Chapter Three: Sex and crime in time and space

The purpose of this chapter is to provide a background to the rest of our study of sex and crime. We do this by situating contemporary debates about sex in their temporal and geographic contexts. We do this in part to show you that what we 'know' today about crime, **deviance**, and how sex comes into it is not a natural given. Rather, everything has a history and (at least one) point of origin. For this chapter, we want you to adopt the position of critical outsider. We will explore ideas that are often taken for granted – such as the legality of heterosexuality, or the fact that rape is a violent crime – your role is to join us in observing how and why these things came to be. In doing this, bear in mind that nothing is neutral; all ideas and knowledge comes from somewhere. By focussing on the 'when' and 'where' of sex and crime, we will be able to better see how we come to know what we think we know.

By the end of this chapter you will understand more about:

- The importance of history, **colonialism**, politics and **power** on how sexual activity and knowledge is sculpted by the tools of justice.
- How issues which at first may appear to have nothing to do with sex become sexualised.
- How these debates will feed into the specific topics we examine in the rest of the book.

Why is sex such a big deal?

One of the reasons why there is such an explicit link between sex and crime is that the juridical and quasi-juridical regulation of **sexuality** has been variously employed as tools through which to control and manage a population.

Over the centuries, even in pre-modern times, there developed the understanding that in order to create a community with an identity - today we would see this as a **nation-state** – what was needed was a healthy, productive, law-abiding population. This heralded a raft of measures, regulations, and incentives to make sure that the population is in good shape, and the **state** is strong. The control of **sexual practice** through law and criminal justice is just one of the ways in which this control and regulation unfolded (these include health care discourse – see Chapters Nine about disability and Ten on risk, it also includes the family, or education systems; you can probably think of others). In this chapter, we are going to examine how ideologies of **nation**, and good citizenship, have been put to work to regulate sex across time and space. We will look at this in more depth in the context of the regulation of heterosexuality and homosexuality, and in the creation of the crime of rape. In our discussion we draw on examples and illustrate how these different nation-building projects function in various national contexts.

Building the nation (why is the state in my bedroom?)

Arguably a foundational philosopher of the relationship between state, sex and history was Michel Foucault (1998[1978]), whose specific interests lie in the way that knowledge is created, and how we know what we know. He also examined the

different ways that power works and observed, in the context of sex, that appropriate and inappropriate conduct is incited, regulated, and controlled by a myriad of exercises of power, which he called '**discourses**'. Power, in this context, is not necessarily uniform, hierarchical, or top-down, but operates in relation to people and things:

> It had long been asserted that a country needed to be populated if it hoped to be rich and powerful…its future and its fortune were tied not only to the number and uprightness of its citizens, to their marriage rules and family organisation, but to the manner in which each individual made use of his[sic] sex. (Foucault, (1998[1978]: 26)

In order to produce an obedient, healthy, and 'good' population, Foucault identifies four exercises of power mobilised as techniques of sexual control (104-5). The first strategy, the 'hysterization of women's bodies'; a rendering of the female body as inherently sexual, and necessarily tied to medical discourses, expressed a concern about reproductive rates, the well-being of children, and the sustenance of family life (we see more of this in Chapter Six). The 'pedagogisation of children's sex' (which we see more of in Chapter Twelve) concerns the fact that children's expression of sexual desire posed 'physical and moral' dangers and that this should be controlled by families, doctors, or educators. The 'socialisation of procreative behaviour' addresses fertility, and the desire that some members of the population reproduce, and contribute to a healthy citizenry, but that those who are considered to be too old, too disabled, too young, too poor, too non-white, too deviant, or too immigrant desist from reproducing. The 'psychiatrisation of perverse pleasure' moves sexual paraphilia, or what it seen as sexual deviance (for instance

homosexuality or fetishes), from the legal realm to the medical one, making sexual deviance a medical problem (see also Ian Hacking, 1986).

Of course, Foucault's theorisations can only apply in the **post-industrialist**, modernist context that Foucault had in mind when he was writing, but we can see its influence in laws, policies, educational approaches, the development of 'norms' and social taboos that govern how we think about sexual practice across time and space.

The influence of such thinking is evidenced by Jeffrey Weeks' (1981) discussion of the production of a healthy population which saw the creation of the Factory Acts of 1802, 1819, and 1847 which limited child labour in Britain and the Poor Law 1834 which would consign the poor to workhouses and discourage them from 'reckless overbreeding' (Weeks, 1981: 123). Later, the construction of the mother as the key to the nation gave rise to policies and campaigns which sought to keep women out of public life and to centre them in the role of childbearing and rearing (126-7). Eugenicist discourses naturally run through all of these incentives, because of course, not all women were invited to people the nation; in an African-American context, Patricia Hill Collins (2005) outlines exactly how this sense of nationhood is racialised.

