

Women's Legal Landmarks

*Celebrating the History of Women and Law
in the UK and Ireland*

Edited by
Erika Rackley
and
Rosemary Auchmuty

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are
trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Reprinted 2019

Copyright © The editors and contributors severally 2019

The editors and contributors have asserted their right under the Copyright, Designs and Patents
Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means,
electronic or mechanical, including photocopying, recording, or any information storage or retrieval system,
without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage
occasioned to any person acting or refraining from action as a result of any statement in it can be
accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©.
All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©.
This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998–2019.

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

Library of Congress Cataloging-in-Publication data

Names: Rackley, Erika, editor. | Auchmuty, Rosemary, editor.

Title: Women's legal landmarks : celebrating the history of women and law in
the UK and Ireland / edited by Erika Rackley and Rosemary Auchmuty.

Description: Oxford, UK ; Portland, Oregon : Hart Publishing, 2019.

Identifiers: LCCN 2018034445 (print) | LCCN 2018035208 (ebook) |
ISBN 9781782259787 (Epub) | ISBN 9781782259770 (hardback : alk. paper)

Subjects: LCSH: Women—Legal status, laws, etc.—Great Britain—History. |
Women—Legal status, laws, etc.—Ireland—History.

Classification: LCC KD734 (ebook) | LCC KD734 .W664 2018 (print) | DDC 342.4108/78—dc23

LC record available at <https://lcn.loc.gov/2018034445>

ISBN: HB: 978-1-78225-977-0
ePDF: 978-1-78225-979-4
ePub: 978-1-78225-978-7

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit www.hartpublishing.co.uk.
Here you will find extracts, author information, details of forthcoming events
and the option to sign up for our newsletters.

DPP v Jonathan Cape and Leopold Hill (1928)

CAROLINE DERRY

In November 1928, Radclyffe Hall's novel *The Well of Loneliness* was found to be criminally obscene: liable to 'deprave and corrupt' those likely to read it. What makes the case significant is that the 'obscenity' of the book resided in its subject-matter, lesbianism. For the Chief Magistrate, its harm lay not in graphic sexual depictions of 'sexual inversion' (there were none), but in its plea for tolerance of 'inverts'.

This was not the first mention of lesbianism in the legal context, although overt discussion was a rare and recent phenomenon. However, the 1928 trial marked a high point of legal and social visibility, with discussion extending beyond the courtroom into daily newspapers. The specific version of lesbian relationships described in the book, with its reliance on sexological discourses, would thus colour public perceptions within and beyond the legal system for much of the twentieth century.

I. Context

Sex between women has never been explicitly prohibited in English criminal law, although it has been within the ambit of other laws governing, for example, indecent assault, age of consent, and public decency,¹ as well as wide-ranging social, economic and medical policing mechanisms. The reason for this legal silence was made explicit in 1921 during parliamentary debates on a proposal to criminalise 'gross indecency between women'. As Conservative MP John Moore-Brabazon argued, the English approach to lesbians was 'to leave them entirely alone, not notice them, not advertise them. That is the method that has been adopted in England for many hundred years'.²

The subject of sex between women was only articulated in the context of a spoiling amendment designed to be controversial enough to kill the Criminal Law (Amendment) Bill 1921, which would have strengthened age of consent laws, in particular by increasing

¹ eg indecent assault on a female contrary to section 52 Offences Against the Person Act 1861 (*R v Mourez* (1885) 49 *Justice of the Peace* 745), later section 14 Sexual Offences Act 1956 (eg *R v Allen* [1996] 2 Cr App R (S) 36), now sections 2 and 3 Sexual Offences Act 2003 (*R v Newland*, unreported, *The Guardian*, 12 November 2015). Two men were convicted of 'insulting behaviour' under s 5 Public Order Act 1986 for kissing at a bus stop (*Masterson v Holden* [1986] 3 All ER 39).

² HC Deb, vol 145(8) cols 1802–1803.

the age of consent for indecent assault from 12 to 16. However, lawmakers were also being drawn into other confrontations: not only between the growing movement for tolerance of female and male ‘inverts’ and those who saw them as a threat to society, but also between the feminist movement and traditional ideals of womanhood.

