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Introduction

A couple stand before the congregation, clad in white sheets, and confess their sin – that they have scandalised the community by living together as man and wife without being married. This was a risk that those living together outside marriage faced for many centuries until the church courts finally ceased to prosecute moral offences in the late eighteenth century. That such punishment is almost unimaginable – even laughable – today is a sign of how far the law and social attitudes have changed in the intervening years, particularly in the last few decades. Over the second half of the twentieth century, first cohabiting couples with children, then childless cohabitants, and finally same-sex couples, have been recognised by the legal system as members of each other's 'family'.[1]

Hence the subtitle of this book, which alludes to the shift in the legal treatment of cohabiting couples over the past four hundred years, from punishment as fornicators to acceptance as family. Yet the process of change has been slow and is still far from complete: even if the law is willing to apply the terminology of 'family' to cohabiting couples, this does not mean that they enjoy the same legal rights as their married counterparts. There are still many situations in which cohabitants do not enjoy any special rights, and are treated in law as if they were strangers to one another. Nor has the shift from punishment to acceptance been characterised by a smooth linear progression:[2] examples of judicial criticism and even condemnation can be found at a surprisingly late date, even after cohabitants had begun to acquire statutory rights; while examples of more sympathetic treatment, or at least a positive outcome, can be found in earlier centuries. 'From fornicators to family' denotes not only the

[1] See respectively *Jones* v. *Trueman* August 11, 1949 (unreported); *Hawes* v. *Evenden* [1953] 1 WLR 1169; *Dyson Holdings* v. *Fox* [1976] 1 QB 503; *Fitzpatrick* v. *Sterling Housing Association* [2001] 1 AC 27. On the relatively limited scope of the rights gained by being a member of a person's family, see e.g. A. Barlow, 'Family law and housing law: a symbiotic relationship?' in R. Probert (ed.), *Family Life and the Law: Under One Roof* (Aldershot: Ashgate, 2007).

[2] As late as 1981 there was the prospect of a woman going to prison for sharing her home with a man – or rather for breaching the specific undertaking that she had given not to cohabit with any other man in the matrimonial home. At first instance the judge went so far as to order her committal to prison, but this was stayed while she appealed, and the Court of Appeal took the view that she should not have been required to give such an undertaking in the first place (*Holtom* v. *Holtom* (1981) 11 *Family Law* 249).

broad historical shift that has taken place, but also the spectrum of attitudes to cohabitation that might exist at any particular point in time.

The main title was just as carefully chosen, if less alliterative. For some, the term 'regulation' may imply criminal sanctions; for others, the 'legal regulation of cohabitation' might suggest a package of rights for those living together. As we shall see, both modes of regulation play their part in the story of the transition 'from fornicators to family'. More important still is the idea that regulation is an active process. Titles such as 'cohabitation and the law' imply that the two develop independently of each other; by contrast, 'the legal regulation of cohabitation' alludes to the fact that the law has a role to play in shaping social constructs and behaviour.[3] As Fineman has noted:

> The family is contained within the larger society, and its contours are defined as an institution by law. Far from being separate and private, the family interacts with and is acted upon by other societal institutions. I suggest the very relationship is not one of separation, but of symbiosis.[4]

As a result, it is as important to look at social trends in the context of the law as it is to examine the way in which the law is influenced by social trends. The central aim of this book is to investigate the relationship between law and behaviour, that is, between the different modes of legal regulation that have prevailed at different times and the extent and nature of cohabitation.

Examining this relationship is all the more important precisely because the transition from fornicators to family is not yet complete: at the time of writing, the question of whether to promote marriage or offer greater protection to those who live together unmarried is very much a live one. Recent events have made it clear that there is no prospect of imminent reform of the law relating to cohabitation.[5] Instead, the coalition government is debating (and divided as to) the desirability of encouraging marriage through fiscal incentives,[6] while the Law Commission, proposing that cohabitants should have a right to a share of a deceased partner's estate in cases of intestacy, has acknowledged that the costs involved in such a reform might render it unfeasible for the present.[7] Meanwhile, the varied reactions to the Supreme Court's recent decision in *Jones* v. *Kernott*[8] illustrate why the current law is not well understood. Some

