *The Economics Journal* 74, no. 294 (June 1964): 347.
35. See the discussion of factors that encouraged takeovers in the 1950s in John Wright, 'The Capital Market and the Finance of Industry', in George D. N. Worswick and Peter Ady, *The British Economy in the 1950s* (Oxford: Clarendon Press, 1962), 461, 465–6.
36. Corporate contributions to the funding of rearmament and the Second World War through the National Defence Contribution introduced in 1937 were replaced in 1947 by a profits tax, see the Finance Act 1947, sec 30. See Brian R. Cheffins and Steven A. Bank, 'Corporate Ownership and Control in the UK: the Tax Dimension', *Modern Law Review* 70, no. 5 (2007): 778.
37. J.B. Tabb, 'Reasons for the Emergence of Contested Company Takeovers in the 1950s', *Accounting and Business Research* 11, no. 44 (September 1981): 44.
38. As Gower explains, the profit from selling their shares had the potential to be taken tax free, see Laurence Cecil Bartlett Gower, 'Corporate Control: The Battle for the Berkeley', *Harvard Law Review* 68, no. 7 (May 1955): 1178.
39. Report for the Board of Trade by E. Milner Holland QC, *The Savoy Hotel Limited and the Berkeley Hotel Company Limited* 1954, 5.
40. George Bull was Foreign Affairs Editor for the *Financial Times* and a well-respected British Japanist, see his obituary in the *Guardian*; <https://www.theguardian.com/news/2001/apr/10/guardianobituaries> (accessed 31 March 2023).
41. Bull and Vice, *Bid for Power*, 70.
42. The relocation to its current site occurred in 1972.
43. Gower, 'Corporate Control'.

44. Arnold Bennett's career as a novelist is bookended by *Grand Babylon* (1902) and *Imperial Palace* (1930). See Randi Saloman, 'Arnold Bennett's Hotels', *Twentieth Century Literature* 58, no. 1 (April 2012): 1. See also A.A. Milne, *The Birthday Party and Other Stories* (1948, most recent edition London: Boxtree, 2017).
45. Olivia Williams, *The Secret Life of the Savoy: And the D'Oyly Carte Family* (London: Headline Books, 2017).
46. The Social Diary and Society pages of popular newspapers and serials such as the *Daily News*, *Daily Herald*, *The Sketch* and *The Tatler* carried regular and fulsome reports about events, arrivals and departures at the Savoy.
47. *The Stage*, 23 July 1953.
48. P. Cantarini, *The Savoy Was My Oyster* (London: Robert Hale, 1976).
49. Bull and Vice, *Bid for Power*, 72.
50. Oliver Marriott, *The Property Boom* (London: Hamish Hamilton, 1967), 48, 49.
51. For ideas about classifying those involved in property transactions into broad groups, see David Adams, 'The British Commercial Development Industry', *European Planning Studies* 3, no. 4 (December 1995): 531.
52. Richard Roberts, 'Regulatory Responses to the Rise of the Market for Corporate Control in Britain in the 1950s', *Business History* 34, no. 1 (January 1992): 183.
53. Despite all the plaudits about his ability to judge fashion when he was enjoying success, the now disgraced retail entrepreneur Philip Green made much of his wealth and retail success by selling the stores that he acquired, see Oliver Shah, *Damaged Goods: The Inside Story of Sir Philip Green, the Collapse of BHS and the Death of the High Street – The Rise and Fall of Sir Philip Green* (London: Penguin, 2019).
54. The Capital Issues Committee derived its authority from the Investment (Control and Guarantees) Act 1946.
55. See the discussion in Marvin E. Rozen, 'Investment Control in Post-War Britain 1945–1955', *The Canadian Journal of Economics and Political Science* 29, no. 2 (May 1963), 185.
56. Peter Scott, *The Property Masters: A History of the British Commercial Property Sector* (Abingdon: Taylor & Francis, 2013), 53–4.
57. Marriott, *The Property Boom*, 19.
58. The Town and Country Planning Act 1947 introduced the concept of 'planning permission', thus for the first time separating out land ownership from the right to develop and a development charge which was a 100 per cent tax on the increase in land value that occurred when planning permission was granted.
59. One way in which the development charge could be avoided was to redevelop as offices, blocks of flats that had been requisitioned as offices in the Second World War.
60. Marriott, *The Property Boom*, 54.
61. B. Whitehouse, *Partners in Property* (London: Birn Shaw, 1964) 46–7, 65–78.
62. N. Davenport, *The Spectator*, 4 December 1953, 36.
63. Bull and Vice, *Bid for Power*, 73–4.
64. Companies Act 1948 s.164 conferred a general power of investigation on the Board of Trade and the Companies Act 1948 s.172 contained the power for members and capital bearers to apply as described previously.
65. See C. Mackenzie, *The Savoy of London* (London: George G. Harrap & Co, 1953), 27 for a discussion of this building.

66. Max Joseph was the founder of Grand Metropolitan PLC, a large hotel group.
67. All four adults were born in the UK but they are likely to have had relatives in Nazi-controlled Europe. For information on the Badsey stay, see <https://www.badseysociety.uk/people/joseph/max> (accessed 12 March 2023).
68. *Interim Report of Mr J.B. Lindon QC* (London: HMSO, 1953). Events overtook the report so there is no 'final' report.
69. For a concise summary of concerns about the position of ordinary shareholders in Savoy Ltd and the Worcester Building Scheme, see N. Davenport *The Spectator*, 11 December 1953, 30. In Davenport's view the winner in the whole Savoy episode was Charles Clore who began buying shares when they were priced at 30s for nothing more than quick profit taking it seemed and sold them for considerably more to Harold Samuel.
70. By 14 December 1953 the Savoy share price had dropped to 46s, where it stayed for several years, *The Times*, 15 December 1953.
71. For further speculation on Samuel's reasoning, see n82.
72. Speculation was that finance was provided by one Sir John Ellerman, a shipping magnate, see Bull and Vice, *Bid for Power*, 81.
73. A 'moral victory' was how his position was described, see N. Davenport, *The Spectator*, 18 December 1953, 38.
74. Companies Act 1948 s.165.
75. Report for the Board of Trade by E. Milner Holland QC, *The Savoy Hotel Limited and the Berkeley Hotel Company Limited* 1954.
76. E. Milner Holland QC, Report, para 13(10), 16.
77. E. Milner Holland QC, Report, para 17, 17–20. Milner's view was also supported by Gower, see Gower, 'Corporate Control', 1185–6. For a review of Gower's argument see Johnston, 'Takeover Regulation', 424–6. These pages of Milner's report also contain a fascinating account of a falling out between the Savoy director, Goldsmith, who is thought to have first approached Charles Clore about his interest in Savoy Ltd and his fellow Savoy directors.
78. Joel Seligman, 'Equal protection in Shareholder Voting Rights: the One Common Share, One Vote Controversy', *George Washington Law Review* 54 (1986): 687.
79. Institutional investor opposition to dual class share structures has softened somewhat as IPOs have forsaken the London Stock Exchange in favour of launching themselves in other markets more friendly to entrepreneurial founders. Following the Hill Review in 2021, see <https://www.gov.uk/government/publications/uk-listings-review> (accessed 12 March 2023), the Listing Rules have changed to allow listings with dual class share structures under certain conditions, see Bobby V. Reddy, 'Up The Hill and Down Again: Constraining Dual Class Shares', *Cambridge Law Journal* 80, no. 3 (November 2021): 515 and Min Yan, 'Permitting Dual Class Shares in the UK Premium Listing Regime: A Path to Enhance Rather than Compromise Investor Protection', *Legal Studies* 42, no. 2 (June 2022): 335.
80. For an account of the rise during the 1950s of the businessman as a figure of popular interest see Ralph Samuel, 'The Boss as Hero', *Universities and Left Review* 7 (1959): 26.
81. See Maurice Wright, 'City Rules OK? Policy Community, Policy Network and Takeover Bids', *Public Administration* 66, no. 4 (December 1988): 389. Although this piece is primarily centred on the City Code on Takeover and Mergers and the desirability or not of self-regulation, it does provide a useful account of City relationships prior to the changes described in the text accompanying notes 86 and following.

82. According to Clutterbuck and Devine's biography of Charles Clore, Harold Samuel withdrew from the Savoy battle because of the anti-Semitic nature of the media commentary, see Clutterbuck and Devine, *Clore*, 61. There is no corroborating evidence that this was the nature of the commentary or indeed that it was Samuel's view. However given the 'insider/outsider' nature of the City and other British institutions, it is certainly not without the bounds of possibility. Clore felt that he was vilified by the Savoy affair as a 'treacherous schemer'. He attributed this and other subsequent reverses of fortune to anti-Semitism, see Clutterbuck and Devine, *Clore*, 213–14.

83. See the texts cited in n11.

84. Julian Franks and Colin Mayer 'Evolution of Ownership and Control around the World: The Changing Face of Capitalism', in Benjamin E. Hermalin and Michael S. Weisbach (eds), *The Handbook of the Economics of Corporate Control* (Amsterdam: North-Holland, 2017), 685.

85. This cuts a long and more complicated story rather short. It is very well told in Johnston, 'Takeover Regulation'.

86. For an explanation of the events that brought about the criminal trial of four well-known City figures for their activities in a takeover battle between Guinness PLC and Distillers, see Adrian Milne and James Long, *The Guinness Scandal* (London: Michael Joseph, 1989). Michael Levi offers a typically incisive and at times amusing account of the sentencing of Saunders, Ronson, Parnes and Lyons, see Michael Levi, 'Sentencing White Collar Crime in the Dark: Reflections on the Guinness Four', *The Howard Journal* 30, no. 4 (November 1991): 257. Levi, who views the sentencing of the four defendants as a celebration of their degradation and the victory of envy, also raises the Jewish origins of all of the defendants. Perhaps this supports Clore's perception of how he was viewed.

87. This is a necessarily bald and far too simple statement. For a historical account that embraces both economics and politics, see Christopher Bellringer and Ranald Michie, 'Big Bang in the City of London: An Intentional Revolution or an Accident?' *Financial History Review* 21, no. 2 (August 2014): 111.

88. Paul Thompson, 'The Pyrrhic Victory of Gentlemanly Capitalism: The Financial Elite of the City of London 1945–90, Part 2', *Journal of Contemporary History* 32, no. 3 (July 1997): 427.

89. Laura F. Spira and Judy Slinn, *The Cadbury Committee* (Oxford: Oxford University Press, 2013).

90. On the development of the 'comply or explain' regime in the UK see Michael Price, Charles Harvey, Mairi Maclean and David Campbell, 'From Cadbury to Kay: Discourse, Intertextuality and the Evolution of UK Corporate Governance', *Accounting, Auditing and Accountability* 31, no. 3 (July 2018): 1542.

91. Gerald F. Davis and Suntae Kim, 'Financialization of the Economy', *Sociology* 41, no. 1 (August 2015): 203.

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Chapter 2

The Great London Smog of 1952: its consequences and contemporary relevance

Sue Farran

Introduction

For five days in 1952 London was crippled by one of the worst ‘smogs’ ever experienced. The combination of damp air and pollutants led to thousands of deaths over an extended period of time. This chapter starts by locating the 1952 event within the context of the time and then considers the largely ineffective measures that had been taken in the preceding years to deal with industrial and domestic pollution. The chapter then follows the impetus for further change triggered by the Beaver Report 1954, which led in turn to the Clean Air Act 1956. It highlights the compromises that were made to balance concerns about health, damage to buildings and the wasteful use of coal, against the costs that would be incurred by industrialists and the burdens imposed on local authorities. The chapter concludes by bringing the past up to the present and the persisting problem of air pollution culminating in a coroner’s ruling in 2021 that a child’s death in London had been caused by air pollution. It closes by observing that despite heightened awareness of environmental harms, there is a persisting failure of politicians to robustly address the issue.

The year 1952 neither started nor ended well. In February, King George VI had died, leaving his daughter Elizabeth, aged twenty-five, to succeed him. Although the Second World War had ended seven years earlier, London was still suffering the ravages of air raid bombings, and rationing

on some items remained in force.¹ Crime rates were escalating. In the first two decades of the century the police in England and Wales recorded a yearly average of 90,000 indictable offences. In the 1950s this rose to over 500,000.² Winston Churchill was prime minister leading a Conservative government, having been elected for a second time in 1951, although by 1952 his majority was very slight. Coal mining was a major and booming industry employing over 700,000 workers. The estimated national weekly intake of men and boys into the industry in the course of 1952 was over 1,500.³ In the period 1943–1952 there were 1,480 deep coal mines and 118 open cast mines.⁴ In 1952 around 228 million tonnes of coal was being mined.⁵ Coal-fired locomotives linked London with the rest of the country and coal-fired power stations provided electricity for the city. Much of this coal was exported with lower quality coal left for domestic use. Almost every home had at least one coal-fuelled open fireplace and the image of family gathered around a coal fire became a trope for security, domestication and homemaking in the post-war years of reconstruction and modernisation.⁶ Nead highlights the use of the image in advertising, popular culture, film and literature, where the focus on the home and family provided a counterweight to the disruption and destruction that continued to impact many lives in the post-war years. Attachment to the open coal fire in the ‘family hearth’ was strong,⁷ the fireplace was the focal point of the home,⁸ and the metaphor and image of the open fire aligned with the cry of the war years to ‘Keep the Home Fires Burning’.⁹ As the century progressed, the use of and reliance on coal was increasingly being assailed by more modern designs of housing and heating, including gas-fired utilities and electric appliances, but it was the major event at the end of 1952, described as ‘The catastrophe that gave the smoke abatement movement momentum’, that began to turn the tide as regards the pollution caused by coal.¹⁰

The Great London Smog

From 5 to 9 December 1952 London was smog bound – a mixture of fog and pollutants, described by one medical writer as ‘an extremely dense and polluted fog affecting the whole of the London area’.¹¹ The triggers were a combination of anticyclonic air, sulphur dioxide, carbon dioxide and smoke particles caused largely by coal combustion aggravated by additional fuel burning due to a very cold spell of weather in November and December 1952.¹² The pollution may also have been aggravated by the fact that London had switched from electric trams to diesel buses that year, and a general increase in motor vehicles in

the post-war years.¹³ 'Every 24 hours, London's chimneys and tail pipes spewed 1,000 tons of smoke particles, 2,000 tons of carbon dioxide, and 370 tons of sulfur dioxide into the foggy air.'¹⁴

Fog or smog, as the dense mixture of industrial and domestic pollutants and fog was called, was not a rare occurrence in London, especially in the winter months of November to January.¹⁵ Richly evoked in literature,¹⁶ art,¹⁷ and film,¹⁸ its frequency may also have led to political complacency. Raising the matter of the 1952 fog in the House of Commons, Norman Dodds MP cited a remark quoted in the local press by Mr. Iain Macleod, the minister of health, "Really, you know," he said, "anyone would think fog had only started in London since I became Minister."¹⁹

The smog of December 1952 was, however, exceptionally severe owing to the fatalities it caused. In the House of Lords, it was reported that

During the fog of 1952, it is estimated – I cannot say more than estimated – that between 4,000 and 5,000 people died from the effects of the fog . . . During the week ended December 6, the weekly death figures for London were running at about the normal winter average, about 945. The next week, when the fog occurred, they went up to 2,484, and the week after that the figure was still much above normal, 1,523. Why the increase is said to be due to fog is that there was no trace of any kind of epidemic of influenza.²⁰

Other figures also indicated that at least 4,000 people had died of respiratory issues during the period (some from pre-existing conditions but others who had no pre-existing conditions) and as many as 8,000 in the following months.²¹ Kynaston challenges this official figure, suggesting it was nearer to 12,000 deaths.²² The possibility that the government of the day deliberately concealed the true gravity of the event is reinforced by the lackadaisical response of ministers. Harold Macmillan, who was housing minister at the time, had made his views on reducing the burning of coal on open fires public knowledge, highlighting the 'enormous number of broad economic considerations which have to be taken into account and which it would be foolish altogether to disregard'.²³ More striking perhaps is the absence of any comment by Prime Minister Winston Churchill, who was in London at the time, and the absence of any parliamentary coverage until the new year.²⁴ Indeed, the Honourable member for Dartford, Mr Norman Dodds, commenting on the amount of public concern at the death toll caused by the fog in the House of Commons in May 1953, said, 'This alarm has been greatly increased by the amazing, at least outward, apathy of the Government. Most people who have deep feelings about this just cannot understand why there has not been a public inquiry after thousands of people were choked to death during the December fogs.'²⁵

In a city traditionally notorious for its fogs there was general agreement on its exceptional severity on this occasion. On the late afternoon of 9 December 1952 the *Guardian* newspaper reported as follows:

Lamp-posts have become invisible and their thin lights, faintly visible from immediately beneath, seem to be hanging unsupported in the air. The city police have put on their white coats again for the hazard of point duty in the dark. The smash and grab men are harvesting fast. The fog has made it impossible for the information room at Scotland Yard to direct area wireless cars to 999 calls and police are having to use pedal cycles.²⁶

As suggested by this quote, the immediate media focus was not on health but on the disruption of transport, crime and – as the fog occurred over the weekend – the disruption of sporting fixtures. The first estimate of its health impact was made several weeks afterwards.

The Chief Medical Statistician stated that ‘the incident was a catastrophe of the first magnitude in which for a few days, death rates attained a level that has only been exceeded on rare occasions during the past hundred years as for example at the height of the cholera epidemic of 1854 and the influenza epidemic of 1918–1919’.²⁷

The density and gravity of the fog of 1952 captured the public’s imagination both then and subsequently. Movietone Moment, 4 December 1952, covered it on their newsreel, and further newsreel footage can be found on British Pathé, *The Smog Menace 1953*.²⁸ Ten years after the event the BBC broadcast *A Look Back at the Great Smog of London 1952*, revisiting ‘the scenes of chaos caused by the “dark-yellow choking mass”’.²⁹ The fascination persists. The event is captured in Season 1, Episode 4, of the Netflix series *The Crown*, entitled ‘Act of God’. Fog, and particularly the London fog, has also been a long-standing element in English literature.³⁰ Dominick Donald’s 2018 novel *Breathe* and most recently Kate Winkler Dawson’s 2025 novel *Death in the Air* portray the ‘killer’ fog and the crimes the fog concealed, notably, although fictionally, those of the real-life serial killer John Reginald Christie.

Early responses

The dangers of air pollution were known to the government and various measures had been passed such as the Smoke Nuisance Abatement (Metropolis) Acts in 1853 and 1856 – to control furnaces used to raise steam, factories, public baths, wash houses and steam vessels on the River Thames. Enforcement rested with the police. This was followed by the

Public Health (London) Act 1891, which transferred enforcement responsibility from the police to the sanitary authorities, which were subsumed into the Metropolitan Borough Councils in 1899.³¹ This Act was a codifying and amending Act and the culmination of several efforts since 1875 to bring some order to the many pieces of legislation which governed public health and sanitation in London.³²

The London County Council which had been established in 1889 was given reserve powers to act if a borough authority defaulted. The LCC coal officers had authority to report smoke nuisance cases; however, a well-used defence from industrial polluters was that most of the smoke came from the chimneys of the 7,000,000 houses in London. There was also a requirement in the law that the smoke was 'black' which presented evidential difficulties and resulted in few prosecutions.³³ The Public Health Act (London) 1936 had also included provisions to deal with smoke but it had to be proved that the smoke was a nuisance. The Act also provided for local authorities to make by-laws regulating the emission of smoke and planning regulations calculated to prevent or reduce smoke emissions for new buildings – other than private houses.³⁴

A year after the London Smog, the LCC presented a report detailing its effects.³⁵ There was, however, considerable reluctance to pass further legislation. Harold Macmillan, Minister for Housing and Local Government (who would later become prime minister), in a Memorandum dated 18 November 1953, suggested forming a committee, noting that 'There are some short-term things which we have done, and can do. We can gain popularity by doing them well – the masks, the warning signals etc' and 'there are some longer-term solutions, which we might study – the better stoves, the smokeless coal, and, possibly, some smokeless zones'. He concluded, 'We cannot do very much, but we can seem to be very busy – and that is half the battle nowadays.'³⁶ He went on to state, 'I am not satisfied that further general legislation is needed at present' and to say, in reply to a question why more was not being done, 'of course, the hon. Gentleman must realise the enormous number of broad economic considerations which have to be taken into account and which it would be foolish altogether to disregard'.³⁷ Reluctance to address the issue was evident as the following winter approached when the government response was to require Londoners to wear masks. It was also the case that the problem of air pollution crossed a number of different ministries, for example, housing, health, fuel and power.³⁸ Despite government reluctance to act, pressure from the press, the public, doctors and individual Members of Parliament compelled the government to appoint the Committee on Air Pollution, chaired by Sir Hugh Beaver (The Beaver Committee).³⁹

The Beaver Report 1954

The Beaver Committee produced two reports: an interim report four months after it was formed, in December 1953, and a final report the following year. The interim report focused on air pollution arising from fuel combustion. It found that the greatest cause of air pollution were domestic fires.

No cure can, therefore, be found for the heavy smoke pollution of our cities and towns unless the domestic chimney is dealt with. In our view there would be little justification for requiring industry and commerce to take possible measures to prevent smoke, often at considerable expense, if the problem of domestic smoke were not also tackled.

It recommended improving the availability of smokeless fuels. The final 1954 report included recommendations to create smokeless zones and smoke control areas – where the use of coal would be restricted, and the provision of grants for the conversion of domestic fires to burn smokeless fuels.

The Committee estimated that the smoke, grit, dust and noxious gases, emitted into the air from domestic dwellings and industrial plant, caused damage to property and other harmful effects to the tune of about £250 million a year. Added to this was the value of the heat wasted through excessive smoke, which was assessed by the Committee at between £25 million and £50 million a year. These figures took no account of injury to health and loss of life.

The Committee made a number of important proposals, the adoption of which would, in their opinion, reduce the density of smoke in the atmosphere to an extent amounting perhaps to as much as 80 per cent over the next ten or fifteen years. Their main recommendations were:

- (1) That, subject to certain exceptions, the emission of dark smoke should be prohibited by law.
- (2) That industries, when installing new plant, should be required to take all practical steps to prevent the emission of grit and dust.
- (3) That, subject to confirmation by the Government, local authorities should be empowered to designate 'Smokeless Zones' and 'Smoke Control Areas'.
- (4) That the duty of inspection and enforcement should be placed upon local authorities, except in the case of certain industrial processes, which should be supervised by Government Inspectors.

- (5) That householders in smoke restricted districts should be required to burn only smokeless fuel, and that the cost of converting domestic fireplaces for this purpose should be met, to a large extent, by grants from the Exchequer and the local authorities.

Opposition to the proposal to introduce new legislation drew attention to the complex technical issues involved in reducing pollution, the costs to those contributing most to pollution (factories and industrialists) and the issues of policy which rested on local authorities (who would have to contend with industry and private individuals in their areas).⁴⁰

Arguments in favour emphasised the health risks and the economic costs of not addressing the problem. For example, referencing the Beaver Committee Report in the House of Lords, Lord Munster (Minister without Portfolio) noted:

I should remind the House that the Committee presented a very convincing indictment of air pollution, not only as a threat to health but also as a source of great material damage, which they estimated at no less than £250 million a year. They further pointed out that the prevention of smoke goes hand in hand with the efficient use of coal. Excessive smoke, they said, means a waste of fuel, and the Committee considered that possibly ten million tons of coal was now wasted in this way every year. The damage to health is even more serious.⁴¹

Faced with the threat of opposition to the introduction of new legislation there was an attempt to introduce a private member's Bill based on the Beaver recommendations.⁴² This was withdrawn when the Government undertook to introduce a somewhat weaker Clean Air Bill.

The Clean Air Act 1956

Four years after the Great Smog, Parliament brought in the Clean Air Act 1956 (later amended and extended in 1968 and consolidated in 1993). In some cities 'smokeless' and/or 'smoke control' zones were established, and households were urged to switch to cleaner fuel. By November 1956 the Act was fully operative in principle but it was up to local authorities to implement the measures.⁴³ Responding to questions in the Commons in 1959, the parliamentary secretary to the ministry of housing and local government, Sir Keith Joseph, stated:

The effectiveness of the various measures taken under it will be cumulative. The powers given to local authorities to create smoke

control areas are adequate . . . In England and Wales 104 smoke control orders were in operation at the end of October, 69 others had been confirmed, and a further 59 had been submitted for confirmation. We have been notified provisionally of yet a further 202 schemes. Smokeless zones can be established only under local Acts. Out of some 300 local authorities in the black areas, 183 have so far submitted five-year programmes.⁴⁴

He had to admit, however, that

the Beaver Committee spoke of probably ten to fifteen years being needed to achieve clean air throughout the black areas. There are many problems in achieving clean air. Some local authorities dispute that they are in black areas. Some have concessionary coal problems. There is no evidence that smokeless fuel is a cause of delay. As for diesel oil, that is another question.

Nevertheless, at a time when the concept of environmental law was yet to emerge the Clean Air Act was significant in its scope and application.

The new Act divided air pollution into four classes: first, prohibiting the emission of dark smoke from chimneys; secondly, requiring that new furnaces should, so far as practicable, be smokeless; thirdly, making provision for the declaration of smokeless areas, and fourthly, requiring minimisation of the emission of grit and dust. The enforcement of these various prohibitions was to be left with local authorities and the officials responsible would be the sanitary inspectors. The Act did not however, cover sulphur fumes and diesel fumes.

While well intentioned the Act provided a number of exceptions and defences. For example, in respect of the emission of dark smoke from chimneys, a defence of unavoidable emission on a number of grounds was permitted, and a seven-year period of grace allowed for an offender to show that the contravention was due to the plant used and that the necessary alterations could not be carried out in the time available. In reducing the emission of grit and dust polluters were to use whatever means were 'practicable' allowing for excuses to be made on grounds of non-practicability – especially the cost of installing new furnaces which had the required grit and dust preventing plant.

The declaration of smokeless zones would continue to rest with local authorities but a new dimension was the availability of grants to assist householders with the cost of the shift to burning smokeless fuel with funding support being divided across the owner or occupier (30 per cent), the local authority (30 per cent) and the Exchequer (40 per cent). Also new was the creation of Clean Air Councils for England and Wales and for

Scotland. These were intended to be consultative bodies whose function was to advise the minister (or the Secretary of State) and assist him in keeping under review the progress made in reducing air pollution.

At the time (1956) Lord Milner of Leeds, speaking in the House of Lords highlighted the magnitude of the problem:

The Government propose to get rid of smog within the next ten to fifteen years. There are something like 12 to 14 million houses in Great Britain; there are perhaps 1 million or more commercial and similar buildings and more than half the latter are in what the Committee called 'black areas'. Those cover 6,000 square miles, equal to some 4 million acres of land. Thus if we try to dispose of this question and to minimise the evil, something like 300,000 to 400,000 acres a year will have to be tackled. On its face that would seem an almost impossible task, especially when one remembers that since the war only 3,000 acres have been so dealt with. Then, added to the premises I have mentioned there are some 200,000 factory chimneys and 20,000 steam engines, all of which come within the purview of the Bill. Finally, there is the question of dust and grit deposit. In some areas of my own city of Leeds, 30 to 40 tons of dust and grit are deposited per square mile in the course of a year. Much of that is due to the proximity of power stations and it is well to bear in mind that power stations, especially the old ones, are prime offenders in the depositing of dust and grit. Those figures indicate the tremendous size of the problem; and to deal with it as we hope to do will require a great effort over a long period of time.⁴⁵

The 1956 Clean Air Act made no attempt to set standards for clean air. What it did was to target specific problems of the time and provide incentives, particularly to householders to replace their fireplace, boilers and cookers with cleaner fuel. Targeted areas, such as London, saw some improvement but beyond London, as suggested in the comments of Lord Milner, the challenges were considerable, and progress 'was hampered by a lack of political priority and money in local councils, confounded by vested industrial interests and poor understanding of the impact of the problem'.⁴⁶

Mosely suggests that outside London there were four key obstacles:

- The cost of conversion of domestic coal fires and the financial burden of provided grant assistance by local authorities to householders along with the administrative burden of inspection and approval.
- Shortages of approved 'smokeless' fuel, such as coke.

- This in turn led to the suspension of smoke control orders in some areas.
- Resistance in those areas where mining took place and miners were paid in part with poor quality coal and where there was a deeply engrained ‘coal culture’.⁴⁷

Despite the challenges the government presented a positive picture of progress as indicated by the response to questions in Parliament in November 1959, by Sir Keith Joseph the parliamentary secretary to the ministry of housing and local government, referenced earlier.⁴⁸ He did, however, acknowledge that achieving clean air in the ‘black areas’ would take time, particularly as some local councils denied that they were even ‘black areas’ and that the progress of a number of local authorities could only be described as ‘satisfactory’.

Later measures

The Clean Air Act was updated in 1968, to require coal and gas burning industries to install tall chimneys, and again in 1974 to include control of motor vehicle emissions. Increasing use of smokeless fuels and the development of alternative energy sources and a general decline in the coal heavy industries of the Victorian and later period led to a general decrease in pollution related health issues such as bronchitis. Heys, writing in 2012, notes, ‘deaths in the UK from respiratory disease declined 34 per cent from 212 to 140 per 100 000 population between 1970 and 2003’.⁴⁹ However, because the Clean Air Acts were primarily directed at visible pollution caused by coal, once the ‘pea-soup’ fogs of London abated and dark smoke was reduced, there was, it has been suggested, a false sense of security.⁵⁰ Other pollutants were building up, especially those caused by motor vehicles.

By 1952 British car makers were producing nearly half a million vehicles, most of which were destined for export.⁵¹ Car purchases were on the rise but in 1952 most people still travelled by public transport.⁵² There were around 4 million licensed vehicles in 1950 jumping to 35 million by 2010.⁵³ Consequently, while air pollution from industrial furnaces and coal fires may have abated other air pollutants were replacing them.

In 1993 these Acts were consolidated in the 1993 Clean Air Act. Industrial and other processes were regulated by the Environmental Protection Act 1990 and the Pollution Prevention and Control Act 1999. In anticipation of the European Union’s Air Quality Framework Directive, the Environment Act of 1995 required the government, for the first time, to produce a national

air quality strategy which included standards and objectives in line with the Directive and its successors and established a system of local air quality management.⁵⁴

The position today

Nevertheless, and despite these various regulatory measures it was admitted in Parliament by the government when they published their clean air strategy in 2019 that ‘exposure to the pollution still present in our atmosphere is one of the UK’s biggest public health challenges, shortening lifespans and damaging quality of life for many people’.⁵⁵ In 2021 the Member of Parliament for Twickenham pointed out that ‘Air pollution contributes to diabetes, dementia and heart disease, and can even cause problems for children in the womb. Public Health England has estimated that the cost of air pollution to the NHS will be approximately £1.5 billion by 2025, and £5.1 billion by 2035. Research by Asthma UK and the British Lung Foundation has found that over 8,500 schools and colleges are in places with levels of PM_{2.5} that are above World Health Organization guidelines.’⁵⁶

In 2013 a nine-year old child, Ella Adoo-Kissi-Debrah, died from an acute asthma attack. An initial coroner’s report stated the cause was acute respiratory failure. In 2021 a second coroner’s inquest into her death recorded the cause of death as air pollution. The coroner stated:

The evidence at the inquest was that there is no safe level for particulate matter and that the WHO guidelines should be seen as minimum requirements. Legally binding targets based on WHO guidelines would reduce the number of deaths from air pollution in the UK.⁵⁷

Subsequently Baroness Jones introduced a private members Bill into the House of Lords, the Clean Air (Human Rights) Bill.⁵⁸ This was described as:

A Bill to establish the right to breathe clean air; to require the Secretary of State to achieve and maintain clean air in England and Wales; to involve Public Health England in setting and reviewing pollutants and their limits; to enhance the powers, duties and functions of the Environment Agency, the Committee on Climate Change, local authorities (including port authorities), the Civil Aviation Authority, Highways England, Historic England and Natural England in relation to air pollution; to establish the Citizens’ Commission for Clean Air with powers to institute or intervene in

legal proceedings; to require the Secretary of State and the relevant national authorities to apply environmental principles in carrying out their duties under this Act and the clean air enactments; and for connected purposes.

The Bill addressed a gap in the Environment Act 2021, which, although it includes a section on particulate matter,⁵⁹ falls short of the levels and targets suggested by the World Health Organization.⁶⁰ On 2 December 2022 the bill passed through the House of Lords – an unusual achievement for a private member's Bill. In March 2023 'Ella's Law' (The Clean Air (Human Rights) Bill) reached its second reading in the House of Commons. However, a general election and a new government meant that it did not progress.

The Environment Act 2021 established a legally binding duty on government to bring forward at least two new air quality targets in secondary legislation by 31 October 2022. These are targets for air quality and targets for fine particulate matter. This duty sits within the environmental targets' framework outlined in the Environment Act (Part 1). On 28 October 2022 the Government confirmed that this legal deadline would be missed.⁶¹ Commenting on the delay, Professor Sir Stephen Holgate, special adviser on air quality at the Royal College of Physicians (RCP), said:

These targets are supposed to play a central role in driving our efforts to address environmental decline and its impact on human health in various areas, including air quality. It is therefore deeply disappointing and extremely concerning that the government will now miss the deadline for introducing them.⁶²

The Royal College of Physicians has argued for greater ambition aimed at reducing air pollution by 2030. It has pointed to research by the Clean Air Fund and Imperial College London that

reducing PM_{2.5} levels to 10µg m⁻³ by 2030 is feasible – many parts of the UK are already on course to meet this. It also showed that it would lead to 3,100 fewer coronary heart disease cases and 388,000 fewer reported asthma symptom days in children each year. The total economic benefits were projected to be in excess of £380 billion.⁶³

Some initiatives have been implemented. In a move intended to cut air pollutants in 2019 London introduced an Ultra Low Emissions Zone (ULEZ) across all its boroughs. This was extended to create a larger zone in 2021 and again in 2023 to include the whole of Greater London. The ULEZ operates by levying a charge on all vehicles entering the zone which do not comply with the low emissions standards set for the zone.

The introduction of ULEZ triggered considerable opposition by politicians and drivers. In July 2023 four London borough councils brought a legal claim against the Mayor of London's decision to expand the scheme. On 28 July 2023 the High Court ruled that the expansion was lawful.⁶⁴ However researchers at Imperial College London found that the introduction of ULEZ made very little difference to levels of nitrogen dioxide levels in the city in a comparison of before and after data.⁶⁵ The report suggested a more holistic and integrated approach was needed such as the upgrading of bus and taxi fleets, tighter controls of vehicle emissions and consideration of pollutants generated outside the ULEZ but drifting into it.⁶⁶ Given that a number of other cities either have or are proposing to introduce ULEZ the research is useful in identifying a need for broader thinking. The Mayor of London, however, claimed the introduction of ULEZ was a success because it had resulted in far fewer non-compliant cars – only 5 per cent of cars in London being found to be non-compliant and liable to the charge in October 2023.⁶⁷ Arguably scrappage schemes for non-compliant vehicles owned by Londoners may have helped, while those who owned older vehicles more likely to fail the standards resorted to other means of transport.⁶⁸ Implicitly therefore those who could afford either to pay the fines or to upgrade their vehicles were largely unaffected by the introduction of these measures, while those who could not have become increasingly reliant on public transport.

There are similar social and economic inequalities associated with the government's drive to move from carbon fuel cars to electric vehicles (EVs). The United Kingdom aims to 'end the sale of new petrol and diesel vehicles by 2030, and for all new cars and vans to be fully zero emission at the tailpipe by 2035'.⁶⁹ While this is less to do with air pollution and more driven by concerns about global warming and the commitment of government to reach a certain reduction in carbon targets, a consequence will also be a reduction in vehicle emissions and therefore air pollutants from cars. There are, however, two major inequalities related to this. The first is the cost of acquiring EVs.

The second is the environmental impact of sourcing the rare metals (lithium or lithium-ion, manganese, cobalt, graphite, steel, and nickel) needed to power EVs. Currently, most of these rare metals are from China and the Democratic Republic of Congo, neither of which have good human rights records. However, because demand may soon outstrip supply other sources are being considered, including mining the deep sea-bed around islands where the indigenous populations are already vulnerable to the negative impacts of climate change. This chapter is not the place to examine the arguments for and against electric vehicles, but there are parallels

with the impact of industrialisation on air pollution in 1952. In 1952 a shift to smokeless fuel and greater regulation of furnaces met resistance on the part of industrialists because the costs incurred ate into profits. It was necessary to secure the support of those with vested interests to shift the dial and that took a long time. At the opposite end were health experts and scientists highlighting the dangers of air pollution and events such as the Great London Smog. Today, environmentalists have joined the scientists in highlighting the damaging effects of human activity. At the same time the opportunities to capitalise on shifting priorities are being seized by those who can benefit financially leaving those least able to escape the consequences of these shifts vulnerable to new harms.

Conclusion

In December 2022, seventy years after the Great London Fog, City Hall published a report looking at the impact of Clean Air Acts on air pollution and speculating on what the situation might have been in 1952 had those Acts then been in force. The London mayor, Sadiq Khan, pointed out:

Air pollution in London today is still a matter of life and death. But unlike the toxic pollution of the past, which could be seen, the air pollution today is an invisible killer. It's making people sick from cradle to grave – from stunted lungs in young children to adult onset asthma, lung disease and dementia.⁷⁰

An article in the *Guardian* drew parallels between the events of 1952 and today. Referring to Jenny Jones MP's private member's Bill 'Ella's Law', Garry Fuller reminds us that:

The UK's first Clean Air Act also began as a private member's bill, introduced by the handlebar moustached Tory MP Gerald Nabarro. Nabarro's bill was triggered by a Ministry of Health report that estimated a death toll of about 4,000 people due to the weeklong London smog of 1952, a death rate greater than the Victorian cholera outbreaks and the worst periods of the blitz. Politically, Jones and Nabarro are poles apart but Jones's bill comes at a time when about 4,000 Londoners die from breathing polluted air each year.⁷¹

Scarrow has suggested that the 'most important impact of the Clean Air Act may be its precedent-setting example of what is possible – or what is thought possible – in attacking pollution problems with legal measures'.⁷² Unfortunately there was no reference to the Act in the king's speech at the opening of parliament in November 2023 or in subsequent speeches, and

therefore little hope that the current government will advance this. In some respects therefore limited progress has been made since 1952 despite the UK government acknowledging that:

In the UK, air pollution is the largest environmental risk to public health . . . The annual mortality of human-made air pollution in the UK is roughly equivalent to between 28,000 and 36,000 deaths every year. It is estimated that between 2017 and 2025 the total cost to the NHS and social care system of air pollutants (fine particulate matter and nitrogen dioxide), for which there is more robust evidence for an association, will be £1.6 billion'.⁷³

Although the figure for fatalities attributable to the Great London Fog of 1952 are uncertain, taken at its worst there were around 13,000 deaths at the time of the Fog and in the succeeding months. Figures for this decade are similarly uncertain not least because air pollution is rarely listed as a cause of death – Ella Adoo-Kissi-Debrah's death certificate was an exception. Academic research and media reports suggest however, that air pollution related deaths remain high. In 2018 it was estimated that '28,000 and 36,000 people die as a result of air pollution every year in the UK'.⁷⁴ In 2019 research by Imperial College London, found that 'In 2019 around 4,000 deaths in the capital could be attributed to air pollution'.⁷⁵ In February 2023, *The Standard* newspaper referred to a global study of excess deaths caused by air pollution published in the medical journal *The Lancet Planetary Health*; of these '5,950 were in London, 1,330 in Birmingham, 730 in Leeds, and 670 in Liverpool'.⁷⁶ Although the contributing factors may be different from those in 1952, the fact remains that air pollution is a killer, and that those most likely to succumb are the elderly, children and the socially and economically disadvantaged. It also remains a fact that getting politicians to focus on this issue is a challenge and apparently not a priority.

Notes

1. Rationing did not end completely until 1954.
2. UK Parliament, *Crimes of the Century*, <https://www.parliament.uk/business/publications/research/olympic-britain/crime-and-defence/crimes-of-the-century/#:~:text=During%20the%20first%20two%20decades,1901%20to%201%2C000%20by%201950.>
3. Reply to question put in the Commons 25 March 1952, 'Coalmining', Hansard, Vol. 498, 25 March 1952.
4. Department for Energy Security and Net Zero and Department for Business Energy and Industrial Strategy, 'Historical Coal Data: Coal Availability and Consumption 1853 to 2023'. Updated 30 July 2024.

5. Statista, 'Coal Production in the United Kingdom (UK) from 1913 to 2023', <https://www.statista.com/statistics/1125925/historic-coal-production-in-the-united-kingdom/>.
6. Lynda Nead, "As Snug as a Bug in a Rug" Post War Housing, Homes and Coal Fires' (2011), *Science Museum Group Journal*, <https://journal.sciencemuseum.ac.uk/article/post-war-housing-homes/#abstract>.
7. Queen Elizabeth, in her Christmas broadcast in 1953, sent from New Zealand, referred to the family hearth: 'Of course, we all want our children at Christmas time – for that is the season above all others when each family gathers at its own hearth.' <https://www.royal.uk/christmas-broadcast-1953>
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17. See, for example, the work of Claude Monet and James McNeill Whistler.
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19. Mr Norman Dodds, Hansard, Vol. 515, column 843, 8 May 1953, <https://hansard.parliament.uk/Commons/1953-05-08/debates/551a22aa-af54-4df5-af4c-6716ee8ee6f6/AirPollution>.
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24. There is no mention of the event in Churchill's speeches for December, <https://api.parliament.uk/historic-hansard/people/mr-winston-churchill/1952>. Indeed on 4 December he was facing a motion of censure for the inefficiency of his government. Hansard 1803–2005, HC Deb, 4 December 1952, Vol. 508, cc 1783–892.
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31. Even earlier the problems of smoke pollution in London had been realised with a royal Proclamation prohibiting the burning of sea coal in the thirteenth century.
32. A digitised and annotated copy of the Act can be found in the Wellcome Collection, <https://wellcomecollection.org/works/krgyghjx/items?canvas=7>.
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Chapter 3

Direct line to Beeching and beyond? The failure of the 1950s railway modernisation plan

Emma Jones

Introduction

Britain's railway heritage is deeply embedded in the public's consciousness. From televisual travelogues to trainspotting reminiscences to a network of preserved 'heritage' railways, the development and history of the country's railways is never far away. Similarly, the contemporary railway network, and its potential future, is frequently in the media. At the time of writing, this is most recently due to the UK Labour government's plans for Great British Railways, a planned re-nationalisation of at least parts of the railway infrastructure.¹

Nevertheless, despite this long-standing attachment, there has been relatively little socio-legal exploration of the relationship between the origins and development of the railways, their current position, and the legislative developments which have influenced these. Instead, much of the available literature focuses largely upon technical or economic considerations.² The current chapter addresses this gap by focusing upon the 1955 British Transport Commission plan for the 'Modernisation and Re-Equipping of British Railways' ('the Modernisation Plan').³ It conceptualises the design, implementation and failure of this plan as a key catalyst in the history of Britain's railways. The Modernisation Plan fully exposed longstanding problems facing the railways, with several stemming from the legislative approach taken to the historical development of

the railway system. At the same time, it was instrumental in the creation of the famous (or infamous) ‘The Reshaping of British Railways’ report (commonly referred to as ‘the Beeching report’ after the name of its main author), which changed the landscape of Britain’s railways in a manner that still reverberates today.⁴

In synthesising the legislative development of the railways with the catalytic nature of the 1950s Modernisation Plan, this chapter also establishes railway history as an important site for future socio-legal research. The historical and continuing development of the UK’s railways allow researchers to draw upon economic, political and even geographic contexts in which to site the ‘legal’.⁵ To demonstrate this, the chapter will take a socio-legal perspective to analyse two aspects of the railways which were both, it is argued, relevant to the failure of the Modernisation Plan. Namely, the legal restrictions around freight and passenger traffic which were imposed during the Victorian era (via legislative action) and the lack of an overall plan for the initial construction of the railways in the same period (driven by a lack of governmental and parliamentary vision). It is not suggested that these are by any means the sole determinants of the fate of the Modernisation Plan. Many others, including the increase in road traffic and political wranglings, also played a part. For example, Loft, discussing the Modernisation Plan and its subsequent review, argues that the evolution and final form of each can be attributed to political wrangling.⁶ However, the two aspects chosen both foreground the specific interaction between forms of legislative action (and lack thereof) and the wider social conditions which accompanied the Modernisation Plan. As such, they reflect Charlesworth’s call for ‘socio-legal historical reconstructions of law’s pervasiveness’.⁷ They also act as illustrations of the importance of constructing a detailed socio-legal history of the railways in a way which centres external legal history, exploring the intersections between law and the wider development of the system.⁸

The origins of the railways

The railway industry is possibly unique among modern transport modes in the extent of its linkages with developments that occurred long enough ago to be regarded as history.⁹

The opening of the first passenger railway line, from Manchester to Liverpool, in September 1830, with Stephenson’s Rocket, is seen by many as synonymous with the start of railway travel, with Wolmar describing it as ‘the start of the railway age’.¹⁰ However, prior to that, smaller railways

already existed, funded by merchants and manufacturers to serve quarries, mines and other industrial infrastructure.¹¹ Despite some mixed reviews for these ‘monstrous locomotives . . . obliterating everything beneath their smoke’, the potential for both freight and passenger travel was noted by many entrepreneurs and investors.¹² This was an interest encouraged by the repeal of the Bubble Act 1720, during 1825, which facilitated the formation of joint-stock companies to invest in railway schemes.¹³

Given this boom in railways was taking place against a backdrop of Victorian free trade *laissez faire*,¹⁴ it is perhaps unsurprising that there was relatively little state planning involved in the early railways. Construction was driven by private individuals and interests who combined to incorporate railway companies, with around twenty already formed prior to 1821.¹⁵ Private Bills were required to incorporate such companies, allow for compulsory purchase of land and approve proposed schemes, but these were subject to little debate.¹⁶ The committees who determined the progress of these Bills viewed themselves ‘primarily as umpires’ between landowning and railway interests.¹⁷ There was no overall governmental or parliamentary vision for the railways, instead, the development, location and frequency of lines were determined piecemeal via a combination of commercial, personal and other interests, without reference to an overall vision or blueprint.¹⁸ Crompton captures this well, noting that ‘The UK was unusual in the absence of direct inputs by the state into the design, building or financing of its railway system’.¹⁹

Attempts to introduce a broader set of principles to govern parliamentary decisions were largely unsuccessful or short-lived.²⁰ Fierce competition between companies exacerbated these issues; for example at Hastings, both the London, Brighton and South Coast Railway and the South Eastern Railway built train lines, running parallel to each other.²¹

Running alongside this lack of broad governmental and parliamentary vision were a series of narrower, but highly significant, legislative interventions. Railway companies were subject to the Carriers Act 1830, establishing them as ‘common carriers’ whose services were available to the public. This Act applied to any ‘mail contractor, stage coach proprietor, or other common carrier by land’.²² However, the railways’ growing dominance during the subsequent decades meant that they were still able to impose restrictive terms on companies seeking to transport goods, leading to concerns being raised. This resulted in a succession of legislation, the Railway and Canal Traffic Acts, being introduced from 1854 to 1894 in an attempt to re-balance this unequal bargaining position and refine the ‘common carrier’ duties owed by the railways.²³

From the early days of the railways, once incorporated companies were (on an individual basis) given a set of maximum charges they could apply

for freight, based upon the division of goods into different categories or classes.²⁴ The Railway and Canal Traffic Act 1854 required all railway and canal companies to ‘afford all reasonable facilities for the receiving and forwarding and delivering of traffic’ and required that ‘no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic’.²⁵ It was also specified that they should not be subjected to ‘any undue or unreasonable prejudice or disadvantage’.²⁶ Courts were granted the power to issue injunctions or interdicts to prevent such behaviour, together with an award of costs, backed with a £200 maximum daily fine for non-compliance.²⁷ This effectively required the railway companies to transport any and all goods (with limited exceptions), regardless of their value or quantity. Subsequent legislation attempted to further curb the powers of railway companies to enforce agreements which would impose additional ‘tolls, rates or charges’ in respect of traffic.²⁸ However, Cain notes that by the 1880s a system existed with ‘literally millions of rates nearly all below the maximum allowed and based upon an eclectic policy colloquially known as “charging what the traffic will bear”’.²⁹

It should be noted that the ‘common carrier’ duty and the references to ‘traffic’ in the Railway and Canal Traffic Acts 1854 to 1894 also encompassed passengers as well as freight.³⁰ Further specific restrictions relating to passengers were also introduced, notably, the Railway Regulation Act 1844 required the provision of third-class travel³¹ and the Cheap Trains Act 1883 required railway companies to run a significant number of cheap trains, aimed at workers until its repeal in the 1920s.³² However, it was arguably the restrictions on freight which had the longest lasting impacts.

