

## Introduction

---

In the nineteenth century, sodomy was referred to as the worst of crimes, and it was described as something that no man would wish to be associated with in any way, lest his reputation be damaged for life. And yet as early as 1835, only three years after the passage of the Great Reform Act of 1832, and two years after the legislated abolition of slavery in the British Empire, in the midst of the period known as Britain's "Age of Reform," the elected representatives of the United Kingdom voted to end the death penalty for sodomy. In a way not previously understood, this 1835 vote was intertwined with the fate of the last two men executed for sodomy in Britain. The legislation that would have saved the lives of these men, who had been convicted for committing a private consensual act behind a locked door, had already passed in the House of Commons. It had been in the House of Lords for weeks at the time of the executions, despite Lord John Russell's efforts to advance it. Although the bill would not pass in the Lords, all subsequent death sentences for sodomy were commuted to transportation or imprisonment in a process overseen by both judges and the Home Secretary, beginning with Russell. The use of the royal prerogative to commute sentences after conviction has been described by Roger Chadwick in *Bureaucratic Mercy* as "a mechanism for accommodating moral change" and "a flexible link between an evolving social perception of justice and the less elastic progress" of the law.<sup>1</sup> Executions for sodomy ended almost immediately after the House of Commons voted that they should, in 1835, even if the process by which that was achieved was precarious.

## Excerpt • Temple University Press

Several years later, after Russell had pushed through a bill that reduced the number of capital crimes in Britain to fourteen (down from more than two hundred at the start of the nineteenth century), another effort was begun that would have removed the death penalty for sodomy from statute law.<sup>2</sup> The sodomy law had been left out of Russell's sweeping legislation passed in 1837; it was instead a private member's bill, rather than government-sponsored legislation, that was proposed in 1840 to end the death penalty for sodomy, rape, and a few of the other crimes for which it still applied.<sup>3</sup> Russell did not support all the clauses of the private member's bill, but it became clear, through the course of the debates, that he supported its provision ending the death penalty for sodomy.

A judge who had presided over sodomy trials told Russell in 1835 that he was "convinced that the only reason why the punishment of death has been retained in this case is the difficulty of finding any one hardy enough to undertake what might be represented as the defense of such a crime."<sup>4</sup> One of the men who did this, cosponsoring the legislation in 1840 and 1841 that would pass all three of its readings in the Commons—this time with sustained debate—was Fitzroy Kelly. Kelly, who had recently entered Parliament, came from a family saved from financial ruin after the early death of his profligate father by the success of his mother, Isabella Kelly, as a novelist. Isabella was a close friend of the gothic novelist Matthew Gregory Lewis, who was for a time officially the patron of William Kelly, Isabella's son and Fitzroy's brother.<sup>5</sup> Speculation over Lewis's sexual interest in men as well as women was recorded in the early nineteenth century, and scholars in the twentieth century have identified William Kelly as perhaps the most important emotional attachment of Lewis's life.<sup>6</sup> The nature of Lewis's sexual tastes and the nature of his relationship to William remain points of controversy, but there is no doubt that their relationship intertwined the Lewis and Kelly families and also created a familial link to the other cosponsor of the 1840 and 1841 legislation.

That other cosponsor was Stephen Lushington, one of the most prominent abolitionists of the nineteenth century. He voted against the slave trade in 1807 and worked closely with other leading abolitionists of the 1820s and 1830s. His name is one of eight carved on the Buxton Memorial to the abolition of slavery, on grounds adjacent to the Palace of Westminster.<sup>7</sup> His brother was married to Matthew Lewis's sister. Lushington had also, as a younger man, acted as a lawyer for Anne Isabella "Annabella" Noel Byron during her separation from Lord Byron. Lushington is the individual believed to have threatened to use sodomy allegations to force Byron to give

## Excerpt • Temple University Press

ANNABELLA CUSTODY 133

Annabella custody of their infant child, at a time when paternal custody rights were nearly absolute.<sup>8</sup> These actions were remembered and referenced more than a decade later, and Lushington would face criticism in print for intruding into the private decisions made between a husband and a wife in their bedroom.<sup>9</sup>