Even advances in sexual rights and the decriminalisation of, for instance, homosexuality or abortion in certain states are marked as the advancement, or progress, of the health of the nation. In Britain, calls for private acts of homosexual

sex to be decriminalised started as early as 1921. The 1957 Report of the Departmental Committee on Homosexual Offences and **Prostitution**, known as the Wolfenden report, called both for the decriminalisation of private consensual homosexual sex between adult men and a crackdown on street prostitution. Can you guess which of these recommendations was implemented first? We talk more about Wolfenden in the next section of this chapter. It is interesting to note here that tolerance of homosexuality has now become framed as the liberal act of a civilised nation (Weeks, 1981: 242-3). This is only something that became possible in the conditions available to Britain as, for instance, a late twentieth century, post war, politically, and economically liberal state.

One hundred years before this, the opposite was true. Britain, along with other European countries like France, Spain, and Portugal, were in the fullest throws of colonialism – the policy of occupying and exploiting other countries for political and economic advantage – and the education that Foucault notes about appropriate sexuality was one of the tools of colonialism. Homophobia and the criminalisation of same-sex relations became a tool of empire building, notably in Malawi, Uganda, and Nigeria which Britain began to colonise at the end of the nineteenth century (Ekine, 2013: 78). Meanwhile, in the twentieth century, the notion that homosexuality was 'un-African' and a colonial import also emerged as a mainstream discourse (Ekine, 2013). To date, Uganda has some of the most punitive anti-homosexuality laws in the world. Yet there is also some vociferous and effective **LGBT+** activism in Uganda (Kitsule, 2013; Mwikya, 2013) whose contributions to these debates are often obliterated by mainstream press and

politics (Ndashe, 2013). But from a '**Western'/Global North** perspective, the slow advances that these countries have made in terms of recognising LGBT+ rights are not good enough. Indeed, in some cases they are actively discriminatory; in 2005, same-sex marriage was prohibited in Uganda, as opposed to simply being ignored. In 2011, Nigeria followed suit. The crime of LGBT+ marriage carries the penalty of life imprisonment.

In 2011, David Cameron (Prime Minister of the UK, 2010-6) and Barak Obama (President of the USA, 2009-17) joined forces to tie conditions to aid donations in countries where LGBT+ rights are not protected. Threatening to cut aid to countries where homosexuality is illegal, they called for equality for LGBT+ peoples as a **human right.** What might appear to be a laudable political effort on their part reveals a more problematic and **neo-colonialist** power play which, as Sokari Ekine and Hakima Abbas (2013) demonstrate, does more **harm** than good to LGBT+ people living in these places; LGBT+ people become scapegoats within their communities, the loss of aid impacts directly on the provision of education and health services for LGBT+ people, and creates further local divisions (Nana et al, 27 October 2011). This policy was called out by Ugandan advisors as bullying behaviour which was akin to treating the Ugandan state 'like children'; 'Uganda is, if you remember, a sovereign state and we are tired of being given these lectures by people' (Nagenda; cited in BBC, 31 October 2011). Indeed, given that homophobia is arguably a colonial British construct, and until recently the British – and specifically the Conservative party's – treatment of homosexuality has been appalling, it could be considered hypocritical to impose these sanctions, even as it

is also offered as a marker of how 'progressive' the British state has become. However, hypocrisy lies in British responses to states who persecute the LGBT+ community. In Saudi Arabia homosexuals can be sentenced to death because of their sexual orientation. In 2014, a Saudi Arabian man was sentenced to be whipped 450 times and to spend 3 years in prison for using Twitter to try to meet other men for dates (Simpson, 25 July 2014). Yet, in 2019 the British government entered into a £650 million arms trade deal with Saudi Arabia (Cowburn, 22 July 2019); so, it seems the UK government remains selective about just how important it considers LGBT+ rights abroad to be.

Jasbir Puar argues that this can be understood as an expression of **'homonationalism'**, or 'how 'acceptance' and 'tolerance' for gay and lesbian subjects have become a barometer by which the right to, and capacity for, national sovereignty is evaluated' (Puar, 2013: 336), In her analysis, Puar has in mind the justifications made for the USA and UK invasion of Iraq and Afghanistan: saving queer brown men and women from the barbarism of their own space and time (Puar 2007: 9). An act which, Puar argues, is an expression of empire. This so called 'pinkwashing' is used to obfuscate the violences that a state might enact on its own non-conforming people, including the deportation of undocumented migrants and asylum seekers, or to stoke sentiments of racialised hatred of the 'other' in the name of protecting vulnerable LGBT+ communities 'over there'. This too is an act of **Orientalist** nation building; of creating a sense of national, tolerant exceptionalism, of the figure of the backward and undemocratic 'other', and of

claiming liberal and progressive credentials which are meant to distract from the abuses a state allows to be enacted in its name.