Amidst growing complaints from traders around issues including charges for the provision of ‘terminal services’ such as portage,³³ the Railway and Canal Traffic Act 1888 was introduced. Section 24 of this Act gave the Board of Trade powers to review and ultimately determine the railway companies’ charging practices.³⁴ The product of this, a revised set of maximum tariffs, contributed to what Cain refers to as a ‘coup’ in 1893, with railway companies raising many former ‘special’ rates to the maximum permitted. This resulted in public outrage, led by disgruntled traders who relied on the railways’ freight operation.³⁵ Following a Select Committee and complex negotiations, the Railway and Canal Traffic Act 1894 was passed, further limiting the railway companies’ ability to compete on price.

After the 1894 Act, the railways continued to evolve, notably with 130 railway lines being taken into public ownership under the auspices of a Railway Executive Committee in 1914 at the outset of the First World War.³⁶ Afterwards, the Railways Act 1921³⁷ amalgamated the majority of

different railway companies (120) into four groups: the Southern Group; the Western Group; the North Western, Midland, and West Scottish Group; and the North Eastern, Eastern, and East Scottish Group.³⁸ By creating regional monopolies and fixing standard charges, this Act ameliorated the waste and duplication generated by such extreme competition. However, the sprawling network of railways this had spawned, together with the restrictive protections on freight rail traffic, remained in place. This was despite a 'Square Deal' campaign by the 'Big Four' railway companies seeking the repeal of restrictions.³⁹ The campaign was mounted in the face of increasing competition from road haulage operators, who were not constrained by the requirements placed upon the railway companies as 'common carriers', required to transport all and any freight.

The onset of the Second World War in 1939 effectively ended the Square Deal campaign, but instead led to a renewed prominence on the part of the railway, who played a crucial role in the war effort, from carrying evacuees to moving troops to catering for the needs of wartime industries. The railways were once again brought under Government control with the (re)formation of a Railway Executive Committee, but with the Big Four each retaining a number of distinctive features.⁴⁰ However, the post-war period saw a sharp decline in income with the railway companies' income roughly halved from 1945 to 1946, and a backlog of maintenance and renewals requiring urgent attention, all against a backdrop of post-war material and labour shortages.⁴¹ The newly elected Labour party's commitment to nationalisation of the railways arguably diverted the railway companies' attention from longer term strategy, further exacerbating these issues.⁴²

The railways of the 1950s and the Modernisation Plan

Economically, the early 1950s were a time of emerging from austerity, including the ending of rationing (1954) and growing affluence.⁴³ At the same time, socially, there were contradictions discernible between the desire for a post-war return to stability and convention and demands for social change.⁴⁴ One example of this is the way in which gender and working identities intersected during this period, with women increasingly obtaining part time work, whilst at the same time the large disparity in pay between women and men remained almost static.⁴⁵ Similar contradictions can be discerned in relation to transportation generally. Traditional pre-war aspects of public transport including trains, trams and buses were retained.⁴⁶ However, at the same time the decade marked the beginning of a wider shift to the use of roads for the majority of freight

and passenger traffic.⁴⁷ Such a transition has had longstanding impacts upon spatial, and even social, mobility.⁴⁸ Loft refers to the development of ‘two discernible strands in political debate and cultural commentary during the late 1950s and 1960s: decline and modernization’.⁴⁹ He argues that the problems experienced by the railways ‘seemed to epitomize the problems identified by the “what’s wrong with Britain?” debate’, in contrast to the perception of road traffic as supporters of modern industries and cars as symbols of individual affluence.⁵⁰

The start of this period can be identified as the coming into force in 1948 of the Transport Act 1947.⁵¹ Part II of this Act enacted Labour’s stated intentions by nationalising the railways and placing them under the administration of the Railway Executive.⁵² Cowie, reflecting upon this nationalisation, notes that ‘It was driven more by circumstances and political ideology rather than any great strategic vision for a modern railway’.⁵³ After a change to a Conservative government, the Transport Act 1953 placed the railways under the control of the British Transport Commission (with a supposedly decentralised management system).⁵⁴ This Act also gave the railways greater flexibility in terms of charges, removing some of the traditional restrictions placed on the railways’ treatment of freight traffic.⁵⁵ However, the restrictions placed upon the railways as ‘common carriers’ and under the Railway and Canal Traffic Act 1854 persisted until the 1960s.⁵⁶ There was still little sense of an overall vision or blueprint, and this was reflected in a half-hearted legislative response which retained the most problematic provisions. The main drive for the changes was the Conservative government’s commitment to promoting competition, with the removal of some restrictions acting as a form of ‘compensation’ to the British Transport Commission for the removal of some of its functions.⁵⁷

Perhaps unsurprisingly therefore, despite the changes that were made, by the mid-1950s, the general perception was that Britain’s railways were now inefficient, ill-equipped and unprofitable.⁵⁸ Drawing upon initial plans developed in 1953, the British Transport Commission’s Modernisation Plan, written in 1954 and published in January 1955, was designed to tackle this.⁵⁹ It proposed a full upgrade of the railway system within fifteen years at a cost of £1,200 million.⁶⁰ The key items included improving the track and signalling, the introduction of hundreds of diesel trains and the electrification of hundreds of miles of line (ending the production of steam engines after 1956), the improvement of its 42,000 passenger carrying vehicles and stations, the remodelling of freight services and a mere £35 million on what are described as ‘sundry other items’, such as staff welfare and office mechanisms.⁶¹ The overall aim was the transformation of ‘virtually all the forms of service provided by British Rail’,

generating an additional £85 million revenue for the railways per year.⁶² The plan itself states:

[A]s regards passenger services, remodelling of the operations will provide fast, clean, regular and frequent services, electric or diesel, in all the great urban areas; inter-city and main-line trains will be accelerated and made more punctual; services on other routes will be made reasonably economic, or will be transferred to road . . . as regards freight services, there will be a complete re-orientation of operations designed to speed up movement, to reduce its cost, and to provide direct transits for main streams of traffic; and to attract to the railway a due proportion of the full-load merchandise traffic which would otherwise pass by road.⁶³

The wording 'or will be transferred to road' is one of a few indications contained within the Modernisation Plan that its implementation would require some form of cuts to the network. There are acknowledgments that some forms of both passenger and freight traffic may be better suited to road transport,⁶⁴ although for passenger traffic it is suggested that the 'normal' approach will be to replace steam trains with diesel on such lines where there was a 'reasonable prospect' of obtaining more traffic.⁶⁵ There is also explicit reference to the closure of a number of marshalling yards and goods depots.⁶⁶ However, overall the tone of the Modernisation Plan is positive, suggesting 'the yield to be expected from the Plan in due course . . . is such as to make it an economic venture of the most promising sort'.⁶⁷

Despite its overall tone of optimism, the Modernisation Plan does note that its success in terms of freight requires the railways to offer 'improved services' at 'lower costs',⁶⁸ a comment which seems to disregard the complex web of legislative restrictions already in place, and the challenges these had caused to the profitability of the railways.

The Modernisation Plan was announced with government support and included in a Parliamentary motion on 3 February.⁶⁹ Speaking on 8 February 1955, as part of a debate on increasing the borrowing powers of the transport sector (including providing £75 million towards the Modernisation Plan), the then-minister of transport and civil aviation, Mr Boyd-Carpenter, stated:

The purpose of the modernisation proposals is not only to make the railways solvent, but to enable them to render service which only an efficient and up-to-date railway system can render to the economy of the country and to the comfort and convenience of the travelling public.⁷⁰

In early 1956, the British Transport Commission requested an increase in its charges for freight and passenger traffic, to address an increased surplus resulting from industrial action and increasing costs and wages.⁷¹ The government, in a departure from its usual policy on nationalised industries, intervened to require less significant increases, allowing the Commission to continue running at an increased deficit for a further six months.⁷² As part of this arrangement, the government required the British Transport Commission to provide ‘the necessary proposals’ for reversing this deficit, with Mr Harold Watkinson, the then-minister of transport and civil aviation, noting, ‘this may well include much more drastic closure of branch lines, and many more drastic economies that will be necessary’.⁷³ These proposals eventually formed part of an extensive review of the financing and structure of the British Transport Commission via the White Paper, *Proposals for the Railways*.⁷⁴ This White Paper notes that:

The Commission have, in the Government’s view, presented a convincing case showing that, by such measures as the acceleration of the schedule for the modernisation and rationalisation of the railways, the use of greater freedom in charging policy and the steady development of greater productivity, they should be able to overcome their present financial difficulties, reaching a state of current balance by 1961 or 1962 and eventually a position of considerable strength.⁷⁵

The paper therefore proposed providing ‘special advances’ to the British Transport Commission to cover their revenue deficits for a period, to be repayable in instalments at a later date, and to extend the Commission’s borrowing powers to cover interest payments on sums required for capital expenditure.⁷⁶ A parliamentary debate on this paper ranged in focus from whether the Modernisation Plan was overly optimistic in its forecasts, to means of funding, to the impact on both freight and passengers, to the comparative position of the railways with other parts of the transport industry.⁷⁷ However, the paper’s proposals were then successfully encapsulated in the Transport (Railway Finances) Act 1957.⁷⁸

In late 1957, the Commission informed the government that the cost of the plan had been revised to £1.5 million partly due to rising costs, partly due to more precise evaluations.⁷⁹ A further Bill to extend the British Transport Commission’s borrowing powers was then introduced (later becoming the Transport (Borrowing Powers) Act 1959).⁸⁰ During the debates on this, the government indicated that it had required a further review of the Modernisation Plan, particularly in light of falling levels of

freight traffic and broader industrial and economic shifts which impacted the railways, such as a move from the production of coal (transported by rail) towards cheaper oil (transported by road).⁸¹

Then in 1959 a reappraisal of the Modernisation Plan was published. In it, the Commission concluded:

This Re-appraisal has shown that the Modernisation Plan drawn up four years ago, and the financial appreciation made in the White Paper of 1956, were soundly based. Subsequent events now make desirable some modifications to the Plan but they are not many and are principally in the direction of accelerating its execution. Where the financial forecasts made in 1956 have not been realised, the causes lie predominantly in factors which were expressly excluded from the forecasts as being outside the control of the Commission.⁸²

The reappraisal put the blame for worsening deficits upon a fall in production amongst key industries serviced by the railways, causing a decline in freight traffic, although this was believed to be temporary.⁸³ It also explicitly identifies two key focuses moving forward, not only modernisation but also rationalisation.⁸⁴ In relation to the latter, it indicates that there will be 'a substantial acceleration' of this process.⁸⁵ This shift from largely emphasising modernisation marked a significant change in direction. Aldcroft notes that in the period 1948 to 1959 progress in 'reshaping' had been 'remarkably slow' with only around 5.3 per cent of the 1948 route mileage being completely closed.⁸⁶ The somewhat chaotic legacy of the Victorian railway system had remained substantially in place. The reappraisal's requirement for more closures at a faster pace clearly foreshadows the sweeping changes of the 1960s which sought to thoroughly tackle this legacy.

Overall, at the end of the 1950s there were therefore contradictory currents shaping the progress of the railways. The Modernisation Plan and its reappraisal envisaged overcoming temporary setbacks to achieve a financially viable railway system which met the needs of contemporary society. At the same time, the legislative restrictions placed upon the railways had not been fully removed and the legacy of Victorian railway-building was still evident in the patchwork of lines which remained in service under the British Transport Commission's auspices. The Modernisation Plan and the level of parliamentary and public scrutiny it entailed was catalytic: it placed attention firmly on the railways, putting them at the heart of economic and political concerns. In doing so, it exposed, but could not fully ameliorate or resolve, a range of contradictory and complex currents.

The Beeching Report and the journey to the current day

In 1961 the British Transport Commission published the *British Railways Modernisation Progress Report* which provided optimistic commentary on reaching a 'turning-point' in the 1960s and referring to visible successes of the programme.⁸⁷ A further report in May 1962 was also buoyant in tone, noting:

The re-equipped railways are ready to challenge competitors for the right to supply the transport needs of industry and the public. A modern outlook goes with re-equipment; it holds that railways should be free of shackles that compel them to render services that cannot earn their economic value. The move to acquire freedom to compete on level terms has also been part of the year's progress.⁸⁸

This is in contrast to the views of the Ministry of Transport, as reported in a 1960 Parliamentary Select Committee on Nationalized Industries.⁸⁹ The permanent secretary to the minister indicated to the Committee that it was only upon the publication of the 1959 reappraisal that the detailed calculations behind the Modernisation Plan were fully investigated and found to be unrealistic.⁹⁰ The findings of the Select Committee and a Special Advisory Group were drawn together in a Government White Paper of December 1960.⁹¹ This noted that the British Transport Commission was about to reach a deficit of around £500 million, with the railways at the 'heart of the problem'.⁹² In effect, it was the railways reaching a state of financial crisis, with the Modernisation Plan as a catalyst, which led finally to a government acceptance that the railways required an overall vision or blueprint for their future.

The paper called for the abolition of the British Transport Commission, viewing its remit as too large and unwieldy for it to deal with the railways efficiently.⁹³ Instead, the paper proposed the creation of a series of separate bodies, with control of the railways passed to a newly created British Railways Board under the Transport Act 1962.⁹⁴ As indicated earlier, this is the Act which also finally abolished the restrictions placed upon the railways as common carriers and under the Railway and Canal Traffic Act 1854. Jackson notes that 'British Railways was at last free to wash its hands of the inefficient and expensive sundries and wagon load freight business'.⁹⁵

Following the passing of the 1962 Act, the Commission's duties were duly passed to the British Railways Board from 1 January 1963 under the management of its new head, Richard Beeching and in 1963 the Beeching

Report was published.⁹⁶ Providing a detailed overview of the railway system at that time, it proposed the closure of approximately 2,000 stations and the withdrawal of approximately 250 train services on the grounds they were uneconomical.⁹⁷ Bonavia summarises the eventual impacts of the report as follows: ‘route-miles open for traffic had been 18,214 at the end of 1961; at the end of 1969, there were 12,098. Total stations in 1961 had been 7,025; in 1969 there were 3,002.’⁹⁸

These cuts had numerous long-standing economic and social impacts.⁹⁹ Whether they were necessary and suitable is heavily debated. For example, Henshaw characterises the Beeching Report as the zenith of an anti-railway conspiracy, designed to ensure the supremacy of road traffic.¹⁰⁰ There is also some evidence it led to the defeat of the Conservative government in the subsequent 1964 General Election.¹⁰¹ In contrast, others point out that there had already been (less drastic) cuts prior to 1964, and suggest Beeching was simply being realistic about the state of the railways and the type of radical solution required.¹⁰² Regardless of the viewpoint taken, it is clear that the failure of the Modernisation Plan was the catalyst for such cuts – rationalisation, not modernisation, was now the dominant theme.

After the Beeching era (which only in fact lasted a short but significant four years), the railways then remained nationalised until the mid-1990s. Morse refers to the 1970s and 1980s as “a time of contrasts and contradictions”.¹⁰³ The nationalised entity was known as British Rail from 1965, as part of a shift in corporate branding and marketing.¹⁰⁴ However, despite its sleek and now-iconic corporate logo and improvements in a range of technical matters, it was also regularly pillorised as unpunctual and inefficient, with popular jokes often focused upon the standards of catering.¹⁰⁵ During the 1980s, general economic growth coupled with increased commercial pressure from the then-Conservative government meant that by the 1990s “the network was investment-starved but effective at controlling costs”.¹⁰⁶ The government’s ideological perspective led to a focus upon privatisation during this period, with state-owned institutions being placed in private hands to stimulate competition.¹⁰⁷ As part of this, following the Railways Act 1993,¹⁰⁸ British Rail underwent a process of (re)privatisation, although Albertson notes that this deviated from the norm as public subsidies continued to be provided.¹⁰⁹

Privatisation in the 1990s was achieved through regional franchising to Train Operating Companies, with a separate company (initially Railtrack, then Network Rail) having ownership of the track infrastructure, and several further companies taking responsibility for its maintenance and renewal and for rolling stock.¹¹⁰ The impacts of privatisation have been as heavily contested as those of nationalisation.¹¹¹ For example, Pollitt

and Smith provide a largely positive cost-benefit analysis.¹¹² In contrast, Bowman challenges the narrative of rail privatisation as economically successful.¹¹³ In recent years, several Train Operating Companies have moved to being under government control again, for example, Northern Rail in 2020.¹¹⁴ As indicated in the introduction to this chapter, at the time of writing the current Labour government intend to renationalise the railways, with the Passenger Railway Services (Public Ownership) Act 2024 already passed and a Railways Bill planned for the current Parliamentary session.¹¹⁵

The Modernisation Plan as a catalyst

The railway system in 1950s Britain was the subject of somewhat tortuous political wrangling. This encapsulated a range of contradictory and complex currents around transportation, shaped by wider economic, political and social changes and transitions, including the decline of traditional British industries and the shift to road transport.¹¹⁶ The British Transport Commission, and its governmental and parliamentary overseers, failed to successfully navigate these, leading to the failure of the Modernisation Plan, which in turn led directly to the swingeing cuts imposed following the Beeching Report.

This chapter has highlighted that two of these contradictory and complex currents stem directly from the Victorian development of the railways and the legislative approach taken during this period. Firstly, the government, parliament and the British Transport Commission were still dealing with an inheritance forged by the restrictions on traffic, particularly freight, imposed via the Railway and Canal Traffic Acts 1854–1894. Gourvish highlights the continuing relevance of these early legislative attempts ‘designed to encourage a “public service” obligation in management’ and mitigate the virtual monopoly on Victorian transportation.¹¹⁷ The emphasis on modernisation of the railways through diesel, electrification and other means was not matched by any attempt to remove such ‘outdated statutory obligations’.¹¹⁸

Secondly, alongside these legislative restrictions, the British Transport Commission was attempting to impose a form of economic and geographical logic onto a system which had lacked this from its earliest inception. The railway system had developed piecemeal via a series of individual Acts of Parliament without an overall vision or blueprint.¹¹⁹ Even during the period of implementation of the Modernisation Plan, there still arguably remained a lack of clear and shared vision amongst those involved in its implementation. In a debate on the 1960 Parliamentary Select

Committee on Nationalized Industries, the then-minister of transport, Ernest Marples, noted that 'There is not much sense in looking at individual projects unless we are reasonably clear about the basis and sense of the whole problem, including the future size and shape of the railways.'¹²⁰ The vision that was then imposed, that of the Beeching Report, was focused on rationalising the railway system's Victorian inheritance, with modernisation relegated to something of a side-note.

Overall, the Modernisation Plan was a catalyst, synthesising long-standing issues arising from the Victorian period's legislative approach to the railways with contemporary 1950s concerns and challenges. The significant sums required by the British Transport Commission to execute its Modernisation Plan, and the accompanying governmental and parliamentary scrutiny, brought the shortcomings of Britain's railway system into sharp relief. Such issues could no longer be ignored or their tackling postponed. Therefore, its failure led directly to the seismic intervention of the Beeching Report.

The 'direct line' which can be traced from the Victorian legislative approach to the railways to the Modernisation Plan and then to the Beeching report is a vivid illustration of the role of the socio-legal within railway history. It is one which establishes the railways as an important site for further socio-legal work moving forwards.

Conclusion: a direct line with varied gradients

'How the greatest engineering triumph of the Victorian age will streamline itself to fit the age of the motor car and the atom is, in some ways, a fascinating study. I am sure that no one will disagree that that is the crux of the problem facing us.'¹²¹ Although these words were stated within a discussion of the 1950s Modernisation Plan, they remain pertinent today. The planned (re)nationalisation of the railway system has once again foregrounded the future of the railways as a topic for debate and discussion. Given the continuities which can be discerned throughout the history of the railways, there are lessons which can be learnt from the Modernisation Plan and its failure. This chapter concludes by highlighting three which can be discerned from its socio-legal interpretation of events. Firstly, the Modernisation Plan provides an illustration of the railways' importance and symbolism within British society. The railway system and its future stands in the centre of a mass of contradictory and complex political, economic and social currents which each engender strong beliefs and views. The railways do not represent a 'stand-alone' issue but instead encompass many wider elements. Secondly, it is important

for the specific legislative provisions surrounding nationalisation to be clear, comprehensive and fully consider existing legislation, something which was not achieved when tackling the legacy of the Railway and Canal Traffic Acts 1854–1894. Thirdly, it is vital that such specific legislation forms part of a wider governmental and parliamentary vision for the future of the railways which understands and appreciates their wider functions, rather than repeating the ideologically restricted, piecemeal response to innovation of the Victorian legislature. Drawing on these lessons and appreciating the socio-legal development of the railways can assist in the steep gradient to be navigated over the next few years.

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Chapter 4

Professor Gower, complacent academics and legal education

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A young upstart?

In 1950, *The Modern Law Review* published an extended version of Professor L.C.B. Gower's lecture as the Sir Ernest Cassel Professor of Law at the London School of Economics and Political Science (LSE).¹ Inaugural lectures rarely generate much interest outside the audience of fellow academics, friends and family who gather to listen to the newly appointed professor. However, this inaugural lecture was different. Professor Laurence Cecil Bartlett Gower (known to all his colleagues as 'Jim')² was thirty-five years old, and as such, very young to be appointed to a named chair at a prestigious university. Nevertheless, it was not his comparative youth but the content of his lecture which was to attract attention. Although Gower was a company lawyer, he chose to devote his lecture to 'English Legal Training', examining both academic legal education and the vocational training delivered to those wishing to enter the legal profession as a solicitor or barrister.³ His lecture was subtitled 'a critical survey' and it was critical in the literal sense of the word, right from the first sentence: 'The subject of legal education is one which has aroused singularly little interest in recent years and the general professional attitude to it is one of complacent apathy.'⁴ It becomes clear that by the 'general professional attitude' he is including the attitudes of legal academics, the legal professions . . . and the judiciary. As we shall see, it was his criticisms of judges which were really to ruffle feathers and draw external attention to

his lecture, but legal academics and both branches of the profession were roundly criticised too.

This chapter will summarise the content of Gower's article and place it in its historical and social context, examining what was radical about it and why that was the case, given the state of legal education in England at the time. It will go on to explain why Gower chose to make the arguments he did, and how those arguments were received by those they were directed at. The final section of the chapter will look at the extent to which Gower's arguments are relevant today, and the importance of considering contemporary legal education in the light of his critique.

Critiquing legal education and training

Gower began by contrasting the position in England with regards to an interest in legal education and training with that of other Common Law jurisdictions, in particular North America, 'where', he noted, 'the subject is perhaps the most widely debated of any legal topic'.⁵ In the United States, he went on, there were numerous special editions of journals on legal education, as well as the *Journal of Legal Education* itself and many books.⁶ However, in his opinion, English lawyers (both practising and academic) remained 'blissfully ignorant of this ferment . . . rarely discussing the problem or apparently realising that there is a problem to discuss'.⁷ 'Is our comparative complacency justified?' he asked rhetorically; 'Are our American colleagues making a fuss about nothing, or is our system so superior to theirs?'⁸

In the rest of the article (which ran to sixty-eight pages in total) Gower critically analysed the whole gamut of legal education, from the undergraduate law degree to the professional training of solicitors and barristers. Each stage comes in for blistering criticism. It is a detailed, closely argued examination of legal education and training, which draws on a wide range of literature. In this regard, Gower displayed his respect for the subject, treating it as worthy of serious academic study as much as any area of substantive law. This in itself was unusual; at the time, academic lawyers writing about legal education generally published descriptive articles outlining their views on 'teaching methods' or 'curriculum review'. For example, the first volume of the *Journal of the Society of Public Teachers of Law* (now *Legal Studies*) to be published after the Second World War, covering the years 1947–51 (and thus contemporaneous with the delivery and publication of Gower's lecture) contains twenty-one articles. Fourteen of them are about legal education, with titles such as: 'The Teaching of Common Law and Its Practice' and 'The

Revision of Courses of Legal Study at the University of Cambridge'.⁹ While there are honourable exceptions, overall there are few references to any relevant literature, and the approach adopted by the authors was almost entirely descriptive. In adopting a much more rigorous approach himself, Gower was implicitly sending a message about the intellectual standard which he thought should be adopted in academic debates about legal education.

Law in the universities

Gower first turned his attention to the question of how law should be taught in universities. He wanted to see an end to the situation then pertaining, in which most university law schools acted as law schools for the profession, by admitting articled clerks as students for a year (so that they could fulfil the Law Society's training requirements). Since universities did not generally offer separate teaching for these students, the effect was to constrict academic legal education. Teaching the vocational students and the academic ones together was only practicable for law schools 'if their degree syllabuses cover roughly the same ground as those of the professional examinations'.¹⁰ Better co-ordination between universities and the legal professions, Gower suggested, would enable a clear distinction to be drawn between academic legal education and professional legal training. He quoted with approval Professor Wade's inaugural lecture, where Wade argued that law should be taught in universities 'not as an exercise in professional technique, but in relation to its place in the world in which we live'.¹¹ Gower underlined his support for what we would now call a socio-legal approach by quoting with approval the American scholar, Professor Sydney Post Simpson: 'competence in the practical pursuits of the law is promoted far more by an understanding of the law's underlying purposes and theories than by acquaintance with tricks of the trade'.¹² Though Gower acknowledged that this might not yet be the approach taken in British universities, he was of the opinion that 'they certainly come closer to it than the professional bodies can hope to do'.¹³

Gower developed his argument for teaching law in context, integrating what he called 'non-legal' material into the curriculum, so that law teachers would be able 'to give some indication of the social and economic reasons and consequences of the rules that they expound'.¹⁴ He fully acknowledged the challenges this would involve, admitting that most legal academics found learning and keeping up-to-date with a few areas of law quite time-consuming enough, without attempting to master other disciplines.¹⁵ He was also sceptical about the ability of academic

lawyers to engage in rigorous interdisciplinary analysis of their subjects, commenting that ‘any lawyer who attempted to deal with many of the economic aspects of commercial law would be rightly suspect in the eyes of professional economists’.¹⁶ His solution was to suggest that there should be increased collaboration with other faculties, including seminars taught jointly with colleagues from other disciplines.

The whole point of this approach to law teaching, for Gower, was to encourage students to critique the legal system.¹⁷ He supported Wade’s argument that ‘law should be taught as a great human institution serving social and economic ends’.¹⁸ Not only did he identify the intellectual challenge facing contemporary legal educators who wished to pursue this approach but he also noted that academics had a fear of becoming involved in politics, so they were reluctant to engage in interdisciplinary teaching, which would inevitably involve criticising the law. While he agreed that law teachers should not bring their own party politics into their teaching, he was nevertheless clear that they should be more proactive in criticising the law.¹⁹ Gower’s ‘socio-legal’ approach was quite different to the prevailing orthodoxy. In 1948 Professor W.T.S. Stallybrass was the President of the Society of Public Teachers of Law (SPTL) (now the Society of Legal Scholars) which was at that time the only professional association of academic lawyers). In his Presidential Address to the Society, he made it abundantly clear that in his opinion there should never be speculation about what the law ought to be, since that ‘gets us near to the field of sociology. My own profound conviction at the present day’ he went on ‘is that the first essential of University teaching is that it should be objective and objectivity is difficult when you come to Sociology. I feel that is one of the great dangers of the increasing development of social studies in the University’.²⁰

Gower clearly would not have agreed with such sentiments, and was soon able to demonstrate in his own teaching the broad approach which he advocated, reflecting this in the textbook on company law which he published in 1954. Entitled *Principles of Company Law*, it was extremely well received, precisely because it took a completely different approach to that which was generally adopted. At the time, company law was regarded as ‘very technical and dull’.²¹ Some legal academics regarded it as unsuitable as a field of academic study, and it did not generally feature as a subject of undergraduate law courses.²² Gower’s book, on the other hand, was ‘a breath of fresh air’ in comparison with older treatises on English company law.²³ It was a book which was regarded as defining the subject of company law, and the approach taken was contextual, analysing the history behind the development of company law, as well as pointing out the issues of economic and social policy which it raised.²⁴ In

an appreciation of Gower's life, after his death on Christmas Day 1997 at the age of eighty-three, the *Modern Law Review* commented: 'Seldom can a textbook have made such a radical change in so short a time in the status of a legal subject.'²⁵ Thus, when Gower argued in his inaugural lecture that legal academics should adopt a broader approach to legal education, he was soon to demonstrate exactly what he was talking about.

Gower went on to criticise the law curriculum, which in his view was based upon the assumption 'that the lawyers we train will devote their lives exclusively to private practice . . . and all they need is the knowledge of legal rules and skill in applying them to the facts of new cases'.²⁶ Instead, he argued that Public Law should feature much more prominently in the legal curriculum. This was something he had written about before. In 1948 he had published another article in the *Modern Law Review*, entitled 'The Future of the English Legal Profession'.²⁷ In it, he argued that, in post-war England, social changes would lead to corresponding changes in the legal system. The expansion of social services delivered by the state, nationalisation of key industries and an increasing level of bureaucratic control would lead to the production of more law, and that law would be public law rather than private law.²⁸ 'As the state increases its social services and its control over fields left previously to private enterprise, the growth of Administrative Law in the Continental sense seems inevitable . . .'²⁹ New laws would be implemented through statutes, which made the teaching of statutory interpretation much more important. Although some attempts were made to teach it, they were in his view 'half-hearted' and there was generally little attention paid to public law, despite its growing importance. The insistence on focusing on private law ignored the fact that only a minority of students would actually go into private practice, with the others undertaking a very wide variety of roles, from civil servants to politicians, teachers to magistrates' clerks. It was clear to Gower that his students needed 'something very different from a narrow training in legal technique'.³⁰ Gower's analysis directly reflected the approach of the School of Law at the LSE, which had long championed the importance of public law.³¹

Next, Gower turned his attention to the possibility of improving university legal education, setting out a suggested syllabus. In so doing, he was at pains to emphasise that he was not suggesting that all law departments should follow exactly the same syllabus: 'indeed, a certain amount of local variation is a good thing since without it new experiments would be impossible. Nevertheless, having declared that it is for the university to decide upon a fixed syllabus, I feel that I must go boldly forward and give my views on what that syllabus should be.'³² Gower's proposals do not appear to modern eyes to be particularly unconventional in terms of

subjects to be covered. However, at the time they would have been regarded as much more radical. His syllabus was as follows:

YEAR 1:

- Legal method and the place of law in social research
- English Legal System
- Elements of English Private Law
- Constitutional/Public Law

YEAR 2:

- Contract
- Tort
- Criminal Law (including penology and criminology)
- Land Law (including Trusts)

YEAR 3:

- Administrative Law
- Family Law
- Jurisprudence
- Comparative Law.³³

His suggested syllabus did not include Roman Law, which in itself was a radical suggestion. In his Presidential Address to the SPTL delivered in 1947,³⁴ only two years before Gower delivered the lecture on which his article was based, Professor Smalley-Baker commented that looking back at Addresses delivered in the previous decade, he had found ‘scarcely a single year in which the value and importance of the study of Roman Law has not, like King Charles’ head, crept into our discussions’.³⁵ Gower regarded its retention in the syllabus as a relic of the old-fashioned view that ‘to have some knowledge of Roman Law was culture’ and did not see it as having any academic utility, except as part of a comparative law course.³⁶ He was also keen to introduce a different type of English Legal System course, recognising that students at the time were just expected to pick up legal research skills, together with statutory interpretation and precedent, as they went along, since most Legal Method courses were essentially courses on legal history.³⁷ He was particularly exercised about the failure of legal academics to teach their students legal research skills: ‘We cannot claim to have taught lawyers how to use the tools of their trade unless we instruct them in the use of text-books, reports, digests and indices, and they cannot derive much benefit from the rest of their training unless they know how to use them’.³⁸ What he wanted to see were courses in English law schools similar to those

already delivered in America under the title of 'Legal Method'.³⁹ Gower's ideas about improvements to be made to the law syllabus were born not only from his observations as a law teacher but also from his own experience as a law student: no law teacher had told him about the utility of the *Index to Legal Periodicals* or the digests of cases, 'and I remember that for some time I had an exaggerated admiration for the industry and erudition of the late Lord Halsbury under the mistaken belief that he had written the whole thirty-seven volumes of *The Laws of England*'.⁴⁰

Training barristers and solicitors

Gower's critique of legal education continued as he contemplated the training of barristers, which also got short shrift. After matriculating, they needed to 'keep terms' by dining for three years, during which time they could earn nothing from legal practice, with few opportunities for outside earnings (since they could not engage in anything that the Bar Council regarded as 'trade'). During those three years, the two parts of the Bar examination had to be passed. After they had been 'called to the Bar', students could 'read in chambers' to gain some practical experience.⁴¹ However, as Gower pointed out, there was no compulsory theoretical training, no compulsory practical apprenticeship, and no compulsory institutional attendance. Students were merely 'recommended' to attend the Inns of Court School of Law and to read in chambers.⁴² And although there were compulsory exams, Gower regarded them as considerably easier than an LL.B. or the Solicitors' Finals. 'No-one, I imagine, would seriously contend that the mere fact of passing the Bar Final is proof that one is decently well qualified for the duties which a barrister may be called to discharge.'⁴³

It was much more difficult to qualify as a solicitor. After matriculation (or passing the Law Society's Preliminary Examination), students had to be articled for five years, during which time they had to pass the Law Society's Intermediate and Finals examinations. If they were not a Law graduate, they had to attend an approved law school for at least a year within fifteen months of commencing articles.⁴⁴ Gower's criticisms of solicitors' training were centred on the lack of academic training. Although those without a law degree had to attend an approved law school, the time was actually spent being trained to pass the Law Society's examinations, so there was general agreement that the 'statutory year' was of little educational value.⁴⁵ When it came to articles, there was no way of guaranteeing their quality; it depended on whether the principal was conscientious. And even with a good principal, the

practical experience, based on whatever work the principal did, could be very limited. The Law Society's Final Examination came in for particular criticism: 'The candidate is required to take six papers each of twelve questions ranging over almost every conceivable subject. Every question has to be answered and the candidate has only fifteen minutes to read, understand and to write an answer for each.'⁴⁶ The result of this approach was that the majority of questions merely tested memory; which was, in Gower's view 'the crammers' joy'.⁴⁷ Teachers at the professional law schools were also obliged to 'teach to the test', doing little more than dictating notes.⁴⁸ Clearly, this left a lot to be desired in terms of education.

Finally, both branches of the profession were criticised for the financial barriers to qualification which they did little to relieve. While there were some scholarships available for those intending to practise at the Bar, the same was not true of the solicitors' profession. Both branches of the profession, wrote Gower:

value their exclusiveness and the rules of both branches seem deliberately designed to preserve it by imposing financial barriers in the form of premiums, pupillage fees and especially by prolonging the period of unpaid apprenticeship . . . Such practices are relics of the days when wealth and education went hand in hand, but now that education is no longer the prerogative of the rich, and we are all, whatever our politics, wedded to a policy of equality of opportunity, they seem anachronisms.⁴⁹

He went on to make detailed suggestions for the improvement of the training courses for solicitors and barristers, essentially suggesting that they focus on teaching subjects relevant to practice, rather than replicating subjects that students had already studied as undergraduates; he also suggested that training for the profession should include a course on legal ethics (which in the light of the recent Post Office scandal, seems a particularly perspicacious remark).⁵⁰

Academics, the legal professions and judges: shooting from the hip!

It was when he turned to the topic he labelled 'Practitioners v Teachers' that some particularly controversial elements appeared in Gower's analysis. Noting the gulf separating legal academics from legal practitioners (increased by the advent of university law teaching as a full-time job, rather

than a task carried out part-time by practitioners), Gower commented that the situation:

might not be serious if the two sides were regarded as of equal status; but they are not; the academic side is very definitely regarded as on a lower plane and to a practitioner academic distinction is not a professional asset but a liability to be concealed at all costs.⁵¹

He contrasted this unfavourably with the situation in North America, where practitioners and legal academics respected each other as experts, where there was 'a constant interchange' between practice and academia, with academics becoming judges and judges becoming law professors, and legal academics were held in high esteem by their judicial colleagues.⁵² In a remark which appears to have been born out of bitter experience at successive meetings of the SPTL (of which he was to become president later in his life),⁵³ he said: 'nothing is more nauseating than the patronizing air of mock humility usually affected by one of his Majesty's judges when addressing an academic gathering'.⁵⁴ He conceded that the situation might be changing, as recent addresses delivered to the SPTL had not been so patronising, and he singled out Lord Denning for his 'encouraging tribute to the value of academic studies'.⁵⁵ But, he went on, legal academics were partly to blame for this situation: 'It is my submission that English teachers of law suffer from an acute inferiority complex and that this is a bad thing for the profession as a whole'.⁵⁶ He wrote with approval of the way in which in North America, much more attention was paid to legal education than in England 'and the best of the law schools are constantly experimenting with new courses and new teaching methods and attacking each other's ideas with a freedom which is a refreshing contrast to the back-scratching prevalent in academic circles here'.⁵⁷ And he complained that published criticisms by law teachers on decisions from the House of Lords downwards 'are apt to be so moderate and humble that it is sometimes difficult to be sure that they are criticisms at all'.⁵⁸ He went on to comment that 'more outspoken attacks on judicial decisions (such as are found in the American Reviews) would probably be a healthy development'.⁵⁹ The implication of this remark appears to be that if judicial decisions were subjected to rigorous academic scrutiny, the quality of future decisions could be improved (assuming the judges took account of the academic analysis of their decisions).

Gower was also critical of the quality of legal academics as teachers. When selecting legal academics, more emphasis needed to be placed on teaching ability, he argued; but retention of academic staff was a problem, due not only to the terms and conditions of employment of academics but also to their social status. Since barristers were poorly remunerated in

the early years of practice, they frequently took up lectureships in order to support themselves while they built up their practice. But once they were established, they left academia. Being a barrister was not only more lucrative; barristers were usually held in much higher regard than university lecturers, so young men (and in those days it was young men) preferred to pursue a profession which gave them status, as well as money.⁶⁰ Gower argues that the main way to address both the poor status and poor salaries of legal academics is to introduce a substantially higher rate of pay for legal academics than that given to academics of other disciplines.⁶¹ While he acknowledged the challenges involved in this approach, he also criticised the legal professional bodies for their ineffectiveness as far as their academic colleagues were concerned. Despite their claims of being 'efficient trade unions' they displayed, in his view, a complete inability to support law teachers to achieve higher salaries in the same way that the British Medical Association had done for medics.⁶²

Gower concluded by calling for an inquiry into legal education and training (though he acknowledged that this was unlikely to occur). But he also urged his fellow-academics to take a much greater interest in legal education: 'Legal education must become *and remain* a live question.'⁶³ He made a number of suggestions about the ways in which the SPTL could support this, for instance by introducing a validation system for law schools, as well as concerning itself 'far more than it does with the conditions and remuneration of the teaching side and become something in the nature of the law-teachers' trade union'.⁶⁴

Reaction

Gower's article, with its sustained barrage of criticism, aimed at legal academics as well as both branches of the legal profession and the judiciary, must have been, says Glasser:

a considerable culture shock for members of the legal establishment . . . Not only was the attack, made by a 36-year-old academic, unprecedented, but its tone of sarcasm and the self-confident manner with which the lecturer presumed to sit in judgment on professional lawyers and find them wanting, must have seemed little short of a revolutionary attack.⁶⁵

While some legal academics may have shared his views, they certainly had not expressed them in public (perhaps reflecting the lack of confidence which Gower had criticised). The judges, completely unused to such a public challenge, were outraged. Gower had not only criticised the bad

manners displayed in their attitudes towards legal academics but also indicated that more robust analysis of their decisions by independent-minded legal academics might be beneficial. The Law Lords summoned the editor of the *Modern Law Review*, Lord Chorley (as Glasser puts it, Gower's presumed commanding officer) 'to be solemnly reproved for ever allowing such criticisms to be published'.⁶⁶ While this reaction would be unthinkable today, Glasser reminds his readers that in 1950s Britain, the legal system was at the heart of a number of reforms which led to heightened anxiety within the judiciary. There were suspicions that the new system of legal aid would lead to government control of the legal profession, while Lord Jowitt, the Lord Chancellor in the post-war Labour government, was strongly resisting proposals to establish a Ministry of Justice.⁶⁷ Glasser argues that such challenges to the status quo of the legal system go some way to explaining why the Law Lords reacted so strongly to Gower's criticisms. Some legal academics took a similarly dim view of Gower's ideas: reflecting on his lecture many years later, when he was president of the SPTL, Gower remembered that 'A distinguished member of the Society – now, alas, no longer with us – was moved to publish a disapproving note in a rival law review, which he concluded by saying that he wished me a long and happy tenure of my post but hoped that my influence on legal education would be nil'.⁶⁸ But while some legal academics were unenthusiastic about Gower's ideas, his lecture was much more positively received by others, with Professor Kahn-Freund later referring to it as 'magnificent'.⁶⁹

Why Gower?