The relationships between Kelly's and Lushington's personal experiences and their involvement in the 1840 and 1841 legislation remain ambiguous, but their actions in Parliament are less so. As in 1835, the bills put forward in 1840 and 1841 would pass in the Commons, but only in 1840 and 1841 were vote tallies and the transcripts of the parliamentary debates preserved. This record allows us to know, among other things, that Daniel O'Connell voted for the reform, William Gladstone voted against it, Benjamin Disraeli was absent, and Russell delivered a speech that most likely included an argument as to why it was appropriate to lessen the penalty for sodomy, regardless of how one felt about the morality of the act.<sup>10</sup> In the House of Lords, the explicit argument against lessening the penalty for sodomy, delivered by one of the most outspoken defenders of the radical Protestantism in that chamber, was also recorded.<sup>11</sup> It was not, therefore, a typical member of the Lords who stopped this effort, as most men in both houses seem to have been willing to let this change pass into law without comment.

These events, and the meanings ascribed to them by individuals in the early nineteenth century, are the subject of this book. What is presented here is based on records that are fragmentary, incomplete, and at times impervious to satisfying interpretation, but enough details survive to suggest something very different from most historians' current understanding of the potential to end the death penalty for sodomy in the early nineteenth century. What this book demonstrates is that an amalgam of reformist momentum, familial affection, elitist politics, class privilege, Enlightenment philosophy, and personal desires, experienced by different people, and in different ways, almost brought about a reform that would have changed the legal landscape at a time when many believed that such a reform would not have been possible. It was not part of an accelerating "Whiggish" advance toward greater toleration but closer to the opposite, drawing on the last remnants of the greater sexual openness of the Georgian period, just overlapping with the waning momentum of the Age of Reform.<sup>12</sup> An opportunity to end the death penalty for sodomy based on ethical arguments was lost in 1841, and it did not return. When the issue resurfaced, twenty years later, the results of the new law were far more draconian, even if that outcome was masked by the formal end of the death penalty for sodomy in 1861. The pages that follow explain

## Excerpt • Temple University Press

the reasons and provide a broader source base than has been used to date, from within British politics and society, to understand the meaning of the sodomy law at this particular time and place and those who wished to see it changed.<sup>13</sup>

Since the first works of academic gay history were published, the key date associated with the end of the death penalty for sodomy was (reasonably) taken to be 1861. In 1861, twenty years after the events recounted in this book, the death penalty for sodomy was finally removed from statute law, as part of a years-long process of criminal law reform that contained almost no direct discussion of the sodomy law. The dynamic that had made the 1835 and 1840–1841 efforts so intense, stemming from the general reformist tenor of the age and the willingness of various actors to consider a range of moral and ethical arguments in relation to the sodomy law, is absent from the records associated with the 1861 legislation. Anyone looking for a debate related to the sodomy law in these 1861 records will not find one. It is perhaps part of the reason why the end of the death penalty for sodomy in 1861 is regularly mentioned in the secondary literature, but without sustained analysis.

Jeffrey Weeks was the first to set out the legal framework for understanding how sex between men was prosecuted in nineteenth-century Britain. He identified changes in the law related to sodomy in 1828, when the rules of evidence were changed, making convictions easier to obtain, and 1861, and he also identified 1835 as the date of the last sodomy executions. Focused on how changes in the law affected the policing of sex between men in British society, Weeks did not conduct extensive investigations into why those laws were passed. The laws Weeks first identified have been subsequently mentioned in a summary way in most histories of sex between men in Britain.<sup>14</sup> The most extensive and successful subsequent use of the parliamentary papers to analyze prosecutions related to sex between men in Britain was that of Harry Cocks. Cocks first used the statistics gathered by Parliament to demonstrate the importance of attempted sodomy prosecutions in the eighteenth and nineteenth centuries, although his questions and methodology also meant that the parliamentary debates surrounding the passage of statute law in the early nineteenth century did not fall within his study.<sup>15</sup> A further reason for the absence of analysis of the parliamentary debates was that there seemed to be very little material preserved that related to them, as members of Parliament went to great lengths to avoid directly discussing sex between men, even on those occasions when it was a part of the legislation under review. Additionally, for scholars focused on homosexual identity and homosexual politics, details pertaining to specific bills

## Excerpt • Temple University Press

INTRODUCTION

in the early to mid-nineteenth century might seem inconsequential, given that such identities, let alone such politics, were unknown in that period.