[3] See also M. Freeman and C. Lyon, *Cohabitation Without Marriage* (Aldershot: Gower, 1983), p. 25.
[4] M. Fineman, *The Autonomy Myth* (New York: New Press, 2003), p. xviii.
[5] *Hansard*, HL Deb 6 September col 118 (Lord McNally): 'the Government do not intend to take forward the Law Commission's recommendations for reform of the cohabitation law in this parliamentary term'.
[6] As reflected in recent headlines: see e.g. 'Nick Clegg attacks Conservative plans to give married couples tax breaks' *Daily Telegraph*, 17 December 2011; 'Cameron WILL offer tax breaks for marriage: pledge after Clegg mocks Tories' "return to the 50s"' *Daily Mail*, 19 December 2011.
[7] Law Commission, *Intestacy and Family Provision Claims on Death*, Law Com No 331 (London: TSO, 2011), para. 1.105.
[8] *Jones* v. *Kernott* [2011] UKSC 53.

wrote of it causing 'consternation' among legal circles and prompting calls for reform,[9] while others implied that it signalled a move towards greater discretion and 'fairness' in the division of assets at the end of a cohabiting relationship.[10] Some suggested that it had clarified the law,[11] others that it had confused it still further.[12] The *Daily Mail*, with apparent disapproval, noted 'the devastating confusion which can result when cohabiting couples split' and how '[w]hile marriage break-ups are covered by extensive legislation and case law, Parliament has laid down no laws governing the end of cohabiting relationships.'[13] Most (understandably) bewailed the complexity of the judgments.[14] And the lengthy headline in the *Guardian* managed to combine all of these perspectives: 'Landmark ruling rewrites property rights for UK's unmarried couples: Judgment triggers call for formal legal reform; Complex case ends in 90%–10% ownership split.'[15]

Accordingly, the question of whether, and if so how, to confer greater rights on cohabiting couples is unlikely to go away, and at the heart of such debate there should be an accurate understanding of the way in which the law has treated cohabiting couples in the past, and of whether there has been any relationship between the approach of the law and the actual incidence and precise nature of cohabitation. Such is the divisive nature of the topic, however, that even the very basics are contested. It is therefore necessary to address a number of preliminary issues: first, to define exactly what is meant by cohabitation in

[9] See e.g. C. Binham, 'Call for law change after cohabit ruling' *Financial Times*, 10 November 2011; *Daily Post*, 22 November 2011.

[10] See e.g. C. Flyn, 'Cohabitation: a fairer split; a Supreme Court ruling will end some of the injustice unmarried couples currently face in dividing their assets on separating' *The Sunday Times*, 13 November 2011; C. Bennett, 'Living together? Beware, the state's set to move in too: Some hail the supreme court ruling on cohabitees. Not those who prize privacy and freedom from regulations' *The Observer*, 13 November 2011, who, while expressing doubts as to whether an 'amateur' could understand the significance of the case, tentatively suggested that 'it seems to be anticipating parliamentary reform in saying that the courts will now consider correcting unfair cohabitation outcomes, even when these are perfectly legal, as they already do with marital disputes' before more confidently concluding that '[t]he effect will be to make cohabitation more like marriage.'

[11] See e.g. C. Flyn, 'Cohabitation: a fairer split; a Supreme Court ruling will end some of the injustice unmarried couples currently face in dividing their assets on separating' *The Sunday Times*, 13 November 2011.

[12] See e.g. L. Reed, 'Cohabitees' property rights: still as clear as mud' *The Guardian*, 11 November 2011; 'Unmarried couple's case sets precedent' *The Independent*, 10 November 2011 ('Unmarried couples who buy a home together face heavy legal bills and years of uncertainty over ownership if they later split up, lawyers warned yesterday').

[13] S. Doughty and E. Harding, 'Judges cut absent father's half-share of home to 10%' *Daily Mail*, 10 November 2011, cf. Chapter 8.

[14] L. Reed, 'Cohabitees' property rights: still as clear as mud' *The Guardian*, 11 November 2011 acknowledged that her commentary 'might go some way to pointing out the existence of complexities, but it couldn't hope to explain them. The law in this area is complicated and technical and it really is impossible to condense in a way that is both understandable to a non-lawyer and precise or accurate enough to satisfy a lawyer (read the judgment on the supreme court website; it will make your eyes water).'