As a company lawyer, it would have been the general expectation that Jim Gower would have delivered an inaugural lecture on his primary area of expertise. So what was it about his personal context at the time that influenced his choice of legal education and training as the subject of his inaugural? It appears that teaching was something he took very seriously. Professor Cretney, in the memorial essay he wrote for the British Academy after Gower's death in 1997, noted that Gower claimed that 'being interesting' was the most important quality of a university lecturer, and that he drew large numbers of students to his lectures.⁷⁰ His interest in legal education also extended to the postgraduate researchers at the LSE; he appears to have been genuinely interested in the well-being of these students. Aware of the isolated existence they commonly experienced, he invited them to his home, where, together with his wife, he offered them hospitality, including 'croquet on the lawn and party games

after tea'.⁷¹ Voluntarily giving time to his students in this way provides further evidence of his commitment to what we would now call 'the student experience'.

But it was not only his desire to teach well and ensure his students enjoyed life as postgraduates which suggests why Gower was keen to talk about legal education and training in his inaugural lecture. His family background, and his own experiences of studying law, and training to be a solicitor, appear likely to have given him a particular interest in the subject. Lawrence Cecil Bartlett Gower was born in 1913 at Forest Gate, Essex, into a family which he described as 'upwardly mobile lower middle class'.⁷² Gower's father began his working life as an office boy but rose to be company secretary and chief accountant of Ingersoll Rand, a large engineering company.⁷³ However, the family experienced mixed financial fortunes as Gower was growing up, including the bankruptcy of his father, who also suffered financially during the financial crisis of 1929; despite this, Gower was educated privately, at Lindisfarne College, which he described, not entirely positively, as 'a private school with ambitions to become a public school'.⁷⁴ The fluctuating financial circumstances of his childhood appear likely to have given Gower a keen sense of the need for financial stability. On leaving school he became an articled clerk to a solicitor who agreed to take him on without payment of the usual premium. Unfortunately, the solicitor died unexpectedly; during his search for replacement articles Gower discovered that if he obtained a law degree, the period of articles would be decreased from five years to three years, enabling him to earn a salary more quickly. He enrolled at University College London and graduated with First Class Honours in 1933, following this by successfully completing an LL.M. in 1934 at the age of twenty-one. He then served the remaining part of his articles with the firm of Smiles and Co. in Bedford Row in London (in recognition of his academic success Smiles and Co. also waived their premium). He worked on major company flotations and international commercial transactions, and was admitted as a solicitor in 1937.⁷⁵ As was customary at the time, Gower received no salary during the period of his articles, but he accepted a position as a part-time tutor at University College, for which he was paid £150 a year.⁷⁶

Gower's own financial position, together with his experience of his father's financial difficulties, appears to have made him particularly sympathetic to the plight of those in society who were not financially well off. Thus it is unsurprising to find that after the war, along with his university friends Arnold Goodman (later Lord Goodman, Master of University College, Oxford and a major figure in English public life) and Dennis Lloyd (later Lord Lloyd of Hampstead QC, Quain Professor of Jurisprudence in London University and Dean of the Faculty of Laws at University College

London) Gower established a legal clinic in the Commercial Road in the East End of London.⁷⁷ Since there was no legal aid until after the implementation of the Legal Aid and Advice Act 1949, legal clinics such as this played a vital role in assisting less advantaged families who needed legal advice. So, when he came to consider the training of solicitors and barristers his criticisms of the financial barriers erected by the profession to aspiring solicitors were grounded in personal knowledge and experience.

But in addition to his interest in teaching, and his awareness of the financial barriers faced by aspiring solicitors and barristers, Gower's lecture was also grounded in his professional expertise, both as a practitioner and an academic. He had returned to Smiles and Co. after the war ended, and worked as a salaried partner. However, immediately after the war Lord Chorley, who held the Sir Ernest Cassell Chair of Commercial Law at the LSE, was given two years' leave in order to join the incoming Labour government. When he asked for the leave to be extended, it was refused, and the LSE approached Gower. Cretney notes that Gower's acceptance of the post in 1947 was influenced by the fact that he could earn more as a Professor than as a salaried partner at Smiles and Co.⁷⁸ (The favourable pay of academics relative to practitioners did not last long, so Gower may have come to appreciate the additional income, as well as the opportunity to retain a link with his previous career.)⁷⁹ Gower retained a relationship with Smiles and Co. until the early 1960s, when he resigned from the LSE and took up a post advising governments in Africa on legal education, as well as becoming dean of the Faculty of Law at the University of Lagos.⁸⁰ Gower's continuing experience as a practitioner, together with his role as an academic, meant that he was particularly well placed to critique both the academic and the vocational aspects of legal education.

Was the criticism justified?

Although Gower expressed his criticisms of legal education and training more forcefully than his contemporaries, he was not alone in thinking that reform was needed. Professor Hughes Parry's address as president of the SPTL in July 1949 was entitled 'Some Reflections on Legal Education'.⁸¹ At the time, he was head of the Law Department at the LSE; just as his colleague Jim Gower would do when he delivered his inaugural lecture at the LSE the following year, Hughes Parry noted that a range of matters relating to legal education were discussed with much more vigour in America than in England. He also suggested that legal education and training was in need of reform, in particular the duplication of coverage by professional training courses of subjects already covered in

the undergraduate degree.⁸² Like Gower, Hughes Parry was critical of the rates of pay awarded to legal academics; acknowledging that differential rates of pay, such as those enjoyed by medics teaching in universities were controversial, he thought the SPTL should discuss the issue.⁸³ In the discussion which followed Hughes Parry's address, Gower, foreshadowing the comments he would make in his inaugural lecture, said that he regretted that no-one had taken up the point about the purpose of legal education which the president had raised. 'As a comparative newcomer, he had hoped to learn what we teachers of law really were trying to do' (the implication being that, on the whole, legal academics didn't give much thought to this issue).⁸⁴ It appears that Professor Montrose, of Queen's University Belfast, was of a similar mind to Gower. After listening to Mr Landon's Presidential Address to the SPTL he said in the discussion that followed that he did not agree with the president that 'the task of the law teacher was confined to descriptive exposition of legal rules; some judgment about those rules had to be expressed'.⁸⁵ In the context of the 1950s, given that Professor Montrose's ideas about legal education appear to be along the same lines as those of Gower, it is no surprise that Cownie and Cocks tell us that during the rest of the discussion 'there [was] no record of anyone coming to his support'.⁸⁶

It should not go unnoticed that Jim Gower delivered his inaugural lecture as the Sir Ernest Cassel Professor of Commercial Law at the LSE. In the context of that particular law school it is likely that he found much more support for his views. This was not only true of his head of department, Professor Hughes Parry, as we have seen. It was true of the department in general. It was a law school which had a particular view of law, described as 'a core belief, appropriately nurtured in a school of social sciences, that law should be treated, both in research and teaching, as a social phenomenon'.⁸⁷ The approach advocated by Gower directly reflected its collective philosophy. The department saw itself as assuming a pioneering role in legal education and research. It was an approach also reflected in the *Modern Law Review*, of which Gower was one of the founding members.⁸⁸ He is listed in the first edition of the journal (in 1937) as one of the six members of the editorial committee, taking the role of editor for cases and statutes.⁸⁹ From its inception, the journal was to champion a 'law in context' approach. In the very first issue, the editorial committee included a note setting out their position; it argued that the doctrinal approach to law, while needed, was not in itself sufficient, as a means of teaching and researching law, because 'it isolates law too much from those contemporary social conditions in which it must always operate'.⁹⁰ This approach to legal scholarship is exactly what Gower had referred to in his article when he quoted with approval Professor Wade's comment

that law should be taught in universities 'not as an exercise in professional technique but in relation to its place in the world in which we live'.⁹¹ Wade himself was not a lightweight: the quotation is taken from his inaugural lecture as the holder of the Downing Chair of Law in the University of Cambridge, and he was a distinguished constitutional lawyer.⁹² Thus, although Gower's views challenged the prevailing orthodoxy, and worked in a law school where such views were supported, he was by no means the only person to hold such beliefs about the appropriate way to teach and research the law.

Nevertheless, reading Gower's criticism of the legal education and training offered by universities and the legal professions, one might wonder whether, in 1950, his views were those of a maverick who worked in a radical department of law, or whether he was pointing to a truth which others seem, in the main, to have refrained from expressing. Commentators often turn to the views of presidents of the SPTL, expressed in their presidential addresses, as being representative of the 'mainstream'. At the time Gower's article was published, the SPTL was the only professional association for academic lawyers, and as such, it represented the collective public face of a large number of legal academics. Reflecting on legal education in the 1950s, Abel-Smith and Stevens, in their seminal book *Lawyers and the Courts*, noted that 'The function of university law teaching was as unclear in 1945 as it had been sixty years earlier. Yet the complacent attitude of pre-war years carried over into the post-war years'.⁹³ They singled out the SPTL Presidential address given in 1948 by Professor W.T.S. Stallybrass, an Oxford Law don who was at the time also the vice chancellor of the university. His view of legal education was very narrow, and Abel-Smith and Stevens comment that 'the idea of analysing or criticizing the policies embodied in doctrines or the actual operation of legal principles did not come within [his] concept of a liberal education'. Stallybrass was not alone. The president of the SPTL in 1952 was Mr Landon, another Oxford don, who told his audience that although 'law teachers should certainly take an active interest in law reform he hoped that their teaching would never degenerate into expounding sociology to potential lawyers'.⁹⁴ These two speeches, delivered in the years just before and just after Gower's inaugural, reveal exactly the mindset that Gower was challenging.

Subsequently, it has become even clearer that Gower's critique was not that of a maverick. In the context of the history of the SPTL, Cownie and Cocks comment that 'The Society's activities for the period 1945–55 reveal a time dominated by a powerful form of academic conservatism . . . There was outright condemnation of sociology and anything hinting of the contextual explanation of law'.⁹⁵ Their comment chimes with

the views expressed by a number of expert commentators to the effect that legal education in the late 1940s and early 1950s had a very narrow focus. Twining notes that academic law in the 1950s ‘was still not highly regarded by either the universities or the profession . . . and several law faculties saw their main function as preparing local articled clerks for the Law Society’s examinations’.⁹⁶ Parry comments that Gower ‘brutally’ exposed ‘the intellectually moribund climate that had infected the English law school for most of the early and middle part of the twentieth century’.⁹⁷ Sugarman argues that during the post-war period, ‘The centrality of private law, legal doctrine, courts and cases was strenuously defended for its practical and educational values and for its objectivity, and it was claimed that the development of the social sciences threatened objectivity and law’s singular claims to respect’.⁹⁸ Twenty-five years after Gower published his article, Professor J.W. Bridge of Exeter University published his own inaugural lecture, ‘The Academic Lawyer: Mere Working Mason or Architect?’⁹⁹ The title was derived from Sir Walter Scott’s novel *Guy Mannering*, a scene in a library, when Pleydell, a lawyer, says: ‘These are the tools of my trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect’.¹⁰⁰ In the context of legal education, Bridge interprets the mason as a skilled technician who is not capable of adapting to new ideas or developing new materials and techniques. An architect, in his view, is a virtuoso, a person of imagination and inspiration; skilled in traditional methods, architects are aware of their inadequacies, and can devise new techniques and develop new materials to meet the challenge of change.¹⁰¹ This metaphor would surely have appealed to Gower, as would Bridge’s subsequent comment that:

By the 1950s, there were established law schools in universities, but on the whole they were small and not well-equipped . . . Within the limits of orthodoxy the teaching was sound but tended to be unimaginative . . . In 1951 in a book concerning law reform, to which academic lawyers contributed, it was said that “the drive of law teaching is towards protecting dead practices of the past against the imperative needs of the present. It is hostile to analyses of the law in action. It is largely ignorant of foreign experience and it suffers from complacency . . . It fails to criticise with the appropriate penetration. It gives us legal habit without legal philosophy.”¹⁰²

The views of Bridge and other subsequent commentators of legal education in the 1950s, published in the later twentieth and the twenty-first

centuries, suggest that there was considerable justification for Gower's views.

Jim Gower's other criticisms, of the training of solicitors and barristers, based as they were on a detailed analysis of the situation facing young people who wished to embark on a legal career, backed up by multiple examples of the inadequacies of the training regimes of both branches of the profession, were also difficult to refute. His critique of the patronising attitudes displayed by the judiciary appears to have been grounded in personal experience, and the reaction of the judges to his remarks suggests that they were certainly not used to any effective challenge from members of the academy at that time. So although Gower's views were certainly not part of the prevailing orthodoxy, both contemporary and subsequent academic opinion indicate that his criticisms were justified.

Gower's concluding remarks

Despite the weight of evidence about the need for improvement, Gower himself had mixed feelings about the prospects for reform. He concluded his lecture by calling for the establishment of an inquiry into legal education and training. In the face of apathy from the professions and the difficulty of getting them voluntarily to co-operate with the academy, he argued that there was 'an overwhelming case' for the establishment of a royal commission to carry out such a review.¹⁰³ However, he noted that 'It must be confessed that our recent experiences of such inquiries in this field have not been very encouraging, but I cannot believe that this need be so, particularly if its terms of reference were framed sufficiently widely . . .'.¹⁰⁴ Gower had ambitious proposals for the reform of legal education and training: he was clear that 'Legal education must become and *remain* a live question'.¹⁰⁵ To achieve this there had to be co-operation between the professional bodies and the SPTL. They could, for example, host visits of distinguished academics from other jurisdictions. Meanwhile, the SPTL should publish an annual 'Guide to the Study of Law', providing information about institutions which offered legal education 'and this should include, and not ignore the professional coaching establishments and other non-university institutions'.¹⁰⁶ He had further suggestions for the SPTL, putting forward an extensive action-list. The SPTL should in his view establish an accreditation process for law schools, similar to that which already existed in America 'so that bad law schools would be black-listed'. It should also include representatives from the professional bodies on its committees and concern itself much more with the conditions and remuneration of legal academics, so that it became more of a

trade union for law teachers.¹⁰⁷ Gower was certainly not short of ideas for positively improving the legal education and training which he had so roundly criticised.

Legal education and training (re)-considered

Re-reading his article in 1977 when he was president of the SPTL (by which time he had become vice chancellor of the University of Southampton) Gower said wryly: 'To my surprise, it did not lead me to say "My God, what genius I had then". On the contrary, I said "My God, could I ever have been so conventional?" . . . the fact is, unbelievable though it now seems, that at the time what I wrote was regarded by some as pretty strong meat'.¹⁰⁸ It was, of course, the reaction of the senior judges, affronted at being criticised in print by a mere legal academic, that was the most noticeable reaction to Gower's article. It would be virtually unthinkable nowadays for the senior judiciary to complain about academic critique in the way they did in 1950, but what about Gower's criticism of the attitude of legal academics to the senior judges? He thought that legal academics lacked confidence and were very obsequious in relation to the judiciary.¹⁰⁹ His views echo those of his erstwhile colleague at the LSE, Harold Laski, who, in an extensive correspondence with the celebrated American judge, Mr Justice Holmes, wrote about attending a law teachers' dinner in 1925 at which the judiciary were present. 'The judges' he wrote, 'had a most amusing sense of infinite superiority and the law teachers as interesting a sense of complete inferiority'.¹¹⁰ While legal academics today are happy to analyse and critique judicial decisions, has the legal academy completely shrugged off its sense of inferiority? What about those occasions where there is a prestigious lecture to be delivered, or a keynote speaker to find for an annual conference? Do legal academics take the opportunity to showcase eminent scholars, or is there a continuing tendency to invite a senior judge to speak on these occasions? Both judges and academics have important things to say about the law. Have we got the balance right, allowing both types of lawyer to have their moment in the sun?

Gower was self-deprecating about his suggestions for the legal curriculum. But the fact that it looks quite familiar nowadays should give pause for thought. He made those suggestions more than seventy years ago. Has legal education made sufficient progress since that time? We might be proud of all the different options we offer, reflecting, in some cases, new legal specialisms which did not exist in 1950. But has legal pedagogy moved on in ways that would satisfy the man who said that 'being interesting' was the most important quality of a university lecturer? It is not

only a question of making the delivery of lectures or tutorials stimulating for students. Do the textbooks we write contribute to the excitement of learning law? Since textbooks are generally accepted not to 'count' for the purposes of the Research Excellence Framework (REF) unless they clearly fall within its criteria, do we write them at all, let alone exciting ones? Is it just not worth the risk that they will not 'count'?

And do we give legal education the respect that Gower gave it, reflected not only in the fact that he, a company lawyer, chose to devote his inaugural lecture to it, but also in the way he developed it into a sixty-eight page article, referencing the legal education literature (such as it was at the time) in the same rigorous way he went about his company law research. Is there significant evidence that the contemporary legal academy is significantly less complacent about legal education than Gower's contemporaries in 1950? He commented that there was 'an astonishing paucity of published material on the topic' as compared with North America, where it was 'quite common', he went on 'for a whole issue of a law review to be devoted to it'.¹¹¹ While there are many more legal textbooks to support student learning than there were in the 1950s, as well as a wide literature on the practice of teaching in higher education, it remains the case that many generalist legal journals publish few articles on legal education.¹¹² *The Law Teacher*, first published in 1967, remains the sole specialist legal education journal based in the UK. The reasons for the paucity of articles in well-regarded generalist journals are unclear; consecutive REF panels have commented on the lack of 'methodological rigour and significance' in some legal education outputs, and this may be one of the explanations.¹¹³ However, it may also be the case that many very able academic lawyers are simply not sufficiently interested in education to devote their time to researching the area. Does this mean that there is a danger that legal academics today, at least as regards their practice of, and attitudes towards, legal education, suffer from the same complacency that Gower complained of in 1950? It is a sobering thought.

And what of training for the legal profession? It is still the case that it is not necessary to possess a law degree or indeed any degree, to become a solicitor.¹¹⁴ There is still little co-ordination between the academy and practising lawyers.¹¹⁵ Gower said of the Solicitors Final Examination that, so far as possible, examiners tried to set searching questions 'but no candidate can be expected to deal with twelve of them in three hours, and hence the papers have to be diluted with questions which merely test memory, and these, of course, are the crammer's joy'.¹¹⁶ His view was that professional examinations should not cover subjects already studied at university but should test candidates' ability to deal with the sort of problems solicitors faced in practice, tested by extended questions,

answered over a day, with candidates being given copies of relevant statutes to consult; an additional oral examination should test the ability to deal with papers from a 'real-life' case.¹¹⁷ This approach to assessment, he argued, meant that 'cheating would become virtually impossible, and the menace of cramming be eradicated'.¹¹⁸ The mode of assessment for the Solicitors' Qualifying Examination (SQE), which was introduced by the Solicitors' Regulation Authority (SRA) in 2021, is a two-part examination: SQE 1 tests 'functioning legal knowledge' and SQE 2 tests 'practical legal skills and knowledge'.¹¹⁹ SQE 1 consists of two multiple choice examinations.¹²⁰ Each of these examinations has 180 questions.¹²¹ SQE 2 consists of an oral examination (taken over two consecutive half days) and a written examination which requires candidates to answer twelve written legal skills assessments.¹²² SQE 1, involving 360 multiple choice questions to be answered in six hours, and still covering subjects such as Tort and Contract, which law graduates will have studied at university, bears a remarkable resemblance to the Solicitors' Finals examination which Gower was criticising in 1950. SQE 2, with its twelve written assessments, has also drawn much criticism. Expressing his concerns about SQE 1, Unger comments that 'It is not clear how legal complexity and ambiguity can be assessed by questions that take an average of 90 seconds to answer'.¹²³ A series of articles in *The Law Teacher* in 2018 laid out a range of criticisms, from the damage done to Law as a discipline, to the dangers for any university claiming that its LL.B. will offer advantages in passing the SQE due to the need to comply with advertising standards and the likelihood that efforts to widen participation in the legal professions to a more diverse group of students will be thwarted by the existence of the new assessment regime.¹²⁴ Although some of these criticisms reflect contemporary concerns, such as the continuing need to increase equality and diversity in the legal professions, criticisms of SQE 1, in particular, bear an uncanny resemblance to the concerns Gower voiced seventy-five years ago. The Bar remains a graduate profession; there is a year-long full-time or equivalent part-time professional training course, followed by a year's pupillage to become fully qualified.¹²⁵ Pupil barristers are now paid during the year that they are training, which was not the case in the 1950s.¹²⁶ However, for young people wishing to enter either branch of the profession, the financial barriers remain high. Most students will access a student loan to fund their undergraduate study, and will need to then undertake the relevant vocational training after graduation, involving courses which are very expensive. The introduction of the SQE, for instance, has spawned a large number of courses intended to ensure that candidates are fully prepared to pass the SQE. The cost of such courses is generally more than £5,000.¹²⁷ The financial assistance

offered to those aspiring to join the legal professions, generally by way of scholarships or by winning open competitions, is limited – often generous for those who are successful, but for those who are not, the financial barriers which Gower pointed to in 1950 remain high, accompanied by the risk that there is no guaranteed employment after qualification. For aspiring solicitors and barristers, while the situation has improved since the 1950s, joining the legal profession remains an expensive and risky proposition for many.

Conclusion

When considering whether Professor Gower's 1950 article remains of interest today, it is the audacious ambition with which he approached his subject matter which has the most to say to us. Whichever part of the legal education and training regime he looked at, he was able not only to express cogent criticism, but to offer suggestions for radical reform. The sheer scale of this one piece of academic work is breathtaking. His final sentence ran: 'The vital need therefore is to awaken interest in this country in the problems of legal education and training, and that must be the excuse for this monograph.'¹²⁸ Seventy-five years later, with the exponential growth of artificial intelligence affecting legal education as much as anything else within the academy, the challenging global political situation where human rights and the rule of law are under threat, and questions being raised, in the light of the Post Office scandal, about the professional ethics of the legal professions, the need for legal scholars to take an interest in legal education and training is more important than ever.¹²⁹

Notes

* I would like to thank Professor David Sugarman, Professor Tony Bradney and Professor Rosemary Auchmuty for their very helpful comments on an earlier version of this chapter. Any errors remain the responsibility of the author.

1. L.C.B. Gower, 'English legal training: a critical survey', *Modern Law Review* 13, no. 2 (1950): 137 and see www.lse.ac.uk/law/centenary/history. The actual lecture (a much shorter version) had been delivered on 24 January 1949.

2. <https://www.lse.ac.uk/law/centenary/history>. Accessed 11 November 2022.

3. Gower, 'English legal training', 137.

4. Gower, 'English legal training', 137.

5. Gower, 'English legal training', 137.

6. At the time he delivered his inaugural lecture, Gower had not visited the United States, but he was a visiting scholar at Harvard in 1954–5 and was the Holmes

Lecturer at Harvard in 1966; see 'Jim Gower – An Appreciation', *Modern Law Review* 61, no. 2 (March 1998): 128.

7. Gower, 'English legal training', 138.

8. Gower, 'English legal training', 138.

9. F. Raleigh Batt, 'The teaching of the common law and its practice', *Journal of the Society of Public Teachers of Law* (NS) 1 (1947–51): 3; H.A. Hollond, 'The revision of courses of legal study at Cambridge', *Journal of the Society of Public Teachers of Law* (NS) 1 (1947–51): 105.

10. Gower, 'English legal training', 155 and 159.

11. E.C.S. Wade, 'The aim of legal education', *Cambridge Law Journal* 9 (1945–7): 288.

12. Sidney Post Simpson, 'The Function of the University Law School', *Harvard Law Review* 49, no. 7 (May 1936): 1068–83.

13. Gower, 'English legal training', 161.

14. Gower, 'English legal training', 178.

15. Gower, 'English legal training', 173.

16. Gower, 'English legal training', 178.

17. Gower, 'English legal training', 174.

18. Gower, 'English legal training', 178.

19. Gower, 'English legal training', 175.

20. W.T.S. Stallybrass, 'Law in the universities', *Journal of the Society of Public Teachers of Law (New Series)* 1, no. 3 (1948): 157–69.

21. K.W. Wedderburn, 'The Principles of Modern Company Law. By L. C. B. GOWER, LL.M.(Lond.), Solicitor of the Supreme Court, Sir Ernest Cassel Professor of Commercial Law in the University of London. [London: Stevens and Sons, Ltd. 1954. xl and 574 and index 25 pp. 45s.]' *Cambridge Law Journal* 13, no. 1 (April 1955): 118.

22. Stephen Michael Cretney, 'Lawrence Cecil Bartlett Gower, 1913–1997'. In *Proceedings – British Academy* 101, no. 1 (Oxford: Oxford University Press, 1999), 387.

23. Louis Loss, 'The principles of modern company law. By L.C.B. Gower. London: Stevens and Sons Limited, 1954. Agent for U.S.A.: The Carswell Company Limited, Toronto. Pp. xl, 599. \$7.65.' *Yale Law Journal* 64, no. 7 (June 1955): 1081.

24. 'Jim Gower – An Appreciation', 130.

25. 'Jim Gower – An Appreciation', 130.

26. Gower, 'English legal training', 169.

27. L.C.B. Gower, 'The future of the English legal profession', *Modern Law Review* 9, no. 3 (October 1946): 211.

28. Gower, 'Future of the legal profession', 212.

29. Gower, 'Future of the legal profession', 212.

30. Gower, 'English legal training', 169.

31. Richard Rawlings, 'Distinction and diversity: law at the LSE'. In *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science*, ed. Richard Rawlings (Oxford, Clarendon Press, 1997), 7.

32. Gower, 'English legal training', 178.

33. Gower, 'English legal training', 180–81.

34. The SPTL was renamed the Society of Legal Scholars in 2001: see Fiona Cownie and Raymond Cocks, 'A Great and Noble Occupation!': *The History of the Society of Legal Scholars* (Oxford, Hart Publishing, 2009), 254.

35. C.E. Smalley-Baker, 'The teaching of law as one of the social sciences', *Journal of the Society of Public Teachers of Law (New Series)* 1, no. 2 (1947): 71.
36. Gower, 'English legal training', 180.
37. Gower, 'English legal training', 179.
38. Gower, 'English legal training', 179.
39. Gower, 'English legal training', 179.
40. Gower, 'English legal training', 179.
41. Gower, 'English legal training', 148–9.
42. Gower, 'English legal training', 150.
43. Gower, 'English legal training', 150.
44. Gower, 'English legal training', 149.
45. Gower, 'English legal training', 152.
46. Gower, 'English legal training', 154.
47. Gower, 'English legal training', 154.
48. Gower, 'English legal training', 154.
49. Gower, 'English legal training', 156.
50. Gower, 'English legal training', 184–6. On legal ethics, see Richard Moorehead, 'Hamlyn Lectures 2024', 'Frail professionalism: Lawyers' ethics after the Post Office and other cases', <https://sites.exeter.ac.uk/lawbulletin/2024/08/09/hamlyn-lectures-2024/>, accessed 13 November 2024.
51. Gower, 'English legal training', 198.
52. Gower, 'English legal training', 198.
53. See Cownie and Cocks, '*A Great and Noble Occupation!*', xii.
54. Gower, 'English legal training', 198.
55. Gower, 'English legal training', 199.
56. Gower, 'English legal training', 198.
57. Gower, 'English legal training', 137.
58. Gower, 'English legal training', 175.
59. Gower, 'English legal training', 175.
60. Gower, 'English legal training', 200.
61. Gower, 'English legal training', 201.
62. Gower, 'English legal training', 201.
63. Gower, 'English legal training', 205; italics in original.
64. Gower, 'English legal training', 205.
65. Cyril Glasser, 'Radicals and refugees: the foundation of the Modern Law Review and English Legal Scholarship', *Modern Law Review* 50, no. 6, (October 1987): 704–5.
66. Glasser, 'Radicals and Refugees', 705.
67. Glasser, 'Radicals and Refugees', 705. See also Gavin Drewery, 'Lord Haldane's Ministry of Justice: stillborn or strangled at birth?' *Public Administration* 61, no. 4 (Winter 1983): 408, where the author refers to 'a well-documented fit of apoplexy' on the part of Lord Jowitt, faced with proposals for a Ministry of Justice.
68. L.C.B. Gower 'Looking Back', *The Journal of the Society of Public Teachers of Law (NS)* 14, no. 3 (March 1978): 155.

69. Otto Kahn-Freund, 'Reflections on Legal Education', *Modern Law Review* 29, no. 2 (March 1966): 121.
70. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 386.
71. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 387.
72. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 379.
73. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 379–80.
74. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 381.
75. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 382.
76. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 383.
77. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 382 and 383.
78. Cretney 'Lawrence Cecil Bartlett Gower 1913–1997', 386.
79. On academic pay in the 1960s, see Cownie and Cocks, 'A Great and Noble Occupation!', 90.
80. Cretney, 'Lawrence Cecil Bartlett Gower 1913–1997', 392.
81. D. Hughes Parry, 'Some Reflections on Legal Education', *Journal of the Society of Public Teachers of Law* (New Series) 1, no. 4 (1949): 249–57.
82. Hughes Parry, 'Some Reflections on Legal Education', 253.
83. Hughes Parry, 'Some Reflections on Legal Education', 255.
84. Hughes Parry, 'Some Reflections on Legal Education', 256.
85. 'Annual Meeting of the Society, 1952', *Journal of the Society of Public Teachers of Law* (New Series) 2, no. 1 (1952–4): 32.
86. Cownie and Cocks, 'A Great and Noble Occupation!', 70.
87. Rawlings, 'Distinction and Diversity: Law and the LSE', 1.
88. Gower is listed as the editor for cases and statutes, a member of the founding 'Editorial Committee' which had six members. 'Editorial Notes', *Modern Law Review* 1, no. 1 (June 1937): 1.
89. 'Editorial Notes', 1.
90. 'Editorial Notes', 1.
91. Gower, 'English legal training', 161, quoting Wade, 'The Aim of Legal Education', 288.
92. Wade, 'The Aim of Legal Education', 286–7.
93. Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750–1965* (London: Heinemann, 1967), 365.
94. 'Annual Meeting of the Society, 1952', 32, quoted in Cownie and Cocks, 'A Great and Noble Occupation!', 70.
95. Cownie and Cocks, 'A Great and Noble Occupation!', 81–2.
96. William Twining, *Blackstone's Tower: The English Law School* (London: Stevens and Sons/Sweet & Maxwell, 1994), 30.
97. R. Gwynedd Parry, *David Hughes Parry: A Jurist in Society* (Cardiff: University of Wales Press, 2010), 22.
98. David Sugarman, "'Great beyond his knowing": Morton Horwitz's influence on legal education and scholarship in England, Canada and Australia', in *Transformations in American Legal History: Law, Ideology and Methods – Essays*

in *Honor of Morton J. Horwitz*, vol. II, ed. Daniel W. Hamilton and Alfred L. Brophy (Cambridge, MA: Harvard University Press, 2009), 307.

99. J.W. Bridge, 'The academic lawyer: mere working mason or architect?', *Law Quarterly Review* 91 (1975): 488.

100. Sir Walter Scott, *Guy Mannering* (Edinburgh: Adam and Charles Black, 1886), 264 quoted in Bridge, 'The academic lawyer', 488.

101. Bridge, 'The academic lawyer', 488.

102. Bridge, 'The academic lawyer', 488.

103. Gower, 'English legal training', 204.

104. Gower, 'English legal training', 204.

105. Gower, 'English legal training', 205 (italics in original).

106. Gower, 'English legal training', 205.

107. Gower, 'English legal training', 205.

108. Gower, 'Looking back', 155.

109. Gower, 'English legal training', 175.

110. M. de Wolfe Howe (ed.), *Holmes–Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski, 1916–1935*, 2 vols (1953) quoted by Bridge, 'The academic lawyer', 491–2.

111. Gower, 'English legal training', 137.

112. Between 2020 and 2025, there were no such articles in the *Modern Law Review*, one in *Legal Studies* and two in the *Journal of Law and Society*, though more extensive bibliometric analysis of the latter reveals that legal education is one of the most frequently discussed themes in the journal: Christian Boulanger, Naomi Creutzfeldt and Jennifer Hendry, 'The Journal of Law and Society in context: a bibliometric analysis', *Journal of Law and Society* 51, no. 1 (March 2024), 19–20.

113. See *Research Excellence Framework 2014: Overview Report by Main Panel C and Sub-panels 16–26*, <https://2014.ref.ac.uk/panels/paneloverviewreports/index.html>, accessed 15 February 2025 and *REF 2021 Overview Report by Main Panel C and Sub-panels 13 to 24*, <https://2021.ref.ac.uk/publications-and-reports/main-panel-overview-reports/index.html>, accessed 15 February 2025.

114. The Solicitors' Regulation Authority states that candidates wishing to enter the profession must possess 'a degree in any subject (or equivalent qualification or work experience'. <https://sqe.sra.org.uk/about-sqe/what-is-the-sqe>, accessed 15 February 2025.

115. An exception to the general trend is the Committee of Heads of University Law Schools Pracademia Seedcorn Funding Scheme, which aims to encourage collaboration between legal academics and practitioners; see <https://chuls.ac.uk/786-2/>, accessed 15 February 2025.

116. Gower, 'English legal training', 154.

117. Gower, 'English legal training', 195–6.

118. Gower, 'English legal training', 196.

119. <https://sqe.sra.org.uk/about-sqe/what-is-the-sqe>, accessed 15 February 2025.

120. <https://sqe.sra.org.uk/about-sqe/what-is-the-sqe/how-the-sqe-works>, accessed 15 February 2025.

121. <https://sqe.sra.org.uk/news-item/2023/07/10/the-solicitors-qualifying-examination-managing-the-pressure>, accessed 15 February 2025.

122. <https://sqe.sra.org.uk/exam-arrangements/assessment-information/sqe2-assessment-specification#assessments>, accessed 15 February 2025.
123. Andy Unger, 'Legal education future(s) – the changing relationship between law schools and the legal profession', in *Key Directions in Legal Education: National and International Perspectives*, ed. Emma Jones and Fiona Cownie (Abingdon: Routledge, 2020), 8.
124. *The Law Teacher* 52, no. 1 (2018): 409–98.
125. <https://www.barcouncil.org.uk/becoming-a-barrister.html#stages>, accessed 16 February 2025.
126. <https://www.barcouncil.org.uk/becoming-a-barrister/i-am-a-pupil-barrister.html#fundingawards>.
127. See for example, the online course offered by Barbri: <https://www.barbri.com/sqe/faqs>, accessed 16 February 2025.
128. Gower, 'English legal training', 205.
129. For more information about the Post Office scandal, see the Hamlyn Lectures 2024, delivered by Professor Richard Moorehead under the title 'Frail Professionalism: Lawyers' ethics after the Post Office and other cases'. <https://sites.exeter.ac.uk/lawbulletin/2024/08/09/hamlyn-lectures-2024/>, accessed 17 February 2025.

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Chapter 5

A university in (or of) Wales? Vaisey's folly and St David's College, Lampeter

R. Gwynedd Parry

This chapter is an exercise in socio-legal history. Not because the author had deliberately set out to demonstrate a particular ideological commitment to the socio-legal method of interpreting the legal past. Rather, because the legal events under examination can only be understood by reference to their social, cultural and political context. It is the extra-legal which makes the legal comprehensible in this instance.

The reported Chancery Division judgment in *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R. 559, which provides the stimulus for this chapter, when read in isolation appears like judicial balderdash. That does not mean that it lacks historical value or significance. Subjected to the scrutiny of the socio-legal historian, it sheds light on the political milieu of its time, and acts as a window through which conflicts, biases and political machinations in a particular time and place can better be understood. There is hardly anything in it for those looking for legal theory or legal principles. The personalities will matter more than the ideas in this tale. Moreover, the tale with which we are concerned involves men and only men. That is indicative not only of a male-dominated legal culture but also of the male-dominated society of the 1950s. The players in this play are all chaps and the games they played were the games which chaps played in the sixth decade of the twentieth century. Towards the end of the chapter there will be some reflections on the significance of the events described for the present day. But, in short, the overarching objective is to demonstrate not only the

value of the socio-legal approach to legal history but also that the socio-legal approach is often the only one which has intellectual validity. Let us now turn to our subject.

In February 1951, the Chancery Division of the High Court was presented with a question which had not hitherto troubled the courts of England and Wales: what is a university? The plaintiff was St David's College, Lampeter, an institution founded in 1822 upon the initiative of the then bishop of St David's, Thomas Burgess, and other benefactors. Its founding mission was to offer higher learning for men aspiring to take holy orders and minister within the Church of England, especially in Wales.¹ As the nineteenth century unfolded, the institution evolved and broadened its mission by developing a liberal curriculum across the humanities and sciences, including, at least intermittently, mathematics, physics and chemistry.² It acquired its own degree-awarding powers in 1852 (BD) and 1865 (BA).³ A supplemental charter of 1896 declared that admission to the college was also open to those who were not aspiring to church ministry, and that it was 'to receive and educate any person whatsoever'.⁴ Such a person, however, needed to be a biological male.

If, by the turn of the twentieth century, it could justifiably claim to be more than a theological college, most of its students were, and remained until the outbreak of the second world war, aspiring clergy.⁵ This only cemented a common perception that it was a church institution in a country where most of the people were communicants with one of the nonconformist protestant denominations. For the nonconformists, Lampeter did not offer the sort of higher education to which they aspired. Therefore, the campaign to establish a university in Wales continued and gathered pace in the second half of the nineteenth century. Led by the newly enfranchised political representatives of the nonconformist, liberal and Welsh-speaking population, this university movement culminated in the establishment of university colleges at Aberystwyth (1872), Cardiff (1883) and Bangor (1884), and, most importantly, the federal University of Wales in 1893.⁶ These institutions were founded firmly on non-denominational lines, as had been the case with the University of London earlier in the century. They were also products of a growing sense of national identity in Wales, referred to as a 'national rebirth' by some historians, which was a driving force in the political discourse of Wales at the end of the nineteenth century.⁷ Although the rebirth did not culminate in national self-determination in the way that had occurred in parts of Europe or Ireland, it did beget some cultural expressions of national identity, including the university and its colleges, the National Library and the National Museum. By 1893, Wales had a national federal

university, with three constituent colleges, which awarded undergraduate and postgraduate degrees in a broad range of subjects.

But what of St David's College, Lampeter? Although there had been some discussion about its potential membership of the University of Wales during the 1890s, that did not come to pass. The timing was inauspicious. One of the raging political issues of the time was the disestablishment of the Church of England in Wales. Most within the Church were opposed to it, and most nonconformists were in favour. The Church galvanised support among the nobility and aristocracy in the House of Lords, who voted against disestablishment. The response to and outcome of this resistance to disestablishment was the constitutional reform of the House of Lords in the early twentieth century. We owe the Parliament Act of 1911, which removed the Lords' veto on legislation, at least in part to the great saga of Welsh disestablishment (Lloyd George's 1909 budget being the other catalyst).⁸ And disestablishment eventually won out with the Welsh Church Act of 1914, which entered into force in 1920.⁹

The prolonged saga of disestablishment permeated the landscape at the founding of the University of Wales and contributed to Lampeter's exclusion from the federal university at its foundation. As a leading historian of the University of Wales remarked, 'an unrelenting denominationalism was largely responsible for the failure to include Lampeter in the new University'.¹⁰ But there were also some more explicit factors at play. Lampeter was 'a denominational college without a representative governing body, its principal and tutors were subjected to religious tests'.¹¹ Religious tests for students at Lampeter were abandoned in its supplementary Charter of 1896.¹² Yet Lampeter was seen as an English institution in the heart of Welsh-speaking Wales, and its ethos and institutional mentality were long perceived to be Anglicised and Anglican, and out of touch with Welsh sentiments.

Indeed, some suggested that it held a colonialist view towards Wales and its people. Rev. Canon Daniel Parry-Jones, who was a student at Lampeter in the period immediately before the First World War, described the institutional ethos in his memoir, *Welsh Country Upbringing*:

On my first day there I realised it was not a Welsh college at all, it was merely a college in Wales. Though built in honour of our patron saint, St. David, poor St. David had to be satisfied with that alone, for we were never told anything about him, or the Church to which he belonged. We read English history and English church history, but never Welsh history or Welsh church history . . . the college lacked sympathy with Welsh aspirations, and showed little understanding of the Welsh temperament . . .¹³

Damning evidence indeed. But it is easy to over-simplify. Throughout its history, there had been individuals at Lampeter who promoted an approach that was more attuned with Welsh sentiments. Lorimer Thomas, who was professor of Welsh in the early decades of the twentieth century, was supportive of the Welsh student societies during those years leading up to the First World War.¹⁴ Indeed, there had been lecturers and professors of Welsh at the institution from the outset, with Rice Rees lecturer in Welsh in the 1820s, and the great lexicographer Daniel Silvan Evans lecturer in Welsh for a brief period in the 1840s.¹⁵ Maurice Jones, who was principal from 1923 to 1938, was a Welsh-speaking son of a Trawsfynydd shoemaker who had gained a first-class degree at Oxford before serving for many years as a chaplain in the army. A member of the Gorsedd of Bards with the bardic name Meurig Prysor, he served as treasurer of the Gorsedd from 1925 to 1938 and was a familiar presence at the National Eisteddfod.¹⁶ His Welsh credentials were not in any doubt. Indeed, some would argue that the institutional ethos towards the Welsh language and Welsh culture at Lampeter was no more hostile than in that of some of the constituent colleges of the University of Wales.¹⁷

At the turn of the twentieth century, Lampeter was to continue as an independent degree-awarding institution separated from the federal arrangements of the University of Wales. By the 1940s, Lampeter was in dire financial straits, with dwindling student numbers and no support from the public purse. An institution whose main practical function appeared to be that of training ordinands for church ministry was finding itself in an increasingly precarious position.¹⁸ Although disestablishment became a convenient explanation for many of the ills facing the Anglican Church in Wales after the First World War, the truth, again, was more complex. Church and chapel attendance was dwindling, driven by spiritual disillusionment in the aftermath of the war and increased secularisation. Indeed, even for dissenting Christianity in Wales, the battle for disestablishment was no more than a pyrrhic victory.¹⁹

As the 1940s unfolded, Lampeter's leaders came to believe that a judicial pronouncement on its university status could act as leverage to force the University Grants Committee (UGC) to provide it with financial assistance. The UGC did not regard Lampeter as a university, and so did not offer it the financial support which other university institutions enjoyed. Moreover, Lampeter students were denied state scholarships that would otherwise support their studies. The Ministry of Education, the real seat of power on the issue, concurred with the UGC.

Lampeter's principal from 1938 was Henry Kingsley Archdall, a cleric who had previously served as chaplain at Wellington College and fellow of Corpus Christi, Cambridge.²⁰ Like many of his predecessors and, indeed,

successors, Archdall was not a Welshman, and often found it difficult to grasp the political milieu in which he sought to lead his fragile college. But he knew that to gain recognition as a university was crucial for financial stability and institutional survival. In the early 1940s, he had begun a campaign to persuade the UGC to recognise Lampeter as a university college and to provide it with the financial support enjoyed by other university institutions. It was to prove futile. Accordingly, from 1949 onwards, he began to build a legal case for recognising Lampeter as a university institution which qualified for state funding.²¹

The legal path was never going to be smooth. Towards the end of 1948, the college sought counsel's opinion on its prospects of success. The opinion of Mr H.O. Danckwerts KC (later Sir Harold Danckwerts, Lord Justice of Appeal), dated 3 December 1948, advised the College that the UGC had behaved unfairly but that the legal path was less than straightforward, and suggested that political pressure on the UGC would be more likely to bear fruit.²² Notwithstanding Mr Danckwerts's tentative advice, the college pressed ahead and instructed A.J. Husker as its solicitor, who then briefed Sir Andrew Clark KC, a leading advocate at the Chancery Bar, to make the case for recognising Lampeter as a university.²³ A writ was issued against the ministry and the UGC (but proceedings against the latter were soon discontinued).

The remaining respondent, the Ministry of Education, was represented by Denys Buckley, later Lord Justice of Appeal, who by his marriage to the daughter of the physician Sir Robert Armstrong-Jones had acquired Welsh connections (Buckley's wife was a sister of Ronald Owen Lloyd Armstrong-Jones KC, and aunt to Anthony Armstrong-Jones, Earl of Snowdon, who married Princess Margaret in 1960).²⁴

A preliminary hearing was held before Mr Justice Wynn-Parry on 3 October 1950 when the ministry unsuccessfully applied to strike out the claim on the grounds of it being vexatious, frivolous or an abuse of process.²⁵ The ministry was clearly digging in its heels, resisting Lampeter's claims for financial support, and even appeared somewhat belligerent in denying any legal duty to support Lampeter financially should it be ruled that Lampeter was a university or a university college.²⁶ The ministry's application was dismissed, and a full hearing was listed before a judge in the Chancery Division in February 1951.²⁷

That judge was to be Mr Justice Vaisey. Sir Harry Vaisey (1877–1965) was a product of Shrewsbury School and Hertford College, Oxford. Called to the Bar of Lincoln's Inn in 1901, he took silk in 1925, and was appointed a judge of the High Court in 1944 at the somewhat ripe age of sixty-seven years. Indeed, by the time the present matter came before him, he was seventy-three years of age. He was a high churchman, an authority on

ecclesiastical law, and had served as chancellor of the dioceses of Derby and Wakefield from 1928 to 1944, chancellor of the diocese of Carlisle from 1930 to 1944, vicar-general of the province of York from 1934 to 1944, and commissary general for the diocese of Canterbury from 1942 to 1944.²⁸ With these credentials, Archdall might have had good cause to expect him to be a sympathetic judge, one of our own, so to speak, who would be rather supportive of an institution which seemed to be engaged in a mission to promote Anglicanism in a land of dissent.