But the details matter, because by examining them, we can uncover some of the unexpected reasons why the majority of the elected members of Parliament were willing to lessen the penalty for sodomy, and understand how a diverse range of individuals within British society felt about this. The best account to date of what occurred in 1841 is covered in a few pages of legal historian Leon Radzinowicz's multivolume *A History of English Criminal Law*, but it contains distortions that have obscured the story.<sup>16</sup> Radzinowicz mentions the 1841 attempt to end the death penalty for sodomy briefly, arguing that by 1840, "Russell had decided that public opinion would support abolition of the death penalty at least for rape and carnal knowledge," and that he "attempted at the same time to get it removed for unnatural offences, but this provoked such high feelings in the Lords that it had to be withdrawn lest the whole Bill would be lost."<sup>17</sup> The debates cited in the accompanying note, however, were for the Lords debates on the bill presented by Kelly and Lushington. Kelly is mentioned by name, six pages later, as sponsoring the same bill, with Russell now presented as opposing it.<sup>18</sup> Following the actions of Kelly and Lushington, rather than Russell, links these debates to individuals who argued far more forcefully against the sodomy law and who also argued for the naturalness of same-sex desire and opposite-sex desire within the same individual.

Recovering the details that allow us to understand what these debates meant to the individuals participating in them is extremely difficult, not only because of the lack of sources but also because of the intellectual pitfalls of which such a project has often been assumed to run afoul. On those few occasions when this topic has been addressed at all, the early-nineteenth-century efforts to end the death penalty for sodomy are treated as one aspect of the larger effort to restrict or end the use of the death penalty in Britain.<sup>19</sup> Yet, time and again, the sodomy law is separated out from this general reform process, treated as an exception to the rule, for reasons often not specified, at least not in the moment. Two generations of gender historians and historians whose work is informed by critical race theory have demonstrated that such exceptions to the rule, when made in relation to gender or race, are anything but natural or self-evident and instead are points at which to investigate the workings and logics of power through the ways in which such exclusions were created, justified, and maintained.<sup>20</sup>

Attempts to focus on the specific treatment of sodomy laws in the context of general law reform are sometimes dismissed as an attempt to find mod-

## Excerpt • Temple University Press

ern homosexual identity in a period before the late nineteenth century or to read the evidence of the past through the categories of the present.<sup>21</sup> What must be done to avoid projecting modern understandings into the past is to fully historicize what sodomy law reform meant to all the relevant early-nineteenth-century individuals and in all the relevant early-nineteenth-century contexts. Only by devoting meticulous (and time-consuming) attention to understanding the different meanings that this concept had in that particular time and place is it possible to begin to speculate on an individual's motivation for a particular action, let alone on a self-understanding. Even after doing this work, in many cases meaningful understandings still cannot be known for lack of evidence.<sup>22</sup> Scholars must be prepared for and acknowledge these limitations in their texts, even as they recount as much as can be credibly established. This is the approach that Laura Doan calls for in *Disturbing Practices: History, Sexuality, and Women's Experience of Modern War*, referring to it as "critical queer history" while acknowledging it as the method of critical history in general, first spelled out in Michel Foucault's *Archaeology of Knowledge*.<sup>23</sup>

A version of this methodology is employed in the pages that follow—not to speak primarily to issues of identity, because these only surface briefly in Chapters 5 and 6 and then more extensively in the Conclusion, but rather to establish the contexts within which the ideas of sodomy, law, and reform gained meaning in the early nineteenth century. Each of these concepts had multiple distinct meanings, depending on where, when, or by whom they were being considered. Meanings multiplied, became more complex, and moved differently through the political system, depending on which groups or which contexts were defining the term and when and whether the above three terms were linked, either all together or in pairs.