A similar practice has been identified as **femonationalism** by Sara Farris (2012). Femonationalism 'brings together anti-Islam and anti-(male)-immigrant concerns or nationalist parties, some feminists, and neoliberal governments under the idea of **gender** equality' (2012: 187). That is, nations – especially in Europe, but also North America and Australia – figure the Muslim 'other' as some sort of backward **misogynist** who oppresses women, hates sexual freedoms, and stones gays to death. Here, feminist ideas about the oppression of veiled women are co-opted by right wing politics to justify either invading 'their' countries to save 'their' women (white men saving brown women from brown men; Spivak, 1985), or excluding them entirely from 'our' culture and space though aggressive anti-immigration policies (see also debates about trafficking in Chapter Seven).

In sum, in the service of creating a dominant and effective nation, the control and regulation of sexuality has a long, complex, and often violent history. Rooted to colonialism, to health care discourses, to anxiety about degeneracy and poverty, to international relations and war, the sexed and sexual body has been intrinsic to the creation of the modern nation, of international relations, and war (for more discussion of war see Chapter Eight).

The next two sections explore how homosexuality and heterosexuality in particular have been regulated in order to serve the project of nationhood, and

how such regulations have developed and changed over time and space, leading to and resulting in the perceptions we hold today.

Regulating (homo)sexuality

In this section we explore the evolution of the regulation of homosexuality. While sexual behaviour is not simply controlled by law – for instance a bisexual woman may not feel like she can come 'out of the closet' because of the expectations or prejudices of her family, even though there has never in the UK been any law against the bisexuality, or homosexuality, of women – legal regulation does interact with the social and cultural regulation of people's behaviour. While sexual desires are very difficult to legally regulate, sexual acts can be. This is how legal controls have been exerted over gay men. The criminalisation of the act of sodomy – anal penetration with a penis – has a long history across the world (in Britain the term buggery was used, which is synonymous with sodomy). Yet, while criminalisation of the act of penile penetration of the anus does not specifically relate to gay men, as, for example, heterosexual couples can and do enjoy anal sex, criminalisation and prosecution has focused on gay men.

The moral landscape of anal sex

The perceived dangers of homosexuality that are expressed in media discourses are mere echoes of the way that homosexuality was figured in the legal imaginary. For example, in France – which we might note was one of the first countries in the world to decriminalise homosexuality and is often seen as a country deemed to be sexually liberal – we find examples of how sexual behaviour between people of the

same sex has nonetheless been designated as 'immoral' and has been regulated through law. While sodomy was decriminalised in France from 1791 this was because the new penal code created during the French Revolution made no reference to the criminality of anal sex. Other offences relating to sexuality continued to be illegal – gross public indecency, sexual relations with an underage partner, and 'corruption of young people' - and Michael Sibalis (2002) shows us that that the French courts, at least in principle, treated heterosexuals and homosexuals in the same way as each other. However, such equitable treatment ended during the second world war when the Vichy Government (the Government responsible for the civil administration of France during Nazi occupation) set the age of consent for homosexual sexual acts between men at 21, compared to 13 for heterosexual acts. The difference in age of consent remained in place until 1982, when the disparity was corrected.

Meanwhile, in England and Wales sexual acts between men have been criminally regulated, initially by the church and then through criminalisation by the state. The 1533 Buggery Act constructed the crime of buggery as penile penetration of the anus of a man or woman, or the anal or vaginal penetration of an animal by a man or woman. Other sexual acts between men (oral sex, for instance) were not criminalised until 1885, with the enactment of the Criminal Law Amendment Act, often referred to as the Labouchere Amendment. The statute identified homosexual sexual acts as 'gross indecency' and so allowed for prosecution of men who engaged in sexual acts with other men beyond anal penetration. Gross indecency was far easier to prosecute than buggery which required proof that

penetration had occurred; a challenge if the sexual act was consensual, as both partners would be committing the offence and would self-incriminate if reporting the other. Note, as we will see below, before 1994, non-consensual anal penetration was not deemed to be rape under the law, as the act of anal penetration was already illegal whether there was consent or not. It therefore could never be consented to, and so it could never be rape under this legal iteration.

In Britain, in 1957, Sir Wolfenden was asked by the Conservative government to consider the legal status of both homosexuality and prostitution in the wake of a number of high-profile convictions of well-known men for offences related to homosexuality. Weeks (1981: 239-42) notes that in the post-war era homosexuality was increasingly seen as evidence of a decline in moral standards and was thus accompanied by an increased police 'zeal', which peaked in 1953, for prosecuting homosexual men. Wolfenden's committee considered the merits of continuing to prosecute homosexuality, which was – rightly or wrongly – increasingly being seen as a medical condition rather than a crime. Indeed, the report notes that 'the purpose of the criminal law was to preserve public order… and to protect the weak from exploitation. It was not to impose a particular moral behaviour on individuals' (Weeks, 1981: 242-3), thus private acts of consensual homosexual sex ought to, according to Wolfenden, be decriminalised.