Victorian ideologies of female sexual passivity continued to inform the criminal law: notoriously, the Punishment of Incest Act 1908 criminalised men *having* and women *permitting* sexual intercourse with certain family members. They also supported the notion that if the possibility of sex between women were kept secret from respectable ladies,³ it would never occur to them to try it. How could someone who simply permitted sexual activity engage in it with another passive being?

Feminists had long condemned the sexual double standard, notably in opposing the Contagious Diseases Acts 1864–1869 which criminalised prostitutes while tacitly endorsing their male clients. By the turn of the twentieth century, some feminists identified the power of refusing heterosexual relations in radical terms: Lucy Re-Bartlett argued that women should not marry until men righted their wrongs against women, while Cicely Hamilton condemned ‘marriage as a trade.’⁴ At the same time, women’s opportunities for independence and engagement in the public sphere were growing. It was unsurprising that the role of women in both public and private spheres was a topic of urgent debate.

Meanwhile, eugenic ideas emphasised women’s sexuality and motherhood as vital to the development of the race: those who deviated from the ideal of white, middle-class womanhood potentially threatened the nation itself. ‘Inversion’ as just such a threat had been the theme of dancer Maud Allen’s action for criminal libel against Noel Pemberton-Billing MP.⁵ In the closing months of the First World War, the right-wing Independent MP for East Herts had published an article in his journal *Vigilante* accusing Allen of belonging to the ‘Cult of the Clitoris’ and thus associated her with 47,000 homosexual men and women whom he claimed were being exploited by German agents. Allen lost her case following a number of defence arguments, including that her very knowledge of the word ‘clitoris’ implicated her as a lesbian. Newspaper reports kept the precise allegation unclear, leaving most readers unaware of its nature.⁶

Such sexual ignorance was challenged by the new discipline of sexology. While many feminists were involved in the sexological movement, it was not itself necessarily feminist: for leading British sexologist Havelock Ellis, the movement for female emancipation had involved an increase in female homosexuality, allied to increases in female criminality and insanity.⁷ Nonetheless, ‘inverts’ such as Hall were able to mould such discourses into an argument for rights and recognition: Hall saw herself as a ‘propagandist’ for inverts,⁸ and the

³For further discussion of their race- and class-specific nature, see Catherine Hall, *White, Male and Middle-Class: Explorations in Feminism and History* (Routledge, 1992); Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885–1914* (Penguin, 1995).

⁴Lucy Re-Bartlett, *Sex and Sanctity* (Longmans, 1912); Cicely Hamilton, *Marriage as a Trade* (Moffat, Yard & Co, 1909). See further *A Pageant of Great Women, Cicely Hamilton, 1909–12*.

⁵See Lucy Bland, *Modern Women on Trial: Sexual Transgression in the Age of the Flapper* (Manchester University Press, 2013) chapter 1; Michael Kettle, *Salome’s Last Veil: The Libel Case of the Century* (Granada Publishing, 1977); Jodie Medd, ‘“The Cult of the Clitoris”: Anatomy of a National Scandal’ (2002) 9(1) *Modernism/Modernity* 21–49.

⁶Bland, *ibid.*, 36–37.

⁷Havelock Ellis, *Studies in the Psychology of Sex Vol. 1: Sexual Inversion* (The University Press, 1897) 100.

⁸Radclyffe Hall, letter to Gerard Manley Hopkins, 13 August 1928, cited in Richard Dellamora, *Radclyffe Hall: A Life in the Writing* (University of Pennsylvania Press, 2011) 193.

Well drew upon sexological theories which cast inversion as innate in order to argue it was neither immoral nor unnatural. In keeping with Hall's appeal to scientific authority, Ellis provided the novel's foreword. However, as the *Well* case demonstrated, there was strong resistance to this argument among many parliamentarians, judges, and newspaper editors.

II. The Landmark

Radclyffe Hall was a middle-brow author who had won the Prix Femina and the James Tait Black Prize for her 1926 novel *Adam's Breed*. That literary success encouraged her to write *The Well of Loneliness*, which she described as the first 'long and very serious novel entirely upon the subject of sexual inversion.'⁹ It portrays 'congenital invert' Stephen Gordon, her upbringing as a boy and First World War service as an ambulance driver, and her relationships with other women. Gordon sacrifices the last of these so that her lover can marry a man, and the novel concludes with the plea: 'Acknowledge us ['inverts'], oh God, before the whole world. Give us also the right to our existence.'