But Vaisey was also unpredictable and somewhat eccentric. Among the judicial achievements attributed to him was his celebrated definition of a 'gentleman's agreement':

A gentleman's agreement is an agreement which is not an agreement, made between two people neither of whom are gentlemen, whereby each expects the other to be strictly bound without himself being bound at all.²⁹

Vaisey had also earned his place in the annals of the law thanks to his ruling in the case of *Re Parrott, Cox v. Parrott* [1946] Ch 183. Then, he adjudged that the law does not allow a person to change their given forename and that it was not possible to do so by way of a deed poll. This precedent was subsequently ignored, although a practice developed whereby a person wishing to register a deed of change of name would add a caveat on the deed in these terms: 'Notwithstanding the decision of Mr Justice Vaisey in *Re Parrott, Cox v. Parrott*, the applicant wishes the enrolment to proceed'.³⁰

Now, it was to be the fate of St David's College, Lampeter, that tested Vaisey's legal intellect. The press took an avid interest in Lampeter's bid for university status, and the newspaper reports throw valuable light on the deliberations which otherwise went unreported and unrecorded in the official law report.³¹ For example, the press recorded the fact that during the proceedings Vaisey could not restrain his wit, and in an initial response to the question of what is a university, pondered, 'it is not obliged to have a boat race, is it?'³² Despite Vaisey's tendency to resort to levity, Sir Andrew Clark KC presented a rational and compelling case on behalf of Lampeter. He elucidated a set of criteria for university status and showed how Lampeter satisfied them all.³³ They were:

1. A charter conferred by the crown or a comparable high authority (the pope in years past or in other jurisdictions);
2. That access was open to all regardless of creed (true since 1896, if not earlier);
3. That there existed there a community of scholars;

4. At least one of the higher faculties were present (such as theology, law, philosophy and medicine);
5. Buildings and residence for students;
6. The power to award degrees.

To support his arguments, Clark called several witnesses of standing, including the registrars of both Oxford and Cambridge, who attested that Lampeter was an affiliated institution and that its degrees were of a university standard which allowed its graduates to proceed to further studies at their institutions without having to undertake matriculation examinations.³⁴ Both Oxford and Cambridge had long recognised the quality of Lampeter degrees, unlike the University of Wales, which of course had taken a more churlish stance towards the institution.³⁵ The registrar of the University of Nottingham gave evidence in Lampeter's cause, and said that he believed that it was the power to award degrees that was the crucial feature of university status.

The principal of Jesus College, Oxford, also waded in, and said that the difference between a university and university college was that the former could award its own degrees, whereas the latter awarded degrees validated by another institution. Lampeter, clearly, fell into the former category. Adding to this illustrious parade of witnesses that attested to Lampeter providing education of a university standard was Leonard Hodgson, Regius professor of divinity at Oxford, and Arthur Geoffrey Dickens, professor of history at University College, Hull, and chairman of Lampeter's board of external examiners.³⁶ In addition, there were written submissions on the matter from those unable to attend in person. Among the written submissions was one from Sir F. Maurice Powicke, emeritus Regius professor of history in University of Oxford, who in a memorandum entitled 'The Academic Status of St. David's College, Lampeter' had concluded, 'I have no hesitation in saying that, in my view, the College is a University College in its own right'.³⁷

Denys Buckley, counsel for the respondents, then cross-examined Douglas Veale, Oxford's registrar, and it was established that the University College of North Staffordshire and Lampeter were the only institutions restricted to offering bachelor's degrees. Veale agreed but added 'with the exception of the bogus universities'. Buckley responded by saying that he was unaware of the existence of bogus universities. Vaisey, sensing his opportunity, at this point joined in and offered his own insight on the point: 'one would have thought they would have gone the whole way if they were bogus'.³⁸

The respondent then called its witnesses, which consisted of civil servants at the Ministry of Education. Not one of the respondent's witnesses

was an academic or a representative from another institution who might gainsay the testimony presented on behalf of Lampeter. Mr Gilbert Flemming, a deputy secretary of the Ministry of Education, claimed that Lampeter's case was considered objectively in the light of the prevailing regulations. Mr Flemming also made a point which would later be taken up by Vaisey in his judgment, which was that the ministry treated institutions as universities if they had explicitly asserted that status in their founding charters, or had been granted the title by appropriate authority.³⁹ In truth, the respondent offered little to refute the plaintiff's arguments, and even conceded that Lampeter was a university college which offered education of 'a university character'.⁴⁰ But the thrust of the respondent's submission was that it was for the minister to interpret the 1948 regulations for determining state scholarships and university supplemental awards and to decide if an institution qualified for state financial support.⁴¹

It appears that Lampeter had considered the option of asking the judge to declare the institution a 'university college', which would have been a lesser status than that of a 'university', but Sir Andrew Clark had advised that such a declaration would not be of great advantage to Lampeter, and that as the expression 'university college' was found in the regulations it might only strengthen the respondent's case that it was for the minister to interpret the phrase.⁴² As such, it would not have overcome the Ministry of Education's unwillingness to provide Lampeter with public funding.⁴³

When it came to pronouncing judgment, Vaisey prevaricated. He began by conceding that the expression university was not 'a word of art', before explaining why Lampeter should not be regarded as a university.⁴⁴ He found that Lampeter's size and limited degree awarding powers, the BA and the BD, weakened its case for university status.⁴⁵ He then went on to offer a rather circular criterion, namely that whether an institution is a university or not can be decided by reference to what the 'ordinary man would say if he were asked whether this college is a university'.⁴⁶ What did he mean? The man on the Clapham Omnibus? His ordinary man was 'the ordinary man who does know what a university is or who has received his education at a university'.⁴⁷ How such a man would justify his opinion, and state 'what a university is' was left unanswered. He then stated a further weakness to Lampeter's case, which was that the institution's charters did not explicitly state that it was a university. This was, in contrast to the University of Wales, which Vaisey stated was 'incorporated as a university'.⁴⁸ Lampeter, he said, was a 'borderline' case, indeed, 'in a class of its own'.⁴⁹

Vaisey's judgment was hardly a pinnacle in legal reasoning. It turned on his ordinary (reasonable) university-educated-man test, combined with a narrow literal interpretation of the institution's charters. His use of

the ordinary, university educated man was arguably a case of relying on a false authority. But such a man provided Vaisey with a suitably vague bystander who could be said to share the judge's own views, with those views then being largely unchallenged and unchallengeable.⁵⁰ Although the ordinary and reasonable man has a long-standing pedigree in the common law, his deployment to determine legal issues has not been without its difficulties.⁵¹ The potentially subjective nature of the ordinary, reasonable person as opposed to his purported objectivity has been the subject of criticism (after all, one man's reasonable man is another's idiot), and he has often been seen as a convenient tool for 'ad hoc rationalizations deployed to obscure private agendas'.⁵² What was extraordinary in this case was that Vaisey, having employed the use of the ordinary, university educated man, came to the conclusion that he would not have concurred with the views of the registrars of the Universities of Cambridge, Oxford or Nottingham, the principal of an Oxford college, nor two eminent professors who all said that Lampeter was a university institution and ought to be so recognised.

The more constructive, criteria-based interpretation which Andrew Clark had argued for was not adopted. That is, did the institution behave like a university, by providing a university education, did it have staff which could be described as academic university staff (which were highly qualified and had professorial status, for example, which was indeed the case), and did it have degree awarding powers? The fact that the institution was small and only offered undergraduate degrees in the humanities ought not to have been fatal, as that was a feature of North Staffordshire University College (later Keele University), which did receive government support at the time. Vaisey did not press the Ministry on why Lampeter should be treated differently. Interestingly, no-one thought it relevant to mention that Lampeter admitted men only, unlike the constituent colleges of the University of Wales, which had been admitting women soon after, if not at the time of their founding. One might speculate that provoking that hornet's nest might have created a great deal of trouble to other, more venerated institutions. Women would not be admitted as students at Lampeter until 1965.⁵³

A more substantive stumbling block for Lampeter, mentioned by counsel for the respondent in his submissions, was s. 100 of the Education Act 1944, which gave the minister absolute discretion in recognising an institution as a university for the purposes of receiving financial support from the government.⁵⁴ Vaisey might have ruled that as this was the law he had no power to intervene. But, as his exchanges with Buckley suggest, he found the idea that a judge could not hold the minister to account, even if he had found his behaviour capricious (which he did not in this case), unacceptable.⁵⁵ In this case, nobody had argued bad faith on the part of

the ministry, because no evidence could be produced in support of such an assertion. And judicial review was but in its infancy at the time. Power rested with the minister, and it was not open to the judge to interpret the regulations. Vaisey could only appeal for a more sympathetic approach towards the institution by hoping that some special financial provision might be made to support its work. He went as far as sharing his view that the ministry's intransigence and ungenerous attitude was surprising if not distasteful.⁵⁶

It might also be said that Vaisey took a normative stance. He did not really answer the question, was Lampeter a university as a matter of fact, but whether it ought to be regarded as so in the circumstances. Yet the response in the press both generally and in Wales was one of sympathy towards Lampeter and its plight.⁵⁷ The *Western Mail*, a conservative-leaning newspaper at the time, expressed the view that the decision against Lampeter 'will be received with regret in Wales . . . because its influence upon the religious and moral development of Wales has been profound'. The paper's reporter added, 'it is difficult for us to imagine Wales without Lampeter. A comparatively humble establishment, in his Lordship's words, it has exercised an influence out of all proportion to its size, and it is hard that the excellence of its record should be denied full recognition'.⁵⁸

The judgment was criticised by legal commentators and even christened, 'Vaisey's Folly'.⁵⁹ D.J. Christie, in a detailed article published in *Public Law* in 1976 (then edited by J.A.G. Griffith, a Cardiff-born son of a Baptist minister), concluded that 'the judgment as a whole should be regarded with circumspection'.⁶⁰ In particular, Christie showed how Vaisey's resort to the reasonable-university-man test was at odds with the normal principles of statutory interpretation when it came to a term which is not a term of art. In such cases, proper reference to ordinary everyday meaning was required, using a standard dictionary, and Lampeter clearly met the dictionary definition of a university.

Must we therefore simply dismiss the outcome as an example of poor legal reasoning by an eccentric judge? To do so would be naïve and to ignore the political context. The Minister for Education during what would become the dying months of Atlee's Labour government was George Tomlinson. It is doubtful that this Lancastrian had a strong personal view on the matter, but his close associates in the ministry might well have brought influence to bear on his judgment. Indeed, it is inconceivable that the Welsh Department would not have exerted such influence. In a letter to H.A. Strutt, who was a civil servant in the Home Office, dated 28 May 1953, Archdall pulled no punches when he said, 'we have known for a long time that there is opposition to us in the Welsh Department: and it seems to us that power is concentrated in the hands of one man'.⁶¹ As Prys

Morgan later remarked, 'the suspicion was that the harm was done by the Welsh Department of the Ministry, a pawn in the hands of the Welsh establishment'.⁶² To what and to whom was Archdall alluding?

Sir Ben Bowen Thomas (1899–1977), who had been knighted in 1950, was the permanent secretary to the Welsh Department of the Ministry of Education from 1945 to 1963.⁶³ A Welsh-speaking Baptist and a calm yet effective operator in Welsh public life, he would not have been a friend of Lampeter. He was a University of Wales (via Aberystwyth) graduate, had been a member of staff at Aberystwyth prior to his appointment to Whitehall in 1945, and he would serve as President of Aberystwyth from 1964 to 1975. His loyalty to his *alma mater* was not in doubt, and he had 'maintained the closest interest in the College throughout his adult life'.⁶⁴ Nowhere is he mentioned in the law reports nor in the newspaper reports. Yet, behind the scenes, he was the Sir Humphrey Appleby of our play.

In addition, the cabinet of Clement Attlee had a strong Welsh representation. It is probable that Aneurin Bevan, Ness Edwards and, perhaps more crucially, James Griffiths, appropriately briefed by Ben Bowen Thomas, would have alerted their colleagues to the political sensitivities surrounding Lampeter's bid for university status. Although not a party to the action, the University of Wales had a vested interest in the outcome. Ironically, Vaisey referred to the University of Wales in his judgment when he described Lampeter 'as a rival and complement of the University of Wales'.⁶⁵ He was nearer to the truth on that point than on any other which he made. Sir William D. Ross, of Oriel College, Oxford, and vice-chancellor of the University of Oxford, sensed that the relationship between Lampeter and the University of Wales was the political problem at the root of things. In a letter he sent to Sir Walter Moberley (Chairman of the UGC between 1935 and 1949) on 7 October 1943, on the question of Lampeter's status as a university college, he remarked: 'I understand that a difficulty felt by the University Grants Committee may be that it treats academic institutions on a territorial basis and regards the University of Wales as the one academic institution truly representative of that country.'⁶⁶ Those old hostilities towards Lampeter were unabated. Lampeter degrees were treated with suspicion by the University of Wales authorities even when it came to admitting Lampeter graduates to undertake its postgraduate degrees.⁶⁷ And, as recently as 1944, the University of Wales had rebuffed Lampeter's advances, choreographed by Archdall, when it had sought to reopen the question of its relationship with and potential admission into the federal university.⁶⁸ Jenkin James, the federal university's secretary, had encapsulated the University of Wales's Council's view of Lampeter when he wrote to Archdall advising him that Lampeter might move forward by 'entrusting to the National University and its constituent Colleges the provision

of all forms of higher education at the undergraduate level, reserving to themselves the provision of facilities for post-graduate theological studies in association with the University of Wales'.⁶⁹

Unsurprisingly, Archdall and Lampeter's authorities would have none of it. This was a form of bullying, and in a letter to the principal of Jesus College, Oxford, dated 4 June 1953, Archdall vented his feelings by saying: 'It is an astonishing thing to me to see the readiness of Lloyd George Liberals to become totalitarians in outlook and policy'.⁷⁰ It was not the case that all within the University of Wales had their knives in Lampeter's back. Among Archdall's supporters was Professor E.G. Bowen of the Department of Geography at the University College of Wales, Aberystwyth. They would correspond regularly, and Archdall confided in him that the application to join the University of Wales failed because, 'the small junta which controls the University Council simply demanded that we should shut up shop'.⁷¹ Another of Aberystwyth's academics who gave his support to Archdall's endeavours was Professor Richard I. Aaron, the head of the Department of Philosophy. An external examiner at Lampeter, he helpfully stated that the academic standards applied at Lampeter were as good as those at the universities of Wales, Manchester and Bristol.⁷²

Yes, the University of Wales had considerable political leverage (James Griffiths had been awarded an honorary LLD of the university in 1946). Moreover, the University Grants Committee, which had initially been added as a party to the legal action but whose involvement had been discontinued, concurred with the Ministry of Education's view that Lampeter was not a university. It had, since 1948, the founder of the Institute of Advanced Legal Studies, Sir David Hughes Parry, among its members. This resolute defender of the University of Wales, and of Aberystwyth in particular, would become vice-chairman of the UGC from 1951 onwards.⁷³ Archdall had been advised to approach Hughes Parry, as vice-chairman of the UGC, so as to explore the way forward.⁷⁴ Hughes Parry had declined an invitation to meet with Archdall, explaining that although he acted as chairman of the UGC during Sir Arthur Trueman's illness, the latter was now back in harness. He added, 'in the circumstances I think it would be improper for me to discuss the matters you mention with you'.⁷⁵ Hughes Parry later agreed to meet Archdall after he had retired from Lampeter.⁷⁶

Archdall's successor as Lampeter's principal, J.R. Lloyd Thomas, had found Hughes Parry to be charming and reasonable, and did not believe him to be the 'villain of the piece' although he was 'one of those dedicated Welshmen who had *Lampeter delenda est* on their hearts'.⁷⁷ Instead, Lloyd Thomas laid the blame for the UGC's attitude squarely at the door of Sir Walter Moberley, chairman of the UGC, who had rejected Archdall's entreaties in 1942.⁷⁸ He was probably right. Moberley's letter to

Archdall, following an application to the UGC for a treasury grant in 1944, was curt and unsympathetic, and concluded in a distinctively frosty tone, 'the members were unanimously of the opinion that no new reasons had been advanced which would justify departure from the adverse decision already conveyed to the College'.⁷⁹

Whoever might have been Lampeter's antagonist in chief, there can be no doubt that there were some formidable political operators behind the position taken by the Ministry of Education. Of course, Vaisey could have decided in favour of Lampeter, regardless of the opposition. But the Ministry of Education's objections and their interpretation of the regulations must have weighed on his mind, even if he did not say so openly. Despite the political strength of his opponents, Archdall gave the prospect of an appeal to a higher tribunal some consideration, and even ventured to present a petition for a supplemental charter to the Privy Council in the middle of 1952 that would have recognised Lampeter as a university college. Unsurprisingly, this was also turned down in February 1953.⁸⁰ By then, the combination of financial constraints and physical and mental exhaustion, exacerbated by the death of his wife, meant that Archdall had neither the appetite for a replay before different judges nor the strength to continue the campaign.⁸¹ Sir Maurice Powicke, among others, wrote to him to express their support and sympathy following what had been a long and personal ordeal.⁸² Tired yet indefatigable, Archdall would resign the principalship in 1953, and hand over the care of Lampeter to his successor, J.R. Lloyd Thomas, who would continue the struggle to secure Lampeter's future.⁸³

In a booklet published in the aftermath, Archdall shared his reflections, and quoted from the leading article in the *Western Mail* on 9 February 1951, which probably summed up his own feelings by the end.

On strictly legal grounds, of course, the judge could reach no other decision. But he made it plain that he thought it unfortunate that an institution which offered tuition in so wide an academic field should be denied the title of university simply because it had not full powers to grant degrees. On equitable grounds it has earned the title, and the Ministry of Education's attempt to prevent even a High Court declaration in the matter, on the grounds of 'unjustifiable expense', was a mean subterfuge. The revelation of these attempts, coupled with the judge's expressed hope that the Ministry would take a more sympathetic view, may succeed in putting matters to rights. Official recognition of St. David's College as a university would not only be welcomed in Wales but by the universities in Britain who have long ago acknowledged its right to the honour.⁸⁴

The postscript is that Lampeter, with the support of the University College in Cardiff, would eventually become a constituent member of the federal University of Wales, and so finally secure for itself financial aid from government.⁸⁵ What became of its degree-awarding powers? This issue was the subject of a letter from the Privy Council Office to Lloyd Thomas, which stated that while, 'it is understood that the College is prepared to forego any right to opt out of the University of Wales while the federal structure remains, I can confirm that it is unlikely that any objection would be taken to the College's degree granting power being suspended rather than abrogated.'⁸⁶ As for Vaisey's judgment, for what it was worth, it would also become redundant with subsequent legislation.⁸⁷ And the irony of ironies is that since the beginning of the present century there has been a steady exodus of the constituent colleges of Aberystwyth, Cardiff, Bangor and Swansea from the federal University of Wales as they have obtained degree-awarding status and become independent universities.⁸⁸ In contrast, Lampeter continues to award University of Wales degrees as an integral part of the newly formed University of Wales Trinity Saint David.

What is the significance of this relatively minor legal episode? The case with which this chapter has been concerned can hardly be described as a milestone in the story of the common law. It is not for its legal content that it acquires fascination. Indeed, when the law report is read in isolation, the judgment is barely comprehensible. But when it is contextualised, it sheds light on the politics of higher education in Wales in the first half of the twentieth century. The case betrayed ancient, deep and unbridged chasms in the life of Wales. Lampeter was unsuccessful not so much because it did not function as a university, but because political forces were at play that meant it ought not be recognised as one. Denominationalism had a strange longevity in Welsh life even after the church pews and the chapel galleries had long emptied. I might tentatively suggest that it still does, as although greater inter-denominational cooperation has been seen in recent times, attempts to unite the nonconformist denominations have hitherto failed.

The story of Lampeter's day in court also has significance for scholars of a more socio-legal bent. The case illustrates the limitations of legal formalism and legal analysis based principally on 'black-letter' interpretation of law reports. Much of what has been presented here is not to be found in the reported judgment. Making sense of things requires a reading between the lines, consulting the archive in search of letters and private papers, the press reports and other non-legal sources, and acknowledging the existence of that political dimension which often colours human, including legal, judgement. Here was a case where the expedient outcome

determined the mode of reasoning, and the desired ends mattered more than reasoned argument.

Finally, the tale of Lampeter's bid to obtain recognition as a university also has a contemporary resonance for higher education in the twenty-first century. The institution which appeared before the Chancery Division of the High Court in 1951, claiming the right to be called a university, had a long and honourable tradition of scholarship. Among former staff it claimed intellectuals of the calibre of T.F. Tout, the great historian who later made his name as the founder of the history school at the University of Manchester. The nine years he had spent at Lampeter had been the making of him and had given him an opportunity to pioneer new ways of teaching history.⁸⁹ Another of the same ilk was Hugh Walker, a fine and productive scholar of English Literature, who served at Lampeter for half a century.⁹⁰ Lampeter was an institution which had behaved like a university although it was not recognised as one by the government (even though, as we have seen, the University of Oxford and other supportive institutions took a different attitude).

It is more than seventy years since the question was asked, what is a university? It remains a valid question. We might ask again, what are universities and what are they for? Do universities still contribute to maintaining an enlightened, fair and free society, or are they no more than trade schools on stilts, or worse still, in the business of exploiting for financial gain? Neoliberalism, globalisation and commodification have all challenged our traditional understanding of the university as a sanctuary for academic freedom and a bastion of rigorous and independent scholarship in the public interest.⁹¹ Academic rigour has given way to employability and the student experience. Academic independence and critical engagement are under siege as sanitised or censored opinions are championed at the expense of authentic enquiry, open debate, and free speech.⁹² Academics live precarious lives, constantly seeking the approbation of 'users' of the fruits of their labours to demonstrate the useful impact of their research. The academics of our times, out of a necessity to survive, engage in sometimes seedy collaborations with agents that are labelled as stakeholders, busily telling them what they want to hear (as that is what they are ready to pay for), rather than what they should be told. And although academic malpractice through artificial intelligence appears to be the current bugbear of the sector, in truth we have been silently sailing close to the ethical rocks for many years.⁹³

Here is where the plot thickens. There is a newer breed of institution which is called a university. It enjoys the trappings of the status and is recognised as a university by those in authority. It is often limited to the teaching of one or two disciplines, such as law and business.⁹⁴ Its

contribution to learning probably falls far short of that of Lampeter in the century which led to the events of 1951. Indeed, this new type of university has neither the breadth nor the depth of intellectual enquiry that typified the academic community at Lampeter in 1951. Yet, the rise of the private university in the United Kingdom is one of the innovations of our times.⁹⁵ Supported by successive governments, ostensibly in the interests of consumer choice, yet also favoured for its economic benefits for the taxpayer, it is free from much of the oversight, regulation and performance-measuring mechanisms that burden the publicly funded university. Once the private university persuades the Office for Students to grant it university status, it is free from any significant external authority and accountability. This raises justifiable concerns about quality control and market volatility.⁹⁶

As these are mostly for-profit businesses, they will not hesitate to close shop if the going gets rough. There is little chance that they will soldier on for more than two centuries, regardless of the adverse conditions, as St David's College, Lampeter has so valiantly done. At least until now. As this essay is going to press, the storm clouds are gathering once more over Lampeter as its parent institution, University of Wales Trinity Saint David, is proposing to end all undergraduate teaching at the Lampeter campus. The future looks uncertain, and the status of Lampeter as a centre of academic learning hangs in the balance.⁹⁷

Predicting its future is probably a futile exercise. The only conclusion here is that the treatment of St David's College Lampeter at the hands of those empowered to determine its status in the middle of the twentieth century was capricious and unfair, the product of an old grudge rather than progressive thought. The bar was set high to deprive Lampeter of its rightful status. The bar since then has lowered significantly, and the political imperatives have shifted, although not necessarily for the better. The quip about bogus universities, which gave such amusement to Sir Harry Vaisey at the time, might have been prophetic. Vaisey's judgment had its shortcomings, and it provided no *ratio decidendi* to bind the courts or even to guide the law student. But the arguments that were considered in *St David's College, Lampeter v. Ministry of Education* in answer to the question, what is a university, and the context in which those arguments were heard, should continue to provoke us.

Notes

1. D.T.W. Price, *A History of Saint David's University College Lampeter, Volume One: to 1898* (Cardiff: University of Wales Press, 1977), 54; E.L. Ellis, *The University College of Wales, Aberystwyth, 1872–1972* (Cardiff: University of Wales Press, 1972), 5.
2. William Gibson, *In a Class by Itself* (Oxford: Privately published, 2007), 5.
3. D.T.W. Price, *Bishop Burgess and Lampeter College* (Cardiff: University of Wales Press, 1977), 71.
4. Price, *A History of Saint David's University College Lampeter, Volume One: to 1898*, 167.
5. Price, *Bishop Burgess and Lampeter College*, 73.
6. See, generally, J. Gwynn Williams, *The University Movement in Wales* (Cardiff: University of Wales Press, 1993).
7. See K.O. Morgan, *Rebirth of a Nation: A History of Modern Wales* (Oxford: Oxford University Press, 1981), 106–12.
8. See Jeffrey Gainer, 'The Road to Disestablishment,' in *A New History of the Church in Wales*, ed. Norman Doe (Cambridge: Cambridge University Press, 2020), 27–44, at 43.
9. Discussed by Morgan, *Rebirth of a Nation: A History of Modern Wales*, 183–7.
10. J. Gwynn Williams, *The University of Wales 1893–1939* (Cardiff: University of Wales Press, 1997), 6.
11. J. Gwynn Williams, *The University Movement in Wales*, 142.
12. D.T.W. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971* (Cardiff: University of Wales Press, 1990), 150.
13. D. Parry-Jones, *Welsh Country Upbringing* (Upton: The Ffynnon Press, 1974), 117–18.
14. Parry-Jones, *Welsh Country Upbringing*, 118.
15. Price, *A History of Saint David's University College Lampeter, Volume One: to 1898*, 78.
16. See his entry in R.T. Jenkins et al. (eds.), *The Dictionary of Welsh Biography 1941–1970* (London: The Honourable Society of Cymmrodorion, 2001), 139–40.
17. Saunders Lewis, *Ati Wŷr Ifainc* (Cardiff: University of Wales Press, 1986), 58–64.
18. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 106–8.
19. See, further, D. Densil Morgan, 'The Welsh language and religion', in *Let's Do Our Best for the Ancient Tongue: The Welsh Language in the Twentieth Century*, ed. Geraint H. Jenkins and Mari A. Williams (Cardiff: University of Wales Press, 2000), 371–96; also Rowan Williams, 'Welsh Anglicans and cultural debate', in *A New History of the Church in Wales*, ed. Norman Doe (Cambridge: Cambridge University Press, 2020), 239–56.
20. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 107–8.
21. Gibson, *In a Class by Itself*, 20–24.
22. University of Wales Trinity Saint David, Special Collections and Archives (UWTSD, SCA), file UA/E/1: Opinion of Mr H.O. Danckwerts KC, dated 3 December 1948.
23. *Carmarthen Journal*, 26 January 1951, 1.
24. *Who's Who* (London: Adam and Charles Black, 1961), 415–16.
25. *The Birmingham Post*, 1 February 1951, 3.

26. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 151–2.
27. Reported as *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., 559.
28. *Who's Who* (1961), 3106.
29. Attributed to him by Staughton J. in *Chemco Leasing SPA v. Rediffusion P.L.C.*, (1985) 1 F.T.L.R. 201, Q.B.D. Commercial Ct.
30. For further comment, see Roderick Munday, 'The girl they named Manhattan: the law of forenames in France and England', *Legal Studies* 5, no. 3 (1985): 331–44.
31. *Daily News (London)*, 7 February 1951, 3.
32. *The Birmingham Post*, 7 February 1951, 6.
33. *Western Mail*, 7 February 1951, 4; *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., at 560–61.
34. *The Times*, 8 February 1951, 10.
35. *Western Mail*, 31 January 1951, 4.
36. *The Times*, 8 February 1951, 10.
37. UWTSD, SCA, UA/E/1: F. Maurice Powicke, *The Academic Status of St. David's College, Lampeter (A Memorandum for Her Majesty's Most Honourable Privy Council)*, 1951.
38. *The Birmingham Post*, 8 February 1951, 6; *Western Mail*, 8 February 1951, 4.
39. *The Times*, 8 February 1951, 10; *Liverpool Echo*, 8 February 1951, 6.
40. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 153; also Gibson, *In a Class by Itself*, 24.
41. *The Birmingham Post*, 7 February 1951, 6.
42. See J.R. Lloyd Thomas, *Moth or Phoenix* (Llandysul: Gomer, 1980), 35.
43. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 153.
44. *Carmarthen Journal*, 16 February 1951, 5.
45. *The Yorkshire Post*, 9 February 1951, 3.
46. *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., at 561.
47. *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., at 561.
48. *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., at 562.
49. *The Times*, 9 February 1951, 11.
50. The problem of judicial subjectivity and other difficulties that arise when deploying the reasonable person test is discussed by Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003).
51. For a critical discussion of the reasonable person's characteristics, see John Gardner, 'The mysterious case of the reasonable person', *University of Toronto Law Journal* 51 (2001): 273–308.
52. See Keith J. Bybee, 'Legal realism, common courtesy, and hypocrisy', *Law, Culture and the Humanities* 1, no. 1 (2005): 75–102, at 77.
53. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 220.

54. *The Times*, 7 February 1951, 2.
55. *The Birmingham Post*, 7 February 1951, 6; *Yorkshire Post*, 7 February 1951, 1.
56. *Western Mail*, 9 February 1951, 3.
57. Gibson, *In a Class by Itself*, 24–5.
58. *Western Mail*, 9 February 1951, 2.
59. William Gibson, *In a Class by Itself*, 25; also Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 153; also J.R. Lloyd Thomas, *Moth or Phoenix*, 36.
60. D.J. Christie, 'The power to award degrees', *Public Law* [1976]: 358–96, at 377.
61. UWTSD, SCA, UA/E/1: letter from H. K. Archdall to H. A Strutt (Assistant Secretary of State, Home Office), 28 May 1953; see also Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 158.
62. Prys Morgan, *The University of Wales 1939–1993* (Cardiff: University of Wales Press, 1997), 79.
63. For an overview of his life and career see W. John Morgan, 'Ben Bowen Thomas, Wales, and UNESCO', *Transactions of the Honourable Society of Cymmrodorion* 28 (2022): 80–93.
64. Ellis, *The University College of Wales, Aberystwyth, 1872–1972*, 320.
65. *St. David's College, Lampeter v. Minister of Education* [1951] 1 All E.R., 562.
66. UWTSD, SCA, UA/E/1: *St. David's College, Lampeter, Negotiations with the University Grants Committee* (pamphlet), 28.
67. J. Gwynn Williams, *The University of Wales 1893–1939*, 334.
68. Prys Morgan, *The University of Wales 1939–1993*, 28–30.
69. UWTSD, SCA, UA/E/1: letter from the Secretary of the Council of the University of Wales to the Principal of St. David's College, Lampeter, 11 March 1945, in *St. David's College, Lampeter, Negotiations with the University Grants Committee* (pamphlet), 15.
70. UWTSD, SCA, UA/E/1: letter from H.K. Archdall to the Principal of Jesus College, Oxford, 4 June 1953.
71. UWTSD, SCA, UA/E/1: letter from H.K. Archdall to E.G. Bowen, 24 February 1951.
72. UWTSD, SCA, UA/D/112: letter from Richard I. Aaron to H.K. Archdall, 7 June 1947.
73. See R. Gwynedd Parry, *David Hughes Parry: A Jurist in Society* (Cardiff: University of Wales Press, 2010), 127–30.
74. UWTSD, SCA, UA/E/1: letter from H.K. Archdall to Sir David Hughes Parry, 30 June 1952.
75. UWTSD, SCA, UA/E/1: letter from Sir David Hughes Parry to H.K. Archdall, 11 July 1952.
76. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 155.
77. J.R. Lloyd Thomas, *Moth or Phoenix*, 24.
78. J.R. Lloyd Thomas, *Moth or Phoenix*, 23–4; also, Gibson, *In a Class by Itself*, 20–21.
79. UWTSD, SCA, UA/E/1: letter from Walter Moberley to H.K. Archdall, 29 March 1944.

80. UWTSd, SCA, UA/E/1: letter from Lord Salisbury to H.K. Archdall, 19 May 1953.
81. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 156–8.
82. UWTSd, SCA, UA/E/1: letter from Sir Maurice Powicke to H.K. Archdall, 10 February 1951.
83. Price, *A History of Saint David's University College Lampeter, Volume Two: 1898–1971*, 162–5.
84. H.K. Archdall, *St. David's College Lampeter: Its Past, Present and Future* (Lampeter: J.D. Lewis and Sons, 1952), 8.
85. Prys Morgan, *The University of Wales 1939–1993*, 113–15.
86. UWTSd, SCA, UA/E/2: letter from W.G. Agnew, Privy Council Office, to J.R. Lloyd Thomas, 23 March 1967.
87. See Dennis J. Farrington, 'Higher education charters: implications for faculties', in *The Dean in the University of the Future*, ed. Christian Scholtz and Volker Stein (Mering, Munich: Rainer Hampp Verlag, 2014), 52–9, at 54.
88. Discussed by Sam Blaxland in *Swansea University: Campus and Community in a Post-War World, 1945–2020* (Cardiff: University of Wales Press, 2020), 245–6.
89. William Gibson, 'Thomas Frederick Tout at Lampeter: the making of a historian', in *Thomas Frederick Tout (1855–1929): Refashioning History for the Twentieth Century*, ed. Caroline M. Barron and Joel T. Rosenthal (London: University of London Press, 2019), 25–40.
90. For short accounts of his life and career at the time of his death, see *The Scotsman*, Thursday 29 June 1939, 8; *Liverpool Daily Post*, 29 June 1939, 13; *Birmingham Daily Post*, Friday 30 June 1939, 16.
91. The undoing of academic ethos has been a long time in the making. See Edward Shils, 'The academic ethos under strain', in *Universities in the Western World*, ed. Paul Seabury (New York: The Free Press, 1975), 16–46.
92. See, for example, Finlay Malcolm, Bobby Duffy and Constance Woollen, *Freedom of Speech in UK Higher Education: Recommendations for Policy and Practice* (London: The Policy Institute, King's College London, 2023).
93. For further reflections, see John Smyth, *Zombie Leadership, Academic Rock Stars and Neoliberal Ideology* (London: Palgrave Macmillan, 2017), especially 29 and 109; also, Edward J. Carvalho and David B. Downing (eds.), *Academic Freedom in the Post-9/11 Era* (New York: Palgrave Macmillan, 2010), at 205.
94. See John Fielden, 'Private providers of higher education in the United Kingdom', *International Higher Education* 83 (2015): 14–16.
95. For an overview, see Steve Woodfield, 'Private higher education in the United Kingdom: myths and realities', *International Higher Education* 76 (2014): 11–12.
96. For a detailed discussion, see Stephen A. Hunt and Vikki Boliver, 'The private higher education provider landscape in the UK', *Studies in Higher Education* 48, no. 9 (2023): 1346–60.
97. Bruce Sinclair, 'University education at Wales' oldest campus ends' (BBC News), 23 January 2025, <https://www.bbc.co.uk/news/articles/c78x4l9lk430>, accessed 14 February 2025.

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Chapter 6

Radio, *The Listener* and *The Times*: lessons from the 1950s in the public understanding of law

Simon Lee

Introduction

The 1950s were a golden era for a certain kind of magisterial talk about law on BBC Radio, with scripts preserved and disseminated by the BBC's weekly magazine, *The Listener*. Technological innovations and changing values mean that our times are markedly different. For example, it is welcome that the media are much more diverse in the 2020s, BBC Radio has lost its monopoly, and the 'mainstream' or traditional media seem increasingly outflanked by blogs, podcasts, streaming and social media. These forms of communication are less formal in style and are more readily available at the disposal of the listener or reader, rather than the necessarily linear, scheduled talks of the 1950s. Nevertheless, contributions from Lord Radcliffe early in the 1950s and especially Professor H.L.A. Hart at the end of the decade have much to teach us all about how the spoken and written word can deepen and broaden the public understanding of law in the contemporary era.

Lord Radcliffe's 1951 Reith Lectures on the Home Service (now Radio 4) were on 'The Problem of Power', the relationship between the powerful in a state and its other citizens, and therefore raised questions about authority, law and politics.¹ His seven weekly talks were the fourth of an annual, prestigious series, the major set-piece for the BBC after the Second World War, named in honour of its influential former director-general, Lord Reith.

Professor Herbert Hart's 1959 talk on the Third Programme (now Radio 3) was entitled 'Immorality and Treason' and was on the relationship between law and morality.² This was a single talk of twenty-five minutes, first broadcast at 8.30 p.m. on 14 July 1959, following Czech music at 8 p.m. and followed at 8.55 p.m. by Rostropovich playing the cello in a selection of music by Bach and Beethoven.³ The talk was repeated later at night on 7 September in between Purcell and a piano recital.⁴

The scripts of Radcliffe's lectures were published week after week in *The Listener* and were then collated in a book. By the end of the 1950s, even Lord Radcliffe was dissatisfied with his Reith Lectures of 1951.

Hart's talk was published as an article in *The Listener* of 30 July 1959. By the mid-1960s, there had been so much to-ing and fro-ing between Hart and Devlin in later lectures that the original broadcast talk was submerged by publication of two slim but influential books, known collectively by law students and others as the Hart–Devlin debate. Hart's *Law, Liberty and Morality*⁵ was published in 1963 and Devlin's *The Enforcement of Morals*⁶ in 1965, both by Oxford University Press which also published a reflection on the debate by a professor of theology, Basil Mitchell, *Law, Morality and Religion in a Secular Society*,⁷ in 1967 and then my own analysis in *Law and Morals* in 1986.⁸

Radcliffe and Hart had each enjoyed a classical education at New College, Oxford, and proceeded to practise law as barristers before using their intelligence, in every sense, in the Second World War.⁹ Radcliffe was the director of the Ministry of Information. Hart worked for MI5, including at Bletchley where he knew Alan Turing, and in London where he worked closely with philosophy dons in intelligence work, Gilbert Ryle and Stuart Hampshire. After the war, Radcliffe was given various missions by Labour government ministers who had worked with him during the war, and was then appointed in 1949 as a Law Lord, without having had to serve first as a judge in the High Court or the Court of Appeal. He was most famous, or infamous, for having presided in 1947 over the swift, or rushed, drawing of the boundaries between India and Pakistan as they became independent of the UK.¹⁰ Radcliffe had never been to India before and never visited India or Pakistan afterwards. Before and after that task, set by the Attlee government with a time limit of five weeks, Radcliffe chaired other inquiries, reviews and public bodies. Meanwhile, Hart became a tutor in philosophy at his old college, New, in Oxford and then professor of jurisprudence at Oxford.

Their radio highlights of the 1950s came with preludes and encores. In turning his lectures into a book, Radcliffe gave himself two encores, placing some reflections as an introduction to the hardback edition in 1952 and adding a gloomy postscript for the 1958 paperback version. The latter

had been printed also in two parts as articles in *The Times* on 24 and 25 February 1958. *The Times* published in response an excoriating letter from Professor H.L.A. Hart on 1 March 1958. Hart's July 1959 talk on the Third Programme was itself a response to a lecture given on 15 March 1959 at the British Academy by the judge, Sir Patrick Devlin.¹¹ When asked to choose a topic in 1958, Devlin had resolved to discuss the issues raised by the reasoning of the Wolfenden Report,¹² the work of a committee which was established by the Home Office in 1954 and which had reported in 1957. It made recommendations on reforming the criminal law on offences related to prostitution, primarily so as to make it less apparent on the streets of London, and on liberalising the law to stop it being criminal for consenting men in private to engage in gay sex. The prosecution of some prominent characters for such offences and the risk of gay men being blackmailed had led to the committee being created. Just before it began its proceedings, Alan Turing, the leading hero among the wartime code-breakers at Bletchley Park, had taken his own life after being convicted under the pre-existing law (for which, in 2013, he received a posthumous royal pardon).¹³ Devlin had appeared before the committee, and was in favour of the reforms, but he took issue with the report's reasoning. Now, Hart took apart Devlin's reasoning. Numerous encores by Devlin and Hart ensued. None were quite as good as Hart's Third Programme talk.

Do these broadcast talks speak to our times? My argument here is that the public understanding of law can be deepened and broadened by revisiting, and learning from, Lord Radcliffe's foreword to the book of his Reith Lectures and from that short original article by Hart in *The Listener*. For instance, in 2019, Lord Sumption, who had recently retired as a Supreme Court justice, gave the Reith Lectures on 'Law and the Decline of Politics' without once referring to Lord Radcliffe's Reith Lectures.¹⁴ In the 2024/5 Parliamentary year, the major legislative drama is about assisted dying, where Professor Hart's 1959 talk is relevant to disentangling good and bad arguments on all sides of the national debates. In both cases, more attention to Radcliffe's and Hart's lessons from the 1950s would have been invaluable.

Law on BBC Radio from the 1920s to the 1950s

The BBC's first radio broadcast talk about law was by Florence Clarke in August 1923 and further lectures by women followed in 1924.¹⁵ By 1954, however, the first collection of BBC Third Programme broadcast talks in the series *The Law in Action* to be published in a book consisted of six lectures by men.¹⁶ The second series in 1957 had ten talks, all by men.¹⁷ What had

happened to the pioneering approach of BBC Radio? In between times had come the depression, the build-up to war and the Second World War itself.

Two privileged white men did not constitute a cross-section of British society in the 1950s but all Law Lords and all UK law professors were white men in that decade.¹⁸ After the war, the BBC Features department had commissioned Jenifer Wayne to create a series *This Is the Law*, with a book of stories from the broadcasts appearing in 1948, with the subtitle 'Stories of Wrongdoers by Fault or Folly'.¹⁹ Jenifer Wayne explained that,

These stories are freely adapted from a series of radio programmes broadcast at various times in the BBC Home Service. I am grateful to the BBC for allowing the material to be reproduced in this form. But I should like to thank particularly the barrister-at-law whose patient advice was the basis for the scripts, and all the actors whose lively co-operation brought them to the air as entertainment.²⁰

The focus in *This Is the Law*, as the title indicated, was on setting out, through stories of incidents, what the law did or did not entail on a variety of scenarios the public might encounter. Jenifer Wayne was advised by a prolific broadcaster on the law and legal journalist, known by a pseudonym as C.H. Rolph.²¹ He had started broadcasting and writing on the side during a twenty-year career as a police officer. His actual surname was Hewitt. Wayne and Rolph/Hewitt married after the latter's divorce from his first wife. He was a campaigner for social justice reforms, including the abolition of capital punishment and the decriminalisation of homosexual acts between consenting male adults in private.²²

One example of ethnic diversity in broadcasting about law in the 1950s was that Learie Constantine, the famous West Indian cricketer, was given a platform by the BBC.²³ This was not only as a cricket commentator and pundit, but as a law student, then barrister, litigant against racial discrimination, politician, diplomat and celebrity. This carried on through the decades as Constantine was honoured with a knighthood, a peerage, an appearance on the BBC's *Desert Island Discs*, and appointment as the first Black governor of the BBC. He was, for example, on *Any Questions?* on 9 November 1951 on the Light Programme (which later became Radio 2), broadcast from what was then University College, Southampton, and was described among his many accomplishments as a law student:

Learie Constantine, a newcomer to 'Any Questions?' was born in Trinidad. He played cricket for the West Indies in this country and in Australia and New Zealand. In 1929 he became a professional, and played for Nelson, Lancashire, in the Bradford League until 1942, when he joined the Ministry of Labour. He has written books

on cricket, and broadcast many times, both on cricket and on other subjects. He is at present studying law in London.²⁴

In 1959, he had a dedicated programme on the Home Service, one which could well be re-broadcast in our era of heightened consciousness of the long-term consequences of colonialism, *From Cricket to the Caribbean*.²⁵

While Learie Constantine was extraordinary, it is the sixteen talks in *The Law in Action* series which indicate the standard form of broadcasting on the law in the 1950s. A typical example from the first series is Professor C.J. Hamson of Cambridge on 'The Liability of Hospitals for Negligence', broadcast on 6 December 1953. He concluded that,

The observation which a lawyer may properly make is only this: that the law as regards hospitals seems to be changing; that this change is connected with a change in the conception of the function and duty of hospitals; and that such changes have large and important social implications which are only partially and incidentally reflected in the law.²⁶

Barristers in those days were required by their profession to be anonymous on the radio, although their identities were revealed in the book versions.²⁷ They included, for example, a programme broadcast anonymously on 7 November 1954 by Gerald Gardiner QC, later the Lord Chancellor, on Freedom of Contract.

