Trials of character: the use of character evidence in Victorian sodomy trials

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On 31 July 1854, a man who gave the name George Campbell appeared at the Guildhall magistrates court in the City of London. He had been arrested a few days previously at an unlicensed dancing place and charged, along with one other man, with conducting himself 'in a manner to excite others to commit an unnatural offence'.¹ He and his partner had both been dressed in women's clothes. While his companion, a man of 60, had been 'dressed in the pastoral garb of a shepherdess of the golden age', Campbell had been 'completely equipped in [the] female attire of the present day'.² The police alleged that the defendants had been dancing together in the company of several other men, and that their actions constituted an incitement to commit a homosexual act. Campbell's defence was that he had done nothing immoral, but had dressed as a woman merely in order to disguise himself and 'see a little of London life, without mixing with its abominations'.³

Conclusive evidence that Campbell had committed any indecent acts was lacking. In fact the principal evidence comprised the competing testimonies of the police and a few conveniently myopic bystanders. Neither were Campbell's intentions judged by the nature of his attire. Effeminacy, which might have been inferred from his dress, was not considered an inevitable sign of homosexual desire.⁴ In fact, Campbell's explanation of his clothing as a form of disguise was accepted without murmur by the court. In the absence of a clear description of the defendant's actions or a recognised interpretation of his general demeanour, evidence of the defendant's good character took on a disproportionate importance. The chief magistrate at the Guildhall, Sir Richard Carden, told Campbell that the case was 'entirely a question of character, and if you can show me that you are a respectable person, it will have more weight in my mind than anything you can elicit from the [police] officers'.⁵

Campbell's trial was not unique among nineteenth-century trials for sodomy and homosexual offences in its emphasis on character. While the numbers of reported cases are small, the evidence which emerges from law

reports, newspaper accounts, and other sources suggests that the character of the defendant, prosecutor, and witnesses were central to this type of criminal litigation. A sample of forty-eight criminal petitions between 1829 and 1877 shows that in almost all of these cases where character evidence was presented, the good character of the defendant and the bad character of his accusers had been a principal issue at the trial and was repeated in almost every petition for re-hearing or clemency.⁶ There were two principal reasons why character evidence achieved such prominence in trials for homosexual offences: one practical and one legal. First, the 'secret' nature of these offences meant that the facts were often in dispute and not subject to verification by independent witnesses. Second, but related to the first, the rules of evidence in sexual offences stressed the significance of the respective characters of the persons involved.⁷ For both of these reasons, a defendant charged with homosexual offences often found that the best means of gaining an acquittal was to demonstrate that he was not the sort of man capable of committing this sort of offence and, if possible, to demonstrate that his accusers were the sorts of persons whose accusations could not be trusted.

Character evidence had a protean nature – it might speak either to the individual's reputation or to his mental state. In the context of trials for homosexual offences during the nineteenth century, however, character evidence did not perform the same function for the prosecution and the defence. Evidence of 'bad character' could discredit an accuser, by suggesting that he was morally or mentally suspect. Only evidence of 'good character', however, was admissible as regards a defendant. Moreover, it was settled in 1864 that evidence of the defendant's character – whether offered for or against him – must speak to reputation, and not mentality.

Homosexual offences therefore provide a contrast to the increasing willingness of the English judicial system to examine directly a defendant's mental state. Joel Peter Eigen has shown that in trials of murder and other offences against the person and property it was increasingly common to investigate states of partial or total derangement through expert testimony.⁸ 'Sodomitic acts' were often thought of outside the court as a species of derangement, but expert testimony rarely figured in the outcome of trials for these offences. Moreover, the other likely means by which an analysis of the defendant's mental state might have been explored – character evidence – was so hemmed in by restrictions as to render it largely useless for this purpose.

I Homosexual offences and their interpretation

The number of prosecutions for homosexual offences increased enormously during the late eighteenth century and continued to grow throughout the nineteenth century. Yet there has generally been a lack of clarity among historians as to what counted as a homosexual offence in this period. It has often been assumed that male homosexual behaviour was only generally

Figure 3.1 *Indictments for sodomy, indecent assault, and other homosexual offences presented at the Old Bailey, 1750–1830⁹*

criminalised in 1885, when the Criminal Law Amendment Act outlawed acts of ‘gross indecency’ between men in public and in private.¹⁰ However, it is clear that all male homosexual acts, whether committed in public or private, were already liable to prosecution under the medieval law against sodomy, which was defined as anal penetration or bestiality. By the eighteenth century, the common law principle that any attempt to commit a crime was in itself a crime had begun to be applied to the crime of sodomy. Most eighteenth- and nineteenth-century trials, therefore, proceeded under the formal legal assumption that any homosexual act was an attempt to commit sodomy. Any act which stopped short of sodomy therefore began to be described as an ‘assault with intent to commit sodomy’.¹¹ All kinds of homosexual acts, including indecent assaults, verbal or written invitations, consenting acts including kisses, touches, and other intimacies were therefore criminal, and susceptible to prosecution.¹²

In London, where homosexual offences were prosecuted most frequently, there is a clear increase in the numbers of sodomy/indecent assault cases, as Figure 3.1 demonstrates. This pattern of increase is repeated throughout the nineteenth century. Between 1806 and 1900, a total of 8,497 men were committed for trial, of whom 56 were executed.¹³

The rise in numbers of indictments does not seem to have spurred a discussion of homosexuality in legal circles. Transcripts of sodomy and indecent assault cases – other than the verdict and the name of the defendant – were not recorded in the *Old Bailey Sessions Papers* and detailed accounts rarely

figured in other legal documents.¹⁴ Scientific opinions on the nature of homosexuality were rarely given in court. Judges and barristers celebrated their ignorance as a sign of the moral rectitude of the British legal system. Sir John Duke Coleridge, who was Attorney General at the time, remarked in 1871 that such knowledge might be suitable for foreign scientists, but it had no place in British justice. It was fortunate, he argued, 'that there is very little learning or knowledge upon this subject in this country; there are other countries in which I am told learned treatises are written . . . [but] fortunately doctors in England know very little about this matter.'¹⁵