Initially, the book enjoyed a muted but largely positive reception, thanks partly to Hall's efforts to control its advertising and to seek out sympathetic reviewers.¹⁰ That changed dramatically on 19 August 1928, when James Douglas's *Sunday Express* editorial thundered 'I would rather give a healthy boy or a healthy girl a phial of prussic acid than this novel. Poison kills the body, but moral poison kills the soul.' Douglas demanded that the Home Secretary take legal action to prevent the novel's distribution if its publishers did not withdraw it. It was no coincidence that the attack came from a newspaper in the middle of a circulation war.

Nonetheless, the next day publisher Jonathan Cape submitted the book to the Home Secretary, Sir William Joynson-Hicks, for his view on whether it might breach the Obscene Publications Act 1857, which provided for the seizure and destruction of obscene material held for sale or distribution. This Conservative MP is described in the *Oxford Dictionary of National Biography* as 'the most prudish, puritanical, and protestant home secretary of the twentieth century', who also sought to censor publications on birth control, DH Lawrence's novels and a translation of the *Decameron*.¹¹ Predictably, his verdict was that the *Well* should be withdrawn.

Cape therefore ceased publication – but took casts of the type to Paris for publication there. The *Well* was thus soon back in print and being imported into England. When copies were seized by Customs on 4 October, officials expressed 'considerable doubt whether the book can properly be regarded as indecent or obscene.'¹² However, the Director of Public Prosecutions took a different view and proceedings were brought in Bow Street Magistrates' Court, with the publishers summoned to show cause why the books should not be destroyed as an obscene libel.

⁹ Letter to Newman Flower, 10 April 1928, quoted in Laura Doan and Jay Prosser, 'Introduction: Critical Perspectives Past and Present' in Laura Doan and Jay Prosser (eds), *Palatable Poison: Critical Perspectives on the Well of Loneliness* (Columbia University Press, 2001) 1–31, 1.

¹⁰ Doan and Prosser, 'Introduction', *ibid*; Dellamora, *Radclyffe Hall: A Life in the Writing*, n 8 above, 192–95.

¹¹ FML Thompson, 'Hicks, William Joynson-, first Viscount Brentford (1865–1932)' in *Oxford Dictionary of National Biography* (OUP, 2004; online edn, September 2010).

¹² HO144/22547, reproduced in Dellamora, n 8 above, 196.

In his judgment (*Director of Public Prosecutions v Jonathan Cape and Leopold Hill* (1928), unreported) on 16 November 1928, the Chief Magistrate, Sir Chartres Biron, relied upon *R v Hicklin*,¹³ which defined as 'obscene' material which tended 'to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'. The *Well* would not do so by explicit sexual content, since there was none. However, Biron identified a different source of corruption: the book glorified 'unnatural practices between women ... which between men would be a criminal offence, and involve acts of the most horrible, unnatural and disgusting obscenity'.¹⁴ Had lesbianism been presented as 'a tragedy' then the novel might not have been obscene.¹⁵ Instead, it was

a plea for existence in which the invert is to be recognized and tolerated, and not treated with condemnation, which they are at present, by all decent people. This being the tenor of the book, I have no hesitation whatever in saying that it is an obscene libel, that it would tend to corrupt those into whose hands it should fall, and that the publication of this book is an offence against public decency, an obscene libel, and I shall order it to be destroyed.¹⁶

III. What Happened Next

An appeal to the Quarter Sessions (a local court, held four times a year, which heard criminal cases as well as criminal and civil appeals) was dismissed after five minutes' deliberation.¹⁷ In 1929, however, the US edition was the subject of another trial in New York, whose Court of Special Sessions ruled that its treatment of a 'delicate social problem' was *not* obscene. Pegasus Press continued to print the novel in France, and was never prosecuted. The US and France thus became sources of illicitly-imported copies for readers in Britain, where the *Well* remained out of print until 1949. Hall would publish several more, uncontroversial, novels before her death in 1943.