In the foreword to the first series, Lord Asquith explained that,

The guiding principle was that each talk should be based on a recent decision or series of decisions of the English courts which raised questions of general interest: and the governing aim, both in the selection of subjects and their treatment, was to strike a balance between the demands of the professional lawyer and those of the discerning layman, whose increasing interest in the law is a ground for unmixed satisfaction.²⁸

There was to be no 'talking down'.

In his foreword to the second series, Lord Denning quoted that with approval and added:

the success of the series is significant. It shows that ordinary people take a great deal of interest in the law, even when they are not parties to litigation. This is as it should be. It would be a great pity if the law became so complicated and so technical that it could not be explained to the layman . . . the law, like everything else, depends in the long run on the support of a strong public opinion.²⁹

In the 1950s, then, BBC Radio gave the opportunity for lawyers and journalists to influence public opinion about the law. Lord Radcliffe explored how best to use this relatively new medium. Professor Hart encouraged critically engaging with, and if necessary standing up to, strong public opinion.

Lord Radcliffe's 1951 Reith Lectures on the problem of power

In the 1951 Reith Lectures, Lord Radcliffe was given the time and the platform to reach a bigger audience with a broad sweep of thousands of years of history in his exploration of 'The Problem of Power'.³⁰ The lectures themselves showed his education and intelligence but they read as if he were unaware of the chaos and furore he had caused in India and Pakistan so recently. Indeed, while not addressing Partition, he went out of his way to praise the work of British colonial administrators over the previous century and a half. He objected to the way in which the word 'Establishment' was bandied around but his lectures were a classic example of Establishment thinking.

His 1958 postscript for the paperback edition was even worse.³¹ During the decade, Lord Radcliffe had lost confidence in the quality of democracy and of debate in the public square. He regretted not being more precise in his original lectures as he thought that the vague use of language had become a social problem. Trained as two articles in *The Times* on 24 and 25 February 1958, this reflection drew an indignant response from Professor Hart in a long letter to *The Times*, taking issue on five points in particular but the whole tone of Lord Radcliffe's postscript in general. Hart's letter was on 1 March 1958. This was a dry run for Hart's combative response the following year on the Third Programme to Sir Patrick Devlin's lecture of 15 March 1959. The subject matter of the two disagreements overlapped. Hart began and ended trenchantly, with the first of his five points giving the flavour of his disagreement with Radcliffe:

Lord Radcliffe's two articles, on February 24 and 25, on the purpose of politics are inspired by a nostalgic vision of society . . . his condemnation of the ideals, the practices and the 'tone' of our form of democracy is on almost every issue vague or ambiguous, and in some instances rests on dubious assumptions as to matters of fact. The general effect of these articles will be to encourage the belief that our society is not really worth defending . . .

Will you permit me, therefore, to question some of the more obscure counts in this indictment? (I) 'A meaningless constitutionalism which asserts that anything is all right if it is permitted, nothing is all right if it is forbidden, by an Act of Parliament'. Who identifies morality with existing law in this way? And what reason is there for thinking the identification more widespread now than before? Surely there is discussion about what should or should not be legal or illegal. Why ignore the often stormy divisions on capital punishment, homosexuality, prostitution, AID?³² What is, of course, missing are the passions excited by the worst forms of poverty, slums, disease, and exploitation. These have gone because the laws that permitted them have been changed under the impulse of the sentiments of kindness which Lord Radcliffe thinks so overvalued.

. . . Of course, facile optimism concerning the future of our society is dangerous and silly. So, too, is facile pessimism.³³

Quite so. We should not take Lord Radcliffe's lectures as gospel. Hart's critique is mild compared to a later deconstruction of Lord Radcliffe in his later role as chancellor of the University of Warwick, by E.P. Thompson³⁴ although there has been some rehabilitation of Lord Radcliffe by Professor Neil Duxbury.³⁵

Nevertheless, in 1951, it was a revelation for the public to hear a serving judge, from our highest court, giving radio lectures on politics and the state, and his eight-page foreword to the hardback book version the following year, 1952, remains a first-class guide to broadcasting or even podcasting on law.

The problem of power, according to Radcliffe, is two-fold: 'what really prevents men who have authority from abusing their authority?' and 'what is it, if it is not force, that leads men to give obedience to authority?' These are good questions, not adequately answered: the essence seems to be to do with national character, culture, institutions, education and experiences but then that covers much of life. Lord Radcliffe does, however, make two good points at the very end of his lectures and book. First, he endorses a view from the nineteenth century in Matthew Arnold's *Culture and Anarchy*. Radcliffe explains that Arnold's

theme is simple. Acts of Parliament, like other actions, are not good or bad just because they are vigorously advocated or because a lot of well-meaning people energetically desire them. Such things can only be judged by bringing to bear upon them the best that has been thought or said in the past about the nature and purpose of human life and testing their value in the light that will thus play upon them.³⁶

Second, his parting message is to, ‘Think it possible, as Cromwell said, that you be mistaken.’³⁷

By now, those versed in jurisprudence will have discerned that Radcliffe is coming close to the territory of Hart’s later monograph on *The Concept of Law*,³⁸ and that Radcliffe anticipates Hart’s revival of John Stuart Mill in his *Listener* article and subsequent exchanges with Lord Devlin.³⁹ Those familiar with wider philosophy will also have spotted that this fourth series of Reith Lectures was quite similar, in some ways, to the very first series, by Bertrand Russell on ‘Authority and the Individual’ in 1947.⁴⁰ Russell was of the Left and Radcliffe was usually seen as being of the Right, but they covered much the same ground.

What I most wish to commend from Radcliffe’s reflections comes in his preface to the hardback book. He explains that he had never at this stage in his life written a book but he would like to think that a fresh book of his (rather than essentially the scripts of broadcast talks) would ‘have more balance, it would risk more complicated constructions, it would tend to be more musical, it would certainly have a greater content of allusion’.⁴¹ This is because a radio script is

neither a conversation, nor a speech nor a lecture nor a discourse . . .
The fact is that a broadcast talk is not at all like a conversation . . .
not merely because the talk is a monologue, but because the casual
enlargement of ideas, one of the essences of conversation, becomes
impossible when there is no exchange of speakers . . .⁴²

But then Lord Radcliffe contradicts himself, concluding that, ‘Fundamentally, a broadcast talk is a discourse’. It is fascinating, nonetheless, to see the Law Lord grappling, even after delivering the Reith Lectures, with the genre of such broadcasting, with what he was trying to do and the way in which he was trying, or was constrained, to do it. Eventually, he reached a resolution that could be adopted by teachers in universities and beyond, as well as by legions of bloggers and podcasters.

What I have tried to do is to interest my hearers in certain ideas and to stimulate their curiosity as to the meaning and value of what they have before, possibly, rather taken for granted. My method has been to describe some great work, some significant phase, of the past in order to let the present be seen in relief . . . I do not want to be a party to the idea that the function of broadcasting on the BBC is to tell people what to think . . . So the aim of this book is not to inform or to instruct. Nor is it at all its aim to justify or to condemn any particular form of political society. If somebody would use the word ‘stimulating’ about it I should be very content.⁴³

Hart on immorality and treason

This brings us to the most stimulating short talk and article in the history of jurisprudence, Hart on 'Immorality and Treason'. Hart's talk was sublime, a fitting finale to the decade of growing coverage of ethical, legal and political dilemmas. It was given a double page spread in *The Listener* of 30 July 1959 (on pages 162–3). It has been much anthologised, although in a volume edited by Dworkin, *The Philosophy of Law*, with its succinct opening omitted, in which Hart explains the context of Sir Patrick Devlin's 1958 lecture and the 1957 Wolfenden Report which prompted it.⁴⁴ Hart's talk was his first response to Lord Devlin on the relationship between law and morality.

To my mind, the later lectures by Hart and Devlin which take over their books mean that the brilliance of the original broadcast talk has been lost. Many are reluctant now even to call the controversy the Hart–Devlin debate since the recent revelation to the IICSA truth project by Clare Devlin, one of Patrick Devlin's twin daughters, that she was sexually abused by her father from the age of seven for some ten years from the late 1940s into the 1950s.⁴⁵ While Lord Devlin is likely to be written out of what has been known hitherto as the Hart–Devlin debate, there are two points where he is still needed to explain Hart's article.

First, Hart's obscure title of 'Immorality and Treason' is because Devlin's public lecture in 1958 drew an analogy between society defending itself from treason and society defending itself from immorality. Hart was outraged by this. He knew that the pioneering computer genius and code-breaker Alan Turing, with whom he had worked at Bletchley, had helped considerably in winning the war and yet his then unconventional lifestyle had been condemned by the state he had saved, leading to his suicide. Hart is quite right to observe that the realm of sexual acts in private is nothing like treason, called subversive activity by Devlin. The latter has a public aim and public consequences. The former is private and, as the Wolfenden Report memorably explained, following Mill, 'in brief and crude terms it is not the law's business'.

Second, Hart hammers away at Devlin claiming that the feelings of the public are sufficient to justify outlawing behaviour if that arouses 'a real feeling of reprobation . . . of intolerance, indignation and disgust'. This is what Hart re-casts as public feelings supposedly reaching 'concert pitch'. Hart is right again to say that if the public feel that way, the response ought to be to critically explore with the public why they think like that, not to convert the prejudice into criminal law sanctions against others who do not share such disgust. It was not clear how Devlin came up with these 'feelings' as his test but now we know that he was a sustained abuser of

one of his children, it may be that he was consciously or subconsciously invoking the terminology that the public would have used to describe his own behaviour, had that become known. Hart's solution is that

the legislator should ask whether that general morality is based on ignorance, superstition, or misunderstanding whether there is a false conception that those who practise what it condemns are in other ways dangerous or hostile to society; and whether the misery to many parties, the blackmail and other evil consequences of criminal punishment, especially for sexual offences, are well understood.⁴⁶

Hart's article is not quite 'pitch perfect' in curiously invoking that term, sometimes put as 'pitch-perfect' with a hyphen and sometimes without. It features four times in one short section and six times overall. In each case, Hart is referring to what he might have called the fever pitch level of disgust Devlin is describing. It is not a term which Devlin used, however, and it seems, so to speak, off-key here. It may be that the Third Programme's combination of talks and music has somehow influenced this terminology.

Nevertheless, in only 2,500 words, Hart spoke and wrote compellingly. It is accessible through *The Listener* archive, where it can be seen in its original setting of a double-page spread.

Given his title, it is worth commenting on significant points which Hart did not make about immorality and treason. On the first, like other contributors to this debate in the 1950s, 1960s and 1970s, he seemed unaware that St Thomas Aquinas had set out what Hart sees as Mill's principle in the thirteenth century, nearer six hundred than five hundred years before Mill's *On Liberty* in the mid-nineteenth century.⁴⁷ The significance of this is that the debate need not be cast as secular liberals such as Mill and Hart against (very lapsed) Catholics such as Devlin. As I pointed out in my teaching and writing in the 1980s,⁴⁸ to the surprise of students, Aquinas had written that,

Law is laid down for a great number of people, of which the great majority have no high standard of morality, therefore it does not forbid all the vices from which upright men can keep away but only those grave ones which the average man can avoid and chiefly those which do harm to others and have to be stopped if human society is to be maintained, such as murder, theft and so forth.⁴⁹

On the second, Hart might have addressed the controversial British execution of William Joyce, 'Lord Haw-Haw', for treason in his radio propaganda broadcasts for the Nazis during the Second World War. His

conviction was upheld in the courts even though in fact he was not a British citizen, which might be thought to be a fundamental requirement for the offence in question. Joyce was an American citizen.⁵⁰ Moreover, if we look further afield than the UK and the USA, where the talks and subsequent lectures by Hart and Devlin were given, it is by no means obvious that treason is the paradigm case of when law can enforce morality if it is an evil regime which claims to be entitled to defend itself.⁵¹ For example, Hart and colleagues in the Ministry of Intelligence in the 1940s had been rightly encouraging Germans to be double agents and commit what the Nazi state decreed was treason. At the time of Hart's broadcast in the late 1950s, Nelson Mandela was on trial in South Africa for High Treason in seeking to overthrow the apartheid regime. He was acquitted after more than four years of court proceedings, although later convicted and imprisoned on other charges.⁵² Examples could be multiplied to show that while 'immorality' as judged by the predominant view of the times is not as justifiable a reason for the criminal law to intervene in defence of society as treason is, it could be moral even to commit acts of treason against a state that has forfeited any moral authority.

Of course, Hart could not cover everything in a short talk. In what he did say, and in how he argued, Hart's article was a model of public engagement in understanding the relationships between law, morality and justice.

A media, medical and legal interlude: how radio, *The Times* and *The Listener* made a difference in the 1980s

Almost thirty years on, *The Times* ran a joint article by Professor Ian Kennedy and myself, on 1 April 1987, under the heading 'This rush to judgment'.⁵³ This was the day before the Law Lords' hearing of *Re B* on 2 April, when they authorised the sterilisation of a seventeen-year-old who was described in the litigation, in the language of the time, as 'mentally handicapped' or as having the mental age of a five-year-old. In 2010, Ian Kennedy gave the British Academy's Isaiah Berlin Annual Lecture in which his memory was that it was on the day of the hearing.⁵⁴ But the first word of the article is 'Tomorrow'.

I well remember writing a piece with my then colleague, Simon Lee, about the legality and ethical propriety of sterilising a young girl who lacked capacity to consent. The article's publication was timed to appear on the day that the case came before the House of Lords. It was a suitably punchy piece for *The Times* . . . What made the case

even more remarkable was that, given its huge importance in terms of human rights, there were no cases nor papers before the court, except for the judgment of the court below, and our article – the first and perhaps the only time that a single sheet of newspaper was the only ‘authority’ before the court . . . seeking to use the media, as Lee and I were trying to do, to argue a case outside the courtroom, in the court of public opinion, is a legitimate activity for educators.

The judges did in fact discuss the Canadian case to which we referred, *Re Eve*.⁵⁵ It was Andrew Grubb, then of Cambridge, who first kindly alerted us to this Canadian case and, while we were writing about it, he spoke on Radio 4’s *Law in Action*, explaining this different approach from Canada. Ian Kennedy’s memory is that the judges, egged on by Alan Ward QC, dismissed our article because of the headline, ‘This rush to judgment’, which was the work of a sub-editor, not reflecting the substance of our analysis. We did, however, use the word ‘rush’ twice and we could have phrased it differently, ‘with all due speed’ or ‘without delay’. The Law Lords might have said that we were the ones rushing to judgment. It was true that one day I had not heard of the *Eve* case or *Re B*, the next I was writing about them and the next, the Law Lords were being shown what we had written. Our article was, however, also drawing on Ian’s years of thought about the underlying medical ethics and alternative ways of establishing the law, while I had been much involved in radio, television and newspaper commentary on law and morality. We succeeded in making clear that other legal systems handled these matters better. We were calling for something like the Nuffield Council on Bioethics, which duly materialised and which Ian Kennedy chaired. We also conveyed our deep concern about a vulnerable teenager being treated as if society could relax about our duties towards her so long as she could not become pregnant. And we publicised why, of the four options which we presented in the article, the Canadian approaches were preferable to the Law Lords’.

We also made history, as Ian Kennedy indicated. In the good old days, only dead academics were said to be cited in court, supposedly in case living ones changed their views. There is, incidentally, little fear of that, in many cases. Now, we were the go-betweens in a dialogue of sorts between the judges and the judged. After the adjournment for lunch, Lord Hailsham had the good grace to make the point that he had been made aware (presumably by John Laws QC) that we were in court (or, rather, in the Committee Room of the House of Lords) and were not responsible for the headline.

Given the urgency of the case, the judges announced their decision after only a short adjournment but there were to be four weeks before the Law Lords were to give their reasons, Easter intervening on 19 April. *The Listener* asked me to write on my own an article timed to coincide with their judgments. They gave me a free hand but I thought there was no point in trying to predict their lines of reasoning. It would be better to make a wider point about the public understanding of law. Instead of ‘This rush to judgment’, the phrase I used in my own sequel in *The Listener* of 30 April was deciding ‘without delay’.⁵⁶ In the 1 April article in *The Times*, we had ended with the sentence, ‘Issues of human rights deserve more than their day in court.’ In my *Listener* article, I ended with this question, ‘which will come sooner; the first television coverage of the Law Lords, the first Law Lady or the end of the century?’

These developments came in reverse order, with Baroness Hale in 2004 and the UK Supreme Court being seen on screen from 2011. Technological innovation has been vital in taking listeners and viewers with us in attempts to promote the public understanding of law. Many citizens listen to podcasts nowadays and many take their news from clips on social media. The BBC and other broadcasters were able to show us, for example, Lady Hale giving a summary of the Supreme Court’s judgment in the *Miller II/Cherry* case, the second major Brexit decision against the government. This dimension of television news and the Supreme Court’s willingness to be live-streamed goes well beyond what radio talks could do in the 1950s in terms of the public understanding of law. It is especially striking when the public can now often see a judge giving her sentencing remarks in cases which have been controversial.

Sumption’s 2019 Reith Lectures and the decline of law on the radio?⁵⁷

On the other hand, we should not lose the legacy of the Radcliffe and Hart talks from the 1950s. Yet, around the same time as Ian Kennedy and I were using the media to address cases before the courts, the BBC described (and still describes on its website)⁵⁸ Lord McCluskey’s 1986 Reith Lectures on ‘Law, Justice and Democracy’ as the first by a serving judge, which is only true if you ignore those 1951 Reith Lectures by Lord Radcliffe on ‘The Problem of Power’.⁵⁹ This Scottish judge, the former Solicitor General for Scotland under the 1974–9 Labour government and a peer from 1976, was a talented pianist who drew on his musicality to make a memorable point about judicial decision-making:

The law, as laid down in a code, or in a statute, or in a thousand eloquently reasoned opinions, is no more capable of providing all the answers than a piano is capable of providing music. The piano needs the pianist and any two pianists, even with the same score, may produce very different music.⁶⁰

After almost the same gap of another thirty years, the BBC asked another lawyer with judicial experience to give the Reith Lectures for 2019. Jonathan Sumption, like Cyril Radcliffe, had gone straight from the Bar to the highest court in the UK, the Judicial Committee of the House of Lords in the 1940s, now in the 2010s, the Supreme Court. Neither the 1951 nor the 1986 series was mentioned by Jonathan Sumption, despite the obvious relevance of their titles to his and despite Lord Radcliffe's involvement in wider public life while being a Law Lord offering a challenge to Sumption's thesis that judges are straying more nowadays into the realm of politics.

Ignoring Lord Radcliffe's pioneering radio lectures is emblematic of the 1950s being a decade neglected even by the BBC which gave him that platform and by his 2019 successor, Lord Sumption, who is an accomplished historian of a different period, the Hundred Years' War.

Nor did Lord Sumption refer to the 1980 Reith Lectures on 'The Unmasking of Medicine'⁶¹ by Professor Ian Kennedy, even though Sumption chose medical law as his first example of a substantive area where he thinks judges have become more interventionist, citing the Charlie Gard case.⁶²

In any event, Lord Sumption has often been featured on radio and television in his retirement from the Supreme Court. This might also obscure how pioneering it was of Lord Radcliffe and the BBC back in 1951 for a serving senior judge to be given the prime broadcasting platform. Sir Jack Beatson, a distinguished academic and judge, explained in a speech in 2008 the origin and demise of the Kilmuir rules:⁶³

In December 1955 Viscount Kilmuir, then Lord Chancellor, wrote to the Director General of the BBC. He stated that 'the importance of keeping the judiciary insulated from the controversies of the day' meant that it was as a general rule, undesirable for judges to take part in wireless or TV broadcasts. His reason was that, 'so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism' . . . But judges have always had a public side, even during the time of the Kilmuir Rules . . . The Kilmuir rules were abolished by Lord Mackay of Clashfern in November 1987. He saw them as difficult to

reconcile with the independence of individual judges. Lord Mackay did not favour a free-for-all. He said that judges ‘must avoid public statements either on general issues or particular cases which cast any doubt on their complete impartiality, and above all, they should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial’.

In this context, it is worth adding that Viscount Kilmuir was Sir David Maxwell-Fyfe, the Home Secretary who encouraged the prosecution of homosexual men in the early 1950s, then asked Sir John Wolfenden to chair a Departmental Committee on whether the law should change, and later disagreed with the committee’s recommendations. On judges speaking out, there are rules for retired members of the Supreme Court if they wish to serve on the supplementary panel, to sit occasionally in any gap between their retirement and the statutory age limit of seventy-five.⁶⁴

One hundred years after women started talking about law on the BBC, we deserve to hear from Lady Hale, the first woman to be president of the Supreme Court, who has now retired. Not that she needed to be retired to speak candidly, as shown by her reply to Lord Sumption’s thesis in a public lecture that year, 2019.⁶⁵ Lady Hale also has the distinction of having been a Law Commissioner, so is especially well placed to reflect on the themes of Radcliffe and Hart from the 1950s onwards, exploring the twin tracks of developing the law through the courts and through legislation.⁶⁶

Alternatively, as Lord McCluskey gave a perspective from the separate legal system of Scotland, Dame Siobhan Keegan, the first Lady Chief Justice of Northern Ireland, could be invited to give the Reith Lectures from her vantage-point at the apex of another distinctive legal system, which has experienced the Troubles, the peace process and political turbulence during her time as a law student, barrister and judge.

The media have changed from the radio-dominated BBC of the early Reith Lectures at the end of the 1940s and the start of the 1950s, through the era of huge audiences for television, and on now to fragmentation of the mass media and the rise and fall of waves of diverse social media platforms. With live-streaming from the UK Supreme Court and all manner of podcasting, the public understanding of law necessarily develops differently in the 2020s when compared to the 1950s. But the BBC has wisely made its Reith Lecture archives available as podcasts and its entire *Listener* archive available digitally. Through these projects, we can preserve the contributions of Radcliffe and Hart as distinctive legacies from the 1950s of controversial thinking about law in society.

‘Acts of Parliament, like other actions, are not good or bad just because they are vigorously advocated or because a lot of well-meaning people energetically desire them’⁶⁷

This warning by Lord Radcliffe is as relevant in the parliamentary session of 2024/5 as it was at the time of his Reith Lectures in 1951. However wrong he might have been on the problem of power, or in exercising power in the Partition of India, at least Lord Radcliffe appreciated that his role as a broadcaster, especially as a Reith Lecturer, was to stimulate critical thinking in his listeners. This is vital also in the endless debates about law and morals, from Professor Hart’s intervention in the 1950s in support of the Wolfenden Report, through to the current national debate on the proposed legislation currently before Parliament on assisted dying. The BBC, *The Listener*, *The Times* and other media have contributed to a long line of thinking about medical law and ethics, from Hansom in the 1950s to Ian Kennedy’s Reith Lectures in 1980, and now to what is known in the media as the Assisted Dying Bill but its formal title is the Terminally Ill Adults (End of Life) Bill.⁶⁸

Whether you are for or against law reform to facilitate assisted dying, and whether or not you prefer to call it assisted suicide, we can all benefit from some assistance in arguing about ethics and law in matters of life and death. Like Lord Radcliffe, we might become gloomy about the quality of argument in the public square on such big issues but a previous debate in the House of Commons on Assisted Dying, on Friday 11 September 2015, was enlightening and uplifting, with some MPs saying they had changed their minds since coming into the chamber because of the quality of other contributions. The speeches are still well worth reading.⁶⁹ The Commons was at its best. Expertise and experience ranged from senior lawyers to senior doctors via daughters and nurses.⁷⁰ One MP after another disclosed how constituents had written and told their stories. There was a real sense of engagement and a clear vote against the bill by 330 votes to 118. This time, on 29 November 2024, Kim Leadbeater MP secured a clear majority of 330–275 in the Commons in favour of her bill.⁷¹ Her bill has been much criticised in its committee stage, however, and its third reading has been postponed until after the May local elections, perhaps because there have been so many issues raised and/or because the issue is so divisive. In the Lords, there will be familiar voices in favour, Lord Falconer and Lord Carey, with some powerful voices against, including Baroness Grey-Thompson, the Paralympian, Baroness Finlay the long-serving palliative care consultant, and Lord Williams.

As two former archbishops of Canterbury (George Carey and Rowan Williams) will be on opposite sides of the debate, and as the latest Archbishop of Canterbury (Justin Welby) has just resigned, it is especially salutary to recall how Basil Mitchell⁷² described the secularist view of Professor Glanville Williams⁷³ on such debates, that we may listen to a social policy expert in Baroness Wootton but that we should not listen to the Archbishop of Canterbury.⁷⁴ This is a brilliant passage by Mitchell, who respects Lady Wootton's social science perspectives and Glanville Williams's own views, but who questions whether Williams is right to claim that, 'For the legislator, it seems sufficient to say that theological speculations and controversies should have no place in the formation of rules of law, least of all rules of the criminal law which are imposed upon believers and non-believers alike.'⁷⁵ The former Lord Chancellor, Lord Falconer, has repeated in the current public debate, and will have the chance again in the Lords, this crass view that people's religious views should have no place in the national debate.⁷⁶ He was taking aim, in particular, at the first Muslim to be Lord Chancellor and Minister of Justice, Rt Hon Shabana Mahmood KC MP.⁷⁷ But this is not an issue of secular against religious. There is a group, for example, called Humanists Against Assisted Suicide and Euthanasia that has given an impressive submission to a parliamentary committee.⁷⁸ Even while Glanville Williams wished to exclude religious views from debates on the criminal law, the archbishops of Canterbury at the time of the Wolfenden Report in 1957, Dr Geoffrey Fisher, and of its implementation in the Sexual Offences Act 1967, Dr Michael Ramsey, both supported Wolfenden's liberalisation of the law.⁷⁹

Instead of Baroness Wootton as the archetype of someone who comes at this issue from the opposite perspective to a supposed archbishop's approach, we now have Dame Esther Rantzen – a media celebrity personally promised by Sir Keir Starmer that he would facilitate a private member's Bill on assisted dying if he were to win the election. She was distressed that she would not be able to determine the timing and manner of her death. At the time of the bill being proposed, in the autumn of 2024, a mutual admiration society of Kim Leadbeater MP, Sir Keir Starmer KC MP and Dame Esther Rantzen thought that Dame Esther had less than six months to live, which would bring her within the terms of this measure. Dame Esther had been thinking this since January 2023. Then, in December 2024, she announced that she might have years to live, thanks to a new wonder-drug, and she was enjoying life. She seemed to see no issue with the draft legislation being premised on a necessarily speculative prediction of how long she had to live. If the bill had become law a year or eighteen months earlier, she would have authorised the taking of her own life. Now she is inclined to enjoy her potentially longer

life. Various people have pointed out the inconsistencies in Dame Esther Rantzen's musings on the law on assisted dying:

When I was diagnosed with stage four lung cancer in January last year, I thought that's it, goodbye life. It turns out I was quite wrong. Even though the fatigue which is part of the illness means I can no longer dash around meeting friends and prancing along red carpets as I used to in my television fat-cat days as presenter of the consumer show *That's Life!*, my own life is still worth living and enjoyable. The new wonder drug I'm on – Osimertinib, a cancer growth blocker – may hold back the spread of my disease for months, even years.⁸⁰

Rantzen's and Falconer's styles of campaigning seem to me⁸¹ to be exactly what Radcliffe warned against when he said that, 'Acts of Parliament, like other actions, are not good or bad just because they are vigorously advocated or because a lot of well-meaning people energetically desire them.'⁸²

It remains vital, therefore, to have a vibrant and diverse media so that citizens can develop their own critical thinking on these matters of life and death, and on all the issues of social justice in between. Sometimes, this is about pointing out the context of an expression which is being used in the opposite sense to that intended by its inventor. For example, the mid-nineteenth-century poet Arthur Hugh Clough captured imaginations with his couplet, 'Thou shalt not kill; but need'st not strive, Officiously to keep alive'.⁸³ But this comes from a poem which is satirical, ironic, sarcastic. Clough was taking each commandment in turn and showing how we only pay lip service to God's will.⁸⁴ It is not enough to be against, or for, assisted *dying*. Our duty to those who are marginalised is one of assisted *living*, to live their lives to the full, contributing to the well-being or welfare of a just society, with proper investment in hospices and supporting carers.

We need, in other words, assisted *arguing*, which only has impact if we also have assisted *listening*. This is essentially what Radcliffe, Hart and other broadcasters were encouraging in the 1950s. In airing trenchant but well-argued disagreements, BBC Radio and *The Listener* set the tone for a vibrant public square. In our own times, with diverse media in a digital public square, often without any editorial control and seemingly spiralling out of control more generally, we need to be even more vigilant in questioning both conventional wisdom and any fashionable moralism. Learning from the 1950s, cogent arguments can still help to shape the law's power to protect those on the margins of society. Social justice requires us to develop our critical thinking, as stimulated by Lord Radcliffe and Professor Hart, who each appreciated the significance of a deeper and broader public understanding of law.

Notes

1. Cyril Radcliffe, *The Problem of Power* (London: Martin Secker & Warburg, 1952).
2. H.L.A Hart, 'Immorality and Treason', *The Listener*, 30 July 1959.
3. https://genome.ch.bbc.co.uk/schedules/service_third_programme/1959-07-14.
4. https://genome.ch.bbc.co.uk/schedules/service_third_programme/1959-09-07.
5. H.L.A Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963).
6. Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).
7. Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford: Oxford University Press, 1968).
8. Simon Lee, *Law and Morals* (Oxford: Oxford University Press, 1986).
9. Neil Duxbury (2010), 'Lord Radcliffe out of time', *The Cambridge Law Journal* 69, no. 10; Robert Armstrong (2004), 'Radcliffe, Cyril John, Viscount Radcliffe (1899–1977), lawyer and public servant'. *Oxford Dictionary of National Biography*. <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-31576>. Tony Honoré (1994), 'Hart, Herbert Lionel Adolphus, 1907–1992', *Biographical Memoirs of Fellows of the British Academy* (PBA 84) 295; Nicola Lacey (2004). *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (New York: Oxford University Press).
10. The BBC promoted the lectures as being given by 'The Man Who Drew the Line' <https://www.bbc.co.uk/programmes/b0902rn9>. See further Lucy P. Chester, *Borders and Conflict in South Asia, the Radcliffe Boundary Commission and the Partition of the Punjab* (Manchester and New York: Manchester University Press, 2009).
11. Devlin, *The Enforcement of Morals*.
12. Wolfenden, HMSO. See also Wolfenden's review of Hart's *Law, Liberty and Morality*: <https://archive.spectator.co.uk/article/5th-july-1963/19/the-crime-makers>.
13. Dermot Turing, *Prof: Alan Turing Decoded* (Cheltenham: History Press, 2015).
14. The Reith Lectures 2019: 'Law and the Decline of Politics', BBC Radio Four, 21 May 2019, Reith Lecturer: Jonathan Sumption, Lecture 1 'Law's Expanding Empire', <https://www.bbc.co.uk/programmes/m00057m8> (published in book form as Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (London: Profile Books, 2019)).
15. Murphy, Kate. "Careers for Women": BBC Women's Radio Programmes and the "Professional", 1923–1955. *Women's History Review* 32, no. 6 (2022): 809–27. doi:10.1080/09612025.2022.2138018. See also on another pioneer, Venetia Stephenson: <https://www.lawlibrary.ie/about/history/trailblazers-1919-2019-100-years-of-women-at-the-bar/>.
16. Robert Megarry (ed.), *The Law in Action*, a series of broadcast talks, with a foreword by Lord Asquith, vol. 1 (London: Stevens, 1954).
17. Robert Megarry (ed.), *The Law in Action*, a series of broadcast talks, with a foreword by Sir Alfred Denning, vol. 2 (London: Stevens, 1957).
18. Claire Palley became the first female law professor in the UK in 1970: see Fiona Cownie, <https://first100years.org.uk/claire-palley-the-u-k-s-first-female-law-professor/>.
19. Jenifer Wayne, *This Is the Law: Stories of Wrongdoers by Fault or Folly* (London: Sylvan Press, 1948).
20. Wayne, *This Is the Law*, Author's note on the page before the contents, un-numbered but effectively p. 4 as chapter 1 starts at p. 7.

21. C.H. Rolph, *Living Twice* (London: Victor Gollancz, 1974), chapter 10, 'Family Affairs', 157–67.
22. <https://www.independent.co.uk/news/people/obituary-c-h-rolph-1429112.html>; <https://www.independent.co.uk/news/people/obituary-c-h-rolph-1432171.html>.
23. Learie Constantine, *Colour Bar* (London: Stanley Paul, 1954); and see also Gerald Howat, *Learie Constantine* (London: George Allen & Unwin, 1975).
24. 'Any Questions?' BBC Light Programme, Friday 9 November 1951, 20.00hrs. https://genome.ch.bbc.co.uk/schedules/service_light_programme/1951-11-09#at-20.00.
25. 'From Cricket to the Caribbean'. BBC Home Service, Wednesday 16 September 1959. 22.30hrs. https://genome.ch.bbc.co.uk/schedules/service_home_service/1959-09-16#at-22.30.

A conversation between Learie Constantine and Sir Hilary Blood.

Learie Constantine, internationally famous as a cricketer, who lived in this country for more than twenty years, is now Minister of Transport in the Government of Trinidad, his native home. He returned to England for a visit this summer a few days before Sir Hilary Blood left to undertake work on the constitution of British Honduras.

Sir Hilary spent a great part of his Colonial service in the British West Indies, being at one time Governor of Barbados. He is a devoted cricket fan and in this conversation, recorded during the brief period when they were both in England, the speakers range over two subjects mutually absorbing to them.

26. C.J. Hamson, 'The Liability of Hospitals for Negligence', in *The Law in Action*, ed. Robert Megarry, 1953, vol. 1, 28.
27. The reason for the coyness was to prevent barristers from using broadcasts as a form of advertising.
28. Megarry, *Law in Action*, vol. 1, v.
29. In Robert Megarry (ed.), *The Law in Action*, 1957, vol. 2, v–vi.
30. Cyril Radcliffe, *The Problem of Power: The Reith Memorial Lectures 1951 and a postscript* (London: Comet Books, 1958).
31. Radcliffe, *The Problem of Power*.
32. AID standing for Artificial Insemination by a Donor.
33. H.L.A. Hart, 'The Purpose Of Politics', *The Times*, 27 February 1958.
34. E.P. Thompson ('A Report on Lord Radcliffe', *New Society*, 30 April 1970, reprinted in *Writing by Candlelight*, 1980, 29–37).
35. Neil Duxbury, 'Lord Radcliffe Out of Time', *The Cambridge Law Journal* 69, no. 1 (2010): 41–71. See also Richard Davenport-Hines, *Conservative Thinkers from All Souls College, Oxford* (Oxford: Boydell Press, 2022). 'The Resistance of Cyril Radcliffe', <https://www.degruyter.com/document/doi/10.1515/9781800106857-010/html>.
36. Radcliffe, *The Problem of Power*, 108–9.
37. Radcliffe, *The Problem of Power*, 110, referring to Oliver, not Thomas, Cromwell.
38. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).
39. John Stuart Mill, *On Liberty* (London: John W. Parker & Son, 1859).
40. <https://www.bbc.co.uk/programmes/p0oh9l33/episodes/player>.
41. Radcliffe, *The Problem of Power*, ix.
42. Radcliffe, *The Problem of Power*, x–xi.

43. Radcliffe, *The Problem of Power*, xv. For a similar view, see Simon Lee, 'Balliol Influences' quoting Anthony Hope Hawkins referring to his tutor, R.L. Nettleship, in *Re-envisioning the British State in a Time of Crisis: A Critical Revisiting of the Balliol Connection of Temple, Tawney, and Beveridge for the 21st Century*, ed. Chris Baker and Ryan Haecker (Oxford: Temple Books, 2023), e-book, 46. <https://williamtemplefoundation.org.uk/temple-books/>.
44. R.M. Dworkin (ed.), *The Philosophy of Law*, Oxford: Oxford University Press, 1977.
45. Beatrix Campbell, "'Our Silence Permits Perpetrators to Continue': One Woman's Fight to Expose a Father's Abuse", *The Observer*, 25 July 2021, <https://www.theguardian.com/uk-news/2021/jul/25/our-silence-permits-perpetrators-to-continue-one-womans-fight-to-expose-a-fathers-abuse>.
46. H.L.A. Hart, 'Immorality and Treason', *The Listener*, 30 July 1959, 162 at 163, penultimate paragraph.
47. On the life of St Thomas Aquinas, see for example Anthony Kenny, *Aquinas* (Oxford: Oxford University Press, 1980).
48. Lee, *Law and Morals*, 9. In the rest of the book, I pursue the point that applying the 'harm to others' principle depends on what is meant by 'harm' and 'others'.
49. Thomas Aquinas, *Summa Theologiae*, 1a2ae, question 96, article 2, reply, see, for example, Thomas Gilbey (ed.), Blackfriars edition, *Summa Theologiae* (London: Eyre & Spottiswoode, 1963–75), vol. 28.
50. As pointed out by Rebecca West, https://scalar.usc.edu/works/the-space-between-literature-and-culture-1914-1945/vol13_2017_glover.
51. See, for example, Michael Lobban, 'The Travels of Treason', *Modern Law Review* 87 (2024).
52. Stephen Sedley, 'Relentlessly Rational', *London Review of Books* 44, no. 18 (2022), September, reviewing Thomas Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid*. John Murray, referring to the Treason Trials (1956–61) and the Rivonia Trial (1963–4).
53. Ian Kennedy and Simon Lee, 'This Rush to Judgment', *The Times*, 1 April 1987.
54. Now reprinted in Ian Kennedy, *Healthcare Law and Ethics and the Challenges of Public Policy Making: Selected Essays* (Oxford: Hart Publishing, 2021), 319–20.
55. Re Eve (1986) 71 NR 1 (Supreme Court of Canada).
56. Simon Lee, 'Deciding without Delay', *The Listener*, 30 April 1987.
57. The Reith Lectures 2019: 'Law and the Decline of Politics', BBC Radio Four, 21 May 2019, Reith Lecturer: Jonathan Sumption, Lecture 1, 'Law's Expanding Empire', <https://www.bbc.co.uk/programmes/m00057m8> (published in book form as Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (London: Profile Books, 2019)).
58. BBC, <https://www.bbc.co.uk/programmes/p00gq13t>.
59. John McCluskey, *Law, Justice and Democracy* (London: Sweet & Maxwell, 1987).
60. McCluskey, *Law, Justice and Democracy*, 7, and http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/1986_reith1.pdf, quoted by Simon Lee, *Judging Judges* (London: Faber, 1988, 19).
61. Ian Kennedy, *The Unmasking of Medicine* (London: Allen & Unwin, 1981).
62. Sumption, *Trials of the State*, 11.
63. Speech by the Hon. Sir Jack Beatson, FBA, 'Judicial Independence and Accountability: Pressures and Opportunities', Nottingham Trent University,

16 April 2008. <https://www.judiciary.uk/wp-content/uploads/2020/08/beatsonjo4o6o8.pdf>.

64. https://www.supremecourt.uk/uploads/JCPC_guide_to_conduct_for_members_of_the_supplementary_panel_final_oe3oa74ad5.pdf.

65. Brenda Hale, 'Law and Politics: A Reply to Reith', Dame Frances Patterson Memorial Lecture 2019, Lady Hale, President of the UK Supreme Court, available on the UK Supreme Court, see, for example, p. 14:

like the late and much lamented Lord Bingham, I reject the suggestion that judicial processes are not also democratic processes. They are a necessary part of the checks and balances in any democratic Constitution. And it is also necessary to point out that the history of many countries teaches us that political processes, just as much as judicial ones, can be used to promote quite different values – oppressive or discriminatory ones. The task of any modern Constitution is to keep these processes in balance. But in our Constitution the fundamental principle is Parliamentary sovereignty, which both the executive and the courts must respect. We in the courts will always ultimately do Parliament's bidding. Forgive me if I don't quite understand what the problem is with that.

https://supremecourt.uk/uploads/speech_1910o8_66bac81edd.pdf.

66. Brenda Hale, 'Law and Politics: A Reply to Reith', Dame Frances Patterson Memorial Lecture 2019, Lady Hale, President of the UK Supreme Court, https://supremecourt.uk/uploads/speech_1910o8_66bac81edd.pdf.

67. Radcliffe, *The Problem of Power*, 108–9.

68. Terminally Ill Adults (End of Life) Bill (Bill 212, 2024–5) <https://bills.parliament.uk/bills/3774>.

69. Hansard, [https://hansard.parliament.uk/commons/2015-09-11/debates/15091126000003/AssistedDying\(No2\)Bill](https://hansard.parliament.uk/commons/2015-09-11/debates/15091126000003/AssistedDying(No2)Bill).

70. I have drawn attention to contributions from each of the categories, beginning as the example of a senior lawyer with the newly elected MP, Sir Keir Starmer QC (now KC and the Prime Minister, the former Director of Public Prosecutions), in <https://williamtemplefoundation.org.uk/assisted-arguing/>.

71. [https://hansard.parliament.uk/commons/2024-11-29/debates/796D6D96-3FCB-4B39-BD89-67B2B61o86E6/TerminallyIllAdults\(EndOfLife\)Bill](https://hansard.parliament.uk/commons/2024-11-29/debates/796D6D96-3FCB-4B39-BD89-67B2B61o86E6/TerminallyIllAdults(EndOfLife)Bill).

72. Mitchell, *Law, Morality and Religion*.

73. Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber, 1958).

74. Barbara Wootton, *Social Science and Social Pathology* (London: Allen & Unwin, 1959), quoted by Mitchell, *Law, Morality and Religion in a Secular Society*, at 58 and 116.

75. Williams, *The Sanctity of Life and the Criminal Law*, 208, quoted by Mitchell, *Law, Morality and Religion in a Secular Society*, at 127 in the last chapter, 'Some Concluding Comments on the Debate', 119–36. See also Wootton, *Social Science and Social Pathology*, quoted by Mitchell at 58 and 116.

76. <https://www.thetimes.com/uk/politics/article/labour-rift-as-peer-says-keep-religion-out-of-assisted-dying-debate-5c9hdcbck>.

77. <https://www.independent.co.uk/news/uk/politics/assisted-dying-shabana-mahmood-b2652637.html>.

78. Humanists Against Assisted Suicide and Euthanasia, committees.parliament.uk/writtenevidence/116498/pdf. Written evidence submitted by Humanists Against

Assisted Suicide and Euthanasia to House of Commons Health Select Committee, January 2023 which begins,

Humanists Against Assisted Suicide and Euthanasia (HAASE) was formed by atheists and agnostics frustrated with the characterisation of the debate about assisted dying as compassionate, forward-thinking proponents against archaic religious prejudice. There are profound secular arguments – philosophical, historical, and moral – against changing the 1961 Suicide Act that must be considered.

See also their footnote references and the book by their chief executive officer to speak to the committee. Professor Kevin Yuill, *Assisted Suicide: The Liberal, Humanist Case Against Legalisation* (London: Palgrave, 2013).

79. See for a wider view of the Church of England's progressive role in the 1950s and 1960s, Grimley, Matthew, 'Law, Morality and Secularisation: The Church of England and the Wolfenden Report, 1954–1967', *The Journal of Ecclesiastical History* 60, no. 4 (2009): 725–41.

80. Esther Rantzen, 'The Ten Things That Make Me So Happy to Be Alive', *Daily Mail*, 28 December 2024.

81. Since writing *Law and Morals* in 1986, I have identified (for instance in *Uneasy Ethics* in 2003) what I regard as the main bad arguments which have featured in such debates from the 1950s onwards: to accuse the other side of playing God, to try to win the debate by terminology, name-calling, the slippery slope, the danger of activities going underground or into the back streets if you prohibit them, and the accusation of inconsistency. Nobody seems to agree with me on these, at least not when they are deploying such techniques. Indeed, identity politics has made it all the more likely that people will dismiss the views of others on the ground that 'you would say that, wouldn't you, because you are a man/Catholic/white/heterosexual/old' or whatever characteristics they wish to blame for you having the temerity to take a different view to theirs.