Yet, it was not until 10 years later with the passing of the Sexual Offences Act 1967 that consensual homosexual acts between two men aged 21 or over, conducted in

private, stopped being illegal. While consensual *homosexual* anal sex was decriminalised by the 1967 Act, consensual *heterosexual* anal sex was not, and remained a criminal offence punishable by up-to life imprisonment until 1994. Paul Johnson (2019) argues that this occurred in part because buggery was thought of as a purely homosexual act, but also due to belief in Parliament that anal sex was so immoral that men should be prohibited from performing it upon their wives. It seems that there was a general disbelief that a woman may want to be anally penetrated.

A key element of the 1967 Act was that sexual activity between men was only legal if done in private, which did not include:

> (a) when more than two persons take part or are presented; or
>
> (b) in a lavatory to which the public have or are permitted to have access, wither on payment or otherwise. (Sexual Offences Act 1967 s1(2))

The privacy requirement was strictly interpreted; men who had sex in hotel rooms were deemed to be having sex in a 'public' space, and the presence of other people in a private space such as someone's home meant the space was no longer considered 'private', even if the two men were having sex in a separate room from the other(s). As such, while the passing of the 1967 Act was progressive, it did not hold same-sex sexual activity to be equal to heterosexual or lesbian sex.

Given the continued involvement of the law in matters relating to sexual relationships between men, it is obvious that the British state continued to police

and regulate male sexuality that was deemed to be immoral and dangerous. Peter Tatchell (1992), a UK-based LGBT+ and human rights campaigner, argues that prosecution of gay men intensified after 1967. Such conclusions are supported by police recorded data, which shows that prior to 1967 the average number of offences for buggery and gross indecency recorded each year were 248 and 567; after 1967 the average each year was 723 and 1,010 (Home Office, 2016). The continued focus on the perceived immorality of homosexuality is further apparent in the decision to include homosexual sexual acts as part of the 1997 Sexual Offences Act, which introduced the sexual offenders register. As Nick Dearden (1999) argues, by conflating homosexuality with paedophilia, the law responded to the unjustified and anecdotal belief held by wider society that gay men are predatory and pose a risk to 'proselytise vulnerable youngsters (specifically impressionable 16–17-year-olds)… to seduce them into a gay lifestyle from which they may later find it difficult to escape' (1997, 321). As we shall see in Chapter Twelve, this conflation also enabled paedophiles to hijack debates about LGBT+ justice to further their own agenda (see Tom O'Carroll, 1980).

Being queer in the classroom

As we have already outlined, regulation of sexuality is completed not only though the law, but also through social and cultural dynamics of life. The construction of homosexuality as something immoral and dangerous which therefore should not be 'taught' or otherwise 'encouraged' found its pedagogic manifestation in Section 28 of the innocuously-named Local Government Act of 1988, which applied in Great Britain. The section stipulated that:

1. A local authority shall not—

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

2. Nothing in subsection (1) above shall be taken to prohibit the doing of anything for the purpose of treating or preventing the spread of disease.

As you can see, this section prohibits schools from teaching pupils about homosexual relationships except when doing so might help to prevent disease. It is probably not difficult to guess that legislators had HIV in mind here. Even though no local authority was ever prosecuted for 'promoting homosexuality' in its schools, it is easy to see how the creation of such a law demonstrates the status that LGBT+ issues had in 1980s and 1990s Britain. The Act was only repealed – after considerable struggle – in 2003. A consequence of this is that young people in schools up until the early years of this century received no education about LGBT+ sex, no information about LGBT+ relationships, were forced to adopt **heteronormative** models, had few LGBT+ role models, and few ways in which to understand non-heteronormative sexualities as legitimate and acceptable; figuring them instead as 'pretended' family relationships.

Carl Stychin (1995: 42-3) notes how anxiety about positive representations of homosexuality ('promotion') was rooted in an anxiety about people 'choosing' to become gay or lesbian or bisexual or **trans** once they had more knowledge of the culture. This panic constructs homosexuality or queerness as contagious threats to

'traditional, deep-rooted family values', which will be the cornerstone of the strength of the nation.

Regulating (hetero)sexuality

Beyond administering the legal status of sex between men, Criminal Justice Systems around the world have an established history of regulating appropriate and inappropriate heterosexual encounters. One prominent way in which this can be seen is in the changing understandings and interpretation of the crime of rape.

Do we know what rape is? Or, what 'counts' as rape? Perhaps today we can answer 'yes' to these questions, as rape is often characterised as a crime that is clear in its definition. In English and Welsh law, it is currently defined as the intentional penetration of the vagina, anus or mouth of another person with a penis, without consent, or without reasonable belief of consent (Sexual Offences Act 2003, s1) – we discuss the challenges of understanding consent in Chapter Four.