While the legal response reflected a wish to enforce silence upon the subject of lesbianism, reporting of the trial had carried the subject into the nation's homes.¹⁸ That uneasy tension between visibility and silencing was apparent a year later, in the prosecution of Colonel Barker. He had married Elfrida Haward in 1923; but when imprisoned for bankruptcy in February 1929, it was discovered that Barker was physically female. In fact, Valerie Barker had been living as male since ending a violent relationship with a man. Barker was prosecuted at the Old Bailey for perjury, having made a false entry in the marriage register.¹⁹ Although Barker pleaded guilty, the judge Sir Ernest Wild chose to question Haward about their sexual relations before passing a sentence of nine months' imprisonment for

¹³ *R v Hicklin* (1868) 3 QB 360.

¹⁴ Sir Charles Biron, 'Judgement' in Doan and Prosser (eds), n 9 above, 39–49, 41–42.

¹⁵ *ibid* 42. On this basis, he later advised against prosecuting Compton MacKenzie's *Extraordinary Women*, which 'draws a most distasteful and detestable picture of practitioners in vice' (HO45/15727, reproduced in Dellamora, n 8 above, 198).

¹⁶ Biron, n 14 above, 48–49.

¹⁷ Diana Souhami, *The Trials of Radclyffe Hall* (Weidenfeld, 1998) 214–18.

¹⁸ See in particular Souhami, *ibid*.

¹⁹ Inspector Walter Burmby, *Central Officer's Special Report*, 6 May 1929, PRO MEPO 3/439, 1.

‘perverted conduct’ which had ‘profaned the House of God ... outraged the decencies of nature, and ... broken the laws of man.’²⁰

Wild J had participated in the 1921 parliamentary debates around criminalising gross indecency between women, but must also have been influenced by the recent *Well* trial: Barker, like Stephen Gordon, claimed to have been ‘brought up as a boy’ and had driven ambulances in wartime France.²¹ Yet Barker felt obliged to vigorously deny ‘perversion’ and would later claim an essential femininity despite having continued to live as a man after leaving prison.²² Barker’s case was a manifestation of the newly-developing concern with ‘perversion’ amongst the middle and upper classes which followed the *Well* trial. Nonetheless, silencing was by no means abandoned: Wild questioned Haward about her sexual relationship with Barker largely by showing her relevant passages of her written statements and asking if they were true.²³ His concern both to find out about sexual behaviour and to keep it secret from the public is a graphic illustration of the contradictory pressures of silencing and social concern.

Legal silence then fell once again and remained intact for most of the century, even when sexuality was otherwise in the spotlight. When the Wolfenden Committee sat in 1957, its terms of reference on homosexual offences included indecent assault against women²⁴ and the evidence heard included a number of references to lesbianism²⁵ (the *Well* was published in paperback in Britain in the 1950s). However, the report itself simply dismissed acts between women as lacking ‘the libidinous features that characterise sexual acts between males,’²⁶ a distinction which witnesses had often refused to make. Similarly, the 1981 final report of the Policy Advisory Committee on Sexual Offences failed to mention sexual activity between women.²⁷

Lesbianism would not return to the centre of legislative attention until the debate over section 28 of the Local Government Act 1988, introduced by the Thatcher government, which prohibited local authority ‘promotion’ of homosexuality as a ‘pretended family relationship.’ Primarily targeted at schools, it was a response to the growing visibility of lesbians and gay men, including radical feminists.²⁸ Ironically, in standing as a symbol of oppression, the section prompted political activism and increased lesbian visibility. As women defined their own sexuality publicly, and the law moved towards recognition of lesbian and gay rights, so we finally moved out of the shadow of the *Well*.

²⁰ ‘Judge on Crime of “Col Barker”’, *The Evening News*, 25 April 1929.

²¹ ‘Colonel Barker’, *Sunday Dispatch*, 10 March 1929, 1 and 5, 5.

²² Rose Collis, *Colonel Barker’s Monstrous Regiment: A Tale of Female Husbandry* (Virago, 2001); James Vernon, ‘For Some Queer Reason: The trials and tribulations of Colonel Barker’s Masquerade in Interwar Britain’ (2000) 26(1) *Signs: Journal of Women in Culture & Society* 37–62.

²³ Insp Burmby, n 19 above.

²⁴ Matthew Waites, ‘Inventing a “Lesbian Age of Consent”? The History of the Minimum Age for Sex between Women in the UK’ (2002) 11(3) *Social and Legal Studies* 323–42, 333.

²⁵ Public Record Office, HO 345/13.

²⁶ Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* (Her Majesty’s Stationery Office, 1957) 38.