[15] *The Guardian*, 10 November 2011.

this context and to consider the appropriate terminology to use; second, to deal with the argument, made by a number of scholars, that many cohabiting couples in earlier centuries would have regarded themselves as married; and third, to evaluate the arguments that have been advanced as to the extent of cohabitation in past centuries and to provide an overview of the trajectory of change. This done, the way will be cleared to set out the scope and structure of this book, which will, it is hoped, contribute to the debate about the future as well as radically revising our impressions of the past.

Defining and describing cohabitation

As discussions on the appropriate legal treatment of cohabiting couples regularly, and ruefully, note, there are obvious difficulties in defining 'cohabitation'. When, for example, does 'staying over' become 'cohabiting'?[16] In analysing historical records further problems inevitably arise: what, after all, would 'cohabitation' mean to a reader in the eighteenth, nineteenth or even twentieth century? And how should one classify a sexual relationship between a man and a servant, particularly if the man's wife was also resident? Since claims about the extent of cohabitation in past times have been inflated by the inclusion of relationships that would not today be described as cohabiting ones, some neutral and precise criteria are needed. Three preliminary definitional points will be made: the first two explain which relationships are *ex*cluded, while the third deals with the minimum requirements for *in*clusion.

First, the scope of this book is limited to those couples who did not go through any recognised ceremony of marriage – i.e. one that the law would have recognised as giving rise to a valid marriage if the parties had had capacity to marry. While those who married within the prohibited degrees,[17] or bigamously, may have been no more than cohabitants in the eyes of the law,[18] the fact that they had chosen to go through a ceremony despite its invalidity or even illegality sets them apart from those couples who set up home without any such preliminaries. To put it more simply, why would anyone commit bigamy if cohabitation were a wholly acceptable alternative? Since the extent to which couples did choose the former option does cast some light on the acceptability of the latter, evidence of the extent of bigamy and the number of invalid marriages over the period will need to be considered, but bigamists and their ilk are not considered to be 'cohabitants' for the purposes of this book.

[16] As captured by one recent novel: '[t]hey started drinking together in the evenings and sleeping over at weekends, until eventually the sleepovers turned into something indistinguishable from cohabitation' (N. Hornby, *Juliet, Naked* (London: Penguin, 2010; original edn 2009), p. 7).

[17] On which, see S. Wolfram, *In-laws and Outlaws: Kinship and Marriage in England* (New York: St Martin's Press, 1987).

[18] See e.g. *Pawson* v. *Brown* (1879–80) LR 13 Ch D 202, pp. 205–6 ('it was just the same as if he had lived with the second lady without going through any marriage ceremony').

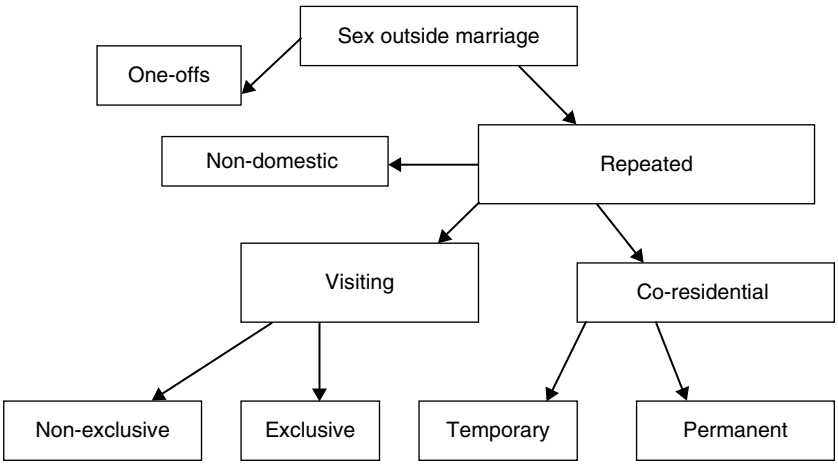

Figure 1.1 Sex outside marriage

Secondly, it has been necessary to narrow the focus to heterosexual cohabitants, and to exclude those of the same sex – partly because there are already a number of historical studies that focus on the latter,[19] and partly because the law's treatment of same-sex cohabitants was, until decriminalisation in 1967, rather one-dimensional. There is also the practical problem of reconstructing the incidence of such relationships: we cannot assume that two people living under the same roof were necessarily engaging in a sexual relationship, whether they were of the same or opposite sex, but in the case of the former there is not even the potential for evidence through the birth of a child.