In spite of this legal rebuff, the increasing numbers of cases meant that some public discussion of 'abominable crimes' could hardly be avoided. Significant scientific investigations of the nature of homosexuality did not begin until the rise of sexology in the 1890s. Nevertheless, several explanations for homosexual desire and behaviour did emerge in the course of the century. The eighteenth-century idea of the 'molly', an effeminate, usually lower-class, man who lived his life in imitation of the female sex was rarely employed in the nineteenth century.¹⁶ Instead, interpretations of homosexual acts tended to focus on the defendant's moral behaviour and intellect, rather than immediately assuming that a homosexual act was the equivalent of gender inversion or of a homosexual 'identity'.

Homosexual behaviour was interpreted in roughly three ways. Firstly, it was possible for 'sodomites' to form part of a 'detestable race' who might be 'addicted to bestial propensities'.¹⁷ Such a 'race' might commit the crime over and over, unable to escape from its compelling hold. These men might be known for their 'effeminate air' but this was not always a telling sign.¹⁸ This idea that homosexuals might form a kind of sub-species of humanity, however, was not widely expressed. More important was the view that sodomy might result from progressive moral decay, which led the sufferer into ever-greater depths of depravity. One of the more notorious accounts of this type comes from William Acton's *The Functions and Disorders of the Reproductive Organs*, published in 1865. He presents sensuality as a gradual decay from the moral state, through a series of almost imperceptible stages, until ever-increasing perversions are required to excite a physically tired and emotionally jaded lust. The search for stimulus leads the debauché through the full repertoire of immorality, until 'as a last resource, unnatural excitement is brought to bear, and we probably find that the first check to the lust of the opulent satyr, is his finding himself the hero of some filthy police case – then, maybe, a convict or a voluntary exile'.¹⁹

Acton shares with John Frost an attention to the degenerative nature of a sodomite's character. Frost, the leader of the Chartist Newport rising of 1839, described his experiences as a transported convict in Van Diemen's Land in an attempt to attack the government of Lord Palmerston. In a series of speeches made on his return from the penal colonies in August 1856, he claimed to

have witnessed the effects of the cruel and unjust penal system, which was the natural consequence of the corrupt English political system. The former denied men generally their moral rights, but the impact of the latter upon convicts was to destroy their moral sensibility, and this made them prey to their lowest inclinations, including the widespread commission of sodomy and other homosexual acts. Frost explained,

It is said by the philosophers, and I believe the saying is a true one, that injustice and cruelty destroy the reflecting faculties and leave no thought or wish but for the immediate gratification of the sensual. In such cases no moral feelings can restrain men from the commission of the very worst acts that can be committed, and these results I have witnessed in Port Arthur to an extent probably not equalled in the world.²⁰

Thirdly, if not a product of moral decay, homosexual acts might be a sign of mental derangement. This seems to be the reason why Joseph Pritchard, convicted of sodomy in 1836, was committed to an institution, even though the parish overseers discovered in 1851 that he was ‘perfectly sane and not in any sense a proper person to be confined in a lunatic asylum’.²¹ Even in 1813 it appeared to the London lawyer Robert Holloway that the apparently overpowering nature of homosexual desire meant that it was a ‘dreadful malignant malady’.²² In 1838 the Scottish alienist Alexander Morison confidently concluded that homosexual acts were not always the result of ‘moral depravity’ but might actually be a species of insanity. Morison argued that ‘monomania with unnatural lust’ was ‘a well marked variety of insanity of not unfrequent [*sic*] occurrence’. In Morison’s experience ‘the existence of this disease was rendered more certain by other marks of disordered mind being combined with [the] unnatural propensity’.²³ This interpretation was especially useful in considering those ‘men of wealth and talents’ who were convicted of such offences. If not actually insane, the sodomite could also be explained as ignorant or incompetent. Those who tried to save young offenders from the gallows by petitioning the Home Office often argued that the criminals’ youth or ‘extreme ignorance’ rendered them incapable of recognising the illegality or sinfulness of the act.²⁴

Outside the courtroom, homosexuality was explained by a man’s mental state – his depravity, insanity, or ignorance. Hence his mental ‘propensity’ to commit homosexual acts was relevant to a ‘common sense’ decision about whether he was a sodomite. In order to determine whether an individual’s mental state was legally relevant to a homosexual offence, however, we must turn to a more particular examination of how such offences were prosecuted.

II Character and criminal evidence

In 1854 the Guildhall magistrate Sir Richard Carden, gave it as his opinion that in cases involving ‘one of the most loathsome offences a man could commit’,

character was 'most at stake and most required'.²⁵ Character, in this context, might mean an individual's general reputation within the community, or it might mean a hypothesis about an individual's mentality that rested on his known conduct or circumstances. There were important practical and legal reasons why character evidence achieved such prominence in trials for homosexual offences. Crimes of this nature were frequently committed in private, and the facts were almost always in dispute because the defendant would usually deny that the alleged acts had taken place. Since evidence of an indecent assault often consisted of touching or other advances which left no evidential trace, such an allegation was easily contested if there were no independent witnesses. Such witnesses, moreover, were rarely found, with the result that only those who had participated in the alleged acts were able to give evidence about them. In addition, as the century progressed it became less common for defendants to make statements to the court, especially after the Prisoners' Counsel Act of 1836 enabled the defence to be put by a barrister.²⁶ These circumstances placed particular emphasis on the prosecutor's credibility, which was effectively decided by reference to his 'character' for truthfulness. Similarly, in the absence of any other means of refuting the prosecutor's factual account, the defendant would tend to produce witnesses who could speak to the defendant's own 'character' for morality, regularity, and integrity.