82. Radcliffe, *The Problem of Power*, 108–9.

83. Arthur Hugh Clough, <https://potw.org/archive/potw238.html>.

84. In <https://williamtemplefoundation.org.uk/assisted-arguing/>, I explain that a sermon by an Anglican layperson in the early years of the twentieth century puts this couplet in context. George W.E. Russell preached in St Stephen's, Walbrook, in words that might apply also today to pollution of lakes, rivers and seas:

The maintenance of human life, the cultivation of public health as leading up to that, is one of the prime duties . . . yet I fear that during the greater part of English history, almost down to within the last twenty years, the creed of most public bodies with reference to sanitary administration has practically been that of the sarcastic couplet from Clough's poem, 'The New Decalogue':—

'Thou shalt not kill, but need'st not strive Officially to keep alive.'

'Well, our duty as Christian voters is exactly the opposite of that . . . sanitary legislation . . . care for a pure water-supply, the improvement of insanitary and overcrowded dwellings, are practical ways' to make a difference.'

Simon Lee, 'Assisted Arguing', William Temple Foundation Blog, 18 October 2024, <https://williamtemplefoundation.org.uk/assisted-arguing/>; <https://anglicanhistory.org/socialism/churchmanship/07.html>.

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Chapter 7

Divorce law reform and feminism in the 1950s

Rosemary Auchmuty

The title of this chapter may surprise anyone who knows the history of English family law in the 1950s. ‘Divorce law reform?’ But there *was* no divorce law reform in that decade. There were proposals, and some procedural reforms, but it was not until 1969 that the Divorce Reform Act finally appeared. So what could be the point of writing about something that did not happen? The history of divorce law reform is well-worked territory, and the challenge is to find anything new to say about it. This chapter aims to meet this challenge in two ways: first, by applying a feminist lens to a feature of the 1950s that has received little attention and, second, by viewing the movement for (and more specifically *against*) divorce law reform as a phenomenon of the 1950s as a distinct decade, rather than (as generally portrayed) a retrograde pause in the tale of progress from the Matrimonial Causes Act 1937 to the Divorce Reform Act 1969.¹

A second objection to the title of this chapter might be that there was no feminism in the 1950s. This misapprehension, widely held by the Women’s Liberation Movement of the 1970s, has been challenged.² This chapter is a contribution to efforts to show that, while 1950s feminism may not look like the feminism of the second or later waves, what was once seen as a fallow period for feminist activism and achievement was, rather, a decade of continuous campaigning for and by women which, though often unsuccessful, nevertheless made a distinctive contribution to social and legal history.

The history of divorce law reform movements has long fascinated historians and legal scholars but the field is overwhelmingly male and dominated by male concerns. Thus could O.R. McGregor write

in his otherwise comprehensive *Divorce in England* that 'Discussion of the technical aspects of maintenance and matrimonial property law [the issues that really concerned women] is beyond the scope of this book'.³ The history of divorce has never held the same attraction for feminists, largely because easier divorce has never been an important feminist issue by comparison with a hundred other wished-for legal reforms for women. Though there have been excellent accounts of the Victorian period,⁴ little attention has been given by feminist legal historians to the history of divorce law reform in the twentieth century since Dorothy M. Stetson's groundbreaking study *A Woman's Issue: The Politics of Family Law Reform in England* (1982).⁵ Recent years have seen a revival, with Penelope Russell examining the benefits of the 1923 and 1937 Matrimonial Causes Acts for women,⁶ while Sharon Thompson's study of the Married Women's Association uncovers the significant role played by an organisation she has reclaimed as feminist in influencing the debates on marriage and divorce from the 1930s onwards.⁷ Stephen Cretney's *Law, Law, Reform and the Family*⁸ and his magisterial *Family Law in the Twentieth Century: A History* remain indispensable for their detail and insight.⁹

The primary goal of feminist legal history is to examine the role of law in constructing the relationship between men and women and maintaining men's power over women. It asks 'the woman question' (how any given reform might affect men and women differently) and looks beyond the legal institutions at the women's organisations and individual women often overlooked in standard histories – women who, even when unrepresented in Parliament and the courts, helped to shift public opinion and pushed women's issues on to the political and legal agenda.¹⁰ By the 1950s, of course, feminists were represented in Parliament and the legal profession and their influence was beginning to be felt in academic scholarship and the courts.

Feminist legal history also differs from traditional legal history in that as well as looking at successful reforms and progress it studies the legal wrongs that, in spite of strenuous campaigning and advocacy in Parliament and the courts, were not in fact righted in the given period, thanks to (largely masculine) opposition or indifference. Very often reform came eventually but would be put down to the responsiveness of Parliament or courts to shifts in social attitudes, not to feminist endeavour. Feminist legal history is also concerned with chronicling feminist efforts to block the legal changes that worked *against* women's interests: resisting restrictions on abortion, for example, or the imposition of gender-neutral rules in situations where women's weaker social or economic

power makes fulfilling these rules more difficult. These feminist actions, among which can be counted the stance of many feminists in respect of divorce law reform in the 1950s, are often portrayed as conservative efforts to impede progress. On an alternative reading, the fact that divorce law reform did *not* take place in the 1950s may be counted as a feminist victory. By putting off the reform for another decade, feminists were able to ensure that the legislation eventually passed met some, at least, of their concerns about the financial consequences for many divorced women.¹¹

The rise of divorce

Civil divorce was introduced in England and Wales in 1857: to obtain one, men had to prove their wife's adultery but women had to prove their husband's adultery aggravated by another independent offence such as bestiality, sodomy, incest or rape. In 1923, under feminist pressure, adultery became the sole ground for divorce for both sexes. The Matrimonial Causes Act 1937 widened the grounds to include desertion, cruelty and insanity. Every reform increased the numbers of divorces, as did the Second World War and its aftermath: the 47,000 divorces of 1947 were eight times the number in 1937.¹² The Legal Aid and Advice Act 1949 made divorce available to people with limited funds, of whom women were the main beneficiaries. In addition, as the Royal Commission on Marriage and Divorce noted in its 1956 Report, 'Women are no longer content to ensure the treatment which in past times their inferior position obliged them to suffer' (para 45), and some men found it hard to accept this changed position.¹³ Although the divorce rate declined over the 1950s, it remained a matter of public concern in a society premised not simply on the social superiority of marriage but on an economic model in which wives derived most of their financial support and benefits through their husband.¹⁴

While it might seem counter-intuitive to call for even wider grounds for divorce at a time when the divorce rate was causing public concern, there were moves to make it accessible to many whose situations did not fall within the existing grounds. The campaign leading up to the 1937 Act had revealed considerable social discomfort about the existence of 'dead' marriages that could not be formally ended because the required fault could not be found, or could only be ended by fabricating evidence, thus making a mockery of the law. The war had made this situation worse with many hasty and unconsidered marriages needing to be undone.

Matrimonial Causes Bill 1951¹⁵

It was in response to this concern that the Divorce Law Reform Union proposed divorce on the sole ground of seven years' separation. Though many lawyers preferred 'the irretrievable breakdown of the marriage', it was the seven years solution that was taken up by Marcus Lipton MP (Labour, Brixton), a barrister, who tabled an amendment to the Law Reform (Miscellaneous Provisions) Bill 1949.¹⁶ Though supported by 200 MPs, this failed to proceed. The cause was then taken up by the recently elected Eirene White (Labour, Flint East) in 1951, who had promised her constituents she would do so if she won a place on the private member's Bill ballot.

Mrs White was motivated by the plight of the second families formed after the breakdown of the first: the couples 'living in sin', often with children, who could not marry because one or both of them could not divorce the earlier partner.

The social purpose of this Bill is to meet the situation in which many thousands of men and women are living apart in a state which is not marriage, in any full sense of that word, but in which they are unable legally to form another union or to establish a normal home life. The estimates of the number of those separated vary from 100,000 to a much higher figure, and I myself would not be prepared to press the higher figure, but it is quite clear that we have here an important social problem, especially when one takes into account the third parties often involved and the number of illegitimate children (927).

Her primary concern, then, was for 'those who wish to establish a second legal marriage and, in particular, those who wish to have children' (928). Thus could a proposal for *facilitating divorce* be represented, by a paradoxical sleight of hand, as one designed to *strengthen marriage*.

She further pointed out that the current position – that allowed women to be supported for years, decades even, after the marriage was dead – was unfair to men.

I have in mind the case of a man whose earnings have never been more than £5 or £6 per week, but who, over a period of years, has paid more than £2,000 in maintenance to a woman whom he has not seen for 20 years and is never likely to see again. He committed no moral offence, beyond making a mistake in his choice of partner. The result is that she collects a pension for life, while keeping him legally tied (930).

And, by implication, unable to remarry.

There are two untested assumptions in Mrs White's argument: first, that those couples currently unable to marry because of a previous tie would actually wish to formalise their new union – and would do it – and, second, that even if they did remarry the second marriage would not itself end in divorce. Perhaps if Mrs White's Bill had passed in 1951, this might have been the case. But by the time that divorce law reform was actually achieved, almost two decades later, the world had changed: re-marriages soon ceased to compensate for the increase in divorce, and marriages of once-divorced people proved rather more fragile than anticipated.¹⁷

Easier divorce is not usually a measure attractive to feminists. But Eirene White was a new kind of Labour woman, steeped in party politics from childhood, intellectual and aloof from the other women MPs.¹⁸ Her father had been cabinet secretary to four prime ministers; she had studied politics, philosophy and economics at Oxford; she had worked as a political journalist. She married late (at thirty-eight), a man two years her junior; they had no children. Her husband had been divorced and this may have made her sympathetic to the cause.¹⁹ As a professional woman her allegiance would naturally be to the politics of equality and individual choice and agency, not one of protectionism: in 1947, for instance, she had persuaded the Labour Party conference to accept the principle of equal pay.

Every MP who spoke in the debate had received a large volume of letters from interested parties. It was noted that public support for divorce law reform generally came from those with a personal investment in the matter (which is why many supporting MPs felt it necessary to declare their own happy marriages), while opposition was generally 'a matter of belief or principle' (959).

There was considerable resistance to Mrs White's Bill in Parliament. Apart from the usual objections to the liberalisation of a law – 'hard cases make bad law', 'thin end of the wedge' (seven years could soon be reduced to five, three and even two) (954), and 'it is only a matter of time before we get down to divorce by consent' (988), the main criticism was that the Bill enabled what Mr Wood (Conservative, Bridlington) called divorce 'by unilateral compulsion' (948).

On this point, each MP had his or her own image of the reluctant divorcee. Here is Mr Wilkes (Labour, Newcastle-upon-Tyne Central) speaking from experience as a Circuit Judge:

Let me refer to the most common type of case which I meet in the course of practice and my ordinary work among constituents. It is the case of the woman who, after, say, 10 years of being thoroughly overworked, immersed in her family and in the drudgery of housework without the slightest aid of modern equipment, has grown drab in looks,

and whose husband has taken his entertainment and has developed interests outside the home. So far as working-class families are concerned, this is a very common phenomenon indeed. Under this Bill, this woman who has grown drab and aged before her time because of her sacrifice for home and children is going to be placed at the mercy of and compelled to submit to a divorce by a husband who has merely separated himself for the statutory period (969).

Mrs White, however, had quite a different idea of the married woman whose husband sought divorce – the woman who out of spite or vindictiveness refused to allow her husband to divorce her.

I have every sympathy with the man or woman who is genuinely wronged and who is left to face the world with a family without a partner to whose help he or she is entitled. But I have no sympathy whatsoever for the harpies who try to make the most they can out of a broken marriage relationship. If anything has made me wish to bring this Bill before the House it is some of the letters I have received from the intolerably self-righteous (933).

‘Harpies’ is an offensive word, one exclusively applied to women, and, unsurprisingly, many MPs objected to this characterisation. Reluctant divorcees might have good reason to resist, they insisted: because they hoped for a reconciliation or held a religious or other conviction that divorce was wrong (947, 975). Probably because she was not herself a religious woman – she told the House she had been married in a Register Office (926) – Mrs White showed little interest in this view.²⁰ The church could have its rules. Divorce was a civil matter and the State should do what it thought best (938).

There was, finally, scepticism about the claim that the Bill would strengthen marriage; by making divorce so easy, opponents argued, marriage would cease to be much of a commitment, might even cease to have any value at all; Ronald Bell (Conservative, Bucks South) went so far as to declare, ‘This Bill, in fact, is going to abolish marriage’ (994). A sizeable contingent of opinion therefore wanted divorce to be so difficult to access that couples would be forced to work harder at their marriages.

Not every objection was simply a principled one, however. A small number of MPs, male as well as female, raised the issue of the material disadvantage to homemaker ex-wives of the loss of the financial support they had always received from their husbands, as well as the loss of their widow’s pension, insurance benefits and inheritance rights on an intestacy. One such objector was Patricia Hornsby-Smith (Conservative, Chislehurst) who, in contrast to Mrs White, was the daughter of a master

umbrella-maker. She left school at sixteen to become a typist, and now, unmarried, lived in her own flat with an aunt to housekeep for her.²¹ In an interview with Godfrey Winn, Miss Hornsby-Smith displayed her feminist credentials with anecdotes about her treatment as a female MP and learning to deal with men in committees ('Believe me, it is an art in itself').²² When Winn praised her for not looking for 'special favours' for her sex, she corrected him: 'I do think that women should stick together, in that they should support their own sex'.²³ This would explain why she opened her speech with words of gracious admiration and respect for Mrs White, while nevertheless disagreeing with her. For her, the loss of pension and other benefits was the real problem if divorce were allowed without the consent of an innocent wife. She even raised the spectre of divorce by consent (974, 975, 980). 'I therefore believe that we must carefully protect the middle-aged woman who has devoted herself principally to her household and her children, and who may not have maintained the superficial attractiveness which may still beguile her husband in another direction' (977).

Mrs White met these objections by explaining that, under her Bill, a divorcing husband would not get his decree unless the court was satisfied that he could support his first wife and family as well as the second. This led Mr Black (Conservative, Wimbledon) to identify one law for the rich and one for the poor – the rich man could get his divorce because he could support two families, while the poor man could not (953). And of course, demonstrating one's ability to pay and actually doing it were two different things: Mr Wilkes raised the issue of non-payment of maintenance which, he said, would only be increased by the Bill (968). Mrs White struggled to remind her critics that the women who fell within the ambit of the Bill had been living separately from their husbands for seven years and often without financial support, so would be in no worse position on divorce. She showed her impatience with reference to the loss of benefits by declaring that she had 'seen so many of these cases that I have come to the point of asking myself, Is this woman really married to a man or to an old age pension?' (931).

The reason for the lack of detailed consideration in her Bill of the financial matters, Mrs White told MPs, was that she wanted to keep it short and simple so that lawyers could not get embroiled in endless amendment and lose sight of the central principle (927). While fully admitting that 'not everybody can afford the luxury of two families' (928), in an unfortunate turn of phrase she dismissed these concerns as 'on a lower plane' (931). There were many things wrong with the law of marriage, she said; maintenance was a problem during the subsistence of a marriage quite apart from on divorce; but 'we ought to settle in our minds the

principle . . . and [only] then we should face any economic consequences in a larger and more intelligent way' (931).

Feminists will recognise the discursive devices employed in these debates. Two groups of women were pitted against each other, the legal wives and the new partners; likewise the plight of the ('illegitimate') children of the second family and the legitimate though abandoned first family; and the ensuing discussion inevitably threw up anecdotes challenging the notions that abandoned wives were always blameless or that fault was one-sided, with many MPs asserting that it was inappropriate to look for fault when a marriage had irretrievably broken down (940). And there will always be some injustice to men to highlight.

In one of the most interesting contributions to the debate, Mrs Ganley (Labour, Battersea South) challenged two of the stereotypes being bandied about. The first was that the beneficiaries of the Bill would inevitably be men keen to replace older wives with a younger model. Mrs Ganley described the case of a female constituent who had not seen her husband for twenty-three years, who could not prove his death, and who had reluctantly entered into another relationship. This woman spoke of 'the misery of trying to conceal the fact that she was, as she thought and as the world thinks, living in sin'.²⁴ Mrs Ganley added that 'There are even old age pensioners who are still hoping that a Bill will come along to give them relief so that they might be able to claim that they were respectably married' (961).

The other stereotype she countered was that of the penniless, defenceless divorcee. The problem of deserted women was much exaggerated, she said.

We should remind ourselves that conditions today are very much better for many people than they were in the past. The younger woman today is much better able to maintain herself than she was in the 1930's, and a little later on. The economic situation generally is very much easier than it was in those days, and such people, although they can claim our sympathy and understanding, are in a much better economic situation than ever before (963).

Mrs Ganley spoke with authority. At seventy-one years of age she had witnessed huge changes in married women's economic situation over the decades in which she had been active in labour and feminist politics. Married, with three children, she had nevertheless pursued a career in public life as one of the first female Justices of the Peace (JPs), in the London County Council, and as a national representative of the Women's Cooperative Guild. She had kept her independence and, in so doing, must have come across many women like herself.

To the government's annoyance, for it was not keen to take divorce law reform forward, the Bill passed its second reading with a substantial 131 to 60 majority. But Mrs White reluctantly withdrew it²⁵ when it became clear it would not pass in the current session.²⁶ As consolation prize, the government promised a Royal Commission into marriage and divorce. Everyone knew that a Royal Commission was a tactic used by governments who wished to postpone consideration of an issue, but its wide terms of reference – to encompass all aspects of marriage as well as divorce – were welcomed by the feminist groups pressing for financial rights for married women.

Two feminist approaches

It will be clear from this account that women, like men, did not all think alike on the subject of divorce law reform and its effect on women. Yet I would argue that both the approaches of Eirene White and Caroline Ganley on the one hand, and Pat Hornsby-Smith and Edith Summerskill (who did not speak in this debate but dominated the later ones) on the other, were feminist.

Mrs White and Mrs Ganley were liberal or equal-rights feminists, whose primary goal was to abolish all distinctions in law between men and women and give both sexes equal opportunities and choices. Equal-rights feminists did not elevate marriage and homemaking above all other concerns: Phyllis Whiteman, for example, told the readers of her *Speaking as a Woman* that they should walk out on an unsatisfactory husband and get a job.²⁷

Miss Hornsby-Smith and Dr Summerskill represented the protectionist or 'new' feminists, who aimed to improve the position of the dependent housewives who formed the majority of women at the time. The goal of the Married Women's Association, formed in 1938, was to 'secur[e] legislation to establish an equal financial partnership in marriage' and thus transform the power balance between men and women.²⁸ Where Mrs White and Mrs Ganley looked to the future and saw modernising measures such as divorce law reform as incentives to women to work towards greater independence, Miss Hornsby-Smith and Dr Summerskill took women as they mostly were, dependants of men, and sought to protect their position in that valuable role.²⁹

But even within the two groups there were differences. In 1949 Jean Mann (Labour, Coatbridge) agreed to sponsor a private member's Bill (ultimately unsuccessful in the ballot) to allow wives a right to their housekeeping savings and a share of their husband's earnings. The Married Women's Association, however, opposed 'wages for housework'

which, they feared, would strengthen the husband's position as boss.³⁰ They favoured joint ownership of property and income. Later the association split over this issue, with the dissidents, led by its then president, Helena Normanton QC, arguing that husband and wife should be able to agree an allowance and that separate property was preferable to joint ownership, since husbands could not be trusted with their share.³¹

At the same time, there was substantial agreement among feminist groups on many issues. Eirene White favoured a wide portfolio of causes, among them separate taxation for married couples but also the removal of purchase tax from women's cosmetics (a necessity, not a luxury, she argued). She had a clear understanding of sexual politics: she spoke in debates on prostitution, called for safeguards for children in nurseries, and at the 1961 Labour party conference remarked of Tory proposals for hanging and flogging that 'Although they do not realise it . . . they are displaying the deficiencies of their own private lives . . . we all know the connections between sex and sadism'.³²

On the other side, Edith Summerskill supported equal pay as well as rights for housewives, recognising that equality in the workplace and equality in the home were two sides of one coin as far as men were concerned:

The thought that she [the wife] might ever hanker after interests outside the home or give a thought to the welfare of those other than himself [the husband] and his family alarms him . . . The main sufferer would be himself and any inconvenience or discomfort even of the most trivial nature is anathema to him.³³

Juanita Frances of the Married Women's Association stated that she was personally in favour of Mrs White's Bill but that her organisation was really concerned with marriage as an equal partnership and 'financial protection for married women'.³⁴

Joint feminist efforts lay behind the Deserted Wives Bill 1951 which would have empowered courts to transfer the tenancy of a home in a man's name to his deserted wife. Introduced by Eveline Hill (Conservative, Manchester Wythenshawe), and supported by Irene Ward (Conservative, Wallsend & Tynemouth), Viscountess Davidson (Conservative, Hemel Hempstead) and Freda Corbet (Labour, Camberwell North West and Peckham), the Bill shows how women MPs from all parties came together on issues affecting women. It received a second reading but was defeated by a narrow minority.

The following year Edith Summerskill (Labour, Fulham West) introduced the first of two Women's Disabilities Bills 1952³⁵ and 1953 which, as well as repeating the provision for transfer of a deserted wife's tenancy, incorporated two other proposals.³⁶ The first was that the housekeeping

allowance paid by a husband to his wife should be jointly owned. This followed a chain of sad cases in which deserted wives who had built up savings through careful management had been forced to surrender the surplus to their husbands as his property.³⁷ The second proposed that the arrears of maintenance payments by a man to his deserted wife should be recoverable from his wages. The 1953 Bill, introduced by a male sympathiser, Horace King (Labour, Southampton Test), extended this last provision to men who failed adequately to provide for their wives and families during the marriage. Jennie Lee (Labour, Cannock) spoke in support, prefacing her remarks with a rebuke to Ronald Bell for trying to talk the Bill out (828). Unusually for a woman MP, she referred to herself as a feminist, at the same time distancing herself from other feminists by arguing for increased family allowances – the Labour Party line – as preferable to taking money from a husband to give to his wife (830–1). While the first Bill received a second reading but failed to proceed, the second did not even get that far.

Royal Commission on Marriage and Divorce

Much has been written about the Royal Commission that reported in 1956, most of it expressing bitter disappointment at its failure to produce any concrete recommendations for the liberalisation of divorce because of the level of disagreement among the seventeen commissioners. The commission's consideration of the financial aspects of divorce, however, and the position of married women generally, have received less attention: Otto Kahn-Freund, for example, omitted this topic entirely from his *Modern Law Review* review of the Report in 1956.³⁸ Yet it was radical in its admission that housewives suffered significant financial disadvantages and its consideration of various remedies designed to overcome these. The credit for this must go to the women's associations and individual women who submitted evidence to the commission, some of whom (like the Mothers' Union) opposed divorce outright, while others, like the National Council of Women (representing ninety-seven affiliated groups), focused on promoting equality within marriage in the new feminist tradition.³⁹

In the end, however, the report disappointed equal-rights and new feminists alike. The equal-rights feminists were cross that the Royal Commission rejected the reform embodied in Eirene White's 1951 Bill, instead emphasising the need to support and buttress marriage as an institution and individual marriages, however problematic. It called for public funds to be available for education and marriage guidance and conciliation.⁴⁰ Yet the form of marriage it supported seemed little influenced by feminist ideas of equality.

New feminists would have found a measure of encouragement in the commission's rejection of easier divorce but in little else. Neither equal division of the family income nor any form of community of property fell on receptive ears. Any suggestion that men should share their property with their wives and ex-wives proved a sticking point, with commissioners divided over some proposals and rejecting others outright.

Many of the new feminists were in favour of community of property – the idea that spouses should share ownership of the marital property equally – which would certainly have made property division on divorce much simpler and would have provided divorced women who had few other assets with property of their own. But where half the commission members supported the principle, in various forms, the other half did not: for them, not only was community of property un-English and complicated to administer but, significantly, they believed that the existing English 'separate property' regime was a *better* one. Community, they warned, could lead to unfair results, as in the case of the 'wife who has a lazy and improvident husband and who by her own hard work and thrift has managed to buy a house' (para 651) and who would, perforce, have had to sell it and divide the proceeds equally with that undeserving husband. New feminists might complain that a rare exception was being invoked here to refute a much more general rule; that it would be a propertyless hard-working housewife who was claiming against a propertied husband. But the commission's reluctance to accept community of property may have struck a chord with equal-rights feminists, who were generally professional women with an earned income they would not necessarily wish to share, and who would prefer a regime that allowed women to take their own paths in life. Barrister Florence Earengay thought that property-sharing would cause strains in a marriage and noted that court decisions that applied a principle of equal sharing (such as Denning's 'family assets' analysis) all too often resulted in the woman getting less than her fair share.⁴¹ English law permitted co-ownership and 'husband and wife are always free to own property together if they so wish', the Report pointed out (para 651).⁴²

The sole area on which all commissioners were agreed was that co-ownership should apply to the allowance a husband paid his wife for housekeeping. This measure was eventually enacted, but not until 1964.⁴³

Equally, the commission rejected the proposal that a wife should be legally entitled to a fixed allowance or proportion of her husband's wages. This would give wives money of their own and so alleviate the vulnerability of total dependence on a husband. The commission contended that this was something it would be impossible to legislate for: every couple's financial situation was different and a sum suitable for one would not

be suitable for another (paras 654–5). Husbands were already bound in common law to maintain their wives but the degree of support during the marriage and whether maintenance should extend to ex-wives (especially those guilty of a matrimonial offence or those who had remarried) were matters of dispute.

The commission also rejected the feminist proposal that a spouse should be able to apply to a court for disclosure of the other spouse's earnings, assets and liabilities, including payslips and tax returns. This, the Report said, was 'not a matter where legal provision would be appropriate' since marriages should be based on 'mutual trust' (paras 707–11).

On the loss of her National Insurance benefits on divorce, the commission examined proposals ranging from enabling a married woman to make her own contributions ('a radical alteration to the Scheme', para 713) to giving divorced women a pension equivalent to a widow's (worth considering, para 714) but found them all, along with separate taxation (received favourably), outside their terms of reference (para 717).

Feminists had also proposed that wives whose husbands defaulted on maintenance payments should be able to obtain an order for attachment to wages, under which employers would deduct the payment before the man was paid. This, too, was rejected, the arguments against this eminently sensible measure (already in place in Scotland) being that (1) it discriminated against employed men since it could not be applied to casual and self-employed workers, (2) it would 'tend to upset generally the relations between employers and employees', and (3) 'to take money from the husband in this way would represent an interference with his independence'. Such a consensus between employee, employer and commission members offers insight into the strength of masculine resistance to, as the Report put it, 'anything which seemed to savour of an attack on the income of the wage earner' (para 1100).

The family home

In common law a husband was obliged not simply to support his wife and family but also to provide a roof over their heads. If feminists were concerned about financial support for a divorced housewife, they were particularly exercised by the possibility that she might lose her home. A profound irony lay in the fact that the home was not just accommodation for such women, it was their domain (as the word 'housewife' indicated), their very *raison d'être*. But all too often it belonged in law solely to their husband, in which case on divorce a woman would have no share in the financial asset and, more disastrously, would lose her right of occupation.

In the immediate post-war years English land law had begun to grapple with the problem of increasing numbers of deserted wives claiming an interest in the home or the right to continue to reside in it. Case law in the mid-1950s was in a stage of development described by the Attorney General, Sir Lionel Heald, in the debates on the Women's Disabilities Bill 1952 as 'extraordinarily obscure'.⁴⁴ Homes in this period were generally conveyed to the husband on the assumption that as breadwinner he would provide the purchase money and pay the mortgage instalments. But where wives had made financial contributions, as was becoming more common with married women's paid employment increasing over the decade,⁴⁵ implied trusts were beginning to be used to give them a share based on the proportion to the property's value they had contributed.⁴⁶ As co-owners, such women had a right to occupy the property until its sale, when they would receive their share of the proceeds. In the more common case where the wife had contributed nothing in financial terms, Lord Justice Denning, conscious of the injustice done to a homemaker if she lost her home, had developed something called the 'deserted wife's equity' – a right of occupation that was good not just against her husband but against the world.⁴⁷

The commissioners found this problematic. To deprive a man of the use of his property 'is a far-reaching inroad on the rights of ownership' (para 658) and could not be justified as a long-term measure. But the main objection to the deserted wife's equity was not the deprivation of the husband (who, after all, was at fault for deserting her) but the 'insecure position' in which it placed other people with interests in the land. It is fundamental to English conveyancing that third parties (purchasers, mortgagees, trustees in bankruptcy) should only be affected by interests of which they have 'notice' – that is, if the interest is recorded in the Land Register or (in unregistered land) in the Land Charges Register. But the deserted wife's equity was not an interest capable of registration – thus, any of these parties should be able to take the land free of her interest.

Land law is essentially concerned with conflicts between parties who both have rights to the same piece of land. Here the conflict was between the deserted wife in her home and the person to whom the husband (the legal owner) had sold it, the mortgagee seeking to repossess the property on default, or the trustee in bankruptcy wishing to assemble the bankrupt husband's assets to pay his debts. The Royal Commission's proposed solution reflects the preference of English land law for certainty in property transactions rather than the concern of English family law for fairness for people. Thus their report could express sympathy, even pity, for the plight of the deserted wife, but ultimately favour the other party to the dispute.

A married woman may spend years of her life looking after and improving the home. . . . If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own (para 652).

But her moral right should not take precedence over the legal right of third parties to take the land free of her interest unless they had prior 'notice' of her. Of course, they could simply ask the seller if anyone else had a right or interest. But any requirement to investigate a man's personal circumstances was anathema to lawyers: 'it would not be reasonable for an intending purchaser or lender to have to enquire into the relationship of husband and wife' (para 612, quoting *Westminster Bank v. Lee* [1955] 3 WLR 376). Thus was the privacy of a man's home and domestic life held sacrosanct in the 1950s.

So what did the commission propose? First, that the deserted wife's equity should bind the husband until he obtained a court order to get her out of the home – with the proviso that the court could withhold that order if it thought fit (para 667).⁴⁸ This was not new. But, overturning the existing situation in case law, her equity should no longer bind third parties; instead, the wife could apply to the court for an injunction to prevent her husband from transferring an interest to a third party (para 669). But this, too, could be refused, and of course she might only find out about the sale or repossession when it was too late to prevent it. The solution finally proposed to protect such a woman was that a spouse's right of occupation should be registrable, even though it was not really an interest in land but a mere equity. Once registered, it would bind third parties because they would have notice of it – that is, they would have to allow the deserted wife to remain in occupation until and only if an order for possession could be obtained (para 670). The safeguarding possibilities of this measure, eventually enacted in 1967, have always been limited by spouses' ignorance of the need to make the registration until it was too late.⁴⁹

In the situation where the husband defaulted on the mortgage repayments, the commission recommended that the deserted wife should be able to take over the mortgage repayments so that the property would not be repossessed (para 677). But most deserted wives would not have had the means to do this.

For the woman who had made some financial contribution to the purchase, even though she was not named as legal owner, the commission recommended that she could apply to the court for the home to be sold and get her share of the proceeds of sale. If the commissioners had stopped at this they would merely have clarified the current law in tying

the claimant's share to her financial contributions and not, as judges like Denning would have preferred, to some community-type principle (para 678).⁵⁰ But paragraph 678 offers a surprise: it suggests that, where a mortgagee seeks possession, a wife who has contributed financially should be able to request an order for sale and the court would 'have *the widest discretion* to deal with the matter *as it thinks fit*' (my emphasis). While it would have to 'hav[e] regard to the respective contributions of husband and wife to the purchase price of the house', it would not (it seems) be confined to a strict arithmetical calculation, as the following sentence confirms: 'The court should, for instance, be able to order the husband to convey his interest to the house *on such terms as it thinks just and reasonable*' (my emphasis).⁵¹ This proposal would seem to prefigure the provisions in the Matrimonial Proceedings and Property Act 1970 that allowed property transfers on divorce for the first time, premised on a wider set of principles than actual money spent.⁵²

Finally, in a gesture to formal equality that bore little relation to the actual problem, the commission suggested that all these proposals should apply to deserted husbands as well as wives (para 702).

This summary of the Royal Commission's consideration of the family home shows how seriously they took the feminist concerns about the position of deserted wives. The problem they faced, however, was that they were trying to do the impossible – to reconcile two contradictory principles, the one that linked married women inexorably to homemaking, and the other that linked property to men.

Maintenance Orders Act 1958

After the Royal Commission's failure to recommend comprehensive marriage reform, the new feminists decided to abandon large-scale measures in favour of piecemeal reform that might have a better chance in Parliament. The Maintenance Orders Act 1958 started life as a private member's Bill sponsored by the Married Women's Association and introduced by Joan Vickers (Liberal, Plymouth Davenport).⁵³ In a remarkable departure from the Royal Commission's decisive rejection of the idea that maintenance payments could be secured on men's earnings, it was then taken up by the government, largely (Jean Mann tells us) because otherwise the women unable to receive their maintenance would be thrown on to National Assistance.⁵⁴ Three Labour members supported the Conservative Home Secretary introducing the Bill,⁵⁵ which empowered courts to secure the payment of maintenance on a man's property, to set aside any transactions made to avoid the payment, or to order

compensation if it had gone beyond recall, and to make provision for an ex-wife on a deceased's intestacy. Fiercely opposed by the Bar,⁵⁶ always resentful when lucrative work was taken out of their hands,⁵⁷ this hugely beneficial measure for divorced wives struggling to wrest maintenance from their ex-husbands (of whom 3000+ per year went to prison rather than pay maintenance)⁵⁸ would go down in history as a progressive government reform, but clearly owed its origins to feminist campaigning.⁵⁹

In the same year, both the Married Women's Association and the Council of Married Women prepared Bills, the one for joint property and the other for allowances to married women, but neither was taken up.⁶⁰ Meanwhile, divorce law reform faded from view.

Lessons from the 1950s

What does this discussion tell us about divorce law reform in the 1950s? First and foremost, it demonstrates how often feminists have to expend energy on topics that are not of their choosing, responding to masculine agendas instead of leading with their own. It tells us that, for most men then and afterwards, what mattered was the *form and grounds* of divorce and the *arguments for and against its extension*, while for most women, even those who supported easier divorce, it was the *financial consequences* of divorce – which men did their best to avoid. Oliver McGregor, for example, dismisses the lack of engagement with these issues in his *Divorce in England* with the statement that 'All these real disadvantages could easily, and ought to, be removed by legislation. Their existence is not a good reason for preserving the doctrine of matrimonial offence.'⁶¹

The debates show how feminists understood that restricting women's access to property is one of the main ways in which men have maintained women's subordination and men's power over them. As lawyer Erna Reiss wrote in 1934,

You may tell a married woman that . . . she now enjoys equality with her husband in respect of rights of citizenship and of property and of parenthood. But if she has no income of her own and is prevented by the burden of family cares or jealousy of male competitors from earning one, she may find her legal equality but a fleshless bone. The economic dependency of the married women is the last stronghold of those who, consciously or unconsciously, prefer women in subjection, and that perhaps is why the stronghold is proving so hard to force.⁶²

Such words, from an equal-rights feminist, show just how much divorce law reform without adequate provision for discarded wives was opposed

by 1950s feminists, who observed that such provision, or indeed whether it could ever be adequate, was all too often absent from the discussion.

Parliamentary debates and the Royal Commission Report show how deeply resistant many men were to any legal requirement to share their property with their wives after divorce or even during marriage. Trade unions were wedded to the 'family wage' for the working man, making life just as difficult for the equal-rights feminists campaigning for equal pay as for the new feminists who favoured income-sharing in marriage. As Albie Sachs and Joan Hoff Wilson pointed out in their analysis of court decisions affecting women's claims, the legally trained men who dominated Parliament and the courts were quick to couch their objections in legal terms that served as excuses for masculine self-interest.⁶³ So these men opposed the new feminists' proposals ostensibly because the law should not intervene in domestic life, because it would be impracticable or impossible to enforce or would create a slippery slope, because it would call into question established principles of law, because it encroached too far on established (read: men's) property rights. A male barrister MP in the Women's Disabilities Bill 1953 debates declared that 'this Bill ought . . . to be called the Married Women's Rights of Bringing in Third Parties Who Have Nothing To Do With It Bill [or] the Employers' Further Irritation Bill'.⁶⁴ Of course feminists saw through this ploy: and Edith Summerskill called them on it in the parliamentary debate on the first Women's Disability Bill:

Do these hon. Gentlemen come here on a Friday because they have an interest in reform? Do they come here because they know anything about women's grievances at all? . . . They are here now as astute politicians, with legal qualifications, determined so far as possible to obstruct this Bill.⁶⁵

However universal these feminist understandings and patriarchal responses were, there is also something quite time-specific about the 1950s debates on divorce law reform. What stands out clearly to modern eyes is the immunity from challenge of the husband-breadwinner/wife-homemaker paradigm, despite the fact that this was the very factor that made divorce law reform such a problem. Even where it was recognised that increasing numbers of married women were in paid employment, no one suggested that they should be relieved of their homemaking duties.⁶⁶ It was not that feminists did not imagine alternatives: Erna Reiss, for example, remarked wistfully that 'Some day society may be so organized that it will become possible for men and women to share domestic responsibilities.'⁶⁷ But as a policy it was impossible to pursue in the 1950s.

Even less thinkable then was the naming of marriage itself as a problem.⁶⁸ Indeed, the threats voiced by opponents of reform, that making divorce

easier to obtain would lead to the 'end of marriage', drew their power from the notion that such a thing was very frightening. The primacy accorded to marriage, even in an era of public concern over its breakdown, is again specific to this point in time. There had been critiques in the nineteenth and early twentieth centuries, yet during the interwar years marriage recovered its seemingly inviolable status.⁶⁹ First-wave feminists had perhaps entertained the hope that once the worst features of coverture had been removed, marriage could become a true and equal union.⁷⁰ By the 1950s almost all those abhorrent features had gone, but they had been replaced by social norms of equal strength – and equality remained elusive.

Jane Lewis suggests that the policymakers of the 1950s were motivated by a desire to transform marriage rather than abandon it.⁷¹ Yet there is little evidence in the sources here of any impulse to transform the institution: instead, the goal seemed to be to retain its principal features but help husbands and (especially) wives to adjust to them. Marriage Guidance bureaux proliferated in this decade 'with an expanding clientele of all ages and classes'⁷² and, in spite of the male sociologists' persuasive descriptions of increasingly 'companionate' marriages,⁷³ by 1959 one-third of cases dealt with by the Marriage Guidance Council were founded on disappointment (mostly the woman's) over the failure of a marriage to live up to expectations.⁷⁴ It was left to second-wave feminists in the 1970s and 1980s to identify marriage as a major site of women's subjection and whose analyses, aided by the spectacular rise in divorce after the 1969 reform, led to a decline in the marriage rate that has never abated.⁷⁵

The discussions here illustrate the truism that feminists in any given era do not all think alike; there has never been a single feminist viewpoint, and not only do feminists take a range of positions on most issues, they are often at odds with one another. The first Bill for divorce law reform in the 1950s was put forward by a feminist MP, but what she and her supporters saw as progressive and beneficial was seen by other feminists as profoundly damaging to women. What also emerges is the *shortcomings and limitations* of both equal-rights feminism and new feminism in respect of divorce law reform. The absence of thought-through provisions for ex-wives' financial support exposed the weakness of Mrs White's 1951 Bill and the equal-rights feminists' approach of asserting formal equality and choice for women at a time when substantive equality and choice so obviously did not exist for most of them. But the protectionist approach of the new feminists did not serve women well either: in spite of its efforts to elevate the role and financial security of women within marriage, new feminists still positioned women as needy and dependent, a representation that riled equal-rights feminists who had managed to achieve a measure of independence.

Worse than this, the new feminism *institutionalised women's dependence*, both on husbands and on the law. This was a major weakness since, just as husbands could not be trusted to do the right thing, so the law and its officers could not be relied on to do justice to women. It was an unfortunate truth that the women on whose behalf the new feminists spoke really *were* dependent; dependence was built into their approved role as homemakers, and for most women there were no realistic alternatives. Yet this dependence, enforced as it might have been, was often resented by the very men who benefited from it. Victim-blaming was rife in the debates, with men telling women whose husbands failed to support them or left them that it was their fault for choosing the wrong husband. In the debates on the Women's Disabilities Bill 1952, bachelor Philip Bell MP (Conservative, Bolton East) declared that 'Unhappy wives should just leave husbands, not ask for money.'⁷⁶

But the world was changing. By the end of the decade, there was greater acceptance of both married women working (most marriages, Hopkins claimed, were founded on double savings and income)⁷⁷ and divorce (a majority of the public thought Princess Margaret should have been allowed to marry Captain Townsend).⁷⁸ Having some money of their own, argues Helen McCarthy, empowered working wives and inevitably, as men failed to adjust, threatened and indeed broke up more marriages.⁷⁹ 'If the architecture of marriage had always stood upon a foundation of female subordination', concludes Virginia Nicholson, 'by the 1950s it was beginning to look a little shaky'.⁸⁰

Conclusion

Every era is characterised by a particular set of norms and assumptions and it is difficult in any given period to remove oneself from that mindset and imagine a different set of norms and assumptions. In 1950s Britain it was well-nigh impossible to envisage a society like our present one in which marriage is no longer a woman's primary goal, homemaking duties are not solely the responsibility of wives, cohabitation is perfectly acceptable and illegitimacy not only not shameful but conceptually non-existent. Likewise, it is difficult for us today to imagine a future society in which women might have just as much money, property and freedom of action as men do, in which they are not still hindered in that pursuit by sex discrimination, unequal pay, violence and abuse and, above all, responsibility for caregiving. The equal-rights feminists looked towards this world, in which a person's sex would make no difference to his or her access to education, work or property. The new feminists, meanwhile,

took society as they found it, with dependence embedded in women's different role. The dilemma that still divides feminists is whether to work for structural reforms that should benefit all women in the long run but leave many female victims of the old regime's abandonment, or to try to protect those victims here and now, and so help to sustain the unjust and unequal regime.

Notes

1. Roderick Phillips passes over the 1950s with a brief statement 'during the 1950s social attitudes were generally conservative'. *Putting Asunder: A History of Divorce in Western Society* (Cambridge: Cambridge University Press, 1988), 618. Lawrence Stone, *Road to Divorce 1530–1987* (Oxford: Oxford University Press, 1990) ignores the decade altogether.
2. Starting with Dale Spender, *There's Always Been a Woman's Movement This Century* (London: Pandora, 1983).
3. O.R. McGregor, *Divorce in England* (London: Heinemann, 1957), 196.
4. For example, Allen Horstman, *Victorian Divorce* (London: Croom Helm, 1985); Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England 1850–1895* (Princeton University Press, 1989); Joan Perkin, *Women and Marriage in Nineteenth-Century England* (London: Routledge, 1989).
5. Dorothy M. Stetson, *A Woman's Issue: The Politics of Family Law Reform in England* (Westport, CT: Greenwood Press, 1982).
6. 'Matrimonial Causes Act 1923', in *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland*, ed. Erika Rackley and Rosemary Auchmuty (Oxford: Hart, 2019), 189–94; 'Matrimonial Causes Act 1937', in *Women's Legal Landmarks in the Interwar Years: Not for Want of Trying*, ed. Rosemary Auchmuty, Erika Rackley and Mari Takayanagi (Oxford: Hart, 2024), 235–42.
7. Sharon Thompson, *Quiet Revolutionaries: The Married Women's Association and Family Law* (Oxford: Hart, 2022).
8. Stephen Cretney, *Law, Law Reform and the Family* (Oxford: Oxford University Press, 1998).
9. Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003).
10. For a more detailed explanation of feminist legal history, see Erika Rackley and Rosemary Auchmuty, 'The Case for Feminist Legal History', *Oxford Journal of Legal Studies* 40 (2020): 878–904.
11. Matrimonial Proceedings and Property Act 1970. See Rosemary Auchmuty, 'Feminism, Property and Divorce Law Reform in the 1960s', in *Fifty Years of the Divorce Law Reform Act 1969*, ed. Joanna Miles, Daniel Monk and Rebecca Probert (Oxford: Hart, 2022), 75–96.
12. Royal Commission on Marriage and Divorce (1951–55), *Report* (Cmd 9678: Her Majesty's Stationery Office, 1956), 357.
13. Royal Commission on Marriage and Divorce (1951–55), *Report* (Cmd 9678: Her Majesty's Stationery Office, 1956), 357.