This brings us on to the minimum requirements for inclusion. This is not a book about the history of sexual relationships outside marriage; it is concerned with that sub-set of such relationships that involved the parties living under the same roof. In the broad typology of relationships set out in Figure 1.1, it is concerned with non-marital co-residential relationships, whether lifelong or temporary, and whether the couple in question actually held themselves out as married or not. While Glendon has correctly pointed out that concealment 'has sociological significance because it deprives cohabitation of one of the elements of that type of conduct which sociologists would call "marriage" – attestation to the relevant community',[20] to include only those couples who *openly* shared a home unmarried would be to limit the scope of this study unduly and to overlook precisely how couples in past centuries managed to get away with sharing a home unmarried.

[19] See e.g. J. Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* 2nd edn (London: Longman, 1989), Ch. 6; J. Boswell, *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe* (London: HarperCollins, 1995).

[20] M. A. Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe* (New York: North-Holland, 1977), p. 81.

It may be objected that this classification does not do justice to those couples who choose to 'live apart together', conducting their relationship from separate homes. Today, this is a distinct and significant social trend.[21] But the problem of including 'visiting' relationships in a history of cohabitation is that the reasons why couples did not live under the same roof were likely to have been very different in earlier centuries to those that exist today. It hardly needs to be pointed out that there is a difference between living apart because of the demands of work or convenience (or perhaps because of an active choice to maintain independent lives) and living apart because (almost invariably) the man has another family elsewhere that forms his main base, or because the relationship with the woman in question cannot be openly acknowledged. In short, those who in the past maintained separate residences while enjoying a sexual relationship may have done so precisely because cohabitation was not an option. Such relationships are therefore relevant insofar as they shed light on social attitudes towards cohabitation, but must be clearly distinguished from those that took place under one roof.

But is it always possible to distinguish between a relationship that should be categorised as 'visiting' and one that involved co-residence? The past is another country, and the language of earlier centuries and decades is littered with as many *faux amis* as any foreign tongue, especially in the context of love.[22] The deceptively simple terms 'cohabit' and 'cohabitation' did not, in fact, always indicate co-residence. Before the middle of the twentieth century[23] the terms were more likely to indicate that a couple were having sex, rather than living under the same roof. Samuel Johnson, for example, defined 'to bed' as 'to cohabit' in his dictionary of 1756.[24] Even more explicit was Harris's *List of Covent Garden Ladies*, which noted of one damsel that she was:

> so conformed as to require a peculiar method of cohabitation with her, a bar being naturally in the way, which causes a kind of obstruction; without fixing her in a certain position, no one can perform what he would wish to do.[25]

[21] See e.g. J. Haskey, 'Living arrangements in contemporary Britain: having a partner who usually lives elsewhere and Living Apart Together (LAT)' (2005) 122 *Population Trends* 35; S. Duncan and M. Phillips, 'People who live apart together (LATs) – how different are they?' (2010) 58 *The Sociological Review* 112.

[22] For example, the fact that one person was described as another's 'lover' must not be taken as indicating that the pair enjoyed a physical relationship: see e.g. P. Jalland, *Women, Marriage and Politics 1869–1914* (Oxford University Press, 1988), p. 104.

[23] See further Chapter 5.

[24] S. Johnson, *A Dictionary of the English Language* (London, 1756). Similarly, a 'fornicatress' was defined as 'a woman who without marriage cohabits with a man'. This suggests that his definition of 'to cohabit' as 'to live together as husband and wife' is referring to the sexual relationship of husband and wife rather than the co-residence of a couple living together as if they were husband and wife. See also S. Richardson, *Clarissa, or, The Story of a Young Lady* (London: Penguin, 1985; original edn 1747–8), p. 615, in which the term 'cohabitation' describes a relationship in which the man visits the woman in her lodgings.