In addition to these practical considerations, several particular legal assumptions about character brought character evidence to the fore in trials for homosexual offences. As a general matter, where it was not possible to prove that an offence had been committed, character evidence was relevant to show that it was more or less likely to have been committed.²⁷ As one judge explained in a case of indecent assault in 1829, 'altho' character cannot answer a specific charge on oath . . . something must depend on the probability.'²⁸ More specifically, the rules of evidence relating to homosexual and heterosexual offences emphasised the role of character evidence. Presumably because they were similar offences, with similar standards and requirements of proof,²⁹ the rules of evidence in sodomy appear to have been modelled on the law of rape. Certainly the dictum of the great seventeenth-century jurist and judge Sir Matthew Hale that an accusation of rape was 'easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent' was endlessly quoted in sodomy trials.³⁰ To provide 'greater probability to her testimony', Hale had argued that the alleged rape victim should be 'of good fame'.³¹ Hale had provided further indicia of probability,³² but many trials for homosexual assaults turned particularly on the relative reputations of accusers and accused.

The issue that was particularly relevant to a prosecutor or prosecution witness in a case of sodomy or indecent assault was whether he had ever committed such acts himself. If he had committed them in the past, this raised doubt about the reliability of his testimony. In this context, character evidence seems to have been linked to the general perception that homosexual

acts were evidence of a mental or moral aberration. A man who was known to have indulged in homosexual conduct was immoral or deranged; in either case he was unlikely to tell the truth. A further practical objection to testimony by a known sodomite was that extortion might lie behind the accusation. Baron Gurney observed in 1835 that charges of indecent assault were often used as a means of extortion, and that it was 'the melancholy experience of those tribunals before whom guilty individuals of this description [extortionists] have been convicted, to discover that such charges are rarely, if ever made except by those debased beings who are conscious of the horrid offence in their own bosom.'³³ If the accuser had consented to the acts alleged in the present case, this created a further evidential problem. Anyone over the age of 14 who consented to the acts was a principal in the crime, and therefore regarded in law as an accomplice. Rules that developed at the beginning of the nineteenth century stated that the testimony of an accomplice must be corroborated in order for a conviction to be secured.³⁴

Corroboration was not always required by the court. James Smith was convicted in 1877 of committing sodomy with a telegraph boy, who had allegedly been following the common practice of boys so employed of operating a lucrative sideline in prostitution. Smith protested that 'the evidences of at least two independent witnesses of the actual perpetration of the alleged crime were indispensably necessary before the case could be legally left to the Jury.'³⁵ He added that 'the crime for which I am sentenced has been very prevalent amongst the Telegraph lads', and that the case against him rested upon the 'unsupported testimony of lads who admitted having allowed themselves to be defiled for five shillings'.³⁶ However, the fact that the character of accusers was *likely* to be heavily scrutinised at trial meant that their character was probably central to the prosecution's decision to bring the case to trial in the first place. This question was at the centre of the difficulties encountered by the British government over the Cleveland Street scandal of 1889–90.³⁷ This scandal followed the discovery that a male brothel in the West End of London was being frequented by members of the aristocracy and perhaps even by members of the royal family. The principal suspects in the case absconded while the government and the police debated what to do, thereby enabling the radical Liberal MP Henry Labouchere to denounce the delay as part of a cover-up designed to allow the high-born and Tory culprits to escape abroad.

The relevant files show another side to this affair. In particular, they show that the government did not want to proceed with a case that might collapse because most of the witnesses were youths who had willingly participated in 'unnatural acts' and had even earned their living in this way. The Attorney General, Sir Richard Webster, expressed the view that the principal witness, a professional 'Mary Anne' called John Saul, was 'in my judgement utterly unworthy of credit'. The Home Secretary, Henry Matthews, agreed, telling his officials that 'the evidence of a participator in the offence . . . would not be

sufficient in law to warrant a conviction.' The evidence in this case, he concluded, 'stands peculiarly in need of corroboration'.³⁸ Saul's evidence in a failed libel case connected with some of the Cleveland Street allegations had also been utterly discredited. *The Times* commented that the fate of Saul's evidence in that case 'showed beyond all doubt that the law officers were fully justified in declining to institute further prosecutions upon evidence which appeared in the witness box to be not only tainted in its origin, but absolutely untrustworthy from beginning to end'.³⁹

Even where the sexual behaviour of a prosecutor or prosecution witness was not in doubt, his character – in the sense of an assessment of his reliability based on his conduct or circumstances – could still discredit the prosecution. When John Avis was convicted of indecently assaulting a man named Hugh Johnson in 1829, he protested in his petition to the Home Office that the character of his accuser had not been sufficiently examined in court. If it had been, he argued, the outcome of the trial would have been different. According to Avis, he had gone to obey a call of nature in a side street near Mayfair when Johnson had seized him and accused him of attempting to commit an indecent assault. Avis pointed out that his accuser was a servant who had been out of place for ten months, and that he lived in a coffee shop 'of the lowest description in a narrow passage in the neighbourhood of Oxford Street and the resort of low characters'.