However, as Joanna Bourke (2007) argues, rape is a social performance: a ritualised and socialised attack which is acted out and interpreted differently depending upon time, location and context. The same act (for instance penetration of the vagina with a penis), will be understood as rape in some contexts and as not rape in others. As such, it has both social, cultural, and legal meanings that are rooted in historical perspectives and are different in each society. While the following analysis is predominantly based on English and Welsh law, similar

focuses can be seen in other legal jurisdictions, particularly those former colonies that have inherited English legal traditions, such as Australia, Canada, and the USA.

Rape: from theft to consent

While today we see rape as a violent crime which is about exerting power, this has not always been the case. Historically, rape was closely connected in law to crimes of property and stealing something of value, rather than violence. Origins of the word 'rape' comes from the Latin verb *rapere*, which, in classic Latin, meant 'to seize'. As Caroline Dunn (2017) argues, during the thirteenth and fourteenth centuries 'rape' was used to describe both sexual assault against women and also to describe the abduction or consensual elopement of a woman and her lover from her husband or parent's/guardian's family.

As such, the laws were concerned not with the emotional and bodily impact of sexual violence on the woman who experienced it, but with the impact on the man who had control and ownership over her body and sexuality. The control of women by their male kin (relations and wider family circle) is perhaps apparent in the fact that in 1382 the law was amended so that the right to prosecute a man suspected of rape was extended to the woman's male kin or guardians (Saunders, 2001); this change facilitated criminalisation in cases where the woman consented to the elopement and therefore did not want to bring a charge against her lover (Dunn, 2017). The wronged party was often identified as the woman's family, rather than the woman herself.

Virginity is important in this legal context of rape. The crime of *raptus* was seen to be more heinous if committed against a virgin (Dunn, 2017). It was also considered to be easier to 'prove' due to the physical impact of the damage to the hymen. Virginity was highly prized, so there was greater motive for prosecuting these attacks and there was more to gain form the prosecution as the woman's value would have been reduced by the 'loss' of her virginity and thus damage to her marriage prospects. Rape prosecutions were much less likely to be brought by women who were not unmarried virgins, or by women of the lower social status and wealth. Once again, indicating the wider social perception that the true crime in these cases was one of social and financial loss to the men who controlled the woman (the victim/survivor).

We use the term 'victim/survivor' to refer to people who have experienced non-consensual sexual activity and sexual violence. We have chosen this terminology specifically to recognise the differing experiences of individuals in relation to rape and sexual assault. For some it is important their victimisation is recognised. For others the focus is their survival and moving on from that experience. It is no-one's place to tell a person how they should feel about their own experience, and so we use this language to acknowledge and legitimise differing responses of people who experience and live through sexual violence.

Virginity and Law

Virginity is a social concept that holds substantial weight in society, both historically and today; think, for example, of the significance of the Virgin Mary. Yet

what is virginity? What does it mean to be a 'virgin'? How do we define it? And why is it seen to hold such importance?

In her history of the phenomenon of virginity, Hanne Blank (2007: 3) argues that virginity has no tangible existence, and can only be determined to exist due to the presence of its effects or side effects within society. The term 'virgin' comes from the Latin *virgo* meaning a girl, or never married woman (Blank, 2007: 10). Historically and across multiple languages, as Blank outlines, the term is used to describe girls and women, rather than boys. And virginity as a concept continues to be associated much more closely with women and girls than with boys and men. Similarly, it is most often associated with a specific expression of heterosexuality; of a woman having vaginal penetrative sex for the first time. Images of virginity are also racialised, as in the Western world virginity is traditionally symbolised as **Whiteness** and connected to virtue, purity and goodness (such as is depicted in Christian images of the Virgin Mary). In contrast, sin, corruption, and evilness are associated with dark colours and **Blackness** (Blank, 2007). Women and girls of colour are much more likely to be sexualised and perceived as 'immoral' or 'promiscuous' than their white peers, as we explore in Chapter Seven.

The connection of virginity to a first sexual encounter is dubious, as it relies on a fixed definition of 'sex'. For example, if a man and woman intimately touch each other and/or have oral sex, are they virgins? What if they have anal sex? Are you a virgin if you have masturbated? Would a woman be a virgin if she or someone else inserts a finger or sex toys into her vagina? Would people who have only ever

engaged in same-sex sex, rather than heterosexual sex be virgins? What if a man's penis is only slightly inserted into a woman's vagina, or just rests at the entrance; are they still virgins? What if contraception is used during penal-vaginal penetration, or the man pulls out before he ejaculates, would virginity 'remain' in these circumstances? Interpretations of what constitutes virginity 'loss' and what can cause it are varied and multiple. For example, in her study interviewing young adults in the USA, Laura M. Carpenter (2001) found that numerous forms of genital sex were seen to result in virginity loss, and many participants argued that virginity could not be lost through rape; the phenomenon was conceptualised as a gift, stigma, or part of a process.