[25] Quoted by H. Rubenhold, *The Covent Garden Ladies: Pimp General Jack & the Extraordinary Story of Harris's List* (Stroud: Tempus, 2006), p. 146.

One might imagine that 'living together' could have no such ambiguity, but here too there are multiple meanings in previous centuries.[26] In John Cleland's classic pornographic novel *Fanny Hill, or Memoirs of a Woman of Pleasure*, published in 1748, Fanny talks of 'living with' various gentlemen, but the context makes it clear that she does not share a permanent home with them, but is maintained by them in lodgings. Similarly, Byron, musing on the likelihood of his being the father of Claire Clairmont's daughter, noted that 'I have reasons to think so, for I know as much as one can know such a thing – that she had *not lived* with S. during the time of our acquaintance – and that she had had a good deal of that same with me.'[27] The 'S' in question was Shelley, with whom Claire was sharing a home at the time, so it is clear that something other than co-residence is indicated. And again, one finds this euphemism being used well into the twentieth century.[28] Such a meaning should not surprise: 'lived with' is no less an accurate euphemism for sex than the modern 'slept with' – or arguably more accurate, seeing that it at least implies that those involved were awake at the time. It was only when cohabitation in the modern sense began to increase that the terms 'cohabit' and 'live together' ceased to be used as sexual euphemisms – indeed, the point at which this occurred helps to cast light on the emergence of cohabitation as a social phenomenon.

Thus it cannot be assumed that those described as cohabiting or living together in past centuries were actually living under the same roof, and confirmatory evidence should be sought wherever possible and its absence acknowledged where not. But this terminological ambiguity raises a further problem: what term should modern scholars use when referring to those living together unmarried? It goes without saying that it is inappropriate and misleading to impose modern terms on historical material. After all, the expressions used at different points in time tell us so much about the way in which such couples were viewed: a 'concubine' is different from a 'partner', the connotations of 'live-in lover' are not the same as those of 'common-law wife', and 'cohabiting' is less loaded than 'living in sin'. Indeed, so important are the implications of these different phrases that each of the chapters that follow is headed by the term most suited to the particular historical period, and contains a detailed discussion of those current at the time. Within the text I have tried to deploy the full range of terms used by contemporaries in order to give the flavour of the times while rigorously eschewing any that had not yet found their way into the language.[29] I am deeply conscious that some of the terms may be

[26] See also B. Capp, 'Republican reformation: family, community and the state in interregnum Middlesex, 1649–60' in H. Berry and E. Foyster (eds.), *The Family in Early Modern England* (Cambridge University Press, 2007), p. 52.

[27] R. Brandon, *Other People's Daughters: The Life and Times of the Governess* (London: Phoenix, 2009; original edn 2008), p. 107 (emphasis in original).

[28] See further Chapter 5.

[29] Cf. G. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England* (Manchester University Press, 2008), p. 138, who refers to a 'live-in lover' (a term that did not appear until the late 1970s).

offensive or repugnant to many modern readers – I find it difficult to write of 'mistresses' and 'concubines' without wincing – and their gendered nature is all too clear. But offensive terms are part of the story, and their blander modern equivalents fail to capture the attitudes of the past.

There is, however, a group of terms that deserve further consideration at this point because of their potential to mislead modern scholars about both the nature of the relationships involved and the way in which they were regarded by contemporaries. What, for example, would our ancestors have understood by phrases such as living 'as man and wife', or by references to a 'de facto', 'reputed' or 'common-law' wife?

Believing themselves to be married?

Such phrases, if read as denoting unmarried couples, might suggest that such couples were regarded, and regarded themselves, as if they were married. The belief that this was the case has been put forward by a number of scholars.[30] Stephen Parker has similarly postulated a shift from 'informal marriage' in the eighteenth century to 'cohabitation' in the nineteenth – the difference between the two being that those in an 'informal marriage' might regard themselves as married, while those cohabiting would not – and arguing that formal definitions of marriage may fail to capture the subjective views of the parties.[31] Of course, the idea that 'informal marriage' was common in the eighteenth century rests on the assumption that it was possible to marry by a simple exchange of consent before the law of marriage was placed on a statutory footing by the Clandestine Marriages Act of 1753. In my earlier work, *Marriage Law and Practice in the Long Eighteenth Century*, I showed that the common idea that this was possible was based on a series of mistakes and misunderstandings, and that stories of exotic marriage practices such as 'handfasting' and 'broomstick weddings' were indeed nothing more than stories.[32]