Avis complained that his defence had been 'grossly neglected' by his barrister 'inasmuch as he took no trouble to ascertain the character of the prosecutor although particularly requested to do so . . . though by showing which he might have shown that the Prosecutor was not to be believed on his oath'.⁴⁰ In response to Avis's complaints, the trial judge said that he had pointed out to the jury that character could carry weight in circumstances like these where there were no independent witnesses to the alleged assault. He had also told the jury that the prosecutor was a servant out of place 'which though it was not necessarily an inference of immorality left him in an equivocal situation, in establishing a charge which a bad man might easily make'.⁴¹ Avis's arguments appear to have held sway, and the case was referred back to the chairman of the Middlesex Sessions.⁴²

While clearly relevant to proving the (in)credibility of the prosecutor and prosecution witnesses, character could also be directly relevant to establishing the defendant's innocence. In this context, however, character evidence spoke to the defendant's 'good character'. This was established by showing the defendant's status, habits, and his general reputation for morality and integrity. A man of that *character*, it was argued, was hardly likely to engage in homosexual behaviour. In the case of William Dorrien, a 'young gentleman of high connexions in the city', who was accused of an indecent assault in 1825, evidence of his status and habits secured an immediate acquittal. Mr Adolphus for the defence pointed out that if the jury considered the defendant's station in life, and

heard from the host of honourable persons he would call before them, who were his intimate acquaintances that his whole conduct, that all the habits of his life, were in strict conformity to the respectability of his situation and prospects, they could not believe that he could have plunged headlong into an abyss of infamy by a publicity of depravity from which the most habitually hardened would have shrunk.⁴³

Dorrien's character witnesses, including the governor of the Bank of Ireland, then paraded through the court and testified to his good conduct, 'his attention to religious duties', and devotion to his family. The Recorder, suitably impressed, pointed out the 'improbability that a person of the defendant's character – for it was impossible that any man could have a higher character – should forfeit that character by any act that would forever consign him to infamy'.⁴⁴

The defendant's general good reputation could also show that he was unlikely to commit homosexual acts.⁴⁵ William Elder, a man of 'gentlemanly appearance' employed in the ordnance department of the Tower of London was accused of indecently assaulting a soldier in 1842. His chief character witness told the court that he had known the defendant for thirty-five years and 'had always considered him to be a strictly moral and gentlemanly man, and he believed him to be quite incapable of conduct such as that imputed to him'. The witness added that 'he had never observed the slightest tendency on his part to impropriety of any sort'. The judge committed Elder for trial but only because he felt it necessary in order for Elder to be completely vindicated. It was, he said 'quite impossible that anything short of a most searching investigation and an acquittal by a jury, could free the accused's character from the most serious imputation cast upon it'.⁴⁶ Similarly, in the 1867 case of an unnamed 'gentleman' arrested for an indecent assault on a policeman in a Vine Street urinal, John Duke Coleridge, 'rested the defence on the improbability of the defendant, who would be proved to have borne the character of a moral, pure-minded man, suddenly committing such an offence upon an officer of the police, who would certainly apprehend him'.⁴⁷

Evidence of character – of prosecutors, prosecution witnesses, and defendants – was clearly relevant and important in cases of sodomy and indecent assault. The role played by such evidence, however, differed according to whether it was applied to the accusers or the defendant. With regard to the former, evidence of prior illegal, immoral, or socially undesirable acts undermined the accuser's credibility in the present case. With regard to the latter, evidence of the defendant's gentlemanly status, respectable habits, and general reputation for morality suggested that he was unlikely to have committed the offence in question. In both contexts evidence of character related, indirectly, to the individual's supposed mental state, but the evidence pointed in different directions. The accuser's 'bad' character implied a defective moral or intellectual nature, while the defendant's 'good' character implied a healthy one. But could the law inquire no further into the defendant's mentality? Was it

possible to use character evidence, or some other investigative tool, to prove that the defendant *was* likely to commit homosexual acts?

III Character evidence and the investigation of ‘propensity’

That a defendant was likely to commit homosexual acts might have been relevant to the defendant’s or prosecution’s case. A defendant, conceivably, might wish to argue that his predisposition towards homosexuality excused or mitigated his unlawful conduct, while a prosecutor who could not prove that the defendant had committed the offence would wish to argue that the defendant was so inclined to conduct of this type that he had *probably* committed the offence on this occasion. In fact, however, the first rarely happened, and the second was not permitted.

To bring before the court evidence of a general predisposition towards homosexuality, a defendant had to admit his guilt and offer a plea of mitigation. This seems rarely to have happened in the nineteenth century.⁴⁸ However, in isolated cases where a guilty plea was entered, defendants relied on the contemporary assessment of homosexuality as a form of mental illness. Sergeant Ballantine told the Old Bailey in 1851 that his client, a Greenwich schoolmaster named Samuel Miller, had succumbed to a ‘sudden impulse he could not account for’.⁴⁹ Similarly, in the 1870 trial of Edward Park it was argued by the defence that

Many persons were of the opinion that the perpetration of such offences in itself showed something wanting in mind and feeling which indicated that the offender was not in full possession of his faculties and that such cases would be far better treated in a lunatic asylum than in a court of justice.⁵⁰

Whatever defendants might or might not wish to admit, prosecution counsel would have been keen to use evidence of the defendant’s ‘bad’ character to undermine the defendant’s credibility in the same way that an accuser’s credibility could be impugned. Evidence of the prior commission of homosexual acts would have been particularly helpful to show that the defendant was very likely guilty of the crime with which he was charged. Such evidence, however, was out of bounds for the prosecution. In 1810 it was decided that previous unnatural offences, or a disposition of character to commit such offences, were inadmissible. *R. v. Cole*, a case from the Buckingham Assizes, applied the principle that ‘an admission by the prisoner that he had committed such an offence at another time and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence’.⁵¹ This rule was adhered to in 1851 in *R. v. Burt* where, although witnesses had been called to prove the defendant’s good character, the prosecution was not entitled to call witnesses to give evidence of his bad character.⁵²

Occasionally, however, some barristers did test the boundaries of these decisions by attempting to make the defendant’s ‘bad’ character, and hence

his mental 'propensity' to commit homosexual acts, relevant to the outcome of a case. Such a challenge consisted of calling witnesses to testify to the previous bad acts or propensities of the defendant, rather than to his good conduct, gentlemanly status, or reputation for morality. The rule expressed in *R. v. Cole* and *R. v. Burt* usually prevented such evidence from coming forward, but in two cases at least, the prosecution succeeded in having it admitted. In doing so, the prosecution counsel exposed the contradictory nature of character evidence when applied to defendants. While it could be used to suggest the defendant's healthy mentality – it could not be used to suggest that he suffered from mental or moral infirmity.