14. Griselda Rowntree and Norman H. Carrier, 'The Road to Divorce in England and Wales 1858–1957', *Population Studies* 11 (1958): 211.
15. HC Deb 9 March 1951 vol. 485 c926 (numbers in parentheses in the text in the rest of this chapter refer to paragraph numbers from this source).
16. Glanville Williams (ed.), *The Reform of the Law* (London: Gollancz, 1951), 142.
17. Numbers of divorces in England and Wales steadily increased from 1958 until 2022, when the number fell below that of 1971 for the first time. This was probably due to the fact that the marriage rate had fallen from a high point in 1972 of 84 (men per 1000) and 63.5 (women per 1,000) to a low of 20.3 (men) and 18.3 (women) in 2022, so there were now fewer marriages to dissolve. National Office for Statistics, Divorces in England and Wales 2022 (22 February 2024); Marriages in England and Wales 2021 and 2022 (20 June 2024).
18. Jean Mann, *Woman in Parliament* (London: Odhams, 1962), 27.
19. David Lewis Jones, 'White, Eirene Lloyd, Baroness White', in *Dictionary of Welsh Biography*. <https://biography.wales/article/s6-WHIT-LLO-1909>, accessed 19 December 2024.
20. Of course, as her husband had been divorced a church wedding might not have been available.
21. But both women interestingly, had supported their widowed mothers. Jones, 'White. Eirene Lloyd'. Godfrey Winn, *The Queen's Countrywomen* (London: Hutchinson, 1954), chapter 3, 'Our Pat'.
22. Winn, *The Queen's Countrywomen*, n21, 40.
23. Winn, *The Queen's Countrywomen*, 37.
24. A procedure for presuming the death of a spouse after seven years of absence, dissolving the marriage, existed under s 16 of the Matrimonial Causes Act 1950. One can only assume that the woman was unaware of it or unable to satisfy the conditions for the court to exercise its discretion.
25. '[W]earing a black costume', the *Manchester Evening News* tells us, whether in conformity with the press's usual practice of commenting on women MPs' dress, or to suggest that Mrs White was in mourning for the loss of her Bill.
26. 13 April 1951.
27. Phyllis Whiteman, *Speaking as a Woman* (London: Chapman and Hall, 1953), 66.
28. Edith Summerskill, *A Woman's World* (London: Heinemann, 1967). See Thompson, *Quiet Revolutionaries*, 167–70.
29. It is of course ironic that neither herself occupied this role.
30. Thompson, *Quiet Revolutionaries*, 161.
31. Thompson, *Quiet Revolutionaries*, 134. The undue influence in mortgage cases of the later twentieth century bear out the truth of her prediction.
32. 'Observer', Portrait of Eirene White, *Liverpool Daily Post*, 27 November 1967.
33. Summerskill, *A Woman's World*, 41.
34. *Daily News (London)*, 1 March 1951.
35. HC Deb 25 April 1952 vol. 499 c899.
36. HC Deb 8 May 1953 vol. 515 c807.
37. *Blackwell v. Blackwell* [1943] 2 All ER 579.
38. 'Divorce Law Reform?' *Modern Law Review*, 19 (1956) 578–600.
39. Catriona Beaumont, *Housewives and Citizens: Domesticity and the Women's Movement in England, 1928–64* (Manchester: Manchester University Press, 2013), 202.

40. Royal Commission, Summary of Recommendations Part IV, 313.
41. Florence Earengy, *A Milk-White Lamb: The Legal and Economic Status of Women* (National Council of Women of Great Britain, rev. ed. 1953), 36–7, instancing the result in *Rimmer v. Rimmer* [1953] 1 QB 63 where the wife should have got more than half.
42. Law of Property Act 1925, s36.
43. Married Women's Property Act 1964.
44. HC Deb 25 April 1952 vol. 499 c943.
45. The percentage of married women in paid employment had increased from 26 per cent to 35 per cent between 1951 and 1961. Jane Lewis, *Women Since 1945* (Oxford: Basil Blackwell, 1992), 65.
46. *Re Rogers' Question* [1948] 1 All ER 328.
47. *H v. H* [1947] 62 TLR 645.
48. Married Women's Property Act 1882, s 17.
49. Matrimonial Homes Act 1967.
50. *Rimmer v. Rimmer* [1953] 1 QB 63.
51. Para 678.
52. And still in force today, Matrimonial Causes Act 1973, s 25.
53. HC Deb 16 April 1958 vol. 208 cc758–78.
54. Mann, *Woman in Parliament*, 32.
55. Lena Jeger (Holborn & St Pancras South), Freda Corbet (Camberwell North) and John Parker (Dagenham).
56. Olive Banks, *The Politics of British Feminism, 1918–1970* (Aldershot: Edward Elgar, 1993), 59.
57. Cretney, *Family Law in the Twentieth Century*, 285.
58. Cretney, *Family Law in the Twentieth Century*, 324.
59. Thompson, *Quiet Revolutionaries*, 169.
60. Stetson, *A Woman's Issue*, 171–2.
61. McGregor, *Divorce in England*, 149.
62. Erna Reiss, *Rights and Duties of Englishwomen: A Study in Law and Public Opinion* (Manchester: Sherratt & Hughes, 1934), viii–ix.
63. Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (Oxford: Martin Robertson, 1978).
64. Charles Doughty (Conservative, East Surrey) in the Women's Disabilities Bill 1953 HC Deb 8 May 1953 vol. 515 c835.
65. HC Deb 25 April 1952 vol. 499 c907.
66. Alva Myrdal and Viola Klein, *Women's Two Roles* (London: Routledge, 1956).
67. Reiss, *Rights and Duties of Englishwomen*, 79.
68. Exceptionally, C.P. Harvey, 'On the State of the Divorce Market', *Modern Law Review* 16 (1953): 187 did question the need for marriage.
69. For example, Cicely Hamilton, *Marriage as a Trade* (London: The Women's Press, [1909] 1981).
70. For example, Mona Caird, *The Morality of Marriage* (London: George Redway, 1897).
71. Lewis, *Women Since 1945*, 5.

72. Harry Hopkins, *The New Look: A Social History of the Forties and Fifties* (London: Secker & Warburg, 1964), 141.
73. Michael Young and Peter Willmott, *Family and Kindship in East London* (London: Routledge and Kegan Paul, 1957).
74. Peter Lewis, *The Fifties: Portrait of a Period*, 2nd ed. (London: Cupid Press, 1989), 65.
75. For example, Carol Smart, *The Ties That Bind* (London: Routledge, 1994).
76. HC Deb 25 April 1952 vol. 499 c951.
77. Hopkins, *The New Look*, 201.
78. Brian Harrison, *Seeking a Role: The United Kingdom 1951–1970* (Oxford: Clarendon Press, 2009), 296.
79. Helen McCarthy, 'Women, Marriage and Paid Work in Post-War Britain', *Women's History Review* 26 (2017): 48.
80. Virginia Nicholson, *Perfect Wives in Ideal Homes: The Story of Women in the 1950s* (New York: Viking Penguin, 2015), 205.

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Chapter 8

Mrs Gladys Hutchinson, Lord Upjohn, and the case of the bankrupt ‘spendthrift . . . ne-er-do-well and . . . waster’

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Introduction

This chapter examines a bankruptcy case from the 1950s to see whether it qualifies as a ‘feminist judgment’ from a socio-legal perspective. It uses feminist and afterlives methodologies to investigate and contextualise Mrs Gladys Hutchinson’s life, experience, and role in *Stevens v. Hutchinson* [1953] Ch. 299. Upjohn J’s ruling meant that Mrs Hutchinson and the couple’s three children were able to stay in the matrimonial home at 29 Carr Lane, York. The judgment in *Stevens v. Hutchinson* should be viewed as a significant marker in the evolution of law within the realm of bankruptcy and the family home, a brief moment of positive concern for women that quickly passed.

Gladys Warburton was born in 1896 in York.¹ She married Henry Thornburn Hutchinson at the age of twenty in 1916 and they had three children, Enid, Yvonne and Raymond. The marriage continued until the death of Henry Hutchinson in 1960. Mrs Hutchinson is important because she was the successful second defendant in a 1953 case, *Stevens v. Hutchinson*.² Mrs Gladys Hutchinson was fifty-seven at the time of the litigation and the three children were adults.

Mr Justice Upjohn presided over *Stevens v. Hutchinson* on 24 and 25 February 1953 in the Chancery Division of the High Court in London. This

first instance decision was a bankruptcy case that involved an application for an order for sale of the matrimonial home by a creditor of the debtor husband. The judgment creditor was owed £2,008 17s. 3d.

Though women had enjoyed equal status in land law since the reforms of 1925, in the 1950s it was usual for homes to be conveyed to husbands alone, making it harder for a wife to establish a share. Unusually, however, Mrs Hutchinson shared the property with Henry Hutchinson as tenants in common under a trust for sale. As tenants in common the couple were each entitled to their respective equal shares in the home as long as the trust subsisted, but once it came to an end the property would have to be sold and their entitlement would simply be in the proceeds of sale. This meant that, had Mr Hutchinson's creditors taken possession, her home would have been sold and all she would get would be her half-share of the proceeds.

Stevens v. Hutchinson established that a deserted wife whose husband was bankrupt and whose creditor sought a sale could stay in the 'matrimonial home'. This chapter characterises *Stevens v. Hutchinson* as a waymarker on the path of stakeholder interests in the family home on bankruptcy en route to the harsher Insolvency Act 1986 (IA1986) and Trusts of Land and Appointment of Trustees Act 1996 (TOLATA1996). It examines the thesis that Lord Upjohn (as he became), in deciding for the woman, was motivated by a desire to assist deserted wives, at the time a matter of concern for English society. Upjohn heard a number of cases in the realm of co-ownership of a family home where a mortgagee or creditor sought sale, and an occupier sought protection. In allowing Mrs Hutchinson to remain in her home, was *Stevens v. Hutchinson* a feminist judgment?³

The case

The factual background is a classic example of a situation that engaged feminist sympathies in the 1950s. The property, 39 Carr Lane, York, had been devised to Mr and Mrs Hutchinson in equal shares as tenants in common.⁴ The gift was made under the will of the husband's father, dated 18 May 1944, and it was intended to provide a home for the couple. When Mr Hutchinson became bankrupt, one of his judgment creditors was appointed as a receiver in 1951 over his interest in the family home by way of equitable execution. The plaintiff creditor made an application to the court for an order for sale with vacant possession pursuant to section 30 Law of Property Act (LPA1925) as a 'person interested' so that he could recoup the judgment debt owed to him.

Upjohn refused to grant the order for sale.

First, in Upjohn's view the creditor was not a 'person interested' for the purposes of section 30 by virtue of his position as a receiver. Section 30 meant a person interested in some proprietary right under the trust for sale. Section 30 stated that 'any person interested may apply to the court'.⁵ But existing case law had established that a 'person interested' only referred to those who had a beneficial interest in the trust for sale – here, the husband and wife – not a creditor/receiver (who only had a personal interest).⁶ Upjohn decided the case on this point, stating, 'A receiver so appointed is not, in my judgment, a person interested for the purposes of section 30.'⁷ This meant there was no need (or power) for Upjohn to exercise his discretion in favour of the wife.

Second, this was unregistered land⁸ and the appointment of a receiver, as Lindley LJ explained in *Re Potts*, operates as an injunction to stop the dispersal of the proceeds of sale of the property when it is sold *before* the receiver has taken his share.⁹ The receiver had no charge over the property (unlike a mortgagee, for instance) and his only interest was in the proceeds of sale *when the property was sold*. But the property could only be sold if the husband or wife asked for it to be sold and the court granted the sale. Upjohn held that the appointment of a receiver did not give the creditor a charge over the proceeds of sale of the property under section 195 of the LPA1925. Any such charge was confined to equitable interests in the proceeds of sale of land.

This brings us to the third and most important part of the judgment for the purposes of the feminist judgment critique being undertaken in this chapter. The third element of Upjohn's decision was that it would not have been right, in the circumstances of the case, to make an order for sale. Mrs Hutchinson's counsel had argued, among other points, that if the merits of the case were examined they were with the defendant, Mrs Hutchinson. He referred to *Bendall v. McWhirter*¹⁰ as authority for the proposition that the position of a deserted wife left in the matrimonial home had been considered and recognised by the courts.¹¹ Mrs Hutchinson gave evidence that the husband had been a spendthrift throughout the marriage, and that she had repeatedly lent him money. She contended that she had very little means or assets beside the house where she lived. Counsel submitted that in the circumstances it would be wrong to turn Mrs Hutchinson out of her home by ordering a sale.

Upjohn appears to accept this argument but he did not refer to *Bendall v. McWhirter* in his judgment.¹² He simply observed:

but this much is clear: that both the plaintiff and the second defendant have suffered from the first defendant, the husband, who has treated the plaintiff very badly and who appears to have treated his

wife extremely badly for many years. He is a ne'er-do-well and a waster, but this is the *matrimonial home and the wife who is in equity owner of half the house is living there . . . I can see no ground on which it would be right or proper for the court to order a sale of the property in order that the judgment creditor may be satisfied.*¹³

Albery's supplementary argument was deployed in case he was wrong about the receiver not being an interested person. Although everyone agreed that Mrs Hutchinson was a worthy party in the case and the husband was not, what Upjohn appears to be saying is, irrespective of the evidence, *if* the receiver had been able to obtain an order for sale, the court would still not have ordered one.

Upjohn's refusal to grant the order for sale meant Mrs Hutchinson was able to stay in the matrimonial home at 29 Carr Lane, York.

A feminist judgment?

What makes *Stevens v. Hutchinson* look feminist is, first and most obviously, that the outcome favoured Mrs Hutchinson. The creditor's claim for sale of the property failed, and she was allowed to remain in her home. This is in marked contrast to the position of wives in her position under the current legislation, in which the creditor would almost probably, thanks to the wording of section 335A IA 1986 (discussed later), have been granted the sale. From the perspective of today's law, therefore, it would seem that in *Stevens v. Hutchinson* the judge balanced the interests of the wife and the creditor and gave prominence to the wife out of sympathy for her position.

A second apparently feminist feature was the judge's remark that, had the creditor been able to call for a sale, he would still not have granted it. Everyone in this case agreed that Mrs Hutchinson was a worthy party and the husband was not, so the judge's comment looked like a recognition of her superior claim to justice.

Unfortunately, neither of these features of this case make it a feminist one. On the first point, Upjohn J decided it on the purely technical ground that the creditor was not an 'interested party' who could call for a sale under section 30 LPA1925. Only the parties to the trust – Mr and Mrs Hutchinson – were interested parties. So the creditor failed to get his sale, and Mrs Hutchinson's success had nothing to do with any judicial discretion exercised in her favour.

On the second point, Upjohn J as a lower court judge was obliged to follow existing precedent that a deserting husband could not evict his

wife from the family home. This had been established in *Bendall v. McWhirter* following considerable judicial creativity on the part of Lord Justice Denning (as he then was) to develop what he called the 'deserted wife's equity'.¹⁴ So, Upjohn reasoned, if the husband could not evict her, then the creditor ought not to be in a better position than the husband. Once again, Upjohn was merely applying the law – one which, as it later emerged, he did not really agree with, but was bound to follow.

In their pioneering project *Feminist Judgments: From Theory to Practice*, Rosemary Hunter, Clare McGlynn and Erika Rackley set out the features of a feminist judgment:

- (1) asking the woman questions, (2) including women, (3) challenging gender bias in legal doctrine and judicial reasoning, (4) contextualisation and particularity with the reality of women's lived experience, (5) seeking to remedy injustices and to improve conditions of women's lives, (6) promoting substantive equality, (7) drawing on feminist legal scholarship to inform decisions.¹⁵

The question for this chapter is whether, in essence, Upjohn demonstrated a 'feminist consciousness or philosophy' in his judgment;¹⁶ whether, instead of engaging in a 'masculine hierarchy of rights'¹⁷ approach with creditors, the husband, and the wife participating in the insolvent estate, he was adopting 'a form of moral reasoning based on an understanding of individuals as embedded within webs of relationships rather than as disconnected free-floating entities'.¹⁸

There is no evidence of any of this. In contrast to Denning, who certainly did foreground the 'right' of the deserted wife to remain in her home *in spite of* the competing property rights of husband or creditor, Upjohn decided this case on the basis that the creditor *had* no right, so no remedy. End of question. He did not ask whether the existing law had a disproportionate effect on the woman in the case, he made no generalisations about women at all: Mrs Hutchinson was only discussed as a party to the proceedings. He certainly did not challenge gender bias and had no concern to improve the conditions of women's lives in general. He made no reference to any feminist literature which, though hardly present in legal scholarship at this time, would certainly have been prominent in feminist campaigning literature and the media.¹⁹ Nor would we have expected him to do any of this: not only was he a conventional Chancery judge, but he was a judge at first instance who was not free (unlike Denning in the Court of Appeal) to stray beyond the law he had to follow and apply.

But one *can* say that by referring to Mr Hutchinson's character and behaviour, and to Mrs Hutchinson's financial situation, Upjohn was able to recognise the place of the wife in the dynamics of the case and give

context to Mrs Hutchinson's position, reflecting a post-war social concern (though he did not mention it) that increasing numbers of marriages were breaking down and exemplary wives were being left by unworthy husbands without adequate financial support.²⁰

As it happened, Henry Hutchinson had had previous contact with the law. In 1922, when aged twenty-eight he was involved in the theft of some postal orders from his father's post office. The *Blyth News* reported that he had been committed for trial by York magistrates on a charge of having stolen a dozen money orders and with having forged and uttered three of the orders for the payment of £40, £38 10s 6d, and £40, quite substantial sums at the time. Henry Hutchinson is reported as saying:

I am sorry for what I have done. I intended to repay the money I received for the orders at Manchester the same day after backing a horse at Chester, but unfortunately the horse did not run, and I had no other alternative but to make further investments the following days in an attempt to make good but without success.

I am quite aware of the seriousness of what I have done, but I appeal that a lenient view will be taken, not for my own sake, but on account of my father, who is a prominent citizen of York, my wife and three children for the disgrace attached to public proceedings will, I am sure, affect them to a great extent, despite the fact that they are entirely innocent.²¹

It is interesting (and ironic) to note the prominence Henry Hutchinson (doubtless on the advice of his counsel) gave to the ramifications of his actions on his wife and children, a concern that seems to be absent by the time he gets to the formally bankrupt stage of his life in the 1950s. In 1922 he was imprisoned for twenty-one months at the assizes for the North and East Riding of Yorkshire.²² It is not clear from the reported decision in *Stevens v. Hutchinson* whether Upjohn was aware of this episode, but it may have contributed to the judge's use of the language of 'waster', 'ne-er do well' and 'spendthrift'.

Mrs Hutchinson, by contrast, comes out well in this judgment, which shows that in the early 1950s courts were aware of the difficulties for deserted wives who faced losing their homes through no fault of their own. They recognised that, under the preferred form of family organisation at the time, husbands were breadwinners and wives homemakers, often deriving their entire income and rights from their relationship to the husband. In land law, however, homes were financial assets that should ideally be available for mortgage, sale and transfer to creditors. The decision in *Stevens v. Hutchinson* meant that the asset value in the home could not be realised and the house could be conceptualised as a home and left

at the disposal of the wife and family.²³ This worked well for women as long as the doctrine survived, but its days were numbered, and Upjohn, once he reached the House of Lords, was one of the judges who brought it to an end.

A feminist judge?

There were many reported cases in the 1950s in which the wife succeeded under the deserted wife's equity device.²⁴ However, the approach was much disliked by formalist judges and lawyers because it was not an interest that could be entered on any Register, so a third party could not have notice of it and would not be bound by it.²⁵ Consequently, although the deserted wife's equity started out being good against third parties as well as husbands, it was soon narrowed down by the courts to being simply a personal right against the husband.

In the same year as *Stevens v. Hutchinson*, Upjohn sat at first instance in October and November in another bankruptcy and matrimonial home case, *Lloyds Bank Ltd v. Trustee of the Property of O – A Bankrupt*.²⁶ As he would later state in the House of Lords, the case is authority for the proposition that a 'wife on entering a matrimonial home, which is the property of her husband, has no rights, even inchoate, in that home which the law will recognise or protect'.²⁷ Here he was simply stating the law, but not expressing any view as to whether this was a good thing or not. The case related to a flat in Bournemouth. The husband and wife married in 1940 and resided in the flat until the husband deserted the wife in 1952. She then obtained an order under section 17 Married Women's Property Act 1882 to allow her to continue to reside in the matrimonial home. While she was in a nursing home, the husband removed all the furniture and her clothes from the matrimonial home. On her return he took her and the children to a house belonging to the wife's sister. The mortgagee claimed possession of the flat pursuant to two legal charges which had been granted in October 1945. The wife, meanwhile, sought to stay in the matrimonial home with her three children. So the question before the court was whether her interest or that of the mortgagee prevailed. By this time the husband had been made bankrupt on his own petition after failing to repay the amount owing on the mortgages.

The mortgagee's right to possession prevailed. While the wife's right of occupation was good against her husband, Upjohn held that for the right to be effective against a mortgagee it had to arise by an act or event in law before the date of the mortgage. Priority is a key concept in land law, with rights created earlier having priority over those created later. Since the desertion of the wife occurred in 1952, that is, after the date of the mortgages

of 1945, the mortgagee's right had priority. Upjohn distinguished *Bendall v. McWhirter*²⁸ by focusing on the fact that 'Denning, LJ, who stated the law more favourably to the wife than the majority of the court, did not consider that any right to possession arose in the wife before she was deserted'.²⁹

Critics had already pointed out that the deserted wife's equity could equally have arisen at the date of the marriage rather than the date of the desertion.³⁰ Counsel for the wife also put forward a broader argument that the wife, upon entering the matrimonial home, had a right to continue in occupation of the matrimonial home, which even bound prior mortgagees. Upjohn declined to accept 'so fantastic a proposition'.³¹ This is hardly a dispassionate comment.

In 1956 Upjohn revisited the deserted wife question again in *Westminster Bank Ltd v. Lee*.³² A charge had been granted in 1939 by a husband over a freehold house, Timberscombe, which was a matrimonial home. This charge was paid off but in November 1948 a second charge created an equitable mortgage over the property to secure the husband's overdraft. Shortly before this date in September 1948 the husband deserted his wife. The bank was not aware of this at the time of the mortgage. In 1951 the wife obtained a court order restraining the husband from ejecting her from the matrimonial home until he had provided other suitable accommodation. The bank sought possession of the house.

Again, the bank was successful. Upjohn made some pertinent comments regarding the wife's equitable interest. He stated, 'My own view [is that] a deserted wife has no more than a status of irrevocability by the husband; but . . . that a wife has an equity which is enforceable against purchasers taking with notice'.³³ The problem was that the deserted wife's equity was not capable of registration and so could not provide the required notice. For Upjohn, then, while the deserted wife's equity could prevent a husband from evicting his wife from her home, she had no such right against a third party such as a mortgagee. The formal rules of land law prevailed.

Neither of these cases offers any evidence that Upjohn was a feminist. Both were decided in terms of the narrowest interpretation of the law, both explicitly rejecting any wider view.

The case that finally destroyed the deserted wife's equity was *National Provincial Bank v. Ainsworth*.³⁴ By the time it came before the House of Lords in 1965, Upjohn was a Lord of Appeal in Ordinary and sat as one of the five judges in this case. It differed from *Stevens v. Hutchinson* in that in *Ainsworth* the dispute was not between a deserted wife and a creditor but between a deserted wife and a mortgage lender seeking to take possession of the home and sell it. In *Ainsworth*, moreover, the husband was sole owner whereas in *Stevens v. Hutchinson* the wife had a half-interest in the property.

The facts were relatively straightforward. The matrimonial home was the freehold property at 124 Milward Road, Hastings, Sussex, purchased by the car-dealer husband, Gordon Ainsworth, in 1956. On 17 August 1957 the husband deserted that home and his four children and wife, Marjorie Patty Ainsworth, who were in occupation of it. He went to live with his mother in one of the other two homes he owned. In 1961 the wife obtained a judicial separation giving her custody of the children and maintenance for them, as well as rent-free accommodation in the house. In 1959 the husband transferred the matrimonial home to his company (Hastings Car Mart Ltd, located at 7 Bank Buildings, Hastings) through which he ran his business. The house was then used as collateral to form part of a mortgage transaction with the National Provincial Bank Ltd. The company defaulted and in November 1961 and April 1962 the bank sought possession of the matrimonial home to repay a debt of £2,308. It claimed not to have been aware of the husband's desertion or the wife's occupation of the property.

In possession proceedings the question before the court was whether a deserted wife's right in the matrimonial home, which was registered land, was an 'overriding interest' under section 70(1)(g) of the Land Registration Act 1925 (LRA1925) (now repealed and replaced by Schedule 3 of the Land Registration Act 2002). At first instance, Cross J held that the wife's interest was not an interest in land but a mere personal right against her husband, so could not be overriding under the section 70 test. In consequence, the judge made an order for possession. The wife appealed to the Court of Appeal which, with Lord Denning as one of the three judges, allowed her appeal and held that she had a right to remain in the house.

The bank appealed to the House of Lords who held that the right in the case was not one which fell under section 70 LRA1925.³⁵ That section dealt with rights in reference to land which had the quality of being capable of enduring through different ownerships of the land according to normal conceptions of title to real property. Mrs Ainsworth was in actual occupation but her right to remain in the property was a mere personal right against her husband arising from her status as a wife.³⁶ Any equitable right based on the idea of the deserted wife's equity of *Bendall v. McWhirter* fame was held not to exist by the House of Lords.³⁷ The wife then had no interest that could bind the bank, so the bank was entitled to possession and she lost her home.

As the author of Upjohn's entry in the *Oxford Dictionary of Biography* noted, 'Upjohn's learned opinion in *National Provincial Bank v. Ainsworth* (1965) demonstrated conclusively that the notion that a wife could assert a so-called equity entitling her to stay in the husband's property against the wishes of a purchaser or mortgagee was inconsistent with fundamental principles of property law.'³⁸ We can only conclude that Upjohn was in

truth a formalist judge throughout his career who, however sympathetic he may have been to Mrs Hutchinson's position in 1953, was not prepared to extend the same sympathy to Mrs Ainsworth twelve years later.

There are, indeed, several comments from the other judges which suggest that they had greater concern for the position of deserted wives. Lord Hodson noted that 'the common law lends her [the wife] but slender assistance'.³⁹ Lord Cohen said, 'I arrive at this conclusion with some reluctance for I recognise that the respondent is an admittedly wronged and deserted wife . . . the existing law I think is in an unsatisfactory state, particularly as regards the position of the deserted wife and of the third parties.'⁴⁰

These opinions indicate that the Lords believed that Parliamentary action was required to remedy the problems. The result was the Matrimonial Homes Act 1967 (MHA1967) which gave spouses with no beneficial interest the right to occupy the home if their interest was entered on the register of title.⁴¹ This allowed third parties to see before they purchased an interest that there was a prior right that would bind them. As a form of protection, it was not nearly so effective as the deserted wife's equity had been, since the great majority of wives would have had no idea, and would probably have dismissed it if they had, that they needed to protect their right of occupation in case they were deserted. And this MHA 1967 did not apply to wives who, like Mrs Hutchinson, did have an interest in the property as a tenant in common.

Afterlife – even less feminist

We can now move to our second lens of critique for *Stevens v. Hutchinson*. The afterlives methodology is drawn from Terrence Cave's 'Afterlives' perspective.⁴² In his seminal study on Goethe's *Mignon* Cave examined Mignon's afterlives in various forms of artistic output including books, plays, pictures and poems. Cave was able to use these afterlives to highlight the 'value of "Mignon" as an imaginative (cognitive) resource . . . She becomes a figure to think with, both for the authors who imagined and reimagined her and for their readers.'⁴³ For Cave the notion of afterlives fits well with 'genealogical metaphors . . . the family resemblances, the speaking memories, the return of the dead with their enigmatic messages and their unassuageable craving for attention.'⁴⁴

'Afterlives' provides a framework through which an examination of law reform can take place. This chapter uses Cave's 'Afterlives' perspective to assess *Stevens v. Hutchinson* and its progression through posterity. In addition to Cave's exhibition analogy, that is an exhibition of the subject as if they were being curated in a museum, the approach occasionally

employs a ghost metaphor. 'Marks' in posterity are an important aspect of the afterlives lens. These marks are signifiers, gateposts, visible signs or things that someone has left in the present which reminds posterity of their time and impact. These 'marks' can include words and images of other incidents which help towards 'notions of posthumous fame'.⁴⁵

If we couple 'Afterlives' and the 'marks' which are necessary for posterity we can start to examine and explore how, if at all, *Stevens v. Hutchinson* echoes from 1953 to the present day.

It is a truism that a couple's home usually makes up the most valuable asset in the bankruptcy estate. Today, orders for sale, prior to a bankruptcy order, are regulated by section 14 TOLATA1996⁴⁶ and the criteria are set out in section 15 TOLATA1996.⁴⁷ However, when a bankruptcy order is made the section 15 provisions are replaced by those in section 335A IA1986. These provisions stipulate that, unless there are exceptional circumstances, the creditors' interests will outweigh all others, and the property will be sold. These two statutes are major marks in the history of co-ownership disputes and the division of asset value.

What might constitute 'exceptional circumstances' has been considered in the case law both in relation to the old section 30 LPA1925 cases on orders for sale, now been replaced by sections 14 and 15 of TOLATA1996, and under section 335A IA1986. It is worth pausing for a moment to consider these older authorities. As Neuberger J (as he then was) observed in *The Mortgage Corporation v. Shaire* in relation to these older section 30 authorities,⁴⁸

to throw over all the wealth of learning and thought given by so many eminent judges to the problem which is raised on an application for sale of a house where competing interests exist seems somewhat arrogant and possibly rash . . . I think it would be wrong to throw over all the earlier cases without paying them any regard.⁴⁹

Section 30 cases, like *Stevens v. Hutchinson*, are therefore marks in the afterlives sense of the treatment of the wife in property disputes.

Re Holliday involved a married couple who bought a home in 1970 for £7,850.⁵⁰ Of that amount, £6,500 was raised on a mortgage. The couple had three children, but the husband left and moved in with another woman. The court ordered that he should pay maintenance to his wife. He was declared bankrupt as part of a strategy (his bankruptcy was said to be tactical) to avoid paying the maintenance. Creditors in the bankruptcy then tried to force a sale using section 30 LPA1925. This would have meant that the wife and children would have had to leave the home. The court permitted the sale, but it was delayed until the eldest child reached sixteen years of age.

Re Citro (A Bankrupt) involved two brothers (Carmine and Domenico) who were adjudicated bankrupt.⁵¹ There were also dependants in the

case, both brothers having been married and fathered several children. The brothers' only assets were their half shares of beneficial interests in their respective matrimonial homes. The creditors applied for an order for sale using section 30 LPA1925. The effect of a successful order would have been to remove the wives and children from their respective homes. At first instance Hoffmann J (as he then was) took account of their situation. He noted that the half shares to which the wives would be entitled would be insufficient for them to acquire other accommodation in the area and the educational problems caused by moving the children. The judge imposed a provision for postponement until the youngest child in each case attained the age of sixteen. The Court of Appeal reduced the postponement period to six months.⁵²

In *Re Citro* Nourse LJ made it clear that simple inconvenience for a wife and family and not having a home to go to were not exceptional circumstances.⁵³ After reviewing the authorities, he observed:

Where a spouse who has a beneficial interest in the matrimonial home has become bankrupt under debts which cannot be paid without the realisation of that interest, the voice of the creditors will usually prevail over the voice of the other spouse and a sale of the property ordered within a short period. The voice of the other spouse will only prevail in exceptional circumstances. No distinction is to be made between a case where the property is still being enjoyed as the matrimonial home and one where it is not.⁵⁴

Nourse LJ then went on to examine what might constitute exceptional circumstances.

it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.⁵⁵

He concluded that 'the personal circumstances of the two wives and their children, although distressing, are not by themselves exceptional'.⁵⁶ What Nourse is saying, in other words, is that for a woman and her family to be left homeless thanks to her husband's bankruptcy (note: not *her* 'debt and improvidence') is not exceptional because it is common, indeed normal.

The family home does not make up one of the types of assets that are kept out of the bankruptcy estate. In England and Wales the bankrupt's estate is defined by section 283 IA1986. This includes the family home or at least the bankrupt's interest in the matrimonial home.⁵⁷ Indeed, as Milman has pointed out, 'the realisation of this "jewel in the crown" of the bankrupt's estate is a top priority for any trustee in bankruptcy'.⁵⁸ Unfortunately, this has the 'unavoidable corollary . . . that the bankrupt is rendered homeless, and that this fate is also experienced by any spouse or partner, as well as children and other dependants who may share the family home'.⁵⁹ The IA1986 provisions on the family home are dancing on a pin head in the overall battle for value between mortgagees and occupiers. This is because the home is still available for creditors, at the expense of spouses and dependants. Creditors are still able to realise value from the family home despite various stakeholder entitlements. English and Welsh land law is ill-equipped to understand the nature of the family home. Ultimately, it is viewed as a realisable asset. Sales are postponed, not outlawed entirely as is the case in other jurisdictions.⁶⁰ These provisions and the case law suggest that creditor dominance is all pervasive.

The IA1986 and TOLATA1996 provisions are certainly Cave 'Afterlives' marks in the historical development of how wives are treated when a husband is made bankrupt. In the final analysis the legislation does not help the wives of bankrupt men. Section 14 of TOLATA1996 gives receivers that very right to call for a sale of the home which the plaintiff in *Stevens v. Hutchinson* was seeking. Section 335A IA1986 states that, while the interests of others will be considered, unless the circumstances are exceptional the interests of the creditors will prevail, and the property will be sold. Mrs Hutchinson's circumstances, being so common then as they are now, would not count as exceptional under the *Re Citro* formula. Thus, Mrs Hutchinson would almost certainly have lost had the IA1986 and TOLATA1996 been in force when she was hoping to stay in the family home.

Conclusion

Upjohn handed down his *Stevens v. Hutchinson* judgment in 1952. All co-owners today have a right of occupation of their property but if one of the occupants has no interest under an express trust, she or he must first establish an interest under the tricky remedy of the implied trust. This difficulty could be easily remedied if conveyancing solicitors ensured that couples held their property in definable shares, equal or otherwise, as part of the original conveyancing process. Fortunately this situation is much rarer today than it was in the 1950s, as most couples' homes are

conveyed to them jointly, whether they are married or not, as was in the case of Mr and Mrs Hutchinson.

Outside of a divorce or dissolution of a civil partnership, co-owners in this position will take their chosen shares if they decide to sell the property. If a couple divorces or dissolves a civil partnership, however, the family courts have complete discretion to re-allocate the marital property according to family law principles.⁶¹ This discretion, which tends to benefit wives who have made a greater contribution to the welfare of the family than to the property itself in financial terms, did not exist in the 1950s. It does not apply to cohabiting couples who must still establish their shares on property law principles.

Problems arise when a co-owner's right of occupation comes into conflict with the right of a third party – a judgment creditor, as in *Stevens v. Hutchinson* or a mortgagee, as in *National Provincial Bank v. Ainsworth*. This chapter's concern is not how Mrs Hutchinson could establish an interest in the land – she already had one under a statutory trust – nor whether she had any remedy against her deserting husband. Rather, it is about whether she could continue in occupation when faced with a third party seeking to take possession of and sell the property. The operation of the deserted wife's equity in conjunction with the restricted definition of an interested party under section 30 LPA1925 allowed her to do so. Both have now disappeared. First the deserted wife's equity, giving deserted wives right of occupation priority against their husbands, was ended by the House of Lords in *Ainsworth*. Then her position vis-à-vis creditors was clarified in statute in ways that clearly favoured creditors.

So one of the lessons we learn from this story is that feminist outcomes can be reversed and when new legislation is passed, it should not be assumed that it will necessarily improve things.⁶² The continued dominance of secured creditors in mortgage and insolvency law has been noted time and time again.⁶³ Lenders threaten to stop offering loans for businesses or mortgages to help people buy their home.⁶⁴ When Goode asked if the law was too favourable to secured creditors in the early 1980s he could have equally been discussing personal insolvency and the position of the wife.⁶⁵ *Stevens v. Hutchinson* represented a brief moment of concern for women in the early 1950s that was quickly replaced by a return to the status quo favouring commercial and property interests.

Notes

* I would like to thank Professor Rosemary Auchmuty and Professor Fiona Cownie and the audience members at the IALS conference 'The Neglected Decade: Law in the 1950s' (23 November 2022) for their helpful and constructive comments. I would

particularly like to thank Dr Mari Takayangi of the Parliamentary Archives for her assistance and discussions on the genealogy aspects of this chapter and Mr John Briggs, Dr Mark Crosby and Dr Shirley Tung for their helpful and constructive feedback on earlier drafts. Any errors or omissions are the author's sole responsibility.

1. 1921 Census of England & Wales.
2. [1953] Ch 299.
3. On feminist judgments see further: Rosemary Hunter, Clare McGlynn and Erika Rackley (eds). *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010). (Hereafter *Feminist Judgments*.) For a discussion of feminist legal history see Rosemary Auchmuty and Erika Rackley, 'The Case for Feminist Legal History', *OJLS* 40, no. 4 (2020): 878–904.
4. The instrument, dated 4 September 1946, noted: 'an estate in fee simple upon trust to sell the same with power to postpone the sale thereof and to hold the net proceeds of sale and the net income till sale in trust for ourselves as tenants in common in equal shares'.
5. s30 LPA1925.
6. See, for example, *Ideal Bedding Co. Ltd. v. Holland* [1907] 2 Ch. 157, *Flegg v. Prentis* [1892] 2 Ch. 428,
7. [1953] Ch. 299 at 305.
8. The Land Charges Act 1925 is mentioned in the judgment.
9. In *Re Potts* [1893] 1 QB 648.
10. *Bendall v. McWhirter* [1952] 2 QB 466.
11. See Rosemary Auchmuty, 'Divorce Law Reform and Feminism in the 1950s', in this book.
12. In addition to *Bendall v. McWhirter*, Upjohn also had *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738 and *Re Power* [1947] Ch. 572 for guidance.
13. [1953] Ch. 299, 307, my emphasis.
14. See Lord Denning, *The Due Process of Law* (Butterworths, London, 1980) 210–14. See also Pete Walton, *The 'Deserted Wife's Equity' – Forged in the Black Country; Bendall v. McWhirter [1952] 2 Q.B. 466 – An Historical Note* (2019) WLJ, vol. 3, where the author argues that the case is an important point in the development of women's rights.
15. Hunter, McGlynn and Rackley, *Feminist Judgments*, n32, 35.
16. Hunter, McGlynn and Rackley, *Feminist Judgments*, 5.
17. Hunter, McGlynn and Rackley, *Feminist Judgments*, 21.
18. Hunter, McGlynn and Rackley, *Feminist Judgments*, 21.
19. See Sharon Thompson, *Quiet Revolutionaries: The Married Women's Association and Family Law* (Oxford: Hart Publishing, 2022).
20. See Auchmuty chapter in this book.
21. 'Theft of Postal Orders – York Man's Story of Betting Transactions' *The Blyth News*, Monday 29 May 1922. See also: 'Alleged Postal Thefts: York Man Appears Before the Local Magistrates', *Yorkshire Evening Post*, Thursday 18 May 1922.
22. 'Post Office Robbery'. *Sheffield Daily Telegraph*, Friday 7 July 1922.
23. On this tension between asset and home see M.P. Thompson, 'Monied Might or Social Justice? Mortgage Repossessions and the Protection of Occupiers', in Frank Meisel and Peter Cook, *Property and Protection: Legal Rights and Restrictions – Essays in Honour of Brian W Harvey* (Oxford: Hart Publishing, 2000), 157; Lorna Fox O'Mahony,

“Re-possessing Home”: A Re-analysis of Gender, Home Ownership and Debtor Default for Feminist Legal Theory’, *William & Mary Journal of Women and the Law* 14, no. 3 (2008); Lorna Fox O’Mahony, ‘The Idea of Home in Law’, *Home Cultures* 2, no. 1 (2005): 25–49; Lorna Fox O’Mahony, ‘Reforming Family Property: Comparisons, Compromises and Common Dimensions’, *Child and Family Law Quarterly* 15, no. 1 (2003): 1–20; Lorna Fox O’Mahony, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge’, *Journal of Law and Society* 29, no. 4 (2002): 580–610; Lorna Fox O’Mahony, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart Publishing, 2007).

24. For example, *Bendall v. McWhirter* [1952] 2 Q.B. 466; *Thompson v. Earthy* [1951] 2 K.B. 596; *Errington v. Errington and Woods* [1952] 1 K.B. 290; *Ferris v. Weaven* [1952] 2 All E.R. 233; *Street v. Denham* [1954] 1 W.L.R. 624; *Westminster Bank Ltd v. Lee* [1956] Ch. 7 (a judgment of Upjohn); *Jess B. Woodcock & Sons v. Hobbs* [1955] 1 W.L.R. 152; *Churcher v. Street* [1959] Ch. 251.

25. See S.J. Bailey, ‘Husband and Wife: Deserted Wife’s “Equity” to Remain in Matrimonial Home. Effect on Husband’s Successors in Title. Mere Equity. “Licence Coupled with an Equity”’, *Cambridge Law Journal* 23, no. 2 (1965): 216–19.

26. [1953] 1 WLR 1460.

27. *National Provincial Bank v. Ainsworth* [1965] AC 1175, p.1230C, per Upjohn. On which see further: Alison Dunn, *National Provincial Bank Ltd v. Ainsworth* (1965) in *Landmark Cases in Equity*, ed. Charles Mitchell and Paul Mitchell (Oxford: Hart Publishing, 2014).

28. [1952] 2 QB 466.

29. [1953] 1 WLR 1460, 1466.

30. R.E. Megarry, ‘The Deserted Wife’s Right to Occupy the Matrimonial Home’, *Law Quarterly Review* 68 (1952): 382.

31. [1953] 1 WLR 1460, 1466.

32. [1956] 1 Ch.7.

33. [1956] 1 Ch.7, 18, per Upjohn.

34. *National Provincial Bank v. Ainsworth* [1965] AC 1175. Hereafter *Ainsworth*. On which see further: Dunn, *National Provincial Bank Ltd v. Ainsworth* (1965). See Thompson ‘Monied Might or Social Justice?’, 158–60.

35. The panel was made up of Lords Hodson, Cohen, Guest, Upjohn and Wilberforce.

36. *Ainsworth*, 1228 (C).

37. *Bendall v. McWhirter* [1952] 2 QB 466. See also: *Street v. Denham* [1954] 1 WLR 624 and *Jess B. Woodcock & Sons Ltd* [1955] 1 WLR 152.

38. ‘Upjohn’, ODNB.

39. *Ainsworth*, per Lord Hodson 1219D.

40. *Ainsworth*, per Lord Cohen, p.1228 (F).

41. For further discussion of the effect of this Act and its successors, see Alison Clarke, *Principles of Property Law* (Cambridge: Cambridge University Press, 2020), 258. For discussion of wives, guarantees, and the family home see: Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Oxford University Press, 1997).

42. Terence Cave, *Mignon’s Afterlives: Crossing Cultures from Goethe to the Twenty-First Century* (Oxford: Oxford University Press, 2011), generally and 36–29 on ‘Afterlives’. Hereafter *Cave Afterlives*. See further: Anna Holland (ed), *Pre-Histories and Afterlives: Studies in Critical Method* (London: Routledge, 2009), 5–8, 135–46.

43. *Cave Afterlives*, 261.

44. *Cave Afterlives*, 36.
45. Jessica Goodman, 'Introduction: What, Where, Who is Posterity?' *Early Modern French Studies* 40, no. 1 (2018): 2–10, 2.
46. Replacing s.30 LPA1925. On TOLATA1996 see: Nicholas Hopkins. *The Trusts of Land and Appointment of Trustees Act 1996* [1996] Conv 411.
47. On the operation of this section see *First National Bank plc v. Achampong* [2003] EWCA 487, [2004] 1 FCR 18 where Blackburne, J noted at para.62: 'The effect of refusing a sale is to condemn the bank to wait - possibly for many years - until Mrs Achampong should choose to sell before the bank can recover anything.'
48. *The Mortgage Corporation v. Shaire* [2001] Ch. 743.
49. *The Mortgage Corporation v. Shaire* [2001] Ch. 761A–B.
50. [1981] Ch 405 (CA). See also: *Woodley v. Woodley (No 2)* [1994] 1 WLR 1167 and *F v. F* [1994] 1 FLR 359 and, *McGladdery v. McGladdery* [1999] 2 FLR 1102.
51. [1991] Ch 142 (CA).
52. Discussed later.
53. *Re Citro (Domenico) (A Bankrupt)* [1991] Ch. 142 (CA).
54. *Re Citro (Domenico) (A Bankrupt)*, p.157.
55. *Re Citro (Domenico) (A Bankrupt)*. On the facts in *Re Citro* Nourse LJ stated, 'the personal circumstances of the two wives and their children, although distressing, are not by themselves exceptional' (159).
56. *Re Citro (Domenico) (A Bankrupt)*, 159.
57. See further: David Milman, *Personal Insolvency Law, Regulation and Policy* (Aldershot: Ashgate, 2005), 52.
58. Milman, *Personal Insolvency Law*, 52. See also 103–9.
59. Ian Fletcher, *The Law of Insolvency*, 5th ed. (London: Sweet & Maxwell, 2017), para.8–021.
60. For example, America, where the home falls outside the bankruptcy estate.
61. Matrimonial Causes Act 1973 section 25.
62. Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks* (Oxford: Hart Publishing, 2019).
63. On which see John Tribe, '“Policy Subversion” in Corporate Insolvency: Political Science, Marxism and the Role of Power Interests during the Passage of Insolvency Legislation', *Insolvency Intelligence* 32, no. 2 (2019): 59. See also: John Tribe, 'When Companies Go Bust, the Law Does Little to Help Suppliers Get Repaid – Here's a Possible Solution', *The Conversation*, 19 February 2021.
64. Ambreena Manji, *Land Law*, in *Great Debates in Gender and Law*, ed. Rosemary Auchmuty (London: Palgrave, 2018), 49.
65. Roy Goode, 'Is the Law Too Favourable to Secured Creditors?' *Canadian Business Law Journal* 8, no. 1 (July 1983): 53.