The unbreached hymen – a membrane, located inside the opening of the vagina - is often considered to be evidence of virginity. It is thought that a hymen remains in place until it is penetrated by a penis through sexual intercourse; thus 'removed', it becomes a physical demarcation of the 'loss' of virginity in women. However, as Blank (2007: 23) states, 'the hymen is nothing more or less than a functionless leftover, a tiny idle remnant of flesh that remains when the opening of the vagina forms' – unfunctional because, unlike, for example, the hymens of whales, which keep out water, or guinea pigs, that dissolve when fertile – the human hymen does very little of anything (Blank, 2007). The human hymen can wear away due to activity other than vaginal-penial intercourse – through finger penetration by someone else or yourself, physical activities such as horseback-riding, gymnastics and hockey, the use of menstrual cups or tampons. Furthermore, some women are born without the flap of skin and some women's hymens will tear or rub away with

limited physical engagement with the genital area, so that they have not noticed it has 'gone'. The cultural myth that the 'breaking' of the hymen will cause substantial bleeding and pain is most certainly not a universal experience.

Therefore, if virginity is a construction that is neither agreed upon as phenomenon nor physically identifiable, then why does it hold such significance, both historically and today? The clearest answer to this lies in the structure of heterosexuality and society around the principles of **patriarchy** and private property. Ownership of possessions, land, titles, for example, and the organisation of society into groups based on 'kin', centralising the man as the head of the household, with control over his wife and children, gave rise to a need to protect men's lineage and patrimony: the inheritance from father to son down the male line of the family. Within this socio-cultural-economic organisation of society, virginity becomes a functional requirement so that a man may 'know' that the children *his* woman births are, in fact, *his* children, and not the off-spring of some other man. Prior to the very recent invention of paternity tests it was impossible to tell who had impregnated a woman, unless you were certain she had never had penial-vaginal sexual intercourse with another man and were assured of monogamy. To secure this, it was thus necessary for a woman be a 'virgin' upon marriage, so as to not bring another man's child into her husband's family, and also that she remained 'chaste' following marriage; only engaging in sexual activity with her husband.

One of the consequences of this construction of virginity is that women who are perceived to not be 'chaste' were considered to be sexually immoral and impure. Such focus on women's sexuality as a mark of their inherent 'quality' became even more important to a woman's character in the nineteenth century, with ideologies of the 'fallen' women. These perceptions of sexuality which denote a woman's worth and quality have impacted perceptions of rape and resonate into the present day, as we will see in Chapter Seven on trafficking and exploitation, children's sexuality, as outlined in Chapter Twelve, and motherhood and reproduction, as outlined in Chapter Six. This is not to say that women never engaged in consensual sexual relationships outside of marriage, but within most social circles, such sexual engagements were kept discreet and secret so as to avoid 'scandal' and 'ruin' of a woman's reputation, and with hers, potentially also her husband's and/or father's. For working women such as servants, a ruined reputation could mean the inability to find employment, at a time when there was little to no social support for the impoverished.

Modern day perceptions about 'loose' women, 'sluts', and 'whores' continue to be a feature of women's **sexuality** in ways that they are not for men, and are expressions of **rape culture**. Therefore, social and cultural regulations of the acceptability of women having sex outside of a monogamous relationship are an example of historical thinking about sex that has failed to develop and modernise.

[START TEXTBOX]

Task: Reflect on what you have read about the concept of virginity and consider:

- What is the significance of virginity in regards to the crime of *raptus* in fourteenth century England, as outlined above?
- How important is 'virginity' for men and women today?
- How would you define virginity? Has your definition changed in reading this section of the book?
- If society was structured around matrilines (tracing the family through the female line) would we be so concerned with the virginity of girls and women? Would we have other worries?
- Is the concept of virginity or chastity still connected to perceptions we have of sexual violence? If so, how?

[END TEXTBOX]

'Against her will'

While the term rape came to be defined as sexual violence alone, statutory definition of the offence only appeared in the late twentieth century; prior to this the offences continued to exist in England and Wales only as a **common law** offence. It was defined as 'the carnal knowledge of a woman forcibly and against her will' (Blackstone, 1791: 210). This common law definition was exported widely to countries outside of England, as British rule and influence spread during the period of colonialism. Thus, it has shaped and influenced the legal understanding of this form of sexual violence in many jurisdictions.

There are a number of important points to note about the common law definition of rape, the first is that the offence operated only on the basis of a female victim

and a male perpetrator, and the offence required the insertion of a penis into a vagina (carnal knowledge). As such, other forms of sexual assault fell under the category of buggery, (as outlined above) or indecent assault, an offence that historically focused on sexual engagement with girls; defining the age of consent (see Chapter Twelve). Thus, under this legal definition, non-consensual penetration of the anus or mouth was not defined as rape. Consequently, legally, a man could not be raped by anyone (man or woman) and a woman could not be raped by a woman, even if sexual acts were committed without consent.