The first of these challenges occurred in 1846, when William French, 'a very respectable-looking' pawnbroker and dissenting minister, whose 'connections are of the utmost respectability', was charged with an indecent assault on a 15-year-old youth. At the committal hearing, witnesses were called to show that the defendant was in fact a sodomite according to most available definitions. Not only had his employer conducted an investigation which had led to his dismissal, but French had also, according to the prosecution, 'been committing most abominable practices for many years'. The defence objected, saying that such evidence 'would only raise a prejudice against the unhappy man by going into other cases, said to have occurred many years ago', and that it was in any event inadmissible. However, the magistrate disagreed and said that he would hear evidence 'as to the defendant's general pursuits and whether he had indulged in immoral practices before, and he [the magistrate] had as much right to do so, as the defence had to call evidence to his [good] character'. Four men then 'deposed to the abominable practices of the prisoner', and French was committed for trial.⁵³

A more significant challenge was made in the case of *R. v. Rowton*. In September 1864, James Rowton, a clerk in holy orders, was accused of indecently assaulting an office boy named George Low at Chalk Farm railway station in north London. At the trial on 30 September Rowton's counsel, Mr Sleigh, produced a number of 'reverend gentlemen' to testify to the defendant's good character. In reply, Mr Tayler for the prosecution announced his intention to call a number of witnesses to rebut this evidence. Tayler called one Rowland Bateman, who had been taught by the defendant, and asked him if he 'could tell us of any acts done by the prisoner?' Sleigh protested, arguing that it was not correct for the prosecution to be trying his client for anything but the present alleged offence, and citing *R. v. Burt* to the effect that no evidence of bad character could be admitted. However, despite these objections, the chairman of the sessions allowed Tayler to pursue his line of questioning, asking the witness what he thought of the defendant's character 'as to purity and decency?' Bateman replied that he thought Rowton 'capable of being guilty of the grossest indecency and the gravest immorality', all of which contributed to his immediate conviction. Sleigh protested that he could not 'sit here and hear the rules of law violated by the bench' and asked that

the point of law be put aside for consideration by the Court for Crown Cases Reserved (the precursor of the Court of Appeal).⁵⁴

The argument was, in effect, over whether the previous bad acts of the defendant could be considered, and whether they could be used to show that he had an inherent tendency to commit such acts. These questions went to the heart of the case and to the nature of character evidence when applied to a defendant. The prosecution argued that prior homosexual conduct created a presumption that the defendant had a predisposition to such conduct. 'It was a question of the mind; the inference to be drawn from a course of conduct [which] was accepted as assisting to solve the question, and that necessarily involved the mental condition of the individual.'⁵⁵ The defence did not object to all 'bad' character evidence employed against a defendant, but specifically to evidence of a defendant's 'bad' acts. The defence argued that if character evidence was admitted, it had to have reference to the defendant's general reputation, and not to specific acts or tendencies of the mind. With regard to a defendant, character consisted in the approbation of others, whether an employer's testimonial written for a domestic servant, or the oral testimony provided by the businessman's respectable connections. Sleigh argued that the court should, like Lord Erskine, define character as 'the slow-spreading influence of opinion arising from the deportment of a man in society', which 'necessarily produced one circle without another, and so extends itself till it unites in one general opinion'. Sleigh also cited Lord Ellenborough for the proposition that 'It is reputation . . . [only] that is admissible in evidence.'⁵⁶

Speaking for the majority, Sir Alexander Cockburn, the Lord Chief Justice of the Queen's Bench, noted the principal difficulties of using character evidence. On the one hand, the case could not be decided unless the inner disposition of the defendant was interpreted, but evidence to general reputation was the only means by which to interpret these private propensities. The central point of the case, Cockburn argued, 'bearing materially on the probability or improbability of the prisoner's guilt' was 'the tendency or disposition of the prisoner's mind to commit the particular offence with which he stands charged'. However, questions relating specifically to disposition were never put, and 'the only way the law allows of your getting at the disposition and tendency of his mind, is by the evidence as to his general character founded upon the knowledge of those who know anything about him and his general conduct'.⁵⁷ Bateman's testimony, since it had been the opinion of an individual and not evidence of Rowton's general reputation, was inadmissible, and the conviction was quashed.⁵⁸

IV Conclusions

'Character' was central to many trials of sodomy and indecent assault in the nineteenth century, and the rules determining the kind of character evidence that could be produced with respect to the defendant had important

consequences for the trials themselves, and also for the wider understanding of homosexuality. Evidence of the defendant's 'good' character helped to establish that he was unlikely to have committed the acts with which he had been charged, but evidence of 'bad' character – which might have suggested a propensity towards homosexuality – was not admissible. This rule did not prevent a mid-Victorian debate over precisely which aspects of character could be admitted and what kind of testimony about character was appropriate. The debate reflected the fact that mental and moral states were directly relevant in these cases. It was commonly assumed that homosexual acts reflected an individual's moral or intellectual degeneration. It was important, therefore, to understand the defendant's mentality, particularly when the charge could not be proved or disproved on the basis of direct evidence. The decision in *R. v. Rowton* affirmed the importance of inquiring into the defendant's mental state, but also affirmed that this inquiry must be limited. Only those who knew the defendant's general reputation over a long period could testify to his mental state. A more specific inquiry into the defendant's past homosexual conduct, therefore, was prevented. Homosexual acts had to be considered as separate, isolated occurrences, and not as a reflection of the defendant's mentality. Interestingly, previous homosexual conduct *was* admissible as regards the mentality of prosecutors and prosecution witnesses. A personal history of this sort helped to prove that the accuser was a liar and possibly an extortionist. It could not, however, help to prove that a defendant had a homosexual 'character'.