²⁷ Policy Advisory Committee on Sexual Offences, *Report on the Age of Consent in Relation to Sexual Offences* (Her Majesty’s Stationery Office, 1981).

²⁸ Davina Cooper, *Sexing the City: Lesbian and Gay Politics within the Activist State* (Rivers Oram Press, 1994); Lynn Alderson, ‘Clause 29: radical feminist perspectives’ (1988) 13 *Trouble and Strife* 3–6, 6.

IV. Significance

In offering a brief moment of visibility to relationships between ‘sexual invert’, the *Well* trial would have a legal and cultural impact extending for decades. It is unfortunate that its reliance upon sexological models made these the lens through which lesbian relationships were viewed, while the lack of open discussion left them largely unchallenged in legal and popular contexts. The notion of pseudo-inversion proved particularly dangerous. While Hall had hoped that the innate nature of congenital inversion would make it a cause for sympathy, courts judging lesbian women saw themselves as protecting pseudo-lesbians, who might choose heterosexual relationships if not corrupted. These notions of corruption fed into such diverse legal areas as the sentencing of women in the criminal courts²⁹ and custody debates in the family courts.³⁰

The *Well* helped to shape perceptions of lesbianism in popular culture, too. Most bookshops would sell sexological texts only to doctors, lawyers and scientists, but the theories became more widely known through this trial.³¹ The response of ‘invert’ readers demonstrated the isolation, and thirst for information and validation, experienced by many at this time. However, visibility through the lens of congenital inversion was double-edged. While feminist critiques of sexuality had denied the naturalness of existing sexual behaviour and demanded that male behaviour should change,³² the sexologists’ work re-naturalised sex roles and undermined women’s moral claims. A refusal of heterosexuality might be no more than a front for lesbianism.³³ The ‘spinster’ was thus an object of suspicion.

But it is undeniable that the trial gave visibility to lesbianism, and that the book remained the one novel on the subject that everyone knew about. By the 1970s, it was both recognised as a milestone and criticised for the way in which it treated the subject: Jane Rule described it as ‘the lesbian novel, a title familiar to most readers of fiction, either a bible or a horror story for any lesbian who reads at all.’³⁴ Some recent readings have gone further and debated whether the *Well* is best understood today not as a lesbian but as a transgender text.³⁵ While the *Well* may seem like a historical relic, the use of ‘born that way’ arguments as a basis for seeking rights remains prominent.³⁶ In a time of unprecedented legal advances, we still risk conceptualising same-sex relationships as something inferior which no one could choose, and tying appeals for rights to appeals to apparent scientific authority.

²⁹ See eg *R v Allen* (n 1 above) where the defendant was described as a ‘malign influence’.

³⁰ Lynne Harnie and Rights of Women, *Valued Families: The Lesbian Mothers’ Legal Handbook* (The Women’s Press, 1997).

³¹ Margaret Jackson, *The Real Facts of Life: Feminism and the Politics of Sexuality c 1850–1940* (Taylor and Francis, 1994) 129.

³² *ibid*, chapter 3.

³³ See further Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present* (The Women’s Press, 1985) 237.

³⁴ J Rule, ‘Radclyffe Hall’ (1975), reproduced in Doan and Prosser (eds), *Palatable Poison*, n 9 above, 77–88, 78.

³⁵ Jay Prosser, ‘“Some Primitive Thing Conceived in a Turbulent Age of Transition”: The Transsexual Emerging from *The Well*’ in Doan and Prosser, *Palatable Poison*, n 9 above, 129–44; Judith Halberstam, ‘“A Writer of Misfits”: “John” Radclyffe Hall and the Discourse of Inversion’ in Doan and Prosser (eds), *Palatable Poison* (n 9 above) 145–61.

³⁶ For a concise and critical overview, see Simon Copland, ‘Born this way? Society, sexuality and the search for the “gay gene”’, *The Guardian*, 10 July 2015.

Further Reading

- Laura Doan and Jay Prosser (eds), *Palatable Poison: Critical Perspectives on the Well of Loneliness* (Columbia University Press, 2001).
- Radclyffe Hall, *The Well of Loneliness* (Penguin Classics, 2015).
- Diana Souhami, *The Trials of Radclyffe Hall* (Weidenfeld, 1998).