Sodomy, for instance, was most widely understood through a range of religious contexts that condemned or disparaged it, but this understanding did not go unchallenged. In his published work, Jeremy Bentham creates a rationalist philosophical context that places sodomy outside the scope of behaviors that could be regulated by the state, and in his private writing, he goes so far as to assert that sodomy is a benign or even positive force.<sup>24</sup> These ideas, along with those stemming from religion, can be seen to influence the political debates of the 1830s and 1840s. It was possible to vote for lessening the penalty for sodomy as Bentham defines it but almost impossible to do so based on how a Protestant evangelical like the Earl of Winchilsea did in the House of Lords in 1841. Sensitivity to the range of ways in which the term was understood at the time also brings in the context of marriage. Sodomy between men

## Excerpt • Temple University Press

is described in a handful of written sources as a natural taste of some men, but those men are also described as naturally desiring sexual relations, including sodomy, with women as well. This interpretation had the potential to place sodomy within marriage and thus place religion, which was the guardian of the sacramental space of marriage, in tension with the authority of the state. This issue was never argued in Parliament, but it was raised in a publication associated with the parliamentary debates.<sup>25</sup>

Meanings of reform likewise varied if it was deployed in the context of Tory political discourse, Whig political discourse, or radical political discourse.<sup>26</sup> The process of Tory law reform was different from that of Whig law reform, and each addressed the issue of the sodomy law in the 1820s, 1830s, or early 1840s. Most prominent Whig and Tory politicians wrote nothing on the concept of sodomy, but it is possible to observe how individuals did or did not remain consistent in their avowed principles of law reform when the sodomy law was in question. This tells us something important about how they understood what the sodomy law meant. The fine distinctions made in the framing of the laws, and in the development of the arguments in 1835, 1840, 1841, and 1861, provide multiple points through which to gain such insights.

The radical perspective is not so clear from the parliamentary debates, but other sources show that for radicals, the sodomy law was often seen as a hated tool of class privilege and religious hypocrisy that was applied only to the poor, while the rich escaped prosecution. In some radical writing, men convicted of sodomy or its attempt are described as “poor buggers,” while far worse invective is directed at the system that protected upper-class men who had committed the same acts.<sup>27</sup>

Additionally, the “sodomy law” was something far more expansive than the concept of sodomy itself. As Cocks has shown, the law against *attempted* sodomy, from the early eighteenth century forward, provided the vast majority of prosecutions for sex between men recorded in the criminal returns. The vagueness of what constituted an attempt at sodomy under the law meant that a wide and subjective range of behaviors might lead to a conviction.<sup>28</sup> In addition, nineteenth-century newspaper reporting of cases involving “indecent assault” between men, which were not recorded separately in the parliamentary papers, suggests that these prosecutions were far more numerous than those for attempted sodomy and that no more than a suggestive touch was necessary to bring about a prosecution.<sup>29</sup> What constituted a criminal sexual advance between men, therefore, was based on the understandings of the accuser, the presiding magistrate, and the jury. The death penalty for sod-

## Excerpt • Temple University Press

omy, although comparatively rarely used, helped anchor the system of men's policing of the masculinity of other men, and we know that its abolition mattered to some men at the time as a step toward delegitimizing this policing, based on the writings they left behind.

Placing the focus on understanding the social and cultural contexts of sodomy law reform significantly increases the body of relevant source material. Because this is a story concerned in part with parliamentary politics, many of the individuals involved are well documented, and the highly structured nature of parliamentary debate allows for small fragments of information to reveal far more than they would in another context. Russell, for example, never spoke the word "sodomy" in his speech arguing that moral objections to sodomy were not enough of a reason to continue to make it a capital crime, nor did he use any of the euphemisms for sodomy associated with the period. However, in the speech where he argued that an unnamed "offence was beyond the law and above the law," Russell was giving his views on each of the clauses of the bill that Kelly and Lushington had put forward, and he was doing so in the order in which those clauses appeared in the text of the bill.<sup>30</sup> In this and many other ways, the systematic nature of parliamentary records allows us to discern what would otherwise be unknown.