Nonetheless, given that beliefs about the law may operate independently of what the law actually is, the issue of how cohabiting couples regarded themselves deserves further scrutiny. The significance of this goes beyond the issue

[30] See e.g. A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart, 2006), p. 53 ('non-marital parenthood often attained the social status of legal marriage'); Frost, *Living in Sin*, p. 124 ('people called themselves married, and their neighbours went along with it'); see also *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, para. 93, where Lord Millett claims that 'there is nothing new in treating men and women who live openly together as husband and wife as if they were married; it is a reversion to an older tradition'.

[31] S. Parker, *Informal Marriage, Cohabitation and the Law, 1754–1989* (Basingstoke: Macmillan, 1990), p. 4.

[32] Since the conclusions of *Marriage Law and Practice* form the starting point for the arguments advanced here, it will be necessary to restate them from time to time, rather than assuming that readers have perfect recall of all the points made in its pages. I will not, however, be repeating the evidence that led to those conclusions, and have thus included references to my earlier publications where appropriate.

of terminology: if couples had believed that by living together they were married – or acquired the same status and rights as married couples – then high levels of cohabitation would be plausible.

At first sight, a claim by a couple to be 'married', or describing each other as 'husband' and 'wife' might appear to offer strong support for the idea that such couples believed themselves to be married. It is, however, necessary to reflect on what such claims actually meant. The very ubiquity of marriage, and the degree of commitment it signifies, has made it a natural metaphor in a variety of contexts. We talk, for example, of people who are 'married to their job' or to a particular cause.[33] Terms such as 'husband' and 'wife' were often used by people who knew perfectly well that they were not married in any sense that the law or society would recognise. Two examples show how such terms may be used to reflect the emotional depth of the relationship rather than any belief in its legal status or consequences:[34] George Eliot, for example, who lived with the married George Henry Lewes from 1854 to his death in 1878,[35] wrote of her gratitude 'to my dear husband for his perfect love'.[36] Similarly, we find Frances Stevenson, writing with equal emotion (but even less justification, considering that her relationship with the married Lloyd George did not at the relevant time even entail sharing a home[37]) that 'It is just two years since [C] and I were "married", and our love seems to increase rather than diminish.'[38] One assumes that by 'married' she was delicately referring to the first time that they had sex. No

[33] See also the character of Kate Vavasor in Trollope's *Can You Forgive Her?* (Oxford University Press, 1999; original edn 1865), Vol. 1, p. 62, who notes her devotion to her brother by admitting '[t]he truth is, I'm married to George.'

[34] Similar motivations underpin the innocent use by schoolgirl chums of terms such as 'husband' and 'wife' in the stories of Elsie J. Oxenham in the 1920s (see R. Auchmuty, *A World of Girls* (London: The Women's Press, 1992), p. 114), and the rather more disturbing correspondence of Wilkie Collins with an eleven-year-old girl whom he addressed as *mia sposa adorata* (M. Sweet, *Inventing the Victorians: What We Think About Them and Why We're Wrong* (London: Faber and Faber, 2002; original edn 2001), p. 168).

[35] R. Ashton, *George Eliot: A Life* (London: Hamish Hamilton, 1991). Given that Eliot is always cited by those claiming cohabitation to be common in the nineteenth century, I thought I should mention her early on. It should go without saying that such an exceptional woman is unlikely to be the best example of what was regarded as usual or acceptable: much could be forgiven one who had written some of the finest novels of the nineteenth century (see e.g. T. Mangum, 'George Eliot and the journalists: making the mistress moral', in K Ottesen Garrigan (ed.), *Victorian Scandals: Representations of Gender and Class* (Ohio University Press, 1992)).

[36] Quoted by H. Blodgett, *Centuries of Female Days: Englishwomen's Private Diaries* (Stroud: Alan Sutton Publishing, 1989), p. 156.