There is an obvious affinity between the legal discourse of character and its wider meaning in Victorian society.⁵⁹ Character evidence could indicate an individual's mental state through the investigation of his conduct and reputation. Similarly, an individual with a 'good character', as agreed by writers as diverse as Samuel Smiles and the psychologist W. B. Carpenter, had developed regular moral habits, exhibited self-command, and established the control of his will over his passions.⁶⁰ Good character, in Carpenter's sense of the term, was a form of 'drilling' of the mind to maintain an automatic and involuntary dominion over the body. In popular texts like his best-selling *Self-Help* (1859) and *Character* (1871), Smiles exhorted his readers to 'build up' character on a sound footing through regular habits, moral behaviour, and dutiful purpose.⁶¹ There are clear echoes of this understanding of character as founded on morality imposed by the will in the testimony of character witnesses as to the 'pure minded' or morally constant nature of a defendant's conduct.

Sodomy and indecent assault trials therefore provide a curious example of cases in which the defendant's mental state was recognised as relevant, but in which the particular rules about character evidence actually hid the defendant's mentality from view. Moreover, because character evidence appears to have been the only means by which the defendant's mentality could be approached, the consequences of this limitation were significant. The issues raised in *R. v. Rowton* were germane to the understanding of homosexual acts

within a legal context: they questioned whether ‘unnatural lusts’ should be viewed as isolated acts, and instead tried to put forward the view that ‘habitual’ indulgence in immoral conduct should be made relevant to the case. The issues also had a wider resonance. Evidence of a defendant’s propensity to homosexual conduct might have contributed to a more sophisticated analysis of such conduct within the legal system. Such an analysis would have had inevitable consequences for defendants, as well as influencing the scientific and popular assessments of homosexuality. Thanks to the law of evidence, however, such an analysis was prevented. The ‘sodomite’ remained, in Michel Foucault’s famous terms, a ‘juridical subject’. He was yet to become a ‘case history . . . a type of life’, a man ‘with an indiscreet anatomy, and a possibly mysterious physiology’.⁶²

Notes

- 1 *Morning Chronicle* (1 August 1854). ‘Unnatural offences’ was the principal legal term used throughout the nineteenth century to describe a group of different homosexual offences. In official statistics, these generally included sodomy (both between men and bestiality), indecent assaults, consenting sexual behaviour, incitements and invitations to commit the offence, and some indecent exposures. Anything not included in these descriptions (and there were almost no homosexual acts which could not be so described) was described as ‘other unnatural misdemeanours’. See Parliamentary Papers, Judicial Statistics, various volumes.
- 2 Private cuttings collection of William Bell Macdonald, ‘Various trials cut from newspapers’ (not dated), quoted in Thomas Boyle, *Black Swine in the Sewers of Hampstead: Beneath the Surface of Victorian Sensationalism* (New York: Viking, 1989), p. 11.
- 3 *Morning Chronicle* (2 August 1854).
- 4 On the demonstration of this fact in the 1871 case of Ernest Boulton and Frederick Park, see Jeffrey Weeks, *Sex, Politics and Society: the Regulation of Sexuality in Britain Since 1800* (London: Longmans, 1989); Alan Sinfield, *The Wilde Century: Oscar Wilde, Effeminacy and the Queer Moment* (New York: Cassell, 1994); Neil Bartlett, *Who Was That Man: a Present for Mr Oscar Wilde* (London: Penguin, 1987).
- 5 *Morning Chronicle* (1 August 1854). Campbell was conducting his own defence. He was neither sent for trial nor fined, his respectability and status having been adequately proved.
- 6 See Public Record Office, Kew (hereafter PRO) HO 17–19, register of criminal petitions. See H. G. Cocks, ‘“Abominable crimes”: sodomy trials in English law and culture, 1830–1889’, (Ph.D. dissertation, University of Manchester, 1998), pp. 260–1 for a list of the petitions.
- 7 Character evidence was very important in other forms of sexual assault as well. Carolyn Conley has noted its prominence in Victorian rape trials, where the ‘fundamental consideration’ was ‘the perceived character of the accused’. Carolyn Conley, ‘Rape and justice in Victorian England’, *Victorian Studies*, 29: 4 (Summer 1986), 519–36, 530.
- 8 In addition to his chapter in the present volume, see Joel Peter Eigen, ‘Intentionality and insanity: what the eighteenth century juror heard’, in William F. Bynum, Roy