Parliament provides one context in which seemingly small amounts of evidence reveal a great deal; family, as shown in the pioneering work of John Gillis, provides another. From Matt Cook's work on queer domesticity in the late nineteenth and twentieth centuries to Emma Rothschild's demonstration in *The Inner Life of Empires* of the importance of family life and family networks for members of Parliament and the commercial class, a range of recent work has shown that examining family is a key to understanding the self in relation to sexuality, in the case of Cook, or the meaning of the Enlightenment as a lived experience, in the case of Rothschild.<sup>31</sup>

The examination of family also begins the process of expanding the range of political actors beyond those who sat in Parliament or voted in elections, as historians from E. P. Thompson to James Vernon have long called for.<sup>32</sup> More popular forms of politics, carried out in the public sphere, preserve the perspective and the writing of political radicals, working men and women, and women writers of the middle and upper classes. The chapters that follow look at a diverse range of political actors, accessible as never before thanks to the digitization of sources.<sup>33</sup> The political networks of poor radicals can be traced, as can obscure literary references meant to be opaque to most readers. It is now also possible to quickly reconstruct the career of a backbench Member of Parliament (MP), to learn something of his family,

## Excerpt • Temple University Press

### INTRODUCTION

and to explore the failed initiatives that provide insights into otherwise unrecoverable aspects of British culture. Approaching these sources with a commitment to foregrounding issues of class, gender, race, and sexuality leads to a political history focused on those who challenged the hegemonic values of Georgian and Victorian Britain and provides a new source base for the history of sexuality before the late nineteenth century.

The material that is presented in the pages that follow is organized chronologically and thematically. The chronological organization is necessary to make the relationships between these events comprehensible. Some of the incidents described in this book have been addressed in other scholarly works. Such incidents as the Bishop of Clogher affair or the evidence of Lord Byron's sexual interest in men and women have long been referenced within queer histories of Britain, but they take on new significance when seen as part of a sequence of events.<sup>34</sup> The material is also arranged thematically, with each of the first six chapters addressing an aspect of the cultural context of the late Georgian, Regency, and early Victorian periods relevant to the analysis of the parliamentary debates that are explored in the final chapters.

To this end, the first chapter addresses Bentham's public and private attempts to establish a new context in which the state regulation of sodomy could be understood and reformed. This chapter asserts that one of Bentham's most widely read and influential works on legal reform, *An Introduction to the Principles of Morals and Legislation*, published in 1789, contains arguments against the criminalization of sex between men.<sup>35</sup> Bentham's argument is presented obliquely, but consideration of Bentham's text as a whole makes clear that several passages directly argue against the criminalization of sex between men, and at least some of those who desired this reform knew that they had the support of the most prominent philosopher and legal theorist of the day.<sup>36</sup> The chapter then analyzes the public debate that occurred in the newspapers in 1772 over whether the death penalty should apply to men who had sex with men, demonstrating that Bentham was not alone in the Georgian period in being willing to publicly express skepticism over the practice of executing men for this reason.<sup>37</sup> The final section of the chapter examines how the dramatic increase in the number of executions for sodomy in the first two decades of the nineteenth century inspired Bentham to go further than he had before. In the 1810s, he plotted out a new work, as systematic as his earlier *Principles of Morals and Legislation*, but this time focused primarily on undermining the state's arguments for regulating forms of sexuality. Whole chapters of this book would be dedicated to contesting the state's rationales for prosecuting men who had sex with men. Knowing how

## Excerpt • Temple University Press

controversial these ideas would be, he attempted to recruit William Beckford, the novelist and sitting MP (who had been ostracized for more than thirty years after being caught having sex with a young man of his own social class), to help him promote his proposed work.

It was not Beckford in the 1810s who brought this issue to the floor of the House of Commons, though, but Kelly and Lushington in the 1840s. Chapter 2 explores the ways in which family experiences shaped Kelly. His brother, William, spent much of his adult life as an unsuccessful actor, and Lushington's relation Matthew Lewis was a famous novelist and playwright. Matthew was publicly the patron of William, and the chapter explores the affective and ethical connections that Matthew and William's relationship created between their families. Central to these connections was Fitzroy's and William's mother, Isabella, who, like Lewis, was a successful novelist. Elements of the relationships between the Lewises, the Kellys, and the Lushingtons are reconstructed in the chapter, as they relate to the relationship between Matthew and William and as they concern Matthew's response to the ethical crisis that he faced after inheriting more than three hundred enslaved individuals from his father.<sup>38</sup> Matthew did not repudiate his ownership of enslaved people, but he did visit his estates in Jamaica twice in the few years that he lived after inheriting them; there, he abolished the use of corporal punishment, considered a far-reaching reform at the time.<sup>39</sup> This chapter argues that at least part of the reason why Kelly was willing to propose the legislation that he did in 1840–1841 can be found in the web of affective and ethical ties that connected and constituted his family.