[37] F. Hague, *The Pain and the Pleasure: The Women Who Loved Lloyd George* (London: Harper Perennial, 2009), p. 216.

[38] A. J. P. Taylor (ed.), *Lloyd George: A Diary by Frances Stevenson* (London: Hutchinson and Co, 1971), p. 23 (the 'C' denoting his position as Chancellor of the Exchequer). In a similar vein, Rebecca West wrote to the married H. G. Wells to thank him for being a good 'husband' and telling him 'I will try to be a good wife to you' (quoted by K. Roiphe, *Uncommon Arrangements: Seven Portraits of Married Life in London Literary Circles 1910–1939* (London: Virago, 2008; original edn 2007), p. 52), while one passionate undergraduate, sharing a bed with her female tutor, claimed that *they* were now married (J. Robinson, *Bluestockings: The Remarkable Story of the First Women to Fight for an Education* (London: Viking, 2009), p. 198).

one would think of describing these two intelligent women as confused about their marital status, and we should not assume that other, less famous, individuals were any less aware.

The use of the terminology of husband and wife also reflects the lack of palatable alternatives then available to describe a non-marital sexual relationship. What woman in love wishes to describe herself as a mistress or a concubine and admit that her relationship has no validity in the eyes of the law or society? But to demonstrate the lack of alternatives, it is necessary to look at how a number of terms that might be *thought* to refer to cohabiting unions in fact had a very different usage.

Today, the term 'de facto wife' might be used to refer to a cohabitant; in the past, by contrast, it was used by the common-law courts to denote that a formal ceremony of marriage had taken place but that there might be some impediment to the union.[39] Such an impediment did not necessarily render the couple cohabitants in the eyes of the law: if its effect was to render the marriage voidable rather than void, the marriage could not be challenged after the death of either of the parties.[40] This usage persisted throughout the nineteenth century[41] and well into the twentieth:[42] in fact, it was not until the 1970s that *The Times* used the term 'de facto wife' to refer to a cohabitant in the modern sense.[43]

The connotations of 'reputed wife' were rather different – and indeed might vary in different contexts. For present purposes, perhaps the most important point to emphasise is that reputation did not *make* a wife: English law has never had an equivalent of the Scottish concept of 'marriage by cohabitation and repute'. Reputation might, however, be an important element in a court's weighing up of whether there had been a formal ceremony of marriage,[44] and the term 'reputed wife' might therefore be used to refer to someone who was thought to be a legal wife.[45] But the phrase could also be employed in a derogatory sense, to cast doubt on the marital status of the woman in question,[46] with

[39] This reflected the division of roles between the different courts: the common-law courts had the power to state whether there had been a marriage *de facto*, since it was a question of fact whether or not the parties had gone through a ceremony of marriage, but it was the task of the ecclesiastical courts to rule whether an impediment existed or not: see e.g. *Hemming* v. *Price* (1701) 12 Mod. 432; 88 ER 1430; *Norwood* v. *Stevenson* (1738) Andr. 227; 95 ER 374.

[40] See e.g. E. Coke, *The First Part of the Institutes of the Laws of England. or, a Commentary on Littleton* 10th edn (London, 1703), lib. 1, cap. v, sec. 36, p. 33.

[41] See e.g. W. E. Browning, *An Exposition of the Laws of Marriage and Divorce: As Administered in the Court for Divorce and Matrimonial Causes* (London: William Ridgway; Stevens & Haynes, 1872), p. 219.

[42] 'Inadmissibility of evidence of former wife: "scoundrel" wins appeal' *The Times*, 17 November 1953 (describing a wife who had obtained a decree of nullity on the basis of her husband's impotence).

[43] '*De facto* wife to share in estate' *The Times*, 18 November 1978, reporting that '[a] housekeeper who became the de facto wife of her employer was awarded £5,000.'

[44] See further Chapter 3.

[45] Usually with good reason: see e.g. the discussion in *Birt* v. *Barlow* as to whether the register of the marriage was sufficient proof that the parties were married in the context of an action for criminal conversation: J. Morgan, *Essays Upon the Law of Evidence* (London, 1789).

[46] See e.g. *Mr. Hervey's Answer to a Letter He Received from Dr. Samuel Johnson* (London, 1772), p. 27.