- Porter, and Michael Shepherd (eds), *The Anatomy of Madness*, vol. 2: *Institutions and Society* (London: Tavistock, 1985), pp. 34–51; Joel Peter Eigen, 'Delusion in the courtroom: the role of partial insanity in early forensic testimony', *Medical History*, 35 (1991), 25–49.
- 9 Corporation of London Record Office (hereafter CLRO), calendar of prisoners, 1756–1822.
 - 10 On this see, F. B. Smith, 'Labouchere's amendment to the Criminal Law Amendment Bill', *Historical Studies*, 67: 17 (October 1976), 165–73. Lesbianism has never been a crime in Britain, although one or two women were charged with sodomy (bestiality) in the course of the nineteenth century. See, for example, Cocks, '“Abominable crimes”', p. 258.
 - 11 See Parliamentary Papers, various volumes.
 - 12 The development of these offences is dealt with in Cocks, '“Abominable crimes”', chs 1 and 2.
 - 13 Reliable figures in the form of Parliamentary returns begin in 1806. For these statistics see Cocks, '“Abominable crimes”', pp. 254–5. The last two men to be executed were James Pratt and John Smith, dispatched together for consensual sodomy in 1835. For this case, see *The Times* (28, 29 September 1835; 28 November 1835). For efforts to save the men from the gallows via petitions for mercy see PRO, HO 17/120 Xv 13.
 - 14 A few records have survived, including the seventy-seven petitions of those convicted of sodomy and related offences in the first half of the century. But no systematic record remains. On this, see Cocks, '“Abominable crimes”', pp. 260–1, and PRO HO 19/5, 6–10, 12, register of criminal petitions.
 - 15 PRO, DPP 4/6, p. 44, *The Trial of Boulton and Park and others for Unnatural Offences*.
 - 16 On the idea of the molly, see Randolph Trumbach, *Sex and the Gender Revolution: Heterosexuality and the Third Gender in Enlightenment London* (Chicago: University of Chicago Press, 1998); Randolph Trumbach, 'Sex, gender and sexual identity in modern culture: male sodomy and female prostitution in enlightenment London', in John C. Fout (ed.), *Forbidden History: the State, Society and the Regulation of Sexuality in Modern Europe* (Chicago: University of Chicago Press, 1992), pp. 89–106; Randolph Trumbach, 'London's sodomites: homosexual behaviour and western culture in the eighteenth century', *Journal of Social History*, 10 (Fall, 1977), 1–33; Rictor Norton, *Mother Clap's Molly House: the Gay Subculture in London, 1700–1830* (London: Gay Men's Press, 1994); Tim Hitchcock, *English Sexualities, 1700–1800* (Basingstoke: Macmillan, 1997).
 - 17 Anon., *Hints to the Public and to the Legislature on the Prevalence of Vice and on the Dangerous Effects of Seduction* (London: E. Wilson, 1811), p. 101; R. v. Morgan (1832), quoted in Anthony Simpson, 'Masculinity and control: the prosecution of sex offences in eighteenth century London' (Ph.D. dissertation, University of Michigan, 1984), p. 875.
 - 18 On this see *The Yobel's Preceptor; or, More Sprees in London! Being a Regular and Curious Show-up of all the Rigs and Doings of the Flash Cribs in this Great Metropolis*, quoted in Pisanus Fraxi (Henry Spencer Ashbee), *Index Librorum Prohibitorum*, vol. 1 (London: privately printed, 1877).
 - 19 William Acton, *The Functions and Disorders of the Reproductive Organs* (London: John Churchill and Sons, 1865), p. 219.
 - 20 John Frost, *The Horrors of Convict Life* (1856, repr. Hobart, 1973), p. 38.

- 21 PRO, HO 17/100 Part 2 Sw 43, petition of the overseers of the poor in the parish of St Mary in Shrewsbury to the Home Office, 1851.
- 22 Robert Holloway, *The Phoenix of Sodom; or, The Vere Street Coterie: Being an Exhibition of the Gambols Practised by the Ancient Lechers of Sodom and Gomorrah, Embellished and Improved with Modern Refinements in Sodomitical Practices, by Members of the Vere Street Coterie of Detestable Memory* (London, Cook, 1813), p. 17.
- 23 Sir Alexander Morison, *The Physiognomy of Mental Diseases* (London, 1838), quoted in Richard Hunter and Ida Macalpine, *Three Hundred Years of Psychiatry, 1535–1860* (Oxford, 1963), p. 773.
- 24 See, for example, the petition of Joseph and Mary Gibson to Lord Melbourne, which argued that ‘from weakness of mind’, their son Jesse ‘knew not, nor understood the nature, nor extent of the guilt and depravity of the offence to which he then pleaded guilty’. PRO, HO 17/47 Part 2 Gt 39, petition to Lord Melbourne, March 1834.
- 25 *Morning Chronicle* (1 August 1854).
- 26 Even when such statements were made, they tended to be truncated and of little assistance to the defence, as they did not have the same authority as other evidence. Until the passage of the Criminal Evidence Act (1898), a defendant could only make an unsworn statement. For an example of such a statement, see Anon., *The Trial of David Robertson of the Jerusalem Hotel . . . for an Unnatural Crime with George Foulston* (London: J. Day, 1806). On the Prisoner’s Counsel Act, see J. M. Beattie, ‘Scales of justice: defense counsel and the English criminal trial in the eighteenth and nineteenth centuries’, *Law and History Review* 9: 2 (Fall, 1991), 221–67. For an overview on the law of evidence see Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997), ch. 5.
- 27 In 1862 Sir George Grey argued that in cases of murder character was irrelevant because ‘Character may be entitled to much weight where doubt exists as to the facts but not so where the crime is clearly proved to have been committed.’ Quoted in Martin Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England 1830–1914* (Cambridge: Cambridge University Press, 1994), p. 90.
- 28 PRO, HO 47/75, Judges’ reports on the petition of John Avis, 22 December 1829.
- 29 After 1828, anal penetration was the required proof of sodomy. Previously emission in the body had also been required.
- 30 Mathew Hale, *Historia Placitorum Coronae: the History of the Pleas of the Crown* (2 vols, 1736, repr. London: Professional Books, 1971), p. 635. Similar rules to those laid down by Hale regarding the credibility of witnesses were also applied in a modified form in sodomy trials.
- 31 Hale, *Historia*, p. 633.
- 32 These included whether the alleged victim had ‘presently discovered the offence and made pursuit of the offender, [and] shewed circumstances and signs of the injury’, whether the alleged attack had occurred somewhere ‘remote from people, inhabitants or passengers’, or ‘if the offender fled for it’. Hale, *Historia*, p. 633.
- 33 *The Times* (29 September 1835).
- 34 On this, see Douglas Hay, ‘Controlling the English prosecutor’, *Osgood Hall Law Journal*, 21 (1993), 165–86. The case law relates to *R. v. Attwood* and *R. v. Hervey and Fordham*, for which see *Annual Register*, 49 (1807), pp. 356–7, in which the judge commented that a conviction on the evidence of an accomplice was unsafe.