Chapter 3 shifts the focus to popular politics in the 1810s and 1820s and examines the attempts of radical and ultra-Tory newspapers to tie the idea of “sodomy” and the “sodomite” to political opponents.<sup>40</sup> The chapter establishes the degree to which such radicals as William Cobbett and William Benbow used incidents involving sex between men as part of their broader critique of the unreformed political system. The chapter highlights the contrasting political uses of the Duke of Cumberland scandal of June 1810 and the Vere Street molly-house raid in early July 1810. In the Cumberland scandal, allegations appeared in the radical press that sex between men was a critical factor in a suspicious death in St. James's Palace and that the government was trying to hide this information. By contrast, just a few weeks later, the ultra-Tory press, and the respectable press in general, emphasized the public's uniting behind the state's punishment of lower-class “sodomites” during the widely publicized Vere Street molly-house raid. The partisan practice of linking the accusation of sodomy to political opponents was most starkly dem-

## Excerpt • Temple University Press

onstrated in relation to the 1822 Bishop of Clogher affair. Clogher, a bishop in the Church of Ireland, was caught having sex with a soldier in a London public house and was subsequently discovered to have destroyed the lives of lower-ranking men who had accused him of sexual assault.<sup>41</sup> Previous scholarship has underestimated the degree to which sex between men was politicized before 1832 and has consequently missed the significance of changes in the criminal law that focused on sex between men, facilitated by Robert Peel, that stemmed directly from the Bishop of Clogher affair.

In the space of just a few years, between 1822 and 1825, Peel dealt with allegations related to sex between men leveled at two close parliamentary colleagues, and he twice changed the law in relation to extortion based on accusations of sex between men. One of the men facing these allegations was Viscount Castlereagh, who, in the days after the Bishop of Clogher scandal broke, confessed to George IV, the Duke of Wellington, his friend Harriet Arbuthnot, and others that he was being blackmailed for expressing sexual interest in other men. He then took his own life.<sup>42</sup> The sole book-length investigation of whether a blackmail played a part in Castlereagh's suicide was written in 1959, by a close friend and one-time employee of Castlereagh's descendants. Chapter 4, for the first time, analyzes the findings of H. Montgomery Hyde in *The Strange Death of Lord Castlereagh* in relation to Peel's subsequent changing of the law on extortion related to sex between men. Hyde's work is scrupulously researched and accurate on almost all its points, except for the one that is most often quoted in subsequent work. Peel's 1823 Threatening Letters Act, as amended in early 1825, would have afforded Castlereagh legal tools to face his accusers, and its passage was followed by a wave of widely reported court cases in the summer of 1825, many of which were based on such extortions. During that summer, two men were forced out of Parliament due to accusations that they had had sex with men. Letters survive in which one of these men, Richard Heber, negotiates his exile and resignation with Peel. Chapter 4 pieces together the public and private efforts of the government to alter the ways in which sex between men was punished (and not punished) up to the summer of 1825 and examines the logic of Tory law reform that underpinned the legal changes.

These legislative changes and arrests in the summer of 1825 did not go unnoticed, and shortly thereafter, an individual penned an outraged protest of what Peel had done, calling out individual members of the Commons known for their humanitarian sympathies and chastising them for not resisting Peel on this issue. This protest is a portion of the multiauthored text published under the title *Don Leon*. Chapter 5 establishes for the first time the

## Excerpt • Temple University Press

connection between *Don Leon* and Beckford, linking it to Bentham's earlier invitation to Beckford to support his efforts to end the sodomy law.<sup>43</sup> The chapter traces the ways in which *Don Leon* was altered by several individuals, from a wealthy landowner to a radical pressman, in a period that spanned the late 1810s through the late 1850s. The initial portion of the work is identified as the first six hundred lines of *Don Leon* (which argues that the sodomy law is an offense to companionate same-sex couples) and the appended poem "Leon to Annabella" (arguing that the sodomy law is a threat to married couples). The chapter examines the details of the multiauthored *Don Leon* to argue that its primary purpose was to argue from and for the perspective of an individual who naturally feels sexual desires for men and women and who therefore, if otherwise acting morally and ethically, is undeserving of punishment.