Married-to-your-rapist laws

One category of men who were immune from prosecution were men who raped their wives. As this law worked on the basis that within marriage a man had the right to sexual relations with his wife, it was a legal impossibility for the 'carnal knowledge' to be 'against her will' and for the man to commit rape against her, as '…by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract' (Hale, 1736: 629). It was not until 1991 that this common law legal principle was overturned. In the case of *R v R*, the House of Lords (the highest court in the UK at the time, the Supreme Court of the United Kingdom assumes jurisdiction in 2009) upheld the conviction of a man who raped his estranged wife, stating:

> It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so

> in the light of any relevant Parliamentary enactment. (*R v R* [1991] UKHL 12; [1992] 1 A.C. 599 at 610)

According to the United Nations (2015), only 52 countries to date have passed laws against marital rape: that is only one in four countries across the globe.

In some instances, women who are raped are forced to marry their attacker in order to assuage the shame or burden to the family of having a woman so 'despoiled' by rape. We may see the marriage between a rapist and the victim/survivor of the sexual assault as something that only happened in the past; however, in numerous legal jurisdictions laws exist allowing for men who would be prosecuted for rape to be exonerated if they marry the woman/girl they have raped. Overturning such laws is a focus of UN Women (2019b) activism, which has seen some success over recent years with Tunisia, Palestine, Jordan, and Lebanon recently changing their laws to prevent perpetrators from escaping prosecution in this manner. However, many more countries still permit men to marry the woman they have raped, and campaigning against this form of gender-based violence continues.

[START TEXTBOX]

Consider the following:

- What factors do you think might have influenced countries to make it illegal for a man to rape his wife? You might want to look back to Chapter Two for ideas.

- What factors might explain why three-quarters of countries have not yet implemented laws to criminalise marital rape?
- Why might communities be happy for victims/survivors of rape to be married to the man who attacked her?
- What do such social pressures and decisions tell us about how women are regarded and women's rights in these countries?

[END TEXTBOX]

Ejaculation and rape

A further way in which heteronormativity is inscribed in cases of sexual violence lies in how courts decided that the 'carnal knowledge' was 'forcible and against her will'. A determining factor of rape which characterised prosecutions from the late eighteenth century was the need to prove that the accused had ejaculated inside the vagina of the victim/survivor (or anus in cases of buggery). This legal development occurred following the trial of Samuel Hill in 1781 where the jury determined that he should not be executed for the rape of Mary Portas as she could only confirm that Hill had penetrated her vagina with his penis, but not that he had ejaculated. Following this case, the crime of rape was determined to have occurred (the *actus reus* of the offence) only if the complainant could swear that both penetration *and ejaculation* occurred; it would then be left to the jury to determine if her witness testimony was convincing on both points (Block, 2016[2013]: 32). The importance of ejaculation in the legal definition of rape remained a feature of the law, hampering convictions until 1828 when the Government legislated that,

'the carnal knowledge shall be deemed complete upon proof of penetration only' (Offences Against the Person Act 1828).

The significance of the carnal knowledge being 'against her will' has impacted and shaped understanding of rape for centuries and continues to be a feature of rape trials today. In her seminal text of 1975, *Against Our Will*, Susan Brownmiller advocates that for women the crime of rape occurs when a woman chooses to not have intercourse with a man and a man chooses to have that intercourse with her *against her will*; so, for women it is a crime based on their right to consent to what happens to their body. However, historically the legal understanding of rape has been predicated on the principles and evidence of force. Proof of rape has often relied on physical evidence of an extreme struggle. Joan McGregor (2012) argues, that this emphasis on force expresses a direct connection to the concept of virginity again, and the belief that a woman of moral virtue would do all she could to prevent her virginity from being 'stolen' by an unknown man. The law, criminal justice, and society assumed that women valued their chastity highly (indeed, their intrinsic value as humans was often defined by it), and so would protect it with their lives. Failure to demonstrate such a level of resistance was deemed to suggest that a woman had consented to the sexual activity; women who were seen not to have put up enough of a fight were considered not to have been raped. For example, in a case from the USA, *Brown v State* 106 N.W. 536 (Wis. 1906), it was ruled that a 16 year old girl had not been raped as she did not adequately demonstrate she had not consented even though she had tried to scream, was physically knocked to the ground and her attacker physically forced himself upon

her (McGregor, 2012). It also meant that women who were threatened with violence, deceived, pressured, manipulated, or coerced into sexual intercourse through means other than physical force or restraint were not considered to have been raped. In England, it was not until 1885, under section 3 of the Criminal Law Amendment Act, that it became illegal to have 'carnal connexion' with a woman or girl through threat or intimidation, false pretences, or representation.