Chapter 9

The Wolfenden Report, homosexuality and women

Caroline Derry

Introduction

In 1957, the Committee on Homosexual Offences and Prostitution, better known as the Wolfenden Committee, published its report.¹ That publication retains a higher profile than many other legal developments of the 1950s thanks to its cultural as well as legal effects. Although the two cannot be separated, the primary focus of this chapter is on the legal consequences in England and Wales. In considering these, it argues that the story of the Wolfenden Report is one of silences: broken, created or maintained.

Silence might not seem the most obvious lens through which to view the Wolfenden Report since it is credited with introducing new language and a new approach to the law of sexual offences. Most obviously, legislation implementing the committee's recommendations created offences which remained in force for the remainder of the century. More profoundly, the Wolfenden Report encouraged the shift to a liberal approach for sexual offences law which remains influential in the Sexual Offences Act 2003. However, this chapter will establish that the report was not a singular moment of rupture but part of a much longer story. That history diverges from another liberal legal narrative: one of legal history as a story of inevitable progress. This is not the reality; indeed, the report's own liberalism was partial and inconsistent. Rather than being straightforwardly progressive, it established a model of law reform which depends overtly

on liberal principles while covertly maintaining heteronormativity and the sexual double standard. In doing so, it helped prepare the ground for subsequent backlash as well as advances in lesbian and gay rights. Its contribution to the law on prostitution represented no progress at all.

When Wolfenden reported, prostitution was not illegal but surrounding activities such as soliciting and brothel-keeping were. The legal landscape for sexual offences was highly gendered and highly discriminatory. Sex between men was completely illegal, whatever form it took. It occupied an ambiguous position in legal culture as both expressly prohibited (and therefore publicly prosecuted), and subject to a judicial performance of silence. Sex between a man and a woman or two women was legal provided there was consent, and consent was only legally valid if given by a person over sixteen. Within that general rule there were various subtleties: penis-in-vagina sex was given special status in terms of both factual consent and age of consent through specific offences of rape and unlawful sexual intercourse respectively. Sex between women was regulated not only by an indecent assault offence but also by a determined legal silencing of its possibility, a centuries-old approach which had reached its apogee under the Victorians. It depended upon a sharp differentiation between active, desiring masculine sexuality and submissive, undesiring female sexuality. The latter left little space for women to discover lesbianism for themselves but made criminalisation a dangerous source of publicity for this forbidden knowledge. Despite some apparent cracks in the wall of silence in the 1920s, courts and legislators had been quick to reinforce it and it was still standing in the 1950s.

In this context, John Wolfenden was seen as a safe choice to chair the committee: he was vice-chancellor of Reading University and with a 'reputation as a diligent public servant'. (Probably unknown to those who appointed him was that his own son Jeremy was openly homosexual.)² Wolfenden was joined on the committee by fourteen colleagues, a mixture of lawyers, doctors, theologians and politicians. Only three were women: Mary Cohen, vice-president of the Scottish Association of Mixed Clubs and Girls' Clubs; Kathleen Lovibond, chair of Uxbridge Juvenile Magistrates' Court; and Lady (Lily) Stopford, ophthalmologist and magistrate.³ In keeping with the continued silences around homosexuality in particular, the committee was a departmental one meaning that unlike a Royal Commission, its proceedings were held in private.

The Wolfenden Report's recommendations on prostitution were soon given effect in the Street Offences Act 1959. This chapter considers them briefly but focuses primarily upon the part of the Report addressing homosexual offences, especially its implications for women. The Report is well-known for its recommendation that sexual activity between men

should be partially decriminalised; this was eventually given legal effect by the Sexual Offences Act 1967. Academic analysis has also established its importance in importing the concepts of (male) ‘homosexuality’ and ‘the homosexual’ into the law of England and Wales. Its significance for legal understandings of women’s same-sex relationships is less obvious, since it made no recommendations on these, and statute law governing sex between women was not changed. Indeed, ‘female homosexuality’ receives only passing mention in the Report. Nonetheless, this chapter argues that Wolfenden was a watershed moment for the regulation of sex between women, responding to as well as helping shape the changing public perceptions of it. Lesbianism had previously been understood as a distinct phenomenon but ‘female homosexuality’ was now reconceptualised as parallel to, but less prevalent, less troublesome, and less sexual than, male homosexuality. Silencing did not disappear, but it took on a new socio-legal flavour. The Wolfenden Report was therefore a key moment of transformation in the wider approach of courts, Parliament, and broader campaigns whose repercussions continue to be felt today in both law and wider culture.

Prostitution

The Wolfenden Committee had originally been established to consider the law on prostitution. Its recommendations in this area took a straightforward approach: prostitution was to be regulated as a matter of public nuisance. That neatly addressed the reasons for government concern which had prompted the report: perceptions that visible street prostitution was increasing; lobbying from local authorities as well as moral reformers; and sensationalist coverage in the press which reached its height in what Julia Laite has termed the 1953 ‘Coronation year panic’.⁴ Indeed, the Wolfenden Committee’s recommendations corresponded with the wishes of the government which had commissioned it.⁵

The formulation of law’s role as being the prevention of harm in the public realm, not the policing of private morality, was a new development here as it was for homosexuality. However, the existing law had not been based upon a single approach.⁶ Prominent and influential campaigns had challenged the sexual double standard which condemned women for extra-marital sex, commercial or not, while condoning it for men. Organisations led by Josephine Butler in the later nineteenth century and Alison Neilans in the first half of the twentieth opposed state regulation of prostitution while favouring proper age of consent protections for young women.⁷ They achieved notable legislative successes including the raising

of the age of consent for sexual activity with girls to sixteen, and the 1886 repeal of the Contagious Diseases Acts 1864, 1866 and 1869 which had allowed police in military towns to order women to undergo forcible examination and treatment for sexually transmitted infections (STIs).⁸

To achieve reform, these feminist organisations worked alongside 'social purity' associations which favoured a moralistic, even punitive approach to sexual immorality among both men and women. Legal coercion, however, was not always based upon moral justifications. The Contagious Diseases Acts had been rooted in medical justifications, while twentieth-century enthusiasm for eugenics generated new public health anxieties even as two world wars revived concerns about the effects of STIs upon the armed forces. And the notion of prostitution as a public order issue was inherent in legal terminology such as 'disorderly houses',⁹ latterly perpetuated by police evidence that 'brazen' street prostitution had increased since the Second World War.¹⁰

In fact, the Wolfenden Report shows the continuing influence of all these approaches. Liberalism hardly prevailed but made intermittent and uneven appearances. It emerged most clearly in the presentation of prostitution as women's free choice, made on liberalism's 'level playing field', rather than the result of economic necessity or coercion.¹¹ By contrast, the harm principle was watered down to encompass conventional morality: 'the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency'.¹² The report recommended that the derogatory terminology of 'common prostitutes' was maintained.¹³ Its insistence that women, not men, were 'cluttering up the street' and needed regulation ensured the sexual double standard remained intact.¹⁴ Feminist representations from the Association for Moral and Social Hygiene and others had been heard by the committee, but not listened to.¹⁵ Women in prostitution were not only legally but literally silenced by the committee's activity: of all their many and varied witnesses, not one had worked as a prostitute.¹⁶

The report's conformity with established approaches, and the willingness of a male-dominated Conservative government to locate women as the root of the 'problem' of street prostitution, meant that the recommendations were relatively quickly enacted as the Street Offences Act 1959.¹⁷ This legislation made soliciting easier to prove and punishable by higher penalties. The consequence was a legal regime which policed and punished women who sold sexual services, but not the men who bought them. The Wolfenden Report had presented this as a liberal proposal which did not criminalise private immorality but focused upon public nuisance. In reality, it cast at most a liberal veneer over longstanding and deeply problematic approaches. Laite goes further and suggests that it 'facilitated a crack-down on prostitution in the street, which directly

involved the overturning of long-standing liberal principles that had prevented such legal changes . . . in the past'.¹⁸ The offensive terminology of 'common prostitute', the empowerment of policemen to impose cautions without due process protections, and the focus upon women who loitered rather than the men who approached them would have been familiar to the Victorians. In summary, it meant a retrenchment of the sexual double standard which feminists had been fighting since the nineteenth century.

Homosexuality

The proposals on homosexuality were more obviously novel than those on prostitution. They were on their face models of post-war social liberalisation. The Wolfenden Report's main recommendation in relation to homosexual offences was for limited decriminalisation of sex between men. A popular interpretation of this is that it was a liberatory moment, a harbinger of the swinging sixties, and the start of the law's liberal approach to sexual offences. Indeed, it did help end a long history of complete prohibition – and it based its recommendations in part upon the liberal harm principle, which has become the guiding principle for sexual offences today. In that sense, it *was* the starting point of a legal liberalisation which culminated in the Sexual Offences Act 2003's commitment to non-discrimination.

However, academic research has for some time taken a more nuanced and critical view of the Wolfenden Report.¹⁹ In fact, the report's recommendations did not so much mark sustained progress in the law's development as herald a shift in direction. And that direction was not a straightforwardly progressive one – for either men or women.

Male homosexuality

Sex between men had occupied a legally paradoxical position for centuries. It had been explicitly criminalised since the Buggery Act 1533;²⁰ yet prosecutions emphasised its supposed unspeakability as a crime 'not to be named amongst Christians'.²¹ Law reform had occupied an equally awkward position. It was not a twentieth-century innovation: Charles Upchurch has demonstrated that both the death penalty and the existence of the offence itself were live issues in the early nineteenth century. Indeed, several MPs drew upon the work of Jeremy Bentham among others to campaign (albeit discreetly) to mitigate the severity of the law.²² Their arguments were distinct from those of the wider movement to reduce the number of crimes punishable by death. They were not successful, and

indeed the definition of the offence was widened in 1826 when the need to prove emission of seed was removed. As Upchurch emphasises, these events also show that the history of law reform is not one of “‘Whiggish’ advance toward greater toleration’ but a more complex, contingent process dependent upon factors including ‘reformist momentum, familial affection, elitist politics, class privilege, Enlightenment philosophy, and personal desires’ (a summary as true for the Wolfenden Report and its consequences as for the events of the early nineteenth century).²³ The death penalty for sodomy was finally, and quietly, abolished in 1861 having already gone unused since 1835,²⁴ but at the cost of new minimum sentences for sodomy and attempted sodomy.²⁵

The nineteenth-century parliamentary debates on sex between men were not made fully public; the records in Hansard are brief and without detail.²⁶ That has caused its own confusion which persists into recent historical work, not least around the infamous Labouchere amendment of 1885.²⁷ This provision created the offence of gross indecency between males, punishable by up to two years’ imprisonment. It has been seen as a repressive move which criminalised any sexual touching between men. In fact, such conduct had already been prosecuted throughout the nineteenth century as assault or attempted sodomy.²⁸ The maximum penalty for these offences had been raised by the 1861 Act to ten years’ imprisonment. Given that context, Upchurch persuasively argues that the Labouchere amendment was an attempt to return the law on non-penetrative activity to the pre-1861 situation, where the maximum penalty was two years’ imprisonment.²⁹ Further support for that argument comes from an 1888 consultation on sentencing for unnatural offences: the covering memorandum notes this issue was originally raised by Home Secretary Sir William Harcourt in 1882.³⁰ While the consultation was mainly concerned with bestiality, at least one judge supported substantially reducing the minimum sentence of ten years’ imprisonment for buggery between men where the defendant was young.³¹ Yet the century ended with the prosecution of Oscar Wilde for gross indecency in 1895 and new enthusiasm for repression. The reforms of the nineteenth century therefore cannot be simplistically reduced to part of a steady history of progress leading through the Wolfenden Report and to the present: they were more complex than that.

The genesis of the Wolfenden Committee was equally complex. There had been drastic increases in post-war conviction rates for gross indecency. A wave of high-profile defendants (including actor John Gielgud and MP William Field in 1953 and Lord Montagu of Beaulieu, his cousin Michael Pitt-Rivers, and journalist Peter Wildeblood in 1954) had attracted significant press attention. The ruling-class response was to seek to silence such

cases: either by press censorship, as favoured by Winston Churchill,³² or by partial decriminalisation to keep them out of the courts and press.³³ Unable to treat this issue as less of a 'problem' than prostitution, the Home Secretary Sir David Maxwell Fyfe reluctantly added homosexuality to Wolfenden's terms of reference.³⁴ The choice to make the Wolfenden Committee a departmental one whose proceedings were private is a further reminder that the silencing impulse remained powerful.

The report itself introduced the terminology of homosexuality, homosexual acts and homosexual offences into the law. In that sense, it breached the silence around homosexual identities. Indeed, as Leslie Moran argues, it went further and created a legal identity for 'the homosexual'.³⁵ Yet its rationale for doing so was rooted in the idea that liberalisation of the law would make homosexuality less, not more, visible: in other words, it was a silencing strategy. Blanket criminalisation had created noisy scandals; by decriminalising such behaviour in the private domain, homosexuality could be removed from the public sphere. It would then go unseen and unheard by the wider public.

To achieve this, the report recommended a cautious decriminalisation, whose version of the harm principle hardly amounted to a ringing endorsement of gay liberation: 'there must remain a realm of private morality *and immorality* which is, in brief and crude terms, not the law's business'.³⁶ The proposed relaxation of the law was highly constrained in scope and hedged with justifications, aiming to allow homosexuality to be treated and contained rather than to proliferate. Accordingly, the harm principle itself was highly qualified: the criminal law could intervene to 'preserve public order and *decency*' and should 'protect the citizen from what is *offensive* or injurious'.³⁷ That conceptualisation of offence as a relevant harm pervaded the recommendations. In common with the proposals on prostitution, this part of the Wolfenden Report aimed to silence what was immoral or offensive in the public domain.

The publication of the report, which sold in considerable numbers, might have seemed to shatter rather than support silence around homosexuality. The reality was that the subject continued to occupy an ambiguous position in legal discourse: publicly condemned and performatively silenced, often in the same breath. There was much governmental coyness about promoting reform in parliament, meaning that legislation implementing the Wolfenden Committee's recommendations took a decade to be passed. In 1967, Labour MP Leo Abse's determination met support from a Labour Home Secretary, Roy Jenkins, although both support for and opposition to law reform crossed party lines.³⁸ Abse's Freudian-inspired motivation, described as 'eccentric' by Kate Gleeson, was converted into strategic arguments resonating with Wolfenden's: partial decriminalisation would

allow the focus to be on prevention rather than punishment.³⁹ As Abse urged fellow MPs, 'Surely, what we should be preoccupied with is the question of how we can, if it is possible, reduce the number of faulty males in the community.'⁴⁰ Even put in such terms, reform met considerable opposition – not least from the man who commissioned the Wolfenden Report, David Maxwell-Fyfe, who now sat in the House of Lords as Lord Kilmuir.

The consequence was that the limitations on decriminalisation proposed by Wolfenden were enthusiastically embraced and elaborated by legislators and courts. That is apparent in the reinterpretation of the recommendation that homosexual acts between men were only to be decriminalised if performed in private. In the Wolfenden Report, 'private' was not defined but assumed to have the same meaning as for heterosexual behaviour (which is legal unless public decency is outraged, requiring the existence of potential witnesses and permitting many public displays of affection).⁴¹ In the subsequent law, 'private' was exceptionally narrowly defined, effectively limited to a situation where only two men were present in the premises and there was no real prospect of their being joined or observed by anyone else.⁴² This version of privacy was very different to that of classic liberalism's public/private divide, where the whole of the domestic sphere was to be protected from legal interference. The law therefore assumed (as the notorious section 28 would later make explicit) that homosexuality was incompatible with family and the domestic.⁴³ Decriminalisation was effectively a new method of silencing: homosexual acts were to be kept strictly out of public view and, provided that that condition was met, the high-profile prosecutions seen in the 1950s would be avoided.

This emphasis upon decriminalisation as containing rather than liberating gay men was given a medical rationale by the Wolfenden Report, although that was apparently largely strategic. There was certainly no consensus among witnesses to the Wolfenden Committee – or parliamentarians – on key medical features of homosexuality such as its causes or curability. Nonetheless, medical evidence was used in the report to suggest that decriminalisation would encourage gay men to seek treatment, and indeed to recommend a shift from punishment to the development of treatment programmes: an aspect not adopted by parliament.⁴⁴ (The courts did sometimes pass individual sentences requiring medical treatment to be obtained.)⁴⁵ They were more enthusiastic about the use of medical arguments to justify imposing an age of consent of twenty-one, substantially higher than the age of sixteen for other sexual activity. This higher age limit was embraced by parliamentarians and remained part of the law, actively supported by a significant proportion of MPs and peers, until equalisation in 2000.⁴⁶ Wolfenden, then, shaped the law on

sex between men for the remainder of the century – although only after a slow start and significant parliamentary innovations.

Female homosexuality was used as a comparator in Parliament in the years that followed publication of the Wolfenden Report, with some parliamentarians even suggesting fuller decriminalisation of male homosexuality so that it could take ‘its dreary place side by side with lesbianism or adultery’.⁴⁷ However, such arguments were unsuccessful and the eventual legislation broadly matched Wolfenden’s recommendations. Since one necessary concession would be a higher age of consent, the female comparator was allowed to quietly disappear when the appropriate age for sex between men was debated.⁴⁸ Silence descended once more for the female homosexual and took on a new form for the male. Legislators made it clear that even this partial and grudging decriminalisation was not an invitation to openness but to public silence:

I ask one thing and I ask it earnestly. I ask those who have, as it were, been in bondage and for whom the prison doors are now open to show their thanks by comporting themselves with dignity. This is no occasion for jubilation; certainly not for celebration. Any form of ostentatious behaviour now, or in the future, any form of public flaunting, would be utterly distasteful and would, I believe, make the sponsors of the bill regret that they have done what they have done.⁴⁹

The criminal justice system took this request to heart. Prosecutions for offences in public rose considerably in the years after the Sexual Offences Act 1967.⁵⁰ The courts enthusiastically enforced the silence Wolfenden demanded, reviving and expanding the offence of conspiracy to corrupt public morals.⁵¹ Repressive silence was being quickly and firmly reasserted by the criminal justice system.

The Sexual Offences Act 1967 remained in force for the remainder of the century. (It was however amended in 1994 to lower the age of consent to eighteen, and in 2000 to equalise it.)⁵² Wolfenden’s effects were, then, somewhat mixed in this context. Although some sexual activity between men was decriminalised, the limitations suggested by the report and then enshrined in law had lasting consequences. First, the narrow scope of decriminalisation left many men engaging in sex with each other vulnerable to prosecution. For example, many working-class men lived in shared accommodation or as lodgers so did not have access to wholly ‘private’ premises within the stringent terms of the law. Second, the reforms were founded upon, and therefore reinforced, a rationale of fundamental inequality which entrenched the presumed inferiority of homosexual to heterosexual acts.

Female homosexuality

The deeper silence which had been legally imposed upon sex between women was hardly disturbed by the Wolfenden Report. Rather, it was to continue as before although its underpinning conceptualisation was somewhat troubled. Women's sexuality, hitherto depicted as opposite to men's (submissive to men's dominance, undesiring except in response to male desire) was treated in the Wolfenden Report as awkwardly parallel to it. That shift was incomplete and clumsy since the report portrayed female homosexuality not as fully equivalent to its male counterpart but as a pale shadow of it. Indeed, the report's liberalism was fundamental to this, achieving significantly gendered effects through its emphasis upon the public/private divide. In classic liberalism, the private was not only the realm of the family but also specifically feminised as women's sphere of action and responsibility. By contrast, men's activity was normatively in the public sphere, with home a space of refuge and retreat. In the absence of the normative wife and children, it was more: a place of secrecy where the public world of law and politics should not intrude. Wolfenden's association of privacy with concealment resonated with the report's – and the wider criminal justice system's – approach to regulating sex between women.

They were supported in this by the lesser social visibility of women's same-sex relationships. The line between close friendship and a lesbian relationship was generally not easy for outside observers to discern.⁵³ There were social and legal pressures to prefer the former interpretation;⁵⁴ Agatha Christie, for example, included a sympathetic lesbian couple in her detective novel *A Murder is Announced*, but the nature of their relationship was never overtly mentioned.⁵⁵ When such careful unknowing proved impossible, the 'unnatural' lesbian was viewed through the lens of heterosexuality as a 'marriage-breaker'.⁵⁶ That was a particularly damaging representation given the reassertion of women's domestic role in the post-war years.⁵⁷ Explicitly lesbian activism was barely beginning to emerge: the leading group would not be formed until 1964 under the deliberately vague name of the Minorities Research Group.⁵⁸ Cultural change was already happening, though: 'pulp' novels depicting a 'twilight world' of lesbian relationships became available in the 1950s,⁵⁹ and clubs including the famous Gateways in West London existed for women who were able – and brave enough – to visit them.⁶⁰

However, in creating a new legal category of 'homosexuality' with both 'male' and 'female' variants, the Wolfenden Committee fundamentally altered the way in which sex between women was understood by the criminal justice system. While its recommendations were focused entirely upon male homosexuality, the committee had been careful to assert that

female homosexuality also fell within its remit. The Home Office had supplied a list of offences relevant to its terms of reference, all involving sex between men,⁶¹ but the committee itself added indecent assault of a female by a female to the list.⁶² That decision and its consequences were a crucial moment in the regulation of lesbianism since for the first time it was being officially treated as parallel to male homosexuality.

Nonetheless, the report silenced the female homosexual as soon as it had constructed her. It asserted that there was no need to make recommendations for her regulation, since she was already relegated firmly to the innermost spaces of the private realm. Indeed, the Wolfenden Report went further than simply not recommending changes to regulation of sex between women. Female and male homosexuality were equated only to immediately be carefully distinguished, with the female variant effectively dismissed. It was barely mentioned in the body of the report. A brief reference to convictions of women for indecently assaulting females suggested that they were less 'libidinous' in nature than men's offences, 'due *in the main* to the practice of including in the figures relating to any particular offence not only those convicted of the offence itself, but also those convicted of aiding and abetting the commission of the offence'.⁶³ While that was a reference to most convictions of women being based upon accessorial liability for men's sexual acts, it left the impression that women lacked much in the way of sexual agency: the Victorian model of sexuality which underpinned the sexual double standard was being reasserted. Despite the implication that a minority of cases involved women as principal offenders, nothing more was said about them. In consequence, the law on same-sex activity between women remained unchanged: that is to say, there was no specific prohibition, but it was governed by other provisions including the law on indecent assault as well as the repressive socio-legal effects of silencing.

The committee's proceedings show that the report's dismissal and subsequent silence were neither inadvertent omissions nor due to a lack of interest or information. The evidence heard by the committee is preserved in the National Archives: boxes of transcripts, memoranda and letters which not only provided the material for the committee's report but also complicate its account. They show that a significant proportion of witnesses discussed the prevalence, nature, or legal position of lesbianism, either of their own volition or in response to questions from committee members.⁶⁴ Two key elements to such evidence are apparent. First, the committee members were keen to ask professional witnesses – doctors and criminal justice professionals, for example – about how prevalent they thought lesbianism was and how it compared to male homosexuality. They solicited memoranda from the War Office and the

British Medical Association (whose section on lesbianism was written by the Medical Women's Federation).⁶⁵ The underlying concern was whether female homosexuality could be sufficiently distinguished from male homosexuality to justify its very different legal position. It seemed that it could not: evidence was contradictory, with witnesses variously asserting that female homosexuality was less prevalent and less problematic;⁶⁶ similarly prevalent and harmful;⁶⁷ or even more harmful.⁶⁸

Second, witnesses themselves frequently drew a parallel between men and women, invoking the unfairness of their different legal positions. Co-authors Hugh Klare of the Howard League and prison visitor F.E. Baker highlighted that this injustice was not only well known to homosexual men ('every single one of them who came up to us – and some of them were guilty of other offences, they were not just homosexual offenders – brought this point out'),⁶⁹ but was a barrier to their rehabilitation because 'if it is presented to the homosexual that there are moral reasons for ruling out homosexual conduct that completely falls to the ground if it is applied to only one sex and not the other'.⁷⁰ Committee members were unsympathetic to such arguments, pointing out that parity could also be achieved by criminalising acts between women.⁷¹

That rejection of equality as a rationale for reform was crucial to the report's approach. Most obviously and pragmatically, complete decriminalisation would have been politically impossible to achieve at that point. Even the more conservative and limited reforms proposed in the report took a decade to win parliamentary acceptance. In order to advocate for these without admitting the inequality which underpinned them, a distinction had to be drawn between male and female homosexuals. The evidence offered to the committee did little to support such a distinction so the report instead evaded it by downplaying lesbianism.

In doing so, it drew upon wider legal approaches of legal silencing. Thus the complicated manipulation of silence took on another manifestation. Women prostitutes were to be silenced in the public sphere but remain available to men in private. Male homosexuality was to be controlled and contained through silence in the public sphere which, proponents insisted, would equate to lower prevalence: a modern variation on the old legal claim to be punishing a crime 'not to be mentioned'. Female homosexuality was already silenced; the proceedings of the committee as well as their final report were based on an insistence that it was to remain in the private realm.

In order to achieve this, the Wolfenden Report acknowledged the existence of lesbianism, but immediately dismissed its significance and sexual nature. Lesbianism therefore became briefly visible simply to

be rendered invisible again. Wolfenden thus executed a sort of double manoeuvre, tying lesbianism to male homosexuality – which had not been the previous legal position – while simultaneously differentiating it as a less troublesome, less sexual sort of homosexuality than the male variety.

The consequences of women being silenced in this way have persisted long past the Wolfenden Report's direct influence, as discussions of sexual offences law have continued to focus upon sex between men while sex between women is treated as a milder version of it or simply ignored. That can be dangerous. For example, there has been an age of consent for sexual activity between women since 1880, set at sixteen since 1922. However, the myth that there was no age of consent between lesbians persisted into the twenty-first century, including in some apparently authoritative sources.⁷² Young women were thus unknowingly exposed to the risk of prosecution, which was by no means hypothetical.⁷³ Only in the later stages of the campaign to lower the age of consent for sex between men, when equality became a dominant and achievable aim, did the existence of a lesbian age of consent also become taken for granted – since it fell within 'sixteen for everyone' rather than getting any consideration in its own right.

Subsequently, the passage of the Sexual Offences Act 2003 involved little consideration of sex between women. The consequences included that, for example, the initial sentencing guidelines suggested very high sentences based on a rather mechanical analysis of sexual acts which was ill-suited to such cases.⁷⁴ The lack of explicit discussion of lesbian equality has also left judges able to treat lesbian desire as a problem when faced with it in the courtroom. That is apparent, for example, in the awkward approach to 'gender fraud' cases where someone legally female is accused of deceiving a woman into sexual activity. Defendants have expressed often complex and confused identities, with confusion around sexuality and gender identity, while complainants have described a range of harms. Nonetheless, the courts have focused upon treating these events as occurring between women and thus threatening the complainant's heterosexuality. Further, they have established them as forming one of the rare situations where a deception will vitiate consent. The rationale for this is that the difference between lesbian sex and heterosex – even where the specific physical acts are identical – is more significant than the differences between almost any heterosexual encounters.⁷⁵ Lesbian sexuality is thus treated as dangerously inferior to heterosexuality. That was implicit in *R v. Lee*, where the defendant was accepted to be a trans man: the judge emphasised that Lee's motivation being to save the relationship rather than 'a ruse to practise lesbian behaviour' was significant mitigation.⁷⁶

Conclusion

In summary, the Wolfenden Report was at least as concerned with imposing and maintaining silences as with genuine liberalisation. It did indeed secure some relaxation of the law on sex between men but at a high price. The harm principle was compromised to encompass affronts to normative moral or social attitudes as relevant harms, and the law on sexual offences has not entirely shaken off that inconsistency.⁷⁷ Homosexuality became a fixed identity defined by doctors and courts. For gay men, their inferior legal status was explicitly confirmed and embedded for another half century. The price of decriminalisation was the reframing of male homosexuality – and by implication, lesbianism – as a medical issue for which treatment should be sought, or a matter of pity and toleration. There was little scope in this imaginary for bisexuality, fluidity or, indeed, coming out in later adulthood. For lesbian women, there was a shift from earlier efforts to keep lesbianism entirely invisible to a grudging acknowledgement of its existence – but in a context where homosexuality was coded as male. Female homosexuality was brought into official being only to be immediately dismissed as a paler, less sexual, less significant version of male homosexuality in which the subjectivities, needs and experiences of lesbians needed no separate consideration. In other words, it was no longer wholly silenced but a near-silence was nonetheless achieved by ensuring that it was overshadowed by the male. That overshadowing of women's sexuality has persisted into the present: for example, Matthew Waites has demonstrated that the notion of a 'lesbian age of consent' arose only as a comparator in debates around the age of consent for sex between men.⁷⁸ It continues to make the disadvantages and discrimination experienced by women in same-sex relationships invisible in many of the contexts where our rights are determined.

Women also suffered the consequences of Wolfenden's superficially liberal approach to prostitution offences. The focus upon public harms rather than morality did nothing to address the sexual double standard. Instead, it defined women's soliciting as a problem for public order without doing the same for men's importuning. That was not novel: some of the most repressive policing of women had been done under the guise of protecting the public from sexually transmitted infections. The Contagious Diseases Acts of the 1860s were effectively repeated during the First and Second World Wars when Regulation 40D and Regulation 33b respectively allowed compulsory examination and treatment of women accused of spreading sexually transmitted infections.⁷⁹

Wolfenden was not a clean break with the past, then; nor have we broken away from it in the twenty-first century. Certainly, some of its

distinctive features have been reformed. The complex differentiations between heterosexuality and homosexuality, heterosexual privacy and homosexual privacy, and male and female sexuality upon which its recommendations depended no longer shape the various sexual offences. The Sexual Offences Act 2003 shares the Wolfenden Report's commitment to classic liberalism tinged with moralism, but takes formal equality rather than the public/private divide as its central mechanism. Thus gender neutrality is one of its key principles, meaning most offences can now be committed by and against people regardless of their sex. The age of consent is uniformly sixteen regardless of the sex of those involved (although it rises to eighteen in certain situations involving breach of trust).

The silences around sexuality that the Wolfenden Report maintained, adjusted or established are no longer a socially tenable aim but they persist in subtler forms. The emphasis upon heteronormative privacy is subtly reasserted through the offence of sexual activity in a public lavatory, which criminalises conduct already illegal but associated primarily with sex between men.⁸⁰ Sex between women, having gone from forcibly silenced to formally equal, is present in law only 'implicitly'.⁸¹ It has still not entered legal consciousness as something of significance in its own right: lesbian subjectivities were not considered in the passage of the Act.⁸²

Similarly, the law on soliciting has lost its overtly discriminatory terminology of 'common prostitutes'. Offences which criminalise those buying rather than selling sexual services have been introduced.⁸³ Nonetheless, law enforcement – and social censure – fall disproportionately upon women who sell sex rather than men who buy it, even if there is now an emphasis upon 'routes out of prostitution' rather than prosecution.⁸⁴ The use of civil or quasi-civil measures such as anti-social behaviour injunctions perpetuates Wolfenden's emphasis upon public nuisance as the decisive factor.

It would, however, be a mistake to consider the effects of the Wolfenden Report in terms of the criminal law alone. Contrary to the intentions of those involved, it did in fact provide encouragement for lesbian and gay activism. In the 1960s, many campaigners' aims shifted from cautious reform to substantive equality. By the 1970s, the Gay Liberation Movement and Women's Liberation Movement were overtly and effectively countering the silencing of same-sex relationships and challenging heteropatriarchal norms.⁸⁵ John Wolfenden himself, writing in 1976, noted that his recommendations of twenty years earlier now seemed 'Victorian' to young people.⁸⁶

In the latter part of the twentieth century, the Conservative government's attempt to reimpose silence through the notorious section 28 did

significant harm but also reinvigorated liberation movements. Yet some of the most prominent campaigners on issues such as age of consent reform drew upon notions of fixed and immutable sexual identity which even the Wolfenden Report had not fully embraced.⁸⁷ In the twenty-first century, assimilation became the preferred way of containing threats to heteronormativity when, echoing Wolfenden's offer of respectability in return for discretion, a different Conservative government legislated for marriage equality.⁸⁸ Same-sex couples were now able to marry provided that they conformed to normative expectations of respectable monogamy – and did not quibble at the subtle indicators of different status such as the embarrassed statutory silence about what might constitute consummation or adultery. The Wolfenden Report's legacy has become more subtle, but it has not disappeared.

Notes

1. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution* (London: Her Majesty's Stationery Office, 1957).
2. Brian Lewis, *Wolfenden's Witnesses: Homosexuality in Postwar Britain* (Basingstoke: Palgrave Macmillan, 2016), 7.
3. Lewis, *Wolfenden's Witnesses*, 7–8.
4. Julia Laite, *Common Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885–1960*, *Genders and Sexualities in History* (Basingstoke: Palgrave Macmillan, 2012), 185.
5. Kate Gleeson, 'The Timeless Aberration: Wolfenden and the Making of Modern Prostitution', *Lilith: A Feminist History Journal* 16 (2007): 69–83.
6. For a full account, see Laite, *Common Prostitutes and Ordinary Citizens*.
7. The organisations' names and composition changed but their best-known incarnations were the Ladies National Association for the Repeal of the Contagious Diseases Acts and the Association for Moral and Social Hygiene (AMSH).
8. Criminal Law (Amendment) Act 1885; Criminal Law (Amendment) Act 1922.
9. For example the Disorderly Houses Act 1751.
10. Laite, *Common Prostitutes and Ordinary Citizens*, 174–5.
11. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution*; and see Laite, *Common Prostitutes and Ordinary Citizens*, 197–8.
12. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, 140.
13. Originating in section 3, Vagrancy Act 1824.
14. John Wolfenden, *Turning Points* (London: Bodley Head, 1976), 142.
15. Gleeson, 'The Timeless Aberration: Wolfenden and the Making of Modern Prostitution', 79–82.
16. Laite, *Common Prostitutes and Ordinary Citizens*, 186.

17. There was considerable criticism of the Bill from the Opposition as well as back-bench Conservatives, and a lack of wider social consensus: Laite, *Common Prostitutes and Ordinary Citizens*, 199–201; Gleeson, ‘The Timeless Aberration: Wolfenden and the Making of Modern Prostitution’.

18. Laite, *Common Prostitutes and Ordinary Citizens*, 191.

19. See for example Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality since 1800* (London: Longman, 1981); Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (London: Quartet Books, 2016); Leslie Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996); Justin Bengry, ‘Queer Profits: Homosexual Scandal and the Origins of Legal Reform in Britain’, in *Queer 1950s: Rethinking Sexuality in the Postwar Years*, ed. Heike Bauer and Matt Cook (Basingstoke: Palgrave Macmillan, 2012), 167–82; Derek McGhee, ‘Wolfenden and the Fear of “Homosexual Spread”’: Permeable Boundaries and Legal Defences’, *Studies in Law, Politics and Society* 21 (2000): 65–97; Harry Cocks, ‘Conspiracy to Corrupt Public Morals and the “Unlawful” Status of Homosexuality in Britain after 1967’, *Social History* 41, no. 3 (2016): 267–84, <https://doi.org/10.1080/03071022.2016.1180899>.

20. An Acte for the punysshement of the vice of Buggerie (25 Hen 8 c 6). There was a short-lived interruption from its repeal in 1553 to re-enactment in 1563.

21. Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: Thomas Basset, 1681), 58; Edward E. Deacon, *A Digest of the Criminal Law of England; as Altered by the Recent Statutes and the Consolidation and Improvement of It* (London: Saunders and Benning, 1831), 125.

22. Charles Upchurch, *‘Beyond the Law’: The Politics of Ending the Death Penalty for Sodomy in Britain*, Sexuality Studies (Philadelphia: Temple University Press, 2021).

23. Upchurch, *‘Beyond the Law’*, 3.

24. Section 61, Offences Against the Person Act 1861.

25. Upchurch, *‘Beyond the Law’*, 190–92.

26. See for example the debate on the Labouchere amendment: HC Deb 6 August 1885, vol. 300, cols 1397–8.

27. Section 11, Criminal Law (Amendment) Act 1885.

28. Charles Upchurch, *Before Wilde: Sex between Men in Britain’s Age of Reform* (Berkeley: University of California Press, 2009); Harry Cocks, *Nameless Offences: Homosexual Desire in the Nineteenth Century* (London: I.B. Tauris, 2010).

29. Upchurch, *‘Beyond the Law’*, ch. 8.

30. The National Archives, HO 144/216/149134 ‘Unnatural Offences Cases: Memo of Mr Lushington’ (February 1888).

31. The National Archives, HO 144/216/A49134 ‘Unnatural Offence Cases: Opinions of certain judges on sentences’.

32. Lewis, *Wolfenden’s Witnesses: Homosexuality in Postwar Britain*, 6.

33. ‘A Social Problem’, *The Times*, 1 November 1953; Church of England Moral Welfare Council, ‘The Problem of Homosexuality’ (London: Church of England, 1954); Matthew Grimley, ‘Law, Morality and Secularisation: The Church of England and the Wolfenden Report, 1954–1967’, *Journal of Ecclesiastical History* 60, no. 4 (2009): 725–41.

34. Lewis, *Wolfenden’s Witnesses: Homosexuality in Postwar Britain*, 5; Bengry, ‘Queer Profits: Homosexual Scandal and the Origins of Legal Reform in Britain’; Chris Waters, ‘Disorders of the Mind, Disorders of the Body Social: Peter Wildeblood and the Making of the Modern Homosexual’, in *Moments of Modernity*:

Reconstructing Britain, 1945–1964, ed. Becky Conekin, Frank Mort and Chris Waters (London: Rivers Oram Press, 1999), 137.

35. Moran, *The Homosexual(ity) of Law*; and see Weeks, *Sex, Politics and Society: The Regulation of Sexuality since 1800*.

36. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, 24 (emphasis added).

37. Committee on Homosexual Offences and Prostitution, 24 (emphasis added).

38. For a fuller account see for example Kate Gleeson, ‘Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967’, *Parliamentary History* 27, no. 3 (2008): 393–409.

39. Gleeson, ‘Freudian Slips and Coteries of Vice’, 398.

40. HC Debates, 19 December 1966, col. 1078.

41. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, 25.

42. Section 1(2), Sexual Offences Act 1967; Gleeson, ‘Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967’, 406–9.

43. Section 28, Local Government Act 1988.

44. McGhee, ‘Wolfenden and the Fear of “Homosexual Spread”: Permeable Boundaries and Legal Defences’.

45. Tommy Dickinson, ‘Curing Queers’: *Mental Nurses and Their Patients, 1935–74*, Nursing History and Humanities (Manchester: Manchester University Press, 2016), ch. 5.

46. Sexual Offences (Amendment) Act 2000.

47. Earl of Arran, HL Deb, 12 March 1965, col. 77.

48. Caroline Derry, *Lesbianism and the Criminal Law: Three Centuries of Regulation in England and Wales* (London: Palgrave Macmillan, 2020), 202–5.

49. Lord Arran, HL Debates, 21 July 1967, col. 1078.

50. Cocks, ‘Conspiracy to Corrupt Public Morals and the “Unlawful” Status of Homosexuality in Britain after 1967’, 279.

51. *Kneller* [1973] AC 435 (HL).

52. Criminal Justice and Public Order Bill 1994; Sexual Offences (Amendment) Act 2000

53. The distinctions between these – or indeed the extent to which such distinctions can or should be made – have been extensively discussed in lesbian history from its earliest moments: the first comprehensive book on lesbian history (Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present* (London: The Women’s Press, 1981) was already able to draw upon existing literature and make its own interventions into the debate.

54. See the divorce case *Spicer v. Spicer* (Ryan intervening) [1954] 3.

All ER 208, discussed in Derry, *Lesbianism and the Criminal Law*, 215–16.

55. Agatha Christie, *A Murder Is Announced* (London: Collins Crime Club, 1950).

56. Derry, *Lesbianism and the Criminal Law*, 212–18.

57. Pat Thane, ‘Population Politics in Post-War British Culture’, in *Moments of Modernity: Reconstructing Britain, 1945–1964*, ed. Becky Conekin, Frank Mort and

Chris Waters (London: Rivers Oram Press, 1999), 114–33; Marie Blanche Smith, *The Single Woman of Today: Her Problems and Adjustment* (London: Watts & Co, 1951); Laura Hutton, *The Single Woman: Her Adjustment to Life and Love* (London: Barrie & Rockliff, 1960).

58. Derry, *Lesbianism and the Criminal Law*, 220.
59. D.M.C. 1964. More Thoughts on the 'Public Image'. *Arena Three*, September.
60. Rebecca Jennings, "'The Most Uninhibited Party They'd Ever Been to': The Postwar Encounter between Psychiatry and the British Lesbian, 1945–1971", *Journal of British Studies* 47, no. 4 (2008): 898.
61. The National Archives HO 345/7.
62. Committee on Homosexual Offences and Prostitution, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, 59, table (a).
63. Committee on Homosexual Offences and Prostitution, 38 (emphasis added).
64. See memoranda, TNA HO 345/8; and the transcripts of witness evidence, e.g. TNA HO 345/13, questions 1164, 1342, 1375–6, 1760–64, 1960, 2396–9, 2607, 2630, 2912–16, 2936, 3024–5, 3084, 3111–21, 3223–4, 3336–9.
65. War Office, Memorandum, TNA CHP/47, para 1; British Medical Association, 'Homosexuality and Prostitution' (London: TNA HO 345/9, 1955).
66. Dr J. A. Hobson, Royal Medico-Psychological Society, at TNA HO 345/13 question 3335.
67. Drs Kelnar and Dick, Tavistock Clinic, at TNA HO 345/13 question 2912.
68. Rev Sherwin Bailey, Church of England Moral Welfare Council, at TNA HO 345/13 question 1376.
69. Hugh Klare, TNA HO 345/13 question 1761.
70. F.E. Baker, TNA HO 345/13 question 1764.
71. For example, TNA HO 345 13 questions 1760, 2396–2399, 3224, 3339.
72. Stonewall, 'Age of Consent', http://www.stonewall.org.uk/information_bank/criminal_law/66.asp, accessed 13 December 2006.
73. Derry, *Lesbianism and the Criminal Law*, 230.
74. Sentencing Guidelines Council, 'Sexual Offences Act 2003 Definitive Guideline' (London: Sentencing Guidelines Secretariat, 2007); Derry, *Lesbianism and the Criminal Law*, 258.
75. *R v. McNally (Justine)* [2013] EWCA Crim 1051.
76. *R v. Kyran Lee (Mason)* (unreported, 16 December 2015, Lincoln Crown Court).
77. See for example the moral pronouncements in *R v. Brown* [1994] 1 AC 212.
78. Matthew Waites, 'Inventing a "Lesbian Age of Consent"? The History of the Minimum Age for Sex between Women in the UK', *Social & Legal Studies* 11, no. 3 (2002): 323–42.
79. Regulation 40D, Defence of the Realm Act 1914; Regulation 33B, Emergency Powers (Defence) Act 1939.
80. Section 71, Sexual Offences Act 2003.
81. Sexual Offences Review, 'Setting the Boundaries: Reforming the Law on Sex Offences, Vol 1' (London: HMSO, 2000), para. 6.2.2.

82. Derry, *Lesbianism and the Criminal Law*, 252–3; Carl F. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003), 36.
83. Sexual Offences Act 1985, replaced by section 51A Sexual Offences Act 2003; section 53A Sexual Offences Act 2003.
84. For example, Crown Prosecution Service, 'Prostitution and Exploitation of Prostitution' <https://www.cps.gov.uk/publication/prostitution-and-exploitation-prostitution>, accessed 23 September 2024.
85. Rebecca Jennings, *A Lesbian History of Britain: Love and Sex between Women since 1500* (Oxford: Greenwood World Publishing, 2007), 169–85.
86. Wolfenden, *Turning Points*, 146.
87. Rosemary Auchmuty, 'Feminist Approaches to Sexuality and Law Scholarship', *Legal Information Management* 15 (2015): 6, <https://doi.org/10.1017/S1472669615000055>; Matthew Waites, 'Equality at Last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom', *Sociology* 37, no. 4 (2003): 644–8.
88. Marriage (Same-Sex Couples) Act 2013.

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