Within a few years of the writing of *Don Leon*, larger political events provided an opportunity to bring about the end of the death penalty for sodomy. The Tory control of government that had persisted for more than two generations was finally ended, and a host of reforms, many first considered before the French Revolution, began to be enacted. Whig governments, from 1830 on, proceeded with franchise reform, the abolition of slavery, factory reform, poor-law reform, municipal-government reform, and a host of other reforms, including the dramatic reduction in the use of the death penalty within the criminal law.<sup>44</sup> Chapter 6 examines the philosophy that underlay Whig reform of the criminal law and the degree to which protégés of Bentham controlled the process. At least one of these protégés, John Austin, can be shown to have directly engaged with Bentham's arguments against the criminalization of sex between men. The chapter then provides the first scholarly examination of the parliamentary attempt to end the death penalty for sodomy in 1835, which saw the first House of Commons majority ever secured for such a reform. The relationship of this effort to the plight of James Pratt and John Smith, who were executed within weeks of the stalling of the 1835 effort in the House of Lords, is also explored.<sup>45</sup> Pratt and Smith were two adult men who were observed having consensual sex with each other behind a locked door. Charles Dickens was among those who took notice of their plight.<sup>46</sup> They became the last men in Britain to be executed for sodomy, and the impact of their widely reported story on Russell and on the parliamentary effort to end the death penalty for sodomy in general is told in this chapter.

Compared to the 1835 effort, the parliamentary maneuverings of 1840 and 1841 are far better documented. This effort brought Kelly and Lushington together, and during this effort, Kelly tirelessly shepherded his bill past

multiple setbacks. Chapter 7 reconstructs for the first time the details of that legislative process and shows how it was possible to have a majority of men in the Commons vote to end the death penalty for sodomy, not in the context of an omnibus bill but in a vote just on a clause ending the death penalty for sodomy and rape. The logic by which Parliament linked sexual violence against women with a category that conflated forced and consensual sex between men is analyzed, as are the parliamentary records of the men who sided with Lushington and Kelly and the nature of the support offered by Russell.<sup>47</sup> The bill would pass all three readings in the Commons, where the word “sodomy” never appears in the transcripts of debates, but it faltered in the Lords, where one outspoken member repeatedly used that word in a way that cast aspersions on the bill and those who supported it.

The concluding chapter demonstrates how different the political situation of 1861, when the death penalty for sodomy was finally eliminated, was from that of 1835, 1840, and 1841. Events in these years were not the start of a steady march toward reform in relation to sex between men but instead the result of a unique configuration of ideas, individuals, and circumstances that did not extend past the early 1840s. In the later 1850s, in a brief window when Kelly served as Attorney General, he inserted clauses ending the death penalty for several crimes, including sodomy, into a broader law reform bill that had been under development for years. After the ministry that Kelly was a part of fell, though, the sodomy provisions of the bill suffered punitive amendments, so that by the time of its final passage in 1861, the death penalty for sodomy no longer existed, but the maximum punishment for “attempted sodomy” and “indecent assault” was raised from two to ten years of imprisonment. A later government in 1880, building off the work of an 1879 Royal Commission, would attempt to undo this punitive amendment, not by lessening the penalty for attempted sodomy and indecent assault but by establishing the category of “indecent acts,” with a two-year maximum sentence, for the punishment of sex between men.<sup>48</sup> This chapter argues that the passage of the Labouchere Amendment to the Criminal Law Amendment Act of 1885, and with it the establishment of the charge of “gross indecency,” should be seen as the culmination of these earlier efforts.

This new interpretation of the Labouchere Amendment, derived in part from the questions asked and the methodologies employed over the preceding chapters, is then used to bolster the call for a renewed emphasis on queer history that examines the period before the late nineteenth century. As the identity categories created in the late nineteenth century are increasingly called into question in the present day, the absence of such identities in earlier

## Excerpt • Temple University Press

periods need not be the barrier to research that it once was. Investigating how marginalized individuals created political arguments and political alliances to bring about ethical reforms in a hostile political climate seems to be a topic of vital interest to contemporary queer studies. It emphasizes the importance of seizing the opportunities that are present in the moment rather than waiting for more ideal conditions that might never arrive. It is an approach that will help us better understand our own past and provide insights that might inform efforts to shape a better future.