The emphasis on force shaped much feminist analysis of the law and campaigning for a change in the latter half of the twentieth century. Sexual violence became a key focus for feminist activism during second wave feminism of the 1960s, 1970s, and 1980s. Feminist voices rose to tell stories of women's experiences of sexual violence, aiming to illustrate that these are everyday experiences for many women, not infrequent occurrences for the unfortunate few.

Academic writing and political campaigns led to the opening of rape crisis centres, protests against men's violence towards women, as well as criminal justice responses to such violence, particularly in the use of women's sexual history to discredit her testimony when giving evidence in court, and drew attention to the law's inability to recognise martial rape (see Russell, 1975; Smart, 1977, 1989; Edwards, 1981; Stanko, 1985; Temkin, 1987; Kelly, 1988). Ultimately, many feminists identified that rape was an expression of the dominance of men over women, rather than about sex, and that it formed part of a wide spectrum of violence and control exerted over women by men they encounter: partners, friends and family, as well as acquaintances, and strangers.

[START TEXTBOX]

In the UK, we now have more specific and explicitly worded criminal offences relating to non-consensual sex. However, the current law still leaves us with a number of challenges as to how we legally define and understand sexual violence. Take a look at the following questions and see what you think might have impacted our legal understandings of rape, considering the historic and social influences outlined in this chapter:

- Across the UK, rape is defined as penile penetration, and yet it is based on the concept of consent. What if a person uses another person's penis to penetrate their own anus, mouth, or vagina without the consent of the person whose penis it is (for example a woman performs oral sex on a man without his consent), do you think this fits a legal definition or rape? Do you think it should fit a legal definition or rape? Why do you think the law of rape has not captured this form of non-consensual sex?
- Alongside the crime of rape is the crime of 'assault by penetration', which is the insertion of an object or a body part other than a penis into the anus, mouth or vagina of another person without their consent. Across the UK laws have specifically considered this to be a crime distinct from rape (although the punishment is the same). This is different from other legal jurisdictions, for example in Canada the word rape is not used and the law criminalises 'sexual assault'. What is the significance of the term 'rape' in law? Do we still need it to distinguish from other sexual acts that occur without consent? Why are we still concerned with the penetration of the

body with a penis? Penetration with other implements may potentially be more traumatic or damaging than a penis, for example, penetration with a knife or broken bottle.

- The law is based on a defendant's belief that the victim/survivor consented, rather than on the simple fact that the victim/survivor says they did not consent, for example, if the victim/survivor did not want to have sex but did not say anything due to fear of repercussions of showing a lack of consent, and so there were no outward signs of non-consent (except perhaps lack of enthusiasm) then the crime of rape has not been committed. Do you think this is right? Could the law operate in any other way? If so, how? What might the legal repercussions be for the accused?

[END TEXTBOX]

Summary

The regulation of sexuality and sexual practice through law and criminal justice has an established history that echoed around the world. Of course, the Criminal Justice System is not the only way that sexuality is policed. It acts in dialogue with government policy, medical discourses, religion, education, and the family, to name a few. We have seen how this plays out to control, guide, and manage a population and to build a strong nation. The way in which sexual activity is understood and regulated also depends very much on the spatio-temporal context of the activity: who the actors are, their ages, the country, the era that we are living in, and what they are doing. Contemporary understandings of sex and sexuality are laced with

historical legacies, as we have explored in the examples of decriminalisation of homosexuality and changing nature of rape law.

One thing that is apparent from this chapter is that whether it is to do with LGBT+ rights or the right of a man to rape his wife, legal reform often follows in the footsteps of social change. We have also seen how these changing laws become an expression of nationhood: with progressive feminist policies or legalising gay marriage becoming a stick with which to beat other, supposedly, less 'progressive' countries, and a mask behind which to hide racist and otherwise problematic policies and practices.

As you move through this book, hold on to this critical analysis of the context of crime, sex, law, and justice. Ask yourself where knowledge about what you are encountering comes from, in terms of time (when is it happening), space (in which national, global, local context it occurs), and for what does it seek to achieve? What does it actually achieve? (This last one is a hard one to answer).

Review Questions

- How do ideas of nationalism impact understandings of normative sex?
- How have ideas of acceptable/non-acceptable sex been shaped by patriarchy?
- What will normative sex look like in the future? In the UK? In other countries?

- What socio-cultural factors will impact developments of ideas of sex and sexuality?

Other chapters that this links to:

Chapter Four (Consent and its discontents)

Chapter Five (Sex and institutional cultures of abuse)

Chapter Six (Reproduction, sex and crime)

Chapter Seven (Sexual exploitation and the State)

Chapter Twelve (Children, sexualisation and the law)

Chapter Fifteen (How to change your life)