- See also Simpson, 'Masculinity and Control', p. 53. On the situation just before these rules developed see Valentine Jackson, *The Remarkable Trials at the Lancashire Assizes, held August 1806 at Lancaster Before Sir Robt Graham Knight* (London: T. Day, 1806), which details a series of cases arising from the investigation of a group of men in Warrington in 1805. In these trials, evidence was provided mainly by those who admitted having committed sodomy with others in the past. The judge wished 'sincerely that the prisoner had brought some witnesses to his character' since 'this was one of those cases in which satisfactory testimony to character would have greatly increased' his doubt about the principal evidence. Jackson, *Remarkable Trials*, p. 54.
- 35 PRO, HO 144/20/58480, petition of James Smith to the Home Office (July 1890).
- 36 PRO, HO 144/20/58480, first petition of James Smith to the Home Office (April 1877). On the question of corroboration see also H. Montgomery Hyde, *Famous Trials: Oscar Wilde* (London: Penguin, 1970), pp. 214–15. For another conviction on the unsupported evidence of one person see the case of John Goode, PRO, HO 19/114 Wq–Ws, criminal petitions.
- 37 For accounts of the Cleveland Street Scandal, see H. Montgomery Hyde, *The Cleveland Street Scandal* (London: W. H. Allen, 1976); Lewis Chester, David Leitch, and Colin Simpson, *The Cleveland Street Affair* (Boston: Little Brown, 1976); Theo Aronson, *Prince Eddy and the Homosexual Underworld* (London: Murray, 1994); Morris Kaplan, 'Did "My Lord Gommorrah" smile: homosexuality, class, and prostitution in the Cleveland Street Affair', in Nancy Erber and George Robb (eds), *Disorder in the Court: Trials and Sexual Conflict at the Turn of the Century* (New York, New York University Press, 1999), pp. 78–99; Morris Kaplan, 'Who's afraid of John Saul?: urban culture and the politics of desire in late Victorian London', *GLQ: A Journal of Gay and Lesbian Studies*, 5: 3 (1999), 267–314; Jeffrey Weeks, 'Inverts, perverts and Mary Annes: male prostitution and the regulation of homosexuality in the nineteenth and early twentieth centuries', in Martin Duberman, George Chauncey, and Martha Vicinus (eds), *Hidden From History: Reclaiming the Gay and Lesbian Past* (London: Penguin, 1991), pp. 195–211.
- 38 PRO, DPP 1/95/1, letter from Henry Matthews to Sir Augustus Stephenson, 26 August 1889.
- 39 *The Times* (1 March 1890).
- 40 PRO, HO 47/75, petition of John Avis to Robert Peel, attached Judge's Reports, not dated (1829).
- 41 PRO, HO 47/75, letter from trial judge to Robert Peel, 22 December 1829.
- 42 See also PRO, HO 19/114 Wq–Ws, petition of John Goode, March 1834.
- 43 *The Times* (7 November 1825).
- 44 *Ibid.*
- 45 On the importance of character in rape cases, see Carolyn Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford: Oxford University Press, 1991), p. 173.
- 46 *The Times* (11 July 1842).
- 47 *The Times* (4 April 1867). For similar cases see *Weekly Dispatch* (3 October 1847); *The Times* (13 May 1833); PRO, HO 17/60 Kt 3, petition of Joseph Peveril to Lord Melbourne, undated (1833); *The Times* (5 August 1835, 5 April 1847, 27 October 1847, 15 June 1850, 14 August 1862).
- 48 On successful challenges to medical evidence see PRO, DPP 4/6, *R. v. Boulton* (1871). In the twentieth century, defendants were much more likely to throw

- themselves on the mercy of court psychiatrists, especially since such treatment was an alternative to prison. On this, see Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Post War Britain* (London: Fourth Estate, 1994).
- 49 *The Times*, 20 June 1851.
- 50 *The Times*, 26 July 1870. The defendant was Edward Park, whose more famous brother Frederick had been arrested two months before while wearing women's clothes in the West End in company with Ernest Boulton. On this case see *Queen v. Boulton and Others* . . . PRO, DPP 4/6.
- 51 J. W. Cecil Turner, *Russell on Crime* 12th edn, 2 vols (London: Stevens & Sons, 1964), vol. 1, p. 737.
- 52 *R. v. Burt* (1851) 5 Cox C.C. 284.
- 53 *The Times*, 27 June 1846.
- 54 *The Times* (1 October 1864). *R. v. Rowton* (1865) is reported at 13 W.L.R. 436; 34.3 L.J.R. (n. s.) 57; 10 Cox C.C. 25.
- 55 *The Times* (23 January 1865).
- 56 (1865) 34.3 L.J.R. (n. s.) 58. For Erskine's remarks, see *R. v. Hardy* (1794) 24 S.T. 1079; for Ellenborough's remarks, see *R. v. Jones*, (1809) 31 S.T. 310.
- 57 34.3 L.J.R. (n. s.) 60–1.
- 58 *The Times* (28 January 1865).
- 59 This has been remarked upon by Martin Weiner, *Reconstructing the Criminal*, pp. 38–43.
- 60 See, for example, Samuel Smiles, *Self-Help, with Illustrations of Conduct and Perseverance* (London: John Murray, 1859). Carpenter argued that the chief 'motive power' of the mind was 'previously acquired habits, which automatically incite us to do as we have been before accustomed to do under the like circumstances, without the idea of prospective pleasure or pain, or of right or wrong being at all present to our mind.' W. B. Carpenter, *Principles of Mental Physiology* (London: Kegan Paul & Co., 1874), p. 414. On the idea of character and its absorption into a variety of discourses, see Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850–1930* (Oxford: Clarendon Press, 1991); Nathan Roberts, 'Investigating character in England, c. 1890–1914', Ph.D. dissertation, University of Manchester, (forthcoming 2002).
- 61 On the pervasiveness of character across a variety of discourses, see Roberts, 'Investigating character'.
- 62 Michel Foucault, *The History of Sexuality*, 3 vols, vol. 1 (London: Penguin, 1984), p. 43.